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WHAT IS A "FAIR" RESPONSE TO JUVENILE CRIME?

*Susan K. Knipps**

I. Introduction

The question of how to deal fairly and effectively with the problem of juvenile crime has long perplexed the public and the policy makers. The current juvenile justice "system" in New York State reflects this collective uncertainty, as it simultaneously employs two completely different models for the adjudication of juveniles accused of unlawful acts. The first model — established by the Family Court Act of 1962[1] — emphasizes the provision of rehabilitative services for delinquent youth through noncriminal proceedings in the Family Court. The second model — established by the Juvenile Offender Law of 1978[2] — stresses the use of punitive sanctions in the adult criminal courts for more serious juvenile offenders.

In the continuing debate over appropriate responses to juvenile crime, some have advocated for a change in the current "mix" of models, with greater reliance upon the adult system, if not complete abolition of the juvenile court. Interestingly enough, two completely opposite analyses have been advanced in support of this position. Some of the critics assert that the Family Court's role should be reduced because it is too lenient to deal effectively with today's young offenders. Others, however, urge a change because they believe the Family Court approach is — covertly — too punitive.[3]

To begin to sort through these conflicting criticisms, this Essay first examines the development of the current juvenile justice system in New York State. It then examines the assumptions and values underlying these two prescriptions for change. While finding elements of truth in each viewpoint, this Essay contends that increased prosecution of juveniles in the adult courts would be unlikely to improve the current situation. This Essay concludes by noting factors that have limited the fairness and effectiveness of the Family Court's rehabilita-

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1. *See* 1962 N.Y. Laws 686.

2. *See* 1978 N.Y. Laws 481.

3. *See infra* Part IV.

tive model, and by suggesting alternative strategies that might be helpful in addressing the troubling problem of juvenile crime.

II. The Development of New York's Juvenile Justice System

New York's system for the adjudication of juveniles accused of unlawful acts has undergone a series of dramatic changes in the past century. Indeed, the impulse for reform in this area has been so strong that the system has practically gone full circle in one hundred years: from prosecution of juveniles in the adult criminal courts, to adjudication in a separate non-criminal system, and then back to prosecution of some juveniles in the adult system.

A. Prosecution in the Adult Criminal Courts

The early criminal justice system in New York State provided no separate tribunal for the adjudication of children accused of unlawful acts, although the common law's infancy defense did allow for differential treatment of some juveniles under the age of fourteen. Under the infancy defense, children below the age of seven were exempt from criminal liability. Children from age seven to fourteen were presumed to lack the moral and intellectual capacity for the formation of criminal intent, although the presumption was rebuttable. Children over the age of fourteen, however, were entitled to no special considerations. Most adolescents were accordingly tried as adults, and subject to incarceration in adult facilities if convicted.[4]

Nineteenth century reformers found two major defects in this system for handling young offenders. First, in their view, the incarceration of juveniles with adults only further schooled the youngsters in the ways of vice and crime. Second, due to the harshness of adult sanctions, juries often proved reluctant to convict juveniles accused of crimes. A nineteenth century district attorney explained the problem:

> [A] lad of fourteen or fifteen years of age might have been arrested and tried four or five times for petty thefts, and it was hardly ever that a jury would convict. They would rather that the culprit, acknowledged to be guilty, should be discharged altogether, than be confined in the prisons of our State and county.[5]

The first reform efforts in the nineteenth century sought to address

4. *See generally*, MERRIL SOBIE, THE JUVENILE OFFENDER ACT: A STUDY OF THE ACT'S EFFECTIVENESS AND IMPACT ON THE NEW YORK JUVENILE JUSTICE SYSTEM 7 (1981); Lucia B. Whisenand & Edward J. McLaughlin, *Completing the Cycle: Reality and the Juvenile Justice System in New York State*, 47 ALB. L. REV. 1, 11-14 (1982).

