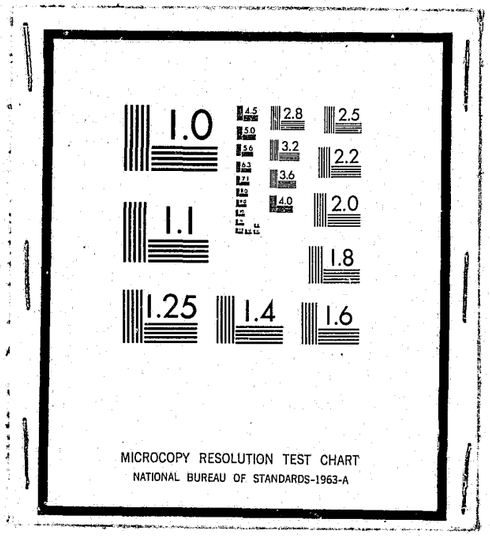

PROBATION and PAROLE

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THE JOURNAL OF THE NEW YORK STATE PROBATION AND PAROLE OFFICERS ASSOCIATION

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Probation and Parole is the professional journal of the New York State Probation and Parole Officers Association, Inc. and is the tangible expression of our goal to increase and improve communication between Probation and Parole staff on all levels in the State. Subscription to the journal is included in the $5.00 annual dues. Non-members may purchase the journal for $3.50 the single copy. All disciplines applicable to correction and rehabilitation are encompassed in this publication, with particular attention given to articles relating to conditions in New York State. Typewritten manuscripts should be addressed to the Editor, Probation and Parole, P.O. Box 408, Madison Square Station, New York, N.Y. 10010. The ideas expressed in these articles do not necessarily represent those of this Association or the agencies for which the authors are employed.

NEW YORK STATE PROBATION AND PAROLE OFFICERS ASSOCIATION, INC.
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NEW YORK, N. Y. 10010

MARTIN B. LAMBERT
PRESIDENT

September, 1975

Dear Colleague:

We are pleased to present this seventh issue of our journal, Probation and Parole, dedicated to the ideals and goals of the men and women who staff the field of corrections.

The New York State Probation and Parole Officers' Association, through its legislative, educational, and public relations programs stands for positive, constructive, and significant change in those areas of Criminal Justice which require revision. The professions of Probation and Parole have recently been attacked by both insiders and outsiders. Some have had valid criticisms; others have not.

Over the years, the Probation and Parole Officer has dealt with rising rates of crime and delinquency. Unlike traditional law enforcement officers, we are charged with playing a dual role that of Probation and Parole caseworkers. We must never lose sight of that duality by sacrificing one of our functions for the other. We must remain total in our approach to our jobs - or we may have no jobs to worry about.

During the past session of the New York State Legislature, attempts were made to completely do away with us. We must remain aware of the changing structure of the Criminal Justice System, and work within it to positively effect and alter that which time has shown us is ineffective. However, we must also strongly discourage efforts to "throw out the baby with the bath water."

The New York State Probation and Parole Officer's Association works through educational and legislative programs to influence intelligent progressive change. I would like to thank the members of the Executive Board and all members of the Association for the time and dedication they have expended in the betterment of their chosen professions.

Very truly yours,

Martin B. Lambert

Martin B. Lambert
President

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JUVENILE JUSTICE: A FORMULA FOR THE FUTURE

On April 17, 1975, the Nassau County Probation Officers Benevolent Association and the New York State Probation and Parole Officers Association in cooperation with the Department of Criminal Justice, C.W. Post Center of Long Island University presented the Probation Task Force Report and Professional Institute. The following abridged articles are in essence the position, support for that position and recommendations by the Probation Task Force for future changes or developments in the Juvenile Justice System. The policy of the editorial staff of the Journal has been, to date, to avoid printing position papers; however, at this time, we feel an exception should be made on behalf of the membership of our association, whose task force report this is. Papers of opposing viewpoint will, of course be given every consideration in terms of future publication....Ed.

Juvenile Justice: A Formula For The Future

I. DIVERSION PROGRAMS AND FAMILY COURT PROCESS

It should be noted that, while the juvenile justice system includes many agencies other than the courts, its philosophy is uniform. A loose amalgam of various municipal, county, and state agencies, the juvenile justice system includes police, courts, probation, temporary detention facilities, "private" schools, and the Division For Youth. Before discussing each of these aspects of the system individually, let us examine what we mean by "diversion." By diversion, as applied in the juvenile justice system, we simply mean turning youths away from the formal aspects of the system toward community reintegration. An example of this process in the criminal courts is Operation Midway, a pretrial court diversion program for first time felony offenders, that diverts them from the formal court system. Initially funded by the Federal Government as a pilot project, Operation Midway has been formally consolidated within the regular line operation of the Adult Division of the Nassau County Probation Department, and expanded as its major court diversion program. Operation Midway has, thus far, effectively diverted over 1500 indicted defendants from the regular, formal court process.

Through intense counseling and referrals designed to meet the specific needs of individual offenders, Midway has successfully helped in the total rehabilitation of these offenders outside the formal court process.

One of the basic assumptions of the criminal justice system is that everyone who is made subject to its care needs "treatment." This results from corrections "buying into" the medical treatment model, and unfortunately, sometimes "over prescribing."

Many people feel that such is the case with the PINS category, whom they contend should not be subjected to the juvenile justice system. We however would have to subscribe to the principal in loco parentis in such cases, as the category of youth described presents social problems at least equivalent to those of delinquent youth, and should not be deprived of the treatment potentially available through the Family Court.

The structural and procedural systems that society has established to deal with its problem segments have two built-in patterns that tend to be self-defeating. First, the juvenile offender is identified and labeled. Once labeled, certain sanctions are imposed which, in turn, tend to reinforce the offender's and others' convictions that he is a deviant, that he is different. The labeling process further tends to unlike treatment of like subjects for like acts, for example the juvenile on probationary supervision who acts out in the junior high school may be less likely to receive counselling or consideration, and be more likely to end up in detention than the non-labeled offender who may act out in the same manner. As these distinctions are made, the offender is further convinced of his difference and of society's discrimination. [1]

Second, as the deviance continues and the offender penetrates further into the juvenile justice system, he is subjected to an increasing degree of segregation with others of his kind. From special school, to local detention, to institutionalization in private schools, to state institutions, each step invites further identification with the sub-culture of the delinquent. [2] His anti-adult, anti-social peer-oriented values are reinforced and confirmed, and the positive social-producing influences of the majority of society are further removed from him. As the system's "treatment" is intensified, so too is the rejection, both covert and overt. As we try harder to socialize the deviant through traditional techniques, we remove him further from the normal socializing process. [3]

To the extent that the foregoing has validity, a counterstrategy is recommended to minimize the juvenile offender's penetration into the juvenile rehabilitative process. To this end, we must explore all available alternatives at each decision point, such as police, probation intake, investigation and supervision, court proceedings, short-term detention, placement and commitment. At each critical step, we should exhaust the less rejecting, less stigmatizing recourse

before taking the next expulsive step. [4] This should be done to the extent necessary to assure the most constructive handling of an individual case consistent with the needs of public safety and the objective of maximizing the health and safety of all citizens. [5]

The first potential area for diversion from more structured action in the juvenile justice system is presented at the police level. Many police departments have designated youth officers to deal with juvenile matters, including persons in need of supervision, and in compliance with court decisions, have set aside areas in police stations for the questioning of juveniles. In some areas the youth officer is a detective level assignment and often requires a college degree. Youth officers generally exercise discretion in making "stationhouse adjustments" or otherwise close out cases by referral of the juvenile to the parents, community agencies, or the Intake Division of the Family Court as alternatives to formal court action. In these cases where there is no adjustment or agreement, juveniles are "taken into custody," or "arrested," and advised of their rights. In such cases the youth may be brought directly to the Family Court for immediate arraignment, or released to his parents' custody (only in extreme cases will the juvenile offender be lodged at the Children's Shelter). It is more common however, where there is no adjustment, for the juvenile officer to draft a petition charging the youth with juvenile delinquency, or PINS and refer the matter to the Family Court. In some jurisdictions, the officer will appear at any conferences, or be present while the petition is drafted. The Intake Probation Officer will draft and /or process the petition, and the case will be calendared by the Clerk, who notifies the youth or his guardian of the date of appearance. Where there are sufficient personnel properly trained, the Juvenile Aid or Youth Bureau effectively serves to divert many juveniles from the Court System.

