

3-1995

## Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System

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### Recommended Citation

Julianne P. Sheffer, Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System, 48 *Vanderbilt Law Review* 479 (1995)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol48/iss2/4>

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# NOTES

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## I. INTRODUCTION

In early 1994, an American teenager was caned by Singapore authorities after his conviction for various acts of vandalism. This highly publicized punishment sparked sharp controversies in the United States. Amnesty International, along with many columnists, condemned Michael Fay's sentence as too harsh, given his youth and the non-violent nature of the crime.<sup>1</sup> The American public, by contrast, strongly supported the punishment.<sup>2</sup> Apparently, many Americans felt that if tougher sanctions were imposed on youths who committed criminal acts in this country, our delinquency levels would more closely resemble Singapore's almost negligible offense rates.<sup>3</sup>

Given the widely held perception that America's juvenile crime rates are increasing, the controversy over Singapore's punishment of Michael Fay highlights a dilemma of growing importance in United States society. What is the proper balance between rehabilitation and punishment, the dual goals of the juvenile justice system?<sup>4</sup>

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1. See, for example, *Condemn Singapore's Brutality*, N.Y. Times 18 (April 10, 1994) (arguing that Americans should not be supporting Singapore's attitude of enforcing order at the price of imposing cruel and unusual punishment). Caning is, by all accounts, an extremely painful punishment that can cause a person to "pass out, go into shock, or sustain permanent scarring." *Id.*

2. John Leo, *America's Retreat From Disorder*, 116 U.S. News & World Rpt. 25 (April 25, 1994) (citing approval rates of up to 75%).

3. See Michael DeCourcy-Hinds, *Teen-Ager Caned in Singapore Returns Home*, N.Y. Times 12 (June 23, 1994) (noting that people in Dayton, Ohio, Fay's hometown, "overwhelmingly" supported his punishment, and quoting one resident as saying: "A lot of people related the lack of crime to the severe punishment in Singapore. . . . A lot of people here are fed up with juvenile crime"). Notably, in the wake of the debate over Fay's caning, proposals to institute paddling as punishment for delinquent juveniles have already been made in several jurisdictions in this country. See, for example, California Assembly Bill 150(a), Spec. Sess. A., § 1 (1994); Louisiana House Bill 38(c), 3d Extraordinary Sess., § 1 (1994). See also, *Canings for Vandals Proposed in St. Louis*, N.Y. Times 8 (May 20, 1994) (discussing a local alderman's proposal for public caning of graffiti vandals); Bonna M. de la Cruz, *Judge Watches as Teen Whipped*, Tennessean 1 (Sept. 10, 1994) (describing juvenile court judge's authorizing punishment of delinquent 16-year-old girl with a court-supervised whipping, administered by the girl's parents).

4. "Punishment" is used here as a general term encompassing several related philosophies: deterrence, incapacitation, and retribution. See note 19 and accompanying text.

In recent years, many states have enacted laws specifically addressing the problem of serious and habitual juvenile crime.<sup>5</sup> Several prominent commentators have interpreted this trend as an indication that society has rejected the juvenile court's traditional philosophy of rehabilitation in favor of more punitive, offense-oriented sanctions, and some have concluded that recent changes call into question the very viability of the juvenile court system.<sup>6</sup>

This Note challenges such an interpretation. By focusing on statutes which authorize and create integrated programs for serious and habitual juvenile offenders (as opposed to the "get tough" statutes that have so intrigued most researchers), this Note demonstrates that current scholarship has been premature in pronouncing the demise of rehabilitation as a goal and method of the juvenile justice system. Part II will briefly outline the philosophies of rehabilitation and punishment and discuss their importance in the current juvenile justice system. Parts III.A and III.B will discuss two different types of serious and habitual juvenile offender statutes—the punitive, "get tough" approach and the integrated, intensive supervision program. Part III.C will compare the two approaches in order to show that, far from signaling a wholesale rejection of the rehabilitative philosophy, recent legislative reforms evince a continued commitment to both punishment and rehabilitation. Finally, by examining the goals and effectiveness of such statutes, Part IV of this Note will demonstrate that punishment and rehabilitation are compatible goals, both in theory and in practice. Each deserves its place in the juvenile justice system, and integrated serious and habitual juvenile offender statutes are one means of achieving an appropriate balance.

## II. THE DUAL GOALS OF THE JUVENILE JUSTICE SYSTEM

Most states' juvenile justice systems are designed to achieve several goals: rehabilitation, deterrence, incapacitation, and retribution. These goals may be classified broadly into two primary categories: rehabilitation, which focuses on the offender, and punishment, which centers attention on the offense.<sup>7</sup>

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5. See note 49. Most of these statutes can be grouped into one of two major types: "get tough" reforms, and integrated serious and habitual offender programs.

6. See Part III.A of this Note for a discussion of the theory that recent reforms have made the juvenile court more punitive and have eliminated its commitment to rehabilitation and for an outline of arguments for and against eliminating the juvenile court.

7. Professor Barry Feld originally classified juvenile sentencing practices as offender-based (rehabilitative) and offense-based (punitive). Barry Feld, *The Juvenile Court Meets the*

### A. Rehabilitation

Rehabilitation, in the context of the juvenile justice system, is premised on the philosophy that a child who commits a delinquent act can be turned from his or her deviant ways, not through threats of punishment, but by changing the youth's thinking, goals, and values.<sup>8</sup> It generally rests on the belief that children lack the moral maturity of adults, and, as such, are not fully culpable for their actions.<sup>9</sup> Rehabilitation theory views juvenile delinquency as caused by influences external to the child, such as poverty, abuse, and neglect. Thus the "pure" rehabilitation theorist holds that the proper response to juvenile crime is not punishment, but rather treatment services designed to help the child learn to cope with negative external influences in non-delinquent ways.<sup>10</sup>

Rehabilitation has been a stated goal of juvenile justice systems from their inception. Illinois, for example, the first state to develop a court system exclusively for juveniles, based it expressly on the philosophy of rehabilitation.<sup>11</sup> To this day, rehabilitation remains a primary goal of most states' juvenile codes.<sup>12</sup> In addition, the prevailing United States Supreme Court decision on this issue,

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*Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. Rev. 821, 821-22 (1988). See also note 56. For purposes of clarity, and because this Note is designed to critique Professor Feld's theory, it will utilize his system of classifying the goals and methods of juvenile sentencing statutes.

8. Anne R. Mahoney, "Man, I'm Already Dead": *Serious Juvenile Offenders in Context*, 5 Notre Dame J. L. Ethics & Pub. Policy 443, 454 (1991).

9. Martin L. Forst and Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 Notre Dame J. L. Ethics & Pub. Policy 323, 324 (1991). See also *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion) (noting that the Court has "endorsed the proposition that less culpability should attach to a crime committed by a juvenile" because juveniles are inexperienced, have less education and intelligence, and are more likely to act based on "emotion" or "peer pressure" than are adults).

10. *In re Gault*, 387 U.S. 1, 325-26 (1967) (noting that the "underlying philosophy" of the rehabilitative model is "that delinquency [is] an illness the state could cure by providing individual and expert attention to . . . each delinquent youth's situation").

11. See Illinois Juvenile Court Act §21, 1899 Ill. Laws 137 (stating that the purpose of the juvenile court law was to ensure that "the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents"). The Illinois law was a product of the Progressive Era, and more specifically the efforts of reformers such as Jane Addams, Julia Lathrop, and Lucy Flower, whose Chicago Women's Club, along with other public-spirited organizations, began a movement which culminated in the drafting of the Illinois law. Barry Krisberg and James F. Austin, *Reinventing Juvenile Justice* 29 (Sage, 1993). By 1925, all states except two had established separate courts for juveniles. *Id.* at 30.

12. See, for example, Ark. Stat. Ann. § 9-27-302(1) (1987) (stating that the purposes of the Arkansas Juvenile Code include assuring "that all juveniles brought to the attention of the courts receive the guidance, care, and control . . . which will best serve the emotional, mental, and physical welfare of the juvenile").

*McKeiver v. Pennsylvania*,<sup>13</sup> holds that the juvenile court is fundamentally a rehabilitative system and is not sufficiently punitive to require that juveniles coming before it receive the full panoply of legal rights guaranteed adult criminal defendants.<sup>14</sup> While *McKeiver's* reasoning has been criticized on this point,<sup>15</sup> and while the Court itself acknowledged that the rehabilitative "ideal" is rarely achieved in practice,<sup>16</sup> the Court has yet to overturn its affirmation of the rehabilitative model for juveniles.

Indeed, despite a great deal of commentary emphasizing the increasingly punitive nature of the juvenile justice system,<sup>17</sup> the rehabilitative philosophy remains embedded in the law. State statutes overwhelmingly continue to express a commitment to rehabilitative goals, and current case law abounds with discussions of the juvenile court's rehabilitative purpose.<sup>18</sup> Thus, even while there is evidence

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13. 403 U.S. 528 (1971).

14. *McKeiver* held that juveniles do not have a constitutional right to trial by jury in the adjudicative stage of a delinquency proceeding. *Id.* at 545. Earlier decisions had established that juveniles have certain other constitutional rights in a delinquency hearing. See note 22.

15. See Barry Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 696 (1991) (arguing that the Court "did not analyze the differences between treatment and punishment").

16. The Court stated, "We must recognize . . . that the fond and idealistic hopes of the juvenile court proponents and early reformers . . . have not been realized. . . . The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment." *McKeiver*, 403 U.S. at 543-44. In more recent cases, the Court has continued to hold that the juvenile system is primarily a rehabilitative, rather than punitive, institution. See, for example, *Schall v. Martin*, 467 U.S. 253, 263 (1984) (stating that "the Constitution does not mandate the elimination of all differences in the treatment of juveniles. . . . The State has a *parens patriae* interest in preserving and promoting the welfare of the child"). See also *U.S. v. R.L.C.*, 112 S. Ct. 1329, 1343 (1992) (O'Connor, J., dissenting) (explaining that one justification for the procedural informality of juvenile proceedings is "that the focus of sentencing is on treatment, not punishment").

17. See Feld, 75 Minn. L. Rev. at 691, 716 (cited in note 15) (noting that "rehabilitative euphemisms . . . cannot disguise the punitive reality of juvenile confinement"); Feld, 68 B.U. L. Rev. at 821 (cited in note 7) (recognizing the gap between rehabilitative rhetoric and the punitive aspects of the system); Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 323 (cited in note 9) (noting that the sanctions imposed by the juvenile system have become more punitive); Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 443 (cited in note 8) (arguing that the juvenile system must do more than just "get tough" with offenders, but also address the underlying social causes of the problems).

18. See, for example, *State ex rel Juvenile Dep't of Klamath County v. Reynolds*, 317 Or. 560, 857 P.2d 842, 845-46 (1993) (stating "[w]ithout exception, this court's cases support the conclusion that the Oregon juvenile justice system always has been focused on the rehabilitation of delinquent youth"); *In re Keith W.*, 310 Md. 99, 527 A.2d 35, 38 (1987) (stating "the overriding goal of Maryland's juvenile statutory scheme is to rehabilitate and treat delinquent juveniles so that they become useful and productive members of society"); *In re P.M.*, 156 Vt. 303, 592 A.2d 862, 865 (1991) (stating "the purpose of Vermont's juvenile provisions is not to punish juvenile offenders, but to . . . provide treatment consistent with the public interest for children who have

that the juvenile court is becoming more punitive, neither legislatures nor courts are yet willing to abandon the goal of rehabilitation.