5. BRADFORD PEIRCE, A HALF CENTURY WITH JUVENILE DELINQUENTS: THE NEW YORK HOUSE OF REFUGE AND ITS TIMES 79 (Patterson Smith 1969) (1869).

these concerns by the establishment of separate facilities for convicted juveniles. A more fundamental innovation followed in the early twentieth century: the development of a completely separate *noncriminal* system for the adjudication of juveniles accused of criminal acts.

B. The *Parens Patriae* System

The creation of a separate juvenile court system was the product of several concerns and motivations. Some sought a system that would promote the welfare of the children by shielding them from harsh adult sanctions and by providing them with services that would hasten their reform. Others, however, sought a system that would promote "law and order" by allowing for state intervention in cases where criminal sanctions might be viewed as inappropriate.

The new system thus provided that youths found to have committed unlawful acts were not to be deemed guilty of a crime, but of an "act of juvenile delinquency." Through informal proceedings, the juvenile court judge was to glean the deficiencies of the wayward youth and draft a dispositional order designed to provide remediation, not punishment. An early twentieth century commentator described the process in its ideal form:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.[6]

Unfortunately, however, the actual functioning of this *parens patriae* system did not live up to its rhetoric. Juvenile court judges all too frequently simply removed unruly children from their family homes and then committed them to "training schools," which were harsh, punitive and without any apparent rehabilitative effect. Moreover, as the Supreme Court observed in one of the earliest juvenile rights cases, the lack of due process protections under this early approach resulted in young offenders being subjected to "the worst of both worlds" since they faced sanctions comparable to the criminal system, but enjoyed none of the constitutional and procedural safeguards established for those accused of crimes.[7]

C. The 1962 Family Court Act and the Implementation of Due Process Protections

The concept of due process was introduced into New York's juve-

6. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).
7. Kent v. United States, 383 U.S. 541, 556 (1966).

nile justice system with the 1962 enactment of the Family Court Act. Five years before the United States Supreme Court declared in *In re Gault*[8] that due process protections applied to juvenile proceedings, the Family Court Act provided the basic elements: notice of the charges, a hearing based on competent evidence, a right to an appeal, and most significantly, a right to the assistance of counsel throughout the proceedings.

These due process provisions radically changed the form of juvenile delinquency proceedings in New York State. But many of the substantive themes from the *parens patriae* system remained the same. Delinquency proceedings under the Family Court Act continued to be noncriminal. The focus at the dispositional stage was still upon the child's individual needs, and not upon the particular crime committed.

In its current form, the Family Court Act expressly discourages the use of incarceration as a dispositional alternative. So long as the community's safety is not compromised, reasonable efforts are to be made to prevent the need to remove the child from his or her home. The Family Court Act authorizes a broad array of dispositional alternatives: adjournment in contemplation of dismissal, conditional discharge, probation, restitution, as well as placement away from home. In crafting a dispositional order, the Family Court is to select the least restrictive alternative that is consistent with the needs and best interests of the respondent as well as the protection of the community.[9]

If placement away from home is determined to be necessary, the permissible initial periods are relatively short: up to twelve months for a finding of a misdemeanor and up to eighteen months for a felony finding.[10] For certain "designated felonies," however, the initial placement may be for a period of three to five years.[11] Moreover, twelve month extensions of the placement may be ordered upon a showing of continued need until the youth's eighteenth birthday.[12]

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

9. *See* N.Y. FAM. CT. ACT § 352.2(2) (McKinney 1983 & Supp. 1993).

10. *See* N.Y. FAM. CT. ACT § 353.3(5) (McKinney 1983 & Supp. 1993).

11. The "designated felonies" are specified serious felonies committed by older youth. They include murder in the first or second degree, kidnapping, arson, assault, manslaughter, rape or sodomy in the first degree if committed by a youth 13 years of age or older; and burglary in the first degree and certain types of burglary and robbery in the second degree if committed by a youth 14 years of age or older. *See* N.Y. FAM. CT. ACT §§ 301.2(8), 353.5 (McKinney 1983 & Supp. 1993).

