# THE PENAL MODEL OF JUVENILE JUSTICE: IS JUVENILE COURT DELINQUENCY JURISDICTION OBSOLETE?

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## I

An inability to reconcile society's need for protection from juvenile crime with the use of nonpunitive measures has troubled the juvenile justice system since its inception. Society long ago adopted a paternalistic attitude toward juvenile crime, treating such behavior not as a question of law enforcement, but as a social and psychological problem requiring therapeutic interventions and state assumption of parental rights and duties.[1] The juvenile court was conceived as a kind of social welfare agency rather than as an instrument for the enforcement of the criminal laws. With the mantle of benevolence bestowed and in the name of "individualized treatment," the juvenile courts were given broad jurisdiction over both criminal and noncriminal misbehavior and were vested with virtually unlimited discretion to impose limitations and sanctions on a child's conduct.[2] They were to operate a "no fault" process, geared to providing treatment and rehabilitation to children whose overt misbehavior manifested underlying problems.[3] Juvenile court procedures were to be informal and nonadversarial, and the court was to make dispositions based on the best interests of the child.[4]

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[1] *See* A. PLATT, THE CHILD SAVERS 67-74 (1969). *See generally* THE CHILD, THE CLINIC AND THE COURT (J. Addams ed. 1925). A good history of the juvenile court and its working principles may be found in E. Ryerson, Between Justice and Compassion: The Rise and Fall of the Juvenile Court (1970) (unpublished doctoral dissertation in Yale Law Library) (to be published in April 1978 by Hill & Wang as THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT).

[2] *See* Hazard, *The Jurisprudence of Juvenile Deviance*, in PURSUING JUSTICE FOR THE CHILD 4-6 (M. Rosenheim ed. 1976); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

[3] Mack, *supra* note 2, at 109-10.

[4] *Id.* at 109-10, 119-20. These features of the juvenile court were accompanied by euphemistic terminology in which an indictment was a "petition"; a prosecutor a "court advo-

The unique features of this system as an approach to deviant behavior are its lack of significant concern with fault or blame;[5] its jurisdiction over noncriminal behavior such as truancy and a failure to obey one's parents;[6] its informality and lack of procedural technicalities;[7] and its approach to rehabilitation, exemplified by a system of indeterminate sentencing in which type and duration of sanction is based on the needs and "best interests" of the offender rather than the seriousness of the offense.[8]

It is now commonly agreed that the juvenile court has failed to achieve its objectives. It has neither provided adequate protection for society from juvenile crime nor succeeded in rehabilitating young offenders.[9] It has compromised important legal values[10] and intervened excessively into the lives of children and their families.[11] And perhaps its principal failure is the lack of proportionality in the sentencing provisions of the juvenile delinquency statutes. Some criminal offenses committed by persons of juvenile court age are so serious that the maximum sentences authorized by these statutes[12] are insufficient to punish the offender, protect the community, and vindicate

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cate"; a defense lawyer a "law guardian"; a guilty verdict a "finding"; a sentence a "disposition"; a jail a "detention center" or "receiving home"; a prison a "school"; a cell a "room"; and solitary confinement "intensive treatment."

[5] *Id.* at 119-20.

[6] Hazard, *supra* note 2, at 4-6.

[7] Mack, *supra* note 2, at 109-10.

[8] *Id.* at 109-10, 119-20; *see* Hazard, *supra* note 2, at 11-13.

[9] *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967) [hereinafter TASK FORCE REPORT]; F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 51-55 (1964); E. SCHUR, RADICAL NONINTERVENTION 3-5 (1973).

Indeed, the situation is such that:

> [J]uveniles now represent almost half the crime problem in this country. Children between the ages of 10 and 17 compose only 16 percent of the national population, yet they account for more than 48 percent of all arrests for serious crimes. And the problem is even worse than these figures indicate, because a large proportion of adult arrests for serious crimes are those we failed to rehabilitate as young offenders.
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> Our dismal failure to rehabilitate is dramatically clear from the recidivism rate for juvenile delinquents, estimated at 74 percent to 85 percent.

118 CONG. REC. 3046 (1972) (remarks of Sen. Bayh); *cf.* Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22, 25, 48-49 (discussing failure of rehabilitation programs in adult prison systems to reduce recidivism rates).

[10] *See In re* Gault, 387 U.S. 1, 14-21 (1967).