The purpose of Probation Intake is to screen and evaluate all cases referred to the Family Court and to adjust appropriate cases informally if the circumstances warrant, and all parties are agreeable. [6] The President's Commission on Law Enforcement and Administration of Justice has endorsed an informal, preadjudicatory service for juveniles (diversion) recommending that as many cases as possible be adjusted outside of the formal judicial process.

It is our feeling, based on study and experience, that Intake, the traditional diversion model is a neglected area of the Juvenile Justice System which ironically cannot utilize true diversion techniques. Although "diverting" between 50% and 75% of juvenile referrals from the formal Court process, a lack of personnel and statutory limitations upon Intake's jurisdiction (sixty days with an additional sixty day extension with approval of the Court) render it less effective than its potential. These factors also render regularly scheduled counselling sessions and follow-up on referrals difficult at best.

As a result of these handicaps, the Intake Probation Officer, one of the most highly skilled practicioners in the Juvenile Justice spectrum is frequently limited to single counselling sessions with juveniles, parents and other concerned parties, culminating in referrals to other public and private agencies. While such activities may lead to beneficial treatment and rehabilitation for many youths and families who are already, or can be readily motivated for such contact, for many others it falls far short of the mark.

We have no question that if the statutory time limit for Intake involvement was substantially increased, and sufficient personnel were allocated, that a realistic diversion model at this level could deter further acting out by many youths. In such a scheme, in addition to the one-to-one counselling role and referral to other outside agencies, or services within the Probation Department, the Intake Officer would serve as case manager, coordinating the array of treatment modalities available to the juvenile and his family.

In the context of intensive Intake, diversion assumes an expanded meaning: not only diverting as many cases as possible from formal Court action but "beefing up" viable alternatives for problem resolution and nurturing community resources where gaps exist.

The importance of engaging community support and involvement is recognized by the U.S. Department of Health, Education and Welfare. The value placed on community involvement by the Department of Health, Education and Welfare is so great that it has adopted a national strategy for preventing juvenile delinquency by developing comprehensive community based programs designed to meet the needs of all youths. [7] The obvious question, if it is acknowledged that community participation is essential, is how Probation Intake may engage these services. Before this question can be answered we must ascertain what alternatives do exist, what services are needed, and how best these services can be utilized. One means of such determination is to involve those Probation Officers who are continually involved and interacting with the community organizations and agencies. They know what services are available, how they function, and how they can be used therapeutically. [8] In order to capitalize on this particular expertise, this knowledge may be disseminated by means of group conferences and discussion of treatment plans in difficult cases, coordinated by the Probation Supervisor.

Both the role of the Intake worker and the efficacy of treatment would be substantially increased in such a system.

For the youth exposed to the Juvenile Justice System, the Intake or entry level of the Family Court is one of the most critical decision points. In most cases, we would recommend the application of intensive diversion process at this level as the alternative of choice and the least stigmatizing, most potentially effective recourse.

Where the complainant insists on formal Court Proceedings, his access to the Court may not be denied. We would suggest, however, the establishment of procedures whereby the Judge, based upon his evaluation of the individual case, and guided if necessary by a Probation report, could refer such cases back to Intake for diversionary treatment. This procedure should be effected without the formality of a fact finding hearing.

Another instance in which formal proceedings bypassing Intake intervention would be appropriate would be when the juvenile steadfastly denied guilt or culpability. In such cases, the youth's due process protections should be safeguarded by directing the case to the Court for a hearing. In these instances, rather than foreclosing exposure to the Intake diversionary model to such a youth, referral back to Intake by the Judge should be possible, with a dismissal of the finding based on the Court's discretion and a written summary submitted by the Intake Officer upon successful completion of the program. Should there be further acting out by such a youth while in the diversion program, the case could be returned to the Court for further, more formal disposition.

There would be relatively few instances where we would totally foreclose the option of diversion leading to informal adjustment at Intake, to a juvenile. These would be the cases of youngsters whose acts were so heinous, or so repetitious, or who had already been afforded the opportunity of such treatment in a prior case, that it would be inappropriate to consider informal techniques. Rather than dealing here with such a class in great detail, we shall refer the reader to the second section of the report on "The Dangerous, Violent and Habitual Juvenile Offender", which specifically spells out the characteristics of the group. Cases which, upon the reasonable judgment and discretion of the Juvenile Aid Bureau or the Intake Probation Officer, meet the criteria for such categorization, should be referred directly to the Court for formal action.

Other than these limited exceptions, the application of the intensive counselling and referral resources of the Intake Diversion model should be made available to all juveniles entering the Family Court.

If counselling at the Intake level is unsuccessful or the complainant or respondent insist upon a formal hearing, notice is given to both parties of the date for a Court hearing. The first part of this proceeding is called a "fact-finding hearing," conducted in accordance with rules promulgated for same, protective of the juveniles due process rights. Here the Court attempts to ascertain whether in fact the juvenile actually committed an act that is alleged by the

complainant or petitioner. [9] If an affirmative finding is made, the judge may refer the case to a Probation Officer for Investigation and Report (I & R) and for formulation of a treatment plan.

The purpose of the pre-sentence investigation in the Family Court, as in the Criminal Courts, is to provide the judge with a comprehensive legal and social history of the individual and a dynamic analysis to serve as a guide for disposition. The Court is not bound by the recommendation, if any is offered. However, under the Family Court Act there is not currently even a requirement that such an investigation be performed prior to certain dispositions, including placement on probation. As there is no real differentiation in this area in terms of the utility of a pre-sentence report between the Criminal Courts and the Family Court, we feel strongly that such a report, performed by the Probation Department serving the Court, should be required.

Generally, subsequent to a probation report being filed with the Court, we would see a sentence to Probation as being most appropriate and least stigmatizing, and the disposition of choice. A certain number of cases (generally described in the prior chapter) would, however be referred back to Intake for the intensive diversion project: others, for social or psychological reasons, or due to emotional deprivation might realistically require placement or commitment; and certain cases, those categorized as Dangerous, Violent, or Habitual Juvenile Offenders, should be automatically committed to a highly structured institution.

To better serve the majority of cases dealt with at the formal level for whom Probation would be the disposition of choice, the line Probation operation would again require strengthening to maximize its rehabilitative potential. Caseloads must be reduced to realistic levels and support services must be expanded and strengthened. Caps in services must be eliminated.

One relatively new dispositional option available to the Family Court Judge is the Adjournment in Contemplation of Dismissal (ACOD). We see this as an unnecessary alternative within the Family Court, irrelevant to the processes of Juvenile Justice. It is an outgrowth of the increasingly adversary nature of proceedings in this Court whereby attorneys attempt to plea bargain, receive a "favorable" disposition for their clients, or otherwise "win". The A.C.O.D. is a legitimate disposition for the minor, or first offender in the Criminal Courts, which do not have an Intake, or screening process. However, in the Family Court, where there is an initial screening process, where there is such a flexibility of available dispositions, the A.C.O.D. accomplishes nothing. To withhold treatment from the Juvenile Offender whose acts are serious enough to require Formal Court action not only serves no purpose, but is contraindicated.

We have also seen cases, of questionable legality, where "informal" supervision is imposed as a condition of an A.C.O.D. We can only respond that if the juvenile, in the discretion of the Judge, does require supervision, the formal processes of Probation should be utilized. Formal Probation supervision with its many treatment options and the possibility of return to the Court of a Violator of Probation for further disposition, but with the Judge also free at the successful conclusion of the Probationary term to vacate the original finding and dismiss the petition, is a far superior choice to an A.C.O.D. with "informal" supervision.

