

4-15-1996

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Recommended Citation

Ralph A. Rossum *Reforming Juvenile Justice and Improving Juvenile Character: The Case for the Justice Model*, 23 Pepp. L. Rev. Iss. 3 (1996)

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Reforming Juvenile Justice and Improving Juvenile Character: The Case for the Justice Model

Ralph A. Rossum

If crime is only a disease which needs cure, not sin which deserves punishment, it cannot be pardoned. How can you pardon a man for having a gumboil, or a club foot? But the Humanitarian theory wants simply to abolish Justice and substitute Mercy for it. . . . Mercy detached from Justice grows unmerciful. That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice: transplanted to the marshlands of mere Humanitarianism, it becomes a man-eating weed, all the more dangerous because it is still called by the same name as the mountain variety.¹

In November 1995, the Federal Bureau of Investigation (FBI) reported the good news that during 1994, the rate of serious crime in the United States fell by 2 percent from the previous year and by 7.7 percent since 1990. Over the same time periods, the rate of violent crime fell by 4.1 percent and 2.2 percent, respectively, and the rate of property crime fell by 1.7 percent and 8.5 percent, respectively.² Many commentators attributed the decrease in serious crime to higher rates of incarceration for convicted offenders.³ These figures, while encouraging overall, masked an ominous trend in juvenile crime: The rate of serious juvenile crime increased by 4.5 percent from the previous year and by 13.8 percent since 1990. The rate of violent crime increased by 5.7 percent and 29.9 percent, respectively, and the rate of property crime increased by 4.2 percent and 10.0 percent, respectively.⁴

1. C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 224-30 (1953), reprinted in C.S. LEWIS, *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 294 (Walter Hooper ed., 1970).

2. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES—1994 5-7, 10-12, 35-37 (1995) [hereinafter 1994 UNIFORM CRIME REPORTS].

3. See, e.g., John J. DiIulio, Jr., *Why Violent Crime Rates Have Dropped*, WALL ST. J., Sept. 6, 1995, at A19.

4. 1994 UNIFORM CRIME REPORTS, *supra* note 2, at 226; FEDERAL BUREAU OF INVES-

In 1995, juveniles between the ages of ten and eighteen constituted 12.6 percent of the total U.S. population.⁵ According to the FBI's November 1995 report, however, juveniles commit 30.9 percent of all Index offenses,⁶ 19.4 percent of all violent crime, and 35.1 percent of all property crime.⁷ More specifically, juveniles commit 16.7 percent of all murders and non-negligent manslaughters, 15.6 percent of all aggravated assaults, 16.3 percent of all forcible rapes, 32.0 percent of all robberies, 33.4 percent of all larcenies, 36.2 percent of all burglaries, and 55.3 percent of all arsons.⁸ More individuals are arrested for property crimes at age sixteen than at any other age, and more are arrested for crimes of violence at eighteen than at any other age.⁹

For the past ten years, serious juvenile crime has been soaring. During the past decade, the number of juveniles arrested for murder rose by 128 percent, and the number arrested for violent crime rose by 57 percent. During that same time period, the murder rate for male blacks between the ages of fourteen and seventeen (76 percent of whose victims were also black) increased 320 percent.¹⁰ During the 1980s, the number of arrests for weapons offenses increased 175 percent among those twelve to fifteen years of age, and 133 percent among all those less than eighteen years old.¹¹ During the second half of that decade, delinquency cases

TIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES—1991 222 (1992).

5. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MIDDLE SERIES, PROJECTIONS OF THE POPULATION, BY AGE, SEX, RACE, AND HISPANIC ORIGIN, FOR THE UNITED STATES (1993).

6. Index offenses include the four crimes of violence (criminal homicide, forcible rape, robbery, and aggravated assault) and the four crimes against property (burglary, larceny-theft, motor vehicle theft, and arson).

7. 1994 UNIFORM CRIME REPORTS, *supra* note 2, at 227.

8. *Id.*

9. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 42 (2d ed. 1988) [hereinafter REPORT TO THE NATION].

10. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993 386, 41769 (Kathleen Maguire & Ann L. Pastore eds., 1994).

11. Lawrence A. Greenfeld, Youth Violence and the Backgrounds of Chronic Violent Offenders, Paper Presented at the Institute of United States Studies Conference on Juvenile Justice and the Limits of Social Policy 3 (May 9, 1994); *see also* LAWRENCE A. GREENFELD & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, 3 WEAPONS OFFENSES AND OFFENDERS (1995).

Juveniles accounted for 16 percent of those arrested for weapons offenses in 1974 and 23 percent in 1993. Between 1985 and 1993, the number of juvenile arrests for weapons offenses increased by more than 100 percent, from just under 30,000 to more than 61,000; at the same time, adult arrests grew by 33 percent.