[11] Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1397-1402 (1974) [hereinafter Note, *Ungovernability*].

[12] *See, e.g.*, N.Y. FAM. CT. ACT § 753-a(3) (McKinney Supp. 1977-1978) (five year maximum sentence); PA. STAT. ANN. tit. 11, § 50-323 (Purdon Supp. 1977-1978) (lesser of three years or maximum adult sentence).

moral principles inherent in the criminal law. Conversely, intervention in cases involving minor or noncriminal misbehavior often results in the imposition of sanctions related neither to the gravity of the offense nor to the good of the child.[13] The disproportionality problem is exacerbated by the informality of juvenile court procedures and the judge's unfettered discretion which permit widely varying outcomes on similar facts.

In large measure, these failures can be traced to the unrealistic assumptions that underlay the juvenile justice system, such as the belief that the court could act as a substitute for the parent in performing certain child-rearing functions. There is no meaningful similarity between a state's acting to protect society and enforce morality through prosecution and sentencing of offenders, and parents' acting to nurture and socialize children through love, care, discipline, and education. The coercive nature of court-imposed "therapy" inevitably renders it punitive from the child's viewpoint. However benevolently it is intended, involuntary restriction of an individual's liberty because he has engaged in conduct deemed unacceptable *is* punishment.[14] Similarly, the traditional pretense that the problems of juvenile delinquency can be cured with love and understanding is naive and simplistic. The causes of youth crime are so deeply rooted in the poverty and the social disorganization of urban communities,[15] in the family,[16] and in the individual personality,[17] that even the best-intentioned efforts of kindly judges, friendly probation officers, and humane correctional personnel are unavailing in many cases.

[13] *See* TASK FORCE REPORT, *supra* note 9, at 25.

[14] 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. If this is true, we can no more avoid the problem of unjust punishment in the juvenile court than in the criminal court.

F. ALLEN, *supra* note 9, at 18 (emphasis in original).

[15] C. SHAW, DELINQUENCY AREAS (1929); C. SHAW & H. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS (rev. ed. 1969).

[16] T. HIRSCHI, CAUSES OF DELINQUENCY 83-109 (1969).

[17] E. Ryerson, *supra* note 1, at 128-68.

Recommendations for reform of the juvenile justice system have generally called for procedural reforms,[18] improved treatment and facilities,[19] and experimentation.[20] These solutions, however, do not affect the unbridled discretion of juvenile courts to intervene in the lives of children and their families and to impose coercive sanctions disproportionate to the behavior that triggered its jurisdiction. Recognizing this, other commentators have gone further and proposed restricting juvenile court jurisdiction[21]—an approach adopted in large measure in the volumes of proposed standards produced by the IJA-ABA Joint Commission on Juvenile Justice Standards (Joint Commission).[22]

The standards contained in the three volumes under review here—*Juvenile Delinquency and Sanctions, Dispositions,* and *Dispositional Procedures*—propose four general principles to meet the problems engendered by the current system of juvenile court jurisdiction. First, the standards provide that juvenile court delinquency jurisdiction should be limited to acts which, if committed by an adult, would constitute a crime, thereby abolishing jurisdiction over so-called "status offenses" such as truancy and incorrigibility.[23] Second, the standards create defenses and mitigations related to fault, degree of culpability, and actual harm,[24] thus rejecting the "no fault" basis of the current juvenile justice system in favor of notions common to the "adult" criminal justice system. Third, the standards restrict dispositional discretion by limiting the type and duration of sanctions[25] and by requiring that the severity of the disposition be proportional to the

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[18] *See, e.g.,* F. ALLEN, *supra* note 9, at 16-24, 54-56; Wizner, *The Child and the State: Adversaries in the Juvenile Justice System,* 4 COLUM. HUMAN RIGHTS L. REV. 359, 395-99 (1972) [hereinafter Wizner, *The Child and the State*].

[19] J. POLIER, A VIEW FROM THE BENCH (1964).

[20] Stapleton, *A Social Scientist's View of* Gault *and a Plea for the Experimenting Society,* 1 YALE REV. L. & SOC. ACT., Winter 1970, at 72, 79-80. *But see* Teitelbaum, Gault *and the "Experimenting Society": A Response to Mr. Stapleton,* 1 YALE REV. L. & SOC. ACT., Winter 1970, at 86, 89-90 (the "experimenting society" must sedulously respect the child's right to resist state intervention); Wizner, *Juvenile Justice and the Rehabilitative Ideal: A Response to Mr. Stapleton,* 1 YALE REV. L. & SOC. ACT., Winter 1970, at 82, 84-85 (experimentation with juvenile justice system must safeguard child's due process rights).