One of the biggest problems for the Probation Officer is to find an adequate foster home or residential treatment facility for his juvenile client. When it becomes apparent that a juvenile should be placed, it is the responsibility of the Probation Officer to secure such placement. This process involves forwarding a social history, complete psychiatric and psychological evaluation and profile (which may take weeks to schedule and complete) and other materials to the school, and a personal interview whereby the youth must be transported to the school by Deputy Sheriffs and/or Probation Officers, at great expense and security risk. Many of these private schools, in their quest for homogenous populations, have standards hard to reach for many of our population of Juvenile Delinquents or P.I.N.S. In addition, they enjoy the luxury of returning children to the Court if they

become "troublesome". It would appear that these schools, which are "private" but supported largely by public funds, are enjoying the best of both worlds. A general policy whereby juveniles can be referred to only one school at a time, was at the inception of these schools. This policy, widely accepted statewide, serves the administrative convenience of the schools, but does little for the youth confined in a detention facility, who must be rejected by one school before being referred to the next. It also discourages referrals of some youths to the "better" schools where rejection is probable, and is responsible for eventually relegating some to state training schools. Streamlining of the placement process, mandating proceedures and standards for the schools as well as the Probation Department is required. A "shotgun" placement approach, making referrals simultaneously to several schools, or attributing responsibility to one state agency, must be considered as alternatives to this current practice.

The purpose of long term detention facilities for juveniles is to provide rehabilitation and treatment leading to reintegration into the community. Included among such facilities are state training schools; urban homes, forestry camps, and START centers operated by the State Division for Youth; and the "private" schools.

The desirable direction in the area of long-term detention, except for the Dangerous, Violent or Habitual Juvenile Offender is toward the establishment of more community based and oriented non-secure facilities for smaller groups, closer to their own communities. Such facilities would allow for participation by the juvenile in a more "normal" community and lifestyle, including attendance at local public and vocational schools, part-time jobs, public service projects, etc. It would also provide less of a gap for the juvenile to bridge upon his return to the community. Treatment modalities could be varied, including individual and group counselling, vocational and educational programs, psychiatric services, etc. "Graduates" of such programs who establish a positive record in the community could be utilized at "peer counsellors". Youths with specific needs, as for instance for psychiatric treatment, would be assigned to facilities especially geared toward their problems.

Training school programs should be relevant to the needs of their population, and should include intensive remedial education and vocational programs, as well as medical, psychiatric, counselling and recreational programs. A regional system of training schools is recommended as making the youth feel less removed from his familiar surroundings, facilitating family visits and an integrated approach by school workers to the youth's problems and family oriented problems, and to allay unnecessary anxieties by parent or youth. It would also make the juvenile accessible to the Probation Department serving the sentencing Court, thereby potentially increasing their role.

Should the aforementioned system of community homes become functional, they could also serve the training school population as a transitional re-entry facility. Also, with increased utilization of community based facilities, the training school population would be reduced. Dangerous, Violent or Habitual Juvenile Offenders should be housed in a specific facility designated for that population. The control aspect would most evident in such a setting, and treatment techniques would be geared toward an extended period of time.

Insofar as the "private" schools, used by the Courts for placements are concerned, there has been little real control over their intake practices or programs. Different schools have chosen to serve different types of youth populations with diverse approaches and services. We feel that an increased form of direct control should be exercised by the State over such facilities in terms of intake, treatment, and release practices, thus effectuating a coordinated, rather than haphazard availability and administration of services. As the judiciary by and large feels that it has lost control over the placed or committed child, and as we shall develop in the following report, increased post-sentence authority and control should be vested in the Courts.

One challenge of the Juvenile Justice System is to find a sufficient number of suitable foster homes for juveniles requiring removal from their own homes for reasons of health, welfare or safety. Such a setting is by far the least restrictive, most natural, and least stigmatizing and expulsive out-of-home placement. Unfortunately, the youngster for whom such placement is most appropriate has frequently been emotionally scarred by a disturbed and disruptive family setting, and may present greater problems than many foster parents are willing to contend with.

The purpose of short-term detention facilities is to provide brief detention for juveniles awaiting Court proceedings or placement, where their own or the community's welfare dictates. Unfortunately, in addition to serious offenders detained for the public protection, such facilities may house runaways, truants, emotionally disturbed youngsters, and others whose home environment is so lacking or negative as to not allow the youngster's return to it.

It must be emphasized that shelters and the like are conceptually short-term, last resort detention facilities and not treatment facilities. Nevertheless, they should provide a professional staff, counselling, health services, psychological services, and educational and recreational programs, at the minimum. Secure shelters are preferable only for the dangerous or violent offender. For other youngsters, depending upon their needs, non-secure shelters, group homes, or foster homes could provide alternatives with different degrees of control, and less disruption of normal routine.

While some Family Courts have established review procedures for cases in detention for longer than a specified period of time, such factors as completion of a social study, psychiatric referral and evaluation and unsuccessful placement attempts frequently extend such detention beyond desirable limits. Since some youngsters realistically require secure detention, priority should be given to processing these cases so that, even if committed, an integrated treatment program may be initiated as quickly as possible. The greatest delays generally occur with these "difficult to place" youngsters.

RECOMMENDATIONS

In addition to the recommendations or concepts which may be specifically or implicitly contained within the preceding chapters, there are several additional proposals which we shall make, and others which we shall reiterate.

1. All larger police departments should be required to maintain Juvenile Aid Bureaus, as an integral component of the diversionary process. Wherever practical, officers assigned to such Bureaus should possess bachelor's degrees, with a major or minor in the social sciences or criminal justice, and such assignment should be at the detective level. Juvenile Aid Bureaus thus structured could exercise on increased function and discretion within the Juvenile Justice System.
2. We would recommend that the concept of "taking a juvenile into custody", as opposed to making a formal arrest, be standardized as police procedure, for obvious reasons.
3. The Intake Division of the Probation Department in the Family Court should be the primary diversion program in the Juvenile Justice System. This will require the assignment of additional personnel, to allow for intensive probation and counselling casework, follow-up on referrals, group staff conferences, discussion and development of community resources, etc. The Intake Probation Officer should function as the case manager in the Intake diversionary model.
4. The Family Court Act, Sec. 734 (c) should be amended to provide that

in the case of a juvenile, the permissible period for efforts at adjustment be able to extend for 180 days (rather than 60 days), with extension for an additional period of 180 days (rather than 60 days) with leave of a Judge of the Court.

5. Only those cases should be statutorily excluded from the Intake diversion model where:
   a) the complainant insists upon access fo formal Court proceedings;
   b) the respondent juvenile denies guilt or culpability of the acts charged:
   c) the juvenile, if exposed to formal Court proceedings,could reasonably be expected to be found a Dangerous Violent or Habitual Juvenile Offender; and
   d) at the discretion of the Probation Officer, where the juvenile has previously been afforded the services of the Intake diversion process.
6. We recommend legislation to provide that in such cases, as referred to the Court for formal action, after an affirmative finding at a fact finding hearing, a Probation Investigation and Report must be conducted before a disposition may be made. This report should be conducted by the Probation Department serving the Court in question.
7. For those cases requiring formal Court proceedings, Probation is recommended as the disposition of choice in most cases. Notable exceptions would be cases referred back to the Intake diversion model, and the Dangerous, Violent, and Habitual Juvenile Offender.
   The Probation supervision function could be made more effective in reacting to individual needs by reduction of caseload levels and strengthening of auxiliary and support services.
8. The Family Court Act should be amended to eliminate the Adjournment in Contemplation of Dismissal as a disposition. Juveniles with problems serious enough to require formal Court action should not be deprived of available treatment.
9. Greater control must be exercised by the State over the intake, treatment and release practices of the publicly supported, "private" schools. A "shotgun" placement approach whereby referrals would be made simultaneously to several schools, either through the State Division for Youth, or by individual Probation Departments, is required to eliminate unnecessary pre-placement detention and expedite the treatment process.
10. The State training school system should be operated as a network of regional institutions and facilities, with the juvenile placed at the facility nearest his home unless special needs requiring special treatment, are present.
    There should be a separate, highly structured institution for the Dangerous, Violent and Habitual Juvenile Offender.
11. We recommend the establishment of more community based, nonsecure facilities and group homes for smaller groups. Such facilities would be the placement choice in many cases, and could also serve as transitional re-entry facilities for the training school population.
12. Every treatment facility should be accountable for meeting the treatment mandate by providing highly professional staffs and programs.
13. Short-term detention facilities and secure shelters should be reserved for the most serious offenders, whose detention is clearly required by the public interest. Less secure facilities, including group and foster homes could be utilized for youngsters requiring temporary removal from an undesirable environment pending long range planning.
    The above-mentioned facilities too, although more transitory, should be held accountable for the same high standards desired of long-term facilities, with programs geared more appropriately to short-term crisis intervention.
14. We are fully in accord with the guarantee of due process protections to the juvenile appearing before the Family Court.

