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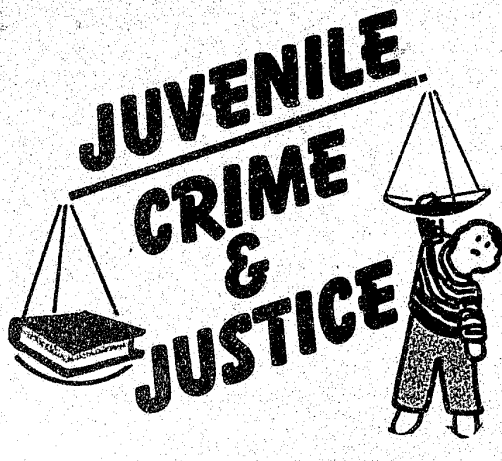

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ator's Briefing Book

William W. Treanor
and
Adrienne E. Volenik

an Youth Work Center

The New Right's

JUVENILE CRIME AND JUSTICE

AGENDA FOR THE STATES

A Legislator's Briefing Book

by

William W. Treanor

and

Adrienne E. Volenik

American Youth Work Center
Washington, D.C. 20036
August, 1987

DEDICATION

TO:

Sean Benjamin Treanor
Daniel Whitehead Treanor
Joshua Volenik Katz
Alexander Volenik Katz

Who daily teach us of the need to temper discipline with understanding and compassion and who remind us that children cannot rationally be held to the same standard of conduct and responsibility to which we hold adults.

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American Youth Work Center
Washington, D.C. 20036
August, 1987

ABOUT THE AMERICAN YOUTH WORK CENTER

The American Youth Work Center (AYWC), located in Washington, D.C., is a non-governmental resource organization for American and foreign youth service agencies and youth workers. The Center's mission is to provide information, training, technical assistance, publications, and overseas exchange opportunities to a broad spectrum of youth organizations including international agencies, national or regional coalitions, community-based youth service agencies, state and local governmental units, and others committed to developing effective and innovative services for youth.

AYWC training activities have included the International Youth Services Conference (Chicago, IL 1985), the Non-profits in Business Seminar (Anaheim, CA 1986), and the International Shelter for the Homeless Conference (Boston, MA 1987). The Center has organized professional exchange programs for youth workers with Israel, Italy, France, and the United Kingdom.

Youth Services agencies interested in membership information may write to the Center at the following address:
American Youth Work Center, 1751 N Street, N.W., #302, Washington, D.C. 20036; (202) 785-0764.

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ABOUT THE AUTHORS

William W. Treanor has been the Executive Director of the American Youth Work Center since its founding in 1984. He was the founder and Executive Director of the National Youth Work Alliance for seven years. His other experience includes work for the UNESCO Youth Division in Indonesia and as Staff Professional for the U.S. Senate Subcommittee on Juvenile Justice, and service as first Chairman of the National Coalition of State Juvenile Justice Advisory Groups.

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Adrienne E. Volenik was formerly an attorney with the National Center for Youth Law in its St. Louis, MO office and a director of the Juvenile Justice Project of the Criminal Justice Section of the American Bar Association. She is currently living in semi-poverty in rural Maine, raising her own juveniles, and occasionally doing some writing. She serves on the Maine Juvenile Justice Advisory Group.

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PREFACE

The Model Juvenile Justice Code developed by the Rose Institute and the American Legislative Exchange Council owes its existence to the right wings' growing taste for Federal pork and to former Office of Juvenile Justice and Delinquency Prevention Administrator Alfred Regnery's willingness to dish it out to former cronies in Young American's for Freedom.

In Mr. Regnery's cynical view of the mission of OJJ, apparently finding fellow far right wingers to fund came first, the cover to use for funnelling funds to them came second. So, it is of little surprise that this self-proclaimed fiscal conservative and political appointee would manage to steer funds into the hands of the militantly anti-tax American Legislative Exchange Council to produce what can only loosely be called a "model" juvenile justice code.

Nearly every legal and juvenile justice professional who has read even a part of the "model" "just deserts" code has found it profoundly deficient in philosophical orientation, content and professionalism. Perhaps the most damning of all criticisms of the code is that there is no evidence that its implementation would result in a diminution of juvenile crime or a corresponding improvement in public safety.

What it would most certainly do is increase the number of youths processed by the juvenile court as well as increase the demand for space in youth corrections facilities -- notorious breeding grounds for crime. Before any state legislator introduces this "model," he or she should be prepared to explain where additional funds will come from to pay for the changes it will engender. At an average cost of $30,000 per year to institutionalize a juvenile, this code will prove expensive for the taxpayer. Its shift to increased secure confinement is curious not only because of the increased costs associated with such a plan but also because of trends reflected in such states as Utah and Massachusetts towards community and home based care -- with gratifying results from the perspective of quality of care, cost, and recidivism.

State legislators should be alert to these concerns if attempts are made to introduce all or part of this "just deserts" "model" as a panacea to the problems posed by juvenile delinquency. Good models do exist -- models based upon practices that have proven effective in a variety of jurisdictions rather than upon an ideological philosophy isolated from reality.

This guide's narrative and analysis of the ALEC/Rose Institute code not only critiques the substance of that product but also tells the story of how nearly a million dollars was awarded to develop a "model" "just deserts" code to organizations unqualified to undertake such a task by any standard other than political orientation and ideology. If there is any consolation for those who labor conscientiously to improve the nation's juvenile justice systems and to assist America's youth in this waste of scarce juvenile justice resources, it is that the publication of this new code once again focuses attention on the problems of juvenile delinquency and the need to constantly evaluate our current solutions and to creatively seek new ones. To that end, the American Youth Work Center's guide seeks to make a small contribution.

No manual such as this can be completed without the assistance of many people and organizations. First and foremost, thanks go to the Veatch Program of Plandome, New York for its grant to the American Youth Work Center to monitor national youth policy trends. Without that help along with support from the Center's members, this manual would have remained little more than an idea. Secondly, Deputy Director of AYWC, Virginia K. Hines, contributed much time and insightful expertise to the project. Lastly, the efforts of Pamela Mudge-Wood to catalogue and organize the documents amassed in conjunction with the project were invaluable.

William W. Treanor
Washington, D.C.
August, 1987

The New Right's

JUVENILE CRIME AND JUSTICE

AGENDA FOR THE STATES

A Legislator's Briefing Book

I. INTRODUCTION

In the March 2, 1987 issue of the **New Republic** written by Crocker Coulson and entitled " A Taste for Pork," Coulson states that "OJJ (Office of Juvenile Justice and Delinquency Prevention of the Department of Justice) became the biggest policy pork barrel the right wing has ever seen" under the direction of Al Regnery who resigned under fire in May, 1986. According to Coulson, one of the recipients of "servings of intellectual pork" was the Rose Institute, which received nearly one million dollars from OJJ for a "Juvenile Justice Reform Project" to develop a model juvenile "just deserts" code.

The resulting "just deserts" code abandons traditional efforts to rehabilitate juvenile offenders and substitutes instead a punishment system. As noted by Coulson, the code has been criticized by almost every group in the juvenile law field from the National Council of Juvenile and Family Court Judges to the National District Attorneys Association.

Even the Justice Department is belatedly dissatisfied with the product. According to Coulson, Justice spokesman John Lawton said of the model code, "It's an embarrassment." In practical terms, this dissatisfaction translated to a refusal on the part of OJJ to pay for the final printing of the code or its distribution. Further, according to John Wilson of OJJ's Office of General Counsel, the Department of Justice has not endorsed the code.

Embarrassment or not, the Rose Institute and its sub-contractor on the project, the American Legislative Exchange Council (ALEC), distributed the code to state legislators in the spring and early summer of 1987, in hopes that some would introduce this repressive and counter productive legislation. Attached to the code is a lift out page containing a quote from Attorney General Edwin Meese III that begins "[o]n behalf of the Department of Justice, we are proud that we could lend our support to the Juvenile Justice

Reform Project...." While the implication is that this code has been endorsed by Meese and the Justice Department, that is not the case. According to John Wilson, to the extent that the insert makes it appear that way, it is misleading as neither the Attorney General nor OJJ's Acting Administrator has given the code his stamp of approval. Indeed, Mr. Wilson has pointed out that the quote is clearly identified as having originated at a National Training Conference for State Legislators held in April, 1986, at a time long before the code was completed.

This document examines both the substantive merits of the code itself as well the controversies surrounding its development. It begins with a discussion of the propriety and politics of the award of the grant, the process followed in the development of the code, and concludes with a critique of its most controversial provisions.

II. ORIGINS OF THE JUVENILE JUSTICE REFORM PROJECT CODE

A. History of the Grant.

1. Introduction.

What is the Rose Institute? According to its own literature, it is a research center located at Claremont McKenna College in Claremont, CA. Specializing in state and local government, it publishes studies in a number of areas, most notably redistricting, elections, transportation, and pollution. Prior to receiving funds from OJJ, it had never issued any studies in the area of juvenile justice. Indeed, its only relevant qualifications to undertake this project appear to be its right wing politics and the presence on staff of Ralph Rossum, a former Justice Department employee well connected to OJJ decision makers.

As with many of the controversial "pork barrel" grants awarded by OJJ during the stormy Regnery years, it is difficult to determine what initiated the Rose Institute's application. According to a document prepared by the Rose Institute entitled "Responses to Hostile Questions Concerning OJJ Grant," question #6 is "[i]sn't it true that far-right Paul Dietrich [of the National Center for Legislative Research] dreamed up this proposal in the first place?" The answer concedes that Dietrich may have discussed the matter with Regnery but then goes on to outline how Alan Heslop [head of the Rose Institute] contacted Regnery with an idea for funding, but was instead encouraged to submit the proposal for the "Juvenile Justice Reform Project" to develop the "just deserts" code.

In fact, there is evidence to support the suggestion that the original idea for the proposal came from Dietrich, who served as a member of ALEC's first Board of Directors and, at one time, as treasurer for that organization. Additionally, he was a member of Young Americans for Freedom during the same time period that Mr. Regnery was. In a June 29, 1983 memorandum from Dietrich to OJJ staff persons Terry Donohue and Debbie Stawicki, Dietrich discusses various aspects of a "Juvenile Justice Reform Project" that he is proposing -- a project nearly identical to the one later proposed by the Rose Institute and funded by OJJ in November, 1984 for $996,226.

Despite this clear evidence that the idea for the project originated somewhere other than the Rose Institute, the contract for it was awarded in the absence of a Congressionally required published and public request for proposal (RFP) originating from OJJ.

2. Sole Source Contracts.

Is Coulson's contention that the OJJ award to the Rose Institute was little more than blatant pork barreling accurate? The circumstances of the award strongly suggest that it is. By the Rose Institute's own admission, the idea for the project was suggested to them by OJJ Administrator Regnery. Regnery's interest in and support for a "just deserts" model stemmed, no doubt, from his strong interest in (1) imposing stiff penalties on serious and violent offenders; (2) encouraging the secure detention of runaways and other status offenders; and (3) gutting the philosophical and programmatic core of the very agency he administered. As a consequence, OJJ did not issue an RFP for the project, but instead elected to give a non-competitive grant for the project to the Rose Institute with a subsequently approved subcontract to ALEC.

This non-competitive contract was awarded even though Congress amended the Juvenile Justice and Delinquency Prevention Act to limit the circumstances under which the Office could make such contracts. See 42 U.S.C. 5635 which mandates that new programs selected after October 12, 1984, be selected through a competitive process. That process can be short circuited only when the Administrator has determined that the proposal is not within the scope of any written program announcement, is of outstanding merit, and has been through a peer review process or when the Administrator determines that the applicant is uniquely qualified to "provide proposed training services...and other qualified sources are not capable of carrying out the proposed program."

This change in legislation came only after Congressional concern was raised about other non-competitive awards made during Regnery's tenure as administrator of such dubious merit as the one to Judith Reisman at American University for some $800,000 to study sexually exploitive images of children in Playboy, Penthouse and Hustler magazines and one to George Nicholson, a long-time friend and political ally of Ed Meese, for $4,000,000 to establish the National School Safety Center. (See attached New Republic article)

a. Qualifications of the Rose Institute.

Was the Rose Institute uniquely qualified to undertake this project and, hence, an appropriate recipient of a sole source non-competitive contract? The answer is most emphatically no! Prior to undertaking this project, the Institute had never ventured into the juvenile justice area. Further, Ralph Rossum, selected as the director of the Project, listed no specific juvenile justice experience on his curriculum vitae submitted to OJJ with the project proposal. Indeed, his most significant experience may well have been his recent employment with the Bureau of Justice Statistics which, along with OJJ is a part of the Office of Justice Assistance, Research and Statistics (OJARS).

Did the Rose Institute believe this to be important? The answer is, again, suggested in the Rose Institute's drafted "Responses to Hostile Questions Concerning the OJJDP Grant." Question #10 asks "[i]sn't Rossum a Republican and a former member of the Reagan Administration? Isn't Heslop [the Director of the Rose Institute] a former Reagan consultant?" The answer, or more accurately the non-answer: "Party affiliation need not influence one's scholarship; in the cases of Rossum and Heslop, it has not. We would urge you to examine their published research and to judge the quality of their scholarship to see if it betrays a Republican bias."

The Director of Research for the Project and a Ph.D. candidate at the Claremont Colleges with which the Rose Institute is affiliated, Christopher Manfredi, claims a number of presentations and publications to his credit that deal with juvenile justice issues. It appears, however, that all of these were developed while he was engaged in working for the project.

Did the Rose Institute see itself as qualified to undertake the tasks outlined in the grant proposal? Again, the answer must be no. Referring again to its paper "Responses to Hostile Questions Concerning OJJDP Grant," one gets a sense

of some of the deficiencies recognized by Project staff. In response to question #7, "[i]sn't it true that you have a covert arrangement with ALEC [American Legislative Exchange Council] to do a lot of the work?", the answer is "[t]he Rose will need the assistance of skilled legislative draftsmen and knowledgeable legislative strategists. ALEC can provide both."

The Rose Institute's formal request to OJJ to enter a sole source contract with ALEC to complete a major portion of the project brought a concerned reply from Margaret A. Baken, of the Office of the Comptroller, OJARS, about the Institute's qualifications to conduct the project. In a March 13, 1985, memorandum to John Veen she stated, "[i]n the Introduction to the Program Narrative the grantee stated, 'the Rose Institute is experienced in all tasks necessary for effective performance on the proposed program and its senior personnel are qualified in the subjects that are involved.'" She then suggested that a decision should be made whether the Rose Institute was qualified to conduct the project before turning to the next question, whether it was appropriate to permit the sole source contract with ALEC.

In a subsequent memo dated May 2, 1985, Ms. Baken, either naively or courageously, reiterated her concern in even stronger language. "The grantee appears to be ill suited to perform the tasks necessary to meet the program objectives without outside assistance." She went on to add: "It is recommended that the program office give serious consideration to either cancellation or reduction of the award to this grantee. If the project is one that the program office feels has great merit, a program announcement open to all qualified applicants might be appropriate." Needless to say, her suggestion was ignored.

Despite the Rose Institute's very apparent lack of ability to perform with expertise the tasks described in the grant proposal, its contract was continued. Further, the Institute was permitted by Regnery to enter into the requested non-competitive contract with the American Legislative Exchange Council (ALEC) -- despite that organization's equally apparent lack of experience in the juvenile justice field.

b. Qualifications of ALEC.

"Those of us who are fighting to control government on the federal level desperately need ALEC's creative efforts to challenge the liberals at the state level."

Ronald Reagan

The American Legislative Exchange Council is a membership organization of individual State Legislators that provides research and educational services. According to Coulson's New Republic article, it is a conservative "stalwart" which favors vastly scaling back the role of government. Like the Rose Institute, ALEC had never worked in the juvenile justice area before contracting with Rose to develop the "just deserts" code. And like the Rose Institute, it put a person in charge of the project as program director who had no prior experience in juvenile law. However, unlike the Rose Institute, ALEC was trapped by its own internal policies from directly accepting federal funds. However, while it could not apply directly to OJJ for money, it had no scruples about accepting those same federal dollars once they were laundered through a suitable private organization -- the Rose Institute.

Just as OJJ entered into a non-competitive contract with the Rose Institute, the Rose Institute entered into one with ALEC to draft the project code and to assist with requisite training conferences. While OJJ did not approve the sub-contract until after June 4, 1985, it was actually formalized between the Institute and ALEC in late February, 1985, effective February 1. It appears clear that the Rose Institute was confident that gaining official approval was only a matter of time, no doubt a result of Paul Dietrich's connection with ALEC and his relationship with Regnery.

For the Rose Institute, the subcontract was a sweet deal indeed. After subcontracting virtually all the work demanded by the Project to ALEC for $350,000, they were left with nearly $650,000 and very little to do. In effect, the Rose Institute, with Regnery's blessing, charged the American taxpayer nearly 2/3 million dollars to launder a grant to ALEC.

Despite the foregone conclusion that the sub-contract with

ALEC would ultimately be approved, the Institute was still required to jump through some hoops before receiving the final okay. It was, for example, required to justify its reasons for a sole source contract. In a February 25, 1985, memorandum, Rossum endorsed ALEC because of its "extensive and successful experience in drafting model legislation" -- despite the fact that it had not worked in the juvenile justice area before!

In the same memo, Rossum cavalierly dismissed other organizations from consideration. The National Conference of State Legislators, the American Bar Association and the American Correctional Association would all be "obligated to promote associational positions and interests" and, therefore would not appear to be objective. (How ALEC would escape these same pressures is not explained.)

Unlike ALEC, all of these organizations had prior experience in the juvenile justice area. The American Bar Association (ABA) along with the separate Institute of Judicial Administration (IJA) drafted 23 volumes of Juvenile Justice Standards covering all aspects of the functioning of the juvenile justice system from police activities to architecture of juvenile facilities. These comprehensive standards, funded in part by OJJ, took over six years to complete between 1971 and 1977 and were subjected to a thorough review by all interested groups in a process that took an additional two years. In addition, the ABA operates both the National Legal Resource Center for Child Advocacy and Protection and the Juvenile Justice Project. Both Projects include staff members with extensive experience in juvenile justice.

The American Correctional Association (ACA) and the affiliated Commission on Accreditation for Corrections (CAC) similarly developed several volumes of standards for use by those working in the juvenile justice arena. In 1983, the second editions of these Standards were published.

Similarly, the National Conference of State Legislators (NCSL) has been involved with issues relating to children and youth on a regular basis.

Rossum also urged a non-competitive contract with ALEC because of that organization's extensive experience conducting conferences and providing legislative training. Again, the broad experience of the other three groups in training a variety of professionals including legislators on a broad spectrum of children's topics was ignored.