[21] *See, e.g.,* P. MURPHY, OUR KINDLY PARENT—THE STATE 174 (1974); McCarthy, *Should Juvenile Delinquency Be Abolished?,* 23 CRIME & DELINQUENCY 196, 203 (1977).

[22] INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT (Tent. Draft 1977) [hereinafter STANDARDS].

[23] *Id., Juvenile Delinquency and Sanctions* 2.2-.3; *id., Noncriminal Misbehavior* 1.1.

[24] *See id., Juvenile Delinquency and Sanctions* 3.1-.5.

[25] *Id.* 6.1-.4.

seriousness of the offense and the offender's prior record.[26] Finally, the standards extend procedural safeguards to the dispositional stage of the delinquency proceedings.[27]

In theory, these standards confront quite successfully the more egregious failings of the current juvenile justice scheme. The limits on both the jurisdiction and the dispositional powers of the juvenile court reduce the potential for overreaching by the state. Juvenile delinquency jurisdiction can be invoked only when the juvenile is charged with specific criminal conduct—that is, conduct causing serious harm to someone other than the juvenile himself or a member of his family[28]—and he intended, knew, or should have known the consequences of his action.[29] The standards that require the judge to impose the least restrictive available disposition[30] and to supply reasons on the record for that disposition[31] mitigate the danger of excessive sanctions—a peril further avoided by the limitation on custodial dispositions to two years (or three for multiple offenders).[32]

In addition, the incorporation into the dispositional proceedings of adversarial procedures required at the adjudicatory stages buttresses procedural fairness.[33] The Joint Commission apparently recognized that dispositional proceedings are often more significant in terms of "grievous loss" than the original adjudication of delinquency.[34] The dispositional inequities so common in the present system, moreover, are met with a grid system of maximum sentences proportional to the seriousness of the offense,[35] thus restricting the enormous discretion currently evidenced by indeterminate sentences putatively based on the "needs" of the juvenile.

One area the Joint Commission does not successfully address is the rehabilitation of juvenile offenders. This failure is perhaps to be expected, for the rehabilitative ideal itself has recently come under

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[26] *Id.* 6.2.

[27] *See id., Dispositional Procedures.*

[28] *Id., Juvenile Delinquency and Sanctions* 1.3, 2.2-.3.

[29] *Id.* 3.1-.2. In addition, other volumes of the *Standards* authorize "adjustment" of cases—dismissal or nonjudicial disposition—at the intake stage in situations in which juveniles are deemed not to be proper subjects for juvenile court jurisdiction. *See id., Prosecution* 4.1, 3; *id., The Juvenile Probation Function* 2.1-.16.

[30] *Id., Dispositions* 2.1.

[31] *Id., Dispositional Procedures* 7.1(A)(2).

[32] *Id., Juvenile Delinquency and Sanctions* 6.2(A)(1), .3(B)(2).

[33] *See id., Dispositional Procedures* 2.1-7.1.

[34] *Id.*, Introduction at 2, 9-13.

[35] *Id., Juvenile Delinquency and Sanctions* 6.2(A).

attack on both theoretical and pragmatic grounds.[36] Thus it is not surprising that the standards in this area reflect often contradictory and sometimes troublesome principles. For example, in proposing a delinquency jurisdiction based on penal rather than parental considerations—that is, one applicable to the legally guilty, not the merely troubled, youth—the standards reject the concept of therapeutic intervention as the cornerstone for delinquency jurisdiction.[37] One might logically anticipate a concomitant rejection of any "right" existing in the juvenile to rehabilitative services, a right which some courts have argued is a necessary implication of a therapeutically based system.[38] The Joint Commission, however, proposes to retain and indeed enlarge the notion of a juvenile's right to services,[39] suggesting that, although a juvenile should not be forced to accept services,[40] a failure to provide them should justify a reduction in the severity of the disposition or an outright discharge.[41] The fit is an awkward one.[42]

