ON YOUTH CRIME AND THE JUVENILE COURT†

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It's a very depressing, horrible place. It's completely not in the real world. . . . [H]ow does this court think it's going to rehabilitate a fifteen-year-old who's lived in an entirely different society? . . . The [Juvenile] Court was made for the little newsboy who broke somebody's window with a stone. That's when the laws were made. Not for the fifteen-year-old who's into drugs and killing.

—A juvenile court prosecutor[1]

Did we win or did we lose?
We won.
Yeah? What did we win?

—The author and his client[2]

I. INTRODUCTION

In a thoughtful and provocative essay, Abbe Smith has provided a forceful defense of the juvenile court in response to critics who predict or advocate its demise. She tells a poignant and compelling story of urban youth deprived of their childhood and hope for the future by poverty and racism, drugs and violence, decaying neighborhoods and blighted housing, bad schools and destructive peer influences, parental neglect and abuse, and lack of opportunity.[3] But it is these very youths who cause residents of urban areas to feel increasingly insecure for their personal safety. Compassion for disadvantaged youth does not eliminate our fear of them, and understanding of the apparent causes of juvenile lawlessness does not substitute for effective law enforcement, humane or otherwise.

The juvenile court is only a part of the system of law enforcement for juvenile offenders. It is no secret that the majority of crimes,

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[1] Quoted in PETER PRESCOTT, THE CHILD SAVERS 168 (1981).

[2] Conversation between a child and the author after a successful defense to a charge of burglary in a juvenile delinquency proceeding. Discussed in Stephen Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUM. RTS. L. REV. 389, 398–99 (1972).

[3] Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, *ante*.

especially crimes against property, go unsolved. And this appears to be true whether the perpetrators are adults or juveniles. Many juveniles who commit crimes (like their adult counterparts) do not get caught. This is one reason why neither the adult criminal justice system nor the juvenile justice system has proven effective in controlling anti-social behavior. It would seem to follow that changes in either system, whether by giving the adult criminal courts jurisdiction over some (or all) juveniles, or by retaining all juveniles in the juvenile court, will have no overall effect on the crime problem (except for incapacitating for longer or shorter periods the few offenders who happen to be caught, prosecuted, convicted and sentenced).

The argument between those who would abolish the juvenile court, and those, like Abbe Smith, who advocate that it be retained and its jurisdiction over juvenile offenders expanded, is not really about crime control. No serious student of juvenile—or even adult—crime believes that tinkering with the jurisdiction and procedure of the courts, or even its sentencing power, can significantly diminish the incidence of criminal activity in society.

If the controversy over the juvenile court is not about crime control, what is it about? It is about the juvenile court's capacity to impose dispositions upon those juvenile offenders who are adjudicated delinquent; dispositions that are seen by the public as appropriate official responses to the offenses juveniles have committed.

The reason that many seek to remove older, serious, repeat juvenile offenders from the juvenile court is that the juvenile court is not understood to be a criminal court for children and adolescents. Consequently, the court is not given the authority to impose services and rehabilitative confinement of sufficient intensity and duration to have any hope of reforming these offenders or of providing adequate protection to the community.

What is the justification for maintaining a separate, more lenient justice system for minors? As Geoffrey Hazard has cogently argued, the juvenile court requires "a coherent theory of its own."[4] If, as Abbe Smith contends, juvenile crime is a reflection of a "social problem" rather than an "individual malady," then the "individualized treatment" which has been the hallmark of the juvenile justice system may no longer serve as its primary *raison d'etre.*

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[4] Geoffrey C. Hazard, *The Jurisprudence of Juvenile Deviance, in* PURSUING JUSTICE FOR THE CHILD 3, 4 (Margaret K. Rosenheim ed., 1976).

II. A Tale of Three Offenders

This is a story about three offenders whom we shall refer to as "Adult Offender," "Mentally Ill Offender," and "Juvenile Offender." Adult Offender is a normal adult male. Mentally Ill Offender is a man with a psychotic illness who suffers from delusions and hallucinations. Juvenile Offender is a fifteen-year-old boy.

This is also a story about "John Q. Public," a decent, law-abiding citizen. Mr. Public is a good husband and father; he has a job; he pays taxes; he gives to charity; he coaches little league; he volunteers at the local soup kitchen; he votes. In short, he is a model citizen. One day as John Q. Public is heading home after a hard day at the office he is viciously assaulted by Offender, who steals his wallet and runs away, leaving Public lying beaten, bleeding and unconscious on the sidewalk.