### B. Punishment

Punishment is the second major goal of the juvenile justice system. The term "punishment" generally encompasses one or more of the following related goals: deterrence, incapacitation, and retribution.<sup>19</sup>

Once exclusively devoted to rehabilitation, juvenile justice systems have, in recent years, increasingly emphasized punitive goals.<sup>20</sup> There are two reasons for this changing emphasis. First, in the 1960s, commentators and courts began to acknowledge that much of the juvenile court's "treatment" was, in fact, punitive. Based on this recognition, Supreme Court decisions such as *In re Gault*<sup>21</sup> ushered in a variety of procedural protections—notice, counsel, cross-examination, and the beyond a reasonable doubt standard of proof—normally associated with criminal trials.<sup>22</sup> While *McKeiver*

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committed delinquent acts"). See also note 12 (regarding state statutes and rehabilitative goals).

19. Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 333-37 (cited in note 9).

20. See notes 54-56 and accompanying text (discussing punitive reforms of juvenile justice statutes).

21. 387 U.S. 1 (1967).

22. *Id.* at 33, 41, 57. In *Gault*, a 15-year-old boy, Gerald Gault, was taken into custody by the sheriff of Gila County, Arizona based on the complaint of a neighbor, who claimed that Gerald had made a "lewd" and "indecent" call to her. *Id.* at 4-5. No notice of arrest was given to Gerald's parents, nor did the authorities give them written notice of the charges against Gerald or notice of his hearing. *Id.* at 5-6. At Gerald's hearing, the complainant was not present, no witnesses were sworn in, no transcript was made, and no record of the proceeding was produced, except for a "referral card" which listed the charge against Gerald as "Lewd Phone Calls." *Id.* at 7. At the close of the hearing, the judge declared Gerald a delinquent child and committed him to the State Industrial School until the age of majority (age 21). *Id.* at 7-8. On habeas corpus, Gerald's parents claimed that the Arizona Juvenile Code, which permitted such a commitment upon a finding that a child is "delinquent," was unconstitutional because it allowed the delinquency determination to be made at a hearing which lacked the basic procedural protections available in adult criminal trials. *Id.* at 9-10. The Court agreed, holding that the Due Process Clause of the Fourteenth Amendment entitles a juvenile delinquent to: adequate written notice of charges; the right to counsel, retained or appointed; and confrontation and cross-examination of witnesses. *Id.*

In a later case, the Court held that the beyond a reasonable doubt standard of proof also applied during delinquency proceedings. *In re Winship*, 397 U.S. 358, 368 (1970). In *McKeiver*, however, the Court refused to extend the constitutional protections available to delinquents any further, and held that the Due Process Clause of the Fourteenth Amendment does not require a trial by jury at the adjudicative stage of a delinquency proceeding. *McKeiver*, 403 U.S. at 545. A principal rationale for this refusal was the Court's belief in the rehabilitative goals of the juvenile system: "The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are reluctant to say . . . that the system cannot achieve its rehabilitative goals." *Id.* at 547.

ended this expansion by refusing to extend to juveniles the right to trial by jury in delinquency proceedings, the rights granted during the *Gault* era helped transform juvenile courts into institutions that more closely resembled the punitive adult criminal court.<sup>23</sup>

Second, the juvenile court has become more punitive as state legislatures have responded to the public's demand for tougher policies toward juvenile crime. The past two decades have been marked by a perception that the rate of juvenile crime—especially violent juvenile crime—is increasing,<sup>24</sup> and some statistical evidence supports this perception.<sup>25</sup> This phenomenon, coupled with the belief that juvenile courts were too lenient on young offenders, helped bring about official changes in the philosophy of the juvenile justice system—changes that rejected the exclusively rehabilitative model and substituted in its place the combined goals of rehabilitation and

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23. See Forst and Blomquist, 5 *Notre Dame J. L. Ethics & Pub. Policy* at 328-29, 331 (cited in note 9) (discussing how demand for greater procedural protections helped change the focus of juvenile courts away from the individual characteristics of the offender and more toward elements of the offense, such as proving the "crime"). The *McKeiver* decision, in refusing to extend the right to trial by jury to delinquency proceedings, halted the convergence of the juvenile and criminal systems. Indeed, the desire to maintain a separate juvenile system was one of the Court's justifications for refusing to extend all the procedural rights of criminal defendants to juveniles in delinquency hearings. *McKeiver*, 403 U.S. at 545-46. The Court wrote: "If the formalities of the criminal . . . process are to be superimposed on 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." *Id.* at 550-51.

24. See *Debate Rages on Treatment of Violent Juvenile Offenders* (CNN television broadcast, Sept. 14, 1994) (transcript available on Lexis, NEWS library, CNN file) (citing results of CNN-USA *Today* poll, which showed 52 percent of those surveyed thought juveniles should receive the same punishment as adults, and stating that more and more Americans feel it is time to "get tough on the nation's youngest criminals," given statistics showing rising juvenile crime rates). See also Charles Krauthammer, *People Are Sick of Extreme Libertarianism*, Wash. Post 17 (April 11, 1994) (stating that "the laissez-faire, everything-goes regime of the past 30 years . . . has given our cities a palpable sense of danger"). However, despite the popular view that the public overwhelmingly supports "get tough" legislation, a recent comprehensive national study found that the public is *not* exclusively set on punitive reforms. The survey found that 73% of respondents believed rehabilitation should be the primary goal of the juvenile justice system, while only 12% felt its main objective should be punishment. Moreover, while 50% wanted juveniles accused of "serious property crimes" tried in adult courts, and 68% wanted youths who committed "serious violent crimes" tried as adults, well over half the respondents did not want juveniles even with these serious offenses to be sentenced as adults or to serve time in adult prisons. Support of funding alternative dispositions—community-based counseling and education programs, job training, and restitution programs—ranged from 57% to 81%. Ira M. Schwartz, Shenyang Guo, and John J. Kerbs, *Public Attitudes Toward Juvenile Crime and Juvenile Justice: Implications for Public Policy*, 13 *Hamline J. Pub. L. & Policy* 241, 249-50, 251 (1992).

25. See Jeffrey Butts and Eileen Poe, U.S. Dep't of Justice, *Juvenile Justice Bulletin, Offenders in Juvenile Court, 1990* (Dec. 1993) (stating that juvenile courts in the U.S. handled 10% more cases in 1990 than in 1986). But see Forst and Blomquist, 5 *Notre Dame J. L. Ethics & Pub. Policy* at 332 n.24 (cited in note 9) (noting that while juvenile crime did increase significantly between 1960 and 1975, the rate has "leveled off or decreased" since 1975).



punishment.<sup>26</sup> This more punitive approach toward juvenile delinquency is evidenced by the fact that serious offenders are now more frequently waived to the adult courts, that mandatory minimum sentences are imposed more regularly on juveniles, and that juvenile court procedures have become more formal.<sup>27</sup> The enactment of serious and habitual juvenile offender statutes, discussed in detail in this Note, is one example of this more punitive philosophy.

### 1. Social Protection: Deterrence and Incapacitation

Punishment, to the extent it is designed to protect society, encompasses the goals of deterrence<sup>28</sup> and incapacitation.<sup>29</sup> Deterrence and incapacitation have not always been stated purposes of the juvenile court.<sup>30</sup> Nonetheless, an increasing number of states have included social protection among the official goals of their juvenile justice systems.<sup>31</sup> The changes in California's Juvenile Code illustrate the point. As of 1983, the code's purpose clause included protection of the public, but this goal was plainly secondary, as it was listed *after* the goal of securing the "welfare of the minor."<sup>32</sup> In 1984, however, the old purpose clause was repealed and under the new provision "the protection and safety of the public" became the *first* listed goal of the juvenile justice system.<sup>33</sup> In sum, social protection—and thus the philosophies of deterrence and

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26. Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 332-33. See notes 57-63 and notes 86-98 (providing examples of statutory reforms).

27. Feld, 75 Minn. L. Rev. at 696 (cited in note 15).

28. As used here, the term "deterrence" includes both specific deterrence, which justifies punishment in order to reduce future crimes by the same offender, and general deterrence, which refers to using the example of the offender's punishment to discourage others from committing crimes.

29. Incapacitation involves incarcerating or otherwise physically preventing the offender from accomplishing further criminal acts. Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 455 (cited in note 8).

30. See Illinois Juvenile Court Act § 21, 1899 Ill. Laws 137 (mentioning only the care of the child as its goal). See also Feld, 68 B.U. L. Rev. at 825 (cited in note 7) (stating that early juvenile courts emphasized treatment and rejected the jurisprudence of adult criminal proceedings).

31. See, for example, Ala. Code § 12-15-1.1 (1994) (stating that "[t]he purpose of this chapter is to . . . preserve the public peace and security"); Cal. Welf. & Inst. Code § 202(a) (West 1984) (stating that "[t]he purpose of this chapter is to provide for the protection and safety of the public"); Ark. Stat. Ann. § 9-27-302(1) (1987) (stating that a purpose of juvenile code is the "best interests of the state" and "protection of the public"). See also Feld, 68 B.U. L. Rev. at 842-45 (explaining that at least 10 of 42 states with purpose clauses in their juvenile codes have amended such clauses in recent years to include "public safety" as a goal).

32. Cal. Welf. & Inst. Code § 202(a).

33. *Id.*, as amended by 1984 Cal. Stat. ch. 756 §§ 1, 2. For a discussion of California's adoption of a more punitive purpose clause, see Feld, 68 B.U. L. Rev. at 844 n.94 (cited in note 7).

incapacitation—has taken its place beside rehabilitation as a major goal of many juvenile justice systems.

## 2. Retribution: Just Deserts

The goal of punishment also includes retribution. Retribution, or “just deserts,” is the theory that punishment should be carried out in proportion to a criminal’s moral culpability.<sup>34</sup> The “pure” retributivist justifies punishment not on the ground that it will reduce future crimes, or rehabilitate an offender, but rather *solely* on the ground that an offender deserves it. For the retributivist, moral culpability alone is a necessary and sufficient prerequisite for imposing punishment.<sup>35</sup>

Early juvenile systems affirmatively rejected any reliance on retributive goals. The Progressive reformers who founded the juvenile court at the beginning of this century avoided retribution because it conflicted with their exclusive emphasis on rehabilitation and with their belief that children were not fully culpable for their delinquent acts.<sup>36</sup>

Both judicial decisions and juvenile codes officially continue to reject retribution as a goal of the juvenile justice system.<sup>37</sup> Few court opinions acknowledge retribution as an aim of the juvenile system,<sup>38</sup> and some statutes specifically express a preference for rehabilitative over retributive goals. Arkansas’s juvenile code is typical. It states that its purposes are to be achieved by “substituting for retributive punishment, whenever possible, methods of . . . rehabilitation.”<sup>39</sup> Even certain states that have amended their juvenile codes to reject an exclusive emphasis on rehabilitation have sometimes taken pains to point out that the move toward a philosophy of social protection

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34. Michael S. Moore, *The Moral Worth of Retribution*, in Joel Feinberg and Hyman Gross, eds., *Philosophy of Law* 685 (Wadsworth, 4th ed. 1991).

35. *Id.* at 686.

36. Forst and Blomquist, 5 Notre Dame J.L. Ethics & Pub. Policy at 324 (cited in note 9). The authors write that the Progressives “envisioned a separate system of justice which took cognizance of the belief that juveniles were different from adults and needed to be protected, nurtured, and treated, rather than held completely responsible and punished for their wrongdoing.” *Id.*

37. See, for example, *Reynolds*, 857 P.2d at 846 (citing *Hills v. Pierce*, 113 Or. 386, 231 P. 652 (1925)) (stating that the purpose of Oregon’s juvenile justice system is “not to convict or punish but to protect”).