We find it regretable however, that the trend towards selective application of these rights has been largely spurred by the failure of the Juvenile Justice System to fulfill its mandate of treatment and rehabilitation.
Even with the increased application of due process within the system, we feel it is possible for Family Court proceedings to be conducted in a less adversary fashion, so as to best serve the interests of both the youth and the community.

15. Upon examination of the many legislative proposals to either increase or decrease the age of eligibility for Family Court jurisdiction over juvenile offenders, we have found no studies or evidence provided to demonstrate the efficacy of such change.
    Until such affirmative evidence can be produced we see no meaningful mandate to effect such change.
16. We agree conceptually with the proposals advanced by the Association of Family Court Judges of the State of New York to require all parties to a proceeding before the Court, and those responsible for the care of a child, to cooperate in seeking and accepting treatment and counselling. However, we do have reservations as to the enforcability and constitutionality of these broad proposals.

FOOTNOTES

1) Robert L. Smith, "Diversion: New Label - Old Practice, LEAA Monograph, 1973, p. 44.
2) Ibid, p. 45.
3) Ibid, p. 45.
4) Ibid, p. 45.
5) Division of Probation: Program Analysis & Review, June 1973.
6) In the case of preadjudication informal asjustments, preservation of the child's right to demand a formal adjudication of his status is particularly critical. In all probability this is constitutionally required. (Klopper v. North Carolina, 386 4S213 (1966)).
7) Robert Geinguari, p. 8, LEAA, 1973.
8) Francis N. Smith, N.Y.S. Division of Probation, Northeastern Area Office Lake George, New York, "Evaluation of Intensive Intake Program," p. 6.
9) Daniel L. Sholer, "Counsel in Juvenile Court Proceedings - A Total Criminal Justice Perspective, "Journal of Family Law, 1968, Vol. 8, No. 2, pp.243-277.

II. THE DANGEROUS, VIOLENT AND HABITUAL JUVENILE OFFENDER

Delinquent behavior is learned behavior acquired through a process of socialization. The learning of delinquent roles is maximized in a criminalistic society and the United States is such a society. [1] The Dangerous, Violent and Habitual Offenders are the victims of a society whose social institutions are failing. The fact remains that society is failing our youth. Their families are failing. Their schools are failing. The social institutions generally relied on to guide and control people in their individual and mutual existence are not operating effectively. Instead of turning out men and women who conform to the "American Norm," at least overtly, our society is producing a higher rate of crime, vice and financial dependence. [2] No wonder we are now faced with this new classification of the Dangerous, violent and Habitual Criminal.

We classify this type of Juvenile Offender as a child who is sixteen (16) years of age or younger "who has committed an act which would be a felony if committed by an adult, where, after social study and a hearing, the court finds that the child is not committable to an institution for the mentally ill and not treatable in any institution or facility of the State designed for the care and treatment of children, or where the court finds that the safety of the community clearly requires that the child continues under restraint for a period extending beyond his minority." [3]

Another definition that explains who these juveniles are is contained in "The Standards for Juvenile and Family Courts" published by the Children's Bureau of U.S. Department of Health, Education and Welfare in 1966. The report gives a positive outline which defines our conception of who is the Dangerous, Violent and Habitual Juvenile Offender. The criteria put forth are:

1. Seriousness of the alleged offense
2. Aggressive, violent, premeditated or willfulness by which the offense was committed
3. Evidence apparently sufficient for a grand jury indictment
4. The juvenile associates in the alleged offense will be charged with a crime in adult court
5. Sophistication, maturity and emotional attitude of the juvenile
6. Record and history of the juvenile, including prior contact with the police, courts and other official agencies
7. Possible need for a longer period of incarceration
8. Community attitude toward the specific offense
9. Proximity of juvenile's age to maximum age of juvenile court jurisdiction[4]

In the famous Supreme Court Kent v. U.S. decision we see a similar definition of this class of juvenile.

> "An offense falling within the statutory limitation...if it is heinous or of an aggravated character, or-even though less serious - if it represents a pattern of repeated offenses which indicates that the juvenile may be beyond rehabilitation under juvenile court procedures, or if the public needs the protection against such a person." [5]

The social and psychological profile of such a juvenile is a difficult proposition. Because we are dealing with human reactions to the social, personal, economic, etc. problems, an attempt to explain the exact nature of this type of Juvenile Offender would be impossible. In reviewing the extensive literature that covers the psychological and social reasons for the development of the Juvenile Delinquent, one fact above all emerges, and that is that our social scientists cannot agree on the causes and effects of Juvenile Delinquency. We do know that the environment and conditions of the ghettos and slums of our major cities contribute to the problem.

In "The President's Commission on Law Enforcement and Administration of Justice" we see that the commission deduced from the limited information available to draw a tentative definition which we feel as closely as possible represents some social characteristics of the Juvenile Offender. The report states that he is a child of the slum, from a neighborhood that is low on the socio-economic scale

of the community and harsh in many ways for those who live there. He is getting younger (below sixteen (16)), and is one of numerous children who lives with his mother in a house that sociologists call female-centered. The family may be broken; it may never have had a resident father. He may never have known a grown-up male with whom he could identify or emulate. From the adults who care for him he has had leniency, sternness, affection, and perhaps indifference, in erratic and unpredictable succession. [6]

The family unit is the first and most basic institution in our society for developing the child's potential. It provides, more than any of our other social institutions, for the emotional, intellectual, moral, and spiritual needs of the juvenile. It is within the family setting that the child must learn to curb his desires and to accept rules that define the time, place, and circumstances under which highly personal needs may be satisfied in socially acceptable ways. This early training-management of emotion, confrontation with rules and authority, and the development of responsiveness to others, has been repeatedly related to the presence or absence of delinquency in later years. [7]

Research findings, while far from conclusive, point to the principle that when the organization of the family, the contacts among its members, or its relationships to the surrounding community diminishes, the moral and emotional authority of the family as it relates to the young person, increases the likelihood of delinquency. [8]

Other sociological factors that are important to understanding this type of Juvenile Offender are Discipline, Parental Affection or Rejection, and Identification between parent and child. An important research study done by the Glueck's indicates that the most important factor in the lives of many boys who become delinquent is their failure to win the affection of their fathers.

Extensive research done on Selection and Prediction Methods of Juvenile Delinquency can be found in research done by Bechtoldt in 1951. [9] Research done by Carl Wentham on "The Function of Social Definitions in the Development of Delinquent Careers" [10] also provides an excellent overview of the social dynamics in the causes and prediction of Juvenile Delinquency along with an extensive reference on this subject.

