

Institute of Judicial Administration

American Bar Association

Juvenile Justice Standards



STANDARDS RELATING TO

Dispositions

Recommended by the
IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS

Hon. Irving R. Kaufman, *Chairman*

Approved by the
HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, 1979

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This book is printed on recycled paper.

Preface

The standards and commentary in this volume are part of a series designed to cover the spectrum of problems pertaining to the laws affecting children. They examine the juvenile justice system and its relationship to the rights and responsibilities of juveniles. The series was prepared under the supervision of a Joint Commission on Juvenile Justice Standards appointed by the Institute of Judicial Administration and the American Bar Association. Seventeen volumes in the series were approved by the House of Delegates of the American Bar Association on February 12, 1979.

The standards are intended to serve as guidelines for action by legislators, judges, administrators, public and private agencies, local civic groups, and others responsible for or concerned with the treatment of youths at local, state, and federal levels. The twenty-three volumes issued by the joint commission cover the entire field of juvenile justice administration, including the jurisdiction and organization of trial and appellate courts hearing matters concerning juveniles; the transfer of jurisdiction to adult criminal courts; and the functions performed by law enforcement officers and court intake, probation, and corrections personnel. Standards for attorneys representing the state, for juveniles and their families, and for the procedures to be followed at the preadjudication, adjudication, disposition, and postdisposition stages are included. One volume in this series sets forth standards for the statutory classification of delinquent acts and the rules governing the sanctions to be imposed. Other volumes deal with problems affecting nondelinquent youth, including recommendations concerning the permissible range of intervention by the state in cases of abuse or neglect, status offenses (such as truancy and running away), and contractual, medical, educational, and employment rights of minors.

The history of the Juvenile Justice Standards Project illustrates the breadth and scope of its task. In 1971, the Institute of Judicial Administration, a private, nonprofit research and educational organi-

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zation located at New York University School of Law, began planning the Juvenile Justice Standards Project. At that time, the Project on Standards for Criminal Justice of the ABA, initiated by IJA seven years earlier, was completing the last of twelve volumes of recommendations for the adult criminal justice system. However, those standards were not designed to address the issues confronted by the separate courts handling juvenile matters. The Juvenile Justice Standards Project was created to consider those issues.

A planning committee chaired by then Judge and now Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit met in October 1971. That winter, reporters who would be responsible for drafting the volumes met with six planning subcommittees to identify and analyze the important issues in the juvenile justice field. Based on material developed by them, the planning committee charted the areas to be covered.

In February 1973, the ABA became a co-sponsor of the project. IJA continued to serve as the secretariat of the project. The IJA-ABA Joint Commission on Juvenile Justice Standards was then created to serve as the project's governing body. The joint commission, chaired by Chief Judge Kaufman, consists of twenty-nine members, approximately half of whom are lawyers and judges, the balance representing nonlegal disciplines such as psychology and sociology. The chairpersons of the four drafting committees also serve on the joint commission. The perspective of minority groups was introduced by a Minority Group Advisory Committee established in 1973, members of which subsequently joined the commission and the drafting committees. David Gilman has been the director of the project since July 1976.

The task of writing standards and accompanying commentary was undertaken by more than thirty scholars, each of whom was assigned a topic within the jurisdiction of one of the four advisory drafting committees: Committee I, Intervention in the Lives of Children; Committee II, Court Roles and Procedures; Committee III, Treatment and Correction; and Committee IV, Administration. The committees were composed of more than 100 members chosen for their background and experience not only in legal issues affecting youth, but also in related fields such as psychiatry, psychology, sociology, social work, education, corrections, and police work. The standards and commentary produced by the reporters and drafting committees were presented to the IJA-ABA Joint Commission on Juvenile Justice Standards for consideration. The deliberations of the joint commission led to revisions in the standards and commentary presented to them, culminating in the published tentative drafts.

The published tentative drafts were distributed widely to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The ABA assigned the task of reviewing individual volumes to ABA sections whose members are expert in the specific areas covered by those volumes. Especially helpful during this review period were the comments, observations, and guidance provided by Professor Livingston Hall, Chairperson, Committee on Juvenile Justice of the Section of Criminal Justice, and Marjorie M. Childs, Chairperson of the Juvenile Justice Standards Review Committee of the Section of Family Law of the ABA. The recommendations submitted to the project by the professional groups, attorneys, judges, and ABA sections were presented to an executive committee of the joint commission, to whom the responsibility of responding had been delegated by the full commission. The executive committee consisted of the following members of the joint commission:

Chief Judge Irving R. Kaufman, *Chairman*
Hon. William S. Fort, *Vice Chairman*
Prof. Charles Z. Smith, *Vice Chairman*
Dr. Eli Bower
Allen Breed
William T. Gossett, Esq.
Robert W. Meserve, Esq.
Milton G. Rector
Daniel L. Skoler, Esq.
Hon. William S. White
Hon. Patricia M. Wald, *Special Consultant*

The executive committee met in 1977 and 1978 to discuss the proposed changes in the published standards and commentary. Minutes issued after the meetings reflecting the decisions by the executive committee were circulated to the members of the joint commission and the ABA House of Delegates, as well as to those who had transmitted comments to the project.

On February 12, 1979, the ABA House of Delegates approved seventeen of the twenty-three published volumes. It was understood that the approved volumes would be revised to conform to the changes described in the minutes of the 1977 and 1978 executive committee meetings. The *Schools and Education* volume was not presented to the House and the five remaining volumes—*Abuse and Neglect*, *Court Organization and Administration*, *Juvenile Delinquency and Sanctions*, *Juvenile Probation Function*, and *Noncriminal*

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Misbehavior—were held over for final consideration at the 1980 mid-winter meeting of the House.

Among the agreed-upon changes in the standards was the decision to bracket all numbers limiting time periods and sizes of facilities in order to distinguish precatory from mandatory standards and thereby allow for variations imposed by differences among jurisdictions. In some cases, numerical limitations concerning a juvenile's age also are bracketed.

The tentative drafts of the seventeen volumes approved by the ABA House of Delegates in February 1979, revised as agreed, are now ready for consideration and implementation by the components of the juvenile justice system in the various states and localities.

Much time has elapsed from the start of the project to the present date and significant changes have taken place both in the law and the social climate affecting juvenile justice in this country. Some of the changes are directly traceable to these standards and the intense national interest surrounding their promulgation. Other major changes are the indirect result of the standards; still others derive from independent local influences, such as increases in reported crime rates.

The volumes could not be revised to reflect legal and social developments subsequent to the drafting and release of the tentative drafts in 1975 and 1976 without distorting the context in which they were written and adopted. Therefore, changes in the standards or commentary dictated by the decisions of the executive committee subsequent to the publication of the tentative drafts are indicated in a special notation at the front of each volume.

In addition, the series will be brought up to date in the revised version of the summary volume, *Standards for Juvenile Justice: A Summary and Analysis*, which will describe current history, major trends, and the observable impact of the proposed standards on the juvenile justice system from their earliest dissemination. Far from being outdated, the published standards have become guideposts to the future of juvenile law.

The planning phase of the project was supported by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The National Institute also supported the drafting phase of the project, with additional support from grants from the American Bar Endowment, and the Andrew Mellon, Vincent Astor, and Herman Goldman foundations. Both the National Institute and the American Bar Endowment funded the final revision phase of the project.

An account of the history and accomplishments of the project

would not be complete without acknowledging the work of some of the people who, although no longer with the project, contributed immeasurably to its achievements. Orison Marden, a former president of the ABA, was co-chairman of the commission from 1974 until his death in August 1975. Paul Nejelski was director of the project during its planning phase from 1971 to 1973. Lawrence Schultz, who was research director from the inception of the project, was director from 1973 until 1974. From 1974 to 1975, Delmar Karlen served as vice-chairman of the commission and as chairman of its executive committee, and Wayne Mucci was director of the project. Barbara Flicker was director of the project from 1975 to 1976. Justice Tom C. Clark was chairman for ABA liaison from 1975 to 1977.

Legal editors included Jo Rena Adams, Paula Ryan, and Ken Taymor. Other valued staff members were Fred Cohen, Pat Pickrell, Peter Garlock, and Oscar Garcia-Rivera. Mary Anne O'Dea and Susan J. Sandler also served as editors. Amy Berlin and Kathy Kolar were research associates. Jennifer K. Schweickart and Ramelle Cochrane Pulitzer were editorial assistants.

It should be noted that the positions adopted by the joint commission and stated in these volumes do not represent the official policies or views of the organizations with which the members of the joint commission and the drafting committees are associated.

This volume is part of the series of standards and commentary prepared under the supervision of Drafting Committee III, which also includes the following volumes:

INTERIM STATUS: THE RELEASE, CONTROL, AND DETENTION OF ACCUSED JUVENILE OFFENDERS BETWEEN ARREST AND DISPOSITION
DISPOSITIONAL PROCEDURES
ARCHITECTURE OF FACILITIES
CORRECTIONS ADMINISTRATION

*Addendum
of
Revisions in the 1977 Tentative Draft*

As discussed in the Preface, the published tentative drafts were distributed to the appropriate ABA sections and other interested individuals and organizations. Comments and suggestions concerning the volumes were solicited by the executive committee of the IJA-ABA Joint Commission. The executive committee then reviewed the standards and commentary within the context of the recommendations received and adopted certain modifications. The specific changes affecting this volume are set forth below. Corrections in form, spelling, or punctuation are not included in this enumeration.

1. Standard 2.2 was amended by changing "should be governed by" to "include consideration of."

2. Standard 5.3 was amended by adding brackets around "5".

3. Commentary to Standard 1.2 D. was revised by adding a comment that juveniles should be fully informed of their right to be provided with or to refuse services.

4. Commentary to Standard 1.2 G. was revised by adding a statement that state legislatures should exert efforts to ensure availability of necessary resources.

5. Commentary to Standard 2.1 was revised by adding a statement that the dispositional criteria recited in the standard inherently take into consideration the need for public safety in selecting the least restrictive disposition appropriate in the case.

6. Commentary to Standard 3.2 B. 1. was revised by adding discussion distinguishing a separate civil action brought by the victim for damages inflicted by the juvenile from enforcement of a restitution order by juvenile court.

7. Commentary to Standard 4.2 was revised by adding a statement on the need for juveniles to be fully informed of their rights and obligations in connection with their participation or refusal to participate in programs.

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Dispositions

Introduction

The standards contained in this volume concern the dispositions to be imposed by courts on juveniles who have been adjudicated delinquent. A discussion of the offenses for which juveniles may be sanctioned, together with a set of recommended maximum statutory dispositions for each category of offense, is contained in the *Juvenile Delinquency and Sanctions* volume. The present volume deals with the choice of disposition within the maxima, as well as with the characteristics of each type of disposition and the situations in which dispositions, once imposed, may be modified.

An effort to create a jurisprudence of juvenile sentencing is basic to the discussion of the imposition of coercive dispositions on juveniles found to have violated the law. Although a few scholars and standard-setting commissions recently have set forth principles to guide the sentencing and correction of adults, this effort has not extended to juveniles. Indeed, the development of legislative, judicial, or academic guidance for the imposition of dispositions on juveniles has progressed little beyond the traditional formulation of the "best interests of the child."

Unfortunately, empirical research assessing the results of various dispositional alternatives and practices in the juvenile field is scant; consequently, results from the adult field have been presented in the commentaries where they appear relevant. The research data that do exist strongly indicate that we know little about the specific causes of juvenile crime and even less about its possible cures. The lack of convincing data to support any single rationale for a correctional system (punishment, deterrence, or rehabilitation, for example) led to the adoption of two basic propositions: the imposition of coercive dispositions should be consistent with concepts of justice and fairness as well as with the aims of law enforcement and individual growth; and the correctional system for juveniles can be considered only as one modest component of a broader system of preventing crime by juveniles.

This attempt to limit the goals of the correctional system does not

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preclude the obligation of the state to provide a full range of services aimed at facilitating the normal growth and development of juveniles under correctional jurisdiction; indeed, it is argued that the state has a special obligation to juveniles under its jurisdiction, both because of the dependence and malleability of the young and because of the additional responsibilities undertaken by the state when it assumes full or partial custody over certain individuals. However, these standards unequivocally take the position that justice and fairness demand that the system respond only to past illegal behavior, rather than to predictions of future conduct. Beyond this point, the extent to which dispositions should be influenced by the circumstances and needs of individual juveniles as well as by the nature of their illegal behavior is arguable. The approach adopted by the commission in Parts II and III of these standards attempts an accommodation between the views of those who would advocate either a strict proportionality or a strict treatment approach.

Part I of the standards consists of a statement of the purposes of a correctional system for juveniles and of various limitations imposed by concepts of fairness on how the system should go about achieving its aims. The commission recommends limiting and structuring the discretion of all officials given authority over delinquent youths; to this end, the legislature is given a larger and more specific role in setting maximum dispositions and courts are given greater authority over the nature and duration of dispositions than currently is the case.

Part II provides criteria to guide courts in exercising their discretion to choose among dispositions that range from outright release to the maximum disposition provided by statute. The standards provide for a two-part determination of disposition. Under this scheme, the category and duration of a disposition are to be determined with reference to the seriousness of the juvenile's offense, as modified by the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile. Courts are directed to employ the least restrictive alternative that is consistent with these considerations. The choice of a particular program within the category selected, on the other hand, should depend on the needs and desires of the juvenile.

Part III describes the various options available to a sentencing judge, divided into the general categories of nominal, conditional, and custodial dispositions. It is in the intermediate area, between the lesser options of exerting little or no coercion and the drastic alternatives involving the removal of a juvenile from his or her home, that

the standards could make one of their greatest contributions. Courts currently have far too few choices between the use of probation, frequently with minimal supervision, and the use of custody. It is hoped that much more extensive use of such options as community service, restitution, and fines will help to convey to the victims and society a juvenile's sense of responsibility for an offense while dealing more humanely and less destructively with juveniles themselves.

Part IV concerns the obligations of the state to provide services to juveniles under correctional supervision, not as a quid pro quo for the juveniles' relinquishment of constitutional rights but as an affirmative responsibility of the state toward young people under its control. Where services required as part of a disposition are not or cannot be provided, the court is directed to employ an alternative disposition of no greater severity or to discharge the juvenile. In addition, juveniles are given the right to refuse services that are offered to them in certain situations.

Part V treats the various situations in which dispositional orders should be modified, and provides criteria to govern such modification. Courts, rather than correctional administrators or parole boards, are allocated the primary responsibility for modification. Correctional administrators are given the authority to petition sentencing courts for reduction of dispositions considered inequitable or enforcement or modification of dispositions with which a juvenile has not complied, as well as a limited ability to reduce the duration of a disposition as a reward for a juvenile's good behavior.

Because of the novelty of the effort and the dearth of empirical data, several of the standards do not give as precise guidance to courts and administrators as would be desirable. It is hoped that these standards will serve as a first step in the development of a rationale for dispositional decision making and that further experience, record keeping, and evaluation in such areas as the application of dispositional criteria and the costs and effects of various dispositions will lead to their improvement and refinement.

In drafting these standards, the reporter has benefited from the suggestions and criticisms of many colleagues in the fields of law and corrections. The reporter wishes to acknowledge in particular the contributions of the following: Lynn Bregman Kassirer, whose exhaustive research and drafting made her role more akin to that of a co-author than a research assistant; J. Michael Keating, whose thoughtful comments and research have been incorporated into Part I of the volume; Robert L. Smith, Fred Cohen, and Sanford Fox, who helped the reporter to examine the implications of the various

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possible approaches that might be taken by the standards; and Allen F. Breed, who, as the chairperson of the drafting committee that reviewed the volume and an experienced and widely respected correctional administrator, reviewed several drafts of the standards and exercised considered influence over the final product.

Standards

PART I: GENERAL PURPOSES AND LIMITATIONS

1.1 Purpose.

The purpose of the juvenile correctional system is to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior. This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of juveniles, and that give juveniles access to opportunities for personal and social growth.

1.2 Coercive dispositions: definition and requirements.

A disposition is coercive when it limits the freedom of action of the adjudicated juvenile in any way that is distinguishable from that of a nonadjudicated juvenile and when the failure or refusal to comply with the disposition may result in further enforcement action.

The imposition of any coercive disposition by the state imposes the obligation to act with fairness and to avoid arbitrariness. This obligation includes the following requirements:

A. Adjudicated violation of substantive law.

No coercive disposition may be imposed unless there has been an adjudicated violation of the substantive law.

B. Specification of disposition by statute.

No coercive disposition may be imposed unless pursuant to a statute that prescribes the particular disposition with reasonable specificity.

C. Procedural regularity and fairness.

The imposition and implementation of all coercive dispositions should conform to standards governing procedural regularity and fairness.

D. Information concerning obligations.

Juveniles should be given adequate information concerning the

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obligations imposed on them by all coercive dispositions and the consequences of failure to meet such obligations. Such information should be given in the language primarily spoken by the juvenile.

E. Legislatively determined maximum dispositions.

The maximum severity and duration of all coercive dispositions should be determined by the legislature, which should limit them according to the seriousness of the offense for which the juvenile has been adjudicated.

F. Judicially determined dispositions.

The nature and duration of all coercive dispositions should be determined by the court at the time of sentencing, within the limitations established by the legislature.

G. Availability of resources.

No coercive disposition should be imposed unless the resources necessary to carry out the disposition are shown to exist. If services required as part of a disposition are not available, an alternative disposition no more severe should be employed.

H. Physical safety.

No coercive disposition should subject the juvenile to unreasonable risk of physical harm.

I. Prohibition of collateral disabilities.

No collateral disabilities extending beyond the term of the disposition should be imposed by the court, by operation of law, or by any person or agency exercising authority over the juvenile.

PART II: DISPOSITIONAL CRITERIA

2.1 Least restrictive alternative.

In choosing among statutorily permissible dispositions, the court should employ the least restrictive category and duration of disposition that is appropriate to the seriousness of the offense, as modified by the degree of culpability indicated by the circumstances of the particular case, and by the age and prior record of the juvenile. The imposition of a particular disposition should be accompanied by a statement of the facts relied on in support of the disposition and the reasons for selecting the disposition and rejecting less restrictive alternatives.

2.2 Needs and desires of the juvenile.

Once the category and duration of the disposition have been determined, the choice of a particular program within the category should include consideration of the needs and desires of the juvenile.

PART III: DISPOSITIONS

3.1 Nominal: reprimand and release.

The court may reprimand the juvenile for the unlawful conduct, warn against future offenses, and release him or her unconditionally.

3.2 Conditional.

The court may sentence the juvenile to comply with one or more conditions, which are specified below, none of which involves removal from the juvenile's home. Such conditions should not interfere with the juvenile's schooling, regular employment, or other activities necessary for normal growth and development.

A. Suspended sentence.

The court may suspend imposition or execution of a more severe, statutorily permissible sentence with the provision that the juvenile meet certain conditions agreed to by him or her and specified in the sentencing order. Such conditions should not exceed, in severity or duration, the maximum sanction permissible for the offense.

B. Financial.

1. Restitution.

a. Restitution should be directly related to the juvenile's offense, the actual harm caused, and the juvenile's ability to pay.

b. The means to carry out a restitution order should be available.

c. Either full or partial restitution may be ordered.

d. Repayment may be required in a lump sum or in installments.

e. Consultation with victims may be encouraged but not required. Payments may be made directly to victims, or indirectly, through the court.

f. The juvenile's duty of repayment should be limited in duration; in no event should the time necessary for repayment exceed the maximum term permissible for the offense.

2. Fine.

a. Imposition of a fine is most appropriate in cases where the juvenile has derived monetary gain from the offense.

b. The amount of the fine should be directly related to the seriousness of the juvenile's offense and the juvenile's ability to pay.

c. Payment of a fine may be required in a lump sum or installments.

d. Imposition of a restitution order is preferable to imposition of a fine.

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e. The juvenile's duty of payment should be limited in duration; in no event should the time necessary for payment exceed the maximum term permissible for the offense.

3. Community service.

a. In sentencing a juvenile to perform community service, the judge should specify the nature of the work and the number of hours required.

b. The amount of work required should be related to the seriousness of the juvenile's offense.

c. The juvenile's duty to perform community service should be limited in duration; in no event should the duty to work exceed the maximum term permissible for the offense.

C. Supervisory.

1. Community supervision.

The court may sentence the juvenile to a program of community supervision, requiring him or her to report at specified intervals to a probation officer or other designated individual and to comply with any other reasonable conditions that are designed to facilitate supervision and are specified in the sentencing order.

2. Day custody.

The court may sentence the juvenile to a program of day custody, requiring him or her to be present at a specified place for all or part of every day or of certain days. The court also may require the juvenile to comply with any other reasonable conditions that are designed to facilitate supervision and are specified in the sentencing order.

D. Remedial.

1. Remedial programs.

The court may sentence the juvenile to a community program of academic or vocational education or counseling, requiring him or her to attend sessions designed to afford access to opportunities for normal growth and development. The duration of such programs should not exceed the maximum term permissible for the offense.

2. Prohibition of coercive imposition of certain programs.

This standard does not permit the coercive imposition of any program that may have harmful effects. Any such program should comply with the requirements of Standard 4.3 concerning informed consent.

3.3 Custodial.

A. Custodial disposition defined.

A custodial disposition is one in which a juvenile is removed coercively from his or her home.

B. Presumption against custodial dispositions.

There should be a presumption against coercively removing a juvenile from his or her home, and this category of sanction should be reserved for the most serious or repetitive offenses. It should not be used as a substitute for a judicial finding of neglect, which should conform to the standards in the *Abuse and Neglect* volume.

C. Exclusiveness of custodial dispositions.

A custodial disposition is an exclusive sanction and should not be used simultaneously with other sanctions. However, this does not prevent the imposition of a custodial disposition for a specified period of time to be followed by a conditional disposition for a specified period of time, provided that the total duration of the disposition does not exceed the maximum term of a custodial disposition permissible for the offense.

D. Continuous and intermittent confinement.

Custodial confinement may be imposed on a continuous or an intermittent basis, not to exceed the maximum term permissible for the offense. Intermittent confinement includes:

1. night custody;
2. weekend custody.

E. Levels of custody.

Levels of custody include nonsecure residences and secure facilities.

1. Nonsecure residences.

No court should sentence a juvenile to reside in a nonsecure residence unless the juvenile is at least ten years old and unless the court finds that any less severe disposition would be grossly inadequate to the needs of the juvenile and that such needs can be met by placing the juvenile in a particular nonsecure residence.

2. Secure facilities.

a. A juvenile may be sentenced to a period of confinement in a secure facility; such a disposition, however, should be a last resort, reserved only for the most serious or repetitive offenses.

b. No court should sentence a juvenile to confinement in a secure facility unless the juvenile is at least twelve years old and unless the court finds that such confinement is necessary to prevent the juvenile from causing injury to the personal or substantial property interests of another.

c. Secure facilities should be coeducational, located near population centers as close as possible to the juvenile's home, and limited in population.

PART IV: PROVISION OF SERVICES

4.1 Right to services.

All publicly funded services to which nonadjudicated juveniles have access should be made available to adjudicated delinquents. In addition, juveniles adjudicated delinquent should have access to all services necessary for their normal growth and development.

A. Obligations of correctional agencies.

Correctional agencies have an affirmative obligation to ensure that juveniles under their supervision obtain all services to which they are entitled.

B. Purchase of services.

Services may be provided directly by correctional agencies or obtained, by purchase or otherwise, from other public or private agencies. Whichever method is employed, agencies providing services should set standards governing the provision of services and establish monitoring procedures to ensure compliance with such standards.

C. Prohibition against increased dispositions.

Neither the severity nor the duration of a disposition should be increased in order to ensure access to services.

D. Obligation of correctional agency and sentencing court.

If access to all required services is not being provided to a juvenile under the supervision of a correctional agency, the agency has the obligation to so inform the sentencing court. In addition, the juvenile, his or her parents, or any other interested party may inform the court of the failure to provide services. The court also may act on its own initiative. If the court determines that access to all required services in fact is not being provided, it should employ the following:

1. Reduction of disposition or discharge.

Unless the court can ensure that the required services are provided forthwith, it should reduce the nature of the juvenile's disposition to a less severe disposition that will ensure the juvenile access to the required services, or discharge the juvenile.

2. Affirmative orders.

In addition, the sentencing court, or any other court with the requisite jurisdiction, may order the correctional agency or other public agencies to make the required services available in the future.

4.2 Right to refuse services; exceptions.

Juveniles who have been adjudicated delinquent have the right to refuse all services, subject to the following exceptions:

A. Participation legally required of all juveniles.

Juveniles who have been adjudicated delinquent may be required to participate in all types of programs in which participation is legally required of juveniles who have not been adjudicated delinquent.

B. Prevention of clear harm to physical health.

Juveniles may be required to participate in certain programs in order to prevent clear harm to their physical health.

C. Remedial dispositions.

Juveniles subject to a conditional disposition may be required to participate in any program specified in the sentencing order, pursuant to Standard 3.2 D.

4.3 Requirement of informed consent to participate in certain programs.

Informed, written consent should be obtained before a juvenile may be required to participate in any program designed to alter or modify his or her behavior if that program may have harmful effects.

A. Juveniles below the age of sixteen.

If the juvenile is under the age of sixteen, his or her consent and the consent of his or her parent or guardian should be obtained.

B. Juveniles above the age of sixteen.

If the juvenile is sixteen or older, only the juvenile's consent need be obtained.

C. Withdrawal of consent.

Any such consent may be withdrawn at any time.

**PART V: MODIFICATION AND ENFORCEMENT
OF DISPOSITIONAL ORDERS**

Dispositional orders may be modified as follows.

5.1 Reduction because disposition inequitable.

A juvenile, his or her parents, the correctional agency with responsibility for the juvenile, or the sentencing court on its own motion may petition the sentencing court (or an appellate court) at any time during the course of the disposition to reduce the nature or the duration of the disposition on the basis that it exceeds the statutory maximum; was imposed in an illegal manner; is unduly severe with reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given by the same or other courts to juveniles convicted of similar offenses; or if it appears at the time of the application that by doing so it can prevent an unduly harsh or inequitable result.

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5.2 Reduction because services not provided.

The sentencing court should reduce a disposition or discharge the juvenile when it appears that access to required services is not being provided, pursuant to Standard 4.1 D.

5.3 Reduction for good behavior.

The correctional agency with responsibility for a juvenile may reduce the duration of the juvenile's disposition by an amount not to exceed [5] percent of the original disposition if the juvenile has refrained from major infractions of the dispositional order or of the reasonable regulations governing any facility to which the juvenile is assigned.

5.4 Enforcement when juvenile fails to comply.

The correctional agency with responsibility for a juvenile may petition the sentencing court if it appears that the juvenile has willfully failed to comply with any part of the dispositional order. In the case of a remedial sanction, compliance is defined in terms of attendance at the specified program, and not in terms of performance.

If, after a hearing, it is determined that the juvenile in fact has not complied with the order and that there is no excuse for the non-compliance, the court may do one of the following:

A. Warning and order to comply.

The court may warn the juvenile of the consequences of failure to comply and order him or her to make up any missed time, in the case of supervisory, remedial, or custodial sanctions or community work; or missed payment, in the case of restitution or fines.

B. Modification of conditions and/or imposition of additional conditions.

If it appears that a warning will be insufficient to induce compliance, the court may modify existing conditions or impose additional conditions calculated to induce compliance, provided that the conditions do not exceed the maximum sanction permissible for the offense. The duration of the disposition should remain the same, with the addition of any missed time or payments ordered to be made up.

C. Imposition of more severe disposition.

If it appears that there are no permissible conditions reasonably calculated to induce compliance, the court may sentence the juvenile to the next most severe category of sanctions for the remaining duration of the disposition. The duration of the disposition should remain the same, except that the court may add some or all of the missed time to the remainder of the disposition.

D. Commission of a new offense.

Where conduct is alleged that constitutes a willful failure to comply with the dispositional order and also constitutes a separate offense, prosecution for the new offense is preferable to modification of the original order. The preference for separate prosecution in no way precludes the imposition of concurrent dispositions.

Standards with Commentary

PART I: GENERAL PURPOSES AND LIMITATIONS

1.1 Purpose.

The purpose of the juvenile correctional system is to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior. This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of juveniles, and that give juveniles access to opportunities for personal and social growth.

Commentary

This standard is based on the premise that we know little about the specific causes of crime and delinquency. The past fifty years have seen the flowering—and the waning—of the conviction that, given adequate research, behavioral and social scientists eventually might pinpoint the causes of delinquency and shape public policy to remove them. Instead, the efforts of science to date have served to illuminate the complexity and virtual insolubility of the problems of the causation and prevention of delinquent behavior. Indeed, if—as social scientists long have maintained—the root causes of delinquency lie in poverty, racial discrimination, and the breakdown of family structure and values,¹ there may be little that a correctional system can do to reduce crime. According to a recent essay by James Q. Wilson:

If a child is delinquent because his family made him so or his friends encourage him to be so, it is hard to conceive what society might do about

¹ Of young people committed to the California Youth Authority in 1973, for example, 65 percent of the males and 68 percent of the females had parents who were not living together due to divorce, separation, or death. California Department of the Youth Authority, "Annual Report" 11 (1973).

this. No one knows how a government might restore affection, stability, and fair discipline to a family that rejects these characteristics; still less can one imagine how even a family once restored could affect a child who by now has left the formative years and in any event has developed an aversion to one or both of his parents. "Crime and the Criminologists," *Commentary*, July 1974, at 47, 48.

Uncertainty over the causes and cures for delinquency necessarily makes it difficult to define the purpose of a correctional system within a general scheme of criminal justice. The confusion is heightened further by the competing claims of those who urge retribution or deterrence or rehabilitation as the overriding purpose of corrections. The warnings of critics of rehabilitation can be applied equally to those who urge the primacy of retribution or deterrence:

Ignorance, in itself, is not disgraceful so long as it is unavoidable. But when we rush to measures affecting human liberty and human dignity on the assumption that we know what we do not know or can do what we cannot do, then the problem of ignorance takes on a more sinister hue. Allen, "The Rehabilitative Ideal," in *Contemporary Punishment* 215 (P. Gerber and P. McAnany eds. 1972).

Of the recognized purposes of corrections, none recently has been subject to such relentless attack as rehabilitation. Mounting evidence indicates that the juvenile correctional system does not help young people and may even harm them.² Beginning with Professor Allen's critique in the early 1960s, a steadily growing number of social and behavioral scientists have questioned the effectiveness and, indeed, the appropriateness of the "rehabilitative ideal." In 1969, Leslie Wilkins summarized the negative results of his research in the field of correctional rehabilitation:

It is difficult to find any reasonable grounds . . . for disagreement with the conclusion that the major achievement of research in the field of social pathology and treatment has been negative, and has resulted in

² Edwin M. Schur is one of a growing group of scholars, joined by an increasing number of correctional administrators, who have argued that the further into the justice system a juvenile penetrates, the more the juvenile will be damaged by the experience. See generally Schur, *Radical Non-Intervention: Rethinking the Delinquency Problem* (1973). For further elaboration of the "labeling" or outcast theory of delinquency, see Maher with Stein, "The Delinquent's Perception of the Law and the Community," in *Controlling Delinquents* 187 (S. Wheeler ed. 1968), and J. Freedman, *Deviancy: The Psychology of Being Different* (1968).

the undermining of nearly all the current mythology regarding the effectiveness of treatment in any form. *Evaluation of Penal Measures* 78 (1969).

Succeeding studies have confirmed Professor Wilkins' pessimism. Dr. Robert M. Martinson's much publicized study of over 200 rehabilitative programs led to the conclusion that "[o]n the whole, the evidence from the survey indicated that the present array of correctional treatments has no appreciable effect—positive or negative—on the rates of recidivism of convicted offenders." "Can Corrections Correct?" *The New Republic*, April 8, 1972, at 14-15.

Too much can be made of this damning research, which has provided support to opponents of rehabilitation as the primary purpose of a correctional system. A closer reading of the research findings suggests caution. Dr. Martinson, for example, includes in his study an important caveat: "It is just possible that some of our treatment programs are working to some extent, but that our research is so bad that it is incapable of telling." Or again: "This is not to say that we found no instances of success or partial success; it is only to say that these instances have been isolated, producing no clear pattern to indicate the efficacy of any particular method of treatment." "What Works?—Questions and Answers about Prison Reform," *The Public Interest*, Spring 1974, at 49.

In the face of critical research findings, supporters of rehabilitation have argued that the failure to date does not compel abandonment of the ideal, but rather the development of new and better attempts.³ The standard does not disagree with this position. The route of future accommodation may well lie in the direction suggested recently by Norval Morris, in considering the future of the adult prison system:

"Rehabilitation," whatever it means and whatever the programs that allegedly give it meaning, must cease to be a purpose of the prison sanction. This does not mean that the various developed treatment programs within prisons need to be abandoned; quite the contrary, they

³ See, e.g., Griffith's review of Packer's *The Limits of the Criminal Sanction*, 79 *Yale L.J.* 1388, 1427 (1970):

In the nature of things, we will not get better informed if we do nothing—most of the questions to which we need better answers arise only in the context of a functioning system. If we do not try to rehabilitate, we will have no basis for evaluating the effectiveness of rehabilitation.

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need expansion. But it does mean that they must not be seen as purposive in the sense that criminals are to be sent to prison for treatment. There is a sharp distinction between the purposes of incarceration and the opportunities for the training and assistance of prisoners that may be pursued within those purposes. The system is corrupted when we fail to preserve this distinction and this failure pervades the world's prison programs. *The Future of Imprisonment* 14-15 (1974).

The standards are intended to encourage the development of more meaningful ways of providing rehabilitative programs. The standards do reflect, however, the fact that we currently do not possess sufficient knowledge to make rehabilitation the exclusive—or even the fundamental—purpose of corrections.⁴ Thus, the standard is intended to serve as a limiting principle designed to narrow the aims of the correctional system to a more modest perspective.

Sufficient knowledge to base a correctional system on a theory of general deterrence also is lacking. While there is some evidence indicating that capital punishment has little effect on the murder rate, there is scarcely any empirical evidence on the impact of deterrence on other criminal activity. Our instincts and experience tell us that we are deterred from illegal behavior by the fear of apprehension and punishment, but to date the social scientists have found it difficult to provide the quantitative evidence to support our intuition. See N. Walker, *Sentencing in a Rational Society* 61 (1969). Here again, the standards do not deny the potential impact of deterrence, nor do they discourage further study of its value. They do, however, reject deterrence as the sole or fundamental purpose of a correctional system for juveniles.