Also puzzling is the standards' almost total failure to acknowledge directly the social interest in protecting society from crime. Perhaps society is thought best protected by achieving a *fairer* system of juvenile justice, one that respects the liberty and privacy interests of young people. Or perhaps the goal has been abandoned altogether because it conflicts with the Joint Commission's overriding concern with limiting state intervention. But surely society has a legitimate interest in identifying and restraining those who demonstrate persistent criminal behavior and thus one might legitimately question

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[36] *See, e.g.*, E. VAN DEN HAAG, PUNISHING CRIMINALS 188-91 (1975); Martinson, *supra* note 9, at 25-38; Abram, *Social Risk Sentencing*, N.Y.L.J., Oct. 25, 1977, at 1, col. 2.

[37] STANDARDS, *supra* note 22, *Noncriminal Misbehavior* 1.1 & Introduction at 2.

[38] *E.g.*, Nelson v. Heyne, 491 F.2d 352, 358-60 (7th Cir. 1974); Martarella v. Kelley, 349 F. Supp. 575, 585, 598-600 (S.D.N.Y. 1972); *cf.* Rouse v. Cameron, 373 F.2d 451, 452-56 (D.C. Cir. 1966) (right to treatment for involuntarily committed mental patients).

[39] STANDARDS, *supra* note 22, *Dispositions* 4.1.

[40] *Id.* 4.2.

[41] *Id.* 4.1(D).

[42] *See* Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755, 762 (1969) (arguing that the "right to treatment" implies a duty to accept treatment, and thus could result in greater state intervention); *cf.* O'Connor v. Donaldson, 422 U.S. 563, 578-79 (1975) (Burger, C.J., concurring) (patient's refusal to accept psychiatric treatment should be considered in assessing defendant hospital's good faith defense against charge that hospital unconstitutionally confined civilly committed defendant). It could be argued that the standards indirectly impose some obligation to accept treatment, since acceptance of treatment may be made a condition of probation. STANDARDS, *supra* note 22, *Dispositions* 3.2(D). If treatment is made a condition of probation, failure to comply may justify imposition of a more severe sanction. *Id.* 5.4.

whether the maximum sentence lengths allowed under the standards are sufficient. While the standards seek to limit the acts triggering delinquency jurisdiction to "adult" offenses, they do not permit "adult" sanctions: an adult committing murder risks life in prison; a juvenile committing the same act faces two years.[43] Even the most assiduous skeptics of deterrence rationales might find that contrast questionable.

In the final analysis, however, one central thesis can be gleaned from the principles reflected in the standards, namely, that state intervention into the lives of children and their families should be minimized. The standards repudiate the idea that the state, in the form of the juvenile court and under the guise of omniscient benefactor, is best able to effect social goals relating to child development. By drastically curtailing the juvenile court's discretion and imposing procedural safeguards, the standards create a strong presumption against juvenile court jurisdiction and in favor of family supervision and treatment of minors. But the more important question is, of course, whether the standards in operation would make any practical difference in the outcome of juvenile delinquency cases.

## II

Tested against the principle of limiting state intervention, the practical consequences of the standards may not, in our view, fulfill their theoretical promise. This conclusion is largely owing to the strong incentives contained in the standards for juveniles to plea bargain, incentives absent in the traditional juvenile justice system and ones likely to increase court intervention in the lives of juveniles.

In the traditional system, a juvenile proceeding results in either an adjudication of delinquency or a dismissal.[44] When the former

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[43] *See* STANDARDS, *supra* note 22, *Juvenile Delinquency and Sanctions* 6.2(A)(1). A multiple offender can receive a three-year sentence. *Id.* 6.3(B)(2). The standards authorize transfer of a limited group of serious cases to the adult criminal court. *Id., Prosecution* 4.3(A)(3). A motion to transfer a case to the criminal court may be filed only if the youth was at least 16 years of age at the time of the offense, and there is clear and convincing evidence (a) that the crime committed was a "class one juvenile offense" (punishable for an adult by at least 20 years in prison); (b) that the juvenile has a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury; (c) that previous dispositions have demonstrated the likely inefficacy of the dispositional alternatives available to the juvenile court; and (d) that services and dispositional alternatives available in the criminal justice system are "more appropriate for dealing with the juvenile's problems and are, in fact, available." *Id.*