12. *See* N.Y. FAM. CT. ACT § 355.3 (McKinney 1983 & Supp. 1993).

D. The Juvenile Offender Law of 1978

From 1962 to 1978, the Family Court had exclusive jurisdiction over all youths between the ages of seven and sixteen charged with unlawful acts. However, in 1978, New York undertook yet another substantial reform of its juvenile justice system: the creation of a new category of "juvenile offenders" ("JOs") who could be prosecuted in the adult system for specified serious offenses.[13] Adopted in response to public outcry over a perceived increase in violent juvenile crime, the New York Juvenile Offender Law represented at the time the harshest and most punitive system for the treatment of young offenders in the United States.

Under the JO law, a youth arrested for a JO charge may be arraigned, tried and sentenced in the adult criminal court. The law requires that an indeterminate sentence of incarceration be imposed upon conviction of a JO offense. The minimum and maximum periods of incarceration are generally not as long as those prescribed for adults, but longer than those that would be available in the Family Court. Specific minimum and maximum terms include five years to life for murder in the second degree, and four to fifteen years for arson and kidnapping in the first degree.[14]

The JO law, however allows for some amelioration of these stringent sanctions. The court — with some limitations[15] — may grant the defendant "Youthful Offender" status ("YO"), which provides for the substitution of a non-criminal adjudication for the criminal conviction. YO status — which has long been available to sixteen to nineteen-year-old defendants in the criminal courts — allows the judge to order a variety of lesser sanctions, including a term of probation or a fine. Alternatively, a JO case may be removed to the Family Court for prosecution as a juvenile delinquency matter either before

13. The JO law provides for adult prosecution of youths 13 years of age and older charged with murder in the second degree, and of youths 14 years of age and older charged with any of 15 offenses, including murder in the second degree; or kidnapping, arson, assault, rape or robbery in the first degree. *See* N.Y. PENAL LAW § 10.00(18) (McKinney 1987).

14. JO sentences are generally served in secure facilities operated by the New York State Division for Youth until the youth reaches age 21, at which time he or she is transferred to the Department of Corrections for incarceration in an adult facility.

15. The court may not grant YO status if the youth has been convicted of an A-I or A-II felony, has previously been convicted and sentenced for a felony, has previously been granted YO status following a felony conviction, or has been previously found to have committed a designated felony by the Family Court. When the youth has been convicted of an armed felony offense or certain sexual offenses, the court may only grant YO status when particular mitigating factors are found. *See* N.Y. CRIM. PROC. LAW § 720.10(2),(3) (McKinney 1989 & Supp. 1993).

or after conviction.[16]

E. The Current System

The current juvenile justice "system" in New York is thus exceedingly complex. Split between two separate court systems, with two separate sets of goals and procedures, the system reflects themes and values imposed by successive reform movements. Should the circle of reform now be completed by prosecuting even more juveniles in the adult system? The arguments of the two distinct groups who advocate such a change are now examined.

III. Is Adult Prosecution of Juveniles "Fairer" to the Community?

Some examine New York's current "mixed" system of juvenile justice and urge that more youths be prosecuted in the adult system because it would be fairer to the community. A typical formulation of this argument posits that youngsters will not be "mollycoddled" if prosecuted as adults, and that the harsh sanctions of the adult system will do a better job of deterring future crime. Implicit in this argument are two factual assumptions: first, that the adult system imposes harsher sanctions and second, that the sanctions will have a deterrent effect upon juveniles. Both points are worth examining closely.

How *do* juveniles fare in the adult system? In the nineteenth century, as previously noted, some believed that youngsters all too frequently escaped any sanctions whatsoever when prosecuted as adults. Today, statistics concerning prosecutions under the JO law suggest that a similar result may still be occurring: the harsher system does not necessarily yield harsher treatment.