In searching for the limiting principle made necessary by the failure of empirical science to provide the data on which to base a unitary, coherent approach to correctional policy, the standard returns to some of the basic elements of Anglo-American law. One important function of the sanctions provided for in the juvenile criminal code and the correctional system that implements it is to ensure that the code's substantive provisions are observed by making the strictures of the code credible. Thus, according to H.L.A. Hart, certain actions are forbidden by law and designated as offenses "to announce to society that these actions are not to be done and to secure that fewer of them are done." Hart, "Prolegomenon to the

⁴ Due to our lack of knowledge of how to cure delinquency, it is not necessary to reach the troubling philosophical questions concerning the appropriateness of using the coercive power of the state solely for the purpose of treatment.

Principles of Punishment" in *Theories of Punishment* 358 (S.E. Grupp ed. 1971).

More important in the framing of a limiting principle is the fundamental legal concept that confines the application of criminal law to past misconduct. No one may be punished for an offense unless the conduct constituting the offense has been defined legislatively. The constitutional ban against bills of attainder and ex post facto laws and the judicial void-for-vagueness doctrine represent constitutional applications of this traditional concept. See H.L. Packer, *The Limits of the Criminal Sanction* ch. 5 (1968). Necessarily, this means that the correctional system, as well as the criminal code, is primarily retrospective, responding to past illegal behavior rather than to attitudes or predictions of future conduct.

This does not mean that the correctional system must look only to the past. The standard, which recognizes that a correctional system for juveniles also should contain prospective elements, attempts to promote the development of individual responsibility for lawful behavior on the part of offenders by providing opportunities for personal and social growth. The importance of this prospective element reflects the traditional legal perception of the physical dependence of the very young and the slow process of intellectual and emotional maturation during adolescence.⁵

In this view of corrections as one component in a broader system of preventing antisocial behavior, the role of the juvenile correctional system is modest. The system represents one way—and one way only—of dealing with juvenile crime. This attempt to limit the goals, as well as the claims, of corrections does not preclude either the obligation of the state to provide a full range of services for juveniles subject to the correctional system (see Part IV of these standards) or broader efforts outside of the correctional system to provide services aimed at improving their social and economic situation to all juveniles. Especially in view of the large number of juveniles who commit delinquent acts but entirely escape the juvenile justice system, no persuasive reason exists for making the correctional system the pri-

⁵ "Juveniles may be viewed as incomplete adults, lacking in full moral and experiential development, extended unique jural status in other contexts, and deserving of the social moratorium extended by this and all other societies of which I am aware. Thus, removal of the treatment rationale does not destroy the rationale for a separate system or for the utilization of an ameliorative approach; it does, however, require a different rationale." Cohen, Position Paper (Juvenile Justice Standards Project, no. 18, 1974); see also Lasswell and Donnelly, "The Continuing Debate over Responsibility: An Introduction to Isolating the Condemnation Sanction," 68 *Yale L.J.* 869, 884-85 (1959).

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mary provider of services to juveniles who have broken the law. As criminologist Leslie T. Wilkins has stated:

Rather than seek to deal with social ills because they are believed to be causes of crime, I would recommend that we should deal with them because they are social ills. Rather than expect that a more than marginal change in the incidence and prevalence of crime might be related to action concerning offenders, I would expect more profit to arise from research investment in the study of victims, the environment in which crime takes place, the decision processes of criminal justice personnel, and the economics of the illicit market place. "Current Aspects of Penology: Directions for Corrections," 118 *Proceedings of the American Philosophical Society* 235, 235-36 (1974).

A final aspect of the standard emphasizes the effort to create a system that operates fairly and equitably and that is perceived by the young people affected by it to be fair and equitable. The standard thus seeks to respond to the ideal described by John Rawls:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore, in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising. *A Theory of Justice* 3-4 (1971).

1.2 Coercive dispositions: definition and requirements.

A disposition is coercive when it limits the freedom of action of the adjudicated juvenile in any way that is distinguishable from that of a nonadjudicated juvenile and when the failure or refusal to comply with the disposition may result in further enforcement action.

The imposition of any coercive disposition by the state imposes the obligation to act with fairness and to avoid arbitrariness. This obligation includes the following requirements:

A. Adjudicated violation of substantive law.

No coercive disposition may be imposed unless there has been an adjudicated violation of the substantive law.

Commentary

This standard confirms the restrospective nature of the juvenile justice system, based on principles of legality. The standard represents a restriction against the imposition of sanctions without a legally proved violation of specific, written laws. This principle is a basic component of our legal structure and is embodied in the notice requirements of the due process clauses of the fifth and fourteenth amendments to the Constitution.

B. Specification of disposition by statute.

No coercive disposition may be imposed unless pursuant to a statute that prescribes the particular disposition with reasonable specificity.

Commentary

This standard provides that no penalty for the violation of a provision of the juvenile criminal code may be imposed unless the sanction is specifically described in the code. This fundamental legal principle, known as *nulla poena sine lege*, represents a limit on the power of the state to deal with convicted offenders in arbitrary ways. See J. Hall, *General Principles of Criminal Law* 28, 55 et seq. (1960).

C. Procedural regularity and fairness.

The imposition and implementation of all coercive dispositions should conform to standards governing procedural regularity and fairness.

Commentary

See the *Dispositional Procedures* volume for standards on dispositional proceedings in juvenile court and the *Corrections Administration* volume for standards regulating the implementation of dispositions.

D. Information concerning obligations.

Juveniles should be given adequate information concerning the obligations imposed on them by all coercive dispositions and the consequences of failure to meet such obligations. Such information should be given in the language primarily spoken by the juvenile.

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Commentary

The possibility of further enforcement action if the juvenile should fail to comply with a coercive disposition makes it particularly important that the juvenile be informed of exactly what is expected of him or her with sufficient preciseness to enable the juvenile to conform his or her conduct to the requirements of the disposition. This information must be communicated in language the juvenile can understand, by a multilingual staff where necessary.

The National Advisory Commission on Criminal Justice Standards and Goals recommends that probationers should be provided with written statements and explanations of the conditions imposed and that they should be authorized to request clarification of any condition from the sentencing judge. National Advisory Commission on Criminal Justice Standards and Goals, "Corrections," § 5.4(3) (1973). (Hereafter cited as "Corrections.") The commission observes that "the probationer should at all times be in a position to comply with the conditions of probation. This requires that he be provided with precise explanations . . . and that he have the continuing opportunity to request further clarification from the sentencing court." *Id.* at 160.

The American Bar Association similarly recommends that

[a]ll conditions of probation should be prescribed by the sentencing court and presented to the probationer in writing. Their purpose and scope and the possible consequence of any violations should be explained to him by the sentencing court or at an early conference with a probation officer. ABA Standards for Criminal Justice, *Probation* § 3.1(a) (Approved Draft 1970).

In addition, the ABA standards require that "the conditions should be sufficiently precise so that probation officers do not in fact establish them" and that the probationer have the right to apply to the sentencing court for clarification. *Probation* § 3.1(b).

A requirement that probation conditions be stated with sufficient specificity to enable offenders to guide themselves accordingly also appears in the American Law Institute's "Model Penal Code" § 301.1(4) (1962). (Hereafter cited as "Model Penal Code.")

The juvenile also should be fully informed of the right to participate in and to refuse services, as provided in Standard 4.2.

E. Legislatively determined maximum dispositions.

The maximum severity and duration of all coercive dispositions should be determined by the legislature, which should limit them according to the seriousness of the offense for which the juvenile has been adjudicated.

Commentary

The *Juvenile Delinquency and Sanctions* volume provides a criminal code for juveniles, which serves as a model for legislative action. The present volume discusses the role of the courts and administrative agencies in selecting, implementing, and enforcing dispositions within the maximum limits.

F. Judicially determined dispositions.

The nature and duration of all coercive dispositions should be determined by the court at the time of sentencing, within the limitations established by the legislature.

Commentary

The standard envisions that the nature and duration of all coercive dispositions will be determined by the judge at the time of sentencing. Thereafter, neither correctional authorities nor administrative agencies, such as parole boards, may independently alter the nature or duration of a juvenile's disposition without a judicial order. The two exceptions are the good time allowance provided pursuant to Standard 5.3 and the ability of administrators to petition the sentencing court (or an appellate court) for reduction of dispositions they consider inequitable, pursuant to Standard 5.1.

The prohibition against administrators' changing the nature of a juvenile's disposition without returning to court applies only to changes from one category or subcategory of disposition to another, not to changes among placements within a dispositional category. For example, the correctional agency may move a juvenile from one foster home to another, but it may not, without a court order, move the juvenile from a foster home to a secure facility or to community supervision.

The standard is predicated on the adoption of much shorter maximum sentences than currently exist, so that administrative discretion will not be necessary as an escape from lengthy maxima imposed by legislatures or courts. The standard also presumes the abandonment of the automatic continuation of jurisdiction over juveniles adjudicated delinquent until they reach the age of majority. Preventing administrators from making determinations regarding juvenile dispositions is intended to reduce, not to lengthen, sentences.

The use of the indeterminate sentence⁶ is even more prevalent in

⁶The "indeterminate sentence" for adults has been subject to varying definitions and applications. Four formulations prevail: (A) the completely indeter-

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juvenile court statutes than it is for adults. Forty-one states grant the juvenile court jurisdiction over juveniles found delinquent until they reach the age of twenty-one. Generally this dispositional pattern enables a juvenile court to commit a person to the custody of a private or public agency, which then makes the administrative decision of when to release the youth. Except for provisions enabling the court to retain jurisdiction over a youth until the age of majority, however, juvenile codes exhibit a remarkable variety.

The predominant statutory pattern is that the juvenile court retains jurisdiction over the youth until he or she reaches the age of majority. As the age of majority in many states has been lowered to eighteen, the jurisdiction of the court over a large segment of the young population has been reduced.⁷ This reduction in the jurisdiction of the court has not been without legal battles. In Delaware, for example, a recent law passed by the legislature reduced the age of majority for most purposes except for the jurisdiction of the juvenile court. Juveniles above the age of eighteen have challenged the court's jurisdiction.

Perhaps the most striking aspect of the jurisdictional question in juvenile codes is the manner in which various state codes differentiate between youths in discrete age or offense groupings. In Califor-

minate sentence (totally unlimited commitment with neither a minimum nor a maximum, as is used, for example, in sentencing "psychopaths" in Maryland. *Md. Ann. Code* art. 31 B. § § 6(a), 9(b) (1971); (B) legislatively set maxima and minima (judicially imposed sentence for a term "prescribed by law," as is used in California, where the Adult Authority determines the precise time of release); (C) legislatively set maxima and judicially set minima (sentencing court retains authority to impose a minimum term as is recommended by the "Model Penal Code" § 6.06); and (D) judicially set maxima and minima (judge can set both limits, within legislative bounds, while parole authorities have discretion within this range, as is used in Alaska, Illinois, and New York. *See, e.g.,* N.Y. Penal Law § 70.00 [McKinney 1967]). Note, "The Indeterminate Sentence: Judicial Intervention in the Correctional Process," 21 *Buff. L. Rev.* 935 (Spring 1972). For a description of various other permutations of the indeterminate sentence see *R.L. Goldfarb & L.R. Singer, After Conviction* 167-69 (1973); D. Glaser, F. Cohen, & V. O'Leary, "The Sentencing and Parole Process" 10-15 (U.S. Dept. of Health, Education & Welfare, Office of Juvenile Delinquency and Youth Development 1966). As used here, an indeterminate sentence refers to any penal commitment for which the actual amount of time served is decided by correctional or parole authorities subsequent to the implementation of a portion of the sentence instead of by the sentencing judge at the time of sentencing.

⁷In Montana, South Carolina, and New Jersey there is no maximum age limitation on the continuing jurisdiction for certain serious offenses such as rape and homicide. Levin and Sarri, "Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States," *National Assessment of Juvenile Corrections* 15 (1974).

nia, for example, the court has jurisdiction over juveniles until the age of majority (lowered to eighteen in a series of amendments in 1971). Cal. Welf. & Inst'ns Code ch. 2, § 607 (1972). The legislation establishing the California Youth Authority, however, states that for juveniles committed to the custody of the Youth Authority, the dispositional pattern is as follows:

- § 1769—for juveniles adjudicated delinquent by a juvenile court, the maximum period of control is until the age of twenty-one, or two years after the original commitment, whichever occurs later;
- § 1770—for those committed to the Youth Authority by the superior court as misdemeanants, until age twenty-three, or two years after the commitment;
- § 1771—for those committed to the Youth Authority as felons, until age twenty-five.

Much more prevalent than the elaborate structure found in California is that which merely retains jurisdiction of the child until the age of majority. Kentucky provides that a youth committed to the Department of Child Welfare may be under the control of the department until age twenty-one. Ky. Rev. Stat. Ann. § 208.200(c) (1972). Similarly, Virginia provides that the juvenile remain in the jurisdiction of the court until twenty-one. Va. Code Ann. § 16.1-159 (1975). For a general discussion of the subject, see S. Rubin, *Crime and Juvenile Delinquency* 93-118 (rev. ed. 1961); and S. Rubin, *The Law of Criminal Correction* 507-520 (2nd ed. 1973).

A recent trend has been the development of codes that establish a specific period of commitment beyond which an agency cannot hold a juvenile without first appearing before the committing court and requesting an extension of control. The Connecticut code provides that a delinquent can be committed for an indeterminate period up to a maximum of two years. The code also allows the agency to petition the court to extend jurisdiction for another two years if such extension is in "the best interest of the child." Conn. Gen. Stat. Ann. § 17-69(a) and (c) (1969).

The New York Family Court Act provides that for juveniles adjudicated delinquent, except for the most serious offenses, the court can commit the juvenile for a maximum of eighteen months, with one-year extensions allowed upon request to the court. N.Y. Family Ct. Act, art. 7 § 756 (1975). However, for those juveniles committed for the most serious offenses (*e.g.*, murder or arson), section 753-a of the Juvenile Justice Reform Act, effective in 1977, requires mandatory minimum sentences of two years, one year of which must be spent in a secure facility. The New York code also provides that a juvenile cannot be placed on probation for more than two

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years if an adjudicated delinquent, and if a PINS for not more than one year. *Id.* at § 757.

The standard rejects the use of indeterminacy as a governing principle of juvenile sentencing. Indeterminacy can affect two aspects of an offender's sentence: the total length of jurisdiction over the juvenile; and the length of time he or she will have to spend at various levels of custody—*e.g.*, an institution versus community supervision. Systems embracing indeterminacy all involve some sort of discretionary release, generally through parole. Proponents of such systems suggest several advantages: (A) indeterminacy allows maximum implementation of the rehabilitative ideal in corrections; (B) the chance for early release under an indeterminate sentence motivates the offender to work for rehabilitation; (C) indeterminacy best protects society from hard core recidivists and mentally defective offenders; (D) indeterminacy prevents warehousing by eliminating unnecessary incarceration; (E) indeterminacy removes the judgment concerning the duration of sentences from the hands of the judge and places it in the hands of more qualified professionals; (F) the decision as to the length of incarceration reflects the needs of the offender and his or her readiness for release, not just the offense; and (G) indeterminate sentences deter. See ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 3.1 and commentary (Approved Draft 1968); Spaeth, Jr., "A Response to Struggle for Justice," 52 *Pris. J.* 4 (1972); Prettyman, Jr., "The Indeterminate Sentence and the Right to Treatment," 11 *Am. Crim. L. Rev.* 7, 15-17 (1972).

The arguments against indeterminacy and discretionary release on parole seem more persuasive. First, allowing administrators or correctional authorities to alter judicially imposed sentences would increase the disparate treatment of similar conduct that other standards aim to reduce. All information relevant to disposition according to these principles—seriousness of offense, age and prior record, and the culpability of the juvenile's conduct in the particular case (Standard 2.1)—is available to the judge at the time of disposition and remains unchanged during the term of the juvenile's commitment.

Sentencing juveniles to periods of indeterminate duration, with the concomitant authority of parole boards or institutional administrators to determine release dates, reflects adherence to the concept of individualized sentencing, which posits that offenders are "sick" and in need of "treatment" that can be successfully provided by the correctional system. These premises recently have been challenged, however, and the promises of individualized sentencing have remained largely unfulfilled. See, *e.g.*, M.E. Frankel, *Criminal Sen-*

tences: Law Without Order 89-92 (1973); and F. Allen, *The Borderland of Criminal Justice* 25-41 (1964); "The Crime of Treatment," in *Struggle for Justice* 83-99 (American Friends Service Committee 1971); J. Mitford, *Kind and Usual Punishment* (1973). See also material on the ineffectiveness of correctional rehabilitative efforts, *infra* at 104-107. In fact, where the duration or the nature of the disposition is determined by administrators or correctional authorities, true treatment may be made more difficult by the juvenile's motivation to dissemble in order to procure early release. For a discussion of "conning" or "shamming" by offenders playing what they term the "treatment game," see Prettyman, Jr., *supra* at 26. See also Mitford, *supra*.

A second consideration is the anxiety experienced by offenders when the exact nature and duration of their dispositions are unknown. The "inmate experiences as cruel and degrading the command that he remain in custody for some uncertain period, while his keepers study him, grade him in secret, and decide if and when he may be let go." Frankel, *supra* at 96. For further discussion of the psychological impact of indeterminacy, see American Assembly, "Prisoners in America" 93 (1973). In addition, offenders frequently are convinced that no valid or consistent criteria are employed in the release determination. This leads to distrust and the belief that decisions are made arbitrarily and unjustly. See American Friends Service Committee, *supra* at 93.

Third, indeterminacy introduces unregulated discretion into the system, which recently has been subject to extensive criticism and litigation. According to K.C. Davis, *Discretionary Justice* 170 (1969), "[t]he discretionary power to be lenient is an impossibility without a concomitant power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate" (original in italics). For an extensive critique of the virtually unchecked power that parole boards have over offenders' freedom, see, e.g., Citizens' Inquiry on Parole and Criminal Justice, Inc., "The New York State Parole System, Preliminary Draft" (1974).

Mandating due process protections for offenders at parole release decision-making hearings may structure the administrative discretion of parole board members to some extent. The discretion of correctional staff members, who also play an immeasurably important role in recommending release for certain offenders and not for others, however, cannot be cured by instituting such safeguards. This discretion may be misused so that release denials can be used to punish offenders for their nonconforming beliefs and unpopular views.

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According to some critics:

Despite all the rhetoric about individualization and treatment . . . the major impetus behind the development of parole and other measures of indefinite sentence length . . . has been the effort of the correctional bureaucracy to achieve better control over their population and management problems. Foote, "The Sentencing Function," in Annual Chief Justice Earl Warren Conference on Advocacy, *Final Report, A Program for Prison Reform* 23 (1972).

Analysis of available data provides the most cogent reasons for rejecting indeterminacy. It appears that in systems employing indeterminate sentencing, release does not vary with those factors that proponents of individualized sentencing say should be taken into account; rather, considerations not related to offender needs or characteristics are most influential in lengths of stay.

Statistics compiled by the research division of the Ohio Youth Commission demonstrate that, while the indeterminate sentence is designed to "individualize" sentences, individualization in fact does not occur. Institutional lengths of stay vary more with institutional size, classification systems, and offender characteristics than with any measure of rehabilitative progress. In Ohio's institutions, for example, it is reported that

the only offender-related variables linked to length of stay were age and sex. Controlling on institution, younger residents invariably stayed longer, as well as females. More important, when controlling on committing offense, the least serious status offenders were associated with longer institutional stay. G. Wheeler, "National Analysis of Institutional Length of Stay: The Myth of the Indeterminate Sentence" 19 (Division of Research, Planning and Development, Ohio Youth Commission 1974).

A "child welfare effect" was seen in the greater exercise of staff discretion not to release young offenders, while release of the older, often hard core delinquents was more automatic. "That age appeared as the most significant client characteristic related to institutional stay is interpreted as an unanticipated consequence of the juvenile courts' philosophy of *parens patriae* and related indeterminate sentence, married and reinforced by social work's historical and fervent commitment to providing 'treatment' programs." G. Wheeler and D.K. Nichols, "A Statistical Inquiry into Length of Stay and the Revolving Door: The Case for a Modified Fixed Sentence for the Juvenile Offender" 20 (Division of Research, Planning and Development, Ohio Youth Commission 1974).

In California, where the rehabilitative ideal and the principle of indeterminacy were embraced wholeheartedly, until quite recently, for adults as well as for juveniles, the median time served by adult prisoners from 1959 to 1969 rose from twenty-four to thirty-six months, the longest in the country. See American Friends Service Committee, *supra* at 91. See also California Youth Authority, "Board Policy and Procedural Manual, Division III—Board Hearings, Continuances and Reviews," § 30 (1973). Evidence reveals, however, that parole outcome is not influenced by the amount of time served in an institution. See D. Jaman, L. Bennett, and J. Berechochea, "Early Discharge from Parole: Policy, Practice and Outcome," Administrative Abstract, Res. Rep. No. 51 (California Department of Corrections April 1974); and J. Berechochea, D. Jaman, and W. Jones, "Time Served in Prison and Parole Outcome: An Experimental Study," Rep. No. 1, Administrative Abstract, Res. Rep. No. 49 (California Department of Corrections October 1973).

Several individuals and study groups recently have recommended abandonment of the parole system and indeterminate sentencing for adults. Members of the Annual Chief Justice Earl Warren Conference on Advocacy concluded that "the ultimate goal should be no indeterminacy whatsoever in sentences." *Supra* at 12. The American Friends Service Committee also advocates abolition of indeterminacy, *supra*.

The Group for the Advancement of Corrections, comprised primarily of correctional administrators and ex-administrators, recently advocated "the discontinuance of indeterminate sentencing in favor of fixed maximum terms to be imposed by the court at the time of sentencing."⁸ The Academy for Contemporary Problems, The Group for the Advancement of Corrections, "Toward a New Corrections Policy: Two Declarations of Principles" 8 (1974).

Abolition of indeterminate sentences and parole boards has been recommended by Richard A. McGee, former director of the California Department of Corrections and one-time advocate of indeterminacy and parole. See McGee, "New Look at Sentencing," 38 *Fed. Prob.* 3 (June 1974).

A comprehensive study of parole recently was undertaken by the New York Citizen's Inquiry on Parole and Criminal Justice, Inc., which concluded that "the parole process is demonstrably and absolutely ineffective." *Supra* at 152. The study urges "that most sentences be definite in nature [since] if the fallacy of rehabilitation

⁸The Group does, however, provide for "remission of a portion of the fixed term . . . granted administratively under strict regulation for cooperative conduct while under control." *Supra* at 8. This is consistent with Standard 5.3.

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is recognized . . . there is no reason why the decision as to the precise length of imprisonment should be postponed." *Id.* at 192.

Similarly, a study group in Ohio concluded that offenders are not being rehabilitated, so that "the indeterminate sentence has become a very cruel hoax, which has degenerated into little more than a club to compel conforming behavior within the walls." Ohio Citizens' Task Force on Corrections, "Final Report to the Governor" D-24 (1971). See also O.W. Wilson Legal Center and Wisconsin Chapter of Americans for Effective Law Enforcement, Inc., "Replacing the Scheme of Indeterminate Sentences and Discretionary Probation-Parole by a System of Certain Term Sentences and Probation Alternatives" (undated).

Commenting on the opportunity for the unequal treatment of minority juveniles presented by systems allowing jurisdiction until juveniles reach majority, the Minority Advisory Group Committee of the Juvenile Justice Standards Project states: "[M]inorities must be particularly concerned that we proceed and demand limitations on dispositions and sentences if we are to protect the minority child." "Proceedings of the Minority Advisory Group Committee," Juvenile Justice Symposium 29 (June 1974).

G. Availability of resources.

No coercive disposition should be imposed unless the resources necessary to carry out the disposition are shown to exist. If services required as part of a disposition are not available, an alternative disposition no more severe should be employed.

Commentary

Challenges to dispositions after they have been imposed may be avoided if sentencing courts are aware of the availability of necessary resources at the time of disposition. This proposition may seem self-evident: a juvenile should not be committed to a foster home if none is available. Yet the actual availability of facilities and services often is ignored during this critical stage. Juveniles in interim detention then may wait for extended periods of time while correctional agencies search for suitable placement.

The dispositional hearing, together with the conferences that precede it, generally is the last time that all the parties involved, including the juvenile's counsel, will be present and is the most appropriate time for assessing the realities involved in various dispositional alternatives. When attendance at vocational or counseling programs is considered the appropriate disposition, for example, the availability of such a program should be established before the sentence is imposed.

A provision of the Federal Youth Corrections Act seeks to ensure that proper and adequate resources are available before a youth is committed under the act: "No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided." 18 U.S.C.A. § 5012.

In *United States v. Alsbrook*, 336 F. Supp. 973 (D.D.C. 1971), certification of the attorney general was held required in each case before youths could be committed to the Lorton Youth Center, since existing facilities and programs at the center could not effectuate the purposes of the Youth Corrections Act. But see, *e.g.*, *Robinson v. United States*, 474 F.2d 1085, 1091 (10th Cir. 1973). (Although § 5012 "does bar commitment to the Attorney General under the Act until the Director certifies that proper and adequate facilities and personnel have been provided . . . the certification provision was concerned with the starting point for the use of the Act. . . . § 5021 does not say that a certificate must be submitted to the trial court in every case. . . .")

Whenever resources necessary to carry out a disposition are unavailable an alternative disposition no more severe must be employed. The juvenile for whom confinement in a foster home has been found appropriate may not be ordered confined in a group home or an institution just because no foster home is available. The state, having by its own deficiencies precipitated the need for selection of a new disposition, is precluded from penalizing the juvenile. For a discussion of related issues see Standard 4.1 C. and 4.1 D. 1.

The duty of the state to provide necessary services to adjudicated juveniles should be acknowledged by each state legislature, which should exert every effort to ensure the availability of adequate resources through the appropriation of funds earmarked for that purpose.

H. Physical safety.

No coercive disposition should subject the juvenile to unreasonable risk of physical harm.

Commentary

Neither coercive dispositions nor any of the conditions associated with them should subject the juvenile to unreasonable risks of physical harm. While action through civil suits for negligence may be taken against officials or the state when a juvenile is injured, the present provision is intended to preclude the use of unsafe situations as dispositional alternatives (including the use of facilities or staffing patterns that fail to protect juveniles from injury by other juveniles)

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and to give the sentencing court the clear authority to remove a juvenile immediately from any situation considered unsafe. See also "Corrections" § § 2.4, 2.5; NCCD, "Model Act for the Protection of the Rights of Prisoners," § § 2, 3 (1972); "Model Penal Code—Part III On Treatment and Correction" § § 303.6, 304.7 (1962); Fourth U.N. Congress on Prevention of Crime and Treatment of Offenders, "Standard Minimum Rules for the Treatment of Prisoners" Part I (1955).

I. Prohibition of collateral disabilities.

No collateral disabilities extending beyond the term of the disposition should be imposed by the court, by operation of law, or by any person or agency exercising authority over the juvenile.

Commentary

Convicted adults generally incur various legal and practical disabilities, both during and after serving their sentences. Historically, these deprivations were rooted in the concept of "civil death"; conviction led to forfeiture of civil and proprietary rights.

Today, various aspects of the concept of civil death are retained by thirteen states; other states and the federal government, while disavowing the concept, have enacted specific disability provisions. See "Corrections" 592; Cohen and Rivkin, "Civil Disabilities: The Forgotten Punishment," 35 *Fed. Prob.* 19 (1971); Note, "Civil Death—A New Look at an Ancient Doctrine," 11 *Wm. & Mary L. Rev.* 988 (1970). Thus, convicted or imprisoned individuals often may not vote, hold public office, obtain occupational licenses, secure employment, enter into judicially enforceable instruments, serve as jurors or fiduciaries, maintain family relationships, or obtain insurance and pension benefits. See Cohen and Rivkin, *supra* at 20-23.

The validity of various statutorily imposed disabilities recently has been challenged in the courts. See Rubin, "The Man with a Record: A Civil Rights Problem," 35 *Fed. Prob.* 3, 5 (1971). Abolition of collateral disabilities for adult convicts has been advocated strenuously by a variety of reformers. See the Academy for Contemporary Problems, the Group for the Advancement of Corrections, and the Ex-Prisoners Advisory Group, "Toward a New Corrections Policy: Two Declarations of Principles" 9 (1974); "Corrections" § 16.17; The National Commission on Reform of Federal Criminal Laws, "Proposed New Federal Code," ch. 35 (1971); National Conference of Commissioners on Uniform State Laws, "Uniform Act on Status of Convicted Persons" (1965); "Model Penal Code, Article on Loss and Restoration of Rights Incident to Conviction or Imprisonment," § 306; NCCD, "Model Act to Authorize Courts to Annul A Record

of Conviction" (1962). See also A Bill of Rights for Prisoners, § 11, in American Friends Service Committee, "Struggle for Justice" 169 (1971).

Hawaii enacted the nation's first law prohibiting discrimination against ex-convicts in private employment. 15 *Crim. L. Rev.* 2548 (1974). New York also has enacted legislation prohibiting discrimination in public or private employment against those who have been imprisoned for felonies or misdemeanors. *The New York Times*, July 9, 1975, at 1, col. 4.

For juveniles the imposition and debilitating effects of statutory disabilities should be less of a problem than for adult offenders. Forty-nine jurisdictions statutorily guarantee that the status of an adjudication in juvenile court is not criminal.⁹ M. Levin and R. Sarri, *Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States* 58 (1974). This philosophy often is reiterated by the courts. See, e.g., *District of Columbia v. M.E.H.*, 312 A.2d 561 (D.C. App. 1973) (a juvenile delinquency proceeding is not a criminal prosecution and results in no judgment of conviction so that no civil disabilities or other consequences usually associated with criminal conviction flow); *K.M.S. v. State*, 129 Ga. App. 683, 200 S.E.2d 916 (1973) (an adjudication of delinquency is not a conviction of a crime); and *People ex rel. Colvin v. New York State Board of Parole*, 75 Misc. 2d 432, 347 N.Y.S.2d 831 (Sup. Ct. 1973) (youthful offender proceeding spares the young adult from the stigma and adverse consequences that necessarily flow from a criminal conviction).

Thus, juveniles generally are relieved of the penalties applicable to many adult offenders. But instances of differential and discriminatory treatment of juvenile offenders by public and private agencies or individuals are pervasive nonetheless. For the juvenile offender seeking employment or participation in school or recreational activities, the practical effect of an adjudication of delinquency often is no different from conviction, especially where an employer or agency has access to the juvenile's court record. For state provisions regarding confidentiality of records and the problems of "loopholes," see Levin and Sarri, *supra* at 58-59. The authors conclude that "very few mandatory protections exist for the juvenile. As in other areas, judicial discretion remains paramount. . . . The popular notion that juveniles do not have a 'court record' after juvenile court processing is not supported by examination of statutes." *Id.* at 59.

A recent survey of the effect of a criminal record on employment with state and local public agencies throughout the United States

⁹ Alaska and Arkansas have no such provisions.

concluded that even in states with statutes mandating differential treatment of adult and juvenile offenders, information concerning a juvenile's criminal record often is sought by prospective employers, partially because "... the cooperation of subordinate jurisdictions with the spirit of that [state] policy, if not the law, has been poor." H.S. Miller, "The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies," Report prepared for the Manpower Administration, U.S. Department of Labor, at 23 (1972). In addition, "[d]espite state statutes relating to the confidentiality of juvenile records, evidence indicates that employers frequently have access to them." *Id.* at 5.

It thus becomes obvious that steps must be taken to ensure that juveniles are not disadvantaged by their adjudication. States should consider, for example, penalizing agencies or employers that discriminate against individuals with juvenile records. Miller has suggested that

[s]tates should enact a Use of Juvenile Record Statute which provides for all records to be sealed. Except for sentencing and certain law enforcement purposes, such records should not be released where a request for information is related to an application for employment, license, bonding, or any civil right or privilege. . . . The statute should explicitly require that juveniles be informed of these procedures and how the status of their juvenile record relates to whether or not they must acknowledge this record on any application or in any other proceedings. Miller, *supra* at 5-6.

See generally the *Records and Information* volume, which deals extensively with this issue.

PART II: DISPOSITIONAL CRITERIA

2.1 Least restrictive alternative.

In choosing among statutorily permissible dispositions, the court should employ the least restrictive category and duration of disposition that is appropriate to the seriousness of the offense, as modified by the degree of culpability indicated by the circumstances of the particular case, and by the age and prior record of the juvenile. The imposition of a particular disposition should be accompanied by a statement of the facts relied on in support of the disposition and the reasons for selecting the disposition and rejecting less restrictive alternatives.

Commentary

Standard 1.2 E. provides that the legislature shall establish maximum sanctions for juveniles who commit each category of offense. Suggested maxima are contained in the *Juvenile Delinquency and Sanctions* volume.

The provision of legislatively mandated minimum dispositions, on the other hand, has been rejected as inappropriate for juveniles.¹⁰ Under this scheme, courts will retain the discretion to choose among dispositions ranging from outright release to the maximum authorized by the legislature. This standard is intended to establish criteria to govern the exercise of this judicial discretion.

In establishing maximum sentences for types of offenses, the legislature will take into account the harm caused or risked in a typical case. In choosing among allowable dispositions, on the other hand, the judge should consider the offense in terms of the particular circumstances of its occurrence. This recognizes the fact that no code possibly could articulate the infinite variations of mitigating and aggravating considerations that accompany the behavior described by a discrete juvenile offense. The formula to be used by the judge is: the greater the juvenile's responsibility for the offense, the greater the justification for the maximum term and the more coercive intervention. Mitigating circumstances, of course, are factors in choosing a less severe term or type of disposition. Therefore, inherent in the dispositional criteria recited in the standard is the attempt to identify objective factors to consider in selecting a disposition within the established maximum sentences prescribed for the particular offense which will impose the least restriction consonant with the need for public safety.

