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REHABILITATING THE JUVENILE COURT

CHARLES E. SPRINGER*

INTRODUCTION

I could not go on living if I did not feel with my whole heart a moral structure with real meaning . . . and some kind of higher power; otherwise there is no basis to know how to live.

The Rabbi, in Woody Allen's movie, Crimes and Misdemeanors.¹

In 1899 the Illinois legislature devised a “peculiar system for juveniles, unknown to our law.”² Toying with the judicial branch of government, the Illinois legislature created a “juvenile court.” The new juvenile court had jurisdiction over “any child under the age of sixteen years who violates any law”;³ but for young law violators the “idea of crime and punishment was to be abandoned.”⁴ Youthful criminals were not brought before the juvenile court to be dealt justice but, rather, “to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.”⁵

The juvenile court founders were “profoundly convinced that society’s duty to the child could not be confined by the concept of justice alone. They believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’”

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* Presently a member of the Nevada Supreme Court, Vice-Judge Charles E. Springer is a former member of the board of trustees of the National Council of Juvenile and Family Court Judges. He served for seven years as Juvenile Court Master in the Nevada courts and is currently on the faculty of the National College of Juvenile and Family Law and of McGeorge Law School, University of the Pacific, where he teaches juvenile law. His LL.B degree is from Georgetown; LL.M, from the University of Virginia. His master’s thesis, published by the Department of Justice in monograph form, is entitled Justice for Juveniles.

5. Id. at 15.
but, rather, what, in the child's best interest, could be done "to save him from a downward career." 

This is the picture then: in 1899 the Illinois legislature, with procrustean abandon, wedged into the existing judicial structure a peculiar non-court which was forbidden to do justice and was commanded to abandon the criminal law in criminal cases and to behave not as a court of justice, but as a clinic. How bold, how daring, how innovative... how wrong!

Borrowing the juvenile court's own shibboleth, "rehabilitation," I will argue that, mainly because of the inherent conceptual fallacy that a court can be made into a clinic, the juvenile court is in urgent need itself of rehabilitation, a need to "re-establish the character and reputation" of the juvenile court.

To enhance the character and reputation of the juvenile court, to rehabilitate the juvenile court, we must remodel and remoralize it. By "remodel" I mean casting off the 1899 clinical model. By "remoralize" I mean two things: to bring to the juvenile court a "moral structure with real meaning" and to restore the morale of those who are responsible for conducting the affairs of the juvenile court.

In the remodeled, rehabilitated juvenile court that I propose, the term "juvenile justice" will take on real meaning. No longer will the juvenile court be seen as a quasi-judicial court-clinic but, rather, as a real court, administering real justice in its traditional retributive and distributive meanings. As I argue in this paper, I believe that juveniles should have to pay for their crimes; but, I also believe that society has a duty to its young delinquents to help them to gain moral and civic equilibrium.

6. Id. at 15.
9. See, for example, Aristotle, Nichomachean Ethics, Book V, ch. 3: "[O]ne kind [of justice] is that which is manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution... [and the other] one is that which plays a rectifying part in transactions between man and man." Great Books of the Western World, vol. 9, at 378 (W. Benton, publisher, Encyclopaedia Britannica, Inc., 1952) (emphasis supplied). The two forms of justice are commonly referred to as (1) distributive justice and (2) retributive, rectificatory or commutative justice.
A justice-modeled juvenile court will be a court with moral substance and clarity of purpose. The remodeled, remoralized court will at last have a "basis to know how to live." 10

In advancing my proposal for rehabilitating the juvenile court by remodeling it, I will first show that the juvenile court system is founded on a false premise. I will then argue for the institution of a new, moral model based upon justice alone, after which I will show how such a model might be installed and operated within the juvenile system as it exists today.

1. The Court-Clinic: An Idea Whose Time Has Come — And Gone

Science robs men of wisdom and usually converts them into phantom beings loaded up with facts.

Miguel de Unamuno 11

When I said that the Illinois legislature was "toying" with the judicial branch, I meant just that. Trying to turn a court into a clinic was a "simple-minded" 12 idea "hatched in a Viennese laboratory." 13 Based on a social science theory, untested at the time but now generally repudiated, the Illinois legislature proceeded to cast off the system of criminal laws developed over centuries and to decriminalize all criminal offenses committed by persons under the age of sixteen. As Francis Allen has said:

Ignorance, in itself, is not disgraceful so long as it is unavoidable. But when we rush to measures affecting human liberty and human dignity on the assumption that we know what we do not know or can do what we cannot do, then the problem of ignorance takes on a more sinister hue. 14

It may be easy to say today that the court-clinic idea was simple-minded and based on ignorance and faulty assumptions, but in the first part of this century it was an idea whose time had come. Few were able to see the "sinister hue". 15
attendant to the abandonment of justice and the creation of an amoral clinic for the criminally ill, and juvenile-court fever spread throughout the land and throughout the world.¹⁶

Those who questioned the scientific dogma were considered reactionary as the social scientists assured us of the validity of the new scheme. Noted social scientist of the time, Sheldon Glueck, told us in 1928 that criminal law could be safely discarded as an archaic form of "sublimated social vengeance" and described "just retribution" in terms of being an "old argument" that "no thoughtful person today seriously holds."¹⁷ Notwithstanding the force behind the supposedly "scientific" pronouncements, some "thoughtful persons," like the Cambridge professor and author C.S. Lewis,¹⁸ and renowned law professor and author John H. Wigmore,¹⁹ continued to hold to the "old argument."