38. But see *In re Javier A.*, 159 Cal. App. 3d 913, 206 Cal. Rptr. 386, 421 (1984) (stating that “the purposes of the juvenile process have become more punitive”). See also note 45 for other cases discussing retribution in the juvenile system.

39. Ark. Stat. Ann. § 9-27-302(3) (1987). See also Md. Cts. & Jud. Proc. Code Ann. § 3-802(a) (1989) (stating purpose of juvenile delinquency proceeding is rehabilitation).

does not mean that the system should also become retributive. California's amendment of its juvenile code, for instance, included a special clause stating that "[p]unishment, for the purposes of this chapter, does not include retribution."<sup>40</sup>

Nonetheless, as discussed above, there is a great deal of evidence that retribution has become a goal for more than a few juvenile justice systems.<sup>41</sup> One of the most commonly cited examples of this development is that of Washington state, which, in 1977, adopted a new Juvenile Justice Act, the stated purpose of which was to establish a system which would ensure "that youth . . . be held accountable for their offenses" and to "[p]rovide for punishment commensurate with the age, crime, and criminal history of the juvenile offender."<sup>42</sup> Washington's Juvenile Code thus clearly includes a retributive element: the notion that punishment should be in proportion to the crime is the essence of retribution.<sup>43</sup> Like Washington, other states have revised the purpose clauses of their juvenile codes in ways that reflect a more retributive philosophy.<sup>44</sup> As a result of these statutory changes, some courts have acknowledged that the juvenile justice system is partly based on retribution.<sup>45</sup>

Finally, as many commentators have pointed out, despite the rhetoric of rehabilitation, the *reality* is that many juveniles are punished by the juvenile system under the guise of being "treated."<sup>46</sup>

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40. Cal. Welf. & Inst. Code § 202(e) (West 1984 & Supp. 1995).

41. See Feld, 75 Minn. L. Rev. at 692 (cited in note 15); Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 336 (cited in note 9) (recognizing the support that punishment based systems have received from lawmakers and lobbyists across the political spectrum).

42. Wasb. Rev. Code Ann. § 13.40.010(2) (West 1977 & Supp. 1988).

43. See Moore, *Moral Worth of Retribution* at 685 (cited in note 34).

44. See, for example, Ark. Stat. Ann. § 9-27-302 (stating that "the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases"); Cal. Welf. & Inst. Code § 202 (noting that minors should "receive care, treatment, and guidance . . . which holds them accountable for their behavior"); Fla. Stat. Ann. § 39.001(2) (West 1990) (recognizing that "application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases").

45. See, for example, *In re P.M.*, 592 A.2d at 865 (recognizing that the purpose of Vermont's juvenile code was to treat, rather than punish, but concluding that such goals "*can only be accomplished when children who have committed acts . . . proscribed by our laws are held accountable for their actions*" so that they can be required to participate in appropriate treatment programs" (emphasis added); *In re D.S.F.*, 416 N.W.2d 772, 780 (Minn. App. 1987) (Crippen, J., dissenting) (asserting that the commitment of a juvenile offender to a secure facility for a determinate sentence was "[i]nescapably . . . a criminal justice sentence, not a juvenile court disposition aimed at doing what is best for the individual"); *In re Seven Minors*, 99 Nev. 427, 664 P.2d 947, 950 (1983) (discussing the advantages of the juvenile court "formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses").

46. Barry Feld, for example, has criticized the traditional juvenile court for punishing "in the name of treatment." 75 Minn. L. Rev. at 723 (cited in note 15). Similarly, Forst and Blomquist refer to the "*de facto* punitive characteristics of the juvenile court's sanctions," 5 Notre Dame J. L. Ethics & Pub. Policy at 328 (cited in note 9), and even Irene Rosenberg, a

Indeed, the primary motivation for the Supreme Court's extension of basic procedural safeguards to juvenile delinquents in *In re Gault* was the realization that what officially passed for "rehabilitation" was really quite similar to punitive incarceration.<sup>47</sup> Some courts, such as the Supreme Court of West Virginia, have been even more direct in acknowledging the retributive realities of the purportedly rehabilitative juvenile court.<sup>48</sup>

In sum, retribution, which was a philosophy plainly foreign to the creators of the original juvenile court, has become both a conscious goal (in a few states) and a practical reality (in many others) of the current juvenile system. Serious and habitual juvenile offender statutes, the purposes of which are sometimes expressly retributive, are examples of the juvenile justice system's growing emphasis on punitive goals.

### III. SERIOUS AND HABITUAL JUVENILE OFFENDER STATUTES

At least sixteen states have enacted statutes specifically addressing the problem of sentencing serious and habitual juvenile offenders.<sup>49</sup> Some of these statutes set forth special sentencing criteria for a specific list of particularly severe or violent crimes.<sup>50</sup> Other statutes set forth a definition of a "serious or habitual juvenile offender" and combine this with a section or provision for the

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vigorous defender of the juvenile court, admits "the juvenile courts impose punishment in the name of treatment." Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 Wis. L. Rev. 163, 165.

47. See *In re Gault*, 387 U.S. at 27 (stating that "[h]owever euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated").

48. "We acknowledge what has been an unspoken conclusion: our treatment looks a lot like punishment . . . [and] treatment is often disguised punishment." *State ex rel D.D.H. v. Dostert*, 269 S.E.2d 401, 415-16 (W.Va. 1980). See also *In re D.S.F.*, 416 N.W.2d at 780 (Crippen, J., dissenting) (stating that juvenile court's disposition of youth to a term of 180 days in a county facility, pursuant to sentencing guidelines, was "inescapably" a "criminal justice sentence" which deprived the youth of the same liberty as a sentence in an adult prison would).

49. See Ala. Code § 12-15-71.1 (1975 & Supp. 1994); Cal. Welf. & Inst. Code § 500 (West 1984 & Supp. 1995); 1987 Colo. Rev. Stat. § 19-2-803; Conn. Gen. Stat. Ann. § 46b-140(e) (West 1979); Fla. Stat. Ann. § 39.058 (West 1988); Ill. Ann. Stat. ch. 705, § 405/1-8.1 (Smith-Hurd 1987 & Supp. 1994); Iowa Code Ann. § 232.22 (West 1992); Minn. Stat. Ann. § 260.185.2(b) (West 1993); Mont. Code Ann. § 41-5-103(24) (1978); Nev. Rev. Stat. Ann. § 62.135 (Michie 1986); N.J. Rev. Stat. § 2A:4A-44 (1987); N.M. Stat. Ann. § 31-18-15.3 (1978); N.Y. Penal Law § 70.05 (McKinney 1987); 10 Okla. Stat. Ann. § 1160.1 (West 1991); R.I. Gen. Laws § 14-1-7 (1981); Tenn. Code Ann. § 37-1-137 (1987); Va. Code Ann. § 16.1-330.1 (Michie 1993); Wash. Rev. Code Ann. § 13.40.160 (West 1993).

50. See, for example, Wash. Rev. Code Ann. § 13.40.160 (requiring use of sentencing guidelines for certain serious juvenile offenses).

disposition of juveniles who satisfy the criteria.<sup>51</sup> Generally, only children above a certain minimum age are subject to the terms of a serious and habitual juvenile offender statute,<sup>52</sup> but this limitation is by no means universal.<sup>53</sup>

Despite differences in form, all serious and habitual juvenile offender statutes are, to a degree, punitive. Their punitive nature can be seen in two ways. First, some statutes expressly acknowledge their punitive purposes.<sup>54</sup> Second, all serious and habitual juvenile offender statutes impose particular sentences, or give the court authority to impose tougher sentences, *based on the offense a juvenile commits*.<sup>55</sup> Statutes which set forth a sentence or disposition based on the crime committed (as opposed to focusing on individual characteristics of the juvenile offender) are, according to current theory, primarily designed to punish rather than to rehabilitate.<sup>56</sup>

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51. See, for example, 1987 Colo. Rev. Stat. Ann. §19-2-803. States have also addressed the problem of serious juvenile crime by enacting legislative waiver statutes, which require the juvenile court to decline jurisdiction and "waive" the offender to the adult system for certain specified crimes. See, for example, N.Y. Penal Law § 30.00(2) (McKinney 1987) (giving the criminal courts automatic jurisdiction over the adjudication of certain serious crimes by older juveniles). Note, as in the case of New York, that a state may have more than one manner of addressing serious juvenile crime. Because the focus of this Note is on the adjudication and disposition of serious juvenile delinquents *within* the juvenile system itself, such legislative waiver provisions will not be analyzed in detail. Analyses of waiver-transfer statutes appear in Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 337-42 (cited in note 9) and Feld, 75 Minn. L. Rev. at 701-08 (cited in note 15).

52. See, for example, Conn. Gen. Stat. Ann. § 46b-126(a) (West Supp. 1994) (stating that a child must have "attained the age of fourteen years at the time of the alleged delinquent act"); Iowa Code Ann. § 232.22.2.c(1) (West 1994) (stating that a child must be "at least fourteen years of age").

53. See 10 Okla. Stat. Ann. § 1160.2(11) (West Supp. 1995) (defining "serious juvenile offender" and "habitual juvenile offender" as any person under age eighteen who has been adjudicated delinquent for the commission of certain specified crimes).

54. See, for example, N. J. Stat. Ann. § 2A:4A-20 (West 1987) (Senate Judiciary Committee Statement) (stating that "[t]his bill recognizes that the public welfare . . . can be served most effectively through an approach which provides for harsher penalties for juveniles who commit serious acts or who are repetitive offenders"); Nev. Rev. Stat. Ann. § 62.211(2)(b) (Michie Supp. 1993) (stating that the juvenile court may impose on a "serious or chronic" juvenile offender "any other *punitive measures* the court determines to be in the best interests of the public" (emphasis added)); Wash. Rev. Code Ann. § 13.40.010(2) (West 1977 & Supp. 1988) (stating that the purpose of the juvenile code includes providing for "punishment commensurate with the age, crime, and criminal history of the juvenile offender").

55. Whether they operate by setting forth penalties for certain offenses, or by ascribing "serious or habitual offender" status according to the offenses a juvenile has committed, all such statutes place at least some emphasis on the wrongful act itself. See, for example, 1990 Colo. Rev. Stat. § 19-2-803(1) (defining "violent juvenile offender" as one who has committed one of a number of specified "crime[s] of violence"); Tex. Fam. Code Ann. § 53.045 (West Supp. 1992) (subjecting to a new 40-year maximum sentence only those juveniles who commit one of six listed felonies); Wash. Rev. Stat. Ann. § 13.40.020 (creating three categories of juvenile offenders, with presumptive sentences for each, based in part on the offense a juvenile commits).

56. See Feld, 68 B.U. L. Rev. at 833 (cited in note 7) (explaining that "[p]unishment imposes unpleasant consequences because of an offender's *past offenses*," whereas rehabilitative

Serious and habitual juvenile offender statutes do, however, vary in the means chosen to achieve their punitive goals. While there are far too many variations to be covered fully in this Note, the typical approaches fall into two major categories: (1) "get tough" reforms; and (2) integrated serious and habitual juvenile offender programs.

#### A. "Get Tough" Statutes

The phrase "get tough" refers to those statutory reforms which are primarily designed to impose harsher or more certain punishments on juveniles. Generally, such statutes minimize or eliminate specific attempts at rehabilitating or treating delinquent youth. Typical get tough approaches include: (1) imposing mandatory minimum sentences or sentencing ranges for listed offenses;<sup>57</sup> (2) authorizing the juvenile court to impose a determinate sentence for specified offenses, rather than the traditional indeterminate period used for the majority of delinquent acts;<sup>58</sup> (3) authorizing the juvenile court to impose a longer period of incarceration, up to a statutory maximum, for certain serious offenses;<sup>59</sup> (4) authorizing the juvenile court to impose harsher sentences, at the discretion of the juvenile judge, on youths who commit certain listed crimes;<sup>60</sup> (5) extending the juvenile court's jurisdiction over serious juvenile offenders to a later age than is allowed for non-serious juvenile delinquents;<sup>61</sup> (6) giving the juvenile court discretion to place the serious or habitual offender

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treatment "focuses on the mental health, status, and future welfare of the individual rather than on the commission of prohibited acts".