What we do *to* and *for* and *about* Offender, if and when he is apprehended, depends in theory upon *which* Offender we are talking about—Adult Offender, Mentally Ill Offender or Juvenile Offender. But, in substantial respects, the actions we take, and our reasons for taking them, are in fact the same, regardless of which Offender attacked and robbed John Q. Public.

Suppose, for example, it was Mentally Ill Offender who attacked John Q. Public. Suppose, further, that Offender believed, because of his psychotic thought disorder, that Public intended to kill him, and was planning to do it with powerful, lethal, radioactive money that he had in his wallet. So, poor, demented Mentally Ill Offender did what he thought was necessary and reasonable under the circumstances—he took steps to defend himself. He struck out in what he delusionally believed was self-defense, attacked Public, grabbed his wallet, and threw it down the nearest sewer.

Upon apprehension by the police, Offender, who is babbling incoherently, is taken to the nearest hospital emergency room, where he is diagnosed as paranoid schizophrenic and dangerous, and sent by ambulance, in restraints, to a state mental hospital. In time, with treatment and medication, Offender is determined to be competent to stand trial. He is prosecuted and found not guilty by reason of insanity, whereupon he is ordered confined in a maximum security psychiatric hospital until such time as he is no longer mentally ill to the extent that his release might constitute a danger to others.[5]

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[5] *See* Jones v. United States, 463 U.S. 354, 368, 370 (1983).

An alternative scenario for Mentally Ill Offender, especially where his victim has not been hurt seriously and chooses not to press criminal charges, is civil commitment. Instead of his standing trial in criminal court, a petition could be filed in the appropriate civil court seeking his involuntary commitment, and upon presentation of clear and convincing evidence that Offender is mentally ill and dangerous to others or to himself, or "gravely disabled," the court will order that he be confined in a mental hospital.[6]

Suppose instead that it was Adult Offender, the normal, sane adult, who assaulted Mr. Public. He, too, would be apprehended by the police, but he is taken to the nearest police precinct, given *Miranda* warnings, interrogated, formally placed under arrest, taken to jail, and either released on bail or held in jail until his trial. In time, he either pleads guilty or stands trial, and (unless acquitted) is convicted, and, because of the gravity of the offense and a prior criminal record, is sentenced to a substantial period of incarceration in a state prison.

Now suppose that it was fifteen-year-old Juvenile Offender who beat and robbed John Q. Public. What happens to him when he is caught by the police? Is he treated like Adult Offender or like Mentally Ill Offender? The answer is that the law views him as being a little like each of them, even though Juvenile Offender is not like either of them. On the one hand, Juvenile Offender is not an adult, and therefore is not considered fully morally responsible for his anti-social actions. On the other hand, the typical juvenile offender is not mentally ill, and therefore cannot be relieved of responsibility for his actions for that reason.

Because Juvenile Offender is neither an adult offender nor a mentally ill offender, his case is under the jurisdiction of the juvenile court. Here is what will happen to him. When he is apprehended by the police, he will be taken to the nearest police station and turned over to a Youth Officer. The Youth Officer will call Offender's parent and notify her or him that Offender is in custody. Offender will then be taken to the Juvenile Detention Center where he will be held pending a detention hearing. At the detention hearing a Juvenile Court judge will decide whether to release Offender into the custody of his parent, or order that he remain in detention to await an adjudicatory hearing.[7]

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[6] *See* Addington v. Texas, 441 U.S. 418, 433 (1979); O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[7] Schall v. Martin, 467 U.S. 253, 277 (1984). For a convincing critique of the United States

At the adjudicatory hearing Offender will either "admit" to some or all of the charges, or stand trial. A prosecutor, typically referred to by some euphemistic title such as "court advocate," will present evidence, and if the judge (in almost all jurisdictions there is no jury) finds beyond a reasonable doubt that Offender did what he is alleged to have done, he will adjudicate offender a "juvenile delinquent."[8]

Once Juvenile Offender has been adjudicated a delinquent, the judge will order that a dispositional study be conducted by a probation officer. Pending a dispositional hearing, Offender will be returned to detention (unless he has been released to the custody of a parent). At the dispositional hearing, the judge may place Offender on probation, but in view of the seriousness of the offense and Offender's prior juvenile record, the judge will likely order Offender placed for a fixed period in a state training school or some other residential facility for juveniles.