Rossum also totally ignored in his analysis at least a dozen other non-trade association research centers, well versed in juvenile justice issues, that could, ideological considerations aside, have undertaken the work with skilled efficiency.

Rossum's equally thin and final argument in favor of ignoring the law and entering into a sole source contract with ALEC was that ALEC was currently available to do the work while other organizations would need lead time to reach the experiential level available through the staff at ALEC. At that very same time, the ABA, the ACA and CAC, and NCSL had staff members with the experience in juvenile law that would have enabled them to undertake this project immediately.

While Rossum's arguments supporting a sole source contract with ALEC may have reflected, to put it charitably, his ignorance of the qualifications of these other organizations, Regnery and other officials at OJJ and the OJARS Office of General Counsel could not claim such ignorance. All these organizations had received money from OJJ in the past for a variety of projects. (Indeed, CAC had been funded to do training for OJJ not long before this.) and both the ABA and CAC were, at that same time, discussing possible training projects with staff members at OJJ. Ultimately, OJJ's willingness to accept ALEC as the sole source subcontractor on the project was undoubtedly the result of the politically conservative orientation of ALEC. As Benjamin Koller, Director of the ALEC Juvenile Justice Reform Project that drafted the code, reported, Administrator Regnery told him: "There are dollars to give away. Let's give them to conservative groups."

Because of the connection between Paul Dietrich and ALEC on the one hand and Al Regnery on the other, the Rose Institute felt so confident that approval would be forthcoming that it entered into a contract with ALEC in February, 1985, months before it received official approval to do so. Indeed, OJJ Project monitor John Veen wrote in a Contact Report dated May 1, 1985, that he discussed with Rossum options to a contract with ALEC in the event that approval was not forthcoming. That, of course, proved to be an idle fear and the subcontract was approved in June.

3. Code Development: The Process.

As is typical with OJJ grants, the Rose Institute was required to have an Advisory Board to assist it in the process of code development. This Board, however, was barely involved in the process. When it met for the first time in

May, 1985, it was presented only with a position paper supporting a juvenile justice system based on "the twin pillars of individual responsibility and system accountability." No drafts of the code were available at this time. According to the minutes of that meeting, the Board appeared to endorse those concepts although no motion to that effect was offered and no vote was taken.

The Board was not given an actual opportunity to review a code proposal until the first draft was disseminated shortly before the Rose Institute and ALEC conducted a national conference in April, 1986, to introduce the code to specially selected legislators. Subsequently, two more Board meetings were held but both were poorly attended. According to an article in the December 15, 1986, issue of the "Criminal Justice Newsletter," one member of the Board, Leland Fish, administrator of juvenile court services in Spokane, Washington, is quoted as saying: "'The Board has been very disjointed; it has never been a collective, cohesive influence' on ALEC." Fish noted that he had not received a copy of the final draft until December 8, 1986, leaving only two or three weeks to fix the problems with it. "'Ben Koller is working hard, scurrying around trying to rectify a lot of problems.' Fish said. 'But I doubt that this is a draft that anyone should endorse.'"

With Advisory Board input little more than a sham, the staff of the ALEC Project assumed responsibility for the drafting of the Code. Their inexperience and that of the Rose institute show clearly in the process that evolved for refining the Code. What happened was that the revision and refining process that routinely leads to a final draft was conducted in public. Each draft was disseminated publicly for comment but comment periods were so brief as to preclude meaningful input. This process differed dramatically from that followed by other groups developing model legislation and standards where the drafting and revision process was routinely done in-house. Only after a carefully crafted product had been completed, thoroughly reviewed and revised was it disseminated to other groups for public comment. This kind of process was not followed by ALEC.

Instead, what was apparently the first draft of the Code was disseminated just prior to the national conference held in Washington in April, 1986. (The very poor quality of the draft supports the conclusion that it was a first and not a final draft. So too does the number of drafts that were subsequently circulated.) This was a significant departure from the Timetable for the Project submitted with the grant

application to OJJ which would have had the final draft of the Code completed prior to the conference.

Despite the evidence that the preliminary work necessary for a productive conference had not been completed, the Rose Institute forged ahead with the meeting. At it, a second and different draft was distributed to the selected legislators who attended. One reviewer, Robert Croom, Chairman of the Georgia Governor's Council on Juvenile Justice and Delinquency Prevention wrote about these two drafts in a November 5, 1986, letter to Acting OJJ Administrator Vernon Spiers, who replaced Regnery: "I demand better quality than was in that draft from beginning freshman; I should think it would have been a source of profound embarrassment to everyone involved--including the Office [OJJ]. The version released during the meeting was of only slightly better quality."

Concern for the poor quality of these early drafts was also registered by the National Council of Juvenile and Family Court Judges in a resolution passed by that body on July 17, 1986. In recommending that the "model" code be rejected, NCJFCJ stated: "The document is poorly drafted and would create endless litigation and delay in processing juvenile cases."

Criticism of the product was not limited to outside organizations. Peter Freivalds, Senior Social Scientist with OJJ wrote in a June 20, 1986, memorandum that in order for the Juvenile Justice Reform Project to have some lasting benefit the "code should be expressed in good legislative language, polished, and accompanied by a clear rationale for each of its significant provisions." To accomplish that end, he recommended that the project ought to "engage several consultants" including a technician in code construction who could polish the final draft--this only one year after OJJ had approved the sole source subcontract of the Rose Institute with ALEC to draft the code because of ALEC's "extensive and successful experience in drafting model legislation."

Finding itself in a position of having presented a substandard product to the public, ALEC began an equally public process of revision of the "just deserts" code. Successive drafts were disseminated to representatives of a number of professional groups including, according to the Introduction to the Final Draft (which was not actually the final draft, but rather the next to the final draft), the National Council of Juvenile and Family Court Judges, the America Probation and Parole Association, the National

District Attorneys Association, the National Sheriffs Association, the International Association of Chiefs of Police, the American Bar Association, the National Network of Runaway and Youth Services, Inc., and the National Coalition of State Juvenile Justice Advisory Groups. The American Youth Work Center avoided any involvement in the process in order to be totally unimplicated in the outcome.

The Introduction also states that it "actively solicited the suggestions and counsel of these groups." Note, that one organization, the American Bar Association, formally disputed this. In the Introduction to its "Response to the Final Draft of the Juvenile Justice Reform Code" it stated "any suggestion that official participation of the ABA in the review and critique of this Code was sought by the drafters of the Code is incorrect....no official report from the ABA was solicited and indeed because of the rush to publish the final Code, sufficient time was not provided for any meaningful comment by the ABA."

Perhaps as the result of this disclaimer, the "Introduction" to the March, 1987, manuscript published by the Rose Institute and ALEC which contains the real final or "ultimate" draft of the "just deserts" code omits any mention of the specific juvenile justice organizations whose suggestions and counsel were ostensibly sought by the Project. (The term "ultimate draft" is coined to distinguish the final product published by the Rose Institute and ALEC in March, 1987, from the document the Rose Institute titled "Final Draft" which was disseminated in December, 1986.

In a December 9, 1986, memorandum from Ben Koller to Peter Freivalds at OJJ, Koller discusses soliciting comments from these groups as well as from individuals. To a large degree, the groups did not respond or did not respond in a timely fashion. Untimely responses can, no doubt, be attributed in large part to the fact that numerous drafts were mailed out. These were not marked with dates nor identified so that the reader could be certain which was the most recent of drafts. In addition, time limits for comments were either not established or were so short as to make organizational review nearly impossible.

For example, Koller noted that A.L. Carlisle, head of the National Coalition of Juvenile Justice State Advisory Groups, and a delegation from Maine responded in September to a draft that had been disseminated at the National Conference in late April. By then the draft had been re-edited by ALEC at least twice and most of the comments had been, according to Koller, "remedied by drafts already made public."

Similarly, the National District Attorney's Association (NDAA) did not respond until "nearly seven months after they first received copies of the code and were asked to give input." The attitude of impatience reflected in Koller's memo toward groups which were slow in responding to drafts or which opposed either the substance of the code or the process by which input was solicited reflects his lack of familiarity with these groups and their internal operations -- a lack that cannot be condoned in light of ALEC's sole source selection as sub-contractor that was based in part on its expertise in these matters. Membership organizations such as the majority of those contacted by ALEC and the Rose Institute routinely make major decisions at national meetings that are held only one to four times per year. Consequently, these groups lack the ability to respond officially within the tight framework apparently contemplated by ALEC and/or the Rose Institute.

In November, 1986, Gus Sandstrom, Chairman of the Juvenile Justice Advisory Committee of National District Attorneys Association wrote to Acting Administrator Speirs discussing this very problem. He noted that there was a "perception that the proposed 'Model Code' is being rushed in an effort to justify funding rather than a genuine interest in...creating a workable model." The timing of the release of the first draft made it difficult for national organizations "to consider the code as one of the subject matters of their conference agenda in the last year." As a result, he suggested that there are those "who believe there has been an effort to avoid review, evaluation, and input." He then suggested a slower more thoughtful review process be undertaken. "What is apparent is that the proposed 'Model Code' needs some additional gestation. As the draft stands, it is our recommendation that prosecutors oppose its consideration by any legislative body."

Other groups expressed this same sentiment. The Southern Legislator's Conference, the National Coalition of State Juvenile Justice Advisory Groups, and the Georgia Governor's Advisory Council on Juvenile Justice and Delinquency Prevention all recommended that there be an extended period for review and evaluation by juvenile justice groups and agencies before the Code could be distributed to state legislators.

In a commentary prepared by the American Probation and Parole Association, the drafter pointed out other difficulties faced by reviewers in assessing the Code:

It is unclear to this reader whether the Code is intended to be completed by later additions. Further, dealing with the sections of the Code in its present form without any official commentary accompanying the text makes judgments of interpretations problematic. Whether the sponsors wished detailed drafting suggestions, or only an overall assessment of the Code's sections is unclear.

A commentary of sorts was finally appended to the Code for its January, 1987, circulation. Unlike commentaries to other standards or codes, this one did little more than paraphrase the contents of the various code sections. It was totally devoid of authorities supporting the positions taken. As noted in the ABA "Response," it is "incomplete and insufficiently related to the text to be helpful to policy makers." It fails to address "the rationale for adopting the provision."

The frustrations expressed by members of these organizations, long active in the juvenile justice field, with the inability to have meaningful input is understandable. Indeed, it was exacerbated by the timing of the distribution of the final draft for comment. This version of the Code was distributed along with a significant amount of new material including commentary in late January, 1987, with a February 16, 1987, deadline for comments. This incredibly short comment period was totally unworkable for most groups and reinforced the suspicion that the review process was merely a sham to disguise the fact that the code was developed to conform to preconceived notions, often espoused by Regnery, that juvenile courts were soft on juvenile criminals and that what was needed--and demanded by the public--was a system that would give them their "just deserts."

It is crystal clear from reviewing the process that was followed to develop the code that it was at best a haphazard one. Outside review and comment appear to have been sought primarily to deflect criticism from OJJ and to improve the technical appearance of the code, not to incorporate substantive changes into the code's preconceived contours. This sense that comments were not taken seriously unless they supported the already determined content of the code caused the American Youth Work Center to abstain from participation in the limited review process. AYWC refused to lend credence to the final product by submitting serious criticisms only to have them disregarded except where their incorporation would serve to make the final product appear more polished and professional.

B. Conclusion.

Is the Juvenile Justice Reform Code a "model"? Robert E. Croom, Chairman of the Georgia Governor's Advisory Council on Juvenile Justice and Delinquency Prevention, wrote "The product..., is not a 'Model Juvenile Justice Code.' The product... is nothing more than a limited-use procedure for dealing with the relatively small percentage of juveniles who are serious-violent offenders." In the sections that follow, the substance of the code is examined. That discussion further emphasizes the many ways that the code fails to achieve "model" status.

III. THE SUBSTANCE OF THE JUVENILE JUSTICE REFORM PROJECT CODE

A. Introduction.

It is now appropriate to scrutinize the substance of the "just deserts" code. While in some instances, it is possible to separate the political origins of a project from its substance, it is not possible to do so in this case. The code reflects the philosophy espoused by the OJJ administration at the time that the grant award was made, without respect to the merits of that philosophy.

Former administrator Al Regnery made no secret of his distaste for the concept of rehabilitation for juveniles. Instead, he favored an accountability or "just deserts" punishment model that assumes all juveniles are capable of choosing whether or not to obey the law. Consequently, they should be held responsible, just as adults are, when they fail to do so.

In a recent article by Bill Howard, "Putting Out the Contract on OJJDP" which appeared in the Winter, 1986, issue of Justice for Children, Howard discussed Regnery's views as articulated in a number of articles. He noted that Regnery emphasized a "lock-'em'-up philosophy." While this was directed primarily at the small group of repeat offenders who commit most of the serious crimes, Regnery failed to draw any distinctions for punishing less serious offenders.

The concepts of accountability and punishment, linked to an emphasis on locking up juveniles, are important precepts of the "just deserts" code. Further, the code, like Regnery, shows no concern for the financial or practical consequences of these concepts. As Howard notes, Regnery chose to gloss over the statistics that show that "incarceration rates are unrelated to crime rates and that harsh penalties have no

measurable deterrent effects."

In essence, the "just deserts" code was designed, not as a "model," but rather to reflect a particular philosophy irrespective of the merits of that philosophy. This has been so apparent that, in a recent speech in San Francisco, Eugene Thomas, President of the American Bar Association, appropriately called the code "M.A.I." -- "Made as Instructed."

Allen F. Breed and Robert L. Smith published a two-part article entitled "Reforming Juvenile Justice: A Model or an Ideology?" in the April 6 and April 20, 1987 issues of the Juvenile Justice Digest. (See Appendix). In it, they address the very basic question of whether the theoretical basis of the "just deserts" code has merit and whether it would provide better protection for the public than existing laws do. After a well reasoned and scholarly analysis in which they accept the principles articulated in the code as legitimate rather than ones incorporated to satisfy the whims of former Administrator Regnery, they conclude that the assumptions underlying the "just deserts" code lack support both in practice and in theory.

While they acknowledge that "just deserts" has surface appeal, they conclude that it lets those who administer justice off the hook for any criminal acts the juvenile commits in the future. "Deserts says that if society punishes fairly and proportionally, then its obligation to the victim, as well as the offender, has been fulfilled." Further, they note that public opinion polls actually support those rehabilitative services, overlooked by "just deserts," that are likely to reduce the probability of future criminal behavior.

As we turn to a discussion of specific provisions within the code, it is important to keep these two things in mind: (1) the code was designed to reflect the rhetoric and philosophy articulated by former OJJ Administrator Regnery; and (2) the theoretical underpinnings of the code are not supported in either the literature or in actual practice.

It is also important to know that the final product of the Rose Institute and ALEC has not been endorsed by either the Office of Juvenile Justice and Delinquency Prevention or the Justice Department. This is important to remember as the code is now being distributed by the Rose Institute along with an attachment that quotes a statement made by Attorney General Edwin Meese III at the National Training Conference for State Legislators held in April, 1986, which implies

endorsement of the code. As John Wilson of the Office of the General Counsel has stated, Mr. Meese's statement was made long before a final draft of the code was available. To the extent that the insert makes it appear that Mr. Meese or the Justice Department has endorsed the code, it is misleading. Neither the Attorney General nor OJJ has given the code its stamp of approval.

Mr. Wilson has also noted that OJJ can't approve implementation of the code because it is not consistent with both the requirements of the Juvenile Justice and Delinquency Prevention Act (JJDPA) and the subsequently developed National Advisory Committee for Juvenile Justice and Delinquency Prevention. (NAC) Standards for the Administration of Juvenile Justice.

> On behalf of the Department of Justice, we are proud that we could lend our support to the Juvenile Justice Reform Project...[Its] new philosophy arises from a natural, obvious intuition. It is, stated most simply, that individuals -- juveniles as well as adults -- should be held responsible for their conduct. And that, similarly, all parts of our criminal justice system -- both its enforcement and judicial components -- must be made accountable for their performance. You might say that sounds like plain common sense. But it's indicative of how far out of kilter our juvenile justice system has become that common sense now reappears as a new approach.
>
> U.S. Attorney General
> Edwin Meese III
> National Training Conference
> for State Legislators
> Juvenile Justice Reform Proj.
> April 28, 1986

Mr. Wilson acknowledged that the code is consistent with the literal requirements of the Juvenile Justice and Delinquency Prevention Act, if not with its philosophy. It is not, however, consistent with the Standards.

B. Contents of the Juvenile Justice Reform Project Code.

1. Introduction.

The "just deserts" Code consists of two separate portions: the first is the Model Juvenile Delinquency Act; the other a Disobedient Children's Act. Conspicuously absent is a section concerned with abused and neglected children, normally a significant portion of any juvenile code. This absence bothered both the National Council of Juvenile and Family Court Judges and the Georgia Governor's Advisory Council on Juvenile Justice and Delinquency Prevention and was listed by both as a reason for opposing the code in their Resolutions dated July 17, 1986 and October 16, 1986 respectively. Their concern is well justified in light of the growing body of literature that recognizes a link between neglect and abuse by parents and others and subsequent delinquent behavior.

Provisions of both Acts will be examined in the pages that follow.

2. The Model Juvenile Delinquency Act.

a. Introduction.

Quite obviously, any legislator interested in juvenile justice reform will wish to scrutinize this "just deserts" model carefully in order to assess whether it contains an approach to juvenile delinquency that will be appropriate in his or her state. It should be noted that the sentencing or dispositions provisions, a cornerstone of the "just deserts" concept, have been modelled, according to the drafters, on the Washington State code. That code, passed in 1977, is the only state code that imposes determinant dispositions in all delinquency cases. Nonetheless, the model departs from the Washington State code in many significant respects, discussed in the sections on dispositions that follow. The reasons for these departures are never explained or justified -- a fact that is disturbing in light of the intensive analyses of the Washington state experience that have been completed and published.

What follows is a discussion of selected specific provisions contained in the Juvenile Delinquency Act. These provisions should be reviewed carefully by individuals seriously contemplating code revision along the lines suggested in the "just deserts" code as they appear to pose potential constitutional, financial and practical application problems.

b. Preamble and Purpose.

While preamble and purpose clauses are often general, the generalities in the preamble to the "just deserts" code go beyond what is normally encountered in existing state codes. Noting that parents are "bound" to "instill the fundamental moral tents of the community," whatever those are, in their children, the preamble endorses the concept, endorsed by virtually all Americans and by juvenile justice professional organizations, that the family unit should remain intact with a child to be removed only when the welfare of the child or the protection of the public would otherwise be endangered. Nonetheless, the code enthusiastically encourages the incarceration of the majority of children who break the law, without addressing in any fashion the child welfare issues normally contained in abuse and neglect provisions which delineate the circumstances in which an endangered child can be removed from the home.