As for the psychological profile of the Dangerous, Violent and Habitual Offender, the literature has failed to address itself to this problem. Fritz Redl states that the juvenile uses a series of ego devices to make delinquent behavior possible and to keep it guilt free. Such ego defenses as repression, blocking, and defending impulse gratification at any cost, are repeatedly present in an analysis of this type of juvenile. He uses such techniques as: "Repression of Own Intent", "He Did It First", "Everybody Else Does Such Things Anyway", "We Were All In On It" and "But Somebody Else Did That Same Thing to Me Before". As Redl further states, "Their deficient and sick conscience happens to coincide with a deficient or delinquent ego. That makes for a combination which seems to defy our usual treatment channels, and which taxes even the most ingenious total treatment strategy to the utmost." [11]

Psychologically, the Dangerous, Violent and Habitual Juvenile Offender cannot be defined with any sort of definite structure. Thus we feel that individual differences are an important consideration when putting a juvenile into this classification. The psychological and psychiatric profile prepared by the professionals in the mental health disciplines should consider the psychological background of the juvenile, the circumstances that precipitated the deviant action and the awareness of its consequences when making a diagnosis, and more importantly a prognosis for treatment of the juvenile. Since this workup is extremely important in helping the Court to later decide on a proper disposition, it is incumbent that these reports make positive and realistic determinations in their findings.

It is our belief that the Dangerous, Violent and Habitual Juvenile should only be defined as such when he commits serious acts such as criminal homicide, under the category of murder and nonnegligent manslaughter, forcible rape, robbery

and aggravated assault, or lesser felonies repeatedly committed. These criminal classifications must be applied in a proper court setting to determine whether or not the juvenile should be placed into the class of Dangerous, Violent and Habitual Offender. If the juvenile is adjudicated as either Violent, Dangerous, or Habitual or any combination of these, there should be extant proper procedures to allow the Court to be responsive to the problem.

Offenses committed by young people should not be excused or condoned. The society in general should be protected, and young people must be held responsible for the consequences of their misconduct. Society has the moral obligation to provide for the positive rehabilitation of these young people, so as to effect their positive reintegration into our society.

The historical and philosophical development of the Juvenile Court and Juvenile Justice has matured to the point where the rights of the juvenile must first be protected. The basic principle that a child involved in delinquency is in need of treatment rather than of retributive punishment is widely accepted today by experts in the juvenile field. With the current trend in prisoners rights, it appears that there will be an even greater expansion of court review of the conditions of confinement. A major breakthrough is the "right to treatment" concept. The Courts have held that a child in detention must receive psychiatric treatment when indicated or be released. In recent cases, the Courts have required the Juvenile Correction Systems to raise the levels of service. The standard Juvenile Court Act provided that "a parent, guardian, or friend of a minor, whose legal custody has been transferred by the court to an institutional agency, or person, may petition the court for modification or revocation of the decree, on the grounds that such legal custodian wrongfully denied application for the release of the minor or has failed to act upon it within a reasonable amount of time, and has acted in an arbitrary manner not consistent with the welfare of the child in the public interest." [12]

The historical and philosophical trends in Juvenile Justice have brought the Courts to the point where today, they must take positive and definite action on situations which are characterized by the act of the Dangerous, Violent and Habitual Juvenile Offender. In taking action in such cases, the Court may have to limit the child's freedom in order to protect society. But as will be seen later, when such rights are limited they can be so limited only in accordance with due process of law and only to the extent and for the period necessary to insure protection of the public and welfare of the child. Once this has been attained, such rights are reestablished. Donna E. Renn, in a paper published in Crime and Delinquency, addresses the responsibility of the Court for adequate treatment of juveniles:

> "Treatment is the quid pro quo for confinement and the predicate for the constitutionality of the abbreviated due process. A serious legal problem arises if no treatment is given to one confined for treatment. If a person continued under the exercise of the parens patriae powers proves that he is not receiving treatment, a legal challenge to the confinement would seem to be available in that sole jurisdiction for confinement has failed." [13]

From this trend in the Courts today, we observe that the "right to treatment" emerges as the alternative to the individuals' right to be released.

Three major trends are discernible in our present system of Juvenile Justice:

1. The tendency since Kent and Gault to adopt the procedural safeguards offered in the Criminal Court.
2. The effort to constrict juvenile court jurisdiction.
3. The expanding choices proposed for the court in making disposition.

In effect, "due process" and "proper treatment" have emerged as the most important considerations for the Family Court when acting within its jurisdiction. It is granted that these considerations are important, but along with these rights, are

the rights of the law abiding citizen to "life, liberty and pursuit of happiness." When the Dangerous, Violent and Habitual Juvenile Offender violates these rights, the Court system just use "due process" and "proper treatment" to protect not only the individual, but also the society. The Juvenile Justice System must be made to be responsive to these needs.

> "The institution as a means of coping with the problems of specific sectors of our population seems at this point to have run its course. Whether one is aged, below par intellectually or emotionally delinquent, alcoholic, or drug addicted, the source-- and the remedy-- of the problem lie in the communities where such people come from. By bringing them back into the community, by enlisting the good will and the desire to serve, the ability to understand, which is to be found in every neighborhood, we shall meet the challenge which such groups of persons present, and at the same time ease the financial burden of their confinement in fixed institutions." [14]

The problem with presenting positive solutions to detention of juveniles is that all the rhetoric about closing institutions or building new and different ones must be viewed as the result of the basic problems that exist in our society. We must turn away from our traditional approach and move to the real solutions of the problems that face our society. It is as if the complexities of society have tied the human race into a bureaucratic knot. Because of this bureaucracy, there is no responsibility or accountability. No one is willing to say "stop." We must reexamine our systems and institutions and make them responsive to the needs of society. As members of the Criminal Justice System, while we may not be able to solve the problems of society, we can react to them and offer our views born of first-hand experience.

Since this paper deals specifically with the Dangerous, Violent and Habitual Juvenile Offender, we will address our discussion on detention and treatment toward him, but such discussion has relevance to the whole issue of juvenile detention treatment.

Confinement is necessary for the Dangerous, Violent and Habitual Juvenile Offender, and he must be in secure institutions until it is safe to release him. Since only a small percentage of the Juvenile Offender population meets this criteria, a maximum security detention facility should exist, which because of its small size, could be staffed for genuinely meaningful treatment, directed towards specific problem areas. Neither mental hospitals nor prisons are now capable of treating such offenders. Treatment is the "quid pro quo" for confinement; these institutions must provide positive rehabilitation or face the consequences of the legal implications of their failure.

The Juvenile Offender who is confined to our detention institutions must be made aware in a consistent fashion, that we do care about him and what happens to him. One of the chief dichotomies of corrections lies in the fact that while the intended purpose of incarceration is the reform or rehabilitation of the offender, the process of incarceration itself may prevent its realizing this goal. Custodial goals and treatment goals are often in conflict; for example, the goals of self-development and self-sufficiency of inmates may not be compatible with the needs for control and security. Institutional values for security and discipline often create an atmosphere of hostility and resentment amont inmate populations. Security and the need for self-discipline thus become self-perpetuating. [15]

Therefore, we suggest that detention facilities reexamine their security goals. Both the offender and the community must become the focus of correctional activity. The reintegration of the offender into the community comes to the forefront as a major purpose of correction. The reintegration of the offender requires the participation, not only of the offender and the correctional personnel, but also the police, the judicial system, public and private agencies, citizen volunteers, and civic groups. [16]

Along these lines, the correctional facilities should use the resources of the community to help the offender. Volunteer programs using local college and graduate students can provide the needed one-to-one contact so important in bringing about proper resocialization of the offender.

Another important consideration in detention and treatment is the development of halfway houses that can afford the offender the opportunity to re-enter the community. In addition, the juvenile can still receive much needed treatment and support, provided that halfway houses are properly staffed with qualified personnel. Cowden and Basset [17] strongly suggest extension of the institutional period for younger offenders and development of rehabilitation programs that specifically facilitate increased maturation. They state that maturation is a significant factor in the reduction of serious adjustment problems of high risk offenders and of their propensities toward recidivism.