Although he had some difficulty in getting his views published,²⁰ C.S. Lewis presents a rather cogent critique of the theory that threatened to replace justice in our courts. Lewis called the new, amoral doctrine "simpleminded" and argued strenuously against placing criminals "in the hands of technical experts whose special sciences do not even employ such categories as rights or justice" and who ignore "the community's moral judgment on the degree of ill-desert" that must come into play when criminal justice is applied. A further sample of his wisdom-filled but then-unpopular rhetoric appears in the margin.²¹

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¹⁶ That candidate for president of Columbia at the May 1990 elections. According to THE Economist:

Jaramillo’s official bodyguard could not protect him from a 16-year-old, who is said to have been paid $600 for the job; as a minor he faces juvenile court and may go free.

Cocaine and Friends, THE Economist, March 31, 1990, at 38. I am not suggesting, of course, that juvenile courts are presently wont to letting sixteen-year-old murderers "go free," but the Economist reporter obviously saw this as a threat in the reported case.

¹⁷ By 1917, all but three states had passed juvenile court acts.

¹⁸ See Lewis, supra note 12.

¹⁹ See, e.g., Wigmore, Juvenile Court vs. Criminal Court, 21 Ill. L. Rev. 375 (1926).

²⁰ At the conclusion of his article Lewis noted: "One last word. You may ask why I send this to an Australian periodical. The reason is simple and perhaps worth recording: I can get no hearing for it in England." Lewis, supra note 12, at 230.

²¹ They are not punishing, not inflicting, only healing. But do not let us be deceived by a name. To be taken without consent from my
The most relevant, most timely, and most correct response to the juvenile court epidemic was offered by Illinois' own esteemed law professor and writer, John H. Wigmore. In 1926, at the very peak of juvenile court ague, Wigmore wrote an editorial note on the new juvenile law for the *Illinois Law Review*. Wigmore was moved to write the note after he learned about a "gang of four schoolboys, ages between thirteen and sixteen, [who] were arrested in Chicago for safe-breaking. They had drills and explosives, and they had already within three months robbed seventeen safes." What worried Wigmore about these young men was that by virtue of the new juvenile law "all the worst offenses are withdrawn from the regular courts of criminal law," and thus these thirteen- to sixteen-year-old criminals were turned over to the juvenile court authorities, who were forbidden to punish the young criminals for their criminal deeds.

Wigmore was very much concerned by the wholesale decriminalization of such a large section of the criminal population. He made it clear that he was "opposed to this innovation" and minced no words in saying why:

[I]ts devoted advocates, in their zeal, have lost their balance. And, as usual in other fields of science that have been awakening to their interest in the crime problem, their error is due to their narrow and imperfect conception of the criminal law. They are new to it, hence their inability to understand it.

At a time when almost everyone else seemed to be completely captivated by the new scientific criminology, Wigmore

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home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be remade after some pattern of 'normality' hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether it is called Punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the Humanitarian theory has thrown overboard. Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive.


23. *Id.* at 376.
24. *Id.*
25. *Id.*
challenged the "devoted social workers and cold scientists,"\textsuperscript{26} saying:

Do not think that you have the right to demand that all crimes be turned over to your charge until you have looked a little more deeply into the criminal law and have a better comprehension of the whole of its functions.\textsuperscript{27}

The "cold scientists" of whom Wigmore wrote did indeed demand that all crimes be turned over to their charge; and this is where all the trouble started. They wanted it all.

Norval Morris supported the "old argument" when he cautioned that treatment and rehabilitation "must not be seen as purposive in the sense that criminals are to be sent to prison for treatment."\textsuperscript{28} Morris puts it in this way:

There is a sharp distinction between the purposes of incarceration and the opportunities for the training and assistance of prisoners that may be pursued within those purposes. The system is corrupted when we fail to preserve this distinction, and this failure pervades the world's prison programs.\textsuperscript{29}

The failure to recognize the simple proposition that "treatment" of the individual offender cannot be the end and all of the juvenile court process has indeed "corrupted" the juvenile system in this country and throughout the world. "What should distinguish the juvenile from the criminal courts is their greater emphasis on rehabilitation not their preoccupation with it."\textsuperscript{30} Although change is in the air, the juvenile court is still immersed in and "preoccupied" with rehabilitation and "individualized treatment."\textsuperscript{31} Herein lies the essential weakness of the juvenile system.

\textsuperscript{26} Id. at 377.
\textsuperscript{27} Id.
\textsuperscript{29} Id. (emphasis in original).
\textsuperscript{31} This preoccupation was brought home to me at a recent national meeting of juvenile probation officers at which I heard a young probation officer rise and introduce himself as a "delinquency diagnostician." According to a former president of the National Council of Juvenile and Family Court Judges:

The goal-oriented approach has been the basis [policy] upon which juvenile justice systems operate once the child has come within the jurisdiction of the court. The penal codes of this country speak in terms of punishment for one who has been convicted of a crime. In contrast, the juvenile justice system speaks of restoration of the child.
2. A Court in Need of Reform: Remodeling the Juvenile Court

All reform except a moral one will prove unavailing.  

Carlyle

I have respectfully suggested that the juvenile court is in need of rehabilitation—in need, that is, of reestablishing its reputation and character.

The reputation of the juvenile court has suffered because of the self-proclaimed preoccupation of the court with a clinical, non-punitive approach to juvenile criminality. Most people do not believe that punishment for crime should be abandoned in favor of an arcane treat-the-sick scheme. For a long time the public put up with a juvenile system that operated in secret, without having any real idea of what was going on behind those closed doors. Those days are over, and the public will no longer stand for this kind of "juvenile justice." Too often the public hears of some terrible crime being committed by some "unidentified juveniles" and never hears another thing about it. The public is entitled to vindication in cases of the commission of a serious crime by anyone, whatever the age of the criminal. The public is justifiably outraged to be told that criminal acts are being met only by solicitous counseling, treatment or rehabilitation.