The purpose clause declares that juveniles are to be held accountable for their offenses and that the juvenile justice system be both responsible for the needs of juvenile offenders and accountable to the public. While these are laudable and commonplace goals, the purpose clause goes on to incorporate certain specifics that are so vague as to be meaningless or which are specific but are not addressed in the Code in succeeding provisions. For example, "the local community," a term not further defined in the code, is to supervise a juvenile offender whenever appropriate and consistent with public safety. While it is now common practice for juveniles to be supervised in the local community, the supervision services are routinely provided by either private or public institutions .

Paragraph (11) of the purpose clause specifically states that it is a purpose of the Act to "develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile Justice system and related services at the state and local level." However, as a practical matter, the Code does not address how or by whom this important purpose is to be accomplished.

c. Definitions.

The definitions sections of the code should be read carefully. Certain terms are defined in new ways, inconsistent with current practice. They should only be adopted if legislators are certain that the new meanings will enhance the effectiveness of the juvenile code. For example, an adult is defined as "any person, not a youth, eighteen

(18) years of age or older, or any youth who has been transferred to adult court." A child or youth is defined as "any unmarried or unemancipated person under eighteen (18) years of age" or "any person under the age of twenty (20) years of age charged with an offense which occurred prior to his or her eighteenth (18th) birthday."

Apparently excluded from both these definitions are persons under age eighteen who are married or emancipated. While this category may not encompass many people in terms of numbers, it is bound to include some. How are they to be treated?

According to another definition, a "parent" is defined as the father or mother of a child. There is no indication, as there is in existing state codes, whether the definition includes stepparents, adoptive as well as natural parents, or the legal guardians of a child.

These definitions raise questions rather than serve as the basis for answering them. While these examples are merely very obvious illustrations of poor draftsmanship, all definitions should be scrutinized carefully to ascertain their utility.

d. Judges, Referees, and Probation Officers.

Section 5 and section 7 set forth qualifications for judges and referees respectively. Included in each is the requirement that a designated person have the "temperament necessary to deal properly with the cases and youths likely to come before the court." No attempt is made, however, to define what this "temperament" is. Similarly, while both are expected to have special experience or training in juvenile causes, no minimum requirements for that are established. In short, these provision provide no concrete guidelines for the selection of these important individuals.

The NAC Standards for the Administration of Juvenile Justice, on the other hand, set forth specific training requirements for judicial personnel. These include preservice training "on the law and procedures governing subject matter by the family court," as well as on all agencies from law enforcement to service providers that impact on juveniles. The causes of delinquency are to be studied as are methods for preventing and controlling the same. Training is to be ongoing to apprise judicial personnel of changes in both law and policy and should include visits to all programs or facilities that are used as dispositional alternatives. See NAC Standard 1.422.

In Sections 10 and 11 other problems are presented. Section 10 discusses the notice that must be given to all "interested parties" -- a term defined in Section 4(L) to include the victim -- of the findings and recommendations made by a referee. The notice is to inform "parties" of the right to apply for a rehearing before a judge. Here, the term "party" is apparently given a more limited and traditional meaning since Section 11 establishes that within ten days after receiving notice of the referees recommendation, only the court, the juvenile, or the juvenile's parents may move for a rehearing. While this precludes the state from seeking review, it does allow the court to do so, raising the question of who is to rule on the court's motion. Practically, there should be no need for the court to make such a motion since normally judges retain the right to either affirm or reject a referees decision.

Sections 12 and 13 concern probation officers. According to section 13, the chief probation officer is to be appointed by the presiding judge and is responsible to the court. He or she, in turn, may appoint necessary deputies. While this is normal practice in many jurisdictions, section 12 then creates an unfortunate dilemma. Pursuant to it, the probation officer is to exercise all powers conferred by the prosecutor. In essence, the probation officer is given two bosses, one in the judicial branch and one in the executive branch. Further, it is almost guaranteed to create conflict. Since the probation officer is to be employed and presumably paid by the court, the court could justifiably object to the imposition of additional duties by the prosecutor.

From a constitutional standpoint, the separation of powers doctrine would appear to be offended by this practice thus opening it to legal challenge. How can one person serve two bosses, one in the judicial and one in the executive branch of government, without being forced into a position of conflict of interest?

e. Jurisdiction and Venue.

In the final copy of the code distributed by the Rose Institute, a disturbing change was made in Section 15, "Basis of Jusrisdiction" that creates an internal conflict. Part (A) always provided that the court would have exclusive original jurisdiction in all proceedings concerning a "delinquent or alleged delinquent youth." By definition, Section 4(B), this was to include any "person under the age of twenty (20) years charged with an offense which occurred prior to his or her eighteenth (18th) birthday."

While Part (A) remained unchanged in the final code, a new Part (C) was added which states that the court shall have "concurrent jurisdiction over any youth above the age of eighteen (18) charged with an offense which occured prior to his or her eighteenth (18th) birthday." Thus, the final code creates the dilemma of vesting the juvenile court with both exclusive and concurrent jurisdiction over youths aged eighteen and nineteen accused of committing offenses prior to turning eighteen. Obviously, this is an untenable position! It is also troublesome that the final code establishes no procedures for handling a case where concurrent jurisdiction exists. Obviously, procedures must be established in order to eliminate potential conflict with the adult court.

Provisions for the transfer of jurisdiction to adult court raise questions that should be thoughtfully considered. For example, Section 18(A) mandates that juveniles be transferred for the commission of certain crimes. However, other than murder these crimes are not enumerated. Instead, they are to be designated by the same Dispositions Standards Commission created to designate the dispositions to be imposed for all other delinquent acts. Since traditionally, legislatures have established the parameters for automatic transfer, this represents a dramatic departure from existing procedures.

Section 20 decrees that, in the case of a youth transferred to adult court, if the adult court fails to find that there is probable cause to believe the youth committed the crime for which he or she has been transferred, the juvenile court is to resume jurisdiction over the youth for the same crime.

Practically, this means that the juvenile is subjected to a proceeding in the juvenile court followed by one in the adult court followed, potentially, by still another in the juvenile court. In essence, the juvenile court is given two opportunities to try the youth. While double jeopardy considerations are not implicated because there have been no proceedings on the merits of the charges, questions can and should be raised about whether Constitutional due process rights would be violated by continuing to subject the youth to prosecution for the same offense.

Practically, this provision could also result in a youth being detained for a lengthy period of time. He or she could be held pending the initial transfer hearing, prior to proceedings in the adult court, and then again while awaiting new proceedings in the juvenile system. Not only would this have serious cost implications because of the potential for extended detention, but also because of the increased number of judicial proceedings that would be required.

f. Custody.

Section 25 allows law enforcement officers to fingerprint and photograph a youth taken into custody for the commission of a felony if there is "probable cause to believe the youth may have been involved in the commission of the act." However, no individual is given the responsibility for making this important determination. Is it to be made by the arresting officer or is it to be made by the judge at the detention hearing, scheduled to be held within 72 hours after the youth is placed in detention.

Irrespective of who makes this determination, it should be noted that the legal standard to be applied is a new one. Normally, a judicial officer determines whether there is probable cause to believe a crime was committed and that the individual accused committed it. Here whoever makes the determination need only determine if there is probable cause to believe the youth may have been involved in the commission of the act.

Section 26 poses a similar problem with respect to pre-hearing detention. It provides that a youth "taken into custody shall be placed or detained in detention if there is probable cause to believe" that the juvenile has done any of a variety of things. Again, the code does not identify who is to make this probable cause determination. Because this is pre-hearing detention, it would appear that section 12 confers this responsibility on the probation officer. Is a person without legal training competent to make a probable cause determination and what is to be the basis for the determination? Since the determination is not made at a hearing, does the juvenile have any opportunity to participate in the decision making process? These are troubling questions that raise the specter of Constitutional due process violations.

g. Detention.

One of the purposes that this code endorses is "due process" for juveniles. Section 35(A) suggests that this endorsement is more theoretical than real. It provides that juveniles are entitled to be represented at all stages of any court proceedings "other than proceedings for violations." A violation is defined as an act or omission which, if committed by an adult, would be punishable by sanctions other than incarceration. [Section 4(X)]. This term "violation" does not exist elsewhere in the code. Since sanctions are defined only in terms of felonies and misdemeanors and both are punishable by secure confinement, there is no rationale,

consistent with due process, which justifies this deprivation of counsel.

The overall effect of the detention provisions is to encourage the increased use of pre-trial detention. According to Section 36, once a judicial officer finds probable cause to believe a youth has committed a delinquent act, he or she has very limited discretion to release. Indeed, the provision appears to establish a presumption that detention is preferred over release. Not only does this have serious cost implications for all jurisdictions, but it also poses unique problems in those jurisdictions where only limited detention bed space exists or where, becauses of the rural nature of the community, juveniles must be transported long distances to appropriate places of detention. In the "Commentary of the American Probation and Parole Association on the Model Juvenile Justice Code" by Patrick D. McAnany that appears in volume 2, nos. 1-2, 1987, this same concern is expressed.

Separate from the serious cost implications of these detention provisions is another concern. This provision clearly violates that portion of the preamble of the code which urges that families remain intact where possible. It is also contrary to other published standards which stress release as the first alternative to be considered. When detention is to be ordered, it is to be ordered in the least restrictive alternative appropriate. See NAC Standards for the Administration of Juvenile Justice 3.15 and 3.151 and IJA/ABA Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition (1980), Part III.

h. Detention Facilities.

Section 42 authorizes the use of adult jails or lockups for the detention of juveniles under the same circumstances set forth in the Federal Juvenile Justice and Delinquency Prevention Act. While there is nothing wrong with doing so, the inclusion of this provision can certainly not be called "model" since the "model" trend across the country has been for states to eliminate the possibility of jailing youths under any circumstances. Indeed, in the past, OJJ encouraged the halting of jailing of juveniles altogether. States such as Pennsylvania, Missouri, Maryland, and Virginia have already legislatively abolished the practice and many others have made significant strides toward accomplishing this goal. It is, therefore, disappointing to see this self styled "model" endorse the use of jails as places of detention when

they are disfavored alternatives under the best of circumstances.

Section 42 also illustrates another example of the poor quality of drafting present in the code. Part (A) permits the detention of a youth accused of the commission of a felony "for up to 24 hours (excluding Sundays and holidays)" in an adult facility if certain criteria are met. Among them is the requirement that the youth's initial court appearance take place within 24 hours (excluding weekends or holidays) after being taken into custody. There is no logical reason for employing two different standards particularly when they are not, as a practical matter, the same. Further, the adoption of such inconsistent language is inevitably going to result in litigation to clarify its meaning.

i. Initiation of Proceedings.

The charging document filed in juvenile court is routinely denominated a petition. In Section 52, the required contents of a petition are set forth. Missing from the enumerated list are certain elements that are required in most states in order to assure that a youth who is the subject of a petition is given constitutionally adequate notice. These include: the date, time, and place of the alleged offense; the statutory provision that has allegedly been violated; the time and place of the scheduled arraignment; and possible sanctions that can be imposed. Note that the summons outlined in section 55 also fails to inform the youth of the statute he or she has allegedly violated as well as the time, date, and place of the violation.

States adopting these sections verbatim from the "model" could expect challenges to these notice provisions. While inadequate notice can often be cured prior to the adjudicatory hearing, it can result in unnecessary delays and possible dismissals. In either event, the failure to provide constitutionally adequate notice is costly. Ultimately the adoption of such defective provisions could lead to protracted litigation.

Section 59 permits any person "required to be served other than the juvenile" to reopen the case for full consideration if service was not made or was defective, if the person had no reasonable opportunity to appear at the fixed time, and if reopening was in the bests interests of the juvenile. Because no guidance is given as to who is required to be served, this section poses serious problems. For example, if an important state witness failed to appear because service

was defective, could that witness reopen proceedings after the juvenile had already been found not delinquent? Such a practice would most certainly violate the constitutional ban on double jeopardy. It could also encourage abuses by the prosecutor. If the prosecutor was unprepared to proceed to trial but virtually required to do so by speedy trial requirements, he or she could fail to serve a key witness in the expectation that the witness could then seek to have the case reopened, pursuant to this provision, at a later time.

j. The Adjudication Process.

Section 66 establishes the time frame within which the adjudicatory hearing must take place. If the juvenile is in detention, the hearing must be held within 21 judicial days. from a practical standpoint, this comes close to 30 days since judicial days would not include weekends. This is in stark contrast to the 15 calendar days recommended in the NAC Standards for the Administration of Juvenile Justice, Standard 3.16. A youth not held in detention must be adjudicated within sixty judicial days -- the equivalent of approximately 12 weeks. The NAC Standards recommend 30 calendar days. Standard 3.16.

The cost implications of these lengthened periods are staggering. A detained youth can be held for twice as long under the "just deserts" code than he or she could be pursuant to the NAC Standards. In addition, lengthy periods of detention and even lengthier waiting periods for those youths not detained run counter to the common wisdom espoused in the juvenile court -- that juveniles be adjudicated in a speedy fashion so that punishment is not so attenuated from the commission of the offense that it loses much of its impact. The "model" retreats from this important concept, despite the fact that it would seem in keeping with a pure "just deserts" concept.

The code fails to make a specific recommendation for an outside limit on how long a hearing might be continued, leaving that decision to the states. Note, the NAC Standards would permit extensions of 30 days if a youth is in detention and 60 days if he or she is not. Standard 3.162.

All delinquency hearings are to be open to the public, regardless of how minor the offense and irrespective of whether the youth has a previous record. While the judge can close a hearing if exceptional circumstances are present, minor offenses are hardly exceptional, nor are first offenses. Even youths who are merely "disobedient" for a second time are to have open hearings. As a result, a youth

who runs away from home more than once can be forced to appear at a public proceeding for the second offense -- even if the runaway was prompted by abuse at home. Similarly, a juvenile charged with first time shoplifting will be tried at a public hearing.

In the past, the juvenile court has attempted to protect the juvenile from the stigma of criminal conduct. This has always been particularly appropriate in those cases where youths do not re-offend. The "just deserts" code would make no distinction in treatment between these youths and multiple offenders. This is in dramatic contrast to the trend around the county which is to develop a double standard -- one for minor and first offenders and another for multiple offenders. Many codes have been amended to permit open hearings and open records in the cases of multiple felony offenders, while maintaining a closed system for minor and first offenders.

k. Dispositions.

The provisions of the "just deserts" code dealing with dispositions are both the cornerstone of the effort and the most controversial portion of it. It is here that the "just deserts" concept really comes into full play. Judicial discretion is limited with dispositions restricted to a range established by guidelines drafted by a Dispositions Standards Commission. A disposition outside the range would only be justified if "manifest injustice" would result and the code requires that the impact of the crime on the victim be an important consideration in every case. In addition to a sentence imposed by the judge, the juvenile corrections department is empowered to impose a period of "probation or parole" on a juvenile who has served time in a state or local facility. This may be ordered irrespective of whether the judge ordered such a sanction, irrespective of whether or not the youth has served the full term ordered by the court, and irrespective of the youths behavior while incarcerated.

The disposition provisions, located in Sections 70 through 78, are loosely based upon reforms undertaken in the state of Washington beginning in 1977. The "just deserts" code, however, departs from the Washington code effort in many ways according to a presentation made to the Rose Institute staff in February, 1986 by H. Ted Rubin, Senior Associate with the Institute for Court Management of the National Center for State Courts.

Among the differences that exist are the following: The Washington code provides that all juveniles accused of misdemeanors are to be diverted from the system unless they

have substantial prior offense records; the "just deserts" code does not. In addition, in Washington, juveniles are entitled to representation by counsel in all diversion negotiations since a youth may be referred to the court if the diversion agreement is rejected or terminated involuntarily. It is unclear whether counsel rights vest during diversion negotiations pursuant to the "just deserts" code. The diversion agreements provision, Sections 60 through 65, make no mention of counsel. While Section 35 assures counsel at all stages of proceedings, it is unclear whether the term "proceedings" encompasses diversion negotiations.

According to the Washington Code, unnecessary pretrial detention was to be reduced by requiring that a juvenile be detained in the least restrictive alternative capable of ensuring his or her appearance at court proceeding. As discussed above, the detention provisions of the "just deserts" code increase rather than decrease the circumstances under which a youth can be detained prior to trial. The Washington code also admits juveniles to bail but bail is not available to juveniles pursuant to the "just deserts" code.

The legislator interested in evaluating the possibility of introducing the kind of mandatory dispositions system suggested in the "just deserts" code would do well to study carefully the Washington state experience. It has been assessed on numerous occasions, generally by Ann Larson Schneider of Oklahoma State University and others, and its strengths and weaknesses documented. These studies indicate generally negative reactions to the sentencing standards, although positive features were identified. (The most common negative reaction by judges was that the standards necessarily ignored differences among individual offenders). See Schneider and Schram, The Development and Application of Presumptive Sentencing Guidelines for Juvenile Offenders (March 1983).

In a later study, Schneider and Schram looked at recidivism rates in Washington both before and after changes in the law. No dramatic changes occurred as a result in changes in the law. See "The Washington State Juvenile Justice System Reform: A Review of the Findings," 1 C.J.P.R. 211 (1986).

Because of the extensive nature of the reviews of the Washington system, it clearly serves as a better "model" for a determinate sentencing system than does the "just deserts" code. Further, unlike the "just deserts" code, it did not cost the taxpayer nearly one million dollars to produce.

1. Disposition Standards Commission Guidelines.

Sections 79 through 84 establish the mechanism for developing the sentencing standards to be followed by judges in meting out dispositions. The standards are to be developed by a Commission composed of the Attorney General and nine others appointed by the governor. The Attorney General is to serve as the chair of the Commission while the Department is to provide the Commission with technical and administrative assistance. (The Department responsible for this assistance and the costs associated with maintaining and supporting the Commission is never identified in the code; nonetheless, it is clear that there will be costs associated with the Commission that must be born by some organization.) The Commission is to make recommendations to the legislature for their approval. If, however, the legislature fails to adopt the proposed rules, they may take effect anyway. Thus the code provides for the delegation to the Commission of the legislatures function.

m. Restitution.

Restitution is another cornerstone of the "just deserts" code. It is to be ordered whenever appropriate and is to be calculated by the probation officer. There is no dollar limit on the amount of restitution that can be ordered and parents any be held jointly or severally liable for any restitution order issued. Thus, if a youth were to vandalize a local store causing $90,000 worth of damage, the youth and/or his or her parents could be assessed for that amount. Because restitution awards are in no way linked to ability to pay, the parent, earning only a modest income per year and with only limited assets, could stand to lose everything in order to satisfy this restitution order.