In the first five years of the JO law's operation, 6,951 New York City youths were arrested as alleged Juvenile Offenders. The vast majority of those youths (4,770 of them) received *no* criminal sanction because the case was dismissed or removed to the Family Court. Six hundred sixty-four (664) of those arrested received sentences of probation and remained in the community; 598 received sentences of incarceration equal to those which could have been imposed by the Family Court. Fewer than 300 youths in the five year period — or only 4% of those arrested — received sentences that were longer than they might have received from the Family Court.[17] Statewide figures

16. The case may not be removed if the youth has been convicted of murder in the second degree. *See* N.Y. CRIM. PROC. LAW § 330.25 (McKinney 1983).

17. CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK INC., THE EXPERIMENT THAT FAILED: THE NEW YORK STATE JUVENILE OFFENDER LAW 132-33 (1984).

from 1991 are similar.[18]

The explanation for these results is not entirely clear. Anecdotal reports from practitioners suggest that JOs — while the toughest of the young offenders — end up being viewed as the "babies" in the adult system. A number of factors may enter into this: in comparison to their adult counterparts, juveniles' histories undoubtedly seem less egregious, their moral culpability less clear, their prospects for rehabilitation brighter. At any rate, the "get tough" rhetoric associated with the JO law notwithstanding, in most cases, the authorization of adult prosecution has not in fact resulted in harsher sanctions.

Advocates for adult treatment may respond that just the threat of harsher sanctions is useful because it deters future juvenile crimes. The question of the deterrent effect of criminal sanctions — vigorously debated throughout history — is especially problematic in the juvenile justice context. Deterrent theories generally posit that a "rational" offender weighs the potential costs and benefits from any contemplated unlawful act, and chooses that course which is utility maximizing. The validity of this model in the case of adolescents, who are notoriously impetuous and susceptible to peer influence, is highly questionable. And in fact, a recent study employing an interrupted time series analysis of juvenile arrest rates before and after the enactment of the JO law concluded that the harsher sanctions authorized by the JO law had not been effective in reducing juvenile crime levels.[19]

Those familiar with the harsh realities of urban life have observed how insignificant the threat of sanctions can be when compared with immediate conditions on the street. "When I talk to them about the consequences of their actions, I can't scare the kids with prison anymore," a Chicago housing project manager was recently quoted as saying. He continued, "they're worried about simple survival, about living to be 18."[20] An expert on juvenile homicide echoes this view in explaining why even the harshest of sanctions may do little to stem the increasing incidence of violent juvenile crime:

These figures do not include cases that were acquitted, abated or covered by pleas, or cases pending arraignment or indictment.

18. Of the 1,625 JO cases disposed of statewide in 1991, 67% were either dismissed or removed to the Family Court. Of the 546 youths who were convicted as JOs, 68% received YO status and 74% of these received sentences of probation. *Juvenile Offenders*, RESEARCH FOCUS ON YOUTH (N.Y. State Division for Youth Bureau of Program Evaluation and Res.), Winter 1992, at 1.

19. Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521 (1988).

20. Don Terry, *More Familiar, Life in a Cell Seems Less Terrible*, N.Y. TIMES, Sept. 13, 1992, § 1, at 1.

> [Kids who kill] don't think about the consequences and they don't have a long-term perspective. They face death every day on the street and even at school, so why should they be afraid that maybe the police will catch them and maybe they will be executed?[21]

While the impact of more punitive juvenile sanctions upon community safety may be minimal, the impact of such measures upon the public fisc can be extraordinary. The average cost of detaining one child for one year in a facility operated by the New York State Division for Youth ("DFY") is $84,000.[22] Before increasing the number of juveniles prosecuted in the adult system for the sake of community protection, therefore, the public should surely consider whether less costly and more effective alternatives are available. But before discussing possible alternatives, this Essay will examine the arguments of yet another group: those who urge adult prosecution, not because it is perceived as benefitting the community, but because it is viewed as better for the child.