57. Ala. Code § 12-15-71.1(a), (b) (Supp. 1994) (requiring mandatory one year sentences for juveniles adjudicated delinquent for certain violent or serious offenses); N.Y. Penal Law § 70.05.3 (McKinney 1987) (requiring the court to impose a minimum prison sentence, depending on the offense, for certain violent crimes); Wash. Rev. Code Ann. § 13.40.160(1) (West 1993) (requiring court to sentence a serious juvenile offender within a specific "standard range," based on the offense, with exception for "manifest injustice").

58. Colo. Rev. Stat. Ann. § 19-2-803(3) (West Supp. 1994) (authorizing the court to impose minimum sentences for violent juvenile offenders and requiring that juveniles shall not be released without prior written approval of the committing court).

59. Conn. Gen. Stat. Ann. § 46b-141(a) (West Supp. 1994); N.J. Stat. Ann. § 2A:4A-44(3) (West 1987) (authorizing the extension of sentences for up to an additional two or five years, depending on the offense); Tex. Fam. Code Ann. § 53.045 (West Supp. 1992) (imposing a sentence of up to forty years on offenders ten to sixteen years of age who commit any of six listed serious felonies).

60. Nev. Rev. Stat. Ann. § 62.211(2)(b) (Michie Supp. 1993) (permitting the juvenile court to impose on a serious juvenile offender "any other punitive measures the court determines to be in the best interests of the public").

61. Fla. Stat. Ann. § 39.022(4)(a), (b) (West Supp. 1993) (providing that the juvenile court retains jurisdiction over non-serious juveniles until they reach age 19, and over serious juvenile offenders until age 21).

in an adult facility;<sup>62</sup> and (7) authorizing the court to place serious or habitual juvenile offenders in juvenile boot camps.<sup>63</sup>

### 1. A "Pretense of Benevolence":<sup>64</sup> Critiquing the Rehabilitative Ideal

Current scholarship, which overwhelmingly focuses on the get tough variety of reforms, views the enactment of these statutes as an ominous trend for the juvenile justice system and its traditionally rehabilitative philosophy. Several prominent scholars in the field, chief among them Barry Feld, have emphasized the punitive nature of serious and habitual juvenile offender laws. They view such statutes both as evidence of the incompatibility of rehabilitation and punishment, and as an indication that states are increasingly rejecting rehabilitation as a goal of the juvenile justice system.<sup>65</sup> Some even conclude that an independent juvenile court is no longer justified, on the ground that the juvenile system has become no more than a criminal court without the procedural protections of the adult system.<sup>66</sup>

Professor Feld, for example, claims that recent reforms are largely punitive in nature, in that they are designed to deliver

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62. Iowa Code Ann. § 232.22.2.c (West 1994) (allowing a child to be placed in adult detention center if there is probable cause to believe the child committed a felony, or certain other serious crimes).

63. Fla. Stat. Ann. § 39.057 (West Supp. 1993) (authorizing the creation of a boot camp program to provide "an intensive educational and physical training and rehabilitative program for appropriate children").

64. See note 71.

65. Forst and Blomquist, for example, explain that the juvenile system has become more punitive both through reforms which increasingly authorize waiver (sometimes called transfer) of juveniles to the adult system, Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 337 (cited in note 9), and by legislative changes to the juvenile system itself, which have authorized or required juvenile courts to emphasize punitive goals, *id.* at 342. See also Feld, 75 Minn. L. Rev. at 696 (cited in note 15) (arguing that the juvenile court has been "criminalized" in four ways: removal of status offenders from its jurisdiction, increased use of waiver, more punitive sentencing practices, and more formalized procedures).

66. See Feld, 75 Minn. L. Rev. at 723 (stating that "[a]s juvenile courts converge procedurally and substantively with criminal courts, is there any reason to maintain a separate court . . .?"). Others who question the juvenile court's continued viability include Janet E. Ainsworth and Katherine H. Federle, whose works are discussed below. See notes 69-70 and accompanying text. In 1992, an A.B.A. meeting was dedicated specifically to discussing the possible elimination of the juvenile court's jurisdiction over delinquency proceedings. See *Whose Court Is it, Anyway?: The Future of the Juvenile Court*, Session of the Criminal Justice Section, American Bar Association, 1992 Annual Meeting (San Francisco, Aug. 10, 1992). It should be noted that neither Forst and Blomquist, nor Charles Springer, advocate abolition of the juvenile court, despite the fact they concur with Feld and others as to the problems of the juvenile system. See Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 374-75; Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 Notre Dame J. L. Ethics & Pub. Policy 397, 419 (1991).

sanctions based on the nature of the *offense* a juvenile commits.<sup>67</sup> For Feld, punishment and rehabilitation are fundamentally irreconcilable philosophies: Punishment views the offender as morally responsible for his or her acts, and thus deserving of sanctions appropriate to his or her past offenses, while rehabilitation assumes that external circumstances cause the juvenile's undesirable acts, and therefore focuses on "treating" the child to effect changes in his or her future behavior.<sup>68</sup> Similarly, Professor Katherine Federle asserts that recent legislative reforms have been overwhelmingly punitive, and as such have made the "new" juvenile court a "model of accountability, retribution and deterrence."<sup>69</sup> And Janet Ainsworth, who likewise views legislative changes as focusing on punishment and accountability almost exclusively, writes that such reforms "strike at the very heart" of the juvenile court's original rehabilitative philosophy.<sup>70</sup>

Thus, for Feld and like-minded theorists, the enactment of punitive, offense-oriented serious and habitual juvenile offender statutes inevitably signals a rejection of the rehabilitative philosophy

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67. Feld, 68 B.U. L. Rev. at 821-22 (cited in note 7). Feld writes:

The United States Supreme Court's decision in *In re Gault* transformed the juvenile court into a very different institution than that envisioned by its Progressive creators. Judicial and legislative efforts to harmonize the juvenile court with *Gault's* constitutional mandato have modified the purpose, process, and operation of the juvenile justice system. . . . As the juvenile court system deviates from the Progressive ideal, it increasingly resembles, both procedurally and substantively, the adult criminal court system. . . . Changes in juvenile courts' "purpose clauses" to emphasize characteristics of the offense rather than the offender reflect the ascendance of the Principle of Offense. . . . [These changes] indicato . . . the substantive and procedural criminalization of the juvenile court.

Id. (footnotes omitted).

68. Id. at 833. Feld writes:

Conceptually, punishment and treatment are mutually exclusive penal goals. Both make markedly different assumptions about the sources of criminal or delinquent behavior. Punishment assumes that responsible, free-will moral actors make blameworthy choices and deserve to suffer the prescribed consequences for their acts. Punishment imposes unpleasant consequences because of an offender's *past offenses*. By contrast, most forms of rehabilitative treatment . . . assume some degree of determinism. Whether grounded in psychological or sociological processes, treatment assumes that certain antecedent factors cause the individual's undesirable conditions or behavior. Treatment and therapy, therefore, seek to alleviate undesirable conditions in order to improve the offender's *future welfare*.

Id. (footnotes omitted).

69. Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. Contemp. L. 23, 38 (1990). For Federle, such punitive reforms provide one justification for abolishing the juvenile court. Id. at 50.

70. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1105 (1991).



upon which the juvenile court system was founded.<sup>71</sup> More significantly, because the juvenile court does not provide the procedural protections offered by the adult criminal system,<sup>72</sup> this increased punitiveness calls into question the juvenile court's very existence. According to Feld, the current juvenile court gives juveniles the "worst of both worlds: . . . [they receive] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>73</sup> In short, Feld's theory maintains that because the juvenile court has adopted the punitive, offense-based approach of the adult criminal court without providing the procedural safeguards of the adult system, a separate juvenile court is no longer justified.<sup>74</sup>

That rehabilitation and punishment are based on fundamentally different philosophies cannot be disputed. Moreover, to the extent that certain commentators highlight the juvenile court's procedural shortcomings, their theories raise important questions about whether juveniles do, or can, receive "justice" from the juvenile system. Nonetheless, theories like Feld's, Ainsworth's, and Federle's have been rightly criticized for overstating the conflict between the

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71. See Feld, 68 B.U. L. Rev. at 859 (cited in note 7) (stating that "the reality . . . is that rehabilitation no longer remains a substantial goal of the juvenile criminal justice system" (quoting *State v. Schaff*, 109 Wash. 2d 1, 743 P.2d 240, 253 (1987) (Goodloe, J., dissenting))); Ainsworth, 69 N.C. L. Rev. at 1105 (noting that as a result of recent shifts in the philosophy of juvenile justice, "state juvenile court hearings have come to resemble adult criminal trials"). See also Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 342 (cited in note 9) (explaining that during the 1970s, lawmakers "began to respond to calls for harsher measures against juvenile crime by altering the espoused purposes and administration of the juvenile court"); id. at 359 (concluding that the current juvenile justice system "is radically different from the one conceived and constructed by its founders. Gone are the informality, the paternalism, and the pretense of benevolence").

72. While *Gault* did mandate that juvenile courts provide certain formal procedural protections, *Gault*, 387 U.S. at 33, 41, 57, juveniles still lack the constitutional right to a jury trial, see *McKeiver*, 403 U.S. at 545, and "[f]ew of the states that sentence juveniles punitively provide jury trials," Feld, 75 Minn. L. Rev. at 719 (cited in note 15). Moreover, *Gault*'s guarantee of a right to counsel in delinquency proceedings, 387 U.S. at 41, "remains unrealized," largely because so many juveniles waive this right, Feld, 75 Minn. L. Rev. at 720-21.

73. Feld, 75 Minn. L. Rev. at 718 (quoting *Kent v. United States*, 383 U.S. 541, 596 (1966)).

74. Id. at 723. Similarly, Katherine Federle advocates abolishing the juvenile court, for a variety of reasons: the rehabilitative system's failure to reduce juvenile offense rates, the legislative reforms' criminalization of the juvenile court, the Supreme Court's failure to extend the full array of constitutional protections to children in delinquency proceedings, the increasing punishment of status offenders, and the inadequate enforcements of existing children's rights in juvenile court. Federle, 16 J. Contemp. L. at 35-48 (cited in note 69). Janet Ainsworth also argues in favor of eliminating the juvenile court's jurisdiction over delinquency cases, in part because society's current view of childhood is no longer consistent with the "child-adult dichotomy" on which the juvenile court was founded. Ainsworth, 69 N.C. L. Rev. at 1118, 1106 (cited in note 70). Ainsworth explains that "we now perceive children as much more like adults, as demonstrated by our willingness to impose punitive sanctions via the juvenile courts." Id.

goals of punishment and rehabilitation, and for advocating the rather extreme position of eliminating the juvenile court.<sup>75</sup>

## 2. The Unique Nature of Offenders: In Search of a System That Can Achieve Both Punitive and Rehabilitative Goals

Thus, several theorists have suggested that the juvenile court, despite its growing emphasis on punishment and despite its procedural "failings," remains a viable and important institution in which rehabilitative goals still have a significant role to play. For example, while Forst and Blomquist also view recent reforms as being largely punitive,<sup>76</sup> they nonetheless support the concept of a separate juvenile justice system, on the grounds that these punitive reforms have not effectively reduced juvenile delinquency, and that juveniles are, in their view, inherently less mature and thus less culpable for their acts.<sup>77</sup> Forst and Blomquist conclude that some of the reforms of recent years were necessary, in that they provided the adjustments needed to bring juvenile justice into line with the empirical realities of rising crime rates and the relatively ineffective "rehabilitation-only" philosophy of the early juvenile court.<sup>78</sup> Yet, unlike the "abolitionists," Forst and Blomquist still approve of maintaining the juvenile justice system because they feel that it is more appropriate and effective in reducing juvenile delinquency.<sup>79</sup>

Similarly, Judge Gordon Martin asserts that, despite the punitive reforms of the last two decades, rehabilitation maintains an important place in the juvenile court,<sup>80</sup> and suggests that a meaningful balance between rehabilitation and punishment is possible within the juvenile system.<sup>81</sup>

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75. See notes 76-85 and accompanying text.