[44] *See, e.g.*, CONN. GEN. STAT. ANN. § 17-68(a) (West Supp. 1977); N.Y. FAM. CT. ACT §§ 751, 752 (McKinney 1975 & Supp. 1977-1978).

occurs, the "sentence" imposed is governed by the needs of the juvenile rather than the number or seriousness of the charges brought against him or the frequency with which he has appeared before the court in the past.[45] Because there are no separate classes of offenses, the juvenile cannot reduce his sentence exposure by pleading guilty to a lesser offense. Indeed, even in jurisdictions with separate provisions for status offenders, the prosecutorial procedures and kinds of sanctions that might be imposed on a "person in need of supervision" are quite similar to those applied to juvenile delinquents,[46] and consequently, the juvenile has no incentive to plead guilty to the status offense in the hope of reducing his sentence risk on any more serious charges.

By contrast, if the standards for proportional sentencing are adopted, a juvenile will be able to reduce his sentence risk by offering to plead guilty to a lesser offense. The standards create five classes of offenses, each class defined by the type and duration of the maximum sanction imposed for the same conduct in the criminal law.[47] Thus, for example, a "class one" juvenile offense is any violation which, if committed by an adult, could result in the death sentence or imprisonment from more than twenty years to life.[48] Consider, then, the juvenile charged with a class two offense,[49] which imposes a maximum one-year confinement upon conviction,[50] and a class five offense,[51] which could result in only six months probation without risk of confinement.[52] Given the potential for a material reduction in the maximum sentence exposure, the temptation to bargain is apparent.[53]

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[45] D. BESHAROV, JUVENILE JUSTICE ADVOCACY 373 (1973); *see* CONN. GEN. STAT. ANN. § 17-68 (West Supp. 1977); N.Y. FAM. CT. ACT § 753 (McKinney Supp. 1977-1978).

[46] *See* Note, *Ungovernability*, *supra* note 11, at 1389-91. Some states include status offenses in the definition of juvenile delinquency, *e.g.*, CONN. GEN. STAT. ANN. § 17-53 (West Supp. 1977), while others designate status offenders as "persons in need of supervision," *e.g.*, N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1977-1978), or "minors in need of supervision," *e.g.*, Juvenile Ct. Act § 2-3, ILL. REV. STAT. ch. 37, § 702-3 (1973).

[47] STANDARDS, *supra* note 22, *Juvenile Delinquency and Sanctions* 5.2.

[48] *Id.* 5.2(B)(1).

[49] *Id.* 5.2(B)(2).

[50] *Id.* 6.2(A)(2)(a).

[51] *Id.* 5.2(B)(5).

[52] *Id.* 6.2(A)(5).

[53] The standards, although authorizing plea bargaining, *id.*, *Prosecution* 5.1(A), prohibit the prosecutor from agreeing on the disposition he will recommend to the court, *id.* The prosecutor, however, may still bargain concerning the petitions that will be filed. *Id.* 5.4, commentary at 68.

Despite its surface appeal, the creation of a plea-bargain environment would probably result in substantially greater judicial intervention into the lives of children and their families. First, crowded dockets and reluctant witnesses often result in dismissals for failure of the state to proceed to trial. A juvenile who pleads guilty, therefore, forfeits the opportunity for such a dismissal. Second, and on a far more important level, bargained pleas under the standards, even when followed by lenient dispositions, nonetheless represent adjudications of delinquency[54] with their attendant stigma and collateral consequences.[55]

The likelihood of increased adjudications of delinquency under the standards can best be seen by applying their provisions to some representative cases. In recent years, the writers have represented a large number of juveniles in delinquency proceedings in New Haven. We have selected four typical cases in the hope that, by comparing the actual outcomes under the present system with the predicted outcomes under the standards, the practical impact of the Joint Commission's proposals can be assessed.

### *Case One: Bobby D.*

At age 14, Bobby D. was charged with criminal trespass. He had no prior record. While walking across the Yale campus with several friends, he was arrested by New Haven police officers responding to a report of an attempted burglary involving several black youths. The case was dismissed when the campus police declined to testify against him on the trespass charge.

Under the proposed standards, the case would be dismissed even if the campus police pursued the charge. The standards only invoke delinquency jurisdiction for acts that would constitute a crime if committed by an adult. Under the applicable adult criminal trespass statute[56] culpability can arise only if "No Trespassing" signs are posted. Because Yale does not post such signs, Bobby's case would be dismissed regardless of the complainants' willingness to testify.