IV. Is Adult Prosecution Fairer to the Child?

This second group of critics, like the first group, is also dissatisfied with the Family Court system, but contends that the problem is that the system is in fact too *punitive*. These commentators note that interventions labeled "treatment" can have the same functional effect as those labeled "punishment." In the name of individual remediation, they argue, the Family Court may subject children to infringements of their liberty that have no relation to the gravity of their offense. These critics assert that the benevolence of the system is but a myth, and that children would be better off under a system that acknowledges punishment as its goal, so that the state's actions would be limited by the principle of proportionality and more vigorous due process protections.[23]

It is certainly true that in the past, abuses of the *parens patriae* approach allowed unnecessary or inappropriate deprivations of children's liberty. And even today, some twenty-five years after *Gault*,

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21. Fox Butterfield, *Seeds of Murder Epidemic: Teen-Age Boys with Guns*, N.Y. TIMES, Oct. 19, 1992, at A8 (quoting James Fox, Dean of Northeastern University College of Criminal Justice).

22. STATEWIDE YOUTH ADVOCACY, INC., SAVING KIDS AND DOLLARS: A PROPOSAL FOR REFORMING NEW YORK STATE'S JUVENILE JUSTICE SYSTEM 2 (1990).

23. *See, e.g.*, Sanford J. Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, 25 JUV. JUST. 2 (1974); Martin Guggenheim, *Abolishing the Juvenile Justice System*, 15 TRIAL 22 (1979); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

abuses may still continue in those jurisdictions that have failed to develop a system for the provision of effective legal representation for juveniles.[24] The remedy for this situation, however, would seem to be the development of a stronger juvenile rights bar, not the abolition of juvenile courts. In New York City, for example, the Juvenile Rights Division of The Legal Aid Society has an established reputation for aggressive and effective representation of alleged delinquents in the Family Court. By vigorously litigating delinquency cases at both the trial and appellate levels, Juvenile Rights Division attorneys promote the scrupulous enforcement of the Family Court Act's due process protections, as well as its substantive mandates.

Of course, even with effective representation, a child who is prosecuted in the Family Court will not necessarily receive the same disposition as he or she might have received in the adult system. But this does not necessarily establish that the Family Court result is "unfair." The adult system — with its focus on the severity of the crime committed — may have little interest in minor offenses committed by juveniles when it is overflowing with violent predicate adult offenders. Yet the community has some interest in seeing that *some* type of intervention occurs to prevent additional transgressions in the future. The Family Court — with its emphasis upon the particular circumstances of the youth involved — is much more likely to retain jurisdiction over minor offenders, and to order intervention services. The Family Court result, while different from the adult court outcome, may actually be the "fairer" from the community's perspective.

Moreover, while prosecution under a system based upon "proportionality" would likely result in less intervention for juveniles who commit minor offenses, it could easily have the converse effect for more serious offenders. Many of these youths, therefore, might well prefer to give up any claim to a "proportional" punishment in favor of a more paternalistic disposition — especially if the former mandates a substantial term of incarceration in a secure facility, while the latter would impose a much shorter term (albeit with the possibility of extensions) in a more open setting.

Prosecution of juveniles in the adult system may therefore not be the panacea some imagine. But it is clear that much dissatisfaction

24. Unfortunately, this remains a serious problem in many areas across the country. *See, e.g.*, JANE KNITZER & MERRIL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 82-107 (1984) (finding "serious and widespread problems in the quality of representation" afforded to children in New York State outside of New York City). *Id.* at 82.

with the Family Court system remains. Would any measures short of abolition improve things?

V. Why Retain the Family Court Model?

Many things in the world have changed in the decades since the creation of a separate system for the adjudication of youth charged with criminal acts. But some things have not changed. Juveniles today — like those at the turn of the century — still have limited judgment and experience; they still have less clear responsibility for unwise or illegal acts; and they still have a greater capacity for rehabilitation and change. As the historical data suggests, the criminal system, being primarily concerned with the guilt or innocence of autonomous, responsible individuals, has a difficult time fitting these semi-autonomous, semi-responsible persons into its punitive scheme. By contrast, the more flexible structure of the Family Court system is specifically designed to respond to the unique characteristics of juveniles.