3. Disobedient Children's Act.

a. Introduction.

The "just deserts" code creates a new category for labeling children. In the past, youths who committed acts that would not be against the law if committed by adults, were called status offenders. For some unexplained reason, the "just deserts" code elects to relabel these youths as "disobedient." At the same time, it widens the net of behaviors that will enable a youth so labeled to come within the jurisdiction of the juvenile court. As a result, these provisions have significant cost implications for state and local governments.

b. School Disciplinary Problems.

School officials are required to report certain youths to the juvenile court. For example, a school administrator with "probable cause that a child is habitually truant or beyond the control of school officials" must issue a citation and file it with the juvenile court. He or she has no discretion in the matter. (Note, current codes place no such mandatory duty on administrators). The Act, however, neither defines "habitual truancy" nor "beyond the control" of a school officer, therefore assuring that litigation will ensue challenging the vagueness of the terms.

If the probation officer assigned to investigate the citation determines that a it is legally sufficient he or she is required to file it with the court. Once that is done, the court must schedule a hearing on the matter to be held within five days. In these cases, there is no discretion to divert the youth or to informally adjust the case. The cost implications of this are staggering because these cases must come before the court in every instance.

c. Juvenile Alcohol and Drug Dependency.

The juvenile alcohol and drug dependency provisions are among the most disturbing contained in the code. Pursuant to them, a law enforcement officer is required to issue a citation to a youth to appear for drug and alcohol screening before the probation officer whenever an intoxicated youth is taken into custody. The officer then has the option of either releasing the youth or taking him or her to a detoxification unit.

At the detoxification unit, the youth may be evaluated for drug and alcohol dependency. It is unclear, however, whether such an evaluation can be imposed in the absence of the consent of the juvenile. Parents can be assessed for the costs of the services that a youth receives at the detoxification unit as well as the costs incurred in returning the youth to his or her home. The Act does not specify who is to make the cost assessment or determine ability to pay nor does it establish standards for making that determination.

The detoxification unit is required to file a report on all youths admitted to it with the probation officer of the county irrespective of whether they have voluntarily sought services or been referred by law enforcement personnel or others. Further it appears that every youth reported to the probation officer must make an initial appearance before the court. Following this appearance, a youth who consents to a

drug and alcohol dependency evaluation may be eligible for diversion. If a youth refuses to consent to an evaluation, he or she will be scheduled to appear at another court hearing. This "just deserts" code then assures "due process" in an informal, non-adversarial hearing at which the court is to determine whether there is probable cause to believe the youth is drug or alcohol dependent. Because probable cause is such a minimal burden to meet, it should not be difficult to find. When it is found, the court must order the youth to undergo drug and alcohol evaluation. Subsequently, the youth will be subjected to another hearing at which the court will ascertain his or her drug status and determine an appropriate disposition.

Clearly the cost implications of this portion of the code are staggering. First, the detoxification unit must be paid for. Secondly, the costs for increased use of the courts will be immense since all youths receiving services from such a unit will endure at least one court hearing. While rural areas may not feel a significant impact, urban areas where drug use is more prevalent will reel from the weight of these provisions that require mandatory court referrals and mandatory hearings in all cases.

From a social standpoint, the mandatory referral to juvenile court of all youths who voluntarily seek drug or alcohol assistance from a detoxification unit is disastrous. Clearly such a system will serve as a major deterrent to youths to seek help on their own.

d. Conclusion.

The Disobedient Children's Act attempts to address the difficult problems posed and faced by status offenders and the impact of these problems on families and communities. Unfortunately, the Act fails to offer solutions more creative or effective than those already tried. Indeed, the Act has the potential to create more significant problems than those which it seeks to address. For these reason, legislators would be well advised to search elsewhere for a plan to assist status offenders in their states.

APPENDIX

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GLOSSARY OF ORGANIZATIONS AND INDIVIDUALS

The Juvenile Justice and Delinquency Prevention Act of 1974, as amended in 1977, 1980, and 1984. (42 U.S.C. 5601 et. seq.) -- The JJDPA established the Office of Juvenile Justice and Delinquency Prevention (OJJ) within the Justice Department. It seeks to reduce juvenile crime, increase knowledge about and services to delinquent youth and those at risk of becoming delinquent. Currently, 45 states participate in the JJDPA which seeks removal of status offenders from secure facilities and the removal of all juveniles from adult jails. The JJDPA has consistently enjoyed strong bipartisan support in Congress.

The Office of Juvenile Justice and Delinquency Prevention -- Created by the JJDPA, OJJ has as its mission to foster the goals of the Act. Sixty percent of its annual budget of approximately $70 million goes directly to the states which participate in the Act. From the remaining funds, OJJ funds numerous project. These remaining funds were the source of the nearly $1 million grant to the Rose Institute and the American Legislative Exchange Council.

The Office of the Comptroller -- Part of OJJ, this office is responsible for overseeing management of grant awards by OJJ. This includes oversight of the fiscal integrity of grantees to assure economical use of taxpayers money. OC staff members raised concerns about the qualifications of the Rose Institute to undertake the "model" code project and suggested a competitive award process be implemented.

The Office of Justice Programs -- Formerly OJARS and LEAA, OJP, headed by an Assistant Attorney General, is responsible for most Justice Department efforts in the areas of research and statistics, financial and technical assistance to state and local governments and to both profit and non-profit agencies involved in criminal justice related work. OJP provides administrative support and policy guidance to OJJ. During the period when the Rose Institute grant was being developed, OJP was lead by Lois Herrington, wife of Secretary of Energy, John Herrington. She currently heads the White House Conference for a Drug Free America.

The Office of General Counsel -- Part of OJP, OGC provides legal assistance and advise to all OJP components including OJJ. It is currently headed by Charles Lauer who served as Acting Administrator of OJJ from 1981 -1982. During the Carter Administration, OGC was known for its tenacious adherence to a narrow interpretation of what activities were permitted pursuant to the JJDPA. During the administration

of OJJ by Alfred Regnery, OGC cleared a number of large and controversial awards to political conservatives including the one to the Rose Institute and ALEC. Efforts to learn more about the role of OGC in the award of this grant have been stymied by OGC's invocation of the "attorney-client" privilege.

Alfred Regnery -- Mr. Regnery served as Administrator of OJJ from November, 1983 until May, 1986. Prior to his nomination by President Reagan, he had no juvenile justice experience although he had served as a staff member of Young Americans for Freedom. His work with YAF brought him into contact with Paul Dietrich, one of the first Board members of ALEC and with Robert Heckman, Chairman of Citizen's for Reagan in 1984. At the time of Mr. Regnery's nomination as head of OJJ, his car sported the bumper sticker "Have you slugged your kid today?" Twenty-two senators, including both from Mr. Regnery's home state of Wisconsin, voted against his confirmation. In 1984, Regnery told a Rev. Jerry Falwell forum that he had defunded the left. Confronted with a report of these statements by Sen. Metzenbaum (D-Ohio) at a Senate hearing, Regnery denied that he had made them only to have Metzenbaum play a tape of the speech containing the remarks. During his intensely controversial tenure as Administrator, Regnery became a master of sole source grants and of diffusing criticism of his activities by powerful mainstream organizations through judicious use of seats on the Boards of OJJ funded organizations such as the National Center for Missing and Exploited Children. The Rose Institute/ALEC grant provided Regnery with a golden opportunity: he could funnel limited dollars to conservative friends and the product would provide an opportunity to mock the purposes and goals of the JJDPA. Regnery resigned as OJJ Administrator in the spring of 1986 apparently under pressure because (1) a $750,000 grant to study pornography ended without a publishable product; (2) a New Republic article reported that Regnery had pornography around the house; and (3) the OJJ funded National Partnership on Drug Abuse chaired by Nancy Reagan collapsed.

Vernon Speirs -- Mr. Speirs replaced Mr. Regnery in June, 1986. Still awaiting confirmation as of the printing of this document, Speirs is generally regarded as a fair administrator and one unlikely to advance the kind of bizarre proposals that marked the Regnery years. Under his direction OJJ has refused to give the Rose Institute/ALEC code its stamp of approval.

American Legislative Exchange Council -- ALEC was founded in 1973 as a spin off of the American Conservative Union in order to advance the cause of conservatism in state legislatures. Among ALEC's first board members were Paul Dietrich, former Congressman, Bob Bauman, Thomas Winter, editor of Human Events, and Edwin Feulner, currently president of the Heritage Foundation. ALEC claims 2000 state legislators as members. Among the positions Alec endorses are (1) opposition to economic sanctions against South Africa; (2) opposition to passage of the Equal Rights Amendment; (3) a constitutional amendment to require a balanced budget; and (4) right to work legislation. While ALEC was never involved in juvenile justice issues before subcontracting with the Rose Institute to draft a "model" juvenile code, it did take the following positions that would affect the lives of children: (1) support for a subminimum wage for teenagers; (2) opposition to pay raises for teachers. Among Speakers at ALEC conferences have been President Reagan, Edwin Meese, Phyllis Schlafly, and Bob Woodson of the National Center for Neighborhood Enterprise.

Constance C. Heckman -- Ms. Heckman has been the Executive Director of ALEC since June, 1985. According to her resume, Ms. Heckman "has participated in a variety of political campaigns on behalf of conservative candidates for local, state, and national office. In 1976, she served as State Chairman of Youth for Reagan and participated on behalf of Ronald Reagan at both the 1976 and 1980 Republican National Conventions." She is married to Robert Heckman, Chairman of Citizen's for Reagan in 1984.

Paul Dietrich -- Mr. Dietrich who currently owns the Saturday Review and heads the American Conservative Union, the Conservative Caucus, and the John Davis Lodge Center for International Studies was a member of ALEC's first board of directors. He also served as treasurer for ALEC and was a former member of the Missouri legislature. Both he and Alfred Regnery were active in Young Americans for Freedom.

REFORMING JUVENILE JUSTICE: A MODEL OR AN IDEOLOGY?

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Betty B. Bosarge, Editor
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An Independent Summary of Significant News Events in the Field of Juvenile Delinquency Prevention

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Part 1 . . .

REFORMING JUVENILE JUSTICE: A MODEL OR AN IDEOLOGY?

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The Model Juvenile Justice Code proposed by the Rose Institute and the American Legislative Exchange Council (ALEC) promises to replace an outdated rehabilitation model with one that provides responsibility, accountability, equality and certainty. This is certainly a bold promise, and a claim that demands careful examination since this proposal could substantially alter the methods by which juveniles are sanctioned in the United States.

Many people and organized groups are questioning or challenging details contained within the Model Act. While this may be important, it ignores the basic issue that must be faced, namely, whether or not the Model's theoretical base has merit, its arguments and proof are credible, and the consequences of taking the recommended action will, in fact, provide better protection to the public from the alleged "ravages of juvenile crime" brought on by "irresponsible court actions" and "the failure of juvenile corrections to punish or rehabilitate" juvenile delinquents.

(See **MODEL CODE,** *page 3)*

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(MODEL CODE, *continued from page one*)

The term "model" is generally used to refer to any scientific or scholarly presentation couched in the symbolic, postulational, or formal styles used in logic. But, in this work, "model" is used more loosely to imply something eminently worthy of imitation, an exemplar or ideal.

The Model Juvenile Justice Code is presented in the style of an academic exercise -- one that attempts to be precise, but which is verbal rather than operationally specific. Ordinary words are used in special senses to constitute a technical vocabulary. Standard idioms in this vocabulary, together with certain recurrent metaphors, make up a jargon distinctive of a particular point of view, a special standpoint or approach. The material dealt with tends to be ideational rather than reality or experience based, and the treatment of the subject matter is highly theoretical, if not indeed, purely speculative.

The concept of system is introduced as if to suggest some great "principle," applied over and over to specific cases which illustrate the generalization rather than serve as proof for it.

As presented, the Model is contradictory, fails to follow the demands of its theoretical base -- just deserts -- while also incorporating questionable concepts from deterrence and incapacitation theories. It has all of the appearance of a gerrymandered or jury-rigged series of beliefs, partial facts, and existing practices strung together without particular regard to internal consistency or systemic base.

Contrary to its advanced billing, the Model Code is not particularly revolutionary nor exemplary although it does identify some areas of juvenile justice that need a more careful examination.

A twenty-first century historian, looking back at the 1986 Model Code, might well say: "Juvenile justice once again turned away from the advances it had made in the preceding 100 years to return to earlier and unsuccessful periods and practices in which punishment, retribution and other common sense notions took priority over knowledge and reason. In response to a vocal, and potent political minority espousing a simplistic and attractive ideology for reform, principles of juvenile justice were cannibalized while a more disciplined counterforce representing the best in knowledge and practices failed to take a stand and retreated, permitting the organized voice of reform to prevail."

We suggest that such a scenario need not prevail -- at least on the merits presented -- and, indeed, will not prevail when the proposed juvenile justice reform measures are given careful and reasoned review.

The Argument Raised By The Model

As of November, 1986, the purpose of the Model Code, as outlined in its cover letter, was to hold juveniles individually responsible while holding the juvenile justice system accountable for the treatment of delinquent youth. To achieve this end the authors of the Code described it as formal and offense oriented -- formal in that it limits discretion of the court and the agencies administering corrective actions while extending due process, and offense oriented in that it emphasizes seriousness of offense and prior offense history in determining the appropriate punishment.

The authors offer as their rationale the increasing concern and need felt among policy makers and practitioners to affix individual responsibility for a delinquent act. They hold that juveniles, not circumstances or status, are responsible for their acts. The emphasis is on past, not future, behavior. Punishment for an act, not the prevention of future probable acts, is the focus of attention.

Accountability is seen as the revival of classical principles of equity and proportionality. Like cases are to be handled alike with only the serious offenses subject to more punitive sanctions. In the proposed system of juvenile justice, sanctions are to be limited, deserved, uniform, justified and subject to public scrutiny.

Evidence for the practicality of the proposal is based on the State of Washington's Juvenile Justice Act of 1977 which utilizes the concepts of presumptive and determinate sentencing standards. The authors hold that the Washington experience has been positive and that sentencing standards have produced greater equality, proportionality, and predictability of dispositions, even though the limited empirical data available does not justify such conclusions. Further, they suggest that this evidence has shown an increased certainty that juvenile offenders are held accountable for their actions while decreasing the severity of the sanctions imposed.

Implicit in the details of the Model Code are a series of obvious, but not explicit, assumptions. The Code clearly assumes that humans are rational, calculating and informed. Children are essentially "little adults." Retribution, on its own merit, is a worthwhile state enterprise. Punishment is not only a disposition, but an end in itself in that it holds an individual who has committed a delinquent act blameworthy by publicly showing the act to be morally repugnant.

The courts cannot be trusted with discretion, but a commission dominated by law enforcement authorities and other elected officials can be. The state has the knowledge, resources and skills to intervene for the purpose of teaching responsibility to disobedient children when parents fail to instill the "fundamental moral tenets of the community." When delinquent and disobedient children clearly see the reasons for the unpleasant consequences, flowing from their acts, the effect of intervention will be greatly increased, it is argued.

The authors of the Model Act conclude that new goals and alternatives are needed for the treatment and rehabilitation (their words) of delinquents since justice is too difficult to define. But, since two related ideas can be defined, i.e., equality and proportionality, justice can be replaced. We are reminded of the old story of the drunk who looked for his lost coin under the street light, even though he had dropped it elsewhere, because there was more light under the lamp. Such is the logic of the Model Act as presented in December of 1986.

Our Response To The Argument

Earlier we stated that our concern with the proposed Model was directed at the basic tenets of the act, at its consistency with avowed principles rather than the details of law itself. While it would be easy to criticize the Model Code's recommendations to lower the age of responsibility to seven years, or the requirement of transferring specified cases to the adult courts at 14 years, or, return of status offenders to the juvenile justice system -- these deviations from current practice are directly related to basic hypotheses written into the proposed model legislation. The validity of these untested guesses would be challenged since they are the foundation upon which all other arguments are built.

The Need For Revolutionary Juvenile Justice Reform

One of the major arguments presented for the development of the Model Juvenile Justice Act is the failure of the present system to punish and to stem the flow of juvenile crime that is alleged to be ravishing the nation. What are the facts about juvenile crime and its prosecution, and how do these facts support or detract from the arguments made which call for revolutionary change?

Juvenile Crime - - Out Of Control? Perhaps the most important statistic to refute the above argument is the decline of the U.S. youth population.

Between 1971 - 1982, the youth population that was eligible for juvenile court jurisdiction declined by 8.4 percent. The decline will continue through the 1980s.

Associated with this declining youth population has been a drop in juvenile arrests. For example, there were 1,927,120 juveniles arrested in 1975 - - the peak year for juvenile arrests. By 1982, the total number of juveniles arrested had dropped to 1,600,226 - - juveniles arrested for violent crimes declined by 15 percent and arrests for serious property crimes decreased by 22 percent. From 1975 - 1982, there was a dramatic drop in arrests for status offenses (a decline of 64 percent), but this was partially offset by an 18 percent rise in juveniles arrested for a variety of minor offenses.

While fewer juveniles are being arrested, police handling of these cases has changed. Data from the FBI's Uniform Crime Reports reveal a steady increase in the proportion of arrests resulting in a formal court referral. In early 1970 about half of the arrested juveniles were referred to the juvenile court. By 1981, the proportion had increased to 58 percent. During this same period juveniles referred to the adult courts increased from one to five percent of all juvenile arrests.

Juvenile court data reveal a relatively stable number of cases during the period 1975 - 1981. Further, the court was disposing of the cases via formal petitions in slightly less than half the cases throughout this period. Other juvenile court data show an escalation in the seriousness of charges for which youth were referred to court. This latter finding is something of an anomaly because arrests for the most serious offenses were consistently declining. The juvenile court's reaction to an apparently more serious caseload was to stiffen its sentencing practices. In particular, there was an increase in the proportion of cases receiving institutional placements and a decline in the proportion of probation dispositions.

Not surprisingly, the constant caseload before the juvenile court, coupled with the increased severity of sentences, led to a sharp rise in the number of incarcerated youth. While detention admissions declined during 1974 - 1982, the average length of stay in detention increased by more than six days. After a decade of reform efforts to limit detention, 1982 produced the highest number of detentions since 1971.

The rising detention stays are attributable to a number of factors. The increased formality of the court processing, escalating penalties, and more contested proceedings have extended detention stays. An enhanced focus on evidentiary review by prosecutors and defense attorneys, along with the use of increased waivers to the adult court, have added to the increased length of stay.