And so, our three offenders, although viewed by the law, and by us, as significantly different from one another, have ended up being treated essentially the same. Each of them, because he has engaged in anti-social behavior, has been apprehended, subjected to legal proceedings, labelled ("criminal," "mentally ill," "delinquent"), and confined in an institution where he is isolated from family, friends and the rest of society.

The differences in how the law views our three offenders would appear to have less to do with actual ends and means, than with how the law characterizes those ends and means. Thus, the ends of all three systems—criminal, mental health, and juvenile—include proscription of deviant behavior, social protection through supervision and incapacitation, and reform and rehabilitation of deviants. The means by which these ends are sought to be achieved include identification and apprehension of deviants, adjudication, and disposition (sentencing, treatment or placement).

However, it is in our *characterization* of these ends and means where significant differences appear. In the case of Adult Offender, we speak of crime and punishment; of Mentally Ill Offender, illness and treatment; and of Juvenile Offender, delinquency and individualized disposition. Thus, we refer to the incarceration of Adult Offender as "imprisonment"; of Mentally Ill Offender as "hospitalization"; and of Juvenile Offender as "placement."

Supreme Court's decision in *Schall*, see Jean Koh Peters, Schall v. Martin *and the Transformation of Judicial Precedent*, 31 B.C. L. REV. 641 (1990).

[8] *See In re* Winship, 397 U.S. 358, 368 (1970).

Our professed reasons for depriving each offender of his liberty likewise purport to be significantly different. In the case of Adult Offender it is to punish (and, one hopes, reform) a morally blameworthy individual for transgressing established norms of social behavior. Our purposes are retribution, incapacitation and rehabilitation of a criminal offender, as well as deterrence of other potential criminal offenders.

In theory, these are not the reasons why we impose treatment and rehabilitative services on Mentally Ill Offender and Juvenile Offender. The law views these two offenders either as not morally blameworthy at all, as in the case of Mentally Ill Offender, or as significantly less morally blameworthy than Adult Offender, as in the case of Juvenile Offender. It is this absence of, or significantly diminished, moral blameworthiness that distinguishes Mentally Ill Offender and Juvenile Offender from Adult Offender.

But even with respect to these two offenders there are important differences. Mentally Ill Offender is seen as suffering from an illness that requires medical treatment, including hospitalization, medication and psychotherapy. His deviant behavior is understood to be a symptom of his illness. A major purpose of his treatment is to cure or control this symptom.

Juvenile Offender, in contrast, is not seen as suffering from an illness, but rather is viewed as a dependent nonadult who requires and is owed nurturance, discipline, education and love from caring adults in order for him to mature into a responsible, law-abiding, independent adult. His anti-social behavior is understood to be a reflection of his youthful inability to control his aggressive and selfish impulses, to resist temptation, or to defer personal gratification. The justification for imposing services on him and depriving him of his liberty is to help him learn to control his behavior for his own benefit, as well as to provide protection from him for the community.

If the juvenile justice system is in fact not able to perform both of these functions, or even one of them, without further criminalizing its dispositions by incarcerating more youths for longer periods, then the case for maintaining a separate, more lenient juvenile justice system is considerably weakened. An argument that can support the continued existence of the juvenile court as the primary mechanism for addressing youth crime must offer more than poignant stories or a social critique. It must offer, in Geoffrey Hazard's words, "a coherent theory."[9]

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[9] Hazard, *supra* note 4, at 4.

III. Of Parens Patriae and the Police Power: A Court in Search of a Theory

There are two theoretical sources of the state's authority to restrict deviant behavior, the police power and the doctrine of *parens patriae.* In a democracy, the police power is a function of the social contract, representing power ceded to the government by the people to restrict the freedom of individuals for the protection of public welfare, order and security. The adult criminal justice system is the primary example of state action under the police power.

In contrast, the doctrine of *parens patriae* originated in the power of the English sovereign, as exercised through the courts of chancery, to protect his feudal land interests when property was subject to ownership by "enfants" and "ideots."[10] The king would assume paternalistic responsibility for children and the mentally infirm for their own protection and to preserve the property in which they had an interest.[11] Current examples of the state acting as *parens patriae* include civil commitment of individuals with mental illness, appointment of conservators or guardians for adults with mental retardation, removal of parents and appointment of substitute guardians for children, and protective proceedings on behalf of neglected and abused children.