However, as the record from the *parens patriae* era reminds us, reasonable theoretical models are not enough. The actual functioning of the system must be scrutinized. As the various criticisms discussed in the preceding sections suggest, the current operation of the Family Court system is far from perfect. But this is not a reason to abandon the model. It is, however, a reason to improve its implementation.

Many of the most obvious deficiencies in the current functioning of the Family Court can be traced to a failure to allocate sufficient resources to allow realization of the court's statutory objectives. For example, in FY 1991, more than 4,000 juveniles in New York City were placed on probation by the Family Court. In the boroughs of Brooklyn, Queens, and the Bronx, the *average* caseload per probation officer ranged from 99 to 121 youths.[25] Similarly, the caseloads of the "aftercare" counselors who supervise youth after their discharge from placement with the Division of Youth have been reported to be at almost double their recommended levels.[26] Under these circumstances, even the best designed models will prove ineffective.

Some may agree that this sparse allocation of resources explains many of the shortcomings of the Family Court's operation, but note that our society has always underinvested in services for children. They may conclude that the Family Court model is, as a practical matter, unworkable. We therefore should face the "hard facts" that

25. THE NEW YORK CITY DEPARTMENT OF PROBATION, A REPORT ON FAMILY COURT SERVICES 28 (1991).

26. Heidi Evans, *Returned to the Streets*, N.Y. DAILY NEWS, July 26, 1992, at 4.

adequate resources will never be available for the juvenile court, and scrap the whole system.

Ironically, however, some even "harder facts" give some reason for hope on this score. That is, with the continuing fiscal crises at the state and local level, some policymakers are beginning to realize that the state cannot afford *not* to develop and fund community-based programs for youth at risk. These programs not only help save money, they may also do a better job of saving troubled youths and communities.

One example of a recent innovation in New York City is the "Family Ties" program developed by the City's Department of Juvenile Justice. This program, which began operating on a limited basis in 1989, features intensive home-based supervision and services for juveniles who are found to be at risk of placement by the Family Court. For a four to eight week period, a Family Ties counselor is available to the adjudicated youth and his or her family on a twenty-four-hour a day, seven day a week basis. Scheduled meetings between the counselor, the client, and family members occur four to five times a week. Significantly, the sessions focus not only upon such typically rehabilitative matters as anger management and impulse control for the youth, but also discipline techniques and advocacy skills for the parents. The program thus seeks not so much to "cure" the child as to support the functioning of the family, the unit which traditionally has been the source for the supervision and control of children in the community.

If at the end of the initial four to eight week period, the youth appears to be able to function adequately in the community, a recommendation for a disposition of probation is made to the court. If granted, follow-up supervision services are provided by the Department of Probation's Juvenile Intensive Supervision Program. The JISP officers are specially trained in family preservation techniques — and their caseloads are limited to fifteen youths.

Of course, even programs as sensible as Family Ties do not "solve" the problem of juvenile crime, since such interventions do not occur until *after* the law has been broken. In thinking about this issue, therefore, we must recognize that the legal system is not the only, or even the best social institution for preventing criminal behavior. Ultimately, "front end" prevention measures like tougher gun control laws, anti-violence initiatives, drug treatment programs and expanded job opportunities for youth can provide a better hope for community protection and for youth development.

The problem of juvenile crime is a serious issue that touches all of

us. However, the complexity of this issue requires that policies be based not upon emotion or supposition, but upon an examination of the actual facts. The problem will not be solved by simplistic "lock 'em up" slogans or by mere good intentions. It requires a commitment of attention and resources, and a willingness to try new approaches and test their efficacy. There will always be some youths who need to be removed from the community for the sake of community protection. But for the vast majority, less restrictive measures can be appropriate — and less costly. The Family Court has the statutory obligation to order such community-based dispositions whenever possible. With resources to implement this mandate in a meaningful fashion, the Family Court can fairly protect the community and provide the necessary intervention services to the youths who come before it.