GREENFIELD & ZAWITZ, *supra*, at 3.

generally increased by 16 percent,¹² while the most crime-prone age group in the juvenile population, those between the ages of fourteen and seventeen, fell by approximately 11 percent.¹³ More alarming still, fully one-half of all delinquency cases involve crimes serious enough to be listed as FBI Index offenses.¹⁴

Among the factors that explain this increase in serious juvenile crime is demography. While the number of boys between the ages of fourteen and seventeen decreased during the 1980s and hit the bottom of a demographic trough in 1990, it is now once again increasing rapidly.¹⁵ From 1990 to 1995, the number of fourteen to seventeen year-old boys increased by 9 percent (explaining, in part, the 13.8 percent increase in serious juvenile crime since 1990).¹⁶ The boys in this age range will increase in number another 8.3 percent by 2000; 16.2 percent by 2005, and 19.3 percent by 2010. For black and Hispanic boys between the ages of fourteen and seventeen, the increases are even more dramatic: The increase for blacks is 6.7 percent by 2000, 20.6 percent by 2005, and 25.4 percent by 2010; and the increase for Hispanics is 15.6 percent by 2000, 42.2 percent by 2005, and 60.0 percent by 2010. (See Table 1.)

Males at age 18 have the highest per capita arrest rate for weapons offenses at 1007 per 100,000 population. *Id.*

12. JEFFREY A. BUTTS ET AL., *JUVENILE COURT STATISTICS 1991* 5 (1994).

13. GREGORY SPENCER, U.S. DEP'T OF COMMERCE, SERIES P-25, PUB. NO. 952, *PROJECTIONS OF THE POPULATION OF THE UNITED STATES, BY AGE, SEX, AND RACE: 1983 TO 2080* Table 6 (1984).

14. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT* 126 (1995).

15. Crime by girls is a growing but modest problem. Girls are responsible for only about 9% of all juvenile murders and 13% of all juvenile violent crime, and they have recidivism rates of 20% as opposed to 46% for boys. *See id.* at 56, 105, 158; Rita J. Simon & Sandra Baxter, *Gender and Violent Crime*, in *VIOLENT CRIME, VIOLENT CRIMINALS 171-97* (Neil A. Weiner & Marvin E. Wolfgang eds., 1989).

16. *See* text accompanying note 4.

Table 1¹⁷
Increases in the Size of the Most Crime-Prone Age Group
from 1995 to 2010
(Boys, 14-17 Years of Age)
(numbers in thousands)

	<u>OVERALL</u>	<u>WHITES</u>	<u>BLACKS</u>	<u>HISPANICS</u>
1995	7503	5952	1163	933
2000	8129	6394	1241	1078
increase over 1995	626	442	78	145
	8.3%	7.4%	6.7%	15.6%
2005	8716	6734	1403	1327
increase over 1995	1,213	782	240	394
	16.2%	13.1%	20.6%	42.2%
2010	8,949	6,805	1,458	1,493
increase over 1995	1,446	853	295	560
	19.3%	14.3%	25.4%	60.0%

While these percentage increases are dramatic, the actual numbers (and their ramifications) are even more so. There will be over 625,000 more boys between the ages of fourteen and seventeen in 2000 than there are today; 1.2 million more in 2005; and close to 1.5 million more in 2010. When these numbers are considered in light of the findings of the various birth cohort studies that have been conducted in both the United States and England, they explain why criminologist James A. Fox described recent reductions in the rate of serious crime as "the calm before the crime storm."¹⁸

Marvin Wolfgang and his associates at the University of Pennsylvania have conducted what are widely regarded as the two most rigorous, detailed, and comprehensive birth cohort studies.¹⁹ Their studies of all boys born in Philadelphia in 1945 and 1958²⁰ reveal that about one-third

17. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MIDDLE SERIES, PROJECTIONS OF THE POPULATION, BY AGE, SEX, RACE, AND HISPANIC ORIGIN, FOR THE UNITED STATES: 1993 TO 2050.

18. Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52.

19. See PAUL E. TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS (1990); MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT [hereinafter WOLFGANG, DELINQUENCY] (1972); MARVIN E. WOLFGANG ET AL., FROM BOY TO MAN, FROM DELINQUENCY TO CRIME (1987).

20. Included in the birth cohorts were all boys born in Philadelphia in the target

of all boys will have at least one recorded arrest by the time they are eighteen—typically when they are between the ages of fourteen and seventeen. More importantly, however, their birth cohort studies find that approximately 6 percent of all boys commit five or more crimes before they are eighteen and that this chronic offender group accounts for over one-half of all the serious crimes and about two-thirds of all the violent crimes committed by the entire cohort.²¹ This “6 percent do 50 percent” statistic has been replicated in longitudinal studies elsewhere in the United States²² and in England²³ and provides the basis for predicting with confidence that, as a result of the additional 625,000 boys who will be between the ages of fourteen and seventeen in the year 2000, there will be over 37,000 more chronic serious offenders on the streets than we have today, each committing five or more crimes (many of them violent) before they end their juvenile careers. This grim picture gets worse, for this same “6 percent do 50 percent” statistic will mean 73,000 more chronic serious offenders by the year 2005 and 87,000 more by the year 2010. It is little wonder that the U.S. Justice Department darkly warned in 1995 that juvenile arrests for violent crime will double in the next fifteen years.²⁴