The age of the juvenile is also relevant to the determination of the seriousness of his or her behavior. In most cases, the older the juvenile, the greater is his or her responsibility for breaking the law. In this regard, evidence of a mental age lower than a juvenile's chronological age would indicate the choice of a less severe disposition. Similarly, the fact that a juvenile had a record free of serious offenses would indicate a less severe disposition, while a prior record would support the imposition of a more severe disposition.

The standard provides for findings of dispositional fact, which should be supported by a preponderance of the evidence, a statement

¹⁰Generally, the arguments for mandatory minima are that they would tend to reduce crime through the deterrent effect of mandatory sentences, give the legislature more discretionary authority in sentencing and correctional decision making, and eliminate inequities in sentences imposed by different courts.

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of the weight given to certain facts, and specification of the reasons for selecting a particular disposition and rejecting less severe dispositions. These requirements have two purposes: to inform the juvenile and others involved in a case of the reasons for the particular disposition, and to provide guidance for future cases. Eventually, judges' written dispositional guidelines should provide a body of precedent that will make possible the development of more specific disposition guidelines than those contained in this standard.

The exercise of the judge's discretion should be guided by a presumption of minimal interference in the life of the juvenile. The least drastic category of sanctions, "nominal," should be considered and rejected by the sentencing judge before "conditional" and, finally, "custodial" sanctions are reached. Only upon finding that such a disposition is inappropriate to the seriousness of the juvenile's offense, as modified by the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile, should the judge resort to more severe alternatives. This procedure places upon the judge an affirmative obligation to consider and reject lesser sanctions before imposing more severe ones. Maximum sentences are to be imposed only if warranted by seriousness, culpability, age, and record.

The preference for sentencing alternatives that encroach as little as possible on offenders' lives reflects what Bentham in 1789 called "frugality" of punishment: "Now if any mode of punishment is more apt than another to produce any such superfluous and needless pain, it may be styled *unfrugal*. . . ." J. Bentham, *An Introduction to the Principles of Morals and Legislation* 194 (1789). Nigel Walker explains that "[p]enal humanitarians assert . . . that the penal system should be such as to cause the minimum amount of suffering (whether to offenders or others) by its attempts to achieve its aims." *Sentencing in a Rational Society* 4-5 (1969).

The Committee for the Study of Incarceration expresses a similar preference; it refers to the concept as "economy of intervention":

Even after conviction, the burden of justifying any given level of intrusion should always rest on the state. If a proposed penalty interferes with an offender's normal existence to a particular extent, the state should have to show why *this* kind and degree of interference—and no lesser one—is called for. Penalties which inflict severe deprivation should bear an especially heavy burden of justification. The Committee for the Study of Incarceration, "Preliminary Draft," ch. 6 at 3-4 (1974).

Other treatises contain similar provisions; these, however, rely primarily on the concept of "the least drastic alternative." The National

Advisory Commission on Criminal Justice Standards and Goals recommends that criteria should be established for sentencing offenders and that such criteria should include "a requirement that the least drastic sentencing alternative be imposed that is consistent with public safety." The court should then impose the first of a list of alternatives, ranging from unconditional release to total confinement in a correctional facility, that will reasonably protect the public safety. "Corrections" § 5.2. The ABA Standards for Criminal Justice require that "the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public." *Sentencing Alternatives and Procedures* § 2.2 (Approved Draft 1968).

Reference is made in each of these provisions to public safety—the state is admonished to choose the least drastic sentencing alternative consistent with the aim of protecting the public. The least restrictive, or least drastic, alternative doctrine, as generally applied and interpreted in these provisions, requires that a state demonstrate that a chosen course that abridges personal liberties is the least drastic means of achieving a desired end. See Singer, "Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of Least Restrictive Alternative as Applied to Sentencing Determinations," 58 *Cornell L. Rev.* 51 (1972).

The doctrine of the least restrictive alternative was at first used primarily in first amendment cases—see *Shelton v. Tucker*, 364 U.S. 479 (1960), and generally, Note, "The Least Drastic Means and the First Amendment," 78 *Yale L.J.* 464 (1969)—then in civil commitment cases—*Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966), *cert. denied* 382 U.S. 863 (1966)—and most recently in criminal cases where offenders have challenged their sentences under the eighth amendment—*In re Foss*, 519 P.2d 1073 (1974); *Adams v. Carlson*, 368 F. Supp. 1050 (E.D. Ill. 1973); *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973); and *In re Lynch*, 503 P.2d 921 (1972). Within this last category, the cases rely primarily on the language of Mr. Justice Brennan in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972):

... a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary. The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive. 408 U.S. at 279.

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Justice Brennan then went on to state:

Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment. This view of the principle was explicitly recognized by the Court in *Weems v. United States*, 217 U.S. 349 (1910). *Id* at 280.

Thus, disproportionateness and the least drastic alternative doctrine are interrelated. We have chosen, however, to avoid enunciating a pure least drastic alternative requirement, since requiring that the court impose the least drastic sentencing alternative that is "consistent with the goals of the penal system" in reality gives little guidance, especially in light of our limited knowledge regarding which punishments deter and which offenders present a threat to the public safety. See, e.g., Dershowitz, "Preventive Confinement: A Suggested Framework for Constitutional Analysis," 51 *Tex. L. Rev.* 1277 (1973).

Basic to both the least drastic alternative approach and the judicial constraint mandated by this standard is that the burden of persuading the court that less severe sentencing alternatives would be inappropriate in a particular case rests with the state, and not the juvenile.

2.2 Needs and desires of the juvenile.

Once the category and duration of the disposition have been determined, the choice of a particular program within the category should include consideration of the needs and desires of the juvenile.

Commentary

This standard is intended to give the sentencing judge flexibility in meeting the needs and desires of the juvenile involved. It also offers the judge a practical way to differentiate between the available placements within the selected dispositional category and to select one placement above another. Since the factors relevant to the selection of the appropriate duration and category of disposition—seriousness of offense, as modified by the degree of culpability indicated by the circumstances of the particular case and by the age and prior record of the juvenile (Standard 2.1)—may give no guidance to the sentencing judge regarding the most appropriate placement or particular program within the chosen category, it is appropriate to consider whatever social or psychological information has been introduced by the juvenile or by a presentence investigation concerning such factors as the juvenile's need for remedial education or training, his or her

willingness to enroll in a special program for alcoholics or drug addicts, his or her willingness to make restitution, etc.¹¹

It is not envisioned that the court (as opposed to an agency) will determine the identity of the actual program or facility to be used (e.g., a particular foster home) but that the court will determine the particular type of program (e.g., community work or foster home). Consequently, the agency will retain the flexibility to move the juvenile among programs of a similar type, subject to the juvenile's right of access to the grievance procedures described in the *Corrections Administration* volume if he or she disagrees with a decision to transfer or a refusal to transfer among programs in a given category.

The usefulness of this standard may be illustrated most easily with respect to the conditional disposition category. For example, once the sentencing judge has determined six months of a conditional disposition appropriate for a particular juvenile, the judge would select the particular type of conditional disposition by examining the juvenile's expressed needs and desires. For the juvenile with no vocational skills who wants to be an auto mechanic, participation in a suitable training course for the six-month period might be the preferred placement, while for another juvenile who wants to do some useful work with children, six months of community work might be selected. After the court has selected the type of conditional disposition, it is the responsibility of the agency placed in charge of the juvenile's program to provide, directly or through referral or purchase (see Standard 4.1 B.), the appropriate program.

The standard gives flexibility to the sentencing judge while encouraging maximum participation by the juvenile, his or her family, and his or her attorney in fashioning the disposition.

PART III: DISPOSITIONS

3.1 Nominal: reprimand and release.

The court may reprimand the juvenile for the unlawful conduct, warn against future offenses, and release him or her unconditionally.

Commentary

The experience of being adjudicated delinquent may be sufficient sanction for many juveniles, especially for first offenders. According

¹¹ For a discussion of the types of information that may be presented to the sentencing judge, see the *Dispositional Procedures* volume.

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to a recent recommendation, "[t]he censure of the conviction and admonition amounts to some degree of unpleasantness." The Committee for the Study of Incarceration, "Preliminary Draft," ch. 11 at 4 (1974).

Unlike the traditional suspended sentence, no more severe action against the juvenile may be taken automatically as a result of the juvenile's engaging in proscribed conduct after the disposition has been imposed. The deterrent against future offending is that the juvenile may be dealt with more severely (as a second offender) if adjudicated guilty of a new offense.

The National Advisory Commission on Criminal Justice Standards and Goals recognized the utility of unconditional release:

Consistent with the principle of utilizing the least drastic means necessary, outright release of a person convicted of a criminal offense should be considered in many cases. This disposition would be appropriate in cases in which the nature of the offense is so minor or the circumstances such that no useful purpose would be served by imposition of a more drastic sanction. For some offenders, criminal processing and trial may have a decided impact in and of themselves, particularly for first offenders. "Corrections" at 570.

See also *Id.* § 5.2; N.Y. Penal Law § 65.20 (eff. September 1, 1967); Proposed N.Y. Penal Law, Study Bill, Senate Int. 3918 Assembly Int. 5376 at 269-70 (1964). (In cases of misdemeanors and certain lesser felonies, the court may release the defendant unconditionally upon entry of conviction.)

Similarly, the National Commission on Reform of Federal Criminal Laws authorizes "unconditional discharge without imprisonment, conditions or probationary supervision if [the court] is of the opinion that imposition of conditions upon the defendant's release would not be useful." The National Commission on Reform of Federal Criminal Laws, "Study Draft of a New Federal Criminal Code" § 3105 (1970).

Juveniles who might better be released unconditionally now frequently are put on probation. Supervisory dispositions should not be used where actual supervision is neither intended nor thought necessary. The time of supervisors and other resources should be reserved for those juveniles who actually require supervision. In other cases, reprimand and release is the more appropriate sanction. Commenting on the practice in many courts of imposing a term of one day of probation, the American Bar Association asserts that this practice "distorts the image and function of probation and . . . serves no useful purpose." ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* 69 (Approved Draft 1968).

3.2 Conditional.

The court may sentence the juvenile to comply with one or more conditions, which are specified below, none of which involves a removal from the juvenile's home. Such conditions should not interfere with the juvenile's schooling, regular employment, or other activities necessary for normal growth and development.

Commentary

This standard adopts the term "conditional disposition" in place of the catch-all term "probation." Probation, which generally includes community supervision plus conditions, sometimes is imposed upon suspension of execution or imposition of sentence, sometimes as a preadjudicative correctional tool, and sometimes as the singular, final sentence. Use of the phrase "conditional disposition" as authorized by this standard is designed to clear up some of the confusion that may be generated by use of the term "probation," and to denote four separate categories of permissible conditions.

The advantages of probation over institutionalization have been documented extensively, and its use consistently recommended (usually as a disposition preferable to incarceration). See, *e.g.*, "Corrections" § 5.4 at 159-61 (1973); National Commission on Reform of Federal Criminal Laws, "Study Draft of a New Federal Criminal Code," ch. 31 (1970); ABA Standards for Criminal Justice, *Probation* (1970); "Model Penal Code," art. 301; and NCCD, "Standard Probation and Parole Act" (1955). Probation for juvenile offenders is authorized by statute in every state, and is the most frequently used disposition. M. Levin and R. Sarri, *Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States* 53 (National Assessment of Juvenile Corrections 1974).

A. Suspended sentence.

The court may suspend imposition or execution of a more severe, statutorily permissible sentence with the provision that the juvenile meet certain conditions agreed to by him or her and specified in the sentencing order. Such conditions should not exceed, in severity or duration, the maximum sanction permissible for the offense.

Commentary

The suspended sentence posits that the juvenile has agreed to abide by certain specified conditions. The unilateral imposition of conditions by the sentencing judge is not possible under this standard, but is possible when the appropriate dispositional category has been selected. See Standard 3.2. While the standard should permit great

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flexibility in fashioning conditions acceptable to the juvenile, to representatives of the state, and, where appropriate, to the victim of the juvenile's offense, the juvenile may not agree to be bound by conditions more severe than those that could have been imposed by the court. Compliance with the conditions during the time period specified will result in no further enforcement action by the court. Regardless of whether the court suspends imposition or execution of a disposition, the procedures to be followed by the court if the juvenile fails to comply are those specified in Standard 5.4 A. through D.

The suspended sentence provides an opportunity for the juvenile interested in participating in a treatment program or vocational training, in making restitution to the victim, or in performing community work to help formulate plans for such activities. This participation by the juvenile in devising the disposition may enhance compliance, since "to whatever extent the client accepts the limits he has himself set he will be acting upon self-imposed controls rather than external forces." J. Cocks, Los Angeles County Probation Department, "Innovative Correctional Programs for Juvenile Offenders" VIII-105 (undated), describing the "probation contract" used in Ventura County, California.

Use of suspended sentences, though without the added feature of conditions agreed to by the juvenile, as the preferred disposition recently was recommended by the Academy for Contemporary Problems, the Group for the Advancement of Corrections, "Toward a New Corrections Policy: Two Declarations of Principles" 8 (1974). NCCD's "Model Sentencing Act" authorizes courts to "suspend the imposition or execution of sentence, with or without probation" for most crimes. "Model Sentencing Act" § 9 (1972). The American Bar Association has stated: "A conditional suspension of sentence . . . can effectively suffice in many cases. . . ." ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* 6 (Approved Draft 1968). Suspended sentences also are authorized by the "Model Penal Code," Sentencing Provisions § 6.01 (1963).

B. Financial.

1. Restitution.

a. Restitution should be directly related to the juvenile's offense, the actual harm caused, and the juvenile's ability to pay.

b. The means to carry out a restitution order should be available.

c. Either full or partial restitution may be ordered.

d. Repayment may be required in a lump sum or in installments.

e. Consultation with victims may be encouraged but not required. Payments may be made directly to victims, or indirectly, through the court.

f. The juvenile's duty of repayment should be limited in duration; in no event should the time necessary for repayment exceed the maximum term permissible for the offense.

Commentary

The use of restitution¹² for juveniles, as well as the use of fines (see Standard 3.2 B. 2.) as a sanction has received little attention. The lack of experience with restitution and fines in the juvenile field, however, need not preclude greater use of these simple and straightforward dispositional alternatives. The current extent of the use of restitution "seems largely confined to probation services, and even here it is commonly regarded as only an ancillary tool to the primary 'treatment' provided through the supervisory process." Fogel, Galaway, and Hudson, "Restitution in Criminal Justice: A Minnesota Experiment," 8 *Crim. L. Bull.* 681, 682 (1972). While a restitution order may be deemed an appropriate condition of probation, its use need not be so confined; restitution may well be the sole disposition in certain cases.

Greater use of restitution should be encouraged for several reasons. The most obvious, although not necessarily the most important, is the possibility of making the victim whole. In recent years, some states and the federal government have begun to enact schemes for compensating victims of violent crime. See generally R. Goldfarb and L. Singer, *After Conviction* 135-38 (1973). None of the legislation, however, integrates compensation of the victim with sanctioning of the offender.

Restitution orders may have benefits for offenders as well as for their victims; the advantages of the sanction have been summed up by Fogel, Galaway, and Hudson:

¹² Restitution refers to repayment by the offender of the fruits of the crime or reparation for loss or damage caused thereby. As used here, the term is intended to refer to payments made within the juvenile justice system as a sanction for an offense of which the defendant has been convicted. For similar definitions, see ABA Standards for Criminal Justice, *Probation* § 3.2(c) (vii) (1970); and "Model Penal Code," articles on Suspended Sentences, Probation and Parole § 301.1(2) (h) (1962). See also Galaway and Hudson, "Restitution and Rehabilitation: Some Central Issues," 18 *Crime & Delinq.* 403, 404-405 (1972).

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First, the requirements of restitution can be logically and rationally related to the damages done. Second, the use of restitutive procedures would require the offender to engage in constructive acts that may lead to greater integration with, as opposed to alienation from, the larger social order. Furthermore, restitution can be concrete and specific, thus allowing offenders to know clearly at all times where they stand relative to completing the adjudicated penalty. Finally, restitution addresses itself to the strengths of offenders and rests upon the assumption that individuals either possess or are able to acquire the requisite skills and abilities to redress the wrongs done. *Supra* at 681, 683.

According to David Dressler, the strengths of restitution are that:

[i]t is directly related to the offense and the attitude of the offender. There is a reality involved: society does not sanction fraud or other forms of theft; it does not approve injury inflicted upon an innocent person. Society wants to make sure the offender realizes the enormity of his conduct, and it asks him to demonstrate this by making amends to the individual most affected by the defendant's depredations.

[Restitution] offers the individual something within reason that he can do here and now, within the limits of his ability, to demonstrate to himself that he is changing. *Practice and Theory of Probation and Parole* 241 (2d ed. 1969).

Among others emphasizing the rehabilitative potential of restitution are O.H. Mowrer, *The Crisis in Psychiatry and Religion* (1961), *The New Group Therapy* (1964), and "Integrity Therapy: A Self-Help Approach," in *Psychotherapy—Theory, Research and Practice* (1966); and Eglash, "Creative Restitution: Some Suggestions for Prison Rehabilitation Programs," *Am. J. Corr.* 20 *et seq.* (November-December 1958). The United States Code, 18 U.S.C. § 3651 (1925) provides that while on probation an offender "... may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had..." Although this provision accords considerable discretion to the sentencing judge, its primary use has been for crimes involving financial matters and where the offender is presumed to be able to afford the reparation, *e.g.*, for embezzlement—*United States v. LaFollette*, 32 F. Supp. 953 (E.D. Pa. 1940); for tax evasion—*United States v. Taylor*, 305 F.2d 183 (4th Cir. 1962), *cert. denied* 371 U.S. 894, *reh. denied* 371 U.S. 943; *United States v. Steiner*, 239 F.2d 660 (7th Cir. 1957), *cert. denied* 351 U.S. 936; *United States v. Stoehr*, 196 F.2d 276 (3rd Cir. 1952), *cert. denied* 344 U.S. 826; and for violations of the criminal provisions of the Fair Labor Standards

Act—*United States v. Berger*, 145 F.2d 888 (2d Cir. 1944), *cert. denied* 324 U.S. 849; *United States v. Chiumento*, 49 F. Supp. 551 (D.N.J. 1943). See Drobny, "Compensation to Victims of Crime: An Analysis," 16 *St. Louis U.L.J.* 201, 214 (1971).

Various states have adopted their own versions of restitution. Some explicitly mention reparation or restitution only with regard to adult offenders. Application of similar orders for juveniles is not foreclosed in these states, however, since wide discretion usually is accorded to judges to fashion appropriate dispositions for adjudicated youths. Among those states specifically permitting restitution orders for adults are: Ala. Code tit. 42, § 22 (1959) (provides for restitution or reparation for actual damages or loss as a condition of probation); Fla. Stat. Ann. § 948.03 (1973) (allows reparation or restitution as a condition of probation); Ill. Ann. Stat. ch. 38, § 1005-6-3(b)(10) (1970) (specifies restitution as a permissible probation condition); La. Code Crim. Pro. Ann. tit. 30, art. 895 (1966) (allows restitution or reparation as a condition of probation); Me. Rev. Stat. Ann. tit. 34, § 1631 (1964) (permits restitutionary orders on probation); Neb. Rev. Stat. § 29-2219(2)(j) (1964) (restitution as a condition of probation); N.H. Rev. Stat. Ann. § 504.16 (1968) (probation officers authorized to collect restitutionary payments); Vt. Stat. Ann. tit. 28, § 252 (1975 Supp.) (restitution as a condition of probation); and W. Va. Code Ann. § 62-12-9 (1966) (restitution as a condition of probation).

States with restitution provisions mentioned in the juvenile codes include Colo. Rev. Stat. Ann. § 22-8-11(h) (1974) (restitution for damage to persons or property is an available disposition for an adjudicated delinquent); Ind. Ann. Stat. § 31-5-2-1 (Burns 1969) (restitution orders authorized for malicious trespass or petty larceny for a delinquent able to pay); Ky. Rev. Stat. Ann. § 208.240 (1970) (restitution or reparation authorized on such conditions as the court determines); Mass. Ann. Laws ch. 119, § 62 (1964) (restitution may be required as a probation condition); Minn. Stat. Ann. § 260.185(e) (1971) (reasonable restitution may be ordered if the offense involves damage to property); Ore. Rev. Stat. § 419.507 (1974) (restitution authorized for property damaged or destroyed); S.D. Compiled Laws Ann. § 26-8-39 (1967) (restitution may be ordered for damaged property); Utah Code Ann. § 55-10-100 (1973) (restitution for damage or loss); Va. Code Ann. § 16.1-178(8) (1975) (restitution may be ordered); and Wyo. Stat. Ann. § 14.115.30 (1959) (restitution is an available disposition for juveniles).

The use of restitution also has been recommended by the American Bar Association, which, in its *Probation* volume § 3.2(c)(viii), provides as a condition of probation restitution of the fruits of the

crime or reparation for loss or damage caused thereby, and which, by implication, in its *Sentencing Alternatives and Procedures* § 2.7(c)(iii) (1967), requires that in determining whether to impose a fine and its amount, the court consider the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim of the crime.

The "Model Penal Code," articles on Suspended Sentences, Probation and Parole § 301.1(2)(h) allows the court, as a condition of its order, to require defendants to make restitution of the fruits of their crime or to make reparation, in an amount they can afford to pay, for the loss or damage caused thereby. Use of restitution is also alluded to by the National Advisory Commission on Criminal Justice Standards and Goals. In its volume on "Corrections," section 5.5 reveals the preference for restitution by requiring that fines should be imposed only where such imposition will not interfere seriously with the offender's ability to make reparation or restitution to the victim.

Any restitution ordered should be directly related to the juvenile's offense, the actual harm caused, and, where money restitution is ordered, to the juvenile's ability to pay. The first requirement simply prevents imposition of restitutionary orders unrelated to the offense for which the defendant was convicted. In *People v. Becker*, 349 Mich. 476, 84 N.W.2d 833 (1957), an order of restitution amounting to \$1,244 for payment of hospital charges to the parties injured in a collision was vacated since the charge involved was leaving the scene of an accident, and the damages resulted from hitting the pedestrian, not from leaving the scene. *Accord, State v. Barnett*, 110 Vt. 221, 3 A.2d 521 (1939). See Lasser, "Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness," 5 *U. Rich. L. Rev.* 71, 94-5 (1970). Similarly, restitutionary orders must be related to the actual harm caused. See, e.g., *Karrell v. United States*, 181 F.2d 981 (9th Cir. 1950), *cert. denied* 340 U.S. 891 (1950) (an order of restitution to pay persons other than the six whom defendant was found guilty of defrauding was held void on appeal); and *United States v. Taylor*, 305 F.2d 183 (4th Cir. 1962), *cert. denied* 371 U.S. 894, *reh. denied* 371 U.S. 943 (1962) (order that defendant pay \$32,000 in back income taxes remanded since there were not enough facts in the record to determine exactly what defendant owed). *Accord, State v. Sherr*, 9 Wis. 2d 418, 101 N.W.2d 77 (1960).

The final, and most difficult, requirement of this standard involves consideration of the juvenile's ability to pay. In order to achieve the purposes of the juvenile justice system and to teach juveniles that there are consequences flowing from their actions, restitution should

be paid by the juveniles themselves, either out of money they have saved, out of the proceeds of a job they hold, or out of the proceeds of employment to which they have been referred by the court. In order to prevent discrimination against juveniles without funds, it is important that the financial circumstances of the juvenile and his or her family be taken into account. No court should require restitution of an indigent, unemployed juvenile without ensuring that employment is available; in such a case, the means by which to fulfill the order are obviously lacking, making compliance a virtual impossibility. See Standard 1.2 G. Also recommending consideration of the offender's ability to pay are the President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 35 (Washington, D.C. 1967); ABA Standards for Criminal Justice, *Probation* § 3.2(d) (1970); and "Model Penal Code," articles on Suspended Sentences, Probation and Parole § 301.1(2)(h).

Should the court deem restitution the appropriate sanction for such a juvenile, arrangements for employment should be provided; a job may be found for the juvenile and a portion of the earnings turned over to the victim, or work benefitting the victim may be required in lieu of monetary repayment (subject, of course, to the victim's wishes in this regard). Indeed, restitution in kind, where, for example, a juvenile repairs damage caused by his or her own vandalism or removes graffiti he or she has put on a wall, often may be the most appropriate and frequently employed form of restitution.

Either full or partial restitution is authorized by Standard 3.2 B. 1. c. The judge may tailor the order to fit the circumstances of the individual case, and is required to consider the juvenile's ability to pay. Where full restitution is achievable, it may be the proper sanction; where damage is extensive and full financial repayment clearly beyond the means of the juvenile, partial, or "symbolic," restitution may suffice. See Galaway and Hudson, *supra* at 403, 405. See also Fogel, Galaway, and Hudson, *supra* at 681, for a description of the Minnesota program, which requires full restitution as the only sanction.

It would be unfair to limit the victim to whatever restitution is ordered by the sentencing court, since the court is bound to consider the circumstances of the juvenile and limitations on the time during which he or she may be required to make restitution, as well as on the actual harm caused. Civil actions for damages should not be precluded by restitutionary dispositions; any such orders, however, naturally should be taken into account by a civil court in its assessment of damages to the victim. However, such civil actions by vic-

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tims for injury inflicted by juvenile offenders are separate proceedings from the juvenile court adjudication and disposition. The juvenile court dispositional order of restitution can be enforced only by the juvenile court.

Restitution may be the sole sanction, or it may be ordered in conjunction with any other appropriate sanction, as long as the totality does not exceed the statutory maximum for the offense. Where actual financial harm incurred by the victim is nominal but the gravity of the crime substantial, for instance, the judge may feel that the restitutionary sanction alone will be inadequate to impress upon the juvenile offender the consequences of his or her actions. The model codes cited, *supra*, adhere to this view, as does the "Model Sentencing Act" § 9 (1972 Revision), which expressly provides for the use of restitution either as the sole penalty or in conjunction with other penalties.

The required method of repayment is left to the discretion of the sentencing judge, since the circumstances of each case will determine which method of collection is appropriate. For example, where the juvenile is working and a share of his or her earnings will be attached for victim repayment, the installment plan may be deemed the most feasible method of collection.

One advantage of the restitutionary sanction may be in reducing the alienation between the offender and the victim. Involvement of the victim in developing a restitution plan for the juvenile cannot be coerced; however, the victim's participation may be invited and encouraged. See Fogel, Galaway, and Hudson, *supra* at 681, 685, for a discussion of victim-offender reconciliation efforts in the Minnesota restitution program.

Finally, the standard limits the duration of the juvenile's duty to make restitution to the maximum term permissible for the offense. That maximum has statutorily been found sufficiently onerous a sanction to achieve the purposes of the juvenile corrections system; to impose an obligation of repayment that extends beyond the maximum time is to increase the penalty for the offense.

2. Fine.

a. Imposition of a fine is most appropriate in cases where the juvenile has derived monetary gain from the offense.

b. The amount of the fine should be directly related to the seriousness of the juvenile's offense and the juvenile's ability to pay.

c. Payment of a fine may be required in a lump sum or installments.

d. Imposition of a restitution order is preferable to imposition of a fine.

e. The juvenile's duty of payment should be limited in duration; in no event should the time necessary for the payment exceed the maximum term permissible for the offense.

Commentary

Use of the fine as a criminal sanction dates back to the time when feudal overlords required small payments by offenders to help defray the expenses of trial. After the state took over responsibility for punishing criminals, payment by offenders was made to the king. See R.L. Goldfarb and L.R. Singer, *After Conviction* 126 (1973); Rosenzweig, "Fine," in *The Law of Criminal Correction* 221 (S. Rubin ed. 1963). Although the routine use of fines has produced numerous abuses and inequalities, fines nevertheless retain utility as a viable sentencing alternative if used with proper safeguards.

Fines provide an alternative to institutionalization and are easily capable of adjustment according to the means of the juvenile and the gravity of the offense. Fines are readily remissible and can be repaid in cases of injustice. Fines are economical for the state, and might be made payable to a charity chosen by the juvenile. There is some indication that fines may be relatively efficient in reducing recidivism. See, e.g., "The Sentence of the Court: A Handbook for Courts on the Treatment of Offenders" (London, HMSO 1969), for data on the effectiveness of fines for particular offenses, especially for larceny; and Samuels, "The Fine: The Principles," 1970 *Crim. L. Rev.* 201, 206 (1970), for results of a study of the utility of fines for shoplifters. See also Daunton-Fear, "The Fine as a Criminal Sanction," 4 *Adelaide L. Rev.* 307 (1972). In Minneapolis, fining chronic drunks produced longer intervals between arrests than jail or suspended sentences. Lovald and Stub, "The Revolving Door: Reactions of Chronic Drunkenness Offenders to Court Sanctions," 59 *J. Crim. L.C. & P.S.* 525 (1968).

The use of fines for juveniles is expressly authorized by statute in several states. See, e.g., Ind. Ann. Stat. § 31-5-2-1 (1969); Me. Rev. Stat. Ann. tit. 15, § 2611 (1965); N.J. Rev. Stat. § 2A:168-2 (1971); Ohio Rev. Code Ann. § 2151.355(f) (Supp. 1974); S.C. Code Ann. § 15-1196(21) (1962); S.D. Compiled Laws Ann. § 26-8-39.1 (Supp. 1975); Tenn. Code Ann. § 37-231(f) (Supp. 1975); Utah Code Ann. § 55-10-100 (1974); Va. Code Ann. § 16.1-178(9) (1975); and Wyo. Stat. Ann. § 14.115.30 (Supp. 1975). Fines for adults are permitted by statute in most states and authorized by federal statute, 18 U.S.C. § 3651 (1964) (fine as condition of pro-

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bation). Use of the fine as a criminal sanction in appropriate cases is endorsed by the ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 2.7 (Approved Draft 1968), and *Probation* § 3.2(d) (Approved Draft 1970); NCCD, "Model Sentencing Act" § 9 (1972); "Model Penal Code" § 6.03; National Commission on Reform of Federal Criminal Laws, "Study Draft of a New Federal Criminal Code" § 3302 (1970), "Corrections" § 5.5; and the Academy for Contemporary Problems, the Group for the Advancement of Corrections, and Ex-Prisoners Advisory Group, "Toward a New Corrections Policy: Two Declarations of Principles" (1974).

Use of the fine as a sentencing alternative is most appropriate for property crimes:

...if material gain is the object of the criminal act, punishing the offender by taking away more than he has criminally gained, thus making the crime economically unprofitable to him, would seem to be particularly appropriate. Deterrence by fine is more probable where the crime is motivated by greed and avarice than where other motives predominate. Miller, "The Fine—Price Tag or Rehabilitative Force?" 2 *Crime & Delinq.* 377, 379 (1956).

See also Note, "Fines and Fining—An Evaluation," 101 *U. Pa. L. Rev.* 1013, 1018 (1953). Limiting use of fines to cases where the defendant has derived a pecuniary gain from his or her offense is recommended by the American Bar Association, *Sentencing Alternatives and Procedures* § 2.7(a); and the "Model Penal Code" § 7.02(1)(2) (the court shall not impose a fine in addition to a sentence of imprisonment or probation unless the defendant has derived a pecuniary gain from the crime, but imposition of a fine as the sole sanction is not so limited); and is required by some state statutes. See, e.g., N.Y. Penal Law § 80.00(1) (1967).

The standard recommends that fines be considered as a sentencing alternative primarily in cases in which the juvenile has financially profited by his or her offense. Its use in other cases, however, is not entirely foreclosed.

The amount of the fine should be directly related to the seriousness of the juvenile's offense and to his or her ability to pay. Requiring that the amount of the fine be directly related to the seriousness of the offense reflects adherence to the principle of limited intervention as expressed in the standards; the amount of the fine levied against a juvenile convicted of armed robbery would be greater than that levied against a first-time shoplifter. In order to achieve the purposes of the juvenile justice system and to teach juveniles that there are consequences flowing from their actions,

finances should be paid by the juveniles themselves, either out of money saved or the proceeds of a job, or out of the proceeds of employment to which they have been referred by the court.

Requiring a relationship between the amount of the fine and the juvenile's ability to pay is an attempt to alleviate some of the problems associated with the use of fines in the past, especially the institutionalization of individuals sentenced to pay a fine who are unable to do so. The injustice of imprisonment for failure to pay fines is discussed at length by Ronald Goldfarb in his chapter "Debtors in Jail," in *Jails: The Ultimate Ghetto* (1975). The Supreme Court recognized and attempted to deal with the problem in two decisions. *Williams v. Illinois*, 399 U.S. 235 (1970), invalidated the imprisonment of an indigent for 101 days beyond the maximum sentence provided by law to work off his unpaid fine; and *Tate v. Short*, 401 U.S. 395 (1971), held unconstitutional the sentencing of an indigent to a municipal prison farm for eighty-five days to work off his fine, since the Texas law provided only for fines for the offense leading to conviction and not for imprisonment.

Requiring that the amount of the fine be related to the offender's ability to pay is an attempt to deal with the problem of what to do with those unable to pay fines; if the juvenile is indigent, unskilled, unemployable, or unable to pay a fine for any other reason, and if job placement by the court or correctional agency is impossible, a fine is not a suitable sanction. Fines should be imposed only for those who are likely to be able to pay them. In discussing the use of fines for adult offenders, the District of Columbia Crime Commission stated:

If a fine is to be imposed, it should be set in light of the offender's ability to pay. . . . If the offender cannot pay a fine all at once, periodic installment payments should be established. If it appears that he will not be able to pay a fine under any circumstances, the court should impose a sentence of either imprisonment or probation, whichever is appropriate in the case, and not offer the offender a false option unrelated to his character or his offense. "Report of the President's Commission on Crime in the District of Columbia" 394 (1966).

"Corrections" § 5.5(2) recommends that a fine be imposed "only if there is a reasonable chance that the offender will be able to pay without undue hardship for himself or his dependents." The American Bar Association requires consideration of the offender's financial resources in determining whether to impose a fine. *Sentencing Alternatives and Procedures* § 2.7(b) and (c) (Approved Draft 1968). A legislative criterion that the court not be empowered to impose a fine

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unless "the defendant is or will be able to pay it" is suggested by the "Model Penal Code" § 7.02(3)(a).