Because of its innate character defect in the form of its continued and insistent reliance on science over morality, the juvenile court has been slow to recognize the declining condition of its reputation or to respond to public opinion. Because of this, recent reforms and changes in the juvenile court system have been imposed from without rather than being generated from within. Largely as a result of public reaction, in recent years a number of state legislatures have been moving away from the plenary decriminalization of juvenile law-breakers exemplified by the early juvenile legislation. Responding to public pressures, these state legislatures have amended juvenile court acts to expand on the traditional stated purpose of the juvenile acts, that of protecting "the best interests of the child," and have added to legislative purpose clauses language which allows the juvenile courts to consider the "best interests

as a law abiding member of society. . . . [E]ach child must be considered on an individualized basis of individual needs. . . . The diagnosis of the child's needs should be as methodically analyzed as a physician analyzes an illness for a patient.


32. T. CARLYLE, CRITICAL AND MISCELLANEOUS ESSAYS 204 (1869).
of the state," or similar public interests. These statutory changes are designed to allow delinquency dispositions to include punishment as well as treatment and rehabilitation. Under such amendments juvenile courts may levy punitive sanctions on juveniles for utilitarian purposes of deterrence or rehabilitation. No legislature has provided for the kind of justice model that I propose here.

Juvenile court systems throughout the country now suffer from a muddle of models. Some still subscribe to the pure clinical model; others follow a rather poorly defined punishment-rehabilitation hybrid model; still others, moving from tears to tear-gas, have adopted procedures in delinquency cases that are long on punishment and very short on rehabilitation. There is little or no consensus on what juvenile courts throughout the country are really all about. As one commentator has noted:

[J]uvenile justice systems seem to operate like a pendulum clock, swinging slowly back and forth across a compass of ideas, knocking down and putting back up pegs representing one theory and approach or another. This proposition can be proven by looking at modern day juvenile codes.

There are two other troublesome failings of the juvenile system that should be addressed if we are interested in its rehabilitation. One is the failure to define properly what a child is; the other is the present-day overformalization and


34. The California juvenile code gives some illustration of the kinds of changes being enacted. For example, the California juvenile court is required to give its juveniles "care treatment and guidance." CAL. WELF. & INST. § 202b (West 1984 & Supp. 1990). At the same time it must hold its juvenile criminals "accountable for their behavior." Id. To me "accountable" means that you have to pay-up. It means you owe something. The word "retribution" means repayment or recompense; so one would assume that in the case of a youthful offender justice must be done by retribution. He must pay for his crime. Still, I note this sentence in the California act: "‘Punishment’ for the purpose of this chapter, does not include retribution." Id. at § 202d. Punishment in California is all right, however, if it is "consistent with the rehabilitative objectives of this chapter." Id. at § 202b. One cannot tell if the legislature was adopting a justice (retributive), crime control, or rehabilitation model or some roughly-mixed combination of all three. This could be avoided by the frank adoption of a justice model that required accountability and follow-up rehabilitative efforts.

recriminalization of the juvenile court—a failing that I call “Gaultamania.”

First, with respect to what may be called a definitional defect, I note that in the original act a delinquent was any “child” (ages zero to sixteen) who broke the law. Today this definition includes a child of seventeen or even older. The problem with this definition is that Wigmore’s sixteen-year-old safe-cracker cannot, under any reasonable definition of the term, be called a child. We must define what a “real” child is and separate the child from the older, more responsible youth if we are going to do justice in the juvenile court. I address this problem in the last part of this paper when I try to apply my ideas to juvenile court process.

Next, I want to speak to the problem of Gaultamania in the juvenile courts. This defect is directly traceable to the clinical model. From the inception of the juvenile court judges have been punishing juveniles but calling it “treatment.” The Supreme Court has now told us in Gault, Winship and other cases that if we are going to “treat” delinquents in juvenile prisons we must first properly find them guilty of the illness for which they are to be confined. This is a paradox worth pondering.

Although the Supreme Court directed that attorneys and due process protections be provided only in cases in which punitive confinement is the prescribed disposition, panic flared in the juvenile courts, and as a result of heedless overreaction to these decisions by juvenile court officials, young bicycle thieves are now given lawyers and virtually all the procedural formalities that are available to the criminally accused in the adult system. The result of this panic has been a terrific over-

36. Gaultamania is the unnecessary overuse of formalized criminal procedures, lawyers and judges in the administration of a children’s court. Gault (387 U.S. 1 (1967)), involved the notorious Jerry Gault, who was accused of making an obscene phone call. (“Have you got big bombers?”) He denied it. Without notice of charges, counsel, or a semblance of a fair hearing, Jerry was found guilty and hustled off to a boys’ school for “treatment” of up to five years duration. The Supreme Court, quite understandably, decided, that even though they called it treatment, commitment to the boys’ school was really punishment, and this called for due process involving counsel and other rights which one might expect as a condition to one’s being locked up in this fashion. The next thing we knew, the juvenile courts were filled with lawyers, and bewildered little waifs were seen in open court standing with blank faces listening to a robed figure reciting an incomprehensible litany of constitutional rights.

37. 387 U.S. 1 (1967).

load on juvenile court resources, one that has diminished the power of the juvenile courts to do their real job.

In the Gaultamaniac juvenile court we have a court that not only does not know what a child is, it does not know what a criminal is. Too often in today's juvenile court we are treating children like criminals and criminals like children.