Several months after the trespassing incident, Bobby was charged with attempted robbery, assault, and carrying a dangerous

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[54] *Id., Adjudication* 5.1.

[55] The drafters of the standards acknowledge the disabilities imposed by an adjudication of delinquency. *Id., Noncriminal Misbehavior,* Introduction at 12-13; *cf.* Note, *Ungovernability, supra* note 11, at 1401 n.116 (discussing stigma of being labeled a status offender).

[56] CONN. GEN. STAT. ANN. § 53a-109 (West 1972).

weapon. The police report stated that several youths, Bobby among them, had demanded money from another youth and that Bobby had hit the victim with a black jack. The case was dismissed because the victim failed to appear in court on the day of the trial.

Although under both the current and the proposed juvenile justice systems the victim's failure to appear at trial would lead to dismissal of the charge, in practice the result under the Joint Commission's scheme would likely be fundamentally different as a consequence of pretrial events. The most serious charge against Bobby was the attempted robbery count, which carries a maximum adult sentence of twenty years. In the proposed juvenile sanctions grid, the crime would thus fall into "class two," with a maximum juvenile sentence of twelve months.[57] Because the traditional juvenile justice system, at the adjudicatory and dispositional stages, does not consider the seriousness or the number of charges involved, Bobby would have nothing to gain by pleading guilty. Under the standards, the number and seriousness of the charges are the chief determinants of disposition.[58] Facing a serious charge and the possibility of a year's confinement, Bobby would have to consider certain factors before trial: with actual harm charged, there would be no chance of the discretionary dismissal permitted in the standards for de minimis infractions;[59] since Bobby claimed to have an alibi, the standards providing for affirmative defenses like consent[60] or lack of mens rea[61] would be inapplicable. In all likelihood, he would opt to plead guilty to a lesser charge—perhaps breach of the peace, with a maximum sanction of six months of conditional freedom.[62] Instead of the dismissal under the current system, there would be an adjudication of delinquency with the attendant state intervention.

In a third encounter with the law, Bobby was charged with robbery. According to the police account, two youths were seen grabbing a nonagenarian woman, taking her purse, and throwing her to the ground. Bobby was arrested with the woman's change purse and keys in his possession. The case was dismissed because the victim was too weak to testify.

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[57] STANDARDS, *supra* note 22, *Juvenile Delinquency and Sanctions* 6.2(A)(2)(a).
[58] *Id.* 6.2-.3.
[59] *Id.* 1.3(B)(1).
[60] *Id.* 3.3.
[61] *Id.* 3.1.
[62] *See id.* 6.2(A)(5)(b).

In this instance too, the standards would encourage an early plea bargain and thus the application of some sanction in a case in which the traditional system would produce a dismissal. Of course, the outcome under the standards might be perceived by most people as socially preferable—the evidence against Bobby was, after all, very strong, and the dismissal of the case seems uncomfortably fortuitous. But such feelings obscure the underlying issue. If the actual outcome is unpalatable, it should be changed by a straightforward modification of substantive rules, not by means of increased and undue pressure on the juvenile to plea bargain.

Bobby's final contact with the juvenile court system was an arrest for disorderly conduct—shouting obscenities at a passing police car. The case was dismissed after an apology to the police officer. The same result would likely obtain under the standards through invocation of the de minimis discretionary dismissal section.[63]

In sum, then, were Bobby's cases to arise under the standards, the results would be identical in two instances and more severe in two others. Importantly, however, the latter two results would be more severe not because of a direct application of substantive law, but only because of the pressure to plea bargain before trial.

*Case Two: Lynn B.*

At age 15 and with no prior record, Lynn B. was charged with criminal mischief and attempted burglary. A police officer observed Lynn standing in front of a store at night with a can opener in her hand. Upon investigation, the officer found graffiti on the door and scratches around the door knob. The case was dismissed with Lynn's promise to repaint the door.

Under the standards, the maximum sanction for criminal mischief and attempted burglary would be six months in custody,[64] a class three offense. The most probable disposition would be a plea to the lesser offense, criminal mischief (Lynn admitted responsibility for the graffiti), and a sentence suspended on condition of repainting the door. The standards thus would reach the same result as the traditional system, but with one very important distinction—an adjudication of delinquency.

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[63] *Id.* 1.3(B)(1).
[64] *Id.* 6.2(A)(3).