The statistical data reveal a consistent picture of a juvenile justice system that has become more formal, more restrictive and more oriented towards punishment. This appears to be at odds with the one presented as a justification for the Model Code - - a description more accurate of the juvenile justice system as it existed in early 1970, not in early 1987. (See *Juvenile Justice: The Vision and the Constant Star*, by Dr. Barry Krisberg, 1986.)

Public Disenchantment With Rehabilitation - - Fact? One of the major arguments presented for a radical change in juvenile justice is an alleged growing disenchantment with the juvenile court and the justice system in general. Again, we can ask what are the facts?

The public, as reflected in polls and surveys, is frightened, confused and angry, and wants greater protection from criminal and delinquent activity. Beyond that, one cannot legitimately generalize about public opinion.

If one takes the time to review the opinion polls over the past few years, the findings are at odds with what some people believe to be the public attitude about crime and its correction. In general this attitude can be described as punitive, one that supports incarceration as the best deterrent to crime and punishment as the primary goal of the justice system. Further, it could be inferred that the concept of rehabilitation was outdated and the decisions of the court subject to serious question. That conventional wisdom is contradicted by the findings of pollsters. For example:

- Less than 50 percent of the American people feel that incarceration discourages crime.
- To the question "What are prisons for?", the response was: 14 percent, punishment; 26 percent, protection of society; and 60 percent, rehabilitation.
- In both the U.S. and Canada, 50 percent of the people saw courts as too "easy" on crime, but 60 percent favored more judicial discretion.
- Eighty-Three percent favored those in confinement doing work or performing services; 95 percent favored those confined with some form of employment or skill training or education.

This does not, at least on the face of it, seem to suggest that the American people are through with, even disenchanted with, the idea of rehabilitation. In a recent poll in Illinois, two thirds of those responding favored alternatives to additional construction of correctional facilities.

While these polls reflect public attitudes regarding adult criminals, historically there has, and continues to be, a much stronger willingness to help delinquents than there has been to help adult criminals. For example, in 1982 a national opinion poll conducted by the NCCD and the Hubert H. Humphrey Institute of Public Affairs found that 73 percent of the public agreed with the statement that "The main purpose of the juvenile court system should be to treat and rehabilitate rather than punish." Forty-eight percent strongly agreed with this statement of purpose. Nothing in these responses suggests a referendum supporting the abolishment of rehabilitation.

Professional Disenchantment With Rehabilitation - - Practitioners, it is alleged, are disenchanted with rehabilitation and the individualized treatment ideal. Again, we find considerable disagreement with what those who would change the juvenile justice system have described.

In 1983 the U. S. Justice Department's National Institute of Corrections (NIC) undertook a survey to update the recommendations of the 1967 Presidential Task Force Report on Corrections. Like others, the Institute believed that there had been a loss of faith in the recommendations made when there was a strong belief in alternative correctional programs, in community corrections and reintegration of offenders into the community. It was assumed that the prevailing debate among academics concerning deterrence, punishment, determinant sentencing and just deserts were also the concerns and beliefs of those administering the correctional programs of the nation. As it turned out, they were not.

In an attempt to assess the opinions of correctional administrators, a survey was sent to every adult and juvenile commissioner in the United States, to the executive staff of the Federal Prison System, to all Canadian correctional commissioners, and to eight of the principal authors of the original report. They were asked to respond to their agreement or disagreement with 32 separate recommendations made in 1967 along a 10-point scale. The results of an independent analysis surprised the Institute staff as well as the author of the *Update of the Commission Report on Corrections*.

It must be remembered that the 1960s were a period of hope and commitment by correctional professionals who were experimenting with new programs and ideas for the treatment of offenders. Rehabilitation was

an idea in good currency at the time; the arguments of Bailey and Martinson had not yet drowned out the enthusiasm for reform. It was within this environment that the Commission's recommendations were formulated. They were clearly committed to treatment, reintegration and alternatives to traditional incarceration.

The findings of the study confirm a strong and continuing support for the earlier recommendations of the *Presidential Task Force Report on Corrections.* Contrary to current rhetoric, respondents to the survey did not see probation and parole as outmoded forms of correctional control. Respondents supported the greater use of parole and probation, a greater use of community supervision, volunteers, purchase of services and intensive community supervision programs for the non-violent offenders. Classification, prediction, and screening were seen as necessary prerequisites to increased effectiveness.

In the area of institutional programming, there was considerable agreement that institutions should be small, flexible and treated as an expensive and limited resource. To the extent possible these facilities should be located in the community and should reflect the best practices for education and vocational training. Expanded and graduated release programs, prison industries, and special education were all viewed as essential components of successful institutional and community correctional programs.

There was also professional agreement that juveniles and pre-trial detainees need to be handled separately from convicted offenders. Virtually everyone supported treatment for offenders whether in an institution or a community, but there was considerable disillusionment with coerced change. On the other hand, virtually everyone strongly supported the concept of facilitative programs that address practical matters like reading, language and work. Punishment was openly recognized as a legitimate function in corrections – – not retributive punishment, but the application of appropriate sanctions which is itself punishment in that it restricts freedom of choice, movement or options. The imposition of a criminal sanction was seen as punishment and did not require the convicted offender to be placed in some program or institution for punishment.

The following quotation is taken from an interview with Professor Norval Morris in 1983 during NIC's effort to update the recommendations of the *1967 Presidential Task Force Report on Corrections.* It captures the essence of the rehabilitation debate so prevalent during the 1970's – a debate resurrected to justify the Model Code.

> I think that the whole rehabilitation story has been misunderstood. I cannot conceive of a decent prison system that did not include, no matter how the word is used, rehabilitative options within it . . . Insofar as self-development is one of the central beliefs of the democratic process, then to that extent, at the very least, rehabilitative purposes must be predominant within the prisons.
>
> . . . The fact that some of us attack "the rehabilitative ideal" has been greatly misunderstood with the result that a great deal of damage may have been done. We were attacking the proposition that you cannot justify imprisonment for rehabilitative purposes . . .

Editor's Note: Part II of Breed and Smith's critque will appear in the April 20 issue of JJD. ■

WASHINGTON CRIME NEWS SERVICES'
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Part II . . .

REFORMING JUVENILE JUSTICE: A MODEL OR AN IDEOLOGY?

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Editor's Note: Part I of this critique of the Model Juvenile Justice Code proposed by the Rose Institute and the American Legislative Exchange Council (ALEC) appeared in the April 6 issue of Juvenile Justice Digest. In Part I, Breed and Smith said the Model Code "ignores the basic issue that must be faced, namely, whether or not the Model's theoretical base has merit, its arguments and proof are credible, and the consequences of taking the recommended action will, in fact, provide better protection to the public from the alleged 'ravages of juvenile crime' brought on by 'irresponsible court actions' and 'the failure of juvenile corrections to punish or rehabilitate' juvenile delinquents."

Following is the concluding installment of Breed and Smith's critique.

Just Deserts And Culpability

Cesare Becaria, in an Essay on Crime and Punishment written in 1764, presented a revo-

(See **MODEL CODE,** *page 2)*

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(MODEL CODE, *continued from page one)*

lutionary series of ideas to reform penal practices. He pleaded for a schedule of fixed punishments, to be determined not by judges facing actual culprits but by legislators remote from the passions of the courtroom, and a policy for making those punishments "the least possible in the case given, proportioned to the crime."

He was against all the barbaric legal devices that had hung over from the Middle Ages – the use of torture, the admission of secret accusations, the wanton infliction of capital punishment, and the denial of the prisoner's right to call witnesses in his defense and to examine those for the prosecution. He presented the novel idea that making punishment certain would be more apt to deter criminals than making it harsh (H.L. Mencken, *Treatise on Right and Wrong).*

• Just Deserts – In the mid 1970s, academic debates emerged emphasizing deterrence and social control. Advocates of this school argued that rehabilitation had failed and that crime could effectively be reduced through sentencing policies aimed at intimidating potential offenders more efficiently. The theory was well attuned to the law-and-order mood that had become strong in the U.S.

Civil libertarians and others concerned about the fairness of the criminal justice system that was emerging wanted a sentencing theory that gave a central role to the notions of equity and justice. Writings in moral philosophy provided the key with the notion of desert – of deserved punishments, proportionate to the blameworthiness of the criminal conduct. It was argued this rediscovered concept was an integral part of everyday moral judgments involving praise or blame. The idea was best articulated in a book entitled, *Doing Justice,* written in 1976 by Andrew von Hirsch – the source of theory presented in the Model Act.

It is important to emphasize that von Hirsch's work was theoretical and untested in 1976 and remains so today. His ideas and arguments produced a flood of rebuttals by scholars of other schools of thought. Ten years later, von Hirsch produced a new book entitled *Past or Future Crimes* which, while still supportive of the concept of deserts, contained many modifications from the original formulation.

Unlike the authors of the Model Code, von Hirsch is quite specific in his formulation of a theory of just deserts. His theory, and his writings, are directed at adult felons, not children or juveniles. He rejects the concept of selective incapacitation because it exacerbates the conflict between justice and crime-control aims in sentencing – something the Model Act does not bother to do. Culpability and the ability to understand the blameworthiness of a criminal act are central to his thesis.

As the guiding theoretician for the authors of the Model Act, it is worthwhile to see what von Hirsch actually says about his theory:

> I have argued that a fair conception of sentencing should emphasize desert. A desert theory, however, is too easily misunderstood, by advocates as well as critics. The theory, it has variously been said, relies on philosophical ideas of merited punishments; claims that all questions about quanta of sentences can be answered by reference to what has been deserved; and excludes all consideration of crime-prevention effects. This book should make it clear that none of these characteristics are accurate.

Professor von Hirsch's account of desert does not presuppose any notions of "righting" the moral imbalance wrought by criminal misconduct; punishment connotes censure. Penalties should comport with the seriousness of crimes so that the reprobation visited on the offender through his penalty fairly reflects the blameworthiness of his conduct.

To accomplish this, von Hirsch calls for the scaling of crimes according to their blameworthiness, but in doing so he recognizes the difficulty in establishing "degrees" within sentencing categories.

It is through this grading of crimes according to seriousness and the assignment of penalties proportional to the harm done by the crime that the concept of sentencing guidelines emerges. Needless to say, there continues to be extensive debate about whether or not the

necessary guidelines can be constructed fairly. The fundamental argument focuses on internal gradations for offenses since most scholars agree that upper and outer limits can be established. But, if only these limits can be fairly established, then how does the sentencing guideline differ from minimum and maximum sentence legislation characteristic of many states? The response is that the guidelines permit an easier review of compliance -- accountability is enhanced.

Professor von Hirsh recognizes that guidelines do not present a unique set of solutions since the penalty scale as a whole can be toughened or made milder to a degree while the relative proportions among punishments are held constant. He holds, however, that such a theory can provide considerable guidance to rule-makers since they do not have unlimited leeway in increasing or scaling down severity levels before they encounter the limits of available institutional resources, on one hand, and political constraints on reducing severity, on the other.

Prof. von Hirsch's concluding observation is worth noting. He cautions us to beware of miracle cures and reminds us that "sentencing systems might be made somewhat more equitable through the observance of the principles of proportionality," but that the operational word was somewhat.

● **Culpability and Rational Man** – Just deserts is built on the concept of culpability, which receives extensive attention in the substantive criminal law. Without belaboring all of the various types of culpability, it is worth noting that the first principle of culpability is that the gravity of conduct varies with the actor's behavior, that is, whether it was purposeful, knowing, reckless, or negligent.

Clearly, these criteria are appropriate for most adult behavior, but we question whether they are appropriate to juveniles. Specifically, the concept of culpability implies evidence of value-maximizing behavior, that is, comprehension of relevant values and objectives; perceived alternative courses of action; estimates of various sets of consequences: and, finally, a clear valuation of each set of consequences in relation to achieving the desired objective or goal. This is, at the very least, a level of maturity, considerably above that expected for most children.

Knowing the consequences of behavior is certainly a high, if not unreasonable, expectation for a substantial portion of the children who would be effected by the sanctions set by any Model Code. Nothing in adolescent development theory suggests that children and youth are "small rational adults." On the contrary, evidence in a variety of areas outside of justice suggests that society recognizes the difference between behavior appropriate to a child and that appropriate to an adult. Children are required to attend school; they are prohibited from working in certain fields; they are not permitted to change their place of residence without parental approval; they are restricted in a number of areas from receiving medical care; they cannot make binding legal contracts; and, in a number of other areas, they are prohibited from engaging in behavior approved for adults.

Clearly, if children are different in other statuses, they are also different within the processes of justice if we are to be consistent and, in the language of deserts, fair.

● **Sentencing Guidelines** – While it is understandable why the logic of a just deserts model requires sentencing guidelines to ensure equality and proportionality, it is even more interesting to know that sentencing guidelines, except in Washington State, were designed as population-sensitive flow-control strategy to prevent the over use of limited and expensive correctional resources for criminal adults. Only 10 states in the U.S. have sentencing guidelines. In theory, the court's discretion is constrained by the existence of the guidelines. In two states, this is a reality. In eight it is a suggestion and hope.

While the criminal statutes in virtually all states detail a general range of sentencing options deemed appropriate for any particular crime, sentencing guidelines attempt to direct the court to the available options it should choose in any given case.

The range and form of the prescribed sentence can vary significantly from state to state, as the cases of Minnesota and Pennsylvania clearly demonstrate. To be effective, a strong sentencing commission must monitor the use of the guidelines and departures from the recommended sentences by the judiciary. The process is costly and time consuming, but it does produce equality and proportionality within a given state.

Without question, Minnesota is the premier example of sentencing guidelines. They did not happen overnight, but instead, they followed four years of intense legislative debate. As might be expected, the debate focused on disparate sentences, doubts about the efficacy of rehabilitation, and concern that indeterminant sentencing sometimes resulted in lenient sentences that depreciated the seriousness of the crime.

Although there has been great interest in sentencing guidelines, only a few states have attempted to use

them. Of those making the effort, only two -- Minnesota and Pennsylvania -- have systems that approach achievement of some of the promises made by those who support the Model Juvenile Justice Act. Both sentencing systems were designed for adult offenders; both are "policy-driven" systems, i.e., political choices have to be made regarding how much punishment is to be imposed and at what cost. Both are, even at this late date, still modifying and adjusting the systems they implemented -- which is as it should be.

We would echo the caution of Andrew von Hirsch. Deserts is no panacea. The concept of deserts is, and for some time to come will continue to be, a theory -- worthy of careful debate, study, and further testing. There are no examples of exemplar models worthy of immediate replication without serious questioning. Deserts and sentencing guidelines are critical components for the type of juvenile justice reform called for; the experience of Minnesota, Pennsylvania and Washington do not make the case for the reliability and effectiveness of the reform promised.

The Washington Model

Washington's juvenile justice reform was directed at holding juveniles accountable for their offenses in a uniform, consistent, and equitable manner. Although it would not meet Professor von Hirsch's standards for a deserts system, it is consistent with some of the ideas contained in that theory. In Washington, treatment and rehabilitation continue to be important objectives insofar as they might contribute to a reduction of recidivism. But rehabilitation is not a primary goal. Decisions regarding the processing of cases are not made in terms of the treatment needs of a given youth.

Washington shifted decision making authority at court intake from probation to prosecution. Those making the in/out decisions, therefore, could be expected to support the philosophy contained in the law.

Interestingly enough, it is in this end of the process that accountability -- systems accountability -- was depreciated. There are no decision-making guidelines to cover law enforcement. The same is true for decisions made by the prosecutor and probation officers regarding plea negotiations. Clearly, large segments of the juvenile justice system are not held accountable while the courts and correctional arms of the system are expected to attain an even higher level of accountability than they now achieve.

Funding by the U. S. Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) permitted Washington's reform to be evaluated in 1983 by Dr. Anne Schneider of Oklahoma State University. The findings of the study revealed that the severity of sanctions imposed on juveniles decreased during the first two years the law was in effect. Simultaneously the guidelines increased the certainty that cases would be handled through a formal process. Commitments to state institutions increased and surpassed the numbers at the time the law was passed.

Other findings of significance included the following. Sentences in the post-reform era were considerably more uniform. There was a marked increase in the use of incarceration. Non-violent offenders and chronic minor property offenders were less likely to be incarcerated and more likely to be required to pay restitution, do community service, or be placed on probation. Females and minorities received differential handling and were less likely to be diverted or receive lesser sanctions.

Mixed effects were found on accountability. Most important, expected patterns based on deterrence theory were not observed since there was an increase in the certainty of minor sanctions and a decrease in the certainty of severe sanctions. Gains made in this area could be accounted for, almost entirely, in the increased certainty for minor sanctions. The researchers concluded that there was no evidence that the new system had any effect on recidivism.

The major conclusions drawn from the study were that any shift to a just deserts philosophy may not produce changes in the certainty or severity of sanctions that are great enough to bring about a noticeable change in juvenile recidivism. Secondly, even if legally-mandated changes did produce substantial increases in the certainty and severity of sanctions, current research techniques probably will not be able to detect any effect.

There were some direct, costly, and observable effects that did occur, however. In spite of no serious increase in Part One arrest rates, admissions to public training schools have increased significantly. A one-day count in 1984 was almost double that of 1974. The average length of stay in the training school had dropped from 350 days in 1974 to 200 days in 1984 in order to keep pace with increasing commitments. In 1974 the capacity of institutions exceeded the population. In 1984 population and capacity are neck and neck with the institutions barely able to keep ahead of population. Finally, in 1974 the state spent $6.6 million for training schools and in 1984, $18.7 million.

Thus far, the Washington experience does not justify emulation, either in terms of its success or cost benefit. It may well be that with additional modifications and testing the model might warrant replication, but any prudent observer might do better to defer a decision based on current knowledge and experience. Washington is singular in its approach to juvenile justice. That status hardly justifies the whole hearted endorsement found in the Model Act proposed.

The IJA/ABA Comparison

In their search for credibility, the authors of the Model Act call into service the respect of the Institute of Judicial Administration (IJA) and American Bar Association's (ABA) Standards for Juvenile Justice reform completed in 1977. They have the brashness to suggest that their reforms and those of IJA/ABA have something in common. In fairness they do. Three recommendations use the same words but with different meanings. The two efforts have nothing in common either in scope, integrity, nor purpose.

- **Credibility** -- The Planning Committee for the IJA/ABA Juvenile Justice Standards Project first met in 1971. They concluded their work in 1977. In the interim, over 200 juvenile justice experts, distinguished lawyers and judges, along with recognized experts in the fields of social work, psychology, education, law enforcement, corrections, etc., actively participated in the development, review and critique of the Standards. More than 30 reporters -- mostly law school or university faculty members -- drafted the volumes subsequently distributed to the ABA for review. Twenty-three volumes on standards and commentary were produced, covering the entire system of juvenile justice and not just its sentencing component.