In the motion picture, Gorky Park, there is a scene in which a local policeman keeps complaining to a KGB agent about what he refers to as "the gap." On being pressed, the local policeman describes this gap as being "the gap between what we say and what we do." One of the major consequences of having left justice out of the juvenile court has been the constant gap between what is said and what is done. It is my intention now to show how this gap can be greatly narrowed simply by installing a moral model, a justice model, as the framework for juvenile court process.

3. The Case For a Moral Juvenile Court

*Justice has nothing to do with expediency. Justice has nothing to do with any temporary standard whatever. It is rooted and grounded in the fundamental instincts of humanity.*

Woodrow Wilson

We often hear it said that this country is in a state of moral crisis. We certainly cannot blame a demoralized juvenile court for this crisis, but I do think we are entitled to believe that institution of a morally-based juvenile court system will in some measure help to establish a better moral climate for the youth of this country. As I have pointed out, acceptance of the clinical model has brought the juvenile system dangerously close to rejecting ethical exhortation and replacing it with an unproved and virtually untried scheme of social therapeutics which assumes that wrongness of deed is a disease rather than a moral fault. Psychiatric superstar Karl Menninger once wrote that "the very word *justice* irritates scientists." That scientists are irritated and that Dr. Glueck thinks that "no thoughtful person" could believe in justice does not take away from the fact that throughout the history of humankind our greatest teachers and most admired human beings have shown us the truth and value of the moral life. Morality and the ethical concepts of

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42. Glueck, *supra* note 17, at 456.
right and wrong may not be susceptible to scientific measurement, "but they're there." 43

Justice as a virtue is indeed "there," and I need not apologize for advancing the old argument that justice should over-ride social science theory in modeling the juvenile court. Wigmore knew this; and he knew how the "psychiatrists [were] going wrong." 44 They were going wrong by failing to recognize essential function of any court of justice, namely, that "it pronounces and reaffirms the moral law." 45 Wigmore feared that these "cold scientists" were well "on their way to abolish the criminal law and undermine social morality." 46

I should not have to say much to any audience (except perhaps of "cold scientists") in opposition to any proposal to abolish the criminal law or to the undermining of social morality; still, let me say a word in defense of law and morality.

With regard to the criminal law, there are practical as well as moral reasons for not abolishing it. Ephraim Tutt defined law as the rules which enable us to live harmoniously with ourselves and with our rulers. 47 It is hard to imagine harmony resulting from any set of rules or laws to which is not attached some unpleasant consequence or sanction for violation. Without enforcement, without resultant unpleasant consequences for violation, a rule or a law becomes only a suggestion, an option or choice, not a command. It is quite obvious to me, then, that society must insist on imposing sanctions on all law-breakers, young or old, and not rely on mere individual correction or reform. Society has the right and the duty to punish law violators, because it is inherently just and because it is necessary in order to uphold the integrity of the legal prohibitions adopted by the rulers of the society. There is, thus, in an imperfect world, a practical, as well as a moral necessity for the institution and enforcement of criminal laws.

The criminal law can also be defended on moral grounds. It is not just to law-abiders that law-violators not be made to suffer some adverse consequence for their offenses. Punishment is what they deserve because they got out of line. These principles are so right, so basic, so elemental, that it is hard to

43. I quote from the Irish lady who was being interviewed by a sidewalk reporter in Dublin. Asked the question, "Do you believe in Leprechauns, in the 'little people'?" Her answer was, "Oh no . . . but, they're there!"

44. Wigmore, supra note 19, at 376.

45. Id.

46. Id.

understand how they could have been so cavalierly rejected by the founders of the juvenile court.

The truth of the matter is that despite the insistence of social scientists that "all crimes be turned over to [their] charge" and despite appellate court rulings reversing juvenile courts for even mentioning the abominable word "punishment," the juvenile court has been, by and large, conducted as a court and not a clinic and as an institution which properly "pronounces and reaffirms the moral law." The problem is with the model, not with the judges and probation officers who conduct the affairs of the juvenile court. The officers of the juvenile court have as a general rule followed their moral intuition and seen to it that guilty juvenile offenders were somehow punished even if this was contrary to the spirit and letter of codified and case law. My experience as a judicial educator and as an activist in the juvenile court system tells me that the juvenile court judges and juvenile probation officers, who, for the most part, "run the system," have been operating under assumptions not very far from what I am advancing here. My personal view is partially supported by a 1983 survey of juvenile court judges in which the jurists were asked whether they agreed with this statement: "Punishment is a morally desirable goal for the juvenile justice system." Only about one in five disagreed. The author of the survey expressed his surprise to learn that the juvenile court judges evidenced such "strong" support for punishment as a morally justified function of the juvenile court. He found this to be "a most interesting and surprising response for judges in an ostensibly treatment-oriented system."

I was not at all surprised to learn that juvenile court judges believe that punishment is a morally desirable goal for the juvenile justice system. Juveniles ought to be punished for their crimes, and juvenile court judges know it. I cannot say, then, that the judges or the probation officers are in need of reform or rehabilitation—only the juvenile justice system.

As juvenile courts have administered retributive justice, so have they administered distributive justice. They have constantly tried to give to delinquents what, in justice, they deserve—namely, care, guidance, control and discipline. Those

49. Id. at 376.
51. Id.
who wish to call this dutiful activity of the court "therapy" may do so, but I see it in terms of justice. The juvenile courts have the moral and legal duty to give "care" and "discipline" to its delinquent wards and to treat them in a manner that will "approximate as nearly as may be that which should be given by their parents," and this is true irrespective of any supposed "therapeutic" benefits. The juvenile court must act as a sort of parent, parens patriae, to its delinquent wards. As a parent, it has the affirmative responsibility of doing more than merely punishing and forgetting the delinquent youth who come before the court. The juvenile court is bound by law and moral imperative to do everything within its power for delinquent juveniles to retrain and reeducate them, to make them more competent human beings and better citizens and to show them the way toward better, more honest lives in which they practice respect for the law, respect for themselves, and respect for others.