A New York law provides that:

In any case where the defendant is unable to pay a fine imposed by the court, the defendant may at any time apply to the court for resentencing. In such case, if the court is satisfied that the defendant is unable to pay the fine, the court must, notwithstanding any other provision of law, revoke the entire sentence imposed and must resentence the defendant. Upon such resentencing, the court may impose any sentence it originally could have imposed except that the amount of any fine imposed shall not be in excess of the amount the defendant is able to pay. N.Y. Code Crim. Pro. § 470-d(3), as amended, N.Y. Sess. Laws 1967, ch. 681, § 61.

For juveniles who have jobs, or for whom employment can be found, fining procedures such as those used in several other countries are recommended. The laws of Switzerland, Finland, Cuba, and Sweden determine the amount of fines according to the means of the offender. The theory is twofold:

... a fine is expressed in units, their number varying between the minimum and maximum numbers prescribed for the offense. In this manner, distinctions in punishment according to the nature of the offense are preserved. The monetary value of the unit, upon which a minimum and maximum are also set, is determined by considering the wealth of the defendant, his daily income, his production capacity, and the number of his dependents. In this manner, distinctions in punishment according to the economic status of the offender are achieved. Note, "Fines and Fining—An Evaluation," 101 *U. Pa. L. Rev.* 1013, 1025 (1953).

Under the Swedish system of day fines, the fine is arrived at by multiplying a number that reflects the gravity of the offense by a sum of money, the day fine, which is assessed according to the offender's ability to pay and expressed in units reflecting the individual's net earnings. Great Britain, Home Office, "Non-Custodial and Semi-Custodial Penalties; A Report of the Advisory Council on the Penal System" 74-77 (London, HMSO 1970). Because the seriousness of the offense and the defendant's ability to pay are considered, the fine becomes a more sensible and more flexible sanction.

Tailoring the method of payment to the means of the individual by devising flexible collection plans can help to alleviate injustice. The "Model Penal Code," for example, suggests that "the Court may

grant permission for the payment to be made within a specified period of time or in specified installments," and that the court be empowered to allow additional time if nonpayment is without fault, or, if necessary, to change the terms and conditions of payment. Sections 302.1(1) and 302.2(2). The American Bar Association recommends that the "method of payment should remain within the discretion of the sentencing court. The court should be explicitly authorized to permit installment payments of any imposed fine, on conditions tailored to the means of the offender." *Sentencing Alternatives and Procedures* § 2.7(b) (Approved Draft 1968). Legislation authorizing courts to impose fines payable in installments is called for by the National Advisory Commission. "Corrections" § 5.5. Installment payments also are authorized by the National Council on Crime and Delinquency. "Model Sentencing Act" § 9.

Judges may authorize payment of fines in installments under the laws of several states and the federal government. See, for example, Alaska Stat. § 12.55.100 (1974); Cal. Penal Code § 1205 (1966 Supp.); Colo. Rev. Stat. Ann. § 39-11.502 (e) (1975); Del. Code Ann. tit. 11, § 4332 (c) (1966 Supp.) and 57 Laws of Del. ch. 198 (1970); Kan. Stat. Ann. § 21-4610(g) (1974); Md. Ann. Code art. 52, § 18 (1966 Supp.); Mass. Gen. Laws Ann. ch. 279, § 1A (1959); Mich. Stat. Ann. § 28.1075 (1954); N.J. Rev. Stat. § 2A: 166-15 (1953), § 2A:168-2 (1971); N.Y. Code Crim. Pro. § 470-d(1) (b), as amended, N.Y. Sess. Laws 1967, ch. 681, § 61; Ohio Rev. Code Ann. § 2947.11 (1972); and Wyo. Stat. Ann. § 7-322 (1959).

Restitution orders are preferable to fines. Restitution confers benefits unachievable by the fine by making the victim whole and by making the offender responsible for compensating the victim. As the American Bar Association, which also expresses a preference for compensation by the offender to the victim as opposed to compensation to the state in the form of a fine, notes, "it is certainly undesirable for the state to compete with the victim for the often meager resources of the defendant." *Sentencing Alternatives and Procedures* § 2.7(c)(iii). The "Model Penal Code" expresses a similar preference for restitution, stating: "The Court shall not sentence a defendant to pay a fine unless the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." Section 7.02 (3)(b). The National Advisory Commission on Criminal Justice Standards and Goals states: "A fine should be imposed only where the imposition will not interfere seriously with the offender's ability to make reparation or restitution to the victim." "Corrections" § 5.5.

Subject to the time limitation of Standard 3.2 B. 2. e., a fine may

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be imposed as the sole sanction or in conjunction with other sanctions. Combining sanctions is not recommended in most cases (the "Model Penal Code" and the "Study Draft of the Federal Criminal Code" discourage compounding sanctions), but since use of the fine is recommended in cases in which the juvenile has derived monetary gain from the offense, a requirement that the offender disgorge the profit along with another sanction, such as probation, would not be inappropriate. See Note, "Fines and Fining—An Evaluation," *supra* at 1013, 1029.

3. Community service.

a. In sentencing a juvenile to perform community service, the judge should specify the nature of the work and the number of hours required.

b. The amount of work required should be related to the seriousness of the juvenile's offense.

c. The juvenile's duty to perform community service should be limited in duration; in no event should the duty to work exceed the maximum term permissible for the offense.

Commentary

Although its use as a sanction for offenders has not been widely reported, informal use of community work as a sentencing alternative is probably more prevalent than it appears from the literature. The classic example is the judge who believes that the best way to teach a lesson to the juvenile found guilty of sounding a false fire alarm is to make him wash fire trucks on weekends.

Some formal programs of community service already exist. In Denver, Colorado, a year-round mountain parks work program for fifteen- to seventeen-year-old boys provides a weekend group living experience in which half of the juvenile's day is spent in school and half the day in work. Denver also has a work program for children who remain in their homes; half the day is spent in school and half working in the city's parks or zoo. It is reported that children remain in this program for an average of thirty days. Joint Commission on Correctional Manpower and Training, "The Future of the Juvenile Court: Implications for Correctional Manpower and Training" 37 (1968).

Young offenders in Multnomah County, Oregon, who agree to participate are given the opportunity to take part in the Alternative Community Service Program, in which they perform specific amounts of work for a nonprofit agency at a time that does not

conflict with their regular employment. If the job is done satisfactorily, no further sentence is required. The minimum number of hours of work required is twenty-four; eighty hours is the usual upper limit. Work required is for agencies whose services are designed to enhance the social welfare, physical or mental stability, environmental quality, or general well-being of the community.

Programs in California are the best known. In East Palo Alto, youths are referred by the Community Youth Responsibility Program to "work tasks," contractual arrangements in which youths work at some community project selected for its rehabilitative potential, such as supervising recreation programs for young children. See K.R. Geiser, Jr., "Youth Services Field Study: Area 2" (Interim Report prepared for the Juvenile Justice Standards Project, March 4, 1974); Urban and Rural Systems Associates, "Evaluation of the Community Youth Responsibility Program" 17-19 (April 10, 1972). In Ventura County, the probation department uses the Ward Work Training Program as a sentencing alternative. In lieu of fines and further incarceration, a boy may be ordered by the court to put in a specific number of hours working at a county park or other facility. He is supervised by the regular personnel and his work is evaluated to determine if it meets acceptable criteria. Girls, who may be required to work in the county hospital laundry, recently were added to this program.

Judges in Alameda County, California, may offer convicted misdemeanants (adults and juveniles) the option of performing a stipulated number of hours of community service in lieu of paying a fine or serving jail time. Those choosing community work are placed in nonprofit or public agencies. Assignments vary from clerical and maintenance work to staff assistance and child care. It was reported that 69.5 percent of those in the work project between April and June 1973 had successfully completed their service terms; a success rate of 80 percent was projected, and nearly 10 percent of the offenders did more work than was required. Volunteer Bureau of Alameda County, Court Referral Program, "4th Quarterly Report: 4/1/73 to 6/30/73."

Requiring that individuals perform alternate community service in lieu of other available coercive dispositions has achieved increased recognition recently. As part of his amnesty program, President Ford announced in 1974 that draft evaders and deserters might be required to perform community work tasks for specified periods of time, without pay.

Work orders are sometimes used abroad. Under Part IV of the Probation of Offenders Act of 1971, courts in Tasmania may order

work tasks instead of prison sentences. In England, The Home Secretary's Advisory Council on the Penal System produced a report in 1970 introducing the concept of community service by offenders as an alternative to custodial treatment. Great Britain, Home Office, "Non-Custodial and Semi-Custodial Penalties: A Report of the Advisory Council on the Penal System" (London, HMSO 1970). The proposals were incorporated in the Criminal Justice Act of 1972 and six probation and after-care service centers were selected to implement the new programs. Under the community service scheme, offenders may be required by the court to work at a "community task" for a total of not less than forty nor more than 240 hours within a twelve-month period. If an offender subject to a community service order fails to carry out a work commitment, he or she can be returned to the court for further disposition. Services performed include such tasks as woodwork, building, renovating gardens, painting, decorating, and sports coaching. "Community Service by Offenders, A Progress Report on First Year Operation of the Scheme by the Inner London Probation and After-Care Service" (London, January 1974).

Such work projects are intended to benefit the community, to enable the juvenile to make some form of restitution and to help him or her to develop greater responsibility for his or her actions, appreciate the value of work, and learn to work with other people. Juveniles sentenced to community service projects need not be financially recompensed for their labor; the work itself is the sanction. Since there is no compensation, the community service required should not interfere with the juvenile's schooling or other employment.

Work assignments should be for the general welfare of the community, within the juvenile's ability, and, where possible, related to the nature of the juvenile's offense. Consistent with the principle of determinacy, the type of work and the number of hours required must be specified by the sentencing judge, and the number of hours required must be related to the seriousness of the juvenile's offense. The duration of a community service order should not be longer than would be the duration of the juvenile's duty to fulfill a restitution order or a fine.

C. Supervisory.

1. Community supervision.

The court may sentence the juvenile to a program of community supervision, requiring him or her to report at specified intervals to a probation officer or other designated individual and

to comply with any other reasonable conditions that are designed to facilitate supervision and are specified in the sentencing order.

Commentary

When supervision is required, it should be related in some way to the juvenile's offense or pattern of offending. For a juvenile who gets into trouble during his or her after school leisure hours, for example, reporting each day during those hours to a probation officer or some other designated individual may help to prevent future offending. While reporting is not the only permissible type of supervisory condition, other conditions imposed must be "designed to facilitate supervision." A curfew is one example of such a condition and would be particularly appropriate for the juvenile whose offense was committed late at night. A prohibition against frequenting a specified place also may be an appropriate supervisory condition in some cases, so long as it is reasonable and sufficiently precise to be obeyed.

Thus, permissible supervisory conditions correlate with the usual law enforcement functions of probation. Their function is to keep the juvenile from further law violations and not to modify his or her personality.

An interesting variation of community supervision is "peer supervision," employed by the San Mateo County, California, probation department's Watoto Project in East Palo Alto. Local juveniles, some of whom are former probationers, are hired to supervise other juveniles. All are under the general supervision of a probation officer.

2. Day custody.

The court may sentence the juvenile to a program of day custody, requiring him or her to be present at a specified place for all or part of every day or of certain days. The court also may require the juvenile to comply with any other reasonable conditions that are designed to facilitate supervision and are specified in the sentencing order.

Commentary

This standard permits the court to sentence a juvenile to a program of day custody and is an extension of the usual reporting requirements of any supervisory disposition. It generally envisions after school activity centers, such as the one operated at a YMCA in Boston by the private Citizenship Training Group. It would be appropriate for the juvenile whose offenses occur during leisure hours, or

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while his or her parents are away from home at work, to be sentenced under this standard. The juvenile must report to, and remain in, a specified place for all or part of every day or of certain days. His or her attendance in the facility is required solely for the purpose of supervision. While there may be treatment programs at the facility,¹³ and some sort of activities must be provided, participation by the juvenile sentenced under this standard is voluntary; for sentences permitting a requirement of mandatory participation in such programs, see the remedial disposition standard, 3.2 D.¹⁴ For the requirements of access to services and voluntary participation, see Part IV.

D. Remedial.

1. Remedial programs.

The court may sentence the juvenile to a community program of academic or vocational education or counseling, requiring him or her to attend sessions designed to afford access to opportunities for normal growth and development. The duration of such programs should not exceed the maximum term permissible for the offense.

2. Prohibition of coercive imposition of certain programs.

This standard does not permit the coercive imposition of any program that may have harmful effects. Any such program should comply with the requirements of Standard 4.3 concerning informed consent.

Commentary

This standard permits coercive imposition of community programs, such as vocational training, special education courses, and various types of therapy, including individual or group counseling or

¹³Day care as a condition of probation or as an independent sentencing alternative is used in many jurisdictions. These day care programs, however, revolve around planned, compulsory programs of vocational training, remedial education, counseling, guided group interaction meetings, etc. *See, e.g.*, Post, Hicks, and Monfort, "Day-Care Program for Delinquents: A New Treatment Approach," 14 *Crime & Delinq.* 353 (1968). For a discussion of the Philadelphia Youth Development Day Treatment Center, the day care program for delinquent girls in San Mateo County, California, and the Girls' Unit for Intensive Daytime Education, Richmond, California, see Harlow, "Intensive Intervention: An Alternative to Institutionalization," 2 *Crime & Delinq. Lit.* 17-19 (1970).

¹⁴Participation also may be required if the juvenile has been sentenced under Standard 3.2 A. and he or she has agreed to attend a day facility and to participate in specified programs there.

analysis, as a dispositional alternative. The standard attempts to compromise between the conviction that, for the reasons outlined below, participation in such programs should be voluntary, and various practical considerations, which are discussed below.

Purely voluntary participation in remedial programs is considered preferable to coercive imposition for several reasons: (A) participation in correctional programs has not been shown to be effective in reducing recidivism; (B) voluntary participation is likely to prove more productive than coerced participation and programs catering to willing participants are likely to be of higher, more consistent quality than those catering to unwilling participants; and (C) treatment programs can be highly intrusive, and thus may infringe on rights of privacy, personal dignity, and autonomy. For an extended discussion of each of these propositions, see the commentary to Standard 4.2, which prohibits the coercive imposition of treatment programs for juveniles subject to custodial dispositions and the administrative imposition of programs in addition to those specified by the court.

For recommendations by others that offenders' participation in remedial programs be voluntary, see the Academy for Contemporary Problems, the Group for the Advancement of Corrections, and the Ex-Prisoners Advisory Group, "Toward a New Corrections Policy: Two Declarations of Principles" 11 (1974); New York Citizens' Inquiry on Parole and Criminal Justice, Inc., "Report on the New York State Parole System, Preliminary Draft" (1974); "Corrections" 45 (1973); The American Assembly, Forty-second American Assembly of Columbia University, "Final Report: Prisoners in America" (1973); Annual Chief Justice Earl Warren Conference on Advocacy in the United States, "Final Report: A Program for Prison Reform" (1972); American Friends Service Committee, "Struggle for Justice" (1971).

The primary practical consideration prompting the recommended allowance of the coercive imposition of remedial programs, on the other hand, is the provision of another sentencing alternative that may dissuade courts from relying on custodial sanctions.¹⁵ Evidence suggests that when judges have a variety of sentencing alternatives available to them, they reduce their use of incarceration. In Cali-

¹⁵ Judges favoring the coercive imposition of "treatment" may impose such programs only by sentencing juveniles under Standard 3.2. Standard 4.2 recommends that juveniles in custodial dispositions be given a general right to refuse participation in all such programs that are not mandatory for all juveniles. The degree of intrusiveness by the state into the lives of confined juveniles is so much greater than the degree of intrusiveness into the lives of juveniles subject only to a conditional disposition that protection of the juveniles' rights cannot as easily be ensured.

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for example, the Probation Subsidy Program¹⁶ produced an average 44.1 percent decrease in the rate of commitment to correctional institutions in 1972-1973. California Youth Authority, "California's Probation Subsidy Program: A Progress Report to the Legislature 1966-1973," at 18 (1974).

In addition, permitting only sentencing judges and not administrators to impose remedial programs on nonvolunteering juveniles ensures greater visibility and procedural protections in such decisions and provides opportunities for increased regulation of discretion, since such coercive imposition is subject to all the general restraints on dispositions recommended in Part I of these standards. During disposition the juvenile is represented by counsel and is assured of the opportunity to participate in deliberations. Remedial programs employed as a dispositional alternative also are more likely to be designed and imposed for true treatment purposes than programs imposed by institutional administrators, which frequently have been used more as a management technique than out of any desire to benefit the juveniles. See, *e.g.*, A. von Hirsch, The Committee for the Study of Incarceration, "Preliminary Draft, Part IV: Rehabilitation," 24-25 (1974).

Finally, although the evidence suggests that most correctional rehabilitative efforts have thus far proved unsuccessful—see *infra* at 104-107—further research in this area is needed. Since "we are under a moral obligation to use all our intelligence to discover the social consequences of various penal sanctions,"—Morris and Hawkins, "Attica Revisited: The Prospect for Prison Reform," 14 *Ariz. L. Rev.* 747, 760 (1972)—the standard provides subjects for the study of the potential of programs designed to remedy offenders' deficiencies.

Requiring a juvenile's participation in a remedial program must be considered a sanction; its effect is punitive regardless of the benevolent motives of the sentencing judge. As such, required participation is subject to all restraints on the imposition of coercive dispositions. The duration of time for which a juvenile may be required to participate in any remedial program must be related to the seriousness of the juvenile's offense, and in no event may the duration of required participation exceed the maximum permissible for the offense. Programs that may have harmful effects may not be imposed under this standard; pursuant to Standard 4.3, informed, written consent must be obtained before a juvenile may be required to participate in such programs.

¹⁶The Probation Subsidy Program, implemented in 1966-1967, provides state funds to counties for the development of intensive probation supervision programs to be used in lieu of commitment to state institutions.

3.3 Custodial.

A. Custodial disposition defined.

A custodial disposition is one in which a juvenile is removed coercively from his or her home.

Commentary

As used in this standard, a custodial disposition is one that entails the coercive removal of a juvenile from his or her home. Whether continuous or intermittent, a custodial disposition requires that the juvenile live in a specified residential facility that is responsible for his or her physical presence and well-being and obligated to provide shelter, food, and care.

Thus, custody as here defined coincides with the Committee for the Study of Incarceration's definition of incarceration as "collective residential restraint." A. von Hirsch, *Doing Justice* 107-108 (1976). By restraint the committee means restriction to a specified, narrowly circumscribed place in which individuals are placed without their consent and from which they cannot quit if they wish. "The place may have walls or other security measures that physically impede his leaving, but does not have to; even though there are no walls or bars, if he is prohibited from leaving and subject to penalties if he does, he is restrained." A residential facility is simply one in which the individual must live, a place which, along with those charged with its operation, "largely determines the character of his activities and the quality of his life." By collective, the committee means "that the person must live there in the immediate company of others, not members of his family or persons of his own choosing."

B. Presumption against custodial dispositions.

There should be a presumption against coercively removing a juvenile from his or her home, and this category of sanction should be reserved for the most serious or repetitive offenses. It should not be used as a substitute for a judicial finding of neglect, which should conform to the standards in the *Abuse and Neglect* volume.

Commentary

Removal from home is a most drastic sanction. The right of family members to live together and remain in close contact has been recognized frequently by the Supreme Court. See, for example, *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205

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(1972) (“[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *May v. Anderson*, 345 U.S. 528 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder.”); *Pierce v. Society of Sisters*, 268 U.S. 570 (1925); and *Meyer v. Nebraska*, 202 U.S. 390 (1923).

The damage that may be caused by interrupting a child’s “sense of continuity” by removing him or her from the care and guidance of his or her “psychological parents” recently has been stressed by J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child* (1973). The psychological parent-child relationship, in which the “parent is an essential figure for the child’s feelings . . . complemented by the child’s figuring in a similar way in the parents’ emotional life” should be maintained whenever possible.¹⁷ The authors assert in addition: “. . . we can predict that the younger the child and the more extended the period of . . . separation, the more detrimental it will be to the child’s well-being.” *Id.* at 20, 51.

Removal from home is the most severe disposition authorized for adjudicated juveniles. As such, it should be reserved for the most serious or repetitive offenses, and rarely, if ever, used for younger juveniles. Removal from home is most likely to be damaging for younger juveniles; for these youths the presumption against custodial dispositions is even stronger than for older juveniles.

Recent experiences in California suggest that children under twelve can be safely retained in the community without secure custody. In 1965, prior to the use of probation subsidy,¹⁸ approximately 18 percent of the California Youth Authority’s first admissions were eight to fourteen years old. In 1973, this group represented only 4 percent of new admissions. Of all new admissions—2,758—only two were twelve years of age. None was less than twelve. California Youth Authority, “Annual Report” 18-19 (1973).

¹⁷ A psychological parent is one “with whom the child has already had and continues to have an affectional bond rather than one of otherwise equal potential who is not yet in a primary relationship with the child.” *Id.* at 51.

¹⁸ California’s State Aid for Probation Services (probation subsidy) began in July 1966. Participating counties must operate approved supervision programs consisting of intensive care and treatment for selected probationers, and to the extent that they are able to reduce commitments to state institutions, the counties receive state funds for these operations. See California Youth Authority, “Some Statistical Facts on the California Youth Authority” 27 (November 1973).

Although California has over 3,500 county residential treatment beds, none were employed for children twelve and under. The bulk of those youths in custody were fourteen to eighteen years old. Youths between the ages of eight and twelve years who were found to have committed serious violations of the law, who would previously have been committed to the California Youth Authority, are now supervised in the community (presumably in noncustodial settings). See California Youth Authority, "Some Statistics on the California Youth Authority" (November 1973).

The preference for retaining home placement for juveniles was expressed early in the Illinois Juvenile Court Act of 1899. The Standard Juvenile Court Act, after which many states patterned their laws, similarly expressed a preference for keeping juveniles at home. NCCD, "Standard Juvenile Court Act" § 1 (6th ed. 1959). See also National Conference of Commissioners on Uniform State Laws, "Uniform Juvenile Court Act" § 1(3) (1968).

The presumption against out-of-home placement as a sentencing alternative does not preclude removing a child of any age from his or her home in cases of neglect, abuse, or abandonment. Similarly, the juvenile and his or her parents may agree to out-of-home placement if they so choose.

C. Exclusiveness of custodial dispositions.

A custodial disposition is an exclusive sanction and should not be used simultaneously with other sanctions. However, this does not prevent the imposition of a custodial disposition for a specified period of time to be followed by a conditional disposition for a specified period of time, provided that the total duration of the disposition does not exceed the maximum term of a custodial disposition permissible for the offense.

Commentary

The custodial sanction is exclusive and may not be employed in conjunction with other sanctions. Thus, the juvenile removed from home as the disposition for an offense may not be required to pay a fine, nor may he or she be required to participate in a remedial program. *Cf.* Part IV regarding the obligation to provide services. The custodial sanction represents the maximum permissible deprivation of liberty. Ordinary contacts and relationships of juveniles are disrupted, and control over the juvenile is exerted by others on a continuous basis. The onerousness of the custodial sanction and the effort to restrict its use as narrowly as possible dictates that it should

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not be used in addition to other sanctions. Furthermore, the exclusiveness of the custodial sanction may prevent judges from imposing custody where they would otherwise be inclined to favor the imposition of mandatory participation in remedial programs.

While a juvenile coercively removed from his or her home may not be required to participate simultaneously in a program that falls under the category of conditional dispositions, judicial imposition of a custodial disposition for a specified period of time followed by a conditional disposition for a specified period of time is authorized by this standard, provided that the combined duration does not exceed the maximum duration of the custodial disposition permissible for the offense.

An overriding concern of these standards is to reduce the duration and severity of dispositions for juveniles and to keep confinement at a minimum. While for certain juveniles the judge may believe that the custodial disposition is necessary (because of the factors relevant to dispositions enumerated in Standard 2.1), the court also should have the opportunity to mitigate the harshness of a custodial disposition by providing that at a certain time the juvenile be returned home with a specified period of conditional disposition (such as supervision or training). The duration of confinement will be reduced in this way, and the juvenile may benefit from the advantages of the services available in the community.

The provision of authority for the court to impose custodial and conditional dispositions consecutively is intended to retain the advantages of traditional parole systems in facilitating gradual release from institutions, while eliminating the inequities and disadvantages of parole.¹⁹

D. Continuous and intermittent confinement.

Custodial confinement may be imposed on a continuous or an intermittent basis, not to exceed the maximum term permissible for the offense. Intermittent confinement includes:

1. night custody;
2. weekend custody.

Commentary

Intermittent confinement requires a juvenile to be restricted to a designated residential facility for specified hours only. Continuous

¹⁹*E.g.*, the effects of uncertainty of release; the introduction by parole of disparity that other provisions aim to reduce; the introduction by parole of

confinement is the norm in American sentencing; intermittent confinement is used infrequently.²⁰ Intermittent confinement, however, provides a useful variation of the custodial sanction.

Several state statutes authorize noncontinuous confinement of adult offenders. See D.C. Code Ann. tit. 24 §§ 461-470 (1966) (judges may sentence directly to work release defendants convicted of misdemeanors, imprisoned for nonpayment of fines, committed to jail after probation revocation, or those considered to present special circumstances meriting the granting of the privilege); N.Y. Family Ct. Act § 454(a) (Supp. 1966) (an offender's term may be served "upon specified days, or parts of days," as the court directs); and Va. Code Ann. § 19.1-300 (1975) (offenders may be released from confinement on work days if total confinement would cause their dependents to become public charges). Although there are no statistics revealing the prevalence of the practice, some judges undoubtedly use weekend confinement in jail as a sentencing alternative even without statutory authority.

While specific authority exists for sentencing juvenile offenders to intermittent confinement, the widespread use of group and foster homes for juveniles adjudicated delinquent is based on the premise that, even for juveniles whose removal from home is warranted, many do not require twenty-four hour security and can continue to go to school or to work in the community.

Intermittent confinement is used abroad. See, e.g., Great Britain, Home Office, "Custodial and Semi-Custodial Penalties: A Report of the Advisory Council on the Penal System" (London, HMSO 1970). In New Zealand, periodic detention has developed into a prevalent correctional technique. Offenders there may be sentenced to report to "centers" on certain evenings of the week and to live there on weekends. Estlea, "Periodic Detention—An Alternative to Imprisonment," *Probation* (Eng.) (1973).

unregulated administrative discretion; and the difficulty in achieving true treatment occasioned by offenders' motivation to dissemble in order to secure early release. See generally Standard 1.2 F.

²⁰It is the judicially imposed sentence of intermittent confinement that is relatively rare. Offenders in many institutions are permitted to leave on work or educational release programs or other furlough arrangements, but these ordinarily are granted at the discretion of corrections administrators. Such arrangements are consistent with the purpose of these standards.

See *R.L. Goldfarb and L.R. Singer, After Conviction*, ch. VIII (1973), for an extensive discussion of work release and furloughs. In practical effect judicially imposed intermittent confinement and participation in a work program or furlough are similar; in either case the offender spends only some of his or her time in confinement.

The American Bar Association has recommended the use of "partial confinement" for offenders. ABA, *Standards for Criminal Justice, Sentencing Alternatives and Procedures* § 2.4(a)(ii) (1967) ("commitment to a local facility which permits the offender to hold a regular job while subject to supervision or confinement on nights and weekends"). Recently, the National Advisory Commission on Criminal Justice Standards and Goals recognized that

[s]entence to partial confinement with liberty to work or to participate in training or education during all but leisure time . . . serves to punish and deter without totally disrupting the individual's family life, employment, and other ties in the community. "Corrections" 570 (1973).

E. Levels of custody.

Levels of custody include nonsecure residences and secure facilities.

Commentary

Most state statutes authorize placement of juveniles adjudicated delinquent in various residential facilities. Because states label different types of residential facilities inconsistently, uniform definitions are difficult to formulate. This standard attempts to describe briefly two types of commonly used residential facilities, the foster home and the group home. It should be noted, however, that many variations are likely to exist: some states provide for "boarding home" placement in lieu of, or in addition to, foster and/or group home placement, and others may provide for placement in homes that are hybrids between the foster and the group home, often in fact called "foster group homes" or "foster family group homes." See, e.g., Wisconsin Bureau of Corrections, Bureau of Probation and Parole, "Foster Care Manual" 2 (March 1970). See also E. Lawder, R. Andrews, and J. Parsons, *Five Models of Foster Family Group Homes* (Child Welfare League of America 1974). In addition, what in one state may be considered a foster home may in another be considered a group home.

Foster home placement is specified as a dispositional alternative for juveniles adjudicated delinquent in all fifty states and in the District of Columbia. M. Levin and R. Sarri, *Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States* 54 (National Assessment of Juvenile Corrections 1974). Forty-four states require the approval of some specified state agency (the department of social services, public welfare, health services, youth services, or

corrections) prior to the use of a home by the juvenile court. In the remaining states, this authority is vested in the juvenile courts or county governing boards. Levin and Sarri, *supra* at 54. Foster care is not administered by the local court in many jurisdictions. Instead, referrals are made by the court to other public or private agencies for foster care placement; if the referrals are rejected, the judge must choose another disposition. Harlow, "Intensive Intervention: An Alternative to Institutionalization," 2 *Crime & Delinq. Lit.* 26 (1970).

Generally, a foster home placement is designed to offer the juvenile a family living experience. The youth is placed in the home of a family (traditionally a married couple) whose services are purchased by the state. The juvenile lives in that home as a temporary family member. Although a foster family may care for more than one non-family juvenile,²¹ there is no organized program and the juvenile, subject to his or her school or outside employment, participates in household activities as do other family members.

As used here, a group home may be characterized as a facility in which several unrelated youths are placed for care and control.²² Generally, a group home houses from four to eight nonfamily juveniles, although some have a capacity of up to twelve or fifteen.²³ In Minnesota and Wisconsin, for example, group homes accommodate from four to eight juveniles. *Juvenile Justice Digest* 8-9 (July 1973); Wisconsin Division of Corrections, Bureau of Probation and Parole, "Foster Care Manual," ch. XI (March 1970); Minnesota Department of Corrections, "Follow-up Study of 166 Juveniles Who Were Released from State Group Homes from July 1, 1969 through June 30, 1972" (May 1973). In Kentucky, group homes serve from four to ten children. Kentucky Department of Child Welfare, "1970-71 Annual Report" (1972). And in Michigan; "half-way houses" accommodate up to twelve youths, while "small group homes" serve a

²¹ A foster home may care for both adjudicated delinquents and nonadjudicated juveniles placed by a court or other agency. A foster home, however, which houses more than three or four outside children who are unrelated to each other and to the foster parents may more properly be described as a group home, since there the juveniles' experiences will be more those of group living than family living.

²² As is also true of foster home placement, youths placed in group homes need not all be juveniles adjudicated delinquent. Dependent, "predelinquent," and neglected juveniles all may be housed in one foster or group home.

²³ In its report on juvenile detention and correctional facilities, the Law Enforcement Assistance Administration categorizes as "group homes or half-way houses" facilities housing as many as twenty-five juveniles. U.S. Department of Justice, Law Enforcement Assistance Administration, "Children in Custody: A Report on the Juvenile Detention and Correctional Facility Census of 1971," 6 (1974).

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maximum of six youngsters at one time.²⁴ Michigan Department of Social Services, Office of Youth Services, "Annual Report for 1972" 29.

The operation of group homes also varies. "Contract group homes" may be operated by private individuals, civic groups, or churches, and financed through contractual arrangements with the county or state. "Agency-operated group homes" have as staff employees of the agency responsible for placing the youth in the home. Harlow, *supra* at 27. See also M. Gula, *Agency Operated Group Homes: A Casebook* (U.S. Department of Health, Education and Welfare 1964). Staff typically includes a full-time husband and wife team, often aided by part-time (e.g., domestic or culinary) or relief personnel. Professionally trained staff, together with volunteers and/or paraprofessionals, often serve as adjuncts to, or substitutes for, the husband and wife team. E. Turner and T. Palmer, *The Utility of Community-Based Group Homes for Delinquent Adolescent Girls* 2 (The American Academy of Child Psychiatry 1971). Homes may be owned or rented by the surrogate parents themselves or by the placement agencies.

Group homes are designed to offer juveniles a group living experience, in contrast to the family living experience of a foster home. In the latter, the relationship of the juvenile to the family members is likely to be more intense, while there is less likely to be a formalized structure or program. Group homes frequently run their own programs, and often are geared toward a specific treatment philosophy.²⁵

Several group homes have gained national recognition. In Silverlake,²⁶ Los Angeles, the agency-operated group home for sixteen- to eighteen-year-old males used daily group meetings in its attempt to

²⁴ Another name frequently applied today to describe a small, community-based residential facility used for juveniles as a sentencing alternative is "half-way house," although half-way houses were originally created to serve a pre-release or postrelease function, as a bridge between custodial confinement in an institution and full reintegration into the community. See, e.g., R.L. Goldfarb and L.R. Singer, *After Conviction* 552 (1973).

²⁵ Standard 4.2 requires that participation in such programs be voluntary. Consequently, it may be preferable from an administrative viewpoint to send those juveniles who express an interest in participation to group homes that run organized programs and to send unwilling juveniles to more unstructured homes, though both participating and nonparticipating juveniles may be housed in one group home.