- **Clear Statement of Principles** -- The Standards stressed 10 basic principles: proportionality, determinacy of sentence, the use of the least restrictive alternative, the elimination of non-criminal behavior from the jurisdiction of the juvenile court, visibility and accountability of decision making, a right to counsel, a right of self-determination for juveniles, a redefinition of the role of parents to consider the possibility of conflict of interest, limitations on detention, treatment, or other intervention prior to adjudication and disposition, and strict criteria for waiver of juvenile court jurisdiction to regulate the transfer of juveniles to adult criminal court.

- **The Special Nature of Juveniles and Juvenile Justice** -- The Standards clearly recognized that age, dependency, and conditions beyond the control of the juvenile could precipitate involvement in the juvenile justice system, whereas the commission of an unlawful act is the sole determinant in initiating contact with the criminal justice system. These factors made it very clear that the differences in the two systems were significant.

The IJA/ABA Standards started with an assumption that juveniles are more than little adults; their needs, problems, and behaviors are, and can be expected to be, different. The purpose of the juvenile justice system, as they saw it, was not punishment or deserts, but the reduction of juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior. They argued that the purpose should be pursued through means that were fair and just, that recognized the unique characteristics and needs of juveniles, and that gave juveniles access to opportunities for personal and social growth.

We would suggest that a national referendum on this purpose would still be supported by a significant majority of the American people. It is a purpose quite different from that proposed in the Model Act where fair means sameness, proportionality means punishment without regard to future conduct, and status offender means the state again has an enhanced right to intervene in the lives of children -- enhancement granted without adequate justification by the proponents of the Model Act.

Conclusions

Greenwood and Zimring, in *One More Chance*, provide considerable evidence that rehabilitation and prevention are not dead. They also suggest that successful programs must address considerably more than the instant offense which brings a juvenile before the court. Clearly, the evidence they present forcefully argues that just as a juvenile must be responsible for his/her delinquency, the state, too, has an obligation to protect the interests of the child by providing any and all of those services that are likely (even have a chance to) reduce the probability of continuing future illegal behavior.

It is all too true that society is fed up with crime and its consequences. Unlike scholars, however, society (at least individuals) wants to be protected from future crime as well as see punishment met out to those who break our laws. In the abstract, deserts is plausible and attractive. In reality it lets society -- at least those who administer justice within it -- off the hook for any future damage suffered by the victim of a crime. Deserts says that if society punishes fairly and proportionaly, then its obligation to the victim, as well as the offender, has been fulfilled. The age-old cry of the punished offender can once again be heard throughout the land: "I have paid the price society demanded and am free to go my own way."

The criticisms of the 1970s about the failure of rehabilitation and the need for equity and determinacy were heard. Legislatures changed criminal law with the result that we can no longer hold persons because of treatment needs or dangerousness. When the deserts have been satisfied, the persons who previously offended are free to go their own way without interference from the state. The average citizen does not truly understand this subtlety of sentencing reform; he or she expected that in addition to some prescribed punishment the

state would do something to keep the convicted person from continuing to commit crimes. That is why public opinion polls reflect attitudes supporting rehabilitation or practical services that reduce the probability of continuing illegal behavior.

Determinacy, longer sentences and increasing costs are also part and parcel of deserts as it operates in practice. While it is true that theory argues that this need not be the case, our crowded institutions suggest that theory and fact do not always meet. Unconstitutional prisons -- which are physically deteriorating and crowded beyond any reasonable standards, increasingly understaffed and financially undersupported, increasingly dangerous for staff and inmates -- have resulted. There is nothing that we have accomplished by recent changes in the criminal law that even faintly suggests such changes would be replicated for juveniles.

We, too, support increased fairness within the juvenile justice system; we, too, support proportionality. But we do not support sameness for the sake of symmetry. Sentencing guidelines can be helpful, and they can be objective. They can also be unfair and destructive.

We would support a revolutionary reform that was fair and proportional -- particularly throughout the entire juvenile justice system and not just at the point of sentencing. Arrest, prosecution, sentencing and correction all deserve the equal attention of reformers, whether liberal or conservative.

In our opinion, the Standards developed for the Institute of Judicial Administration and the American Bar Association, which were themselves controversial in their support of the removal of status offenders from the juvenile justice system and the restriction of judicial discretion in other areas, approached this goal. We would support the exploration of the real revolution framed within the principles articulated in their 23-volume report. Whatever criticisms might be leveled against this effort, credibility and thoroughness would not be among them.

We concur with the IJA/ABA Standards that the purpose of the juvenile justice system is to reduce crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior. We reject the simplistic notion that the purpose of the juvenile justice system is to make juveniles individually responsible for their delinquent acts and to hold the juvenile justice system accountable. Existing systems accomplish these purposes without the increased cost generated by deserts and sentencing guidelines.

We would suggest that most people in this country -- private citizens and informed professionals -- are less interested in the revolution called for by those who drafted the Model Act than they are in the testing of the reforms called for in the IJA/ABA Standards. The vast amounts of money, time, energy, and skill that went into the formulation of those Standards were not an academic exercise nor an ideological catharsis. They were substantive and revolutionary and merit a considered respect and attention that the proposed Model Act does not. ■

KID REHABILITATION VS. JUST DESERTS -- A HEAVYWEIGHT FIGHT

Another Look At ALEC's Model Code

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Juvenile Justice Digest,
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Part One...

KID REHABILITATION VS. JUST DESERTS – A HEAVYWEIGHT FIGHT

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By Judge Frank A. Orlando
Broward County, Fla., Circuit Court

This was a 15-round heavyweight championship fight. Just Deserts, the new kid on the block, a young, aggressive body puncher with heavy financial backing by his Uncle Sam, has battered and bruised his older, wiser, subdued opponent, Kid Rehab, for 14 long rounds. Without great public support or adequate dollars to train and do his job, the Kid has come a long way since his start back in 1899. Now the Kid sits in his corner waiting for the bell to call him out for the last round. As he sits, his corner handlers, Justice, Due Process and Fundamental Fairness, are trying to pump enough life into the Kid's tired and battered body to come out for the last crucial round. Only a knockout can save the Kid.

Across the ring, Just Deserts sits fresh and ready for the kill. He is way ahead on points. His handlers, Lock'em-up, ALEC, and O. J. Bureaucrat, were cautioning – "stay away, keep dancing, duck the issue; and above all, keep up the deception." The challenger only half listened; he wanted blood; he was poised for the kill.

Meanwhile, the Kid, back in his corner, was reflecting. Where had his game plan gone wrong? His mind wandered back to Illinois, the place of his birth in 1899. Since then he had won the championship, fought back many challengers and had done it all with skimpy resources.

Now, through my fantasy, I hope I have

both your attention and understanding as to the purpose of this article: a look at the proposed new Juvenile Justice Code, better known as the Just Deserts Law. It's not a scholarly look, but is hopefully, an eye-opening look by someone who has spent the last 20 years as part of the juvenile justice system.

We in the system often assume that everyone knows where the rehabilitation model came from and what it replaced. We also assume that everyone else knows of the advances and successes the juvenile justice system has had. Those assumptions cannot be continued because policymakers and legislators, for the most part, have heard of the system's failures and not of its successes. Nor have they heard why we should, in my opinion, continue to support a separate system for youth corrections and not just fold it into the adult system.

Going Back To The Beginning . . .

History tells us that about 100 years ago the first attempts were made to separate children from adults in jails and prisons. The first formal juvenile court laws were passed in 1899 in Colorado and Illinois. The Colorado law became effective in 1901 and was expanded in 1903. Illinois law became effective in 1899; that state is credited with enacting the first law that created a separate system of courts and correction for children.

Prior to this, New York in 1824 and Pennsylvania in 1826 created reformatories called Houses of Refuge to receive children convicted of criminal offenses. The laws creating these institutions authorized committal without trial by jury.

Shortly after the passage of the Pennsylvania law, a father whose daughter was committed to a House of Refuge sought her release by a writ of *habeas corpus*, claiming that committal without trial by jury was unconstitutional. The Pennsylvania Supreme Court denied the writ by ruling:

> The House of Refuge is not a prison but a school, reformation and not punishment is the end . . . The object of the charity is reformation by training and religion . . . and above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task, or unworthy of it, be superseded by the *parens patrale*, or common guardian of the community? – *Ex Parte Crouse* 4 Whart 9, 1829 (emphasis supplied).

The Court answered this question in the affirmative in one of the earliest court decisions to specifically apply the doctrine of *parens patraie*. This case set the stage for the many state court decisions which enforced the state's right to commit children for their own good without the formalities of the adult system.

The state's power was founded on the *parens patraie* doctrine, which when translated means the king's power and guardianship over the children of his kingdom. This doctrine was part of the common law of England. The common law became the law of the American colonies; and with the establishment of the states, this doctrine was vested in our law.

There were many early court decisions interpreting this doctrine before the U.S. Supreme Court in 1967 handed down the landmark decision of *In Re: Gault*, 387 U.S. 1, 1967.

The Pennsylvania Supreme Court, again, in 1903 in a decision concerning the state's juvenile court law, stated what all of the early decisions did:

> The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled as *parens patraie*, to take the place of the father for the same purposes, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. *Commonwealth v. Fisher*, 213 Pa. 48, 1903 (emphasis supplied).

Rehabilitation Was The Goal . . .

Juvenile court laws were passed in all states. In general, they said that the court was not a criminal court; delinquency was not a crime; a finding of delinquency was not a conviction; commitment to a juvenile institution or program was not a sentence or a punishment and was designed to rehabilitate the child. This was all founded on the *parens patraie* doctrine and the state's desire to guide its young away from a life of crime.

Between 1899 and 1967, attempts were made to follow the original ideas of the founders of the juvenile court: helping to rehabilitate wayward children when their parent failed. Over time, the system grew farther and farther away from constitutional protections and rights afforded to children.

Juvenile courts were anything but courts of law; and many felt as Roscoe Pound did, when he said that the creation of the court was the greatest thing since the Magna Carta, but it had become the new Star Chamber for children. This was, I feel, in both aspects an exaggeration, because many judges and correctional personnel were doing everything possible to provide what we came to know as rehabilitation, not punishment, for children.

What we had then was the birth of the rehabilitation model, or my "Kid Rehab," in 1899, founded on the common law of England. What has happened since is that in many instances, the system has lost sight of its stated purposes and returned to practices of punishment and retribution and the deprivation of basic constitutional rights.

Gault: The Voice Of Reason

The voice of reason took hold when the U.S. Supreme Court issued the *Gault* decision, which basically found that juveniles were receiving the "worst of both worlds" – deprivation of the Bill of Rights and punishment instead of rehabilitation. The court told us that a separate court for children was constitutionally permissible but that the Bill of Rights was for children, too.

The court endorsed the concept of rehabilitation as opposed to punishment and reinforced the state's duty to provide a system of guiding its youth away from crime. All of this was permissible as long as the child received due process and the youth services programs were truly rehabilitative and not just prisons with fancy names.

This is where I perceive that Kid Rehab won his championship. Twenty years has now passed since *Gault* and the Kid's biggest success. During this period, applying the procedural requirements of *Gault*, the rehabilitation model has continued as the basic foundation of juvenile justice. Not every effort has been a success, but there is no supportable reason, in my view, for totally discarding the system.

Why Go Backwards?

The proposed Model Code of the American Legislative Exchange Council (ALEC) attempts to take us back to the time of punishment and retribution and my question is why? Is there a well-founded reason for the drastic changes proposed by the ALEC Model Code? Does its theoretical base have merit? My response to both is no!

Part of the answer to why the ALEC Code proposes punishment rather than rehabilitation may be that crime is an industry – big business, if you will. Without it, would we have a need for the police, jails, prisons, prosecutors, defenders, criminal court judges and all the hardware we use? Many within the system have a real interest in discarding the rehabilitation model and in going to the proposed punitive model for that reason. Locking up kids creates jobs in building the place, watching the kids, feeding them, etc. Only the U.S. defense budget can top the total dollars spent on criminal justice in our country.

Recent innovations such as home-based and community based programs (all part of the rehabilitation model) cost less than the brick and mortar that the Just Deserts Law would require and would reduce the bureaucracy. But even though this approach has been shown to be effective for children, it is very hard to sell these concepts to policymakers over the lock'em-up mentality which has prevailed over the last several years.

In spite of hundreds of successes and reduced recidivism that have resulted from rehabilitation, one or two cases where a heinous crime is involved has been used to justify the proposed change to the law, i.e., Just Deserts. States such as Massachusetts and Utah have shown us that the rehabilitation concept does work when properly designed and funded. Their approach has been to close the big, costly, inefficient training schools and funnel resources to a community and family-based system. Recognizing that there are some dangerous delinquents who need long-term, secure confinement, small institutions (25 beds or less) are provided with intensive treatment programs that are intended to redirect the behavior of this small group. However, major resources and efforts are directed to the 95 percent with whom we know we can be successful.

If we are looking for a "model" approach, I suggest it is here, not in the approach promoted in the ALEC Code.

In Massachusetts, the rate of youth services' clients graduating to the adult system has been reduced from 35 percent to less than 15 percent the last 12 years. Also, the number of juveniles waived from juvenile court to adult criminal courts has declined dramatically in the last decade. In Utah, the re-arrest rate of delinquents committed to community-based programs has been significantly reduced. Despite this, that "one-case" syndrome is the killer jab that keeps knocking Kid Rehab back to the ropes.

Editors Note: Part Two of this article, to appear in the next issue of Juvenile Justice Digest, describes how things would change in the juvenile justice system if ALEC's proposed Model Code were adopted by the state legislatures. The author, Judge Frank A. Orlando, served many years as a distinguished juvenile court judge and is the chairman of the National Steering Committee for the "Juvenile Justice: Key Decision Maker Project" of the Center for the Study of Youth Policy, Hubert H. Humphrey Institute of Public Affairs, University of Minnesota. ■

WASHINGTON CRIME NEWS SERVICES'
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An Independent Summary of Significant News Events in the Field of Juvenile Delinquency Prevention

Part Two . . .

KID REHABILITATION VS. JUST DESERTS – A HEAVYWEIGHT FIGHT

Another Look At ALEC's Model Code

By Judge Frank A. Orlando
Broward County, Fla., Circuit Court

Editor's Note: Part One of this critique of the proposed Model Code for Juvenile Justice Reform developed by the American Legislative Exchange Council (ALEC) with Federal funding appeared in the May 4, 1987, issue of Juvenile Justice Digest (Vol. 15, No. 9, Page 5). Following is the conclusion of Judge Orlando's analysis of the problems which adoption of the Model Code would create for the juvenile justice system.

* * * * * *

If the proposed ALEC Model Code were to be adopted, thus knocking out Kid Rehab, how would things change in the juvenile justice system? Let us examine some of the most significant and radical proposed changes (from this writer's point of view):

Dependent Children

Where are they in the Act? They have been left out. The underlying theory of the proposed Act is punishment, or Just Deserts. Protection of children is not included. While delinquency cases will far outnumber dependency cases, most are

(See **MODEL CODE,** *page six)*

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(MODEL CODE, *continued from page one)*

minor offenses requiring little or no system resources. Dependent children, the abused, neglected and battered present the most difficult questions to the court and require the most intensive and professional services from the system.

Less than 15 percent of the delinquency cases involve serious crimes, and only about seven percent require more than probation services. So why revamp the entire system for about seven percent of the targeted population? If any part of the system needs help, it is that part dealing with dependent children.

Every day new legal issues arise in abuse cases. Questions of conflicting jurisdiction in divorce cases where one parent accuses the other of sexual or physical abuse in an attempt to gain custody or to prevent visitation are plaguing courts all over the country. How do we deal with the case of the child while the parent is charged in a criminal proceeding? Should the rules of evidence be relaxed, especially where hearsay testimony or questions of confrontation are involved?

These are the serious and compelling questions facing the juvenile justice system in the 1980s. These are the questions specifically omitted from the proposed Model Code. The Code looks at issues addressed successfully in the 1960s and 1970s such as: whether status offenders (or disobedient children as the Model Code relabels this group of children) should be within court jurisdiction, or subject to secure confinement; the use of jails; the use of the least restrictive placement necessary, and the difference in sentencing approaches in the juvenile and adult courts.

Sentencing Guidelines

At the heart of the proposed Model Code is a system of sentencing guidelines to be developed by a commission. The guidelines would virtually eliminate judicial discretion in disposition. The guidelines look at the offense history and age of child, not at the individual needs of the child, society and the types of dispositional alternatives available in the community or state. All children labeled "serious offenders" (those committing a felony) would have to serve at least 30 days of confinement according to the proposed Model Code. Think of the cost of this and then check the statistics relevant to dispositions in Utah and Massachusetts and their recidivism rates. Then ask yourself: "Why does everyone have to serve at least 30 days?"

The heart of the juvenile justice system and, what I consider the last major difference between it and the adult system, is the discretion afforded the court in the dispositional stage of the case. Here, the court, with the assistance of mental health and criminal justice professionals, can design a disposition to fit the individual and unique needs of each case. If the case warrants punishment, it can be meted out. If restitution and victim compensation are warranted, they can be included; and, as in most cases, if what is needed is the teaching of responsibility, accountability and attitude re-direction, that can also be included.

This is a disposition in the treatment or rehabilitation model -- one designed to meet individual needs, to improve self-worth and discipline and, in the end, to protect society. In the proposed ALEC Code, the sentence guidelines inflict a sentence for the sake of punishment and to reinforce the court's power over the child. It seems we have been doing this in the adult court for years without much success.

All available research indicates that individualized sentences designed to meet the individual needs of the case produce the best results for the child and public safety.

Twenty years ago, the U.S. Supreme Court found in the *Gault* decision that a major purpose for the existence of the juvenile court was its ability to be procedurally different from the adult court, and pointed to the benefits of individualized dispositions available in the discretion of the court. The court, while requiring due process for the child, endorsed the rehabilitation model built into the dispositional stage of the process.

The State of Florida adopted sentencing guidelines for adult criminal cases in 1983. The same reasoning put forth for the proposed ALEC Code (i.e., the inability of judges to administer discretionary sentence), was at the heart of this proposal. Three years later, there is great sentiment and legislative action to repeal or severely modify the guidelines in order to give discretion back to the court in Florida. The guidelines have produced increased litigation and have not reduced prison populations as they were supposed to. The question of whether to reduce or repeal sentencing guidelines is also taking place in the Federal Judicial system.

As long as judges are involved in the process, I believe they must have the discretion to sentence as each individual case warrants. This is one of the many areas where the proposed code conflicts with the IJA/ABA Standards. The Standards relating to dispositions require the court to enter dispositions within legislatively-determined alternatives, but leave the final disposition to the discretion of the court (Standard 1.1, Volume on Dispositions).