76. Forst and Blomquist, 5 *Notre Dame J. L. Ethics & Pub. Policy* at 359 (cited in note 9).

77. *Id.* at 365-69.

78. *Id.* at 374.

79. *Id.* at 375. Forst and Blomquist base their conclusion on the results of current research, which they claim has "reconfirmed the fundamental premise" of the original juvenile court: "juveniles are different from adults" and, as such, should generally not be made to bear the same responsibility or punishments as adults. *Id.* at 374-75. (The term "abolitionist," as used here, is borrowed from Irene Rosenberg. See note 46.)

80. Hon. Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 *Conn. L. Rev.* 57, 59-60 (1992).

81. Martin suggests certain reforms—allowing longer detention periods for "dangerous juveniles" and eliminating the shield of confidentiality for serious offenses—in an effort to preserve a viable role for the juvenile court and its traditionally rehabilitative role. *Id.* at 64-65. Several other theorists, too numerous to discuss in detail in this Note, have taken issue with the view that punishment and rehabilitation cannot be reconciled and with the position that the juvenile court, because it is more punitive, is no longer justified. See, for example, Mahoney, 5 *Notre Dame J. L. Ethics & Pub. Policy* at 461-65 (cited in note 8) (urging the implementation of

Finally, Irene Rosenberg argues persuasively for preserving the juvenile court's jurisdiction over delinquency cases, even while acknowledging the truth of the "abolitionists" criticisms: that juvenile courts regularly punish under the guise of treating young offenders, and that they fail to provide children the constitutional and procedural protections afforded adults in criminal courts.<sup>82</sup> Rosenberg supports the juvenile court for two reasons. First, she claims that abolitionists (such as Feld, Ainsworth, and Federle) overstate the disparity between the juvenile and criminal courts' procedural protections, give too little merit to the gradual procedural improvements in the juvenile system, and "idealize[ ]" the degree to which constitutional guarantees are enforced in adult criminal trials.<sup>83</sup> Second, Rosenberg asserts that adult courts will inadequately consider children's youth and immaturity in assessing guilt and determining sentences.<sup>84</sup> Rosenberg thus makes a persuasive argument that juvenile courts, "despite all their failings" do a better job of protecting children's rights, and at least of recognizing the goal of rehabilitation, than would criminal courts.<sup>85</sup>

In sum, theorists such as Martin, Forst, Blomquist, and Rosenberg contend that there is a place for rehabilitative goals and methods within the juvenile justice system. Despite recent punitive reforms, they urge that the juvenile system maintains an important role in addressing the problem of juvenile offenders.

*B. Integrated Serious and Habitual Juvenile Offender Programs:  
Balancing Punishment and Rehabilitation*

The second type of statute implements integrated serious and habitual juvenile offender programs. In contrast to "get tough" statutes, these programs attempt to combine punishment and rehabilitation in a single, comprehensive plan.<sup>86</sup> To the extent they succeed,

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a "comprehensive plan for children's services as an essential element of "solving" the juvenile crime problem); Springer, 5 Notre Dame J. L. Ethics & Pub. Policy at 419-20 (cited in note 66) (stating "I want to remodel the system, not dismantle it").

82. Rosenberg, 1993 Wis. L. Rev. at 165-66 (cited in note 46).

83. *Id.* at 166-67, 173.

84. *Id.* at 174-75.

85. *Id.* at 184-85.

86. See Cal. Welf. & Inst. Code § 501(a) (West 1984 & Supp. 1995) (establishing an inter-agency program, utilizing law enforcement, probation departments, schools, and juvenile courts, to comprehensively address the problems of serious and habitual offenders); Fla. Stat. Ann. § 39.058(2)(a) (West Supp. 1993) (creating a program for serious and habitual juvenile offenders that "combine[s] 9 to 12 months of secure residential treatment followed by a minimum of 9 months of aftercare"); Ill. Ann. Stat. Ch. 705, § 405/1-8.2 (Smith-Hurd 1987 & Supp. 1994) (authorizing creation of a "Serious Habitual Offender Comprehensive Action Program," which is

integrated serious and habitual juvenile offender ("SHJO") statutes demonstrate that rehabilitation and punishment are compatible, both in theory and in practice. These comprehensive programs, often overlooked by commentators like Feld, thereby support the claim that punitive reforms can be reconciled with—and perhaps improve upon—the juvenile court's traditionally rehabilitative focus.

Integrated programs for serious and habitual juvenile offenders exist in approximately one-third to one-half of all U.S. jurisdictions.<sup>87</sup> The characteristics of these programs vary considerably from state to state,<sup>88</sup> and therefore any attempt to evaluate such programs inevitably involves some degree of generalization. Thus, this Note analyzes the common features of integrated SHJO programs, rather than focusing on any one project. The phrase "integrated serious and habitual juvenile offender (SHJO) program," as used in this Note, refers to such a model approach, although the names<sup>89</sup> (and details) of such programs vary in practice.

The very design of most integrated SHJO programs demonstrates a continued commitment to achieving both punishment and rehabilitation. The common characteristics of SHJO programs include: an initial period of incarceration or detention; the use of small facilities; an emphasis on accountability; intensive supervision throughout the program; and a substantial offering of rehabilitation services.

For example, most integrated SHJO programs involve an initial period of incarceration in a secure facility<sup>90</sup> or in the home,<sup>91</sup> using house arrest or daily contacts with the probation officer.<sup>92</sup> This

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a "multi-disciplinary interagency" case management system); 10 Okla. Stat. Ann. § 1160.3.5 (West Supp. 1995) (mandating the creation of a "Serious and Habitual Juvenile Offender Program" which shall include, among other things, "[a] case management system for ensuring . . . diversion of youth from the juvenile justice system, services for . . . and . . . intensive supervision of serious . . . and habitual juvenile offenders"); Va. Code Ann. § 16.1-330.1(B) (Michie Supp. 1994) (creating a "Serious or Habitual Offender Comprehensive Action Program," which is defined as "a multidisciplinary interagency case management and information sharing system").

87. Dean J. Champion, *The Juvenile Justice System: Delinquency, Processing and the Law* 386 (Macmillan, 1992).

88. *Id.* at 394 (noting that some are "front-end" alternatives to secure detention," others combine incarceration with subsequent community supervision, and a third type uses "secure detention").

89. Typical plan names include "Intensive Supervision Program," "Serious and Habitual Juvenile Offender Comprehensive Action Program," and "Intermediate Punishment Program."

90. See, for example, Fla. Stat. Ann. § 39.058(2)(a) (West Supp. 1993) (providing that their program includes "9 to 12 months of intensive secure residential treatment"). See also note 8.

91. See Champion, *Juvenile Justice System* at 391 (cited in note 87) (describing the Ohio Department of Youth Services's four-phase program, which begins with intensive home-based supervision).

92. See *id.* at 388.

initial period of incarceration or in-home confinement is clearly designed to fulfill punitive objectives: community protection through deterrence and incarceration,<sup>93</sup> as well as, to a certain extent, retribution.<sup>94</sup> Overwhelmingly, such programs require or emphasize detention in small, non-institutional settings.<sup>95</sup> Integrated SHJO programs also emphasize accountability, both through the detention period, and by requiring victim restitution.<sup>96</sup>

In addition, integrated SHJO programs generally require intensive supervision for a relatively lengthy period of time after the initial period of full confinement.<sup>97</sup> Such periods of frequent and highly-structured supervision are designed to satisfy two goals. One is continued punishment (both social control and retribution).<sup>98</sup> A second is ensuring continued contact with the offender so that rehabilitative services may be delivered effectively.<sup>99</sup>

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93. See, for example, Cal. Welf. & Inst. Code § 503 (West 1984 & Supp. 1995) (listing policies of the serious and habitual offender program as "resist[ing] the release of the . . . offender at all stages of the prosecution" and as "detain[ing] minors in custody" whenever necessary); Ill. Ann. Stat. ch. 705, § 405/1-8.1(b) (Smith-Hurd 1987) (stating that one reason for establishing Illinois's "Serious Habitual Offender Comprehensive Action Program" for juveniles is the need "to effectively intensify the supervision" of serious and habitual juvenile offenders); 10 Okla. Stat. Ann. § 1160.1.A.3 (West 1991) (explaining that the "Serious and Habitual Offender Act" is in part designed to "enhanc[e] community control of crime").

94. See, for example, Fla. Stat. Ann. § 39.002(6) (West Supp. 1993) (including "punitive efforts" in a list of elements of juvenile justice system for serious offenders); Cal. Welf. & Inst. Code § 500 (West 1984 & Supp. 1995) (stating that the purpose of the "Serious and Habitual Offenders" provision was, in part, to "prosecute . . . aggressively" and "sentence . . . appropriately" such offenders).

95. See, for example, Fla. Stat. Ann. § 39.002(6) (stating that "the juvenile justice system should avoid the inappropriate use of . . . large institutions"). In Massachusetts, for example, a highly successful program for delinquent youth utilizes a network of small residential facilities, rather than large training schools. Jerome Miller and Lloyd E. Ohlin, *The New Corrections: The Case of Massachusetts*, in Margaret K. Rosenheim, ed., *Pursuing Justice for the Child* 154, 172 (U. of Chicago, 1976).

96. See, for example, Fla. Stat. Ann. § 39.058(2)(a)(11) (West Supp. 1993) (requiring, where appropriate, victim restitution); Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 459-60 (cited in note 8) (discussing advantages of comprehensive programs which include both detention and fines and rehabilitative services).

97. See, for example, Fla. Stat. Ann. § 39.058(2)(a) (West Supp. 1993) (stating that "a minimum of 9 months of aftercare" is required after detention in a secure facility); Champion, *Juvenile Justice System* at 391 (cited in note 87) (explaining that the Delaware County (Ohio) SHJO program involves, after an initial period of incarceration, continuous monitoring of the offender, 16 hours per day, seven days per week).

98. See Champion, *Juvenile Justice System* at 389 (stating that a common element of integrated SHJO programs is "aggressive supervision and control . . . as a part of the 'get tough' movement"); Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* 177-79 (Oxford, 1990) (explaining that intensively supervised probation, house arrest, and detention in a secure facility all have a punitive "purpose and method," even though the degree to which each is punitive varies).

99. By definition, the delivery of various rehabilitative services to serious juvenile offenders involves a significant amount of interagency cooperation and coordination, and many states with integrated SHJO programs expressly provide for such cooperation in the statutes authoriz-

Indeed, a hallmark of integrated SHJO programs is that they provide a wide array of rehabilitation services, which frequently continue for substantial lengths of time after the initial period of incarceration is complete.<sup>100</sup> For many programs, a primary rationale for such services, and the principal focus of their delivery, is to increase the likelihood of the juvenile's successful reintegration into society.<sup>101</sup>

Integrated serious and habitual juvenile offender programs, emphasizing initial detention, accountability, and treatment and reintegration services, are plainly designed to achieve a workable balance between the rehabilitative and punitive goals of the juvenile justice system. Thus, they challenge critics' conclusions that the two philosophies are theoretically incompatible.