In the sixth century Justinian defined justice as the "constant and perpetual inclination to give everyone his due." Distributive justice means rendering to our erring youth what is their due. This kind of justice is what distinguishes the juvenile courts from the adult courts, and from all other courts, past or present.

I conclude my case for the adoption of a justice model for the juvenile court with a word of caution: to beware of any promises of a "quick fix" for the problems of juvenile crime. At their very best the courts cannot be expected to have the answer to juvenile criminality. Although I believe that deterrence and rehabilitation are effective in some cases for preventing crime, there are far too many other factors involved to rest our hopes for a more law-abiding society on a reformed and remodeled juvenile court.

Like Edmund Burke, "I do not know the method of drawing up an indictment against a whole society," but I do

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52. Illinois Juvenile Court Act § 21, 1899 Ill. Laws 137.
53. Id.
54. Id.
55. The doctrine of parens patriae, which views the state as a surrogate parent, was accepted by the courts even before the 1899 Juvenile Court Act. See, e.g., Ex Parte Crouse, 4 Whart. 9, 11 (Pa. 1839). ("[M]ay not the natural parents when unequal to the task of education, or unworthy of it, be superseded by the parens patriae, or common guardian of the community?").
56. Justinian, Institutes 1.1, quoted in DICTIONARY OF MORAL THEOLOGY 673 (P. Palazzini ed. 1962). Cf. Romans 13:7 ("Render to all men whatever is their due").
57. Burke, Speech on Reconciliation with America (March 22, 1775).
understand that there is an unlimited array of unhealthful social conditions that predispose youth to commit crime. We all understand, for example, that in any society in which a relatively small proportion of the people is comfortable and well taken care of and the rest are not, the amount of property crime by the dispossessed against the possessed is naturally going to increase. Some who would not under more favorable circumstances steal another person’s property might yield to the temptation in the face of hungry children, persistent deprivation, or even out-of-control consumerism.

A society in which a large proportion of its youth has its already restricted moral sensibilities deadened by drugs or alcohol might well expect a high incidence of crime; and as long as these conditions are present, all the “wars” that our governments can dream up will not change this unfortunate condition.

My point is simply this: The juvenile court system, like the adult criminal system, is capable at best of having only a relatively small impact on the total number of crimes committed in any given society. Only a small proportion of those who violate the law get arrested, and an even smaller proportion get to court—adult or juvenile. Because of a lot of demagogic clamor and public disinformation, the courts too often get blamed for adverse social conditions over which they have very little control. 58 Those who overestimate the power or capacity of the juvenile court, or any court, to reduce or control criminal activity deceive the public and, worse, make the job of the courts

reprinted in Edmund Burke: Selected Writings and Speeches 168 (P. Stanlis ed. 1963).

58. This point was quite well expressed in the 1985 Robert Houghwout Jackson Memorial Speech given at the National Judicial College by Sol Wachtler, Chief Judge of New York:

People in high public office who, rather than addressing the causes of crime, divert society’s attention by saying, in substance, “If the courts did their work, everything would be all right.”

... We know, and it should be recognized, that violent crime is in some large measure caused by a flawed society. ... What we do not know, is what to do about it, or, to be more precise, whether we are willing to devote the resources to try. That is a debate for another day.

But that debate cannot be conducted constructively if society is allowed and encouraged to blame the courts. If society is permitted to look out the window instead of its own mirror.

even more difficult than it already is. The juvenile courts can hold young criminals morally and legally responsible for their acts and can try to deter and reform them, but this cannot be expected, as it often is, to cure our social ills.

4. Testing the Justice Model

Nothing that lacks justice can be morally right.

- Cicero\(^{59}\)

I argue for a justice model in the juvenile court, a model that incorporates both retributive justice and distributive justice. Adoption of this model will give clarity of purpose to the juvenile court and will end its identity crisis. It will also bring about the rehabilitation of an essentially good system that has suffered a moral deficit traceable to and inherent in its origins.

To test my thesis I decided to examine briefly how the moral model might work in the real world. I certainly would not presume to present here any kind of "model juvenile court act." I will try only to apply very tentatively some of my ideas to the various categories commonly associated with the work of the juvenile court. I find that a moral model fits rather well into the present scheme of things and that there is no need to talk of dismantling or reconstructing the present system. A change to a moral model will necessarily be followed by structural and procedural changes, but I believe that these changes can be carried out by relatively limited alterations of present juvenile court legislation.

I will now discuss some, but not all, of a variety of relevant juvenile court topics, including the legislative purpose clause, adjudication of delinquents' guilt or innocence, transfer to adult court, disposition and sentencing, juvenile probation, and the critical juvenile court function of rehabilitating and reeducating juveniles who have violated the criminal law. It is only by putting the proposed justice model to this kind of test that we can determine whether it makes sense.

A. Legislative Purpose Clause

To install a justice model in the juvenile courts I would first urge the enactment of a legislative purpose clause which would require the juvenile court to do justice. The following purpose clause should suffice in spelling out the dual purpose of the juvenile court in doing justice:

\(^{59}\) Cicero, De Officiis, Book I, ch. 19, § 62 at 65 (W. Miller trans. 1913).
The first purpose of the juvenile court in delinquency matters is, by imposition of appropriate punitive sanctions, to hold criminal offenders justly and fairly accountable for their crimes, thereby maintaining the integrity of the criminal law and conveying a public lesson to juveniles and to the public at large that in the juvenile court the law is upheld.