²⁶ Silverlake, like other residences described above, is usually referred to as a group home, or community-based group residence. It is debatable whether "institution" is the more proper label. As institution is defined in these standards, Silverlake and other such residences may, depending on the amount of security, more properly be described as institutions.

create a nondelinquent subculture. See Klapmuts, "Community Alternatives to Prison," 5 *Crime & Delinq. Lit.* 305, 330 (June 1973); Empey, "Juvenile Justice Reform: Diversion, Due Process, and Deinstitutionalization," in *Prisoners in America* 44-5 (The American Assembly 1973); and Harlow, *supra* at 28. See also Empey and Newland, "Staff-Inmate Collaboration: A Study of Critical Incidents and Consequences in the Silverlake Experiment," 5 *J. Research Crime & Delinq.* 1 (1968). The Highfields Project of New Jersey has been the prototype for the small group-oriented residential home. There, up to twenty youths sixteen and seventeen years old live, working during the day and attending guided group interaction sessions at night. See Weeks, "The Highfields Study," in *Crime and Justice, Vol III: The Criminal in Confinement* 283 (Radzinowicz and Wolfgang eds. 1971); L. McCorkle, A. Elias, and F.L. Bixby, *The Highfields Story: An Experimental Treatment Project for Youthful Offenders* (1958). See also Goldfarb and Singer, *supra* at 66-70. For a description of group homes modeled after Highfields, see Goldfarb and Singer, *supra* at 71; and Urbaniak, "The Concepts of the Turrell Residential Group Center," in Conference Proceedings of Rutgers University, Graduate School of Social Work, "Innovative Programs for the Treatment of Juvenile Offenders—Alternatives to Incarceration" 96 (1970). New York operates "urban" and "apartment" homes in which youths live, working or attending school during the day and adhering to a curfew at night. See Luger, "The New York State Plan," in Conference Proceedings, *supra* at 73. In Boulder, Colorado, the Attention Home, which is entirely locally supported, serves as a group home for juveniles. See Klapmuts, *supra* at 331; Harlow, *supra* at 28; and J. Hagarline, *The Attention Homes of Boulder, Colorado* (Juvenile Delinquency and Youth Development Office, Washington, D.C. 1968).

1. Nonsecure residences.

No court should sentence a juvenile to reside in a nonsecure residence unless the juvenile is at least ten years old and unless the court finds that any less severe disposition would be grossly inadequate to the needs of the juvenile and that such needs can be met by placing the juvenile in a particular nonsecure residence.

Commentary

This standard, together with Standard 3.3 E. 2. a. and b., creates a presumption against removing a juvenile from his or her home.

Such removal should be justified not only by the seriousness of the offense and the age and prior record of the juvenile, but the

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record should also affirmatively show that the needs of the juvenile can be met by placement in a particular nonsecure residence. Such a showing could be made when, for instance, the circumstances surrounding the offense indicate the juvenile's need for greater supervision than the parents are willing or able to provide, or when temporary separation from companions, such as gang members whose influence is considered responsible for the juvenile's participation in the offense, appears necessary.

2. Secure facilities.

a. A juvenile may be sentenced to a period of confinement in a secure facility; such a disposition, however, should be a last resort, reserved only for the most serious or repetitive offenses.

b. No court should sentence a juvenile to confinement in a secure facility unless the juvenile is at least twelve years old and unless the court finds that such confinement is necessary to prevent the juvenile from causing injury to the personal or substantial property interests of another.

c. Secure facilities should be coeducational, located near population centers as close as possible to the juvenile's home, and limited in population.

Commentary

Traditional juvenile institutions are facilities characterized by tight security measures designed to ensure that the juveniles remain in the institution, locations generally removed from residential or urban centers, and large populations (fifty or more, usually of the same sex). These institutions generally are referred to as training schools, but some use alternate labels, such as "schools of industry."

The problems associated with the use of such traditional juvenile institutions have been extensively described and documented. This standard advocates eliminating the use of such facilities. See also the *Corrections Administration* volume, Standard 7.2 and commentary, which requires that secure facilities house no more than twenty adjudicated juveniles and calls for the phasing out of large institutions by 1980. However, the standard also recognizes that for certain juveniles—those who have committed the most serious offenses or are chronic offenders—some sort of institutionalization may be necessary.²⁷ For these juveniles, commitment to secure facilities may be considered as a dispositional alternative of last resort.

²⁷In Massachusetts, for example, where deinstitutionalization has been virtually completed—see *infra* at 76-77—the Department of Youth Services con-

Several reasons may be advanced to support a prohibition on locking up juveniles in training schools.²⁸ Institutionalization inflicts numerous deprivations: it isolates and alienates offenders from society; it debases and brutalizes both offenders and staff members; it schools offenders in ways of crime and fosters relationships that may increase future criminality; and it is extremely costly.

For some examples of flagrant abuses in juvenile institutions, see generally L. Forer, *No One Will Listen: How Our Legal System Brutalizes the Youthful Poor* (1970); H. James, *Children in Trouble* (1970); Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, U.S. Sen., 92nd Cong., 1st sess., May 1971. Deprivation of liberty means not only restriction of movement, but also loneliness, boredom, alienation, lost emotional relationships, lack of opportunity for heterosexual contact, and a threatened self-concept. See Sykes, "The Pains of Imprisonment," in *The Criminal In Confinement* 131 (Radzinowicz and Wolfgang eds. 1971).

The dependency that is fostered in institutions²⁹ exacerbates the problems the offender faces upon release:

tended that "no more than 5 percent of the youth placed in its care required secure surroundings." Bakal, "The Massachusetts Experience," *Delinq. Prevent. Rep.* 4 (April 1973).

²⁸ On June 30, 1970, almost 50,000 children were living in public institutions for delinquents in the United States—5,124 in forestry camps, 2,316 in diagnostic and reception centers, and 42,371 in training schools. U.S. Department of Health, Education and Welfare, "Statistics on Public Institutions for Delinquent Children 1970," DHEW Pub. No. (SRS) 73-03453 (1971). On June 30, 1971, 35,931 children were incarcerated in training schools. U.S. Department of Justice, Law Enforcement Assistance Administration, "Children in Custody: A Report on the Juvenile Detention and Correctional Facility Census of 1971," at 1.

The institutionalization of law violators is a disposition of relatively recent vintage. See Tappan, "The History of Imprisonment," in *Crime, Justice and Correction* (1960); D. Rothman, *The Discovery of the Asylum* (1971); Rothman, "The Invention of the Penitentiary," 8 *Crim. L. Bull.* 555 (1972); R.L. Goldfarb and L.R. Singer, "The Sources of Our System," in *After Conviction* (1973).

²⁹ Philip Zimbardo created a simulated moderately secure prison environment, randomly selecting "guards" and "prisoners" from a group of ordinary university students. Within six days the "guards" became so aggressive and harassing, and the "prisoners" became so docile and frightened, that the experiment had to be called off. Zimbardo reported that the prisoners experienced a loss of personal identity which, when combined with the arbitrary control of their behavior, resulted in a syndrome of passivity, dependency, depression, and helplessness. C. Haney, C. Banks, & P. Zimbardo, "Interpersonal Dynamics in a Simulated Prison" (Abstract, Stanford Univ.). See E. Goffman, *Asylums*, ch. 1 (1961).

Traditional prisons, jails, and juvenile institutions are highly impersonal and authoritarian. Mass handling, countless ways of humiliating the inmate in order to make him subservient to rules and orders, special rules of behavior designed to maintain social distance between keepers and inmates, frisking of inmates, regimented movement to work, eat, and play, drab prison clothing, and similar aspects of daily life—all tend to depersonalize the inmate and reinforce his belief that authority is to be opposed, not cooperated with. C. Bersani, *Crime and Delinquency* 479 (1970).

Large institutions are dehumanizing. They foster an increased degree of dependency that is contrary to behavior expected in the community. They force youths to participate in activities of little interest to them. They foster resident-staff relationships that are superficial, transient, and meaningless. They try to change the young offender without knowing how to effect that change or how to determine whether it occurs. "Corrections" at 351.

The criminalizing effect of juvenile institutions has received considerable attention. "Because many residents come from delinquent backgrounds, a delinquent subculture flourishes in the closed institution." "Corrections," *supra* at 351. Identification with the nondelinquent element is made less likely when identification with fellow offenders is developed. See Glaser, "Criminality Theories and Behavioral Images," in *Delinquency, Crime, and Social Process* (Cressy and Ward eds. 1969). The social structure and peer group influences in prison tend to reinforce negative and illegal behavior patterns. M. Haskell and L. Yablonsky, *Crime and Delinquency* 451 (1970).

There is substantial evidence that institutionalization does not reduce the criminality of those imprisoned; individuals committed to institutions generally recidivate at rates equal to or greater than offenders not so incarcerated. As the National Advisory Commission observes:

The failure of major juvenile and youth institutions to reduce crime is incontestable. Recidivism rates, imprecise as they may be, are notoriously high. The younger the person when entering an institution, the longer he is institutionalized, and the farther he progresses into the criminal justice system, the greater his chance of failure. "Corrections," *supra* at 350.

Generally, studies reveal that institutionalization is no more effective in reducing recidivism than alternative nonincarcerative sanctions;³⁰ some studies indicate that institutionalization actually may

³⁰The Gluecks' early studies revealed evidence of high rates of arrest and conviction for new offenses by individuals who had been exposed to training schools. S. Glueck & E. Glueck, *Criminal Careers in Retrospect* (1943). Babst

increase recidivism.³¹ Studies also indicate that longer sentences to institutions may be associated with greater recidivism.³²

Analyses of the comparative costs of institutionalization versus nonincarcerative dispositions also provide cogent reasons for preferring the latter. After surveying 220 state-operated juvenile institutions for the President's Crime Commission, the National Council on Crime and Delinquency reported that the total operating cost of running training facilities in all fifty-two jurisdictions in 1965 was \$144,596,618. The average per capita operating expenditure, therefore, was \$3,411 (the figures varied from \$871 to \$7,890 from state to state, depending in part on whether the training facilities had their own reception and diagnostic centers). A comparison of institutional costs and the costs of nonincarcerative dispositions revealed that "the overall daily cost for a juvenile in an institution is 10 times more than the cost of juvenile probation or aftercare." NCCD Survey, "Juvenile Institutions," 13 *Crime & Delinq.* 73, 235 (1967).

and Mannering reported that probationers recidivated no more frequently than parolees; if the probationers were first offenders they committed fewer violations; if recidivists they did no worse than parolees. Babst and Mannering, "Probation Versus Imprisonment for Similar Types of Offenders: A Comparison of Subsequent Violation," 2 *J. Research Crime & Delinq.* 60 (1965). Leslie Wilkins reported that in England recidivism rates remained fairly stable when probation was granted more frequently. Wilkins, "A Small Comparative Study of the Results of Probation," 8 *Brit. J. Crim.* 201 (1958). For similar results in an Israeli study, see Shoham and Sandberg, "Suspended Sentences in Israel: An Evaluation of the Preventive Efficacy of Prospective Imprisonment," 10 *Crime & Delinq.* 74 (1964). Work in California also suggests no greater efficacy of imprisonment than community alternatives. J. Robison, "The California Prison, Parole and Probation System," Calif. Assembly Office of Research (Sacramento 1970). See also Robison and Smith, "The Effectiveness of Correctional Programs," 17 *Crime & Delinq.* 67 (1971).

³¹ Wilkins' findings, *supra*, were supported by Hammond, who further found that recidivists did slightly better on probation than with alternate dispositions, including imprisonment. Great Britain, Home Office, "The Sentence of the Court: A Handbook for Sentencers" (HMSO 1970). See also Cambridge Department of Criminal Sciences, *The Results of Probation* (London 1958).

³² Jaman & Dickover, "A Study of Parole Outcome as a Function of Time Served" (California Department of Corrections 1969). See also J. Robison, *The California Prison, Parole, and Probation System* (1970). Cf. J. Berecochea, D. Jaman, and W. Jones, "Time Served in Prison and Parole Outcome: An Experimental Study," Rep. No. 1 (California Department of Corrections, October 1973) ("With comparable groups serving differing lengths of incarceration, there were no significant differences in one year parole outcome"). Most recent and most apposite, a study by Wheeler and Nichols revealed that "youth with the longest stay had the highest rate of return or parole revocation." G. Wheeler and D. Nichols, "A Statistical Inquiry into the Length of Stay and the Revolving Door: The Case for a Modified Fixed Sentence for the Juvenile Offender" 21 (Ohio Youth Commission, Division of Research, Planning and Development, April 1974).

Department of Health, Education and Welfare statistics reveal that in 1970 the cost of maintaining and operating public institutions for juveniles reached an estimated \$291.9 million. The average per capita expenditure for training schools alone was \$5,691. Department of Health, Education and Welfare, "Statistics on Public Institutions for Delinquent Children 1970," DHEW Pub. No. 73-03453 (SRS) (1971). The 1971 census figure for the average per capita operating expense for training schools was \$6,775. Department of Justice, Law Enforcement Assistance Administration, "Children in Custody: A Report on the Juvenile Detention and Correctional Facility Census of 1971" at 17 (1974).

Support for the decreased use of institutionalization comes from numerous sources. Regardless of the various sentencing criteria recommended by different groups, virtually every commission or study group to consider the matter has recommended greatly reduced use of institutions for both juveniles and adults. The National Council on Crime and Delinquency recently issued a policy statement asserting that "[p]risons are destructive to prisoners and those charged with holding them," and that prisons have additionally proved to be ineffectual, probably incapable of being operated constitutionally and themselves productive of crime. Confinement is recommended only for offenders who if not incarcerated would be a serious danger to the public; for all others noninstitutional dispositions are recommended. NCCD Board of Directors, "The Nondangerous Offender Should Not Be Imprisoned: A Policy Statement," 19 *Crime & Delinq.* 449-50 (1973).

Authorization of a sentence of imprisonment is expressed in the negative in the "Model Penal Code," making the preference for probation explicit: "The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless. . ."³³ Several grounds which should be accorded weight in favor of withholding sentence of imprisonment are listed. "Model Penal Code" § 7.01(1) and (2) (1962). See also The National Commission on Reform of Federal Criminal Laws, "Study Draft of a New Federal Criminal Code" § 3101 (1970).

Several standards formulated by the American Bar Association are relevant. In its *Sentencing Alternatives and Procedures* (1967), Stan-

³³ Section 7.01 condones imprisonment where it is deemed necessary for the protection of the public because: (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or (c) a lesser sentence will depreciate the seriousness of the defendant's crime.

Standard 2.2 states: "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." Commentary to this section explains that "[t]he purpose of section 2.2 is to express the conclusion that, in the absence of such particular reasons which justify custody in the individual case, it is more likely that probation or some intermediate sanction will accomplish the overriding objective of producing an ordered society." *Id.* at 63. Standard 2.3(a) proposes that legislatures should authorize sentencing courts in every case to impose probation or similar sentences not involving confinement; commentary cites the President's Crime Commission:

[T]he correctional strategy that presently seems to hold the greatest promise, based on social science theory and limited research, is that of reintegrating the offender into the community. A key element in this strategy is to deal with problems in their social context, which means in the interaction of the offender and the community. It also means avoiding as much as possible the isolating and labeling effects of commitment to an institution. There is little doubt that the goals of reintegration are furthered much more readily by working with an offender in the community than by incarcerating him. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 28 (1967).

The preference for probation and for partial confinement is emphasized in Standards 2.3(c) and 2.4(c). See also ABA Standards for Criminal Justice, *Probation* § 1.1 (1970) (suggesting that probation should be authorized in all cases) and § 1.2 (describing the preferability of probation).

The "Declaration of Principles" of the American Correctional Association, as adopted by the American Congress of Correction (1970), reveals further support for the proposition that institutionalization should be a disposition of last resort. The importance and necessity of noninstitutional treatment of offenders and the goal of reintegrating them into society as law-abiding citizens is stressed in Principles VII, XVIII, and XXI. Most relevant is Principle XIX:

Probation is the most efficient and economical method of treatment for a great number of offenders. To enhance the achievement of the full potentialities of probation, mandatory exceptions to the use of probation with respect to specific crimes or to types of offenders should be eliminated from the statutes.

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Throughout the "Corrections" volume of the National Advisory Commission on Criminal Justice Standards and Goals, the need for nonincarcerative sentencing alternatives is suggested. Total confinement in a correctional facility is listed as the most drastic sentencing alternative, not to be used unless affirmative justification for a sentence of imprisonment is shown on the record. "Corrections" §§ 5.5(1) and (2). In discussing corrections and the community, the commission states: "The principle has evolved: incarcerate only when nothing less will do, and then incarcerate as briefly as possible." *Id.* at 223. As for the future of institutions, the commission took the position

that more offenders should be diverted from such adult institutions, that much of their present populations should be transferred to community-based programs, and that the construction of new major institutions should be postponed until such diversion and transfers have been achieved and the need for additional institutions is clearly established. *Id.* at 349.

As for juveniles, the commission concludes that "existing institutions for juveniles should be closed." *Id.* at 358.

The "guiding principle" enunciated by the Group for the Advancement of Corrections is "minimal interference with the capacity of the offender to be a citizen in good standing." From this it follows that "offenders should therefore be removed from society to the least possible extent so that their return as good citizens will not be unduly difficult." The Academy for Contemporary Problems, the Group for the Advancement of Corrections, "Toward a New Corrections Policy: Two Declarations of Principles" 7 (1974). The group further observes that "for the vast majority of offenses, fines or restitution orders, or both, should be imposed in preference to sanctions involving the restriction of freedom." *Id.* at 8.

Several states have begun focusing on the need to close institutions for juveniles. The Massachusetts Department of Youth Services has provided the most visible example of a state's repudiation of the training school concept. The Massachusetts juvenile correctional system received considerable adverse publicity during the 1960s; weaknesses were documented by several reports, investigations, and exposés, the most intensive of which was a study conducted by the United States Department of Health, Education and Welfare. Instances of overcrowding, terrible living conditions, and inhumane treatment of juveniles in the state's training schools were widely reported, and recidivism rates for juveniles released from the state's

training schools had reached 80 percent while the cost per child ranged as high as \$11,500. Y. Bakal, *Closing Correctional Institutions* 155 (1973). These considerations prompted a legislative reorganization of the system and the appointment of a new commissioner in 1969. The new administration, with support from the governor and local groups, gradually began to reduce institutional populations, to make the schools more therapeutically oriented, and to seek community alternatives. Soon gradualism as a reform tactic was abandoned in an effort to force the development of community alternatives.

Bridgewater, Massachusetts' oldest juvenile institution, was closed down early in 1970, and in January 1972 the closing of the remaining training schools began. Since then, all institutions have been closed, though "dangerous" juveniles (those who have been involved in violence and are considered seriously assaultive) are still housed in several small secure facilities. Youths committed or referred to DYS today ordinarily are placed in group homes, foster homes, specialized residences (private schools, private psychiatric hospitals, etc.), or day care programs. Bakal, "The Massachusetts Experience," *Delinq. Prevention Rep.* 4 (April 1973).

In Kentucky, action was taken in the mid-1960s, when a small group of senior administrators within the department of child welfare sought appropriations from the legislature to undertake a building program of small juvenile facilities throughout the state. Ten such facilities, with maximum capacities of fifty, were built by 1972. At the same time, the two large juvenile institutions were closed down. See A. Rutherford, "Towards Advanced Corrections: An Interim Report" 24 (the Academy of Contemporary Problems, the Group for the Advancement of Corrections 1973). "In Kentucky, we are striving toward developing viable alternatives to the traditional approach of dumping juveniles in large custodial type institutions. The basic philosophy of our department now in working with delinquent youth is directed toward community based treatment programs." Statement of William Ryan, deputy commissioner of the department of child welfare, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, U.S. Sen., 92nd Cong., 2d sess. and 93rd Cong., 1st sess., May and June 1972 and February, March, and June 1973, at 279.

Deinstitutionalization is gaining momentum in other states. Reporting that a training and detention facility was to be phased out by mid-1975, the director of the Maryland department of juvenile services recently explained that "[f]or the last 100 years, institutionalization has not been the answer to juvenile crime," and that

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youths should be given more opportunities to make adjustments in their own communities. The Washington Post, June 12, 1974, at B16.

The North Carolina Bar Association recently recommended that community-based facilities and programs for delinquents be used in lieu of training school commitments, and that no child under the age of ten should be committed to a training school. North Carolina Bar Association, Penal System Study Committee, "As the Twig Is Bent: A Report on the North Carolina Juvenile Corrections System" (1972).

The Connecticut Planning Committee on Criminal Administration has spent more than \$1.1 million since July 1969 to develop group homes in the state. These homes have been created in Connecticut as alternatives to the state's large, unmanageable juvenile training schools. Statement of H.R. Sterrett, executive director, Connecticut Planning Commission on Criminal Administration, Hartford Courant, April 19, 1974.

And in California, the probation subsidy program, first implemented in 1966, provides state funds to counties for the development of intensive supervision programs. The funds are disbursed to probation departments according to their level of commitment to reduction of state institutions. Through financial incentives, the program has greatly reduced the proportion of delinquent juveniles sent to state institutions. "California's Probation Subsidy Program: A Progress Report to the Legislature 1966-1973," i (California Youth Authority, January 1974).

Administrators of training schools are increasingly calling for their restriction or abolition. Alfred Bennett, superintendent of the Indiana Boy's School, has asserted that "institutionalization should only come about as an absolute last resort in dealing with delinquency. Only the most harmful and the most chronic of misbehavior should provide the requisite rationale for commitment." Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, U.S. Sen., 92nd Cong., 1st sess., May 1971, at 118. The principal of the Livingston School in New York, Dr. Esther Rothman, advocates that "the training schools as they exist now should be absolutely closed down, as of now. . . . I do not think there is such a thing needed as a high maximum security, strict attention facility, even for children who have been judged delinquent." *Id.* at 432.³⁴

³⁴ State recommendations for decreased use of imprisonment have not been limited to juvenile correctional reform efforts. In California, it was suggested that the bulk of all correctional efforts, programs, and resources be moved to the

The fundamental priority established by a Wisconsin committee was the replacement by 1975 of the state's existing institutional correctional system with a community-based noninstitutional system. Wisconsin Council on Criminal Justice, "Final Report to the Governor of the Citizens' Study Committee on Offender Rehabilitation" (1972). A similar group in Ohio observed that "incarceration is employed altogether too frequently as a means of dealing with criminal offenders. Every conceivable alternative to imprisonment should be explored before any individual is committed to an institution." Ohio Citizens' Task Force on Corrections, "Final Report to the Governor" A4 (1971). The group concluded that "... we *must* develop a system of community-based alternatives to institutionalization; these are the most effective, fruitful, and realistic solutions to the proper handling of offenders. The emphasis in the future must be on alternatives to incarceration." *Id.* at A8-9.

And in New York State, a citizen's committee studying the parole system concluded that "long term incarceration has been shown not to be helpful to the offender and possibly injurious to him. It is also expensive and ineffective in reducing recidivism." Citizens' Inquiry on Parole and Criminal Justice, Inc., "New York State Parole System, Preliminary Draft #1," at 191 (1974).

Despite the numerous problems inherent in any institutionalization, the standards recognize that for a small percentage of adjudicated juveniles some form of secure custody may be necessary. For this small number of juveniles who have committed the most serious crimes and who may need to be incapacitated for the protection of the public, confinement in secure facilities is permitted as a sentencing alternative of last resort. Previous flight from a nonsecure facility should be used as one of the primary threshold criteria for commitment to a secure facility.

Acknowledgment of the possible need for secure placements does not mean condonation of the use of traditional juvenile institutions. Several of the problems associated with use of training schools could be avoided or ameliorated. For example, size alone must be reduced. A survey of studies on the effects of living unit size in institutions concluded that size is crucial to the implementation of effective and humanitarian treatment: size alone creates organizational pressures toward custodial operations, which tends to alienate inmates. D.

community level. California Board of Corrections, "Correctional System Study—Coordinated California Corrections: The System" (Sacramento 1971). The phasing out of large scale prisons and a moratorium on construction of new institutions was recommended in New Jersey. New Jersey Coalition for Penal Reform, "Position Paper" (1972).

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Knight, "Impact of Living-Unit Size in Youth Training Schools" (California Youth Authority 1971). Limiting secure facilities to populations of twenty or less is one way to diminish the problems caused by institutionalization. In such a setting, security need not be provided by bars and fences: rich staffing ratios can serve to minimize opportunities for escape.

Similarly, secure facilities should be near residential and urban centers, making access of others to the juveniles and access of the juveniles to community services possible. Coeducational units are also recommended for juveniles as a way to make their institutional experiences closer to normal. See *Morales v. Turman*, Emergency Interim Order, 364 F. Supp. 166 (E.D. Tex. 1973), Memorandum Opinion and Order, No. 1948, 383 F. Supp. 53 (E.D. Tex. Aug. 30, 1974).

Specific recommendations such as these are not novel. The Minority Groups Advisory Committee of the Juvenile Justice Standards Project, for example, urges that "[f]acilities which house juvenile offenders should be located in or near the juvenile's community. . .the number of children should be restricted. . ." and that "commingling of sexes. . .should be allowed." Proceedings of the Minority Groups Advisory Committee, Juvenile Justice Symposium 51 (1974).

Security may be achieved by physical characteristics or by high staff-juvenile ratios.³⁵ Such facilities need not be newly constructed; it is recommended instead that existing buildings which meet construction standards intended to protect the health and well-being of inmates be purchased or leased for this purpose. See the *Corrections Administration and Architecture of Facilities* volumes for extensive discussion of these issues.

PART IV: PROVISION OF SERVICES

4.1 Right to services.

All publicly funded services to which nonadjudicated juveniles have access should be made available to adjudicated delinquents. In addition, juveniles adjudicated delinquent should have access to all services necessary for their normal growth and development.

Commentary

When juveniles violate the law, sanctions appropriate to the viola-

³⁵ These facilities, limited by population and located nearer to urban and residential centers, are in reality no different from group homes, made secure physically or by staff ratios.

tion may be imposed. This sentencing power, however, should confer no authority on the state to create additional deprivations above and beyond those that are necessary, unavoidable concomitants of the particular disposition. To deprive a child of needed services merely because he or she has come under the jurisdiction of the juvenile justice system is inimical to the purposes of that system.

Juveniles in the community at large have access to a wide range of services,³⁶ both publicly and privately funded, examples of which include medical care, dental care, educational services, legal services, vocational training programs, recreational services, religious services, and psychological and psychiatric services. Requiring that such services be made available to juveniles sentenced under the juvenile correctional system is a necessary means of implementing the purposes of that system as enumerated in Standard 1.1.

Avowed purposes are meaningless without methods of achievement; the provision of access to a range of services aimed at facilitating the normal growth and development of juveniles subject to the justice system is perhaps the most important of such methods. As was asserted by Justice Blackmun in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972): "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."

Access to services is required to promote the normalization (see the *Architecture of Facilities* volume for a more extensive discussion of the concept of "normalization") of institutions or homes to which juveniles are sentenced, to reduce the isolation of adjudicated delinquents from the rest of the community, and to ensure these juveniles the equal protection of the law. Institutions or homes to which adjudicated juveniles are committed should be no less like the community than is necessary; facilities should approximate the home life available to nonadjudicated children as much as possible.³⁷ The concept of equal protection is also apposite; regardless of whether or not certain services have been labeled by the courts as "fundamental,"³⁸ if such services are available in the community, so must they be for the adjudicated juvenile. For example, if the state establishes schools, as each state has in fact done, the same

³⁶"Services" are benefits or programs of assistance provided by the state, city, or local government, or by independent organizations or agencies, available to citizens of any given community.

³⁷See discussion of cases *infra* at 88-91, especially *In re Savoy*, Nos. 70-4808, 70-4714 (D.C. Juv. Ct. October 13, 1970).

³⁸Rights deemed "fundamental" may be infringed only upon a showing of a "compelling state interest." See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Griffin v. Illinois*, 351 U.S. 12 (1956).

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(or comparable) schooling must be available for youths under the jurisdiction of the juvenile justice system; if the county has built recreational facilities in its communities, such facilities must be provided for adjudicated youths; if medical or counseling clinics have been established in a community, such services must be available to juvenile offenders.

To the extent that the juvenile justice system usurps functions ordinarily performed by the child's parents when it removes the child from the home, basic concepts of fairness and humanity suggest that the system be required to supply services that might be supplied by the parents. Pyfer, Jr., in "A Juvenile's Right to Receive Treatment," 6 *Fam. L.Q.* 279, 315 (Fall 1972), suggests that such a proposition may have a constitutional basis: "...[I]t can be argued that the Ninth Amendment forbids the state to deprive the delinquent of his family life if it then fails to provide the juvenile with the same adequate care, custody and protection which the child had a right to demand from his parent." *Id.* at 315.

Beyond this, juveniles who have been adjudicated delinquent arguably have a claim for greater access to services than those not so adjudicated in order to compensate for the stigma attached to the conviction. Recognizing such stigma, one court noted:

The judgment against a youth that he is delinquent is a serious reflection upon his character and habits The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man. *Jones v. Commonwealth*, 38 S.E.2d 444, 447; 185 Va. 335, 338 (Sup. Ct. App. Va. 1946).

Provision of services is thus interrelated with Standard 1.2. I. which dictates that no collateral disabilities extending beyond the term of the disposition may be imposed. Denial of services necessary to a juvenile's normal growth and development, combined with the stigmatizing effect of conviction, would surely hamper a juvenile's chances for successful reintegration into society upon release. Thus the scope of the standard is not limited to publicly funded services, but extends to all services necessary for juveniles' normal growth and development.

In certain instances, deprivation of services may constitute cruel and unusual punishment. The denial of medical care was dealt with extensively in *Newman v. Alabama*, 349 F. Supp. 278, 285-86 (M.D. Ala. 1972), in which the court found a neglect of basic medical needs

so extreme as to be "barbarous" and "shocking to the conscience":

It is the holding of this Court that the failure of the Board of Corrections to provide sufficient medical facilities and staff to afford inmates basic elements of adequate medical care constitutes a willful and intentional violation of the rights of prisoners guaranteed under the Eighth and Fourteenth Amendments. Further, the intentional refusal by correctional officers to allow inmates access to medical personnel and to provide prescribed medicines and other treatment is cruel and unusual punishment in violation of the Constitution. 349 F. Supp. at 285-86.

The state court decision in *Wayne County Jail Inmates v. Wayne County Board of Commissioners*, Civ. Act. No. 173-217 (Cir. Ct. for Wayne Co., Mich., 1972), also had a significant impact on the expanding right to medical care. See also *Smith v. Hongisto*, No. C-70-1244 RHS (N.D. Cal. 1973). For a compilation of standards and materials on medical treatment, see the American Bar Association, "Medical and Health Care in Jails, Prisons, and Other Correctional Facilities" (November 1973). See also Plotkin, "Enforcing Prisoner Rights to Medical Treatment," 9 *Crim. L. Bull.* 159 (1973); Lalman, "Prisoners' Rights to Medical Treatment," 63 *J. Crim. L.C. & P.S.* 185 (1972); Alexander, "The Captive Patient: The Treatment of Health Problems In American Prisons," 5 *Clearinghouse Rev.* 16 (1972); and Sneiderman, "Prisoners and Medical Treatment: Their Rights and Remedies," 4 *Crim. L. Bull.* 450 (1968).

The totality of conditions in a juvenile detention center was examined in *Juvenile Detention Center of the Baltimore City Jail*, Md. Balt. City Sup. Bench 8-3-71, CCH 2 Pov. L. Rep. 5289, 5291-92, §§ 4125.48, 4125.82. Note, "The Courts, the Constitution and Juvenile Justice Reform," 52 *B.U.L. Rev.* 33, 54 (1972). The juveniles there remained inactive in miserable surroundings, provided with inadequate medical care, recreational facilities, and visiting hours; lack of adequate reading matter, pencils, and paper; and minimal opportunities for schooling. The court condemned these conditions by drawing heavily on language from adult prisoners' rights cases, but only after having emphasized the importance of the fact that children were involved:

The courts of our country, particularly the state courts, are loath to interfere with the internal operations of prison systems, requiring a very compelling show to warrant intrusion. However, there is manifestly a far greater duty and obligation on the courts when we are dealing with the conditions of incarceration of children. . . .

This Court finds as a fact from the totality of the conditions that the treatment afforded juveniles in the Juvenile Detention Center of the

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Baltimore City Jail constitutes cruel and unusual punishment. *Juvenile Detention Center of the Baltimore City Jail, supra.*

Deprivations in other juvenile institutions also have been held unconstitutional, especially those termed "anti-rehabilitative"; although the phrase is left undefined, court decisions seem to indicate that institutional practices and conditions that hinder, rather than foster, the juveniles' opportunities to develop and mature in a normal, healthy manner are violative of the juveniles' rights. In *Lollis v. New York State Department of Social Services*, 322 F. Supp. 473, 480 (S.D.N.Y. 1970), *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971), solitary confinement of a juvenile girl was enjoined as "counter-productive to the development of the child," and violative of the ban on cruel and unusual punishment. In *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1366 (D.R.I. 1972), the court noted: "To confine a boy without exercise, always indoors, almost always in a small cell, with little in the way of education or reading materials, and virtually no visitors from the outside world is to rot away the health of his body, mind, and spirit." *Id.* at 1366.

The court also held

...that because the conditions of confinement in Annex B are anti-rehabilitative, use of Annex B is enjoined as a violation of equal protection and due process of law. If a boy were confined indoors by his parents, given no education or exercise and allowed no visitors, and his medical needs were ignored, it is likely that the state would intervene and remove the child for his own protection. . . . Certainly, then, the state acting in its *parens patriae* capacity cannot treat the boy in the same manner. . . . *Id.* at 1367.

Inmates of Boys' Training School is often referred to as a "right to treatment" or "right to rehabilitation" case. The language cited above suggests that the court there defined rehabilitation in an extremely broad manner. It is this right to a wide variety of services conducive to normal growth and development that the standard intends to make statutory.

The judicially developed "right to treatment" for the mentally ill, the retarded, sexual psychopaths, and juveniles has relied for at least part of its rationale on the necessity of providing a quid pro quo for the state's *parens patriae* intervention. See Kittrie, "Can the Right to Treatment Remedy the Ills of the Juvenile Process?" 57 *Geo. L.J.* 848 (1969). Since treatment, in the scheme envisioned by the standards, may never be the sole justification for state intervention, these cases are relevant only by way of background and analogy. The right

to services created here, by contrast, is based on grounds of equality, normalization, and simple humanity.

The concept of a right to treatment was first proposed for the mentally ill by Dr. Morton Birnbaum: "the present inadequate care and treatment of the institutionalized mentally ill, and the probability of its continuance in the future reflects a basic philosophical problem that in turn poses a legal, rather than a medical, problem." "The Right to Treatment," 46 *A.B.A.J.* 499, 505 (1960). *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), the case to which the emergence of the right is often traced, held that an individual involuntarily committed to a mental institution following acquittal by reason of insanity is entitled to adequate treatment. The decision in *Rouse* was statutorily based, although several possible constitutional arguments for the right were advanced.³⁹

In *Nason v. Supt. of Bridgewater State Hospital*, 363 Mass. 604, 233 N.E.2d 908 (Sup. Jud. Ct. 1968), the court ordered that an appropriate program of treatment be provided for Nason, a patient who previously had been found incompetent to stand trial, in order to implement the therapeutic claims of the commitment statute. Should such treatment not be made available within a reasonable time on a nondiscriminatory basis, the court noted that a more expansive holding may be necessary, on the grounds that "there is a substantial risk that the constitutional requirements of equal protection of the laws will not be satisfied." 233 N.E.2d 908, 913 (1968). See generally Bailey and Pyfer, "Deprivation of Liberty and the Right to Treatment," 7 *Clearinghouse Rev.* 524 (1974).