Another important treatment and detention need is to provide facilities with full-time qualified medical and psychological services to meet the needs of its rehabilitative responsibilities. Adequate diagnostic facilities are needed to provide direction for the best possible treatment of the Juvenile Offender.

RECOMMENDATIONS

In addition to the specific or implicit recommendations that were made in the preceding chapters, we would recommend a number of changes in the Family Court Act, to make the Family Court more responsive in dealing with the Dangerous, Violent and Habitual Juvenile Offender.

1. Amend Section 752 of the Family Court Act by adding subparagraph b:
   b. The respondent may be deemed by the Court to be a Dangerous, Violent or Habitual Juvenile Delinquent after his abjudication as a juvenile delinquent. Such determination shall be made by the Court after considering the nature of the charges involved in the original petition; the aggressive, violent or premeditated nature of the offense; previous juvenile record and response to previous treatment efforts; need for extended commitment; and such other social and psychological information as the Court may deem required or appropriate.
2. Amend Section 753 of the Family Court Act by adding subparagraph e:
   e. The Court shall have, at its discretion, the power to waive its jurisdiction to the criminal court in any felony case the Court feels may be better handled by those courts.
3. Amend Section 756c of the Family Court Act to equalize the age of extended placement of juveniles for both males and females to the twenty-first birthday.
4. Amend Section 708b of the Family Court Act to provide the Court, after due process, with the flexibility of commitment to a special institution, a person who has been deemed to be a Dangerous, Violent and Habitual Juvenile Delinquent. The Court would also be provided with the power of sentencing the persons to an indeterminate period of commitment to be terminated only when a judge from the committing Court deems the said person to be rehabilitated. A yearly mandatory judicial review would also be provided for.

In addition to the above specific recommendations to the New York State Family Court Act, we recommend the following general recommendations:

5. The State Division for Youth should be required to meet the treatment mandate through the establishment of a separate and special institution structured to deal with the Dangerous, Violent and Habitual Juvenile Offender. Respondents found to fall into this category by the Family Court Judge would be committed directly to this institution.
   This facility should provide meaningful rehabilitative and treatment programs, implemented by a professional staff including medical, psychiatric, educational, vocational and counselling personnel.
6. The reintegration of the youth into the community should proceed through a system of secure and non-secure community halfway houses located within the juvenile's home region. Each change in custody status would have to receive prior approval of a judge in the sentencing Court.
7. Probation staff serving the sentencing Court should be bolstered and utilized during the critical stage of reintegration of the juvenile into the community as an alternative to existing aftercare services.
8. Probation staff in the line operation, those closest to the problems and existing gaps in services, should be encouraged to submit proposals for the utilization of State and Federal grant funds to strengthen and beef up the line function in neglected areas, so as to provide the best possible services and response to assist in positive rehabilitative efforts within the Family Court System.

FOOTNOTES

1) Presidential Commission on Law Enforcement and the administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, (Washington, D.C.: U.S, Government Printing Office, 1967), pp. 188-221.
2) Ibid, p. 43.
3) Willian H. Sheridan (preparer), Standards for Juvenile and Family Courts, National Council On Crime and Delinquency and National Council of Juvenile Court Judges, (Washington, D.C.: U.S. Government Printing Office, 1966).
4) U.S. Dept. of Health, Education and Welfare CDildren's Bureau, Survey of Juvenile Courts and Probation Services, (Wash. D.C. : U.S. Government Printing Office, 1966).
5) U.S. Supreme Court, Kent vs U.S. 383 US 541, (1966).
6) Task Force Report: Juvenile Delinquency and Youth Crime, op. cit., pp. 41-47.
7) Ibid, p. 45.
8) Glueck & Glueck, Unraveling Juvenile Delinquency, (New York: The Commonwealth Fund, 1950).
9) H.P. Bechtoldt, "Selection," Handbook of Experimental Psychology by S.S. Stevens (New York: Wiley, 1951) pp. 1237-1266.
10) Carl Wentham, Presidential Commission on Law Enforcement and the Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, (Washington, D.C.: U. S. Government Printing Office, 1967), pp.
11) Fritz Redl, Children Who Hate, (Glencoe, Ill: The Free Press, 1951).
12) Jeffrey E. Glen & J. Robert Weber (Preparers), The Juvenile Court: A Status Report, (Rockville, Maryland: National Institute of Mental Health, 1973).
13) Donna E. Renn, "The Right to Treatment and the Juvenile", Crime and Delinquency, Vol 19 #4 (1975), pg 478.
14) Y. Bakal, Closing Correctional Institutions, (Lexington Mass.: Lexington Books, 1973), pp. vii-viii.

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CAPITAL PUNISHMENT

By
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The issue of Capital punishment has been one of the most continuous and fiercely debated in our history. Since 1846, several States, some 15 in number, have completely abolished capital punishment, and of these, 11 have reinstated the death penalty. Of these 11, 3 have reabolished capital punishment. At the moment, there are only 10 States of the 50 that have totally abolished the death penalty. As evidence of the strong support for capital punishment, the House of Representatives, on October 2, 1972, by a majority of 354 to 2, voted the death penalty for aircraft hijackers.

In 1965, New York State abolished the death penalty, with certain exceptions. On June 29 of this year, the U.S. Supreme Court, by a five to four decision, held unconstitutional the laws of Georgia and Texas, which authorized the death penalty. Two of the three cases before the Supreme Court were rape cases, not involving homicide. The decision has been widely misconstrued to hold that capital punishment was abolished for all purposes. This is not a fact, as a reading of the decision will clearly show. Each of the none Justices had a written opinion, and only two of the none clearly support complete abolition. In any event, this is an unfortunate decision, because it has left confusion and uncertainty in its wake. There was no legal precedent for this decision, even though the issue had been before the Supreme Court on previous occasions. Also, it is noted that the framers of our Constitution explicitly authorized capital punishment. The fifth amendment of the U.S. Constitution makes this abundantly clear. [1]

Since the abolition of the death penalty in our State, we have had a continuous increase in the homicide rate. As a matter of fact, over the past 2 years, we have had one record after another broken with the number of murders. New York City had 1,466 murders in 1971, an increase of 31 percent over the previous year. During the first 5 months of 1972, New York City had a record of 614 homicides and an unprecedented number of 57 homicides for the first week in July of this year. It is noteworthy that this 1-week record came immediately following the announcement of the U.S. Supreme Court decision.

The greatest significance of these homicide figures for 1972 is the fact that during the same period of time the total of serious crime in the city was decreasing by 21 percent. The trend of soaring homicides is similar throughout the entire State of New York. The total recorded in the State for 1971 was 1,817, in contrast with 1,439 the previous year, representing a 26 percent increase. The circumstance of soaring homicide rates, with the aggregate of other serious crime leveling or dropping, is also true outside New York City.

It is interesting to note England abolished capital punishment in 1965. Their experience has shown a marked increase in homicides, even though their homicide rate is substantially below ours in this country. Nevertheless, responsible groups are banning together, urging the reestablishment of capital punishment.

I recognize very well that the statistics that I have set forth do not prove, with absolute certitude, that capital punishment is a deterrent to murder. Likewise, I would dispute the claim of the abolitionist that statistics prove their position. This word seems to be very loosely used in this debate. But, I do submit the statistics above stated do serve as a basis for a sound, commonsense conclusion

that the nonexistence of the death penalty has direct relationship with homicides, which are now reaching epidemic proportions. Nowhere was this dramatized more than the Brooklyn Chase Manhattan holdup this past August. The holdup man, while holding eight hostages in the bank for many many hours, told a reporter that if the cops stormed the bank, "I could kill. I will shoot everyone in the bank. The Supreme Court will let me get away with this. There's no death penalty. It is ridiculous. I can shoot everyone here, then throw my gun down, and you can't put me in the electric chair."