The second purpose of the juvenile court in delinquency matters is to influence criminal offenders in a manner that will lead them to discontinue their criminal conduct and to develop individual responsibility for lawful behavior.

The juvenile court is a special court for the underaged and as such must necessarily act in a manner that recognizes the unique characteristics and needs of juveniles. Juvenile court judges, having special training and skills relating to the problems of delinquent youth, shall have an affirmative duty to take whatever measures that are necessary to carry out the reformatory and rehabilitative ends mentioned above.

B. Organization of the Court

Two different kinds of children come before the juvenile court, criminal and non-criminal. To recognize this difference I would divide the court into two divisions, delinquent and civil. The 1899 act provided for a unified jurisdiction over "dependent, neglected and delinquent" children. This lumping of poor and criminal children together in the same jurisdictional category is consistent with the traditional theory that neglected children and delinquent children are indistinguishable victims of their environment. Such an attempted homogenization of criminal and non-criminal children is not consistent with a moral model. The jurisprudence and procedures of civil and criminal law are sufficiently different so as to justify the institution of two different juvenile court divisions. I envision a civil division to hear the cases of incorrigible youth and of neglected and abused children who are in need of the court's protection. The other division, a delinquency division, would have different rules and procedures, would hear cases involving violations of the criminal law.\[61\]

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60. Illinois Juvenile Court Act § 1, 1899 Ill. Laws 131.
61. Having a separate division for delinquents and thereby recognizing the culpability of those who violate the law is inconsistent with traditional juvenile court philosophy and contrary to a substantial body of social science
The delinquency division would in turn be divided into two branches because two different kinds of delinquent "children" come before the court. The juvenile court should at last recognize the difference between a child and a non-child. The juvenile court obviously should not be dealing with a seventeen-year-old professional safe-cracker in the same manner that it deals with a twelve-year-old petty thief; there is a qualitative difference between the two. I think that this reality requires the establishment of a two-tiered system in the delinquency division, one part for real children, the other for older adolescents and youths. The age of fourteen, the age used at common law, would probably be a good dividing point so that the juvenile or children's branch would have jurisdiction over children under age fourteen (fifteen might be all right), and a youth branch would have jurisdiction over criminal youth of ages fifteen, sixteen, seventeen, and perhaps older.  

C. Adjudication

Adjudication is the fact-finding, guilt-determining stage of juvenile court process. My first concern here is to rid the delinquency adjudication process of Gaultamania. This should be quite easy in the lower-aged, juvenile branch, where we need not be concerned with the type of procedurally-deficient, unconstitutional imprisonment that concerned the Supreme Court in Gault  and Winship.  

It must be remembered that juvenile court, by its nature, is a court of grace. At common law, children over seven years of age were subject to criminal prosecution. Under juvenile court law all children under a certain age, usually eighteen, are immune from criminal prosecution. Since they receive the

research. During the 1970's a fad called "labeling theory" was much in vogue. Under this theory, care should be taken not to condemn criminal youth by stigmatizing or "labeling" them as wrongdoers. Labeling wrongdoers as wrongdoers, the theory goes, tends to create a "self-fulfilling prophesy" that makes future delinquency more, rather than less, probable. Fortunately this theory has now, after the expenditure of millions of dollars in social science research funds, been generally discredited. Even if the theory were valid, I would be opposed on moral grounds to absolving young law violators from blame or shame.

62. Because law violators coming under the jurisdiction of the youth branch would be subject to stricter controls and severer sanctions, intramural "transfer" from the juvenile branch to the youth branch might be considered in cases of very serious crimes by younger children.

63. 387 U.S. 1 (1967).


65. See W. LaFave & A. Scott, Criminal Law 398 (2d ed. 1986).
grace of criminal immunity, it is not unreasonable that juveniles should receive less in the way of the protective formalities associated with criminal prosecutions and that they be afforded more informal but orderly procedures which adjudicate facts in a fair but not a legalistic manner. In all adjudicatory proceedings in the lower-aged, juvenile branch of the court the guilt phase would normally be conducted without judicial intervention (although possibly with some kind of judicial review) and would follow an administrative law model with, of course, proper notice and a fair hearing. Hearings officers, lay panels, and even peer tribunals would be the order of the day. Proof of charges would be by a preponderance of the evidence. No punitive confinement would result from these kinds of proceedings, and no federal constitutional issues would be implicated.

In cases of older youths in the youth branch, in most cases I would employ the same informal proceeding as those of the juvenile branch. More formal adjudicatory proceedings would be conducted only in cases in which the prosecutor notified the accused youth in advance of the state's intention to seek punitive confinement. In these cases, and only in these cases, would I anticipate the necessity of formal trial before a judge or referee, representation by counsel, and the other federal constitutional protections mandated in Gault, Winship, and related cases.

The adjudicatory process under a justice model can be summarized by saying: "Don't make a federal case out of it." Given the available noninstitutional, nonrestrictive juvenile court dispositions available for delinquents young and old, there is no reason why we cannot greatly simplify the fact-finding and adjudicatory process. I should be careful about saying this, but the fact that almost all juveniles who are brought before the court on delinquency charges have in truth committed the crime charged is a fact that we should not be required to ignore. The chances of administrative adjudications being conducted unfairly are not high; and it seems very unlikely that juveniles will suffer injustices under the informal adjudicatory system that I have described.