Although repeatedly invoked as the legal rationale for a separate, more lenient, criminal justice system for minors, the protective power of the sovereign as *parens patriae* does not provide a sound historical basis for the state's power to sanction and control criminal behavior by children and adolescents. In English practice, minors who committed crimes were prosecuted, if at all, under the criminal laws. The chancery courts invoked the equitable doctrine of *parens patriae* only in resolving disputes over guardianship and property matters affecting minors and the mentally infirm who were deemed incapable of caring for themselves.[12]

The juvenile court's delinquency jurisdiction does not derive from *parens patriae,* but rather from the police power, as expressed by the criminal law and the Elizabethan Poor Laws (and their American counterparts) relating to the control of paupers and their children.[13]

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[10] *See* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court,* 23 S.C. L. Rev. 205, 207, 208 (1971).

[11] *See, e.g., id.* at 208.

[12] *See id.*

[13] *See* Norval Morris & Gordon Hawkins, The Honest Politician's Guide to Crime Control 157 (1970); Roscoe Pound, Interpretations of Legal History 134–35 (1923); Rendleman, *supra* note 10, at 222–23.

The childsavers who invented the juvenile court believed that they were creating a benevolent institution that would exercise the state's protective role as *parens patriae*.[14] What they did not—perhaps, could not—admit was the underlying authoritarian nature of the enterprise. As one commentator has observed:

> It is important . . . to recognize that when, in an authoritative setting, we attempt to do something *for* a child "because of what he is and needs," we are also doing something *to* him. The semantics of "socialized justice" are a trap for the unwary. Whatever one's motivations, however elevated one's objectives, if the measures taken result in the compulsory loss of the child's liberty, the involuntary separation of a child from his family, or even the supervision of a child's activities by a probation worker, the impact on the affected individuals is essentially a punitive one. Good intentions and a flexible vocabulary do not alter this reality. This is particularly so when, as is often the case, the institution to which the child is committed is, in fact, a peno-custodial establishment. We shall escape much confusion here if we are willing to give candid recognition to the fact that the business of the juvenile court inevitably consists, to a considerable degree, in dispensing punishment.[15]

Why argue about the historical or theoretical basis for the juvenile court's delinquency jurisdiction? Because much of the debate over the performance of the juvenile court grows out of confusion and disagreement about its purpose and function. If we can be clear about the legal theory that drives juvenile court practice—that it is the police power and not *parens patriae*—then we can be honest about the court's role in protecting the community from youth crime and realistic about its therapeutic goals. Although it would be wrong to deny that most children—including those who commit crimes—are more immature, irresponsible and dependent, and therefore less morally blameworthy, than most adults, it is simply not true that we incarcerate a youth who has robbed and beaten an elderly person for the same reason that we place in protective custody a child who has been neglected or abused by his parents.

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[14] *See, e.g.*, THE CHILD, THE CLINIC AND THE COURT (Jane Addams ed., 1925); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

[15] FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 18 (1964).

IV. QUESTION: WHEN ARE CHILDREN NOT CHILDREN? ANSWER: WHEN THEY COMMIT SERIOUS CRIMES

Almost from its inception the juvenile court has considered certain children who have committed very serious crimes to be ineligible for the court's nonpunitive, treatment-oriented dispositions. Thus, in 1903, only four years after its founding, the Chicago juvenile court transferred fourteen children to the adult criminal court.[16] Eventually, every state, the District of Columbia, and the federal government enacted laws authorizing or requiring the prosecution of certain minors in adult criminal courts.[17]

The very existence of the juvenile court was challenged by the eminent legal scholar John Wigmore, who denounced juvenile delinquency legislation under which, in his words, "murder, arson, burglary, robbery, rape, and all the worst offenses are withdrawn from the regular courts of criminal law for [the juvenile] section of the criminal population."[18] In Wigmore's view, the reformers who invented the juvenile court were "virtually on the way to abolish criminal law and undermine social morality."[19]

Ambivalence regarding what to do about juveniles who commit serious crimes, or are repeat offenders, has troubled the juvenile court from the beginning. Juvenile delinquency legislation has attempted to embrace two contradictory premises: (1) that the juvenile court is a place for *all* children who commit crimes; and (2) that the juvenile court is *not* a place for children who commit violent crimes, or are repeat offenders. The first proposition represents the original intent of the turn-of-the-century reformers—Jane Addams and her associates—to rescue the unfortunate children of the immigrant poor from their wretched urban surroundings, as well as from the harshness and legal rigidities of adult criminal courts.[20] However, as Anthony Platt has argued, the childsavers held sentimental views about children who committed crimes, and had naive expectations regarding the efficacy

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[16] TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 55 n.51 (1978) (citing COOK COUNTY [ILLINOIS] CHARITY SERVICE REPORT 253 (1920)).