While demography certainly helps to explain the recent sharp increase in serious juvenile crime and direly predicts a continuing upward curve, it does not entirely explain the increase to date. Neither does it account for all the additional serious and violent crime we as a society are likely to experience. During the second half of the 1980s, juvenile crime increased by 16 percent, while the number of boys in the most crime-prone age group fell by 11 percent. Likewise, during the first half of the 1990s, the 13.8 percent increase in serious juvenile crime outstripped the 9 per-

year and boys who continually resided in the city at least from their tenth through eighteenth birthdays. There were 9945 boys in the 1945 cohort and 13,160 boys in the 1958 cohort. See TRACY, *supra* note 19, at 39; WOLFGANG, *DELINQUENCY*, *supra* note 19, at 244.

21. TRACY, *supra* note 19, at 90.

22. See DONNA M. HAMPERIAN ET AL., *THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS* (1978); LYLE W. SHANNON, *CRIMINAL CAREER CONTINUITY: ITS SOCIAL CONTEXT* (1988).

23. See DONALD J. WEST & DAVID P. FARRINGTON, *WHO BECOMES DELINQUENT?* (1973); David P. Farrington, *Age and Crime*, in 7 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 189-250 (Michael Tonry & Norval Morris eds., 1986); David P. Farrington, *Longitudinal Analysis of Criminal Violence*, in *CRIMINAL VIOLENCE* (Marvin E. Wolfgang & Neil A. Weiner eds., 1981).

24. SNYDER & SICKMUND, *supra* note 14, at 111.

cent increase in boys between the ages of fourteen to seventeen. Not only do we have more boys committing more crime, but we also have more boys who, on a per capita basis, are committing more, and much more violent, crime. In their research, Marvin Wolfgang and his associates not only found that the members of the 1958 Philadelphia cohort committed 11.4 percent more offenses on a per capita basis than the 1945 cohort, but also discovered that the chronic offenders in the 1958 cohort committed three times as much violent crime per capita as the chronic offenders in the 1945 cohort. "The Cohort II [1958] rate exceeds the Cohort I [1945] rate by factors of 3:1 for homicide, 7:1 for rape, 5:1 for robbery, and almost 2:1 for aggravated assault and burglary."²⁵ Princeton University criminologist John J. DiIulio, Jr., reports that this is a "well-replicated finding" of all the major birth cohort studies; in each succeeding cohort, the chronic offender group (the "6 percent") is three times as dangerous as the one before it.²⁶

To demography, which helps explain the overall increase in juvenile crime, must be added what DiIulio calls the theory of "moral poverty," which helps account for the per capita increase in the amount and seriousness of juvenile crime. DiIulio defines moral poverty as "the poverty of growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings."²⁷ Moral poverty prevents the inculcation of character in children raised in these desperate circumstances.²⁸ Character has been defined by James Q. Wilson as empathy and self-control.²⁹ "Empathy refers to a willingness to take importantly into account the rights, needs, and feelings of others. Self-control refers to a willingness to take importantly into account the more distant consequences of present actions; to be in short somewhat future oriented rather than wholly present oriented."³⁰

Without the inculcation of character, children become radically self-regarding. By living for themselves alone and placing "zero value on the lives of their victims," they become capable of committing the "most heinous acts of physical violence for the most trivial reasons (*e.g.*, a percep-

25. TRACY, *supra* note 19, at 274.

26. John J. DiIulio, Jr., *The Coming of the Super-Predators*, THE WKLY. STANDARD, Nov. 27, 1995, at 25.

27. *Id.*

28. The following discussion of moral poverty relies heavily on Ralph A. Rossum, *Juvenile Justice Professionals: Opponents of Reform*, in *JUVENILE DELINQUENCY IN THE UNITED STATES AND THE UNITED KINGDOM* (Gary L. McDowell & Jinney S. Smith eds., forthcoming).

29. JAMES Q. WILSON, ON CHARACTER 5 (1991).

30. *Id.*

tion of slight disrespect or the accident of being in their path).³¹ They also become radically present-oriented. By perceiving no relationship between "doing right (or wrong) now and being rewarded (or punished) for it later, they live entirely in and for the present moment and quite literally have no concept of the future."³² Such individuals, DiIulio notes, "fear neither the stigma of arrest nor the pain of imprisonment."³³

Character is most commonly and importantly taught to children by loving and responsible parents. For example, parents teach empathy and self-control to Tommy when he hits Billy by saying: "Don't do that; it hurts. You wouldn't want that done to you" (empathy) and "If you hit him again, you'll be grounded for a week" (self-control prompted by consideration of future consequences). The teaching of character is all but impossible, however, in fatherless, Godless, and jobless households, and, when character is not taught, the result is crime—often serious and violent crime.³⁴ Thus, among prison inmates, the Bureau of Justice Statistics has found that 43 percent were raised in single-parent households, 17 percent had spent some time in a foster home or other institution, and 14 percent were raised by neither parent.³⁵ More than 25 percent of inmates report that their parents or guardians had abused alcohol and 4 percent report that they had abused drugs; 37 percent had an immediate family member (and 31 percent had a brother) who had served a jail or prison sentence.³⁶ Among chronically violent offenders, the numbers are even higher. Two-thirds were raised in single-parent households, and 37 percent spent some time in a foster home or other child-care institution; over one-half had parents or foster parents who abused drugs or alcohol; and over 60 percent had an immediate family member (and 40 percent had a brother) with a prison record.³⁷