### *Case Three: Sean B.*

Sean B. had previously been adjudicated delinquent on charges of truancy and running away from home. The juvenile court had committed him to a nonsecure residential facility. He then ran away from the institution and returned home, for which he was charged with escape. The disposition of the case resulted in the revocation of his previous commitment, a new adjudication of delinquency based on the escape, and unsupervised probation.

Under the standards, the escape charge, a class two offense, would carry a maximum sanction of twelve months in custody.[65] The confinement from which Sean escaped, however, had been based on two status offenses, which under the standards would not confer jurisdiction on the juvenile court in the first place[66] and thus Sean's case would be dismissed without even the initial adjudication of delinquency.

### *Case Four: Danny S.*

By the time Danny S.'s case came to trial, he had accumulated nine separate charges against him: two counts of burglary, three counts of criminal mischief, and one count each of disorderly conduct, truancy, possession of marijuana, and being beyond the control of his parent. Most of the misbehavior had occurred at Danny's grandfather's house, where Danny had lived until a year before his trial. Although most of the charges were dismissed, Danny was adjudicated a delinquent based on a finding that he was beyond the control of his mother and he was committed for one year to a nonsecure residential drug treatment facility.

Almost all of the charges against Danny involved difficulties with his family and thus would be dismissed outright were the standards in effect: the standards provide for discretionary dismissal of delinquency proceedings when the persons whose interests are threatened or harmed by the alleged misbehavior are members of the juvenile's family.[67] The standards also remove juvenile court jurisdiction over the marijuana charges and any other "victimless" crimes[68] as well as

[65] *Id.* 6.2(A)(2).

[66] *Id.* 2.3.

[67] *Id.* 1.3(A). Dismissal should only occur, however, if the court believes that the juvenile's conduct can be better dealt with by parental rather than penal authority. *Id.* & commentary at 13.

[68] *Id.* 2.4(A).

those noncriminal acts such as truancy believed more appropriately handled by school officials and parents.[69] Accordingly, under the standards, the probability is that no adjudication of delinquency would occur.

If, as we believe, these four cases represent a fairly typical cross-section of juvenile offenders, the application of the standards to them suggests somewhat disturbing possibilities. In two of the cases, the standards would yield less intrusive results, but in the other two cases the standards would have the effect of increasing state intervention by encouraging pretrial plea bargains. Not only does that effect contradict the articulated goal of the Joint Commission, but it also creates an incentive for prosecutors to overcharge juveniles in the hope of securing a "better" bargain, a not uncommon and often criticized practice in the adult criminal justice system.[70] Indeed, overcharging could also be used to circumvent the limits placed on delinquency jurisdiction through the simple device of characterizing otherwise noncriminal conduct as criminal mischief, thereby undermining every premise on which the standards rest. These possibilities intimate that the Joint Commission may have felt itself too tied to the framework of the past, despite its admirable recognition of the basic deficiencies of that framework.

## III

The juvenile justice standards contained in the three volumes that we have considered advocate gradualist reforms—procedural safeguards, a right to treatment, and limits on both jurisdiction and the exercise of discretion. The principles guiding these standards, we suggest, point the way to more radical change, namely, the abolition of juvenile court delinquency jurisdiction.

The Joint Commission's rejection of the conventional "no fault" approach and corresponding adoption of mens rea requirements, degrees of offenses, proportional and determinate sentencing, and quasi-criminal affirmative defenses, when coupled with the elimination of jurisdiction over noncriminal behavior and victimless crimes, bespeak the abandonment of paternalism and the acceptance of a criminal law model of juvenile justice. These reforms eliminate the unique features of the juvenile court's approach to deviant behavior

[69] *Id.* 2.3; *id., Noncriminal Misbehavior* 1.1.

[70] *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 97-99 (1968).

and transform the system into one that focuses, as well it should, on questions of crime and punishment, guilt and innocence.

One must admire the courage of the drafters of these standards, for they have relinquished long-accepted therapeutic pretensions and euphemistic terminology in favor of acknowledging the concerns of law enforcement and individual rights in a fresh and forthright manner. Even though the drafters eschewed the final step—abolition of delinquency jurisdiction—the impetus provided by their proposals is apparent and welcome. But if the goal—and limit—of juvenile delinquency proceedings is to be prosecution and sentencing of criminal offenders, if sentencing is to be proportional to the seriousness of the criminal offense and prior record of the offender, and if participation in rehabilitative programs by incarcerated offenders is to be voluntary, then how do juvenile delinquency proceedings differ from criminal proceedings?