Similarly, the court in *Maatallah v. Warden, Nevada State Prison*, 470 P.2d 122 (Sup. Ct. 1970) held that the petitioner, who had been found insane and incompetent to stand trial, committed to a state hospital for treatment, and subsequently transferred to a state prison, had a right to a hearing to determine the merit of his allegation of unlawful confinement without treatment.

The most definitive proclamation of a constitutional right to treatment for involuntarily committed mental patients came in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Patients "unquestionably have a constitutional right to receive such individual treatment as will give each of them a

³⁹That the failure to provide adequate treatment raises serious constitutional questions was reiterated by the District of Columbia Court of Appeals in *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969). The *Rouse* decision became the basis for several subsequent D.C. decisions: *Dobson v. Cameron*, 383 F.2d 519 (D.C. Cir. 1967); *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir. 1967); and *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

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realistic opportunity to be cured or to improve his or her mental condition." 325 F. Supp. 781, 784. Depriving one of his or her liberty for supposedly therapeutic reasons and then failing to provide adequate treatment "violates the very fundamental of due process." *Id.* at 781, 785. Such a rationale recently was confirmed in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *cert. granted* 419 U.S. 894 (1975) (nondangerous persons involuntarily civilly committed); *Welsh v. Likins*, 373 F. Supp. 487 (D. Minn. 1974) (involuntarily committed retardates); *Application of D.C.*, 118 N.J. Super. 1, 285 A.2d 283 (1971) (mental hospital commitment); and *Renelli v. Department of Mental Hygiene*, 73 Misc. 2d 261, 340 N.Y.S.2d 498 (Sup. Ct. 1973) (child placed in mental institution). But see *Burnham v. Department of Mental Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd per curiam*, 502 F.2d 1319 (1974).

The right to treatment has also received attention in cases of "special offenders." In *Commonwealth v. Page*, 339 Mass. 313, 159 N.E.2d 82 (Sup. Jud. Ct. 1959), the court upheld commitment under Massachusetts' sexual offenders law, but ruled that the remedial aspect of such confinements must have a foundation in fact. See generally *Kittrie*, *supra* at 848, 866. The constitutionality of Maryland's Defective Delinquent Act was challenged in *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964). The court there upheld the act but remanded to the district court to determine whether the committed defective delinquents in fact were being treated. While upholding the Illinois Sexually Dangerous Persons Act, the court in *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973), ruled that persons incarcerated under the act have a constitutional right to treatment. *Accord*, *Silvers v. People*, 22 Mich. App. 1, 176 N.W.2d 702 (1970). In *Davy v. Sullivan*, 354 F. Supp. 1320 (N.D. Ala. 1973), the court held that treatment under Alabama's sexual psychopath statute must conform to the constitutionally mandated minimum requirements set forth in *Wyatt v. Stickney*.

The role of the training school as the "provision of treatment" was emphasized as early as 1899 in *Wisconsin Industrial School for Girls v. Clark Company*, 103 Wis. 651, 79 N.W. 422, 427 (Sup. Ct. 1899). See Sarri, Vinter, and Kish, "Juvenile Justice: Failure of a Nation" (Paper presented at the Annual Meeting of the Directors of Criminal Justice Research Center, Harvard University Law School, Cambridge, Mass. May 1974), at 28. But it was not until the 1960s that the right to treatment promised by the juvenile law was expanded by several decisions of the United States Court of Appeals for the District of Columbia, construing the statutory requirement that an acceptable home substitute be provided for incarcerated juveniles. These cases

are particularly significant in that they addressed a wide variety of conditions in juvenile institutions and did not base their holdings solely on any treatment purpose of the commitments. The cases enforced a statutory standard included in the Juvenile Court Act, which provides: "When the child is removed from his own family, the court shall secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents." 16 D.C. Code § 2316(3) (Supp. V 1966).

This statutory requirement of an acceptable home substitute, which appears to be the equivalent of the right to all services available outside of the correctional system that is proposed by the standard, derives from NCCD's "Standard Juvenile Court Act" (6th ed. 1959)⁴⁰ which has served as a model for juvenile legislation throughout the United States. The act states:

This Act shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive, preferably in his own home, the care, guidance, and control that will conduce to his welfare and the best interests of the state, and that when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him. *Id.* at art. I § 1.

In *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967), a youth challenged his detention in a place that provided no psychiatric services. The court noted that, by statute, when the juvenile court takes custody of a youth, the care provided should be as nearly as possible equivalent to the care the child's parents should provide, and that while interim custody may not necessitate the extreme therapeutic program involved in the final disposition some attempt must be made to link detention to the needs of the juvenile.

A "substantial complaint" was found in *In re Elmore*, 382 F.2d 125 (D.C. Cir. 1967), where the delinquent juvenile committed to the custody of the department of public welfare was receiving no treatment at all. Noting that the appropriate statute was based upon consideration of rehabilitation through psychiatric care and treatment in appropriate cases, the court asserted that the juvenile court is obligated to fashion dispositional decrees tailored to the child's needs. See Bailey and Pyfer, *supra* at 524; and Renn, "The Right to

⁴⁰The National Council on Crime and Delinquency has revised the "Standard Juvenile Court Act"; in the newer version the acceptable home substitute requirement has been deleted. Council of Judges, NCCD, "Standard Juvenile Court Act" (Revised Draft, May 1972). The 1959 act, however, was the model for nationwide legislation.

Treatment and the Juvenile," 19 *Crime & Delinq.* 477, 482 (1973).

Conditions at the Receiving Home for Children, a juvenile detention center, were examined in *In re Savoy*, Nos. 71-4808, 70-4714 (D.C. Juv. Ct. October 13, 1970). Inadequate medical care, unreasonable solitary confinement, lack of educational opportunities, and lack of recreational facilities were among the specific complaints; all were recognized as meritorious except the allegation of inadequate medical care. In ordering changes in the institution, the court noted that such changes would only alleviate, not cure, the chronic problems of the home; officials were given two years to construct a new facility.

The court's rationale was based primarily on the statutory mandate of an acceptable home substitute. In dealing with the lack of educational opportunities, however, the court emphasized the malapportionment of services already provided by the government. Viewing the problem in equal protection terms, the court analogized the opportunities available in the home to those available in other institutions and to children in the community at large. See Note, "The Courts, the Constitution and Juvenile Institutional Reform," *supra* at 33, 39.

The right to rehabilitative services for juveniles has been recognized in other jurisdictions. In *In re Harris*, 2 Crim. L. Rep. 2412 (Cook Co., Ill., Cir. Ct. Juv. Div. 1967), appropriate services were ordered for a deaf-mute juvenile who had been declared a neglected minor and placed in a detention home unable to treat people with his deficiencies. This order was based on the due process clause of the eighth amendment and on the premises of the Illinois Juvenile Court Act, which states:

The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents. . . . Ill. Rev. Stat. ch. 37, § 701-2(1) (1966).

See Pyfer, Jr., *supra* at 279, 295. The requirement of provision of rehabilitative services under the Illinois act was recently reiterated in *United States ex rel. Wilson v. Coughlin*, 472 F.2d 100 (7th Cir.

1973), a successful challenge to conditions in the Illinois Industrial School for Boys.

In *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), New York children statutorily classified as PINS challenged their secure detention without treatment and under conditions assertedly amounting to cruel and unusual punishment. A federal court held that conditions at one facility violated the eighth amendment and that the programs at the various detention centers did not furnish adequate treatment for children who were not true temporary detainees, thereby violating their right to due process.

Other recent cases concerning juveniles include *In re Johnson*, No. 78056 (Minn. Dist. Ct., Juv. Div., Hennepin Co., Jan. 15, 1974) and *Janet v. Carras*, No. 1079-73 (Pa. C.P. Allegheny Co., Mar. 29, 1974). In *Johnson* the court denied a petition to have the seventeen-year-old respondent, charged with armed robbery, referred to adult court for prosecution, and ordered that if found guilty the boy would be committed to the department of corrections, which would be ordered to provide a rehabilitative program, as is its statutory duty. The court in *Janet* found the director of child care services in contempt of court for failure to provide adequate care and treatment for the petitioner, a mentally retarded girl. The director was fined \$100 as a warning that the juvenile court considers that any agency dealing with children in custody has a duty to provide such children with adequate care and treatment. *Contra*, *New York State Association for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). (There is no constitutional right of rehabilitation owed by the state of New York to mentally retarded children at Willowbrook, although protection from harm is required.)

Most significant are the cases dealing with institutions for adjudicated delinquents: *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1973), *aff'd*, 491 F.2d 352 (7th Cir. 1974); *Morales v. Turman*, Emergency Interim Order, 364 F. Supp. 166 (E.D. Tex. 1973) Memorandum Opinion and Order No. 1948, 383 F. Supp. 53 (E.D. Tex. Aug. 30, 1974). *Nelson* was a class action brought for declaratory and injunctive relief with respect to the operation of the Indiana Boys School, a medium security correctional facility for boys twelve to eighteen years of age. The court noted that the statutory framework of the juvenile justice system in Indiana contemplates much more than bare custody and incarceration; the Juvenile Court Act under whose authority plaintiffs were confined, worded almost identically to the Standard Juvenile Court Act, provides:

The purpose of this act [§§ 9-3201-9-3225] is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents. Ind. Ann. Stat. § 9-3201 (Burns 1956).

Under this statute, and under the Constitution, plaintiffs were held entitled to a "right to treatment." While treatment was never actually defined, the *Nelson* court noted the inadequate staff-to-inmate ratio spent by the staff psychiatrist on individual psychotherapy programs, concluding that individualized treatment programs were not usually even prepared, much less implemented, making the treatment that defendants claimed was available more a matter of form than of substance.

Morales, a challenge to a number of practices and policies found throughout Texas training schools for juvenile delinquents, held that a right to treatment is mandated by the due process clause of the fourteenth amendment and Texas law, which requires that the Texas Youth Council adhere to its statutory duty to provide "a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged delinquent." Tex. Rev. Civ. Stat. art. 5143d, § 1 (1971). This law, observed the court, confers upon each juvenile committed to the custody of the Texas Youth Council a right to humane and rehabilitative treatment directed toward the ultimate purpose of reintegrating the child into society. Having established that juveniles in Texas institutions have an enforceable right to treatment, the *Morales* court held that this right precludes the following practices: (A) segregating by untrained correctional officers of some inmates from the general population on the basis of suspected homosexuality; (B) failing to allow and encourage full participation of family and interested friends in the program of a youthful offender; (C) withholding or neglecting to provide casework, nursing, and psychological or psychiatric services to juveniles confined in solitary confinement or security facilities; (D) failing to provide inmates of a maximum security institution who have a history of brutality, neglect, and intimidation with access to a person who can hear their complaints and seek administrative redress for their grievances without fear of reprisals; (E) confining juveniles in an institution in which a nurse is not available on the premises twenty-four hours a day; (F) employing persons whose personalities, backgrounds, or lack of qualifications render them likely to harm juveniles

in their care either physically or psychologically, absent any attempt to administer to such persons the appropriate psychological testing or psychiatric interviews; in particular, failing to employ an individual who is qualified by education, experience, and personal attributes to superintend the rehabilitation of juveniles who have engaged in seriously delinquent behavior. 364 F. Supp. 166, 175 (renumbered).

The Texas mandate of rehabilitative treatment aimed at reintegrating the child into society was interpreted in *Morales* as requiring access to a wide range of services: "Treatment of an adolescent who has tangled with the law. . . must ensure that the juvenile receives the ingredients that a normal adolescent needs to grow and develop a healthy mind and body. . . Unless normal needs are met, no special therapy modality will work, and the treatment program cannot be deemed an adequate one." *Morales v. Turman*, Memorandum Opinion and Order, 383 F. Supp. at 59 (E.D. Tex. Aug. 30, 1974). It is the required provision of these services, as well as others available to juveniles who have not been adjudicated delinquent, that the standard seeks to make statutory.

The standard is consistent with several other treatises. The "Model Penal Code" §§ 3303.5 and 3304.6 requires the wardens of institutions to establish appropriate programs of rehabilitation "to prepare and assist prisoner to assume his responsibilities and conform to the requirements of the law." The "Standard Minimum Rules for the Treatment of Prisoners, Part II" (Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders 1955), calls for treatment of prisoners designed to encourage self-respect and develop responsibility so as to instill in them the will to lead law-abiding and self-supporting lives after release.

The "Declaration of Principles" of the American Correctional Association as adopted by the American Congress of Correction (Cincinnati, Ohio 1970) has several relevant provisions. Principle XV provides, in part: ". . . the correctional program must make available to each inmate every opportunity to raise his educational level, improve his vocational competence and skills. . . ." Principle XVI states: "Well-organized correctional programs will actively seek opportunities to collaborate with other public and private agencies to assure that the offender has access to a wide range of services which will contribute to his stability in the community." And Principle XXV suggests that "new correctional institutions should be located with ready access to community agencies which provide services, such as mental health centers and educational training institutions. . . ."

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Most recently, the National Advisory Commission on Criminal Justice Standards and Goals (1973) required that "each correctional agency should immediately develop and implement policies, procedures and practices to fulfill the right of offenders to rehabilitation programs." "Corrections" § 2.9.

A. Obligation of correctional agencies.

Correctional agencies have an affirmative obligation to ensure that juveniles under their supervision obtain all services to which they are entitled.

Commentary

The requirement of provision of services for adjudicated youths by correctional agencies would be insufficient without an obligation to ensure access to services provided by other public agencies or by private organizations. Delinquent juveniles (and minority youths in general) often are subject to discriminatory treatment by noncorrectional agencies and prevented from participating in service programs available to other youths. See Polier, "Myths and Realities in the Search for Juvenile Justice," 44 *Harv. Ed. Rev.* 112, 121 (1974). Whenever a juvenile adjudicated delinquent is denied a service to which he or she is entitled, the correctional agency charged with supervision should have the responsibility to intervene on his or her behalf.

Thus, the correctional agency would have an advocacy function to ensure access to entitlements. "Child advocacy" is a poorly defined concept. An advocate may be responsible for many things. For a thorough review of nationwide advocacy programs and the functions they perform, see A. Kahn, S. Kamerman, and B. McGowan, *Child Advocacy—Report of a National Baseline Study* (1972). As recommended by the standard, an advocate must represent the delinquent juvenile's interests in order to ensure provision of entitled services.

The Massachusetts Division of Youth Services views itself as an advocacy agency, in that it "stimulates the development of new services and acts as representation for children whose needs have brought them into juvenile court." Bakal, "The Massachusetts Experience," *Delinq. Prevention Rep.* 6 (April 1973). Massachusetts has recognized the need for advocates for its youth, observing that "it is unrealistic to expect that public concern over ensuring that children's rights and basic needs are met will bring about accountability among public agencies for their services and responsibilities." Commonwealth of Massachusetts, Department of Youth Services, "A Strategy for Youth in Trouble" 25 (undated).

David Fogel stresses the importance of the brokerage function in corrections and suggests that we may be at the threshold of moving from a style of treated and treaters, which saw offenders as clients, to the notion of them as constituents. Fogel asserts that we must

... get on an equal footing with our clientele and ... bend every effort human, financial and bureaucratic in his behalf. Hence, the notions of "broker" rather than therapist for helping a "client" obtain services and "advocate" rather than gatekeeper or dispenser for the system's service delivery. D. Fogel, *Corrections and Social Work in the Year 2000—Some Directions* 25-26 (1973).

B. Purchase of services.

Services may be provided directly by correctional agencies or obtained, by purchase or otherwise, from other public or private agencies. Whichever method is employed, agencies providing services should set standards governing the provision of services and establish monitoring procedures to ensure compliance with such standards.

Commentary

Correctional agencies traditionally have attempted to provide all services themselves, either because they lacked resources to purchase services from other sources or because services provided by others were not readily available to correctional clients. They have made little or no use of established service delivery agencies. Purchasing services from outside sources is recommended whenever possible, since it is less costly than self-sufficiency, it results in the provision of services of better quality, it allows the correctional agency more flexibility in choosing services than where it invests capital to create its own programs, it facilitates offenders' reintegration into the community, and it helps to create community involvement with offenders.

Duplicate service delivery is costly. Creation of an independent vocational training program within a correctional agency, for example, is more costly than a purchase of service arrangement with an existing vocational training center, especially if special materials and machines are needed. Budgetary restrictions have prevented the attempt to create entire duplicate service delivery systems for correctional clients, particularly those in institutions, and have prevented correctional agencies from providing the quality and variety of service available elsewhere. Such restrictions limit the value of vocational training in institutions. See, for example, N. Singer, "Incentives and the Use of Prison Labor," 19 *Crime & Delinq.* 200 (1973).

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According to the Group for the Advancement of Corrections, which is comprised largely of correctional administrators and former administrators, the quality of services provided by correctional agencies is often inferior to the quality of ordinary community services, because "professionals in most occupations tend to consider the correctional setting unattractive. The correctional system has never been accountable to those it has provided services [*sic*]." The Academy for Contemporary Problems, the Group for the Advancement of Corrections, "Toward a New Corrections Policy: Two Declarations of Principles" 11 (1974). By purchasing services, the correctional agency maintains flexibility and can specify conditions and quality of services, providing the best services or skills available.

As the Group for the Advancement of Corrections also points out, "[t]he consequence of claimed self-sufficiency has been to relieve the ordinary social services of any responsibility for the offender." *Id.* at 10. The reintegration of an offender into his or her community can be facilitated through the use of community resources and personnel, while self-sufficiency on the part of the correctional agency tends further to isolate offenders.

David Fogel, former commissioner of the Minnesota Department of Corrections, has suggested that corrections need not necessarily be a government function at all, beyond the point of sentencing, and that "significant pieces of the job could be contracted out." Fogel stresses community involvement and the establishment of rapport between communities and offenders in advocating purchase of services:

Quite aside from the proposition that private sector operation may be more efficient, this approach begins to address itself to the much larger political problem. The wider the involvement, the greater the profitability of the development of a political constituency with clout. . . . [C]ontracting out to an indigenous group provides a credibility long lacking between neighborhoods which produced correctional clients and Departments of Corrections. D. Fogel, *Corrections and Social Work in the Year 2000—Some Directions* 6 (1973).

The most pervasive use of purchase of service arrangements has been by the Massachusetts Department of Youth Services. In Massachusetts, services for juveniles are provided primarily by private agencies, under contractual and other formal arrangements designed to maximize quality and suitability and to integrate the provision of services function. See Foster, "Youth Service Systems: New Criteria," in Y. Bakal, *Closing Correctional Institutions* 34 (1973). Services purchased include foster and group homes, boarding school and psychiatric hospital placements, and vocational training, counseling,

and community college educational programs. See Bakal, "The Massachusetts Experience," *Delinq. Prevention Rep.* (April 1973). In Massachusetts, the problem created when service agencies refused to accept the most difficult youths was remedied by paying the agencies more for accepting certain juveniles. In this respect, costs may be minimized only by reducing capital expenditures. Nevertheless, the other advantages of a purchase of service system are retained, and the correctional system will not find itself committed to use of its own service programs merely because it has invested capital.

Connecticut Commissioner Francis H. Maloney has stated that his agency would follow a similar approach for juvenile corrections:

Our goal in Connecticut is to have technical assistance people to support a state-wide system of purchase of services. We need to transfer the state agency to the community. The biggest problem is in getting the state bureaucracy to take a new look at what it is doing. Competition is the key to community-based services and purchase of care. A lot of private groups competing with each other is essential. Statement of Commissioner Maloney, 1(6) *Impact* (June-July 1973).

Contracting for services is used extensively in New York State as well as in several other eastern states, and recently has been recommended by District Court Judge Lawrence W. Pierce, "Rehabilitation in Corrections: A Reassessment," 38 *Fed. Prob.* 14 (1974).

This discussion of the benefits of purchasing services from the private sector should not obscure the existence of significant abuses that have been associated with purchase of services arrangements in the past. Some private agencies have refused to accept children with the most serious problems; others have shipped children to distant states in order to take advantage of lower costs.⁴¹ Correctional agencies may not abdicate responsibility for the quality of services provided to juveniles simply because they have contracted with private agencies to furnish custody or care. Agencies providing services must establish and monitor standards; however, the responsibility to set standards and monitor performance remains ultimately with the correctional agency regardless of the actual program in which

⁴¹ The overall plan for the provision of child welfare services to New York City children, in which the city funds and relies on the use of voluntary child care agencies, is currently being challenged as discriminatory, since the agencies are organized according to religion and placement along religious lines is mandated by New York State Social Services Law §§ 371(1), (2) and (5). Black juveniles, primarily of the Protestant faith, allege that the practices and policies of the agencies are unconstitutionally discriminatory, denying them their right to proper care. *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974), Complaint for Plaintiffs, New York Civil Liberties Union.

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the juvenile is enrolled. In addition, except in unusual circumstances, any agency, whether public or private, should be prohibited from removing juveniles from their geographic and cultural roots.

Other volumes of standards, particularly those dealing with community agencies and status offenders, recommend the creation of neighborhood-based agencies for providing services to youth. (See the *Youth Service Agencies* and *Noncriminal Misbehavior* volumes.) There is no reason why these agencies should not serve adjudicated delinquents as well as other youth in the community. It is the responsibility of the correctional agency to ensure that the services are actually received by the juveniles under its jurisdiction and, where necessary, to purchase services with its own financial resources. It is unlikely that a correctional agency will require so specialized a service that it cannot be obtained in the open marketplace. If this situation does exist, the correctional agency should cause the service to be provided or provide the service directly.

C. Prohibition against increased dispositions.

Neither the severity nor the duration of a disposition should be increased in order to ensure access to services.

Commentary

In accordance with a model of juvenile corrections built around theories of justice and limited intervention, the provision of services, required while the juvenile is under the jurisdiction of the correctional system, never can be an independent justification for increasing the severity or the duration of a disposition. The choice of dispositions for juveniles adjudicated delinquent is to be governed by the procedures outlined in Parts I and II, which are designed to implement the principle of commensurateness, reduce sentence disparity, and promote equality in sentencing. Increasing the severity or duration of a coercive disposition in order to ensure access to services would be inconsistent with these principles and unjust.

Ensuring access to those services of potential benefit to an offender by increasing sentence duration or severity beyond that which is called for by the seriousness of the juvenile's offense is not more justified than a similar intervention to provide services for a juvenile not so adjudicated. There is, however, some evidence that the provision of services within the correctional system does influence judges' selections of dispositions. In California, for example, a highly regarded study revealed that the choice of a disposition for a juvenile often was dictated by the availability of resources. Where the nonincarcerative disposition thought most appropriate, or the resources

and services needed for carrying it out, were unavailable, judges tended to sentence the juvenile to a state institution. See Board of Corrections, Youth and Adult Corrections Agency, State of California, "Probation Study, Final Report" 19, 22, 36 (1965).

Furthermore, the provision of services actually may tend to attract clients. In Massachusetts, the Department of Youth Services has attempted to furnish a wide variety of services to its clients. This, ironically, contributed to an increase in the number of court-referred youth served: "One of the reasons for the increase in referrals . . . is that the courts have been more impressed by the services that youth received through DYS than they have been with the welfare department. . . . A central issue is the possibility that the process is widening the correctional net to youngsters who might not otherwise have penetrated the criminal justice system." A. Rutherford, "Towards Advanced Corrections, An Interim Report Prepared for the Group for the Advancement of Corrections" 17 (1973). Thus, more Massachusetts youth may have been stigmatized by such referrals because of the attractiveness of the services provided by the department of youth services.

In order to prevent escalation of coercive intervention by the state, the standards provide that the only reaction to an inadequate provision of services may be an immediate arrangement to furnish them as part of the disposition authorized by the seriousness of the juvenile's offense or, if that is not feasible, the imposition of a more lenient disposition.

D. Obligation of correctional agency and sentencing court.

If access to all required services is not being provided to a juvenile under the supervision of a correctional agency, the agency has the obligation to so inform the sentencing court. In addition, the juvenile, his or her parents, or any other interested party may inform the court of the failure to provide services. The court may also act on its own initiative. If the court determines that access to all required services in fact is not being provided, it should employ the following:

1. Reduction of disposition or discharge.

Unless the court can ensure that the required services are provided forthwith, it should reduce the nature of the juvenile's disposition to a less severe disposition that will ensure the juvenile's access to the required services, or discharge the juvenile.

Commentary

Courts traditionally have recognized the principle that confinement under unconstitutional or statutorily prohibited conditions

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amounts to unlawful imprisonment, and that it is the state's duty to remedy the unconstitutionality. The absence of access to required services is one such illegal condition. Judicial orders usually are directed at requiring specific changes or improvements by the offending institution. See *e.g.*, *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973); *Juvenile Detention Center of the Baltimore City Jail*, Md. Balt. City Sup. Bench 8-3-71, CCH 2 Pov. L. Rep. 5289, 5291-92, §§ 4125.48, 4125.82; *In re Savoy*, Nos. 70-4807, 70-4714 (D.C. Juv. Ct., October 13, 1970). This remedy should continue to be used—see Standard 4.1 D. 2.—but not to the detriment of the individuals then confined in the offending institution or program.

Implementation of judicial orders is a notoriously slow process. *In re Savoy*, Nos. 70-4807, 70-4714 (D.C. Juv. Ct., October 13, 1970), provides but one example. In *Savoy*, litigation began when the public defender attacked conditions at the District of Columbia Receiving Home for Children. On October 13, 1970, the superior court, finding that the receiving home did not provide the services required by statute, ordered that certain improvements be made immediately in the operation of the institution. In addition, it declared that the use of the receiving home as a pretrial detention facility for children would have to cease as of October 1972. In 1972, although no substitute for the home had been provided, the court enforced its prior closing order. A new placement plan was adopted by the court, but problems soon arose in locating certain facilities. In February 1974 the court finally approved a consent order altering certain aspects of its 1972 placement plan. Jurisdiction was retained by the court for an additional period of at least one year.

As *Savoy* illustrates, the implementation of court-ordered improvements and additions in juvenile institutions may take years. To hold a juvenile under conditions expressly violative of his or her rights, while the state attempts to remedy these conditions, is irreconcilable with the demands of justice. The nature of the juvenile's original law violation obviously has remained unchanged; to increase the duration or severity of his or her disposition because the state has failed to live up to its constitutional obligations would be unjustified. The state therefore should transfer the juvenile to an equivalent program, reduce the disposition, or release him or her entirely.

Release as a remedy for violation of constitutional obligations by the state has not been used extensively by the courts. In one of the first mental patients' right to treatment cases, *Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1967), the court stated that where the opportunity for treatment has been exhausted or is inappropriate,

“... unconditional or conditional release may be in order. . . .” *Id.* at 458.

More pertinent is *In the Matter of Ilone I.*, 64 Misc. 2d 878, 316 N.Y.S.2d 356 (N.Y. Family Ct. 1970). Respondent, a fifteen-year-old person in need of supervision, had been placed in the New York State Training School, which was directed by the court to provide her with psychiatric care. Such care not having been provided, the court terminated the placement and placed respondent on probation.

The “Model Act for the Protection of Prisoners’ Rights” authorizes release of at least certain offenders as one form of judicial relief: “If the abuses are not corrected to the satisfaction of the court, it may order those prisoners who have a history of serious assaultive behavior to be transferred to another facility, and it may order the discharge of other prisoners.” NCCD, “Model Act for the Protection of Prisoners’ Rights” § 6(d) (1972).

The National Advisory Commission on Criminal Justice Standards and Goals similarly authorizes “. . . the court to shut down an institution or program and require either the transfer or release of confined or supervised offenders.” “Corrections” § 2.18(2)(e).

For the suggestion that total release from all supervision be sought as a remedy to jail conditions, see Note, “Courts, Corrections, and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates,” 44 *S. Cal. L. Rev.* 1060 (1971).

2. Affirmative orders.

In addition, the sentencing court or any other court with the requisite jurisdiction may order the correctional agency or other public agencies to make the required services available in the future.

Commentary

Recent court decisions indicate that courts are empowered to order broad and sweeping changes in correctional facilities. The nature of the changes ordered has varied, but all the cases demonstrate the broad powers of courts to remedy illegal conditions in institutions.

In a few cases, all or portions of institutions have been ordered closed. See *Inmates of Boys’ Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) (use of a wing of the institution enjoined); *United States v. Allsbrook*, 336 F. Supp. 973 (D.D.C. 1971) (juveniles may not be committed to the Lorton Youth Center unless the attorney general certified in advance as to each juvenile that the

appropriate services are available). In the *Juvenile Detention Center of the Baltimore City Jail* case, Md. Balt. City Sup. Bench 8-3-71, CCH 2 Pov. L. Rep. 5289, 5291-92, §§ 4125.48, 4125.82, the failure of the state to make a series of structural and programmatic changes previously ordered to remedy unconstitutional conditions prompted the court to order that the facility no longer be used to house juveniles, effective January 1, 1973. See also *Hodge v. Dodd*, 6 *Clearinghouse Rev.* 287, Clearinghouse No. 7460 (N.D. Ga. 1972) (facility used to house pretrial detainees found unfit for human habitation and ordered closed).

Courts also have ordered reductions in the number of individuals housed in a specific institution. In *Curley v. Gonzales*, No. 8372 (D.N.M. July 29, 1970), the district court ordered the sheriff to hold not more than sixty inmates in the jail. See also *Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs*, Civ. Act. No. 173 217, 5 *Clearinghouse Rev.* 108 (Cir. Ct. for Wayne Co., Mich. 1972), and *Juvenile Detention Center of the Baltimore City Jail*. A reduction in population so that no more than two individuals would be confined in one cell was ordered in *Jones v. Wittenberg*, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971); *aff'd sub nom. Jones v. Metzner*, 456 F.2d 854 (6th Cir. 1975).

Ordering the closing down of facilities or reductions in population may not entail the large expenditures necessary when a court orders specific changes or additions to institutional facilities and programs. Personnel changes and additions, however, frequently have been ordered. The court in *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1969), required that more outside personnel be hired to replace trustees. In *Jones v. Wittenberg*, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), and *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971), more guards were ordered hired. In *Jones*, a dietician and additional staff to serve women also were required. And in the *Wayne County Jail* case, Civ. Act. No. 173 217, 5 *Clearinghouse Rev.* 108 (Cir. Ct. for Wayne Co., Mich. 1972), the hiring of a medical doctor was required, and the addition of a psychiatrist was suggested.

In several cases, comprehensive improvements in institutional services were ordered. The court in *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), ordered the provision of specific programs, with mandatory staffing ratios, in order to provide juveniles with "the ingredients that a normal adolescent needs to grow and develop a healthy mind and body," as well as special services thought necessary to the rehabilitation of delinquent youth. In *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), improvements in medical ser-

vices were mandated. For a similar case in the field of mental health see *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1306 (5th Cir. 1974). In *Juvenile Detention Center of the Baltimore City Jail* case and in the D.C. juvenile detention case, *In re Savoy*, Nos. 70-4807 and 70-4714 (D.C. Juv. Ct. October 13, 1970), specific changes designed to upgrade the services provided were ordered.

Where required services are not being provided, they clearly may be ordered to be made available in the future. Often the state will assert that it is financially unable to comply with the court order or that the court ordering the changes has contravened the doctrine of the separation of powers by ordering the expenditure of funds. Both defenses have been rejected by state and federal courts. In *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1969), for example, the court stated that ". . . the obligation of the Respondents to eliminate existing unconstitutionality does not depend upon what the legislature may do, or upon what the Governor may do, or, indeed, upon what the Respondents may actually be able to accomplish." The separation of powers argument was unequivocally rejected in *Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs*, Civ. Act. No. 173 217, 5 *Clearinghouse Rev.* 108 (Cir. Ct. for Wayne Co., Mich. 1972). Most recently the fifth circuit rejected prison officials' defenses of fund shortages and the inability of a federal court to order appropriations by the state legislature, declaring that if a state chooses to run a prison it must do so without depriving inmates of constitutionally guaranteed rights. *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). See also *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971); *Jackson v. Hendrick*, No. 71-2437 (Phila. Ct. C.P. April 21, 1972). See generally Comment, "Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy," 59 *Geo. L.J.* 393 (1970).

The National Advisory Commission on Criminal Justice Standards and Goals provides as judicial remedies for violations of offenders' rights: "Authority for an injunction either prohibiting a practice violative of an offender's rights or requiring affirmative action on the part of government officials to assure compliance with offenders' rights." "Corrections" § 2.18(a). See also Standard 5.9, "Continuing Jurisdiction of Sentencing Court." For provisions for equally broad power to remedy violations of prisoners' rights, see NCCD, "Model Act for Protection of Prisoners' Rights" § 6 (1972).

4.2 Right to refuse services; exceptions.

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Juveniles who have been adjudicated delinquent have the right to refuse all services, subject to the following exceptions:

A. Participation legally required of all juveniles.

Juveniles who have been adjudicated delinquent may be required to participate in all types of programs in which participation is legally required of juveniles who have not been adjudicated delinquent.

B. Prevention of clear harm to physical health.

Juveniles may be required to participate in certain programs in order to prevent clear harm to their physical health.

C. Remedial dispositions.

Juveniles subject to a conditional disposition may be required to participate in any program specified in the sentencing order, pursuant to Standard 3.2 D.

Commentary

Subject to the three exceptions, this standard makes participation in all correctional programs voluntary on the part of the juvenile adjudicated delinquent.⁴² For example, while opportunities for religious training and for attending religious services must be provided for adjudicated juveniles, they may not be coercively imposed; while recreational facilities must be made available, participation may not be made compulsory; while access to social and psychological treatment programs must be ensured, such treatment may not be coerced.