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ing the programs. See Va. Code Ann. § 16.1-330.1(B) (Supp. 1994) (describing the SHJO as a "multidisciplinary interagency case management and information sharing system"); 10 Okla. Stat. Ann. § 1160.4.1 (West Supp. 1995) (charging the Oklahoma Commission on Children and Youth with the responsibility for, among other things, overseeing the interagency agreements necessary for carrying out the Serious and Habitual Juvenile Offender Program); Ill. Ann. Stat. ch. 705, § 405/1-8.1 (Smith-Hurd 1987 & Supp. 1994). An analysis of the role of interagency compacts to treat and punish serious juvenile offenders is beyond the scope of this Note. It is mentioned here only to highlight the fact that the integrated SHJO programs discussed here, to the extent they emphasize intensive supervision and the delivery of a variety of services to the delinquent child, presuppose and depend on the ability of a state to coordinate the efforts of its various crime prevention, juvenile justice, social services, and educational agencies.

100. See, for example, 10 Okla. Stat. Ann. § 1141.C.3 (West Supp. 1995) (requiring the development, as part of the SHJO program, of a "case management system for ensuring appropriate . . . services for . . . juvenile offenders" in the program); Fla. Stat. Ann. § 39.058(a) (West 1993) (listing services to be delivered by the SHJO program, including "diagnostic evaluation services . . . substance abuse intervention, mental health services . . . gang-related behavior interventions . . . job training, job placement . . . [and] educational services"); Va. Code Ann. § 16.1-330.1.B (Michie 1993) (stating that community "Serious or Habitual Offender Comprehensive Action Programs" shall supervise such offenders to "enhance current conduct control, supervision, and treatment efforts . . ."); Champion, *Juvenile Justice System* at 394 (cited in note 87) (noting that Ohio's juvenile intensive supervision programs include many different treatment services, including: "individual counseling, family counseling, in-home family services, community sponsors, alternative education, job training, and substance abuse counseling").

101. See Fla. Stat. Ann. § 39.058(2)(a) (West Supp. 1993) (requiring "a minimum of nine months of aftercare"); Ill. Ann. Stat. Ch. 705, § 405/1-8.1(b) (Smith-Hurd 1987 & Supp. 1994) (stating that a "serious habitual offender comprehensive action program" is needed to "increase the opportunity for success with juvenile offenders"); 10 Okla. Stat. Ann. § 1141(D) (West Supp. 1995) (requiring Oklahoma Department of Human Services to develop the "services necessary to implement the Serious and Habitual Juvenile Offender Program," with such services "including but not limited to . . . transitional programs"). See also Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 *Crim. Just. & Behav.* 93, 103 (1990) (stating that a primary emphasis of the Violent Juvenile Offender Program, an integrated plan adopted by several urban juvenile courts across the country, is "reintegration of violent delinquents into the community").

*C. Integrated SHJO Programs and "Get Tough" Statutes Compared:  
The Questionable Effectiveness of Get Tough Approaches*

Indeed, comparing the effectiveness of "get tough" reforms with those of integrated SHJO programs calls into question the conclusions of the juvenile system's critics, both as to the alleged incompatibility of punishment and rehabilitation, and as to the viability of the juvenile court. Such a comparison demonstrates that "get tough" reforms, while they may be moderately successful at achieving certain punitive goals, generally are no more effective in this area than are integrated SHJO programs. Moreover, where rehabilitation is concerned, integrated SHJO programs are overwhelmingly more successful.

1. The Punishment Objective

*a. "Get Tough" Statutes*

Given that punishment is frequently the primary objective behind the "get tough" type of serious and habitual juvenile offender statute,<sup>102</sup> one should expect that such statutes would be more effective at punishing than are traditional juvenile court laws. To a certain extent, this is true. Minimum and determinate sentences, for example, are often more likely to achieve the goal of retribution than are treatment-oriented dispositions, which are not necessarily proportional to the juvenile's offense.<sup>103</sup> Those statutes that allow for more punitive sentences, or for placement of serious juvenile offenders in adult facilities, accomplish the retributive goal. Similarly, to the extent that the get tough variety of serious and habitual juvenile offender statutes emphasizes mandatory or extended sentences in secure facilities, such statutes certainly incapacitate during the period of the juvenile's sentence.<sup>104</sup>

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102. See, for example, Wash. Rev. Code Ann. § 13.40.010(2) (West 1977 & Supp. 1988) (stating that purposes of juvenile code include making juveniles "accountable" for their acts and imposing "punishment commensurate with the age, crime, and criminal history of the juvenile offender").

103. See Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 456 (cited in note 8) (noting the success of Washington's punitive statute at achieving standardized sentencing).

104. See Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 354 (cited in note 9) (noting that as a result of Washington's determinate sentencing, 87% of serious or chronic offenders were incarcerated in state facilities, as opposed to only 60% before the sentencing act was passed). It should be noted that traditional juvenile statutes allow for indeterminate sentencing, based on flexible standards such as the "welfare" or "best interests" of the child

However, it is questionable whether get tough serious and habitual juvenile offender statutes, to the degree they focus on mandatory or extended sentences, successfully deter juvenile delinquency.<sup>105</sup> Punishment deters effectively only so long as the offender and the broader audience (potential juvenile delinquents) at whom it is directed are rational, responsible persons.<sup>106</sup> Yet researchers have begun to question whether many serious juvenile delinquents respond rationally to punishment.<sup>107</sup> Moreover, many studies suggest that determinate sentences for juveniles, if unaccompanied by other services, such as counseling and education, do little to reduce recidivism.<sup>108</sup> In sum, while most of the get tough serious and habitual juvenile offender statutes may meet the goals of retribution and incapacitation, their deterrent effect is open to question.

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offender. See, for example, Md. Cts. & Jud. Proc. Code Ann. § 3-802 (1989). As such, traditional statutes leave judges, in some instances, freer to impose longer sentences than would be possible under a serious juvenile offender statute with a specific sentencing range for a given offense. See Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 336-37 (explaining that children's rights advocates have supported determinate offense-based sentencing statutes, on the ground that they will avoid the "disproportionate periods of incarceration" that are possible under indeterminate, flexible "treatment" statutes).

105. Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 456 (cited in note 8) (noting that Washington legislation has not reduced recidivism among juvenile offenders). Studies have shown that mandatory minimum sentences do little to reduce crime rates in the adult population. According to a report of the Campaign for an Effective Crime Policy in Washington, D.C. mandatory minimums do not deter because most criminals are "poor, poorly educated, . . . and are not likely to apply cost-benefit analysis before engaging in criminal behavior." *Fighting Crime; Don't Hop on the Get-Tough Hog Pile*, Star Tribune (Minneapolis) 26A (Feb. 6, 1994).

106. Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 454. Other factors affecting deterrence include whether the public perceives that punishment is "consistent . . . predictable and immediate," *id.*, and the degree of certainty with which punishment is inflicted. Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. Rev. 351, 371. The severity of punishment does not affect deterrence. *Id.*

107. "Rationally" as used here, refers to weighing the costs and benefits of an action—here a criminal act—prior to engaging in such conduct. Young offenders are not "rational" to the extent they do not consider the consequences of their acts in this manner, and therefore the threat of punishment does little to deter them.

As Justice Brennan explained in *Stanford v. Kentucky*, 492 U.S. 361 (1989), "[t]he deterrent value of . . . punishment rests 'on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved.'" *Id.* at 404 (Brennan, J., dissenting) (quoting Gardiner, *The Purposes of Criminal Punishment*, 21 Mod. L. Rev. 117, 122 (1958)). However, noted Justice Brennan, the likelihood that a youthful offender makes this kind of cost-benefit analysis before engaging in a sanctionable act is "so remote as to be virtually nonexistent," especially where more severe punishments are concerned. *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)). Justice Brennan's comments dealt specifically with the deterrent effect of *capital* punishment on young offenders, but the basic theory underlying his conclusions is applicable to all types of juvenile sanctions.

108. See Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 456 (cited in note 8).



*b. Integrated SHJO Statutes*

Available research suggests that integrated serious and habitual offender programs rehabilitate and punish juvenile delinquents at least as effectively as do get tough reforms. While these programs may have non-threatening names, such as "alternative" sentencing, "intermediate" punishment, or "intensive" supervision, and while they often place great emphasis on the delivery of rehabilitative services, they also punish. Because such programs normally include a period of detention in a secure facility,<sup>109</sup> and generally emphasize intensive supervision and control throughout,<sup>110</sup> they ultimately serve the punitive goals normally associated with imprisonment in a traditional facility: retribution, incapacitation, and deterrence.

First, integrated SHJO programs can satisfy retributive goals. Integrated SHJO programs are retributive because they drastically reduce the juvenile's liberty for a significant period of time, in proportion to the juvenile's offense.<sup>111</sup> To the extent society normally associates detention or incarceration with retribution, and feels that criminals or juvenile delinquents receive their "just deserts" when they are incarcerated, these integrated SHJO programs undeniably satisfy the goal of retribution.<sup>112</sup>

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109. See notes 90-93.

110. See, for example, Fla. Stat. Ann. § 39.058(2)(a) (West Supp. 1993) (listing required components of the program); 10 Okla. Stat. Ann. § 1141(D) (West Supp. 1995) (same); Richard G. Wiebush, *Juvenile Intensive Supervision: The Impact on Felony Offenders Diverted From Institutional Placement*, 39 *Crime & Delinq.* 68, 72 (1993) (describing Ohio's model "intensive supervision program").

111. Moreover, despite the punishment-treatment dichotomy put forth by Feld (Feld focuses on the incompatibility of punishment, in which dispositions are based on the offense committed, and rehabilitation, in which dispositions are based on the needs of the individual juvenile, see notes 66-68 and accompanying text), there is nothing inherent in SHJO programs that would prohibit making the length of incarceration hinge on the offense the juvenile committed. The aftercare portion of the program can, based on each individual's needs, adequately serve the program's rehabilitative goals once incarceration is completed. The Ohio program studied by Wiebush, for instance, involved four phases, each of which lasted for mandatory minimum periods of time, and each of which involved gradually lower levels of supervision. Wiebush, 39 *Crime & Delinq.* at 71-72.