31. *Id.*

32. *Id.*

33. DiIulio, *supra* note 26, at 26.

34. See *Family Violence*, 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Lloyd Ohlin & Michael Tonry eds., 1989).

35. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES—1991 9 (1993) [hereinafter STATE PRISON SURVEY].

36. *Id.*

37. Greenfeld, *supra* note 11, at 6. On the basis of his London longitudinal study, Cambridge University's David Farrington has identified a variety of risk factors that accurately predict future persistent offenders. See David P. Farrington, Predicting Persistent Juvenile Offenders, Paper Presented at the Institute of United States Studies Conference on Juvenile Justice and the Limits of Social Policy, (May 9, 1994). They include poor childraising practices, being placed away from both parents, having

Moral poverty is self-perpetuating, with these offenders producing “the same sad experience for their children.”³⁸ The Bureau of Justice Statistics reports that 32 percent of all male inmates and 42 percent of all female inmates have two or more children under the age of eighteen.³⁹ The number of children with a parent in prison is large; in 1991, male and female inmates were parents to more than 826,000 children under the age of eighteen.⁴⁰ Before entering prison, they subjected these children to a home environment filled with drugs; 62 percent of state prison inmates acknowledged that, during the year before they were incarcerated, they had regularly used some drug, including 52 percent who admitted regular use of marijuana and 32 percent who admitted regular use of cocaine or crack.⁴¹

In *Beggars and Thieves: Lives of Urban Street Criminals*,⁴² Mark S. Fleisher traces the “life trajectories” of 194 teenage and young-adult criminals from Washington, Oregon, California, Arizona, and Washington, D.C.⁴³ His ethnographic research into “the familial factors contributing to the social, cognitive, and emotional traits typical among chronic street criminals”⁴⁴ confirms the survey research of the Bureau of Justice Statistics; it reveals, almost without exception, that these criminals’ families “were a social fabric of fragile and undependable social ties that weakly bound children to their parents and other socializers (stepparents, aunts, uncles, cousins, grandparents).”⁴⁵ He found that nearly all of their parents

were alcoholics; many used other drugs too, such as marijuana, heroin, and cocaine. Many fathers were criminals; often they were drug dealers. Mothers, and sometimes grandmothers too, engaged in criminal activities with their husbands, brothers, sons, and nephews. Sometimes these women, the mothers in particular,

few childhood years with parents of both sexes in the home, low family income, convicted parents, delinquent friends, being rated as troublesome by teachers, frequent lying, leaving school by 15, and frequent drug use. *Id.* The more these risk factors are present in a juvenile, the greater the likelihood that he will be a persistent offender. *Id.*; see also David P. Farrington, *Predicting Individual Crime Rates*, in 9 CRIME AND JUSTICE: A REVIEW OF RESEARCH 53-101 (Don M. Gottfredson & Michael Tonry eds., 1987).

38. John J. DiIulio, Jr., *The Question of Black Crime*, THE PUB. INTEREST, Fall 1994, at 25.

39. STATE PRISON SURVEY, *supra* note 35, at 10.

40. *Id.*

41. *Id.* at 21.

42. MARK S. FLEISHER, *BEGGARS AND THIEVES: LIVES OF URBAN STREET CRIMINALS* (1995).

43. *Id.*

44. *Id.* at 4.

45. *Id.* at 248.

were passive bystanders, but they always were active consumers of money and goods brought by crime.⁴⁶

Fleisher continues his description of the "morass of anger and drunkenness and squalid human emotions" in which his subjects were "enculturated" by noting that the

parents usually didn't get along well with each other, especially when they were drunk. Husbands beat their wives with fists or slashed them with knives; knife-wielding wives cut their husbands. Fathers and mothers beat their sons and daughters—whipped them with belts, punched them with fists, slapped them, and kicked them.⁴⁷

He documented "numerous" cases of sexual abuse by fathers or by the mothers' boyfriends and reported that many "[m]others of these children were knowing but passive bystanders, pretending not to know, fearful . . . that they might be beaten or might have their supply of drugs cut off."⁴⁸ Fleisher reports that "the well-being and criminal pleasures" of these parents always came first; [the] children always suffered.⁴⁹

Fleisher concludes that his subjects were raised in conditions of abject moral poverty: "There was no family intimacy; the parents had no commitment to each other or to their children's emotional, physical, or educational well-being. Most addicted parents were more attentive to drug and alcohol addictions than to their children. Children cared for themselves as if they were orphans."⁵⁰ Inevitably, these children "became like their parents"⁵¹; "brutal" and "depraved"—or, as Fleisher entitles his book, "beggars and thieves."⁵² They developed what Fleisher calls a "defensive worldview"⁵³ and what James Q. Wilson would call a bad character.⁵⁴ Thus, these children displayed a feeling of vulnerability and the need to protect themselves, as well as a belief that no one can be trusted.⁵⁵ They also manifested impulsiveness, insensitivity, a willingness to

46. *Id.*

47. *Id.* at 248-49 (endnote omitted).