Inherent in the right to refuse services is the requirement that juveniles not receive different treatment according to whether or not they choose to participate in correctional programs. Juveniles who voluntarily choose to participate should be treated no more leniently than those who do not, and juveniles who exercise their right to refuse should not be penalized in any way for so doing. See A. von Hirsch, *Doing Justice* 93 (the Committee for the Study of Incarceration 1976).

To ensure voluntary and knowing consent or refusal to participate in a program, the juvenile should be fully informed of the services provided and all other pertinent aspects of the program. The juvenile also should be advised of any obligations imposed by participation in

⁴²Standard 4.2 does not preclude enforcement of reasonable regulations necessary to the proper functioning of residential facilities. Compliance with such routine regulations may be required.

The standards recognize that there are difficult problems associated with the voluntariness of consent in the inherently coercive setting in which adjudicated juveniles may find themselves, particularly if they are removed from their homes. Nevertheless, every effort should be made to ensure that consent is truly voluntary. (For recommendations to ensure voluntariness, see Standard 4.3.)

the program and the possible consequences of failure to meet such obligations. See Standard 1.2 D. concerning coercive dispositions.

The recommendation that adjudicated delinquents have a right to refuse services, coincident with a requirement that access to such services be provided (Standard 4.1), while innovative in the juvenile field, is not entirely novel. The National Advisory Commission on Criminal Justice Standards and Goals states:

Endorsement of the right to treatment does not carry with it the right of correctional authorities to require or coerce offenders into participating in rehabilitative programs. Considerations of individual privacy, integrity, dignity, and personality suggest that coerced programs should not be permitted. In addition, a forced program of any nature is unlikely to produce constructive results. "Corrections" at 45.

The Group for the Advancement of Corrections recommends that offenders have access to rehabilitative services but that "[p]articipation by the offender must be at his own volition, and those who choose not to participate should not be penalized." The Academy for Contemporary Problems, the Group for the Advancement of Corrections, and the Ex-Prisoners Advisory Group, "Toward a New Corrections Policy: Two Declarations of Principles" 11 (1974). Purely voluntary participation in correctional programs similarly has been recommended by the New York Citizens' Inquiry on Parole and Criminal Justice, Inc., "Report on the New York State Parole System, Preliminary Draft" (1974); the Forty-Second American Assembly of Columbia University, "Final Report: Prisoners in America" (1973); members of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, "Final Report: A Program for Prison Reform" (1972); and the American Friends Service Committee, "Struggle for Justice" (1971). See also Pierce, "Rehabilitation in Corrections: A Reassessment," 38 (2) *Fed. Prob.* 14 (1974).

Voluntary programs have been established successfully in some correctional agencies. For example, approximately one-third of all California Youth Authority wards in conservation camps chose to participate in a voluntary "academic education program"; though the school courses were offered in the evening, during the wards' free time, the "high level of participation indicates the wards' interest in the program." 2 *Juv. Just. Dig.* 9 (1974). Delinquents in Santa Clara County, California, are offered an opportunity to participate in an urban ecology program in which they receive nineteen units of high school credit for the ecology component and four for the work experience. In New York, nonadjudicated juveniles can, and sometimes do, voluntarily enter Division for Youth facilities.

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There are several reasons for recommending that juveniles have a right to refuse services: (A) coerced participation in correctional programs has not been shown to be effective in reducing crime; (B) voluntary participation is likely to prove more productive than coerced participation, and programs catering to willing participants are likely to be of higher, more consistent quality than those catering only to unwilling participants; and (C) coerced participation raises questions concerning infringement of juveniles' rights of privacy, personal dignity, and autonomy.

There is much evidence that offender rehabilitation programs are not achieving their purpose. According to the National Advisory Commission, "insofar as the word 'rehabilitation' suggests compulsory cure or coercive retraining, there is an impressive and growing body of opinion that such a purpose is a mistaken sidetrack that corrections has too long pretended to follow." "Corrections" at 3.

In "Corrections and Simple Justice," 64 *J. Crim. L.C.* 208, 209 (1973), John Conrad describes certain studies indicating the lack of effectiveness of treatment attempts, and concludes: "In the absence of any strong evidence in favor of the success of rehabilitative programs, it is not possible to continue the justification of policy decisions in corrections on the supposition that such programs achieve rehabilitative objectives." Similarly, in "A Time for Skepticism," 20 *Crime & Delinq.* 20, 22 (1974), Martin Gold asserts: "The best data at hand demonstrate that we have not yet solved the problem of the effective treatment of delinquency." After reviewing similar evaluative literature, Nora Klapmuts, in "Community Alternatives to Prison," 5 *Crime & Delinq. Lit.* 305, 320 (1973), observes: "... treatment programs—at least under the coercive circumstances of the correctional system—do not work." See also Adams, "Evaluative Research in Corrections: Status and Prospects," 38 *Fed. Prob.* 14 (1974) and Warren, "All Things Being Equal," 9 *Crim. L. Bull.* 473 (1973).

The ineffectiveness of prison rehabilitative programs in reducing recidivism rates has been documented by G. Kessebaum, D. Ward, and D. Wilner, in *Prison Treatment and Parole Survival* (1971), and by Robison and Smith in "The Effectiveness of Correctional Programs," 17 *Crime & Delinq.* 67 (1971). David Greenberg sums up sources of the current sense of pessimism concerning prisoner rehabilitation as it exists in our correctional system today in stating:

The failure of prison rehabilitation programs is becoming increasingly well documented. Typically, treated and untreated inmates have similar rates of return to crime after release from prison. . . . This appears also to be true for treatment programs administered in halfway houses or in

community treatment situations. . . . "A Voucher System for Correction," 19 *Crime & Delinq.* 212 (1973).

In light of this conclusion, Greenberg proposes use of a voucher system in which prisoners would be given wide discretion in designing and purchasing rehabilitative programs in lieu of forced participation.

Reviewing the results of correctional research prior to 1966, Leslie T. Wilkins noted that

the greater the degree of rigor in the research methods which were used in different studies to evaluate penal treatment, the less was the likelihood that the studies would claim successful outcomes. . . . The tendency to assume that enlightened treatment . . . must necessarily result in fewer reconvictions for the offenders concerned, coupled perhaps with the fear that rigorous testing might prove this faith unfounded, has had serious impacts upon research designs and the publication of research results. "Current Aspects of Penology: Directions for Corrections," 118 *Proceedings of the American Philosophical Society* 235, 238 (1974).

The one conclusion that Wilkins found "not unreasonable" to assert on the basis of existing research results was that "the less it is found necessary to interfere with the personal autonomy of the offender, the better are his chances for going straight in the future." *Id.* at 239.

The most thorough review of the evaluative literature published to date appears in "What Works?—Questions and Answers About Prison Reform," *The Public Interest* 22 (Spring 1974), by Robert Martinson, who prepared a comprehensive survey of what is known about rehabilitation and its effect on recidivism for the New York State Governor's Special Committee on Criminal Offenders. Martinson discusses under separate headings: (A) educational and vocational training of young males (citing five studies and concluding that there is little empirical evidence to support the proposition that educationally and vocationally trained individuals will be more successful after release from prison than those not similarly trained); (B) training adult inmates (citing six studies and concluding that despite isolated instances of success, educational and vocational training of adult offenders does not reduce recidivism); (C) individual counseling⁴³ (citing eleven studies and concluding that the results suggest no rea-

⁴³ Martinson's research survey in this area may be supplemented by Richard Stuart's summary of empirical findings in psychotherapy research in *Failure and Deterioration Associated with Psychotherapy, Trick or Treatment: How and When Psychotherapy Fails* 43 (1970).

son for enthusiasm); (D) group counseling (citing nine studies and concluding that the burden of the evidence is not encouraging); (E) the transformation of the institutional environment (citing thirteen studies and concluding that although such milieu therapy programs should be encouraged for youthful offenders on grounds of cost-effectiveness, the results of the studies reveal no clear-cut effectiveness of such rehabilitative efforts); and (F) medical treatment (citing three studies evaluating plastic surgery, hormone therapy, and tranquilization). Also reviewed are studies of nonincarcerative treatment modalities such as nonresidential milieu therapy, psychotherapy in community settings, probation or parole versus prison, and the intensive supervision studies. In summarizing the findings, Martinson concludes that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." *Id.* at 25.

It should be noted that Martinson's assessment of research does not, for the most part, address the issue of whether the findings are the result of poor programs or poor research design. Since the publication of Martinson's compendium, other researchers have emphasized that even Martinson's review included some examples of programs that appear to have made a difference for some offenders. See Palmer, "Martinson Revisited," (January 1975). Yet it seems fair to say that we know very little about whether, and under what circumstances, coerced rehabilitative programs can succeed in reducing delinquency.

Particularly pertinent, because limited to correctional programs for young people, is the "Review of Accumulated Research in the California Youth Authority" (California Youth Authority, May 1974).⁴⁴ The studies catalogued are difficult to summarize and compare, especially because "success" or "failure" was not always measured in a consistent manner (*e.g.*, by recidivism rates), but it seems fair to state that the institutional treatment programs studied were generally not very successful. While the psychiatric treatment group at one institution, for instance, had "a lower violation rate" than did the control group, a comparable experimental group at another institution had a higher violation rate. Studies of group counseling at two other institutions found no significant differences in violation rates of the counseling groups and the control groups. Although some studies have produced favorable results (*e.g.*, forestry camp programs), the overall picture of the effectiveness of institutional treatment of youths is not encouraging.

⁴⁴For additional material concerning juveniles, see Zimberoff, "Behavior and Modification with Delinquents," 3 *Correctional Psychologist* 11-25 (1968).

Studies of intensive rehabilitation efforts for paroled and probationed juveniles are equally discouraging. For example, the results of the Parole Research Project (1959-1961) show that wards in reduced caseloads performed no better on parole than those in regular caseloads. Results of the Community Treatment Project reveal that for specific types of offenders, particularly neurotic youngsters, the Community Treatment Program brought about better performance on parole than did the regular program, while for others, the "power-oriented" delinquents, the regular program was more beneficial. Recent findings of the Probation Subsidy Program evaluation project reveal that there is no significant difference between the subsidy and regular supervision cases when matched for age and risk category. "Findings from the AB 368 Probation Subsidy Evaluation Project: Juvenile Case Findings, Preliminary Draft" (California Department of Youth Authority 1974).

The California studies in which juveniles were divided for treatment purposes according to their "interpersonal maturity level classification" reveal encouraging results. See M. Warren, "The Community Treatment Project after Five Years" (California Youth Authority 1966); M. Warren et al., "Community Treatment Project, an Evaluation of Community Treatment for Delinquents: Fifth and Sixth Progress Reports," C.T.P. Research Reports nos. 7 and 8 (California Youth Authority 1966, 1967). But, as is pointed out by Robert Martinson in his article in *The Public Interest*, although the experimentals had a lower *failure* rate, they also had a lower *success* rate; fewer experimentals "successfully" completed their supervision programs so as to be deemed suitable for favorable release, and the higher failure rate for the controls may be attributable to the fact that the probationary status of the controls was being revoked for less serious offenses. Martinson, *supra*.

One commentary suggested that the Supreme Court apparently has adopted the attitude that, at the present time, the treatment sciences cannot effectively accomplish actual treatment. See "A Right to Treatment for Juveniles?" *Wash. U.L.Q.* 157, 167 n.46 (1973), citing the *Kent-Gault-Winship-McKeiver* quartet for the proposition that in mandating procedural safeguards for juveniles in the adjudication phase so that they would not receive the "worst of both worlds" the Court implied that it was unconvinced as to the effectiveness of the treatment sciences; and *Powell v. Texas*, 392 U.S. 506 (1968), as a hard line approach to the realities of the ineffectiveness of treatment facilities and sciences regarding alcoholism.

It is a frequently stated proposition that treatment programs are more successful with willing participants than with the unwilling.

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The proposition is commonly assumed, although little empirical research on the subject is available.⁴⁵

The National Advisory Commission on Criminal Justice Standards and Goals concludes that "... a forced program of any nature is unlikely to produce constructive results" ("Corrections," Standard 2.9 commentary), and the American Assembly asserts: "Although coercion has failed for the most part, it does not necessarily follow that voluntary programs are doomed to the same fate." *Supra* at 5. The American Friends Service Committee observes:

Beyond the special problems of effecting "treatment" in prisons, is it possible to coerce people into "treatment" in any setting? Is the necessary therapeutic relationship between the helper and the helped possible if the person to be helped is forced into the relationship? Psychiatrists have argued that in order for psychotherapy to be effective, the client must enter the relationship voluntarily. When he is coerced, resentment, suspicion of the motives of the therapist, and lack of commitment to the therapeutic goals destroy any chances of success. *Supra* at 97.

In an article entitled "Aversive Therapy: Its Limited Potential for Use in the Correctional Setting," 26 *Stan. L. Rev.* 1327 (1974), Stanley Dirks notes that a large majority of patients serving as subjects in clinical trials of aversion therapy were either voluntary admissions to hospital treatment programs or special research volunteer subjects. Since treatment meted out by the correctional system usually is coercive, it is necessary to determine whether aversion therapy in such a situation would be effective. Dirks' conclusion is that the outlook appears unpromising. He refers to a European study of the use of chemical aversion on homosexuals, reporting that 57 percent of those with no obvious external pressure to participate in the therapy achieved heterosexual adaptation for some time after treatment, while only 15 percent of those coerced into treatment by legal authorities or by relatives changed for even a short period of time. Freund, "Some Problems in the Treatment of Homosexuality," in *Behavior Therapy and the Neuroses* 312, 318 (H. Eysenck ed.

⁴⁵The efficacy of compulsory counseling has been debated considerably in the context of counseling at the time of divorce. See, e.g., Shankiverler, "Statutory Marriage Counseling," 45 *Fla. B.J.* 1557 (1971); Bodenheimer, "New Approaches of Psychiatry: Implications for Divorce Reform," 1970 *Utah L. Rev.* 191; and Hansen, "Three Dimensions of Divorce," 50 *Marq. L. Rev.* 1 (1966). See also Cobb, "Community Mental Health Services and the Lower Socioeconomic Classes: A Summary of Research Literature on Outpatient Treatment (1963-1969)," 42 *Am. J. Orthopsychiatry* 404, 406 (1972).

1960). Other investigators, Dirks reports, achieved similar results. The conclusion of the Shadel Sanitarium group, studying chemical aversion treatment of alcoholics, was that coerced patients do as well as voluntary ones only if they "see the light" and have a change of heart after starting treatment. Lemere, Voeghtlin, Broz, O'Hollaren, and Tupper, "The Conditioned Reflex Treatment of Chronic Alcoholism VIII," 120 *J.A.M.A.* 269 (1942). Also concluding that the prognosis for coerced patients is poor are Thimann, "Conditioned Reflex Treatment of Alcoholism II: The Risks of Its Application, Its Indications, Contraindications, and Psychotherapeutic Aspects," 241 *N. Eng. J. Med.* 406 (1949); and Shanahan and Horneck, "Aversion Treatment of Alcoholism," 6 *Hawaii Med. J.* 19, 20 (1946), reporting that motivation is important for a good prognosis.⁴⁶

In a speech at a symposium on "Medical, Moral, and Legal Issues in Mental Health" (Ellicott City, Maryland, April 1974), Dr. Magnus Lakovics, clinical instructor of psychiatry at Upstate Medical Center, New York, discussed the voluntariness of mental hospitalization as a variable in studying treatment and outcome. Lakovics pointed out that while the list of variables studied is almost infinite, the importance of voluntariness has been consistently omitted. Of the research in which voluntariness is scrutinized, Lakovics cites a study by the National Institute of Mental Health Collaborative Study Group in which 335 patients were divided into four treatment groups. Voluntariness of hospitalization was deemed a significant variable in treatment outcome.⁴⁷ Although several factors could explain the results, Lakovics cites a study of median stays in New York mental hospitals (sixty-eight days for involuntary patients as compared to forty-one days for voluntary patients) to illustrate the fact that voluntariness is a significant variable. See Weinstein et al., "Relationships Between Length of Stay In and Out of New York State Mental Hospitals," 130 *Am. J. Psychiat.* 904 (1973).

The acclaimed success of programs such as Synanon may be attributed largely to the high motivation of the individuals involved;

⁴⁶ Dirks warns that in cases where aversion therapy was successful despite coercion, other prognostic factors overwhelmingly predicted success, referring to Gaupp, Stern, and Ratliff, "The Use of Aversion Relief Procedures in the Treatment of a Case of Voyeurism," 2 *Behav. Ther.* 585 (1971), and Raymond, "Case of Fetishism Treated by Aversion Therapy," 2 *Br. Med. J.* 854 (1956).

⁴⁷ Voluntariness had the highest correlation with effectiveness in the placebo (nonsomatic therapy) group and the poorest in the drug treatment group. NIMH-PRB Collaborative Study Group, "Short-Term Improvement in Schizophrenia: The Contribution of Background Factors," 124 *Am. J. Psychiat.* 900 (1968). A conclusion may be that nonsomatic therapy is effective only for voluntarily committed patients, who are perhaps more motivated and therefore more responsive to treatment than involuntarily committed patients.

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addicts who choose, and are admitted to, Synanon clearly are motivated to kick their habits.⁴⁸

The same may be said of Alcoholics Anonymous, where individuals have been able to face their problems, define their needs, and seek help. Such motivation renders a more favorable prognosis than when an unwilling individual has been told to "get cured." For example, alcoholic probationers forced to attend group meetings (Alcoholics Anonymous or an alcoholism clinic) in San Diego fared less well than ordinary probationers, as measured by recidivism rates (though drunk arrests in the city generally declined). Greenberg, "The Special Effects of Penal Measures," *supra* at 46. By contrast, alcoholics in St. Louis are taken to a detoxification center in lieu of jail. A seven-day stay is offered on a voluntary basis. About 90 percent of the alcoholics do choose to stay. In the three-month period prior to admission in 1967, 46 percent of those discharged had one or more arrests; only 13 percent had one or more arrests in the three months following release from the center. United States Department of Justice, Law Enforcement Assistance Administration, "The St. Louis Detoxification and Diagnostic Center" 65-66 (Washington D.C. 1970).

A voluntary program of behavioral treatment for incarcerated pedophiles in the Connecticut Correctional Institution at Somers has been established by Dr. Dominic Marino, director of the mental hygiene unit. Dr. Marino states: ". . . I do not believe that there can be therapy which is coerced. All therapy to be genuine therapy must be undertaken with the motivation (however minimal) of the patient. Thus, as far as I am concerned there is only one kind of therapy and that is voluntary." Letter from Dr. Marino, July 19, 1974.

Richard Friedman of the American Bar Association Resource Center on Correctional Law and Legal Services summarized the argument in favor of voluntary participation in correctional programs as follows:

In the desire to seek help for resolving personal problems, there needs to be a trusting and positive relationship between client and helper. Initially there must be a recognition of a real problem to be resolved; this must be seen through the eyes of the one seeking assistance and not defined by outsiders. Prisoners usually do not see themselves as being in need of treatment, only as persons caught and sentenced in a discriminatory manner. The desire for change in attitudes and behavior must be noncoerced, voluntary in all respects, and the terms of the helping must be established jointly by client and helper. Once a problem has been

⁴⁸ See Greenberg, "The Special Effects of Penal Measures (Treatment, Special Deterrence, etc.): A Descriptive Summary of Existing Studies" 60 (Staff Memorandum, Committee for the Study of Incarceration, April 1972), for the little data available on the effectiveness of Synanon.

identified, the person seeking assistance must be able to perceive the helper as being capable of providing assistance unaffected by other priorities, such as custody and control. If a trusting relationship is eventually established, the process of change usually takes place within a specific time frame. The problems identified by the client are a primary concern to both treater and recipient of help. The "ground rules" for treatment are thus mutually identified, with those seeking help always free to choose and self-determinate in goal setting, method, and time-frame. "Dilemmas of Correctional Law and Rehabilitation," *Proceedings: Second Annual Workshop on Corrections and Parole Administration* 57, 68-69 (San Antonio, Texas, March 1974).

The lack of motivation and rejection of enforced treatment on the part of adult prisoners has been described by Jessica Mitford in *Kind and Usual Punishment* 103 (1973):

From the convict's point of view, "treatment" is a humiliating game, the rules of which he must try to learn in order to placate his keepers and manipulate the parole board at his annual hearing: "I have gained much insight into my problems during the past year." According to a 1966 study by the Institute for the Study of Crime and Delinquency, "most [inmates] looked upon treatment programs as phony." Seventy percent of inmates polled answered "yes" to the question: Do you believe that therapy and treatment programs are games? The researchers concluded, "Most cons know how to walk that walk, talk that talk, and give the counselor what he wants to hear."

In an article entitled "The Paradox of Prison Reform III: The Meaning of Attica," *New Republic*, April 15, 1972, at 17, 18, Robert Martinson concludes: "Attica reflected a growing disgust with what the inmates regard as the hypocritical fakery of treatment."

These accounts of prisoners' views of mandatory treatment substantiate the thesis of A. Etzioni, *The Active Society* 370-75 (1968); and *A Comparative Analysis of Complex Organizations*, 12-22 (1961), cited in Conrad, "Corrections and Simple Justice," 64 *J. Crim. L. & Crim.* 208, 210 (1973), who suggests that the response to coercion is alienation: "Alienation from authority is at its highest when authority uses force to obtain compliance." Alienation seems an unlikely ingredient in the successful therapeutic relationship.

Mandatory imposition of treatment programs on juveniles adjudicated delinquent posits that correctional authorities are better suited to identify juveniles' needs than the juveniles themselves. As Professor Sanford Fox observes:

Children are not ordinarily asked what they think will be good for them, and even in the rare instances where their views are seriously solicited in an atmosphere conducive to unrestrained expression, their

responses are still more rarely made determinative of the outcome. The reasons for this, importantly, have little to do with shortages in diagnostic skill or penny-pinching legislatures. We have simply been propelled back to carrying out the logic of the original intervention rationale, which was not to provide benefits or to identify needs, but rather because the law has been broken and, for reasons mostly relating to public security, a coercive response having little to do with the welfare of the law breaker is socially desirable.

It may be urged that I have overlooked the issue of competency and that it truly is the welfare of children that is at issue; only they are not competent to see after their own welfare so that the decision must be made for them. This view cannot be seriously entertained. There is first the objection that if we were in earnest about this, then we would not have the needs of black children and poor children assessed by white and middle class officials whose ability to perceive those needs in a sufficiently empathetic fashion is, at best, severely attenuated. "The Reform of Juvenile Justice: The Child's Right to Punishment," 25 *Juv. Just.* 2, 5 (1974).

Allowing juveniles to identify their own needs and problems would provide a way—perhaps the only viable way—to make the selection of programs by the state responsive to juveniles' needs. As the Committee for the Study of Incarceration notes:

Leaving offenders free to decide whether or not to take part in rehabilitative programs in an institution constitutes an important check upon the selection of programs by the state: if inmates feel a program serves institutional interests more than their own needs, they may refuse to attend. If participation is made mandatory, it will prove extremely difficult to fashion a workable alternative form of control over the state's selection of programs—given the elusiveness of defining with any degree of precision or objectivity what kinds of programs are actually "beneficial" to individual offenders. Conferring this power of selection on the state without such controls entails significant danger that programs will be selected which actually serve more to worsen the quality of life within the institution than to benefit the offenders. Programs ostensibly intended for the offender's "own good" may be selected which actually fulfill a variety of less desirable objectives, such as inducing submissive attitudes toward staff ("helping" the offenders with their "authority problems"); compelling inmates to endorse social, class or cultural norms favored by the staff (developing "insight"); obtaining menial work from inmates at low cost (teaching "good work habits"); or just plain harassment (inculcating "tolerance for frustration"). von Hirsch, *supra* at 16, 17.

Proposals for vouchers in the field of education⁴⁹ rest on the

⁴⁹Under such proposals parents would be issued vouchers with which they could purchase educational services for their children at any school they chose.

assumption that free choice improves the quality of services. It is argued that by forcing schools to compete for financial remuneration by attempting to attract students the quality of education will be improved. For discussion of educational voucher systems, see Solet, "Education Vouchers: An Inquiry and Analysis," 1 *J. Law & Ed.* 303 (1972); Note, "Education Vouchers and Curriculum Control: The Parent Versus the State," 52 *B.U.L. Rev.* 262 (1972); and Areen, "Education Vouchers," 6 *Harv. Civ. Lib.-Civ. Rights L. Rev.* 466 (1971).

The use of vouchers to purchase rehabilitative services within the correctional system has been suggested by Greenberg, "A Voucher System for Correction," 19(2) *Crime & Delinq.* 212 (1973). Whether a choice of services for offenders is implemented by use of a voucher system or by any other type of purchase of services as described in Standard 4.1 B., it is likely that competition for participants will be stimulated, thereby improving the quality of the services available.

While Standard 4.3 deals separately with compulsory participation in correctional programs that may have potentially harmful effects, the coercive imposition of programs such as group therapy raises some question as to whether the juvenile's right to privacy has been infringed.

Judicial recognition of the right to privacy may be traced back to *Olmstead v. United States*, 277 U.S. 438, 478 (1928), in which dissenting Justice Brandeis stated, "The makers of our Constitution . . . conferred, as against the Government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men." For more recent cases affirming the right to privacy, see *Roe v. Bolton*, 410 U.S. 179 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The right to privacy encompasses the right to determine for oneself what is to be done to one's mind and body. The right to bodily integrity may have roots in the fourth amendment,⁵⁰ while the ninth amendment has been cited as a source for the right to personality.⁵¹

The school in turn would redeem the vouchers at a government agency for the cost of educating the children.

⁵⁰"Nor are the intimate internal areas of the physical habitation of mind and soul any less deserving of precious preservation from unwarranted and forcible intrusions than are the intimate internal areas of physical habitation of the wife and family. Is not the sanctity of the body even more important, and therefore more to be honored in its protection than the sanctity of the home. . .?" *Huguez v. United States*, 406 F.2d 366, 382 (9th Cir. 1968). See Bowers, "Prisoners' Rights in Prison Medical Experimentation Programs," 6 *Clearinghouse Rev.* 319 (1972).

⁵¹"The protection of private personality, like the protection of life itself, is

Conferring the right to refuse services on adjudicated delinquents rests on the assumption that juveniles are competent to determine the extent of their own participation.⁵² As competent individuals, adjudicated delinquents must be presumed capable of asserting their own interests and making most decisions that affect their lives. See Hillary, "Children Under the Law," 43 *Harv. Ed. Rev.* 487, 507 (1973). Professor Sanford Fox argues that "far from being presumptively incompetent," juveniles "are bordering on the acquisition of full rights of citizenship so that the presumption should be the other way—that they do know best—better presumptively than any others, save perhaps their own parents, what is good for them." *Supra* at 2, 5-6.

As is noted by Professor Fox, children are often required to do certain things by their parents; parents are presumed to have their children's best interests in mind. Parental authority should not be equated with that of correctional authorities, however. Requiring a juvenile's attendance at Sunday school as a condition of probation, for example, has been held unconstitutional. *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946). In discussing this case one commentator states:

While it seems obvious that a parent would have the power to do this, it is equally apparent that the parent's control over children extends far beyond that which would be reasonably granted to the state. The philosophical reasons for differentiating between the parent and the state with respect to control exerted over children are summed up as follows:

"The ancients recognized the fact that parental authority was importantly different from the kind of power which government can exercise. Aristotle stressed the differences between the rule of the ruler and the rule of the husband and father as he exercised authority. 'The rule of the father over his children,' Aristotle says, 'is royal for he rules by virtue both of love and of the respect to the age.' The state can satisfy the latter reason given for parental power. . . . The central difficulty lies in the fact that a parent can love in a sense that the state cannot. The

left primarily to the states under the Ninth. . . Amendment. But this does not mean the right is entitled to any less recognition by this Court as a basic of our constitutional system." Mr. Justice Stewart, concurring in *Rosenblatt v. Baer*, 383 U.S. 92 (1966), cited in Kent, "Under the Ninth Amendment What Rights Are the 'Others Retained by the People?'" 29 *Fed. B.J.* 219, 222 (1968).

⁵²As is true of most presumptions, the presumption that a particular juvenile is competent is rebuttable. Only upon a showing that the juvenile is incompetent should his or her refusal be overridden. Where the state has sufficiently established a juvenile's incompetency, a guardian should be appointed to assert the juvenile's rights, including the right to refuse services.

enormous discretion which a parent has in respect to his child is in part justified on the ground that he will not abuse it because of his deep personal concern for his child." Note, "The Courts, The Constitution and Juvenile Institutional Reform," 52 *B.U.L. Rev.* 33, 42 (1972), citing Paulson, "The Juvenile Court and the Whole of the Law," 11 *Wayne L. Rev.* 597, 613-614 (1965).

The right to refuse services has three exceptions:

Standard 4.2 A. embodies the right of the state to require the participation of juveniles adjudicated delinquent in all types of programs ordinarily required of all juveniles. Compulsory education laws, for example, command the parent to send a child to school, or the child to attend school. See the *Schools and Education* volume. Kleinfeld, "The Balance of Power Among Infants, Their Parents and The State," 5 *Fam. L.Q.* 64, 91 (1971). By passing compulsory education laws, the states deem education so basic to the proper growth and development of their citizens that to exempt an entire class of juveniles from such laws would not make sense. Regardless of why states require school attendance by children of certain ages, the fact that it is so required for all children posits that it may likewise be required for juvenile offenders.

Other services or programs also may be mandatory for nonadjudicated juveniles; certain health or medical care measures, for example, often are compulsory. Where such measures are mandatory, the state exercises its authority over all children. No valid reason exists to exempt juvenile offenders from mandatory service laws imposed on children in general.

Standard 4.2 B., which is aimed at those juveniles who have been removed temporarily from their homes, allows the state to intervene coercively to prevent harm to the health of juveniles in its care. Thus, correctional authorities may take measures to prevent physical illness or deterioration; they may, for example, require physical activity on the part of the totally inert child, and they may procure medical and dental care for the child, subject to the rights of control and consent of the child's natural parents or guardians.

Case law on the state's ability to interfere to prevent harm to a child who is refusing care is scant, but the cases referring to the state's power to intervene to prevent harm caused by the parents' refusal to provide care are appropriate sources from which to derive this state power. Generally, those charged with care and custody of children are obligated to provide and ensure protection from neglect, maltreatment, abuse, or danger to health. The duty of care extends to parents, guardians, and those who have assumed the relation in loco parentis. See 42 *Am. Jur.* 2d, "Infants" § 16. Child protective

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statutes have been enacted in all United States jurisdictions, and the states are ordinarily empowered to take custody of a child where the situation necessitates prompt attention to ensure the general welfare of the child. Note, "Juveniles—The Child, Medicine and the Law," 39 *Miss. L.J.* 508, 509 (1968).

Courts generally intervene to order medical treatment necessary to protect the life or limb of a minor when the parents have refused to supply or allow such treatment because of religious scruples or otherwise. A guardian was appointed to authorize a life-saving blood transfusion for a child, for example, in *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (Ill. 1952), *cert. denied*, 344 U.S. 824 (1952); the state's privilege to order a blood transfusion without which the child would die or become mentally impaired was also affirmed in *State v. Perricone*, 37 N.J. 462, 181 A.2d 751 (1962), *cert. denied* 371 U.S. 890 (1962). See "Parent and Child—State's Right to Take Custody of a Child in Need of Medical Care," 12 *DePaul L. Rev.* 342 (1963).

Other cases have demonstrated the courts' willingness to intervene to order medical care for a child over the parents' objections, even without imminent threat to life and limb. In *In re Karwath*, 199 N.W.2d 147 (Iowa 1972), for example, the juvenile court was found properly to have ordered surgical removal of tonsils and adenoids from three wards of the state over the father's objections. Although the father asserted that the state was powerless to coerce treatment if the condition did not pose a threat to life and limb, the court decided that it was the statutory duty of the department of social services to provide ordinary medical care. The court in *In re Sampson*, 528 N.Y.S.2d 686, 278 N.E.2d 918 (1972), went further and upheld the family court judge's authorization of a "risky" surgical procedure with concomitant blood transfusions in order to improve the appearance of a fifteen-year-old's face and neck, which had been massively disfigured. The court expressed the view that corrective surgery may be ordered despite parental objections even in the absence of a risk of death.

Making no findings as to urgency, the court in *In re Vasko*, 263 N.Y. 552, 554, 189 N.E. 693, 695 (1933), nevertheless ordered the removal of an infected eye from a two-year-old, stating:

The law is not only zealous in the protection of the civil rights of infants but has a special regard for the moral care, training and guidance of children . . . its beneficence extends also to conservation of the health of children, their physical well-being, as well as to the preservation of their lives.

Other cases affirming the state's right to order nonemergency medical treatment include *In re Rotkowitz*, 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. 1941); and *Mitchell v. Davis*, 205 S.W.2d 812 (Texas Cir. App. 1947). See generally Baker, "Court Ordered Non-Emergency Medical Care for Infants," 18 *Clev.-Mar. L. Rev.* 296 (1969).

The power of the state to override the parents' refusal to provide necessary medical care for a youngster similarly allows it to override the child's refusal where such refusal is clearly endangering his or her own health and well-being.

Standard 4.2 C. allows the state to require participation by a juvenile adjudicated delinquent in programs specified in the sentencing order, pursuant to Standard 3.2 D. Such participation is itself the sanction for the juvenile's offense and may be enforced in the same manner as any sentencing disposition. The rationale for allowing the coercive imposition of remedial programs at the time of sentencing is discussed in the commentary to Standard 3.2 D.

4.3 Requirement of informed consent to participate in certain programs.

Informed, written consent should be obtained before a juvenile may be required to participate in any program designed to alter or modify his or her behavior if that program may have harmful effects.

A. Juveniles below the age of sixteen.

If the juvenile is under the age of sixteen, his or her consent and the consent of his or her parent or guardian both should be obtained.

B. Juveniles above the age of sixteen.

If the juvenile is sixteen or older, only the juvenile's consent need be obtained.

C. Withdrawal of consent.

Any such consent may be withdrawn at any time.