112. See Richard J. Lundeman, *Prevention and Control of Juvenile Delinquency* 191 (Oxford, 2d ed. 1993) (emphasizing that intensive supervision programs are, at least to a degree, punitive, that they often "start tough," and even in later stages of the program are "quick to resort to detention" when juveniles are uncooperative); Morris and Tonry, *Between Prison and Probation* at 178-79 (cited in note 98) (highlighting that intermediate punishments, such as intensive supervision programs, often involve severe reductions in autonomy). One could, of course, make the argument that such programs, especially to the extent that they may not impose periods of detention as long as may be given in an adult court, are not sufficiently retributive for those juveniles who have committed truly heinous crimes, such as murder. Indeed, there is a limit to the retributive nature of integrated SHJO programs, and it may be that for the most outrageous juvenile offenses, about which there is a high degree of social consensus as

Second, because of their emphasis on initial detention and continuing intensive supervision, integrated serious and habitual juvenile offender programs also incapacitate quite effectively. Typical programs, in addition to detaining juveniles in secure facilities, involve a wide array of control and surveillance methods. Oklahoma's Serious and Habitual Offender Program enabling statute, for example, requires the development of the following control strategies: tracking services, weekend detention, out-of-home placements (for five-day periods), thirty-day intensive placements, and "highly structured" placements.<sup>113</sup> Similarly, other programs utilize house arrest, drug tests, daily surveillance checks by a case manager, curfew, electronic surveillance, hourly school reports, mandatory employment, and regular employment checks.<sup>114</sup> Given their strong emphasis on controlling the daily movements and activities of their juvenile participants, integrated SHJO programs serve the goal of incapacitation at least as effectively as do get tough, determinative sentencing methods.<sup>115</sup>

Third and finally, to the extent a program's deterrent effect can be measured by its recidivism rates, integrated SHJO programs are at least, if not more, effective than determinate or mandatory sentences. For example, Jeffrey Fagan's study of integrated SHJO programs in four urban areas found significantly lower recidivism rates for violent, serious, and total crimes among juveniles who had completed the programs, as compared to juveniles with similar records and crimes who had received traditional punishment.<sup>116</sup>

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to the need for severe punishment and community protection, the transfer process would better serve retributive goals than would an integrated SHJO program. See Martin, 25 Conn. L. Rev. at 62-63 (cited in note 80) (discussing transfer as a "safety valve" which removes the most violent and severe cases of juvenile crime from the juvenile system).

113. 10 Okla. Stat. Ann. § 1141(D) (West Supp. 1995).

114. Wiebush, 39 Crime & Delinq. at 72 (cited in note 110); Champion, *Juvenile Justice System* at 387, 393 (cited in note 87).

115. See Wiebush, 39 Crime & Delinq. at 87 n.8 (explaining that in a comparative study of two groups of serious juvenile offenders—one placed in an intensive supervision program and the other given traditional incarceration and parole—the juveniles in the intensive supervision program did not recidivate, on average, "until almost seven months after they entered the program . . . about the same as the average length [of time after an] institutional stay").

116. Fagan, 17 Crim. Just. & Behav. at 104-05 (cited in note 101). See also Martin, 25 Conn. L. Rev. at 90 (cited in note 80) (citing "promising indications" of reductions in recidivism among juveniles placed in integrated, intensive supervision programs). Similarly, it was recently reported that a six-year Missouri study of that state's highly integrated programs for violent and chronic offenders (such programs utilize "small, high-security units" and "an extensive network of community programs") found that only 15% of youth who were committed to the programs and discharged later ended up in adult prisons. L.V. Hackley, *What Can We Do to Reduce Juvenile Crime? Training Schools Aren't the Answer; Searching for Solutions*, News & Record (Greensboro, N.C.) F-3 (Feb. 6, 1994).

Studies of recidivism rates thus strongly suggest that integrated serious and habitual juvenile offender programs, to the extent they are effectively implemented, deter as well as, and perhaps better than, traditional dispositional methods.<sup>117</sup>

## 2. The Rehabilitation Objective

### a. "Get Tough" Statutes

Get tough serious and habitual juvenile offender statutes do very little to achieve the goal of rehabilitation. Most such statutes, as noted above, emphasize mandatory terms of incarceration, longer sentences, or simply harsher terms of punishment. There is little evidence to suggest that longer or harsher sentences do much to rehabilitate offenders or reduce recidivism,<sup>118</sup> despite the popular belief, often echoed in the purpose clauses of such statutes, that tougher sentencing policies will cause juveniles to turn away from crime.<sup>119</sup> Most research suggests that longer and harsher sentences actually inhibit rehabilitation.<sup>120</sup> Thus, to the extent that these serious juvenile offender reforms merely adopt a get tough philosophy of longer and more severe terms of incarceration, it is highly doubtful that they can achieve society's punitive goals without sacrificing the traditional rehabilitative aims of the juvenile court.

### b. Integrated SHJO Statutes

Integrated serious and habitual juvenile offender programs also rehabilitate far more effectively than do "get tough" sentencing practices. Indeed, to the extent that many get tough statutes attempt

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117. See Wiebush, 39 *Crime & Delinq.* at 84-85 (cited in note 110) (finding that an intensive supervision program in Ohio did little to reduce recidivism rates, but suggesting that this finding may be because the youth he studied had gone through the program in its beginning stages, before it had "mature[d] operationally"). Notably, Fagan's study also showed evidence of a strong relationship between the "therapeutic integrity" of a program—the "strength and consistency of implementation, . . . and . . . the program design"—and the program's success at reducing recidivism. Fagan, 17 *Crim. Just. & Behav.* at 106.

118. Fagan, 17 *Crim. Just. & Behav.* at 101 (citing several studies which showed that "institutionalization does not result in lower recidivism rates than nonincarcerative sanctions with close supervision . . . , but may actually worsen it").

119. See, for example, Cal. Welf. & Inst. Code § 500 (West 1984) (stating the legislature's intention "to identify offenders early in their careers" and "prosecute them aggressively").

120. See Anna S. Richo, Note, *Mandatory Sentencing for Habitual Juvenile Offenders: People v. J.A.*, 34 *DePaul L. Rev.* 1089, 1104 n.132 (1985) (citing various sources which have found that traditional incarceration does not rehabilitate, and that many facilities become "schools of crime").

to combat serious juvenile crime by requiring longer or determinate terms of incarceration, the use of adult facilities, and the like, they make no claim to be rehabilitative, at least none beyond the general argument that "teaching a child a lesson" helps to rehabilitate a young offender.<sup>121</sup> Integrated serious and habitual juvenile offender programs, in sharp contrast, are designed to deliver a wide variety of rehabilitative services,<sup>122</sup> and as such are far more likely to rehabilitate juvenile offenders. That such programs often have lower recidivism rates than do get tough punishment methods, as noted above, may, in part, be evidence of their rehabilitative success.

Nonetheless, a common criticism of such programs is that they only rehabilitate if they are effectively implemented. Critics argue that the multitude of services sounds good on paper, or in legislative purpose clauses, but that such services are often not delivered in reality.<sup>123</sup> Clearly, program implementation can vary in practice,<sup>124</sup> so it is not unreasonable to conclude that some integrated SHJO programs, despite their lofty goals, fail to rehabilitate effectively. However, at least one commentator who has studied this question found that an Ohio integrated SHJO program delivered a much higher level of supervision and services than that which existed in traditional probation or parole.<sup>125</sup> The existence of several fairly successful alternate programs, such as Project New Pride in Denver, and programs in Massachusetts and Utah, lends support to this conclusion.<sup>126</sup>

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121. Springer, 5 Notre Dame J. L. Ethics & Pub. Policy at 416 (cited in note 66) (explaining that teaching a juvenile that crime has negative consequences serves to rehabilitate).

122. See text accompanying notes 99-100.

123. For example, Ciro Scalera, executive director of the Association of Children for New Jersey, testified before the United States House Subcommittee on Human Resources as to the damage done by inadequate funding of preventive and alternative programs. New Jersey's juvenile code, explained Scalera, was modified in 1984 to authorize judges to use intermediate sentencing (i.e., between probation and prison). However, alternative programs were never funded under the revised law, so the promise of such options remains "unfulfilled." Hearing on Juvenile Crime and Delinquency: Do We Need Prevention?, Hearing before the Subcommittee on Human Resources of the House Committee on Education and Labor, 103d Cong., 2d Sess. 64 (March 22, 1994).

124. See Fagan, 17 Crim. Just. & Behav. at 104, 106 (cited in note 101) (comparing program implementation in four cities); Champion, *Juvenile Justice System* at 397-98 (cited in note 87) (citing various reasons for failure of intensive supervision programs).

125. Wiebush, 39 Crime & Delinq. at 84 (cited in note 110) (noting that the referral of youths to rehabilitative services was "extraordinarily high").

126. See Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 459-60 (cited in note 8) (discussing the success of these programs); Champion, *Juvenile Justice System* at 394 (cited in note 87) (discussing various successful intensive supervision programs in Ohio); Krisberg and Austin, *Reinventing Juvenile Justice* at 180-81 (cited in note 11) (discussing intensive supervision, rehabilitation, and aftercare provided by the Key Program in Massachusetts).

In sum, integrated serious and habitual juvenile offender programs, given their focus on providing counseling, job training, job placement, drug abuse rehabilitation, education, and other services, rehabilitate offenders far more effectively than do get tough approaches to serious juvenile crime. The generally lower recidivism rates among offenders who have participated in such programs provides support for this conclusion. At least to the extent they are effectively implemented, integrated SHJO programs therefore appear to offer a promising means of achieving both punitive and rehabilitative goals for the juvenile system's most difficult cases: serious and habitual offenders.

#### IV. INTEGRATED SHJO PROGRAMS AND THE FUTURE OF THE JUVENILE COURT

There is substantial evidence that integrated serious and habitual juvenile offender programs effectively balance the goals of rehabilitation and punishment—not only in theory but also in practice. This evidence calls into question both the claim that recent legislative reforms signal a wholesale rejection of the juvenile court's rehabilitative philosophy and the argument that the modern juvenile system has lost its primary justification for existence.<sup>127</sup> In addition to the research discussed above, there are several other reasons why a punitive stance toward serious juvenile crime can be reconciled with the rehabilitative, child-centered philosophy of the juvenile system as a whole. The arguments of critics who claim that such a balance is not possible simply do not withstand scrutiny.

First, punishment and rehabilitation are theoretically compatible. In recent years, researchers have begun to suggest that some degree of punishment, especially for serious offenders, is appropriate and compatible with the juvenile system's child-centered philosophy.<sup>128</sup> Even critics such as Professor Feld have acknowledged this

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127. See Feld, 75 Minn. L. Rev. at 693 (cited in note 15) (arguing there is no reason to maintain a separate juvenile court system). Others who advocate abolishing the juvenile court include Janet E. Ainsworth and Katherine H. Federle. See note 74.

128. See Springer, 5 Notre Dame J. L. Ethics & Pub. Policy at 416 (cited in note 66) (arguing that "[t]he single most important rehabilitative factor of juvenile court disposition is the lesson given, namely, that you cannot get away with it").

possibility.<sup>129</sup> Plainly, the two are not mutually exclusive goals: some types of "punishment" can serve to rehabilitate a young offender.

Second, integrated programs for serious and habitual juvenile offenders, even if they do contain elements of retribution, incapacitation, and deterrence, are not as purely punitive as are get tough approaches. Florida's program, for example, mandates that juveniles sent to the serious offender program receive an array of services—counseling, education, job training, etc.—during their term of confinement.<sup>130</sup> Thus, despite the fact that integrated SHJO programs are punitive in some respects, they place significant emphasis on rehabilitation, and to this extent are fully compatible with the rehabilitative goals of the juvenile system. They therefore refute arguments that recent reforms have pulled the juvenile system exclusively in the punitive direction.

Third, rather than signaling the demise of the rehabilitative model, some acknowledgment of the system's punitive goals, where such goals are appropriate, may actually serve to uphold the validity of the juvenile court as a whole. Open acknowledgment that the juvenile justice system will hold serious and habitual juvenile offenders accountable for their actions arguably increases the legitimacy of the juvenile court by convincing the public that the court is aware of its responsibility to punish when punishment is needed.<sup>131</sup> Indeed, by acknowledging the need to include punishment among the system's goals for the small minority of youth who qualify as serious and habitual juvenile offenders, integrated SHJO programs may serve as a "safety valve" that preserves the rehabilitative nature of the court as a whole. By officially marking off a certain group of violent, dangerous, and habitual offenders for more punitive sentencing, such statutes alleviate the pressure to make the entire court more

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129. See Feld, 68 B.U. L. Rev. at 845 (cited in note 7) (noting that "[c]ourts, as well as legislatures, increasingly acknowledge that 'punishment' may be an acceptable purpose of a juvenile court's 'therapeutic' dispositions.")