Detention

The proposed Model Code would require pre-trial detention of juveniles arrested for serious offenses and repeat offenses upon showing of probable cause. In non-urban areas, children currently can be held in adult jails for up to 24 hours, exclusive of weekends, if they are separated by sight and sound from adult prisoners. Children can be held for up to six hours in any jail without sight and sound separation for purposes of processing and transfer to other facilities.

The Model Code provides for an immediate detention hearing, but allows it to take place in up to 72 hours – 24 hours hours if the child is held in an adult facility. If probable cause is found at the detention hearing, the child can be held for up to 21 days for an ajudicatory hearing.

The Model Code does not contain specific criteria for holding a child in pre-adjudication detention except for a finding of probable cause. It does not provide for home detention or any other system of conditional release pending the filing of charges or an adjudicatory hearing.

The proposals in the Model Code regarding detention would greatly increase the population of already overcrowded detention centers and would, in effect, open the adult jail door a little wider.

The IJA/ABA standards provide for holding a child in the least restrictive setting in keeping with his or her best interests and the protection of the public. U.S. crime statistics show that juveniles released pending court action have a much lower rate of non-court appearance than adults released on bail, and commit far fewer crimes than adults awaiting trial when released.

States need to look carefully at pre-trial detention. I believe we detain far too many children at far too high a cost when it is not necessary. This is an area for legislative attention. Detention criteria should be carefully throught out to strike a fair balance between a child's right to be presumed innocent and not held in secure custody, and public safety concerns. The proposed code does not accomplish this goal.

Status Offenders

Re-enter the child in need of supervision, now labeled a "disobedient child" in the Model Code, but still a child who has not committed a crime and is demonstrating an over-reaction to adolescence. The reaction is disturbing to the adults, so the child will be brought into court and "helped."

There seems to be a feeling on the part of the drafters of the proposed Model Code that the deinstitutionalization efforts of the 1970s were a failure and that status offenders all over the country are growing into delinquents and criminals. To answer this, I refer the reader to the research done by Ann Schneider, Oklahoma State University, entitled *Status Offenders: Anecdotes, Myths, Facts and Realities* (Annual Conference of State Advisory Groups for Juvenile Justice, Washington, D.C., 1986). In this paper, Schneider systematically dispels the major myths concerning the deinstitutionalization of status offenders and provides facts as to the realities of what happens to status offenders outside the system.

The major problem I have with the proposed Model Code, besides the fact that these children are included in the court jurisdiction, is the provision that a status offender who violates a court order can be held in secure detention. The Model Code provides that a child can be found to be a status offender by a preponderance of the evidence; and then if the court order is violated, sentenced to a secure detention facility for contempt of court. The Model Code also provides that a status offender can be held in secure detention for up to 72 hours on a showing of probable cause that a valid court order has been violated.

Both provisions raise constitutional questions. For a child to be confined, the original finding must be based on the criminal standard of proof, beyond a reasonable doubt, not the civil standard of a preponderance of the evidence. Of course, confining non-law-violating children under any standard defies reason and is very counter-productive and expensive.

Courts must have the power to enforce their orders, but I have serious questions about a process that allows a person to be found guilty of a status offense by a preponderance of the evidence and then sentenced to a secure facility for continuing the same behavior. If a person is subject to a deprivation of freedom, the process should meet the requirements of due process from the instant it begins.

There are several other questionable sections of the proposed Model Code. The use of referees is endorsed, although not in adjudicatory or dispositional hearings. My question is this: If a judge is required to hear the case in an auto accident or adult criminal case, why not every aspect of the juvenile case, too? It seems to me these cases warrant the same judicial attention, if not more, than any other case.

Traffic cases are brought back into the system under the proposed code. This will deplete already sparse resources, and, in my opinion, modern-day traffic courts have adequately handled the disposition of cases involving a child who undertakes to operate a motor vehicle.

Some Redeeming Sections . . .

The proposed Model Code does have some redeeming sections. It does provide for full due process at every stage of a delinquency proceeding. Early drafts contained provisions for jury trials and bail. These were presumbaly removed because with the provisions for sentencing guidelines, one could say "why a court at all?"

The Model Code provides for liberal discovery rights to the prosecution and the child, a right not available in many states.

The Model Code specifically limits the area in which a case could be transferred to adult court and leaves this as a judicial function, as opposed to transferring it to the prosecutor as has been done here in Florida.

The proposed Model Code also maintains the age of a "child" at up to 18 years, as opposed to lowering the age that a child becomes subject to criminal court jurisdiction as some states have done.

Going Back To The Arena . . .

These are my thoughts from a judicial viewpoint on the major shortcomings as well as positive aspects of the proposed ALEC Model Code.

Now, before we get back to the ring, let me leave you with the thoughts of two old and wise men, one of today and one of days gone by. First the thoughts of Sen. Strom Thurmond (R-S.C.).

The proposed Model Code was first released to legislators at a conference of state legislators in Washington, D.C., on April 28, 1986. In a speech to the conference, Sen. Thurmond, then chairman of the Senate Judiciary Committee, questioned ALEC's contention that the current rehabilitation model had run its course and their proposal to replace it with the just deserts model by saying that: "The law should deal harshly with serious juvenile offenders, but compassionately with juveniles whose conduct can be corrected." He also noted that juvenile crime rates have declined since 1975.

I would interpret this as an endorsement of the rehabilitation model and the continued ability of judges to design dispositions that fit the case.

The second man, Judge Ben Lindsay of Denver, CO, wrote in an essay circa 1904, ". . . too much cannot be expected of the juvenile court. It is a success if it is only better than the old method" *(Children's Court in the U.S.*, 1904, DOC No. 701, 58 Congress, 2nd Session). The "old method" referred to was handling children as a part of the adult penal system before 1899. Can there be any doubt that the juvenile justice system has far outperformed the adult system since its creation in 1899?

Now, back to the arena. The bell has sounded for the last round. So how does it end? You be the judge; fashion your own finish.

Here is mine. Kid Rehab, bolstered by support from his supporters at the American Bar Association (ABA), the National Council on Crime and Delinquency, State Juvenile Justice Advisory Groups (SAGs) and child advocates from every corner of the nation, comes out of his corner with renewed strength and drive. He jabs away and sends a smoking punch to Just Deserts' mid-section. As Just Deserts is down on one knee gasping, his handlers from ALEC and the OJJDP throw in the towel.

The kid is still the champ. He's battered and bruised, but he still the champ.

Now, to post-fight strategy for those who want to solve some of the Kid's 1980s problems, I suggest for a start you look at the IJA/ABA standards. The proposed Model Code attempts to tie itself to these standards, but I can find little or no similarity. I suggest we bring in the new kids in the business from Massachusetts, Utah, Genesee County (Mich.), and other places that are improving on the rehabilitation model.

When the Kid is ready to retire, we'll replace him with a model that continues the successes he has brought

to the system, and not one that tears out the heart of a concept that has been tried, tested and proven successful.

The ALEC/Rose Institute Model Code calls itself a "model code." In my opinion, it is not a model code that meets the needs of twentieth century juvenile justice.

Editor's Note: The author, Judge Frank A. Orlando, served many years as a distinguished juvenile court judge and is the chairman of the National Steering Committee for the "Juvenile Justice: Key Decision Maker Project" of the Center for the Study of Youth Policy, Hubert H. Humphrey Institute of Public Affairs, University of Minnesota. ■

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The National Coalition of State Juvenile Justice Advisory Groups has adopted the following recommendations in regard to the Juvenile Justice Reform Project Model Code:

1. The National Coalition recommends that OJJDP intervene in the time frame set for distribution of the Rose Institute/ ALEC Model Code.

2. The National Coalition recommends that said time frame be extended to allow for continuing review and proper input from those major juvenile justice agencies, organizations and interested individuals which will be affected by the implementation of such legislation.

3. The National Coalition recommends that, until consensus is reached and until the model code complies with all the mandates of the Juvenile Justice and Delinquency Prevention Act and the National Advisory Committee Standards, no code should be published and distributed.

R E S O L U T I O N
of the
National Council of Juvenile and Family Court Judges

WHEREAS, the American Legislative Exchange Council (ALEC) through a contract with the Rose Institute of State and Local Government at Claremont McKenna College has circulated a draft of a "Model Juvenile Justice Code" for comment; and

WHEREAS, the Legislation and Governmental Regulations Committee of the National Council of Juvenile and Family Court Judges has carefully reviewed this proposal in depth with the assistance of other committees and members of the National Council of Juvenile and Family Court Judges; and

WHEREAS, the Committee finds the proposal unacceptable and inappropriate, and recommends that the Model Code be rejected for the following specific reasons and other reasons too numerous to mention in this resolution:

1. This Code has serious Due Process deficiences.

2. The Code is inconsistent with the prior and present policies established by the National Council of Juvenile and Family Court Judges.

3. The document is poorly drafted and would create endless litigation and delay in processing juvenile cases.

4. Mandated structured decision-making processes create inequality and impair wise judicial utilization of dispositional alternatives.

5. The Code fails to establish individual responsibility and system accountability as stated in the Purpose Clause.

6. The stated goal of preservation of the family is not addressed, much less achieved, nor are there any provision for Abused and Neglected children.

7. The Code mandates substantial additional local financial expenditures for court procedures and special programs.

8. The Code distorts the separation of executive, legislative and judicial Constitutional responsibility.

9. The Code fails to acknowledge that most states have recently enacted laws and developed standards and procedures to assure Due Process for the children and families of America.

10. Lastly, the Code reflects a fundamental misunderstanding of the role and function of the court system and court-related personnel, including volunteers.

NOW, THEREFORE BE IT RESOLVED that the Model Juvenile Code of the American Legislative Exchange Council (ALEC) and the Rose Institute of State and Local Government be rejected and repudiated.

BE IT FURTHER RESOLVED that any legislative body involved in reviewing current juvenile laws seriously consider the Thirty-eight Recommendations of the National Council of Juvenile and Family Court Judges dealing with Serious Offenders, and the Seventy-three Recommendations of the National Council of Juvenile and Family Court Judges dealing with the Deprived Children of America.

ADOPTED this 17th day of July, 1986, by the membership assembled in Conference.

 /Signed/ Ninian M. Edwards, Secretary

RESOLUTION
of the
1986 Southern Legislator's Conference

WHEREAS the 1985 Southern Legislators Conference on Children and Youth adopted a Resolution urging the broadest possible participation by Legislators, Judges and others directly concerned with youth crime in the development by grantees of the Office of Juvenile Justice and Delinquency Prevention of a proposed model juvenile justice code for the States, and such participation has not been sought; and

WHEREAS, drafts of the proposed code which have come to the attention of individual legislators, judges and of national organizations concerned with delinquency such as the National Coalition of State Juvenile Justice Advisory Groups, NationalCouncil of Juvenile and Family Court Judges, American Probation and Parole Assocation and others have caused grave concern on such issues as constitutionality, lack of compliance with federal law, unworkability and excessive cost of implementation; and

WHEREAS, the grantees have applied to OJJDP for additional funds so as to publish, disseminate and actively promote the as yet not finalized proposed code to every state legislator in every state, byearly 1987,

NOW THEREFORE BE IT RESOLVED that the 1986 Southern Legislator's Conference urges the Office of Juvenile Justice and Delinquency Prevention and its grantees to provide for a process of comprehensive review of the proposed model code when finalized by appropriate committees of southern and other state legislators, by national organizations of legislators, judges, state and local child protection and correctional professionals, prosecutors and law enforcement prior to any publication, promulgation or general distribution of such code to state legislators.

BE IT FURTHER RESOLVED that federally funded "training programs," if any, for state legislators on any "model code," would be inappropriate and should not be funded unless clear provision is made for the presentation of appropriate contrasting views on the provisions of such code by responsible, relevant organizations or individuals other than those who developed the code, especially those in the juvenile justice system intimately familiar with state juvenile justice legislation and its implementation.

R E S O L U T I O N
of the
Georgia Governor's Advisory Council on Juvenile Justice

WHEREAS, the American Legislative Exchange Council (ALEC) has circulated a draft of a "Model Juvenile Justice Code" for comment; and

WHEREAS, the Georgia Govenor's Advisory Council on Juvenile Justice and Delinquency Prevention has carefully reviewed this proposal in depth; and

WHEREAS, the Council finds the Model Code as amended September, 1986, unacceptable and inappropriate, and recommends that it be rejected for the following specific reasons:

1. The Code has been developed and is in the process of being implemented without the input of those agencies which will be most impacted by it.

2. The Code has serious Due Process deficiencies.

3. The Code is inconsistent with the Standards for the Administration of Juvenile Justice established by the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC).

4. The Code is poorly drafted and its implementation will create much litigation and endless delays in the processing of juvenile cases.

5. The structured decision-making processes mandated by the Code will create inequality and impair wise judicial utilization of dispositional alternatives.

6. The Code fails to establish individual responsibility and system accountability as stated in its Purpose Clause.

7. The Code's stated goal of preservation of the family is not addressed, much less achieved, nor does the Code make any provisions for Abused and Neglected children.

8. The Code fails to acknowledge that most states have recently enacted laws and developed standards and procedures to assure Due Process for the children and families of America and,

9. The Code reflects a fundamental misunderstanding of the role and function of the juvenile court system and its personnel, including volunteers.

NOW, THEREFORE BE IT RESOLVED that the Model Juvenile Code of the American Legislative Exchange Council (ALEC) be rejected and repudiated.

BE IT FURTHER RESOLVED that no version of the ALEC Model Juvenile Code be distributed prior to receiving a thorough review by the agencies which will be affected by it and until such time as it complies with the NAC Standards.

ADOPTED this 16th day of October, 1986, by the membership assembled in Conference.

Signed _____ Date November 6, 1986
Chairman

Defunding the right.

A TASTE FOR PORK

"DEFUNDING THE LEFT" was all the rage among conservatives in the early days of the Reagan administration. The Cato Institute published the ominously titled book *Destroying Democracy*, which detailed how "tax-funded politics" were subverting the republic. Under the guise of helping the needy, the book argued, liberals were lining their pockets and lobbying for ever-increasing government funds. For conservatives the theory explained both liberalism's political success and the durability of social problems in the face of massive federal spending. Cutting off the flow of funds to the left was "the No. 1 goal" of the Conservative Caucus in the early 1980s, according to its national director, Howard Phillips. Phillips convinced Senator Jeremiah Denton to introduce a bill mandating that grants be given only to "politically neutral" groups.

The bill went nowhere, and five years later there is little talk on the right of "defunding"—perhaps because so many right-wing groups are on the dole. Were Phillips to compile his list of tax-funded activists today, it would include such conservative stalwarts as the American Enterprise Institute, the Ethics and Public Policy Center, the

Adam Smith Institute, the Lehrman Institute, the American Legislative Exchange Council, the Federalist Society, the Chamber of Commerce, and the Republican Party. All of them favor vastly scaling back the role of government, yet all use federal funds to advance their political views. And if the scale of support is still small compared with the money that goes to liberal organizations, the waste and absurdities dwarf anything liberal patronage has produced.

A CASE in point is Robert Woodson and the Center for Neighborhood Enterprise that he founded in 1983. Woodson, who once worked for the Urban League, has for several years played the role of the Reagan administration's flack in the black community. When Reagan needs a "black leader" to meet with on Martin Luther King's birthday, Woodson has been more than willing to stop by. Woodson believes that black creativity has been stifled, not by racism, but by an army of white liberal poverty merchants who want to keep blacks dependent on the state. These bureaucrats constantly harp on the problems of the black community. "But when longer-range policies are made and, more important, when grants are handed out," Woodson wrote in the *New York Times*, "it is the professional social-welfare groups and the civil rights leaders who are on the receiving end."

Half huckster, half reformer, Woodson is a phenomenon unique to the Reagan administration: the armchair capitalist. His liberal-bashing has pulled in grants from groups such as the Scaife Family Trust and the Heritage Foundation and, this year, $2 million from Amoco Corporation. But Woodson has also collected from federal agencies such as HUD and the Office of Juvenile Justice and Delinquency Prevention (OJJDP). In 1981 Woodson testified before the Senate Judiciary Committee in favor of dismantling OJJDP, but over the last two years his group has received a half million dollars from that same agency, and opened a branch office in Chicago with the funds.

"I still don't think OJJDP should exist," Woodson told me, "but as long as Congress refuses to kill it, I have to try and see that these funds are getting to the black community and not to pay for more studies by white professors." Woodson's group uses OJJDP funds to make "technical assistance grants" to small community organizations that work with delinquent youths. More than half of the funds are chewed up in administrative costs. In August Woodson used $45,000 in OJJDP funds to hold a three-day conference and "prayer breakfast" on the black family co-sponsored by presidential candidate Pat Robertson and his Christian Broadcast Network. Woodson, who met Robertson when he appeared on the "700 Club," told the *Washington Post*: "I don't remember CBN being a religious organization. It's a news organization."

Under the direction of Al Regnery, OJJDP became the biggest policy pork barrel the right wing has ever seen. (Regnery left office amid controversy in May 1986; see "Al Regnery's Secret Life" by Murray Waas, June 23, 1986.) James McClellan, a dean at Jerry Falwell's Liberty University, received a $186,710 non-competitive grant to design a textbook on the Constitution stressing states' rights and limited government. McClellan's Center for Judicial Studies also received $127,864 from the National Endowment for the Humanities to hold eight seminars applying the doctrine of "original intent" to the Bill of Rights, and $337,000 from the Legal Services Corporation to promote "religious freedom" in public schools. "Personally, I wish that all of these programs were abolished, but it's self-defeating if conservatives leave those dollars out there for liberal groups to pick up," McClellan said.

Other beneficiaries of Regnery's non-competitive grants include George Nicholson, a personal friend of Edwin Meese and an unsuccessful Republican candidate for California attorney general who received $4 million to establish something called the National School Safety Center in Sacramento; Judith Reisman, who received $800,000 to study lewd cartoons in *Penthouse* and *Playboy*; and the Washington Consulting Group, whose $900,000 contract was canceled after it was discovered that a cousin of George Bush was on the payroll. Phyllis Schlafly, head of the anti-feminist Eagle Forum, secured $622,905 from the Justice Department to create the Task Force on Families in Crisis as an alternative to battered women's shelters—which Schlafly believes encourage lesbianism and broken homes.