This is positive proof that the penalty, or lack thereof, was very much on the mind of one armed criminal, a potential killer. It is unreasonable to contend that the death penalty does not enter the minds of some other killers. Such being the case, commonsense dictates that at least some will be deterred. To suggest otherwise is to contend that individuals do not fear death. I strongly urge, if one potential murderer is deterred annually and one innocent life spared, it justifies capital punishment. This is particularly so for homicides involving premeditation.

On March 17, 1971, J. Edgar Hoover testified before the congressional subcommittee that 19 of the killers of police officers during the 1960's had previously been convicted of murder. In 1971, when we had no executions, there were an estimated total of 17,630 murders in our country, as compared with approximately 9,000 in 1960 - a 96 percent increase.

One of the unfairest arguments used by abolitionists is: In recent years the executions have dropped to zero, proving the disfavor of the penalty. This is not true. The very same abolitionists are the ones who have started massive legal attacks on capital punishment across our country, dating back 5 or 6 years. This has caused the sentencing authorities to pause, and appropriately so, pending the final word from our highest authority, the Supreme Court. It does not follow that capital punishment is in disfavor - as the polls and referendums have clearly shown. Unfortunately, the Supreme Court has not given a final word, rather a very indecisive decision.

Those in State government in the executive branch and in the legislature, in the area of criminal justice, have been motivated by an overriding concern for rehabilitation of the criminal. I acknowledge their sincerity and high purpose. I fully support efforts to rehabilitate the criminal, but not at a cost of sacrificing the rights of society. A proper balance can be and must be struck. But the authorities have achieved little in accomplishing their purpose, and, worst of all, they have created an imbalance which has neglected the average citizen. Our citizens in cities and suburbs live in greater fear than at any time in modern history. It can only end when the legislature returns to the fundamental and basic principle: We must have swift and certain punishment for wrongdoing. We must show greater concern for our citizens and the victims of crime than for the criminal. The first and imperative step is to reestablish capital punishment.

FOOTNOTE

1) The pertinent portion reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless...." (Emphasis added.)

Capital Punishment: Some Further Comment

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In a recent article appearing in the February, 1973, issue of the F.B.I. Law Enforcement Bulletin, Sheriff Daniel F. McMahon (Westchester County, New York) presents an interesting but less than convincing argument for restoring the death penalty. [1] McMahon's arguments for restoring the death penalty are essentially three. First, despite the United States Supreme Court's recent ruling "outlawing" capital punishment, this action is without legal precedent. In fact, McMahon feels that the Court's 5 to 4 decision is clearly contrary to the provisions of the United States Constitution. [2]

Second, McMahon believes the decision to abandon the death penalty is clearly "out of tune" with the mainstream of public sentiment. He suggests this is reflected both by the House of Representatives recent (October 2, 1972) 354 to 2 vote to make air hijacking a capital offense and the results of recent polls and referendums. [3]

Lastly, and most importantly, McMahon presents statistical evidence which he interprets as both indicating the deterrent effect of the death penalty and the unfortunate consequences of abolition. These statistical arguments, which are our major concern here, are essentially three:

1. Since the abolition of the death penalty there has been a "continuous increase in homicide" in both New York State and City. For example, New York City had 1466 murders in 1971, an increase of 31% over 1970.[4] Likewise, for New York State, there were 1817 homicides in 1971, an increase of 26% over the 1439 reported killings in 1970.
2. As in the United States, England which abolished the death penalty in 1965 has also since experienced a "marked increase in homicides."
3. In 1971 when there were no executions there was an estimated 17,630 murders in this country compared to approximately 9000 homicides in 1960 (a 96% increase) when the death penalty was in much more common use.

In interpreting these facts, McMahon readily admits that "they do not prove with absolute certainty that capital punishment is a deterrent to murder." They do serve though, according to McMahon, as a basis for the "common sense conclusion" that the nonexistence of the death penalty has a direct relationship with increasing homicides. [5]

With the statistics McMahon presents we take no issue. We do, however, object to both: (a) his selection of facts by which to examine the death penalty question, and (b) his interpretation of the statistics he does present. Both types of difficulties may be best illustrated by briefly examining each of the above arguments.

I. Abolition and Homicide

Since abolition, McMahon argues there has been a "continuous increase" in homicide in both New York City and state. He cites figures showing a 30% increase in homicide in New York City between 1970 and 1971 and a 26% increase for the state between these years. With these figures we can take no issue. They do not, however, indicate the "continuous increase in homicide" McMahon attributes to the abolition of the death penalty in New York. To more properly examine the consequences of abolition it would seem more appropriate to compare homicides before and after 1965 when the death penalty was stricken. Homicide statistics for both New York City and state for years following and prior to abolition are available in the F.B.I. Uniform Crime Reports and are presented in Table I.

(See Table I)

Table I

Number and Percent Change In Homicides For New York City and State Six Years Before and Six Years After Abolition of the Death Penalty*

Year	New York State		New York City	
	Number	% Change	Number	% Change
1971	1817	+26	1466	+31
1970	1439	+ 9	1117	+ 7
1969	1320	+12	1043	+15
1968	1181	+19	904	+21
1967	993	+13	745	+14
1966	879	+ 6	653	+ 3
* 1965	833	0	631	- 1
1964	833	+18	636	+16
1963	705	+12	548	+ 8
1962	628	+ 4	507	+ 5
1961	603	+25	482	+24
1960	481	- 3	390	0
1959	497	+ 8	390	+10
Ave. Percentage Increase before abolition:		11		11
Ave. Percentage Increase after abolition:		14		15

*New York abolished the death penalty in 1965 with the exception of the following offenses: (a) killing a peace officer who is acting in line of duty, and (b) for prisoners under a life sentence who murder a guard while in confinement or while escaping from confinement.

Source of statistics: Federal Bureau of Investigation, Crime In The United States: Uniform Crime Reports, U.S. Department of Justice, Washington, D.C.

Table I reports number and percentage change in homicide for New York City and state six years before (1959-1964) and six years after (1966-1971) abolition. Inspection of these figures reveals that since 1965 the number of homicides has increased each year. Further examination, however, shows the number of homicides between 1959 and 1965 (before abolition) to have also generally increased each year. If the abolition of capital punishment has had the effect of increasing homicides, as McMahon argues, we would expect a greater percentage increase in offenses after 1965 than before this year. Examination of figures for 1966--the year immediately following abolition--shows only a slight percentage increase in homicide for both New York City and state; an increase larger than that between 1964 and 1965, but smaller than that between 1962-1963 and 1963-1964. In short, the immediate effect of abolition would not seem to have been an abnormally large increase in homicides for either jurisdiction.

Further inspection of Table I for the six years preceeding and following abolition also reveals that there has not been a continuous and substantial percentage increase in homicides for either New York City or state. To illustrate, for both jurisdictions the rate of change in homicides increased between 1965 and 1967 but fell between 1968 and 1970.[6] Further, the extremely high percentage increase in homicides between 1970 and 1971, which McMahon cites as evidence of the unfortunate consequence of abolition, must be examined within the context of proceeding years.

First, the large increase in homicide between 1970 and 1971 did not immediately follow abolition, but appears some five years later. Second a near equally high rate of increase in homicide in both New York City and state occurred between 1960 and 1961, well before the abolition of capital punishment. Third, inspection of preliminary F.B.I. figures for New York City for the first six months of 1972 and comparable figures for the first six months of 1971, shows an increase in homicides from 651 to 734; an increase of 13% which is well within the "normal" range of increases for both abolition and death penalty years. In short, the large percentage increase between 1970 and 1971, and the near equally large increase between 1960 and 1961, appear quite typical and may well have little to nothing to do with the death penalty. Lastly, to better assess the overall effect of abolition on homicide in New York, it would seem of value to compare the average rate of increase in homicide for the six years before and after the removal of the death penalty. As reported in Table I, the average yearly rate of increase before abolition is 11% for both jurisdictions. This compares to an average yearly increase of 15% and 14%, respectively, for New York City and state after abolition. Although these changes are in the direction McMahon suggests, neither may be considered substantial, especially in light of the fluctuations in homicide both before and after abolition.