68. The ludicrous overuse of criminal-court formalities is well illustrated in an article on the subject written almost eighty years ago. In a 1911 edition of a legal periodical called the Green Bag an article entitled "Treating the Child as a Criminal" tells of a lawyer employed to defend a boy for theft. A jury was empaneled (oddly enough the early juvenile courts acts
D. Disposition

In addition to a clear statement of purpose, the juvenile court is in need of direction as to how its delinquent subjects are to be managed after they have been found guilty of criminal conduct. The sole function of disposition in the original, treatment-centered juvenile court was clear, straightforward, and unproblematical: to diagnose the social illness of the delinquent and then to administer the appropriate treatment, to the end that the delinquent juvenile would no longer become involved in criminal activity. The function of disposition in today’s juvenile court is no longer so singularly clear. If my proposed justice model were adopted, a welcome clarity would be restored to what juvenile court dispositions are all about.

First, a delinquent must be held "accountable." This means that the juvenile must suffer some unpleasant consequences as a sanction for wrongdoing. By "unpleasant conse-

provided for jury trials) and witnesses were called. The boy raised his privilege against self-incrimination when his confession was introduced. As stated in the article, "[a] lengthy trial, costing $150 and an attorney's fee, resulted in lasting injury to the boy, because he felt less guilty on account of the attempt to justify him and to get him free." *Treating the Child as a Criminal*, 23 The Green Bag 803, 803 (1911). In a poignant piece of precognition showing the fault of Gault, the article tells this story about the lawyer after the trial:

That night when the lawyer entered his home he was met with an exclamation from his little girl: "Oh, papa! Harry stole some apples from Mrs. Fern's yard; Jimmy Peters saw him."

After supper, father said: "Come here, Harry, and tell me about it; I am ashamed that my boy would steal apples. Why did you do it?"

"Well, papa, they looked so nice, I — I —"

"I object to Harry's telling on himself in that way," interrupted the mother, who was a prime mover in the establishment of the juvenile court and had been present at the hearing in court that afternoon.

"But, mother, Jimmy saw him take them."

"That makes no difference," replied the mother. "I will call in Mrs. Smith, Mrs. Green, Mrs. Jones, Mrs. Thomas and Mrs. Franks. We will get Jimmy and any others you want to tell what they know and after we hear them all the women will decide whether Harry stole the apples. Harry shall not tell on himself. You will have to prove it."

"Wife, this is foolish; Harry knows he stole the apples and we can settle this right here in the family without the whole neighborhood being called in. There is no use branding our boy a thief."

"Are you sure it will be constitutional?" said the wife, with a twinkle in her eye.

*Id.* at 83-84.
quences," I have in mind a whole array of possible punishments from slight intrusions into the juvenile’s freedom of movement to fairly serious penalties involving restrictive, institutional confinement. For example, for relatively minor offenses the juvenile tribunal might issue a *punitive reprimand*. This would involve an official reprimand accompanied by some form of palpable punishment, which could include such consequences as home detention, denial of driving privileges and required attendance at prescribed competency training programs. These programs would include, wherever possible, reading and vocational training which would assist in attempts to reeducate the subjects of these dispositions. More serious or repeated offenses would call for the next level of severity, *punitive supervision*, a disposition that would involve formal or informal probationary supervision by assigned probation officers, accompanied, where needed, by “crash” or demonstrative short-term detention. The most serious and severe disposition would be *restrictive detention*, which would mean a punitive loss of liberty, accompanied by a rehabilitative program.

The single most important rehabilitative factor of juvenile court disposition is the lesson given, namely, that you cannot get away with it. Still, there is an increasing number of youths coming before the juvenile court who are virtually incapable of learning that lesson from any kind of punishment that the juvenile court or any other institution might fashion. Let me give a few examples. The first example that comes to mind is the many victims of violent childhood abuse. Study after study confirms the high correlation relationship between serious childhood abuse and later violent criminality.¹⁶⁹ Court action in imposing punishment on this type of offender very often will not have much of an effect on the likelihood of whether these victim-victimizers will commit further violent crime. If we have any interest in preventing these offenders from continuing to hurt themselves and others, we must place greater emphasis on devising and implementing intensive retraining and counseling programs for them.¹⁷⁰

There are, of course, other types of juveniles who are not readily susceptible to being deterred or reformed. It is among

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¹⁷⁰. See Jones, *A Judge’s View*, in D. Sandberg, The Child Abuse—Delinquency Question 75 (1989); A. Coffey, Juvenile Justice as a System: Law Enforcement to Rehabilitation, 16-29 (1974), in which can be found an excellent exposition of the programs that can be instituted for violent offenders who have a history of physical abuse.
these youths that we find the young criminals who commit the vast majority of our juvenile offenses. It is here that we must concentrate our energies so that we might find ways to care for and discipline these offenders in a manner that will address the major source of juvenile crime.

E. Transfer

"Transfer" refers to the process of denying the grace of juvenile court to certain juveniles who have committed serious crimes. Consistent with the traditional clinical model of the early juvenile court, the decision to deny juvenile treatment and transfer a delinquent to the adult court for possible prison sentence is, in most jurisdictions, based on the juvenile court's subjective determination as to whether the juvenile court has the proper medicine for a particular delinquent's malady. Thus, believe it or not, transfer decisions are still being made on the basis of whether a subject juvenile is believed by some judge to be "fit" for juvenile court "treatment," i.e. curable by juvenile court therapy. If the juvenile is seen to be a poor treatment prospect, he or she is likely to be judged to be unfit for the clinical efforts of the juvenile court and hence subject to banishment.

I would eliminate all this nonsense. In fact, I would abolish the whole process of transfer.

One of the biggest problems with transferring juveniles to the adult court is that the adult court does not know what to do with these banished juveniles. In an effort to "get tough," many legislatures throughout the country have been causing more and more juveniles to be transferred to the adult system.71 What happens to these transferees is that, although sometimes juveniles are sent to a prison where they become integral members of our adult criminal society, more frequently they receive probation and no appreciable sanction at all because of judges' understandable unwillingness to send these youngsters to adult prison.