48. *Id.* at 249.

49. *Id.*

50. *Id.* at 104 (endnote omitted).

51. *Id.* at 249.

52. *Id.* at 270.

53. *Id.* at 104.

54. See WILSON, *supra* note 29, at 5.

55. FLEISHER, *supra* note 42, at 104.

use violence and intimidation to repel others, a propensity for risk-taking, and a reluctance to become socially intimate.⁵⁶

Serious and violent juvenile crime is increasing, in part, because the kind of moral poverty that Fleisher chronicles is increasing. In 1991, 1.2 million children were born in the United States to unmarried mothers (an illegitimacy rate of 30 percent); this was up from 665,000 (a rate of 18.5 percent) as recently as 1980 and up substantially from 225,000 (a rate of 5.3 percent) in 1960.⁵⁷ The illegitimacy rate for blacks rose from 23 percent in 1960, to 55 percent in 1980, and to 68 percent in 1991; over the same time period, the rate for whites climbed from 2.3 percent to 11 percent to 22 percent.⁵⁸ For whites with less than a high school education, the rate rose from 35 percent to 48 percent from 1980 to 1990 alone.⁵⁹ The illegitimacy rate for white women below the poverty line is 44 percent, compared with only 6 percent for white women above the poverty line.⁶⁰ From 1960 to 1990, the percentage of children living in single-parent homes has more than tripled (from 9.1 percent to 28.6 percent).⁶¹ Illegitimacy and single-parent families correlate closely with poverty; 73 percent of children from one-parent families will be in poverty at some point during their childhood, while only 20 percent of children from two-parent families will experience poverty, and 22 percent of children from single-parent families will be in poverty seven years or more, compared with 2 percent from two-parent families.⁶² William Galston and Elaine Kamarck report that "the economic consequences of a parent's absence are often accompanied by psychological consequences, which include higher than average levels of youth suicide, low intellectual and educational performance, and higher than average rates of mental illness, violence, and drug abuse."⁶³ Their assertion that one psychological consequence of single-parent families is a higher incidence of youth suicides is confirmed by statistics that show that both the percentage of single-parent families and the teen suicide rate have tripled over the past

56. *Id.*

57. Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14.

58. *Id.*

59. *Id.*

60. *Id.*; see also Charles Murray, *Does Welfare Bring More Babies*, THE PUB. INTEREST, Spring 1994, at 17-30.

61. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS: 1991, p-20, No. 450 (1992).

62. DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY (1988).

63. William Galston & Elaine Kamarck, *A Progressive Family Policy for the 1990s*, in MANDATE FOR CHANGE (1993).

three decades (the teen suicide rate increased from 3.6 per 100,000 in 1960 to 11.3 per 100,000 in 1990).⁶⁴

During the past decade, the incidence of reported child abuse rose by 74 percent⁶⁵ to over 918,263 cases of "substantiated maltreatment" annually by 1992,⁶⁶ and the incidence of sexual abuse more than tripled.⁶⁷ Moral poverty combines with economic poverty in a most unfortunate fashion, for the rate of child abuse is four times higher in families with incomes of less than \$15,000, compared with those with higher incomes, and the rate of neglect is eight times higher.⁶⁸

As the dark and ominous clouds of moral poverty gather and strengthen over this country, they are combining with demographic updrafts to create conditions ripe for a juvenile "crime storm."⁶⁹ What shelter does the current juvenile justice system provide to both at-risk juveniles and the public at large from these destructive forces? What moral wealth does it create to alleviate or mitigate this moral poverty? What steps does it take to inculcate character in those with whom it deals so that the prospect of 1.5 million more young boys by the year 2010 can be a cause for celebration rather than alarm? What lessons about empathy and self-control does it teach to juvenile offenders and their parents? The unhappy answer to all these questions is, "Almost nothing at all." This is the case because, although it calls itself a juvenile justice system, it is not based on the principle of justice.

As it applies to punishment, justice is necessarily linked to the "concept of desert." As C.S. Lewis has argued, "It is only as deserved or undeserved that a sentence can be just or unjust."⁷⁰ Other justifications for punishment exist: deterrence⁷¹ and rehabilitation. But, as Lewis notes,

We may very properly ask whether [a punishment] is likely to deter others and to reform the criminal. But neither of these two last questions is a question about

64. WILLIAM J. BENNETT, *THE INDEX OF LEADING CULTURAL INDICATORS* 13 (1993).

65. SNYDER & SICKMUND, *supra* note 14, at 33-34.

66. National Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services, National Child Abuse and Neglect Data System, Working Paper 2, 1991 Summary Data Component, May 1994.