The National Center for Missing and Exploited Children, which has received $3.3 million in OJJDP money, could almost be a parody of a public interest group. The organization, established in 1984, has spent millions whipping up a storm of news stories, public service announcements, and milk carton photographs explaining that over one-and-a-half million children disappear from the face of the earth each year. Unfortunately for the center, reporters soon discovered that there were no more than a few thousand missing children in the entire country. After two years the center managed to track down only 120 children, most of them runaways. A recent brochure defends the center's factual insouciance: "No factor has more soundly clouded the issue of missing children and served to diminish the seriousness of the problem than that of statistics. . . . How many missing children are there? Far too many."

THE JUSTICE DEPARTMENT also underwrites the titillating "Commentaries on Justice" radio spots, produced by the ex-head of the American Conservative Union James C. Roberts and funded by a $25,000 grant from the National Institute of Justice. According to an NIJ pamphlet, "On issues from designer drugs to international terrorism, from organized mobs to violence in schools, public officials . . . enlarge on their own experiences and concerns." Roberts allows that the program is probably a waste of funds, but adds the refrain of all right-wingers on the dole: "If the money is appropriated there's no reason conservatives shouldn't grab it."

The latest and perhaps most improbable source of conservative grants is the U.S. Peace Institute, which was established by Congress in 1984 to "promote international peace and the resolution of conflicts among nations and

peoples of the world without recourse to violence." Among the Peace Institute's first round of grantees were the right-wing Lehrman Institute, which received $25,000 to hold seminars commemorating the 25th anniversary of the U.S. Arms Control and Disarmament Agency, and the James Madison Foundation. (The Lehrman Institute has also drawn $46,000 from the U.S. Information Agency.) The Madison Foundation—which publishes a newsletter edited by Evron Kirkpatrick, Jeane Kirkpatrick's husband—received $91,400 to counter the influence of the left in U.S. divinity schools. Among the concepts the Madison Foundation seeks to salvage are the "just war" theory and the morality of Star Wars and Third World interventionism. George Weigel, the director, asserts that the aim is to "raise the level of public debate" on religion and foreign policy. Political thinking in the seminaries may be muddled, but this hardly justifies spending tax money on neoconservative propaganda.

Some of the biggest servings of intellectual pork have gone to a few formerly obscure West Coast think tanks with strong ties to members of the Reagan administration. The San Francisco-based Institute for Contemporary Studies, whose board members once included Caspar Weinberger and Edwin Meese, received a grant for $4 million from the Agency for International Development in 1986—allowing it to open a new center in Panama and establish a network of sympathetic economists around the world.

Even more ubiquitous on government grant lists are three policy shops in Southern California, all loosely associated with the Claremont Colleges: Public Research, Syndicated; the Claremont Institute; and the Rose Institute. Since 1982 PRS has received $453,056 from the NEH to distribute articles on the Constitution by Edwin Meese, William French Smith, and Ronald Reagan. The Claremont Institute, a PRS offshoot, secured $303,580 from the NEH to sponsor conferences, lectures, and publications pushing its conservative views on the Constitution. The Claremont Institute received another $140,000 from the NEH for a documentary on Winston Churchill and $400,000 from the U.S. Information Agency to indoctrinate foreign journalists about the principles of American democracy. The Rose Institute recently completed a million-dollar study for the OJJDP.

The worst that can be said of many right-wing grants is that they are a waste of money; others border on illegality. The Office of Adolescent Pregnancy Programs funnels thousands to Catholic groups to instruct schoolchildren that birth control is "intrinsically evil" under Church law—a clear violation of church-state separation. A more subtle area is the use of federal grants for lobbying purposes. Technically, it is illegal to use federal money to influence Congress on any legislation, a restriction that was tightened by the Reagan administration in 1984 to include overhead costs as well. But in October 1985, the State Department awarded a $276,000 secret contract to a Washington public relations firm to lobby for *contra* aid and to create advertisements targeting members of Congress who opposed the administration. And through the actions of agencies such as USIA, AID, and the National Endowment for Democracy—which among them fund dozens of conservative groups to do political work abroad—the principle of political neutrality is abandoned at our borders.

Another way that federal funds are used to change the outcome of the political process is by lobbying at the state level. The most egregious example is the "model juvenile justice code" developed by the Rose Institute under the million-dollar grant from the Justice Department.

The Rose Institute—a think tank that has worked primarily on voter redistricting studies for the California Republican Party—had no experience in juvenile law. The institute soon discovered that its staff was incapable of drafting the code. In desperation, they turned to the American Legislative Exchange Council, which represents 2,000 of the most conservative state legislators in the country, eventually paying them $400,000 from the grant. ALEC had never worked in juvenile law, but had backed far right causes like the right-to-work law, ending the insanity defense, and a balanced budget amendment.

The result was a code that abandoned efforts to rehabilitate juvenile offenders and substituted a punishment-oriented system resembling that for adult offenders. In July the code was "rejected and repudiated" by the National Council of Juvenile and Family Court Judges, and it has since been criticized by almost every group in the juvenile law field. "It's an embarrassment," said Justice spokesman John Lawton. "We're definitely dissatisfied with the work they did."

The Justice Department has asked ALEC to rewrite the code to incorporate the criticisms, but in January ALEC sent out a draft to state lawmakers around the country in hopes of introducing bills this legislative session. The Rose Institute has now decided to use private sources instead. "With private money there's fewer hoops to jump through; we can work directly on legislation," Executive Director Ralph A. Rossum said. "With our track record at Justice, there should be no problem finding a sponsor."

SO PERVASIVE is this intellectual patronage that few conservative luminaries have not received at least a small dose of "tainted" funds. The conservative scholar Russell Kirk used an NEH grant to make his *Roots of American Order* into a television show. Ex-Secretary of the Treasury William Simon, *Commentary*'s Midge Decter, and the philosopher Sidney Hook were among the "social democrats" sent to a Socialist International meeting at USIA expense. And Decter, Norman Podhoretz, Irving Kristol, and Joseph Sobran were all participants in a 1984 State Department seminar on "moral equivalence," receiving honoraria of up to $4,000 for their efforts.

In practice, "defunding the left" has not led to a free marketplace of ideas, but to an intellectual franchise for friends of the administration. "Given a choice," wrote the authors of *Destroying Democracy* about the tax-funded left, "many taxpayers would not support the political agendas of these recipients of governmental largess." Hear, hear.

CROCKER COULSON

The pathetic career of Reagan's juvenile justice chief.

AL REGNERY'S SECRET LIFE

BY MURRAY WAAS

UNTIL EARLY JUNE, Alfred Regnery was the administrator of the Office of Juvenile Justice and Delinquency Prevention in the Reagan Justice Department. In this position Regnery has faithfully followed the president's policy of seeking to abolish the office. The office was established in 1975 with the goal of removing juvenile offenders from adult jails and prisons and deinstitutionalizing status offenders such as truants. At least 81,000 juveniles nationwide remain in such facilities, where they face violent attacks from older inmates and where they are at least eight times more likely to commit suicide than youths held in juvenile detention centers. Nevertheless, Regnery and his superiors say that the federal government needs to do nothing more. Congress, by overwhelming bipartisan majorities, has refused to abolish the office in each of the last five years. Regnery responded by doing the minimum necessary to comply with the congressional mandate. Instead he concentrated his office's efforts on right-wing pet causes such as school discipline and the administration's antipornography crusade.

Regnery abruptly resigned on May 21, saying he wants to return to his family's publishing business. The resignation was treated by both the administration and the press as part of the usual comings and goings of administration personnel. Yet his decision caught his personal secretary, his press secretary, and his immediate superior in the Justice Department by surprise. He had speaking engagements lined up through June, and had spoken to me about his plans for the coming year, including developing programs for chronic juvenile offenders and funding more research on pornography. Regnery has been a controversial figure ever since he was appointed to the job in 1983. With more of his questionable personal and professional behavior coming to light, it seems more likely that Regnery was doing both himself and his colleagues a favor by bowing out quickly.

One of the most disturbing incidents occurred in 1976 and was never discussed in his confirmation hearings. In late October 1976 Regnery was winding up a campaign to become district attorney in Madison, Wisconsin. His wife had called the police three times in the weeks before the election to complain of obscene phone calls and vandalism. Regnery held a press conference to charge that his political opponents were using "Watergate-style tactics" to force him out of the race. When his wife called the police on the afternoon of October 31, 1976, the charge was much more serious. Christina Regnery, who was eight months pregnant, told police that two men broke into her home and warned her that her husband should drop out of the race

Murray Waas, a Washington writer, wrote "Meese's Power Grab" in the May 19 issue.

for district attorney. Then she said the two men had cut her with an embroidery knife and forced her to have oral sex.

The police investigation concluded that Christina Regnery had fabricated the entire incident—and Alfred Regnery told police that he too had "given serious thought" to that possibility. No neighbors had seen anything unusual, there was no sign of a forced entry in the Regnery house, and no sign of struggle. In addition, although Christina Regnery had 73 slash marks on her body, none was serious. "Not a single cut required a stitch or a Band-Aid," said one law-enforcement official involved. The police report concluded that "the infliction of the wounds on Mrs. Regnery are still questionable and may have been self-inflicted or done by subjects known to her. There is no indication that any unknown subjects inflicted any of the injuries." Regnery and the police agreed that they would "pursue the possibility of self-inflicted injuries." The report also said that it was "decided at this time that Mr. Regnery would not disclose any of the circumstances surrounding the incident"

Only minutes later, however, Regnery told a newspaper reporter in the hospital corridor, according to the police report, "that his wife had been raped by a white male and a black male and had been stabbed.... The wounds had been stitched." Of course, his wife had never alleged that she was raped, she was clearly not the victim of a stabbing, and she had not required any stitches. But Regnery's false claims were useful to his campaign. The headline in the Madison paper, "Two Attack Wife of D.A. Candidate," seemed to substantiate Regnery's earlier charges. Nevertheless, Regnery lost the election.

BUT THIS WAS not all the police investigation uncovered. When police searched Regnery's home, shortly after the alleged assault, they found a cache of pornography, including "several catalogues for various prophylactic devices and erotica." The police also reported finding "a book with numerous color photos of various sexual gratification, including oral sex and the placing of objects into the vagina," a German sex magazine, and a copy of *Penthouse*.

Seven years later, in mid-1983, Edwin Meese asked Regnery to informally head the administration's anti-pornography campaign. The President's Commission on Pornography, whose report is due out soon, was set up with the help of a $125,000 grant provided by Regnery's Office of Juvenile Justice.

Regnery denies that he is hypocritical on the pornography issue. At first he claimed that the police report detailing the discovery of numerous catalogs and magazines was "a fabrication." He said he only had "a copy of *Playboy* or something like that." Then he said, "I think a friend of mine in Germany sent me one magazine and I had it around." When asked about all the items on the police report, he conceded: "I probably had a little [pornography] around the house, like I bet lots of people do." But Regnery denied that he was a consumer of pornography. "I wasn't then and I never have been. I don't use and I don't enjoy it."

This was not the last time Regnery's personal behavior raised questions about his public career. The day after Regnery's first child was born, a Madison pediatrician named William Ylitalo was called in to treat the baby for a medical emergency. Ylitalo, citing doctor-patient confidentiality, has never specified exactly what occurred at the hospital. But the doctor came away convinced Regnery was emotionally unstable. He did say that Regnery had showed anger and hostility toward him and the hospital staff. Dr. Ylitalo was so distressed by the incident that in 1983 he sent a private letter to three U.S. senators recommending that they vote not to confirm Regnery as administrator of the Office of Juvenile Justice. "The appointee to this post should be a person who has integrity and is emotionally stable rather than someone whose moral honesty is questionable," he wrote. Regnery says Ylitalo is a "liar."

Dr. Ylitalo's letter compounded the controversy about Regnery's nomination. Regnery was well connected but inexperienced. The son of Henry Regnery, the conservative publisher, he had been a college director of the Young Americans for Freedom, a Senate aide, and had served for a year in the Lands Division of the Reagan Justice Department. But he had never held a job remotely related to juvenile justice, and drove around town with a bumper sticker on his car that asked, "Have you slugged your kid today?" His explanation during his Senate confirmation hearings was, "I try to keep a sense of humor about the things I do."

During those hearings Senator Howard Metzenbaum asked Regnery, "What have you done with respect to juvenile justice matters as far as studying the issues?" This is the exchange that followed:

Regnery: I have done considerable reading and other study on the juvenile courts system.
Metzenbaum: Tell us some of the works you have read concerning juvenile justice.
Regnery: I guess I cannot give you a list of them off the top of my head.
Metzenbaum: Can you give us any?
Regnery: Well, they are in my office. I cannot think of the titles and the authors, but they are either in my office or my home. I have read quite a number. I have also studied the issue of juvenile courts. I have studied the issue of juvenile corrections.
Metzenbaum: How did you study the issue of juvenile courts?
Regnery: Reading.
Metzenbaum: What did you read?
Regnery: Various books and articles.
Metzenbaum: What books?
Regnery: I will have to give them to you. I cannot remember all the titles of all the books I have read, Senator.

IN OFFICE Regnery devoted himself to issues that had little to do with juvenile justice. He was criticized by Republicans and Democrats alike for awarding a $186,710 grant to a dean at Jerry Falwell's Liberty College for the purpose of designing a high-school course on the Constitution. He drew even more bipartisan criticism when he awarded $789,000 to Judith Reisman, a former songwriter for the "Captain Kangaroo" show, to do

a study of cartoons in *Penthouse*, *Playboy*, and *Hustler*.

Reisman had been recommended to Regnery by his chief deputy, James Wooton, who was impressed by Reisman's allegations that Dr. Alfred Kinsey, the renowned pioneer sex researcher of the 1940s, had gotten all of his data on child sexuality from "a 63-year-old man who had sex with over 800 children." Wooton arranged for Reisman to meet Regnery. This meeting led to Reisman's getting the grant.

Reisman later stated in a memo found in Regnery's files that she had been given the money in part "to conclude research on the Kinsey data on child sexuality." Regnery now denies this. "As far as I know," Regnery told me, "I don't think any of our money is going for that Kinsey stuff." Reisman did not return my phone calls.

Regnery now concedes that "the grant was for too much money," suggesting it could have been done for around $600,000. He blames the mistake on "bad advice" from his staff. In fact, Regnery's research director, Pamela Swain, had told him the project could be done for between $20,000 and $60,000, and another official wrote a memo to Regnery saying Reisman's proposal was "very skimpy ... very broad for a minor statutory area" and "a natural for competition." The next day, Regnery awarded the noncompetitive grant to Reisman.

THE MOST extraordinary example of Regnery's practice of doling out grants for political purposes was a $4.25 million grant given in January 1984 to set up a National School Safety Center at Pepperdine University in California. The grant recipient was a close friend and political associate of Meese named George Nicholson, who had lost a bid to become attorney general of California in November 1982.

The fact that Nicholson, who had no previous affiliation with Pepperdine, received a noncompetitive grant just two months after losing the election attracted some attention on Capitol Hill. But Regnery assured a House subcommittee in April 1984 that there was nothing irregular about the grant. He repeatedly said that the administration had selected Pepperdine to sponsor the center, and that Pepperdine had in turn selected Nicholson. Both Regnery and Nicholson denied that Nicholson's friendship with Meese was instrumental in the awarding of the grant.

Yet memos in Regnery's own files show that he misled Congress. The administration privately agreed to give Nicholson the $4.2 million well before Pepperdine was involved. And they gave him the grant as part of a larger public relations effort by the White House to protect the president on a sensitive issue.

The issue was education. In late 1983 White House pollster Richard Wirthlin found that the American people disapproved of the administration's massive cuts in federal education spending by a margin of two to one. White House deputy counsel Michael Deaver was called on to mount a public relations campaign. If the administration wasn't going to change its policies, it could change the public's perceptions.

At the time Regnery was working with Gary Bauer, assistant secretary of education, on a report titled "Chaos in the Public Schools," an exaggerated portrait of mayhem in the classroom. For example, Regnery and Bauer asserted that there had been 2,400 cases of arson in public schools in the previous year. They neglected to mention, though, that the figure came from a National Institute of Education study that found the arson incidents cost an average of 39 cents each. In general, the report vastly overstated the problem of school violence. Democratic representative Pat Williams, who chairs the House Select Subcommittee on Education, pointed out that "students are from between four to eight times safer, depending on which major crime you are talking about, in schools than they are in their own homes."

But the school violence theme was both emotionally powerful and politically versatile. Bauer, an ally of the religious right, was hoping to whip up public support for tuition tax credits. The Justice Department was hoping outrage at school violence could be used to weaken civil rights law. Roger Clegg, head of the Justice Department's Office of Legal Policy, wrote a memo to Lowell Jensen, another top Justice Department official, proposing the administration claim that civil rights laws undermined school discipline by allowing students to sue school authorities. He suggested that the school discipline issue could be the pretext for introducing legislation to give legal immunity from civil rights legislation, not just to school officials, but to all public officials. And of course, Michael Deaver and the White House staff were delighted with an issue that could be used to divert public attention from the president's unpopular education spending cuts.

IN A MEMO dated November 15, 1983, Regnery urged the White House to schedule a televised presidential fireside chat about the importance of discipline in the nation's public schools. Two weeks later Regnery wrote a memo to then-attorney general William French Smith, stating that the White House "expressed considerable interest in the proposal" and that he planned to give $4.2 million to Nicholson. "We plan to fund a school safety resource center. . . . George Nicholson, the Republican candidate for Attorney General of California in 1982 . . . has tentatively agreed to assist us in this endeavor." The memo never mentioned Pepperdine. Whether Meese had anything to do with this tentative agreement is still not known.

In December 1983 the president embarked on an excellence in education campaign, and the "Chaos in the Public Schools" report was released to reinforce this blitz. On January 9, 1984, Reagan devoted his nationwide radio address to school discipline, and announced that Nicholson had been awarded a grant to establish the National School Safety Center. The irony was that Nicholson had not yet applied for the grant. On January 11, 1984, Nicholson finally submitted a formal proposal for the $4.2 million grant that the president had awarded him two days earlier!

Within a year and a half it became clear that Regnery and his superiors had been far more concerned about scoring public relations points than about actually establishing

a worthwhile institution. Regnery's staff had been skeptical from the start that Nicholson was competent to run the School Safety Center. During Nicholson's tenure as director of the California District Attorneys Association in the late 1970s, the group almost went bankrupt. Regnery says he knew of allegations of Nicholson's mismanagement as director of the association when considering the School Safety Center grant, but approved the proposal anyway. Last summer, after hearing numerous complaints about Nicholson's administrative practices, officials at Pepperdine ordered him to go on paid leave and then demoted him.

Regnery says that he is leaving the Justice Department because he has accomplished most of what he set out to do. "We redirected the way the whole criminal justice system regards juvenile crime," Regnery told the conservative *Washington Times*. "We put together some programs and research that will have, over time, a significant impact for the better."

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