Commentary

The rationale that supports the general right to refuse services contained in Standard 4.2 is even stronger with respect to the right to refuse to participate in any program that may have potentially harmful effects on the juvenile. This standard requires a more rigorous, more formal level of assent to the imposition of certain programs or forms of therapy, including therapeutic procedures such as psychosurgery, aversive conditioning, and certain forms of chemotherapy, as well as token economies that employ solitary confinement or other forms of severe deprivation. Written, informed consent

is made a prerequisite to the imposition of any program that may have harmful effects. It is recognized that the identification of programs that may have potentially harmful effects is fraught with difficulties. Where a program or treatment modality is proposed, consensus among medical or psychiatric practitioners would be a good indicator of whether the effects are potentially harmful. If the effects are subject to professional disagreement concerning danger or harm, the procedure may require informed, written consent for its imposition. Where the consensus is that any effects would be harmless, informed, written consent would not be necessary. Considerations such as the probability of the occurrence of the harmful effect and the seriousness of the potential effect should be taken into account in determining whether written consent is necessary.

Some commentators have viewed coercive therapy in terms of the eighth amendment's ban on cruel and unusual punishments. See Kassirer, "Behavior Modification for Patients and Prisoners: Constitutional Ramifications of Enforced Therapy," 2 *J. Psych. & Law* 245 (1974); R. Schwitzgebel, *Development and Legal Regulation of Coercive Behavior Modification Techniques with Offenders* (1971). Scrutiny of procedures used on inmates no longer is withheld because they are labeled "rehabilitation" instead of punishment; increasingly courts have recognized their duty to disregard labels and to look to substance. In *Landman v. Peyton*, 370 F.2d 135, 145 (4th Cir. 1966), the court stated that "'[s]ecurity' and 'rehabilitation' are not shibboleths to justify any treatment"; and in *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1366 (D.R.I. 1972), the court noted: "The fact that juveniles are *in theory* not punished, but merely confined for rehabilitative purposes, does not preclude operation of the Eighth Amendment." In *Knecht v. Gillman*, 488 F.2d 1136, 1139-40 (8th Cir. 1973), forced apomorphine treatment was scrutinized under the eighth amendment in spite of its nomenclature: "Whether it is called 'aversive stimuli' or punishment, the act of forcing someone to vomit for fifteen minutes for committing some minor breach of the rules can only be regarded as cruel and unusual. . . ."

Increasingly, certain forms of therapy may be found to violate the cruel and unusual punishments clause; indeed, the termination of the Anectine program at Vacaville, caused at least in part by public outrage, may be evidence that such aversion therapy may be found incompatible with human dignity. See Note, "Conditioning and Other Technologies Used to 'Treat?' 'Rehabilitate?' 'Demolish?' Prisoners and Mental Patients," 45 *S. Cal. L. Rev.* 616, 657 (1972).

Although courts often are loath to scrutinize a particular form of

medical treatment and find it violative of the eighth amendment, the more controversial treatments, especially those that may approach definition as "experimental," may soon be prohibited. Judicial attention recently has been given to complaints by inmates concerning deprivations of personal needs and sanitation. See Kassirer, *supra* at 258. Therapeutic programs operating on contingencies such as token economies often necessitate deprivations of various items so that they may be used as reinforcers. See Wexler, "Token and Taboo: Behavior Modification, Token Economies, and the Law," 61 *Cal. L. Rev.* 81, 93 (1973); and Wexler, "Therapeutic Justice," 57 *Minn. L. Rev.* 289, 297 (1972). Denying institutionalized individuals' basic needs for therapeutic reasons raises serious constitutional problems.⁵³

Solitary confinement used in a token economy, either as an initial level from which the youngster must progress by amassing tokens, or as a place of regression for those who are not performing adequately, probably is unconstitutionally cruel and unusual, and certainly is unbeneficial. In *Lollis v. New York State Department of Social Services*, 322 F. Supp. 473, 480 (1970), modified 328 F. Supp. 1115 (1971), solitary confinement of a juvenile girl was found to be "counterproductive to the development of the child." In *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd* 491 F.2d 352 (7th Cir. 1974), isolation was condemned as not serving any useful purpose and breeding counterhostility that results in greater aggression by the child. In *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1365-66 (D.R.I. 1972), the court stated:

To confine a boy without exercise, always indoors, always in a small cell, with little in the way of education or reading materials, and virtually no visitors from the outside world is to rot away the health of his body, mind, and spirit. To then subject a boy to confinement in a dark and stripped confinement cell with inadequate warmth and no human contact can only lead to his destruction.

Placing youngsters in solitary confinement in the absence of any legislative or administrative limitation on duration and intensity was

⁵³ Additional problems arise under such cases as *Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781. Judge Johnson there outlined a list of "rights" for mental patients. Many of these rights are things currently withheld as reinforcers in token economies. It is questionable whether rights may be transformed into rewards by the therapist, particularly in view of the Supreme Court's erosion of the distinction between rights and privileges. See *Morrissey v. Brewer*, 408 U.S. 471 (1972).

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also held to constitute cruel and unusual punishment in *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973).

Other forms of treatment that do not involve solitary confinement also have been questioned by the courts. In *Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973), a state prisoner charged that he had been given the experimental fright drug succinylcholine without his consent while at the California Medical Facility at Vacaville. Noting that proof of the allegation would raise serious questions regarding cruel and unusual punishment and impermissible tinkering with mental processes, the court reversed the district court's dismissal of the action. In *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973), a suit brought by Iowa prisoners complaining of the use of apomorphine as an aversive stimulus in the treatment of inmates with behavior problems, the court invoked the eighth amendment and enjoined use of the drug unless certain procedures were followed in obtaining the prisoners' revocable informed consent.

Much publicity was given to the suit by inmates at the Federal Bureau of Prisons' Special Treatment and Rehabilitative Training (START) program⁵⁴ at Springfield, Missouri, a behavior modification project employing an "artificial status system." *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974). The prisoners attacked their confinement and treatment in the program as violative of due process, equal protection, freedom of speech, freedom of religion, and the right to be free from unwarranted search and seizure.⁵⁵ The court concluded that prisoners transferred into START or similar behavior modification programs in which the conditions of their confinement are materially changed are entitled to due process protections.

Enforced treatment also may be open to attack on due process grounds. Although judicial acceptance of objections on substantive due process grounds may be unlikely—see *Buck v. Bell*, 274 U.S. 200 (1927)—summary procedures used to coerce a patient or prisoner into accepting treatment may be invalid for lack of procedural due process. Those condemned to suffer any "grievous loss" by administrative action are entitled to due process. *Goldberg v. Kelly*, 397 U.S.

⁵⁴ START was terminated by the Federal Bureau of Prisons in the spring of 1974.

⁵⁵ No doubt due in large part to the attention the START litigation has generated, Donald Santarelli, then administrator of the Law Enforcement Assistance Administration, announced on February 14, 1974, that he had banned use of LEAA funds for psychosurgery, medical research, and behavior modification, including aversion therapy and chemotherapy. "Corrections," 5 (4) *Crim. Just. Newsletter* 1, 2 (1974).

254 (1970); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

In *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1970), reversing 306 F. Supp. 1158 (E.D.N.Y. 1969), cert. denied 404 U.S. 985 (1971), a mental patient's right to refuse medication on religious grounds was sustained. The court there held that absent an adjudication of incompetency the state could not force medication on the plaintiff in violation of the first amendment, also noting that the summary procedures used violated the concept of procedural due process. See also *In re Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (Sup. Ct. Ill. 1965), and *Welsh v. Likens*, 373 F. Supp. 487 (D. Minn. 1974) (excessive use of tranquilizing medication, improperly administered and supervised and used as a means of controlling behavior, might infringe on complainants' rights under the eighth and fourteenth amendments).

An application by plaintiff and the associate director of Bellevue Hospital for an order of authorization for the administration of electroshock therapy to a nonconsenting mental patient was denied in *New York City Health and Hosp. Corp. v. Stein*, 70 Misc. 2d 944, 335 N.Y.S.2d 461 (Sup. Ct. 1972). In *Simon v. Norristown State Hosp.*, No. 73-1317 (E.D. Pa. 1973), the court denied defendant's motion to dismiss plaintiff's suit for damages allegedly suffered during more than thirty years in state mental hospitals. One of complainant's allegations was torturous shock treatments without consent.

A committed "criminal sexual psychopath" who apparently had agreed to participate in a study for the treatment of uncontrollable aggression became the focus of *Kaimowitz v. Department of Mental Health for the State of Michigan*, Civ. Act. No. 73-19434-AW (Cir. Ct. Wayne Co., Mich., July 1973), which held that an involuntarily detained mental patient could not give knowing, competent, voluntary consent to experimental psychosurgery because of the inherently coercive conditions of his confinement. This case raises additional questions concerning consent by incarcerated juveniles to special treatments.

Two recent cases relate directly to the treatment of juveniles. In *United States ex rel. Wilson v. Coughlin*, 472 F.2d 100 (7th Cir. 1973), the court upheld the district court's order to the department of corrections to remove four juvenile petitioners to a home or other institution and to discontinue the use of tranquilizers for control and punishment. The same court affirmed the injunctive relief ordered in *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974). The district court had enjoined the use of tranquilizing drugs without medical supervision, since such use can have various adverse effects on juveniles, thereby amounting to cruel and unusual punishment.

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These cases may represent the extremes, and it should not be presumed that all—or even most—treatment programs violate the constitutional rights of participants. Many of the programs termed behavior modification that are currently in use in juvenile institutions involve token economies with minor rewards and no apparent threat of harm to participants. Such programs would not be covered by this standard.

But the line between the permissible and the impermissible, between “treatment” and “punishment” and between “treatment” and “experimentation” is not always easily identifiable. The proposition that procedures that may be harmful and that are subject to controversy among practitioners should be imposed only after obtaining written, informed consent is supported by various guidelines. Prisoner participation in any “experiment,” for example, requires informed consent under Federal Bureau of Prisons Policy Statement No. 6110.1 (October 31, 1967). Medical experiments also are governed by the Nuremberg Code, United States Adjutant General’s Department, Trials of War Criminals Before Nuremberg Military Tribunals under Control Council Law No. 10, The Medical Case; and the Declaration of Helsinki, 67 *Annals of Internal Medicine*, Supp. 7 at 74-5 (1967). See also the Institutional Guide, “Department of Health, Education and Welfare Policy on Protection of Human Subjects,” DHEW Pub. No. 72102 (1971). California Assembly Bill No. 4481, May 23, 1974, amending the Welfare and Institutions Code §§ 5326.3, 5326.4, and 5326.5, provides for the right of mental patients to refuse psychosurgery and chemotherapy, and requires written informed consent to be secured prior to such treatment.

Regardless of the juvenile’s age, his or her consent to the proposed therapy should be required for its imposition. The proposition that the parents of the juvenile alone should not be able to require the child to participate in a potentially harmful therapy program may be supported on several grounds. Principles of individuality and self-determination dictate that the child should consent to imposition of such programs. See, e.g., Farson, “Toward the Liberation of Children,” 162 *Current* 45, 46 (1974). The juvenile himself must be permitted to assert his own interests, for the presumed identity of interests between the child and his parents frequently is unwarranted. See Rodham, “Children Under the Law,” 43 *Harv. Ed. Rev.* 487, 507 (1973). In his dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972), Justice Douglas concurred with the majority’s upholding of the right of Amish parents to exemption from the compulsory education law for their children only with regard to the schooling of one child who had publicly testified. Noting the numerous cases

holding that children are endowed with constitutional rights, Douglas asserted that the principal interests at stake were the teenaged children's, not the parents', and were unresolvable until the children gave their views in court. See Rodham, *supra* at 504-505.

In addition, parental consent would be ineffective in stimulating motivation and commitment in the juveniles.⁵⁶ Finally, it often may be the case that parents are willing to consent to any proposed treatment for their child for reasons unrelated to the child's needs, whether out of reaction to their disappointment at having their child adjudicated delinquent, a wish to please the agents of the state in charge of treatment, or a desire to keep the child busy with therapy if the child remains in home placement.⁵⁷

Although the child's consent is required in all cases, parental consent is required in addition for the juvenile who has not yet reached sixteen years of age. Where parental consent is required, the state may not substitute its judgment for that of the parents unless the parents have been found neglectful in a separate proceeding.

Requiring parental consent only for those juveniles under sixteen years old is consonant with established principles of law, and is the position taken by the *Rights of Minors* volume. At common law, children were considered incompetent, their consent to medical treatment was regarded as a nullity, and parental consent was required in every instance. See Wiss, "Position Paper: Medical Care and the Minor" (Juvenile Justice Standards Project 1974).

Even under this common-law formulation, however, exceptions to the parental consent requirement were acknowledged: the emergency treatment exception (imminent danger of death or impairment of health in the absence of immediate treatment excuses the physician's duty to procure parental consent); the emancipated minors exception (an emancipated minor—one no longer under parental control due either to the parents' actions, as when they have failed to meet their legal responsibilities, or to the minor's own actions, as when he or she marries or reaches the age of majority—is competent to con-

⁵⁶In *In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 820, 137 N.Y.S.2d 629 (1955), the court observed that since the fourteen-year-old boy's cooperation in post-operative speech therapy would be necessary, it would be unwise to force an operation on the unwilling boy to correct his harelip and cleft palate.

⁵⁷In discussing consent for psychosurgery for mental patients, Nicholas Kittrie states: "Nor can the patient's best interest be served by conditioning the treatment upon family consent, since the relatives are quite often willing to abide by medical recommendation as long as they are relieved of the burdens of caring for the patients." *The Right to Be Different: Deviance and Enforced Therapy* 307 (1971).

sent to medical treatment); and the mature minor exception (an unemancipated minor of sufficient intelligence to understand and appreciate the nature and consequences of a proposed treatment which is for his or her benefit may consent thereto).⁵⁸

Legislatures also have narrowed the common-law requirement of parental consent to all treatment for all minors. With the ratification of the twenty-sixth amendment lowering the voting age to eighteen—Ct. Spec. App. Md. 1972—the court found that the sixteen-year-old unmarried, pregnant female in need of supervision, competent under Maryland statute—Md. Ann. Code art. 43, § k35 (Supp. 1975)—to procure treatment or advice concerning “venereal disease, pregnancy or contraception not amounting to sterilization,” could not be compelled by her mother to undergo an abortion.

In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972), was cited extensively by the court in *Melville v. Sabbatino*, 30 Com. Sup. 320, 313 A.2d 886, 889–90 (Super. Ct. Conn. 1973): “Consent cannot be the subject of compulsion; its existence depends on the exercise of voluntary will of those from whom it is obtained; the one consenting has the right to forbid.” *Melville* concerned a seventeen-year-old boy seeking release from a psychiatric institution to which he had been “voluntarily” committed at age fifteen upon written request of his parents. The court held that minors of sixteen and over may exercise for themselves the rights of “voluntary patients,” which include the right, under the admission statute, to leave the institution after giving appropriate notice. The court noted that while parents ordinarily can make decisions regarding the welfare of their unemancipated children, this power is not unlimited, citing *In re Smith*; *In re Sippy*, 97 A.2d 455 (D.C. Mun. Ct. App. 1953) (parents could not compel their child to accept their attorney in proceedings initiated by them for commitment of the child to a mental hospital); and *Matter of Anonymous*, 42 Misc. 2d 572, 248 N.Y.S.2d 608 (1964) (parents could not place their ten-year-old child in a psychiatric school when such a structured environment was not necessary).

Specifying the parties from whom consent must be obtained before a therapeutic program that may have harmful effects may be imposed is a simpler task than defining the concept of “informed consent” itself. Under the doctrine of informed consent, an embodiment of the medical patient’s right to bodily control, no medical procedure may be performed without the patient’s consent, obtained

⁵⁸ See *Bach v. Long Island Jewish Hospital*, 49 Misc. 2d 207, 267 N.Y.S.2d 289 (Sup. Ct. Nassau Co. 1966).

after the nature of the treatment, its risks, and the alternatives have been explained. See Cantor, "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life," 26 *Rutgers L. Rev.* 228, 237 (1973). See also W. Prosser, *Law of Torts* (4th ed. 1971); Sharstis, "Informed Consent: Some Problems Revisited," 51 *Neb. L. Rev.* 527 (1972); "Advise and Consent in Medicine: A Look at the Doctrine of Informed Consent," 16 *N.Y.L.F.* 863 (1970).

Generally, the doctor must make such disclosures as are customarily made by reputable physicians under similar circumstances: "Consent, to be effective, must stem from an understanding decision based on adequate information about the therapy, the available alternatives and the collateral risks." Waltz and Scheuneman, "Informed Consent to Therapy," 64 *N.W.L. Rev.* 628, 629 (1970). "Informed" denotes a state of awareness, while "consent" denotes a manifestation of willingness to suffer a particular invasion.⁵⁹

The principles relating to informed consent to medical procedures are applicable by analogy to proposed therapeutic procedures, even those that fall short of traditional definitions of medical treatment. While no precise procedure for obtaining informed consent has been prescribed, reference should be made to the conventionally accepted principles described above. The proponent of the therapeutic program should make such disclosures to the juvenile (and his or her parents if the juvenile is under sixteen) as would be made by reputable practitioners in the field. Adequate information about the proposed treatment should be made available, risks involved explained, and alternative procedures presented. Only after such information has been made available to and absorbed by the juvenile (and his or her parents if the juvenile is under sixteen) can consent that is truly informed be procured.

⁵⁹We recognize that obtaining truly voluntary informed consent may be difficult almost to the point of impossibility within the context of the inherently coercive atmosphere of the correctional system. In part, some of the coerciveness usually observed will be eliminated with the elimination of indeterminate sentencing, in which the offender often is treated favorably if he or she has consented to therapy. Failure to consent to therapy should not lengthen the term of the disposition. Nevertheless, after juveniles adjudicated delinquent have been removed from their homes, voluntariness becomes most difficult. A suggested method of alleviating some of the pressure on incarcerated delinquents would be through the appointment of an independent representative who can advise and counsel the juvenile. Lawyers and parents serve this function before the child is incarcerated.

**PART V: MODIFICATION AND ENFORCEMENT OF
DISPOSITIONAL ORDERS**

Dispositional orders may be modified as follows.

5.1 Reduction because disposition inequitable.

A juvenile, his or her parents, the correctional agency with responsibility for the juvenile, or the sentencing court on its own motion may petition the sentencing court (or an appellate court) at any time during the course of the disposition to reduce the nature or the duration of the disposition on the basis that it exceeds the statutory maximum; was imposed in an illegal manner; is unduly severe with reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given by the same or other courts to juveniles convicted of similar offenses; or if it appears at the time of the application that by doing so it can prevent an unduly harsh or inequitable result.

Commentary

A primary goal of these standards is to reduce sentencing inequality. The provision of guidelines for sentencing judges in Part I and the suggested sentencing criteria in Part II represent attempts to achieve this goal. These efforts, however, may prove insufficient to eradicate sentencing disparity, since juveniles will continue to be sentenced by different courts, and by different judges on the same court who may not exercise their discretion in the same manner.

As the National Advisory Commission on Criminal Justice Standards and Goals recognized, “[a]n offender who believes he has been sentenced unfairly in relation to other offenders will not be receptive to reformatory efforts on his behalf.” “Corrections” at 178. This standard provides a mechanism by which the juvenile, or his or her parents, may petition for redress of what they perceive to be an unduly severe sentence. It thereby posits the need for continuing attention by the defense attorney who originally represented the juvenile.

The correctional agency, including public agencies and private agencies from which services are purchased, with responsibility for a juvenile is also authorized to petition the court on behalf of the juvenile. Often, the correctional agency is in the best position to discover sentencing disparities, since in its charge may be youths from different geographic areas and youths sentenced by various judges. The ability of statewide correctional agencies to deal with

juveniles adjudicated by various courts according to uniform criteria has led some states to adopt legislation that vests in the correctional agency the ultimate responsibility for determining the dispositions of juveniles committed by the courts. See, e.g., Ky. Rev. Stat. Ann. § 208.200(1) (c) (1972), concerning commitment to the department of child welfare. Although the standards reject such total delegation to the correctional agency, preferring the greater visibility and opportunity for procedural safeguards associated with judicial sentencing, this standard attempts to make use of the advantageous position of the correctional agency in discovering and remedying sentencing disparities.

The considerations relevant to the court's determination of whether to reduce a disposition are the same that were relevant to the initial sentencing decision (see Standard 2.1), with the addition of any information concerning the dispositions given by other courts in similar cases or concerning the behavior and circumstances of the juvenile subsequent to imposition of the disposition. In the latter case, reduction would be indicated when, for example, the circumstances (in addition to the seriousness of the offense and the juvenile's age and prior record) that warranted imposition of a custodial disposition pursuant to Standard 3.3 E. no longer exist or when the juvenile's behavior indicates that a disposition as drastic as commitment to a secure facility no longer is required. As with the granting of "good time" credits pursuant to Standard 5.3 *infra*, reduction of a disposition under this standard should not be denied because of the juvenile's "attitude" or because of the exercise of his or her right to refuse services or participation in programs pursuant to Standard 4.2.

Decisions on petitions for reduction of disposition under this standard should be made only after hearings that conform to the relevant procedural requirements set forth in the *Corrections Administration* volume, Standard 5.1. In order to ensure timely decisions on such applications, these hearings should be held within relatively brief time periods, not to exceed thirty days from the filing of the petition. Such a requirement could become quite onerous to the courts, in view of the number of sources from which petitions under this standard might emanate and the number of times they might be repeated; consequently, courts may find it necessary to develop rules that impose reasonable limits on the frequency of such petitions by juveniles or their parents.

For similar recommendations, see "Corrections" § 5.11; ABA Standards for Criminal Justice, *Appellate Review of Sentences* § 1.2 (Approved Draft 1968).

The only modification of the disposition envisioned by the stan-

ard is reduction. In order not to deter the exercise of the right to challenge the original disposition, increases should be precluded unless the juvenile has violated a term of the dispositional order. See Standard 5.4 *infra*. Cf. *North Carolina v. Pearce*, 395 U.S. 711 (1969). For concurring recommendations, see the National Commission on Reform of Federal Criminal Laws, "The Study Draft of a New Federal Criminal Code" § 1291 (1970); ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 6.1(a), (b) (1968). See ABA, *id.* at §§ 6.2, 6.4, 6.5; NCCD, "Model Sentencing Act" § 11 (1972 Revision). See also the *Prosecution and Court Organization* volumes for the duties of the prosecutor and court to monitor dispositions once they are imposed.

5.2 Reduction because services not provided.

The sentencing court should reduce a disposition or discharge the juvenile when it appears that access to required services is not being provided, pursuant to Standard 4.1 D.

Commentary

Reduction of a disposition or outright discharge when required services are not furnished is provided for by Standard 4.1 D. and discussed in the commentary to that standard.

5.3 Reduction for good behavior.

The correctional agency with responsibility for a juvenile may reduce the duration of the juvenile's disposition by an amount not to exceed [5] percent of the original disposition if the juvenile has refrained from major infractions of the dispositional order or of the reasonable regulations governing any facility to which the juvenile is assigned.

Commentary

Incarcerated adult offenders often are awarded "good time credits" if during time served they refrain from major disciplinary infractions. See, *e.g.*, 18 U.S.C. §§ 4161 and 4165 (1964). These credits reduce the duration of the prisoner's sentence. Similar provisions enable juvenile authorities to discharge a juvenile before the expiration of statutorily or judicially determined jurisdiction. The awarding of good time enables correctional administrators to reward good behavior and to deter infractions of dispositional orders or regulations. Time off for good behavior is, for the most part, routinely awarded. Recognizing that a sentence of five years, for example, is in reality considerably less with good time, judges normally take these good

time credits into account when sentencing. See R.L. Goldfarb and L.R. Singer, *After Conviction* 491 (1973); Hirschkop and Millemann, "The Unconstitutionality of Prison Life," 55 *Va. L. Rev.* 795 (1969). Since judges frequently add an amount equal to the good time the prisoner will likely get to the desired sentence, revocation of good time in effect "lengthens" the prisoner's intended sentence. This often produces inequitable results.

While there is nothing magical about a 5 percent reduction, the limitation of good time credits to a small proportion of the disposition would mean that judges need not create an artificial sentencing structure. The limitation restricts the discretion of correctional administrators, while giving administrators some ability to reward good behavior. The limit also reduces the uncertainty of the sentence for the juvenile offenders. See commentary to Standard 1.2 F.

The good time credits should be granted for compliance with the dispositional order and conformity to reasonable rules. Achievement of "treatment goals" and performance in special programs is irrelevant. See Standard 5.4. Reduction of a disposition should result in a formal discharge rather than merely relegating the juvenile to another level of supervision or to some sort of "inactive" status. The administrative withdrawal of any good time must conform to the requirements of due process. See the *Corrections Administration* volume, Part VIII.

Strict regulation of administratively granted remissions is advocated by the Group for Contemporary Problems, the Group for the Advancement of Corrections, "Toward a New Corrections Policy: Two Declarations of Principles" 8 (1974). A good time allowance expressly limited to 5 percent is recommended by the Committee for the Study of Incarceration, in order to avoid subjecting offenders to the "Chinese water-torture of uncertainty." The Committee for the Study of Incarceration, "Preliminary Draft," at 10 (1974).

5.4 Enforcement when juvenile fails to comply.

The correctional agency with responsibility for a juvenile may petition the sentencing court if it appears that the juvenile has willfully failed to comply with any part of the dispositional order. In the case of a remedial sanction, compliance is defined in terms of attendance at the specified program, and not in terms of performance.

If, after a hearing, it is determined that the juvenile in fact has not complied with the order and that there is no excuse for the noncompliance, the court may do one of the following:

A. Warning and order to comply.

The court may warn the juvenile of the consequences of failure to comply and order him or her to make up any missed time, in the case

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of supervisory, remedial, or custodial sanctions or community work; or missed payment, in the case of restitution or fines.

B. Modification of conditions and/or imposition of additional conditions.

If it appears that a warning will be insufficient to induce compliance, the court may modify existing conditions or impose additional conditions calculated to induce compliance, provided that the conditions do not exceed the maximum sanction permissible for the offense. The duration of the disposition should remain the same, with the addition of any missed time or payments ordered to be made up.

C. Imposition of more severe disposition.

If it appears that there are no permissible conditions reasonably calculated to induce compliance, the court may sentence the juvenile to the next most severe category of sanctions for the remaining duration of the disposition. The duration of the disposition should remain the same, except that the court may add some or all of the missed time to the remainder of the disposition.

D. Commission of a new offense.

Where conduct is alleged that constitutes a willful failure to comply with the dispositional order and also constitutes a separate offense, prosecution for the new offense is preferable to modification of the original order. The preference for separate prosecution in no way precludes the imposition of concurrent dispositions.

Commentary

A juvenile's willful failure to comply with a dispositional order may be dealt with by the dispositional court in various ways. Enforcement should be ordered only after a determination that the noncompliance was intentional and unexcused, at a hearing designed to afford the juvenile all the procedural protections to which he or she is entitled.

The enforcement alternatives available to the sentencing court under Part V appear in ascending order of severity. It is contemplated that, in accordance with the principle of the least restrictive alternative (Standard 2.1), lesser enforcement actions will be considered (and generally tried) before more severe actions are employed. As in the original sentencing process, the presumption is in favor of use of the least intrusive measure that will be sufficient to achieve compliance.

A warning and order to comply may be sufficient. The National Advisory Commission on Criminal Justice Standards and Goals suggests the use of such informal alternatives to probation revocation as a conference with the probationer to "reemphasize the necessity of compliance with the conditions" and a "formal or informal warning

that further violations could result in revocation." "Corrections" § 5.4. The American Bar Association similarly authorizes the use of alternatives to probation revocation that would include a conference with the probationer to reemphasize the necessity of compliance and a warning against further violations. *Probation* § 5.1 (1970). See also "Model Penal Code," Articles on Suspended Sentences, Probation and Parole § 305.16 (1962).

The sentencing court also may modify existing conditions of the original dispositional order or impose additional conditions calculated to induce compliance. For example, it would not be appropriate to respond to a juvenile's willful failure to report to a place of supervision each evening by imposing a new requirement that he or she make victim restitution, since the additional condition would be unrelated to the noncompliance. However, the imposition of a new requirement that the juvenile report to the supervising officer directly from school each day would be appropriate, since it would be designed to induce compliance with the original order.

Modifications of and additions to original conditions are commonly authorized responses to an offender's willful noncompliance. See "Corrections" § 5.4; ABA Standards for Criminal Justice, *Probation* § 5.1 (1970); The National Commission on Reform of Federal Criminal Laws, "Study Draft of a New Federal Criminal Code," § 3102 (1970); "Model Penal Code," Articles on Suspended Sentences, Probation and Parole § 305.16 (1962). See also ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 6.5 (1968).

Where it appears that neither a warning nor modification of the existing conditions would be sufficient to achieve compliance, the juvenile may be resentenced to the next most severe dispositional alternative envisioned in Part III, provided that, as is the case with all enforcement orders under Part V in order to retain the concept of limited intervention, the remaining duration of the disposition is not increased. Thus, willful failure to comply with a conditional order under Standard 3.2 may result in an order mandating custody under Standard 3.3. However, the presumption against the use of custodial dispositions should be reemphasized. See Standard 3.3 B.

In order to provide the juvenile the protections of maximum procedural fairness as well as of ceilings on dispositions and the greater burden of proof required for establishing a separate offense, a new prosecution is preferable to enforcement action under Part V whenever the conduct that amounts to a willful violation of the sentencing order also constitutes a separate offense. See the *Corrections Administration* volume, Part VIII, for the recommended handling of separate offenses committed by juveniles within correctional facilities.

Dissenting Views

Statement of Hon. Justine Wise Polier

The *Dispositions* volume, while seeking to protect children from over-intervention by juvenile courts, lowers the goals of juvenile justice and diminishes the entitlements of children.

Stemming from disillusionment with the work of juvenile courts, these standards would shift significant power from both juvenile courts and from public agencies entrusted with the care of children, to state legislative bodies. In order to correct sentencing inequalities in dispositional orders by the juvenile courts, the standards propose "proportional punishment," based primarily on the child's offense. The nature and duration of dispositions would be determined by the court at the time of sentencing within maximum limitations set by the legislatures. Public agencies responsible for care and rehabilitation are allowed only minimal authority to reduce the duration of custodial care (5 percent for good behavior) without regard to a child's responses, attitude, or other changes in circumstances. Such restrictions would impose on juvenile court judges unrealistic requirements for prediction and run counter to the verbal recognition of the unique characteristics of juveniles, their malleability, and their capacity for change, although acknowledged in other sections of this volume.

The right of a child to treatment and to the least drastic treatment required to protect the community under the juvenile justice system, is subordinated to the concept of "proportional punishment." Consideration of the child's individual needs is postponed until after the category and the length of penalty are determined. The standards thus postpone consideration of the individual child's needs so late as to make it all but meaningless.

The standards are contradictory in regard to both the purposes and responsibilities of juvenile courts to secure rehabilitative and treatment services in accordance with the needs of individual children. Such services are denigrated largely on the basis of material

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derived from the criminal justice field, although some little caution is expressed about its relevance to juveniles. Despite such denigration of the value of special services for children, the standards would require that juvenile courts should determine that available facilities to which children are committed will provide appropriate services, and that in their absence, the court shall reduce dispositional sentences or discharge children.

The commentary on the concept of the "right to treatment" is far too narrowly defined. Although reference is included to both "the right to treatment" and "right to rehabilitation care," these rights are viewed largely in terms of medical models for the mentally ill, the retarded, and sexual psychopaths, with juveniles tagged on. From the position that treatment may "never be the sole justification for state intervention," it is concluded that the right to treatment cases are relevant only "by way of background and analogy."

In *McKeiver v. Pennsylvania*, Justice Blackmun, writing for the majority, issued a warning:

If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day; but for the moment we are disinclined to give impetus to it.

This volume of proposed standards goes beyond superimposing the criminal adjudicative process on the juvenile court system. It would extend the criminal dispositional process, a recognized failure for adult offenders, to children and youth. The proposed standards invite an abandonment of the goals and *raison d'être* of the juvenile court system: the recognition that children should be treated differently from adults and are entitled to receive care and treatment in accordance with their individual needs. They fail to establish or support entitlements for children directed to providing unique benefits under law.

I must, therefore, respectfully dissent from the standards proposed in this volume.

Commissioner Gisela Konopka concurs with Judge Polier in this dissent.

Statement of Commissioner Patricia M. Wald

I am concerned about the direction in which this volume would take us. My views of what should and should not be changed in our juvenile justice system are, at points, sharply divergent.

I would, first of all, reaffirm the bedrock objective of juvenile

justice to provide individualized attention to the needs of the juvenile—medical, educational, social, and psychological—insofar as they can reasonably be ascertained and satisfied. Yet the volume nowhere acknowledges the legitimacy of rehabilitation as a goal of the system (*cf.* Standard 1.1). Abandonment of this rationale could seriously undermine the constitutional basis for a separate system of juvenile justice. See J. White in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); and J. Harlan in *In re Gault*, 387 U.S. 1 (1967).

I would also preserve the discretion of juvenile correctional authorities to adjust the duration and nature of the confinement originally imposed by the judge where the juvenile exhibits definite signs of improvement or constructive change in attitudes and behavior. Apart from a maximum 5 percent good time allowance, Standard 1.2 F. in this volume freezes the sentence imposed by the judge, regardless of how the juvenile responds or changes after sentence begins. I do not think we can attract creative, energetic, dedicated personnel into a correctional system that rejects the possibility of character change in juveniles. I am not against the concept of finite maximum sentences, but I firmly believe that some element of post-sentence discretion must be retained to permit positive interrelationships between confined juveniles and their custodians.

Nor would I disallow the juvenile's needs as an element to be taken into account by the sentencing judge as Standard 2.1 presently does. I acknowledge that the juvenile's needs should not necessarily be the dominant criteria for sentencing; the protection of others from youthful violence is a legitimate goal of any justice system. But I would let the judge consider *all* relevant individual and societal factors in imposing sentence.

In short, I am not yet willing to give up on the concept of rehabilitating juveniles—however unfashionable that idea may currently seem. We are not yet omniscient enough to be sure such attempts will fail, and I hope we are not so cynical as to build a juvenile justice system on the tarnished “just deserts” model of the adult penal system. I agree with the volume that efforts at rehabilitation so far do not justify indefinite sentences or compulsory treatment, but I would continue the legal obligation of judges and correctional personnel to make bona fide attempts at meeting individual juvenile needs in the sentencing and correctional processes.