67. SNYDER & SICKMUND, *supra* note 14, at 33-34.

68. *Id.* at 34.

69. See Zoglin, *supra* note 18, at 52 and accompanying text.

70. LEWIS, *supra* note 1, at 289.

71. For purposes of this discussion, incapacitation is viewed as a form of specific deterrence. See Ralph A. Rossum, *THE POLITICS OF THE CRIMINAL JUSTICE SYSTEM: AN ORGANIZATIONAL ANALYSIS* 226-30 (1978).

justice. There is no sense in talking about a 'just deterrence' or a 'just cure.' We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds.⁷²

When the juvenile courts fail to consider what the juvenile deserves and consider only what will cure him, they are operating outside "the sphere of justice altogether" and, as Lewis continues, have reduced him to "a mere object, a patient, a 'case'."⁷³ This is precisely what juvenile courts have done.

Almost without exception,⁷⁴ juvenile courts operate on the basis of the "treatment model"—what C.S. Lewis calls the "humanitarian theory of punishment."⁷⁵ This treatment model understands juvenile delinquency as a disease peculiar to children and perceives the purpose of juvenile justice as bringing children into juvenile courts where this disease can be diagnosed by experts and where a judge can prescribe a treatment he believes meets the child's individual needs.⁷⁶ It requires that our juvenile justice systems treat delinquents the way pediatric medicine treats sick children.⁷⁷ When children become physically ill, they are neither blamed nor stigmatized for their misfortune. Rather, their disease is first diagnosed and then treated by medical professionals whose objective is to do what is best for the patient. While children may need to be separated from society if their disease is contagious or to assure the success of their prescribed treatment, this separation is never punitive in nature. Medical personnel are given maximum discretion to deal with these patients; reliance is placed on their professional training, expertise, ingenuity, and good will—not on lock-step routines or rigid adherence to rules or regulations. Finally, medicine is practiced in confidence; medical personnel work in private, and the medical records of patients are closed to the public.

The treatment model assumes that some children contract a disease called juvenile delinquency and, thus, should be no more blamed or stigmatized for this misfortune than their physically-stricken counterparts. Instead, juvenile court personnel are to diagnose the nature and cause of the juvenile's disease of delinquency and are to recommend to the juvenile court judge—operating as a physician of sorts—a treatment to be prescribed to address the juvenile's needs. This treatment may require

72. LEWIS, *supra* note 1, at 289.

73. *Id.*

74. *Cf.* WASH. REV. CODE ANN. § 13.40.010(2) (West 1993).

75. LEWIS, *supra* note 1.

76. ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 22 (1978).

77. This summary draws heavily on Ralph A. Rossum, *Holding Juveniles Accountable: America's "Juvenile Injustice System,"* PEPP. L. REV., 907, 910-11 (1995).

institutionalization, but this separation from society is imposed not as a punishment, but to ensure the successful treatment of the disease of delinquency and to prevent its spread to others. Just as medical professionals have the discretion to do what is necessary to save their patients, so too, the juvenile court personnel are to be authorized to do whatever is "in the best interest of the child."⁷⁸ And finally, just as is the case for medical personnel, juvenile court personnel perform their services free from the glare of public scrutiny; the public is excluded from juvenile court proceedings to protect children from the stigma of a criminal prosecution and conviction.⁷⁹

By nonjudgmentally dismissing juvenile crime as a disease which needs a cure, and not as a transgression that deserves punishment, the treatment model ignores justice and forfeits an excellent opportunity to teach lessons in character to young offenders desperately in need of such lessons. It focuses only on the offender and his therapeutic needs, not on the offense he has committed and the harm he has caused his victim. Thus, in juvenile court, a juvenile who has committed murder is not charged with, found guilty of, or punished for murder; rather, he is simply adjudicated delinquent and treated in a way that is believed to cure his disease of delinquency. His murderous conduct is not a reason to punish him, but is merely a symptom of his disease of delinquency and of his need for an individually-tailored treatment program to cure him of that disease. The same is true with a juvenile who places an obscene phone call;⁸⁰ his offense establishes him as a delinquent—no more, but also no less, than the murderer—and shows him to be equally in need of an individualized treatment program to cure his disease. How long the treatment of these two juveniles should continue and how coercive the intervention should be (for example, should it be probation as opposed to confinement in a secure detention facility) are determined not by what they have done (their offenses), but by what the juvenile court judge believes is necessary to cure them of their disease of delinquency.

78. *Id.* at 911.

79. *Id.* at 912.

80. *See, e.g., In re Gault*, 387 U.S. 1 (1967). In *Gault*, a juvenile was charged with placing obscene calls to a neighbor. *Id.* While the Supreme Court expanded the due process rights of juveniles and proclaimed that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court," it did not question the treatment model's offender orientation or direct that juvenile court dispositions be related to specific criminal acts. *Id.* at 28.