Although McMahon confines his statistical argument of the presumed deterrent effect of the death penalty to New York, he suggests his interpretation of the New York evidence may equally well apply to the entire country since the Supreme Court's decision on capital punishment. Although not enough time has elapsed since the Court's decision to systematically examine its effect, numerous investigations have been conducted to test the effect of abolition on the state level. Space does not permit a thorough discussion of these studies, but basically they have consisted of comparing state's homicide rates before and after abolition, and in some cases the restoration of the death penalty. These examinations have consistently led researchers to a similar conclusion. As summarized by Thorsten Sellin, one of the nation's leading authorities on the death penalty:

> If any conclusion can be drawn from...the data, it is that there is no evidence that the abolition of the death penalty generally causes an increase in criminal homicides or that its reintroduction is followed by a decline. The explanation in changes in homicide rates (which closely

parallel changes in rates of neighboring states where no changes in statutes have occurred) must be sought elsewhere. [7]

Nor is Sellin alone in his interpretation of the evidence, as reflected by the conclusion drawn by the President's Task Force Commission on the death penalty question:

> The most complete study on the subject, based on comparison of homicide rates in capital and noncapital jurisdictions, concluded that there is no discernable correlation between the availability of the death penalty and homicide rate. [8]

II. The Experience of England

As McMahon suggests, since England abolished the death penalty in 1965 it has experienced an increase in homicide. It should be noted, however, that a number of other European countries (both death penalty and abolition) have also experienced an increase in homicide in the past few years with no change in statutes governing the death penalty. Further, it should also be noted that abolition of capital punishment has not always been followed by an increase in homicide. To the contrary, there are few instances where there is evidence of a substantial, permanent increase in homicide following abolition, and numerous examples of substantial decreases in homicide after abolition.

In sum, like abolition in this country, a comprehensive United Nations investigation of this question concludes that the available evidence shows the abolition of the death penalty to have no discernable effect on murder rates. [9]

III. Homicide and Executions

McMahon's final argument suggests that our nonuse of the death penalty in last few years may well be responsible for increased homicides. He notes that there were no executions in 1971 and homicides totaled 17,630 compared to approximately 9,000 in 1960 when there were 56 executions. [10] The cause and effect relationship between executions and homicide is far from obvious, however.

To illustrate, between 1960 and 1971 there was a 95.2% increase in homicides in this country. It should be noted, however, that between these years there were also very substantial increases in other index crimes where the lessened use of the death penalty is not a concern: forcible rape = +146%, robbery = +260%, aggravated assault = +139%, burglary = +163%, larceny over $50 = +270%, auto theft = +189%. In short, for noncapital offenses as well, crime increased substantially between 1960 and 1971. This fact alone, however, hardly questions the relationship McMahon assumes between the certainty of executions and homicides. To better examine this relationship it would seem preferable to compare the homicide rates of states that have made varying use of capital punishment. That is, we would expect retentionist states with high execution rates (number of executions/number of homicides) to have lower homicide rates than states with low execution rates and vice versa. Numerous investigations, spanning some four decades, examining this very question have come to very similar conclusions. To again quote Sellin:

> The important thing to be noted is that whether the death penalty is used or not or whether executions are frequent or not, both death penalty states and abolition states show rates which suggest that these rates are conditioned by other factors than the death penalty. [11]

In sum, examination of the available evidence both here and abroad would suggest that the presence of the death penalty in law or practice does not seem to influence rates of homicide.

Conclusion

In conclusion, neither the statistical evidence presented by McMahon for the city and state of New York, the experience of England after abolition, nor the covariation between the decreased use of the death penalty over the past few decades and increased homicide leads to the "common sense conclusion" McMahon draws

about the effectiveness of capital punishment. Nor does a survey of the most objective, methodologically sophisticated research on the question lead to such a conclusion. To the contrary, the preponderance of available evidence seriously questions whether the death penalty does act as a more effective deterrent than alternative forms of punishment. As every serious student of the death penalty will readily point out, however, the evidence against the death penalty is not conclusive. There remain a number of questions about the capital punishment not yet answered. [12] It would clearly seem mistaken, however, to argue, as McMahon does, in favor of the death penalty on the evidence he presents and to totally ignore scientific investigations that have been conducted on this question.

In sum, our discussion here should not be considered either a thorough critique of McMahon's arguments nor a survey of the available evidence on homicide and capital punishment. Rather our intention is to simply point out some of the most glaring shortcomings in McMahon's arguments and to briefly summarize some of the most noted empirical evidence on homicide and the death penalty. Hopefully our discussion will prompt the reader to inquire further into this important issue. [13]

FOOTNOTES

1) McMahon well recognizes that the United States Supreme Court did not categorically reject capital punishment as cruel and unusual punishment under the 8th Amendment to the Constitution, but rather only forbid it for certain offenses under certain conditions. See: The Supreme Court Reporter, Vol. 92, No. 18A, St. Paul, Minnesota, West Publishing Co., 1972, pp 2726-2844.

2) It is interesting to note that thirteen states are generally considered abolitionist - they have abolished the death penalty for homicide under most circumstances - but McMahon does not consider these decisions as legal precedent for the Supreme Courts action.

3) Apparently McMahon does not consider abolition in thirteen states as well as the fact that the last execution occurred in this country in 1967 as evidence of a lack of public support behind capital punishment.

4) In McMahon's discussion he uses interchangeably the offenses of homicide and murder, two quite different offenses. It should further be noted that generally only one type of homicide - murder in the first degree - has been punishable by death in this country. Typically, however, deterrence investigators have had to rely upon figures for homicide in examining the presumed effects of the death penalty for no court or police statistics are currently available for capital murder.

5) Although McMahon states this conclusion in the negative, he goes on to discuss the death penalty as a deterrent to homicide.

6) In part, the rather substantial percentage increase between 1970 and 1971 reflects the low percentage increase between 1969 and 1970; an atypically low year compared to 1966 and 1969.

7) Thorsten Sellin, "Experiments With ADolition", in Capital Punishment, Thorsten Sellin, (ed.), New York, Harper & Row Publishers, 1967, p. 124.

8) President's Task Force Commission, The Challenge of Crime In A Free Society, New York, Arno Press, 1970, p. 352.

9) Ramsey Clark, Crime In America, New York, Simon & Schuster, 1971, p. 331.

10) As noted above, the last execution in this country was in 1967. There were two executions this year. The number of executions performed in each of the following years is: 1966 = 1, 1956 = 7, 1964 = 15, 1963 = 21, 1962 = 47, 1961 = 42, 1960 = 50, 1959-1955 = 304, 1954-50 = 413, 1949-45 = 639, 1944-1940 = 645, 1939-35 = 891, 1934-1930 = 776.

11) Thorsten Sellin, The Death Penalty, Philadelphia, The American Law Institute, 1959, p. 23.

12) For an excellent recent discussion of the state of evidence on the death penalty and the major shortcomings of past empirical investigations see: Hugo A. Bedau, "Deterrence And The Death Penalty: A Reconsideration," J. Of Criminal Law, Criminology and Police Science, Vol. 61, 1970, pp. 539-548.

13) The following are recommended as excellent introductions to the theoretical and empirical literature on homicide and the death penalty: Hugo A. Bedau, The Death Penalty In America, Garden City, New York, Harper & Row Publishers, 1967; Thorsten Sellin, The Death Penalty, Philadelphia, American Law Institute, 1959; Thorsten Sellin, Capital Punishment, New York, Harper & Row Publishers, 1967; Thorsten Sellin, "Murder And The Death Penalty," The Annals, Vol. 284 (November, 1952). Of special interest are the following investigations: Thorsten Sellin, "Does the Death Penalty Protect Municipal Police?" pp. 284-301, and Donald R. Champion, "Does the Death Penalty Protect State Police?" pp. 301-315, both in The Death Penalty In America, Hugo A. Bedau (ed.), Garden City, New York, Anchor Books, 1967.

END

7 Notes/Appendix