130. Fla. Stat. Ann. § 39.058(2)(a) (West Supp. 1993). Programs in Massachusetts, Maryland, and New Jersey also offer, or require, a variety of activities, such as job training, schooling, counseling, and community service. Krisberg and Austin, *Reinventing Juvenile Justice* at 179-81 (cited in note 11).

131. Martin, 25 Conn. L. Rev. at 84 (cited in note 80) (arguing that the juvenile court will be more accepted if the public is assured that the court will adequately protect society from dangerous youth); Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, *Dealing With Serious, Repeat Juvenile Offenders* 66 (1982) (noting that the ultimate aim of the juvenile justice system in dealing with repeat and violent offenders should be protection of the public).

punitive, and allow the non-violent cases (the majority) to be settled under a rehabilitative model.<sup>132</sup>

At the same time, there is little support for the argument that integrated SHJO programs, because they are rehabilitative, cannot effectively punish or protect society.<sup>133</sup> First, by creating a comprehensive means of dealing with serious juvenile crime *within* the juvenile justice system, such programs actually help to ensure that serious offenders receive some type of punishment. Ironically, when serious juvenile offenders are transferred to adult criminal court, where they are comparatively *non-serious* criminals, they frequently go unpunished.<sup>134</sup> The claim that integrated serious and habitual juvenile offender programs will fail to hold society's "worst" juvenile offenders accountable for their delinquent acts is therefore unfounded.

Second, arguments that integrated SHJO programs cannot effectively punish or protect society ignore the evidence that such programs, are, as explained above, equally or more likely to reduce recidivism than are the traditional methods of incarceration and probation.<sup>135</sup> Given that youths, even more so than adult criminals, cannot be kept locked up forever, and thus that all but the most vicious juvenile criminals will reenter society at some future date, it simply makes common sense to maintain a system with the potential to rehabilitate and reintegrate juveniles into society effectively.<sup>136</sup> While integrated SHJO programs may not be a panacea, they certainly offer both juveniles and society more hope than the institutional incarceration of the adult system.<sup>137</sup>

Most significantly, there is little merit to claims that a separate juvenile system is no longer justified merely because it has

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132. Compare Martin, 25 Conn. L. Rev. at 83 (cited in note 80) (suggesting that transfer can operate as a "safety valve" which preserves the juvenile court's structure by removing from its jurisdiction the most severe cases).

133. Forst and Blomquist explain that society has supported "get tough" reforms based on the perceived failure of rehabilitative programs to control juvenile crime. Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 332 (cited in note 9).

134. Springer, 5 Notre Dame J. L. Ethics & Pub. Policy at 417 (cited in note 66) (stating that "[w]hat happens to . . . transferees is that, although sometimes juveniles are sent to a prison . . . , more frequently they receive probation and no appreciable sanction at all because of judges' understandable unwillingness to send these youngsters to adult prison").

135. See notes 115-17 and accompanying text.

136. See *United States v. Bland*, 472 F.2d 1329, 1349 (D.C. Cir. 1972) (Wright, J., dissenting) (arguing that "we cannot write these children off forever . . . at some point they will be freed from incarceration").

137. See Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 448 (cited in note 8) (arguing that "incarceration rarely reforms offenders . . . and often makes them worse"). See also Ira M. Schwartz, (*In*)justice for Juveniles: *Rethinking the Best Interests of the Child* 51 (Lexington Books, 1989) (noting that incarceration does little to reduce juvenile crime, and citing recidivism rates as high as 60-85% from some facilities).

adopted some of the punitive goals and methods of the adult system.<sup>138</sup> Such claims give too little weight to the fact that children are, on some level, fundamentally different than adults. Indeed, even if there is some social consensus that youths are more culpable for their actions than was once thought, our society has traditionally viewed—and continues to view—children as significantly less developed, less responsible, and more in need of protection than adults.<sup>139</sup> Many of our laws reflect this belief: children below a certain age are denied the right to vote, the permission to drive or drink alcohol, and they are allowed the defense of diminished capacity—all because of society's belief that children need protection, and should be treated differently than adults in certain key respects.<sup>140</sup> This understanding suggests that eliminating the juvenile court, even if it now serves a hybrid of punitive and rehabilitative goals, would be fundamentally misguided as well as unfair both to juveniles and society as a whole.<sup>141</sup>

Finally, the relatively small size of the serious and habitual juvenile offender population renders inaccurate the view that the existence of serious and habitual juvenile offender programs signals a wholesale shift of the juvenile court from its rehabilitative origins.<sup>142</sup> Serious and habitual juvenile offender statutes affect only a small percentage of the young delinquents brought before the juvenile court.<sup>143</sup> Most juveniles will not meet the definition of a "serious" or

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138. See, for example, Feld, 75 Minn. L. Rev. at 693 (cited in note 15) (arguing that there is no reason to maintain a separate juvenile court system on the ground that recent reforms have made the system more punitive).

139. See Springer, 5 Notre Dame J. L. Ethics & Pub. Policy at 420 (cited in note 66) (acknowledging that young people are qualitatively different than adults in their "imperfect judgment, immature attitudes, impulsivity, [and] difficult-to-resist need to please their peers" which justifies "our treating young law violators differently from older ones"). See also note 9.

140. See *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988) (plurality opinion). See also Forst and Blomquist, 5 Notre Dame J. L. Ethics & Pub. Policy at 326-27, 371-72 (cited in note 9) (discussing modern society's different treatment of adolescents and adults).

141. As one district court judge in Roxbury, Massachusetts, put it: "[I]f a violent juvenile is amenable to treatment, society deserves the chance to gain the non-violent citizen that juvenile might become." Martin, 25 Conn. L. Rev. at 91 (cited in note 80). Indeed, while "rehabilitation" can mask a punitive reality, it does not necessarily follow that all, or even most, rehabilitative programs are simply pretexts for punishment. Nor is it advisable to condemn all rehabilitation programs simply because some, or many, such programs have not been adequately implemented. See Rosenberg, 1993 Wis. L. Rev. at 184-85 (cited in note 46) (arguing that the adult criminal system would be worse than even the flawed juvenile court).

142. See Feld, 75 Minn. L. Rev. at 696 (cited in note 15) (stating that "[t]he juvenile court has been transformed" into a criminal court).

143. Office of Juvenile Justice & Delinquency Prevention, U.S. Dept' of Justice, *The Juvenile Court's Response to Violent Juvenile Offenders: 1985-89* 2 (1993) (stating that violent juvenile offenders make up only 7% of all delinquency cases reported); Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 457 (cited in note 8) (noting that "[s]erious juvenile offenders are a tiny minority in most American juvenile courts").



"habitual" juvenile offender, and thus will be adjudicated according to the rehabilitative standards the vast majority of states still follow for non-serious juvenile offenses.<sup>144</sup> The existence of relatively punitive programs for serious and habitual juvenile offenders does not, therefore, provide support for the conclusion that the juvenile system as a whole has rejected its rehabilitative philosophy or methods.

## V. CONCLUSION

Punishment and rehabilitation can be reconciled. In the context of the problem of serious and habitual juvenile offenders, a satisfactory balance can be achieved through integrated, multi-agency programs which combine an initial period of secure detention with ongoing intensive supervision and the delivery of a variety of services designed to rehabilitate and reintegrate problem youth. The fact that several such programs have satisfied both punitive and rehabilitative goals relatively successfully strongly suggests that a workable balance is possible. Moreover, while several states have taken a "get tough" approach to juvenile crime, the fact that a significant number of jurisdictions has chosen the integrated approach suggests that society is not yet prepared to reject fully the rehabilitative philosophy of the juvenile court. This continued commitment to rehabilitating delinquent youths, and the relative success of integrated SHJO programs, also suggests that commentators' calls for the elimination of the juvenile court are as yet unjustified.

At least one author has suggested that the integrated approach, in that it combines punitive and rehabilitative goals and methods, more closely approximates the true ideals of the original juvenile court system than does either a purely rehabilitative or the punitive model. An integrated program, asserts Charles Springer, would achieve the true meaning of *parens patriae*, that is, the state's responsibility to serve as parent for youthful delinquents.<sup>145</sup> According to Springer, the *parens patriae* philosophy should be interpreted to require juvenile courts both to punish young offenders

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144. Mahoney argues that "[u]ndue emphasis on the serious offenders may undermine the juvenile court's basic function in the community and inhibit the development of a full range of non-institutional sanctions." Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 457.

145. The 1899 Illinois Act instructed the juvenile courts to provide juvenile offenders with treatment which "approximated 'as nearly as may be that which should be given by their parents.'" Springer, 5 Notre Dame J. L. Ethics & Pub. Policy at 420 (cited in note 66). "The *spirit* of the 1899 Illinois juvenile court act," writes Springer, "was *parens patriae*, the state as a good parent." *Id.*

and then care for them in a manner that is likely to result in more acceptable behavior in the future.<sup>146</sup>

The balance Professor Springer suggests is possible. Integrated programs that both hold serious and habitual juvenile offenders accountable and provide effective rehabilitative services are one possible means of balancing the seemingly irreconcilable goals of punishment and rehabilitation.

Nonetheless, one must be careful to define what is meant by "success" in this context. To the extent such programs do not succeed (and there is good reason to doubt that they can "cure" the problem of serious and habitual juvenile crime), the problem may rest not with the goals and methods of the juvenile court, but with larger social problems. No program can successfully rehabilitate juveniles, or reintegrate them into society, if the society to which they return is devoid of legitimate opportunities for success.<sup>147</sup> One cannot deny that there are valid bases for the criticisms of the rehabilitative model of the juvenile court, or for the public's desire for tougher juvenile sentencing. Certainly there is some need for reform within the system.

However, the juvenile justice system has become an all-too-easy target for those who seek to reduce youth delinquency. It is too tempting for the public and lawmakers alike to believe that if we merely make our laws against serious and habitual juvenile offenders "tougher," we will solve the problem. The real source of the problem, however, may lie in society's unwillingness, or inability, to commit resources to our children on a broader scale: to ensure that there are viable opportunities for education, jobs, and, even more fundamentally, basic necessities such as adequate nutrition and personal safety.<sup>148</sup> Integrated serious and habitual juvenile offender programs are a step in the right direction, in that they acknowledge that an intensive and continued commitment of resources is needed if we are to have any realistic hope of successfully reintegrating young offenders into society. But they are only one piece of the solution, and if society does not place greater emphasis on providing for children *in general*, it is unlikely such programs, however well-designed or intentioned, will lead to any lasting or significant reduction in the problem of serious juvenile crime.

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146. *Id.*

147. Mahoney, 5 Notre Dame J. L. Ethics & Pub. Policy at 454-55 (cited in note 8).

148. *Id.* at 465. See also Springer, 5 Notre Dame J. L. Ethics & Pub. Policy at 410 (cited in note 66) (stating that "[b]ecause of a lot of demagogic clamor and public disinformation, the courts too often get blamed for adverse social conditions over which they have very little control").

We cannot, as Karl Llewellyn once wrote, "legislate' a change of heart."<sup>149</sup> Yet, there is a strong argument that a change of heart toward our youth is just what is needed if we are to make real advances against juvenile delinquency. The important lesson, in the present situation, is to recognize that until such a change occurs, any juvenile justice legislation—even the promising serious and habitual juvenile offender programs discussed in this Note—can have, at best, a limited effect.

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149. Karl N. Llewellyn, *What Law Cannot Do for Inter-racial Peace*, 3 Vill. L. Rev. 30, 32 (1957).

\* The Author would like to thank Professor Susan Brooks for her assistance on an earlier version of this Note.