By individualizing treatment in this way and by focusing on the juvenile's disease instead of on his victim's anguish, pain, or loss, the juvenile court obscures any relationship between an act and its consequences and severs completely the nexus between "juvenile justice" and "justice as desert." The juvenile offender is neither forced to confront the consequences of what he has done to others (a lesson in empathy), nor made to understand that what is being done to him is the result of his criminal offense (a lesson in self-control). Furthermore, by characterizing its intervention as treatment rather than as punishment and by closing its proceedings to the public, the juvenile court prevents the threat of a justly-deserved punishment from being communicated to other potential offenders and to the broader public, and thereby fails to teach self-control.

By obliterating the relationship between doing wrong now and being punished later and by reinforcing destructive self-regarding tendencies through its individualization of treatment programs, the juvenile courts contribute to moral poverty and undermine the very foundation of good character. Just how thoroughly the juvenile courts have obliterated the relationship of doing wrong and being punished is apparent from the following:⁸¹ Each year, juvenile courts in the United States handle approximately 1.5 million delinquency cases, 725,000 of which are serious enough to be classified as FBI Index offenses.⁸² Of this number, juvenile courts will informally dismiss or divert 49 percent of them, including 30 percent of criminal homicides, forcible rapes, robberies, and aggravated assaults, and 51 percent of burglaries, larceny-thefts, motor vehicle thefts, and arsons.⁸³ Of the 51 percent that they formally handle, juvenile courts will subsequently dismiss 21 percent before adjudication and waive 1 percent to the criminal courts.⁸⁴ Of the 29 percent they actually adjudicate, these courts will place 17 percent on probation, place 8 percent in detention, and dismiss or otherwise dispose of the remaining 4 percent.⁸⁵ Of the 8 percent the courts place in detention, they will confine the 2 percent who have committed crimes of violence for an average of 353 days, the 4 percent who have committed property crimes for 217

81. The following analysis is largely derived from Rossum, *supra* note 28.

82. SNYDER & SICKMUND, *supra* note 14, at 126.

83. *Id.*

84. *Id.* at 132. It should be noted that most serious juvenile offenders transferred to the criminal courts receive sanctions less severe than they could have received in the juvenile courts. See TRACY, *supra* note 19, at 296; Barry C. Feld, *Delinquency Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 23 CRIMINOLOGY 195-212 (1983); SNYDER & SICKMUND, *supra* note 14, at 155-56.

85. SNYDER & SICKMUND, *supra* note 14, at 126, 134.

days, and the remaining 2 percent who have committed primarily drug or public order offenses for an average of 150 days.⁸⁶

These very low detention rates and brief periods of confinement for the few who are detained certainly do not teach empathy and self-control to those burgeoning numbers of young males in the most crime-prone age group whose character is not being shaped at home or in school; after all, in any given year, for all those juveniles arrested by the police and then actually referred to the juvenile courts for their offenses (half of which will be serious enough to be classified as Index offenses), the average detention imposed by the juvenile court will be only twenty days.⁸⁷ An average anticipated sanction of twenty days for the approximately 12 percent⁸⁸ of all juvenile offenders unlucky enough actually to be both arrested by the police and referred to the juvenile court for their offense (or more likely, simply for their last offense) suggests to these juveniles that they are largely immune to the law's force and sanctions. An average of twenty days does not reinforce for them the principle that the law means what it says and says what it means. An average of twenty days of detention is not a sanction likely to amend the ways or shape the character of morally-deprived, self-regarding, present-oriented juvenile offenders.

86. These figures were derived from data found in SNYDER & SICKMUND, *supra* note 14, at 134, 164, 177; and in BUTTS ET AL., *supra* note 12, at 14.

87. An average anticipated sanction of 20 days was derived as follows: In 1992, the juvenile courts received 743,700 delinquency petitions; in 8% (or 59,500) of these cases, the juvenile court detained the juveniles involved to a period of confinement. SNYDER & SICKMUND, *supra* note 14, at 132, 134. In 2% (or 14,875) of these cases, the juveniles had committed violent offenses and received an average period of confinement of 353 days; in 4% (or 29,750) of these cases, they had committed property offenses and received an average period of confinement of 217 days; and in another 2% (or 14,875) of the cases, they had committed drug or public order offenses and received an average period of confinement of 150 days. *Id.* at 132, 134, 177. The total length of confinement for all 743,700 juveniles referred to juvenile court was 15,425,375 days, or an average length of confinement of 20 days. *Id.* at 164.

88. The figure of 12% was derived as follows: Nationally, only 20% of all crimes (including only 21% of all Index offenses) are cleared by arrest. REPORT TO THE NATION, *supra* note 9, at 68. Assuming that juvenile crime is cleared at the same rate as adult crime, then only 20% of juvenile offenders are arrested for their offenses, and, since only 60% of those juveniles who are arrested are subsequently referred to juvenile courts (figure derived from data presented in SNYDER & SICKMUND, *supra* note 14, at 100, 126), the percentage of juveniles who commit offenses who are actually referred to juvenile court drops to 12% (60% of the 20%).