[17] YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS 97–100, 143 (Donna M. Hamparian ed., 1982). For a critical analysis of the transfer of children to adult courts, see Stephen Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41 (1984).

[18] John H. Wigmore, *Juvenile Court v. Criminal Court*, 21 ILL. L. REV. 375, 375–76 (1926).

[19] *Id.*

[20] *See* ANTHONY M. PLATT, THE CHILD SAVERS 99–100 (1969); ELLEN RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 16–56 (1978).

of nonpunitive, therapeutic approaches for dealing with juvenile offenders.[21] The childsavers probably were not thinking about children who committed violent crimes, and certainly not about those who did so repeatedly. The second proposition, that the juvenile court was not intended for such children, reflects the widely held belief that some criminal offenses committed by juveniles are so serious that the maximum periods of institutionalization authorized by juvenile court legislation are insufficient to protect the community, punish (and reform) the offenders, and vindicate important moral values of the society.

The existing system attempts to implement both of these premises—that the juvenile court both is and is not the appropriate institution for dealing with juvenile offenders—by acting as though certain children who commit crimes are *ipso facto* not children. Such children are "waived" or transferred to the adult criminal court (or the adult court exercises initial, concurrent or exclusive jurisdiction over them).[22]

Maintaining juvenile court jurisdiction over those youths whose offenses are not too serious, and who are deemed to be "amenable to treatment" with the resources available to the juvenile court, while creating a mechanism for expelling or excluding those juveniles for whom the procedural and sentencing alternatives that exist in the adult criminal court are thought to provide the acceptable level of protection for the community, is, in the words of Justice Fortas, "an invitation to procedural arbitrariness."[23] This is because we are not capable of articulating or agreeing upon a precise definition of the juvenile offender who should, in every case, be prosecuted in the adult criminal court, a definition that would ensure that all juveniles who should be in the adult court, and only those juveniles, are in fact sent there.[24]

But there is also an obvious theoretical problem in pretending, in the name of community protection, that some children are adults. A philosophical premise that provides the theoretical underpinning for the juvenile court is that as a matter of equity and justice we ought not treat juveniles who commit criminal offenses as if they were equally responsible for their actions as adults who commit similar offenses. The foundation of the juvenile justice system is that children and adolescents who commit criminal offenses are less morally blameworthy than adults who do so. A corollary of this premise is that juvenile

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[21] PLATT, *supra* note 20, at 67–74.

[22] *See* YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS, *supra* note 17.

[23] Kent v. United States, 383 U.S. 541, 555 (1966).

[24] *See* Wizner, *supra* note 17, at 46.

offenders, even those who commit serious crimes, ought not to be subject to the harsh realities of the adult criminal court, ought to be protected from official contact with adult offenders, and ought to receive services—including institutional confinement—separate from adults.

Is it possible to retain our commitment to this ideal while also providing more appropriate legal responses to serious juvenile crime? To the extent that a judicial system plays any significant role in reducing crime or protecting the community from those who commit crimes, the juvenile court could be empowered in appropriate cases, involving older, serious, repeat offenders, to impose longer and more rigorous terms of rehabilitative confinement than is now legally permissible. Under such a system no juvenile would have to be transferred to an adult criminal court.

The issue remains, however, to what degree we can enhance the capacity of the juvenile court to impose more severe sanctions on juveniles who commit crimes without heading down the road to abolition of the juvenile court as we have known—or imagined—it.[25] It should be possible within the juvenile court to provide reasonable protection for the community from older, serious, repeat juvenile offenders and still to retain dispositional alternatives that promise and deliver individualized treatment and other nonpunitive habilitative services. To accomplish this we will need to be clear about the law enforcement role of the juvenile court and to keep our promise to dedicate resources and provide services to disadvantaged and troubled youth.

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[25] *See* Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1134–35 (1977).