All but the most vicious, violent and irremediably incorrigible youth should be kept in the juvenile system where there is some hope for them. The travesty of wholesale "automatic transfer" and transfer of "unamenable" juvenile delinquents to an unprepared adult criminal system could be avoided if


72. "Automatic transfer" is a misnomer which refers to the legislative
suitable and condign punishment were available in the juvenile system.

I must add, however, that certain offenders and certain crimes simply cannot be properly adjudicated and disposed of in the juvenile court environment. I would not presume to say at this juncture just what kind of offender and what kind of offense should be excluded, but the grace of juvenile court should be withdrawn from certain repetitive offenders and from older offenders who commit the most atrocious of crimes. This does not really involve a transfer at all. There is no "transfer" to the adult system as such, merely a refusal to grant the grace of the juvenile court to certain classes of crime and criminals.75

F. Probation

Juvenile probation will be different under a justice model. Obviously juvenile probation officers will not be wasting so much of their time preparing "diagnostic" reports filled with useless information that no one ever reads or needs to read. Probation officers are not field medics or nurses carrying out the orders of doctor-judges. No one is sick, and no one is going to be cured. Once this is accepted and understood, the juvenile probation officers can go about performing some very valuable work.

Under any system or model, I think the most important thing that juvenile probation officers do is to provide juveniles an example of what a good, decent, law-abiding human being looks like. Some young people have never seen such a creature. Beyond this, the vital, active functions of a juvenile probation officer will be: (1) to recommend to the court appropriate punitive dispositions; (2) to recommend to the court rehabilitative measures that are needed in addition to the rehabilitative effects inherent in the punitive disposition; (3) to ensure compliance with the orders of the court with respect to retributive and rehabilitative dispositions; (4) to report to the court on the successes and failures of the dispositional programs; and (5) to visit, supervise and follow up on designated

decision to exclude certain juveniles from the grace of the juvenile court, without judicial intervention. See generally id. at 494-99.

73. What to do with the growing number of extremely violent or repetitively criminal youths who, I am suggesting, do not deserve to remain within the graces of the juvenile court is a problem which obviously we cannot ignore. As I have said, the adult system does not know what to do with these people. Perhaps it can learn.
delinquent wards, who in the opinion of the court or the probation officer are in need of personal contact or counseling.

I am hoping that the adoption of a justice model will simplify rather than complicate the job of juvenile probation officers, for the important job of these officers is not the relatively easy job of dealing with the self-correcting kind of juvenile delinquent that you and I were. Their job is a truly hard and frustrating one: to reform the unremoralizable and to deter the undeterrables. The probation case-load is made up of intractables—young criminals who, for example, see nothing wrong in what they are doing and look at being caught as merely the reflection of superior power that interferes with the carrying out of their normal criminal occupation. Many youthful drug dealers do not have any conception of doing anything wrong. Likewise, many of today’s “underclass” youth look at mugging and theft from the “have’s” as a virtuous, productive and perhaps revolutionary activity. It is not an easy task either to deter or to reform significant numbers of these young criminals, but we must try, principally because we know that errant juveniles are more subject to being able to change their lives than adults. Our limited resources are more efficiently spent trying to reform young persons rather than old. The real heart-beat of the juvenile system is the work of its probation officers. A justice model will make their difficult job simpler.

5. Conclusion: The Spirit of ’99

To no one will we deny justice. . . .

Magna Carta 1215

I have presumed to call for the rehabilitation of our system of juvenile courts. We should try to reform, remodel and remoralize these courts because that would be the right thing to do and because the courts would run more effectively and efficiently under a clearly defined justice model.

I want to remodel the system, not dismantle it. I applaud a society that thinks enough of its young people to create a special court to deal with their problems. I applaud the women and men who do the difficult and important work that is being done by the juvenile courts despite the ideological weaknesses which I have described. I want to maintain and continue the

juvenile courts of this country in essentially their present form; but I want them to do justice.

In delinquency cases the first office of the juvenile court is to administer retributive justice in a manner that accommodates the diminished capacity of youth and their universally understood attributes—imperfect judgment, immature attitudes, impulsivity, the difficult-to-resist need to please their peers, and other such traits that justify our treating young law violators differently from older ones.

The juvenile courts must also be required to recognize the morally mandated and legislatively imposed duty to care for and discipline delinquent juveniles by undertaking the rehabilitative programs that are their due. Juvenile courts must administer distributive as well as retributive justice. We must attend to what we do for our juveniles as well as to what we do to them.

Although it may appear at first paradoxical to the reader, in many ways I yearn for the child-centered philosophy of the spirit of 1899. If we can avoid stripping the juvenile court of its moral content and say goodbye to the clinical model, there is very much indeed to commend the "Spirit of '99." The spirit of the 1899 Illinois juvenile court act was parens patriae, the state as a good parent. I believe that the Illinois law-makers were right when they instructed the state's newly-created juvenile courts to treat their wards in a manner that approximated "as nearly as may be that which should be given by their parents." These words should be taken to mean that juveniles are to be punished and then cared for in a manner that is likely to foster future good conduct. As parents reprove, punish, and then guide their prodigal children, so should the state's juvenile courts act as parens patriae, in reproving, punishing and then guiding delinquent juveniles. I have made some suggestions as to how the spirit of '99 can be embodied in a remodeled, rehabilitated court of juvenile justice. I hope I have provided something worth thinking about.

75. Illinois Juvenile Court Act § 21, 1899 Ill. Laws 137.