If character is defined as empathy and self-control, the juvenile courts, as presently constituted, not only fail to teach character, but may also be said to lack character themselves. By taking into account only the "rights, needs, and feelings" of the offender, they ignore his offense and fail to display empathy for the "rights, needs, and feelings" of his victims. And, by taking into account only the offender's disease of delinquency, his status as a victim of that disease, and their professional interest in restoring him to that state of emotional and psychological health he would be enjoying had he not succumbed to that disease, the juvenile courts display a present-orientation—their goal is to restore him to what they imagine he would have been, not to prepare him for what he can become.

Displaying a bad character and acting unjustly go hand-in-hand. By adhering to the treatment model and focusing only on the offender, the juvenile courts violate the principles of equality (*i.e.*, that like cases be treated alike), proportionality (the severity of the sanction should be proportionate to the seriousness of the offense), and, therefore, what Andrew von Hirsch calls the "principle of commensurate deserts."⁸⁹ A juvenile justice system that is so committed to curing juveniles of their disease of delinquency that it will act unjustly by denying them the principles of equality, proportionality, and commensurate deserts has become C.S. Lewis' "man-eating weed,"⁹⁰ all the more dangerous because it still uses "justice" in its name.

It need not be so. A necessary first step should be the replacement of the treatment model with the "justice model."⁹¹ The justice model seeks to achieve the twin goals of holding juveniles responsible for their criminal misdeeds and holding the juvenile justice system accountable to the public for what it does to these juveniles.⁹²

The justice model pursues individual responsibility by linking dispositions closely to delinquent acts (future orientation) and by utilizing dis-

89. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

90. LEWIS, *supra* note 1.

91. *Id.* at 45-46; *see also* ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* (1985); *CENSURE AND SANCTIONS* (1993); AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* (1971).

92. Critics of the treatment model include the Institute of Judicial Administration and the American Bar Association. Jointly, they drafted 23 volumes of juvenile justice standards summarized in Barbara D. Flicker, *Standards for Juvenile Justice: A Summary and Analysis* (1977), and the Twentieth Century Fund (through its Task Force on Sentencing Policy Toward Young Offenders) published *Confronting Youth Crime* (1978); they argued in unison that the highly discretionary, offender-oriented treatment model must be replaced with a offense-oriented model that sharply limits discretion and that is based on the principles of equality and proportionality.

positions, such as restitution,⁹³ that encourage juveniles to recognize their obligations to the community and to the victims of their criminal acts (empathy). By so doing, this model teaches character to juveniles raised in moral poverty. It pursues system accountability through its insistence that dispositions must be limited, deserved, uniform, and justified. To ensure that similarly-situated offenders are treated similarly and that the most serious offenders receive the most punitive sanctions, it relies on the use of presumptive and determinate dispositions where the disposition in any case depends upon the nature and seriousness of the criminal offense, the age of the offender, and the number, recency, and seriousness of any prior offenses. This, in turn, inculcates self-control by teaching juveniles that they will be held responsible for their criminal acts; that the more serious and frequent their acts, the more responsible they will be held; and that the older they are, the more responsible they will be expected to be. Also, consistent with accountability and with fostering character in the juvenile courts themselves, the justice model provides the public with the opportunity to scrutinize the performance of juvenile courts through its requirements that all hearings and all records (other than the juvenile's social file) be open to the public.

Abandoning the century-old treatment model and replacing it with the justice model is not a panacea. Adoption of the justice model will not complete the reform of juvenile justice in America, but it should begin it. By itself, the adoption of the justice model will not lift juvenile offenders out of moral poverty, teach character to the young, or end juvenile crime; but it is a necessary first step. Just as a person who possesses empathy and self-control acts differently from one who does not, so too, a juvenile justice system that concerns itself with the offense (as opposed to simply the offender) and that seeks to link an act with its consequences (as opposed to simply its cause) will act differently. It will cease treating juveniles as "mere object[s], patient[s], or case[s]" and will begin to regard them as persons who must be prepared for adult responsibility. It will then be in a position to foster the formation of good (as opposed to bad) character in juvenile offenders. It will then be ready to generate rather than squander moral wealth, and what it generates will flourish all the more because of the multiplier effect this wealth will in turn produce. To paraphrase Stephen Ross' words from *The Nature of Moral Responsibility*:⁹⁴ How the juvenile justice system teaches juvenile

93. See Jeffrey A. Butts & Howard N. Snyder, *Restitution and Juvenile Recidivism*, OJJDP UPDATE ON RESEARCH (1992).

94. STEPHEN ROSS, *THE NATURE OF MORAL RESPONSIBILITY* (1973).

offenders to meet their responsibilities defines who and what they are. What these juvenile offenders take themselves to be circumscribes the responsibilities they will bear and how they will meet them. What these offenders learn to accept as their responsibilities both represents what they will take themselves to be and gives its character to what they will become in the future.

How men meet their responsibilities defines who and what they are. What men take themselves to be circumscribes the responsibilities they bear and how they meet them. What a man accepts as his responsibilities both represents what he takes himself to be and gives its character to what he will become in the future.

Id. at 7.