The only real differences between these standards and the adult criminal codes are that the former provide for shorter sentences[71] and introduce certain special defenses.[72] That an adult court is capable of dispensing lenient sentences when appropriate, however, is self-evident. And the principles represented by the standards' special defenses are already taken into consideration by adult criminal courts in those instances in which they have dealt with youthful offenders. Criminal court prosecutors and judges, for example, regularly grant youthful offender treatment[73] or "diversion" programs[74] to minors without previous criminal involvement. When no real harm has been done, or mitigating circumstances appear, prosecutors typically "nolle" charges and judges dismiss the cases. Although the regulation of this discretion directly by statutes similar to the standards may be desirable, such regulations could just as easily occur in the context of an adult criminal court.

Perhaps a separate juvenile justice system was justifiable when its rules of adjudication and liability were different from those of its adult counterpart, but if we are to accept the Joint Commission's move to a penal model of juvenile justice, this justification evapo-

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[71] *See* text accompanying note 43 *infra*.

[72] These include the defenses of immaturity, STANDARDS, *supra* note 22, *Juvenile Delinquency and Sanctions* 3.2; parental authority, *id.* 3.4(B); family victim, *id.* 1.3(A); and absence of actual harm, *id.* 1.3(B)(1).

[73] For the statutory basis of such actions in Connecticut, see CONN. GEN. STAT. ANN. §§ 54-76b to -76p (West Supp. 1977).

[74] For a statutory example, see *id.* § 54-76p.

rates. Indeed, that procedural safeguards are still in their infancy in juvenile courts suggests that the youthful offender may affirmatively benefit from having his case heard in an adult court where such safeguards are taken for granted. The role strain created for lawyers by the "benevolent" juvenile court, moreover, would not exist and defense counsel would experience no difficulty in assuming their traditional and proper adversary role.[75]

Although it would be unrealistic and unfair to deny that most children—including juvenile delinquents—are more immature, dependent, and irresponsible than most adults, it beggars belief to pretend that we incarcerate a youth who has robbed and beaten an elderly person for the same reason that we place in protective care a child who has been abused by his parents. Whatever rationale is thought to underlie the criminal justice system—deterrence, segregation, retribution, or even rehabilitation—can bear little relationship to the substitute child-rearing model of nondelinquency juvenile court activity. The functions of the jailer and the social worker have little in common and any attempt to combine the two inevitably decreases the effectiveness of each.

Accordingly, while we appreciate the force of Judge Polier's dissent to these standards, in which she characterizes them as an unfortunate retreat from service-oriented and individualized treatment,[76] we believe that rather than going too far, the standards do not go far enough. In our judgment, juvenile court delinquency jurisdiction should be abolished and the jurisdiction of the juvenile court reserved for the protection of abused, neglected, and emotionally disturbed children.[77] The need for a separate delinquency jurisdiction ends where the penal model of juvenile justice begins: surely an adult court is just as competent to weigh factors like diminished responsibility and lack of mens rea as a juvenile court. Thus, while the stan-

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[75] *See* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 35, 39; Wizner, *The Child and the State*, *supra* note 18, at 396-99.

[76] STANDARDS, *supra* note 22, *Juvenile Delinquency and Sanctions*, Dissenting Views at 50-51 (statement of Commissioner Justine Wise Polier).

[77] Even this aspect of juvenile court jurisdiction is not without controversy. It has been argued that broadly worded statutes allow an unfortunate amount of coercive intervention into family lives under the rubric of the "best interests of the child" standard. *See, e.g.*, *id.*, *Abuse and Neglect*, Introduction at 1-3; Lowry, *The Judge v. the Social Worker: Can Arbitrary Decisionmaking Be Tempered by the Courts?*, 52 N.Y.U.L. REV. 1033 (1977); Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 LAW & CONTEMP. PROB. 226, 262-72 (1976).

dards are an excellent attempt at reform of a system that desperately needs reform, they fail to carry through their underlying premises. The drafters may not believe so, but their work is the first step on a path that appears to lead ineluctably to the abolition of juvenile court jurisdiction over criminal acts.

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