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PUNISHMENT OR TREATMENT FOR ADOLESCENT OFFENDERS: THERAPEUTIC INTEGRITY AND THE PARADOXICAL EFFECTS OF PUNISHMENT[†]

*By Jeffrey Fagan**

I. INTRODUCTION

A. The Legacy of Treatment

Throughout much of its history, the American juvenile court maintained a goal of rehabilitation of the individual, and placed custody and punishment as secondary or ancillary goals in the pursuit of “remaking the child’s character and lifestyle.”¹ To its founders, the development of a separate juvenile court reflected a fundamental distinction between sanctions based on characteristics of the offender, and punishment based on the offense. Juvenile court dispositions were designed to determine why the child was in court, and what could be done to avoid future appearances.² Judge Julian Mack’s classic statement of the original theory of the juvenile court suggested that he thought blameworthiness was not significant. The function of the court was “not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make [the delinquent] a criminal but a

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1. See generally DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980).

2. See generally Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987).

worthy citizen.”³ The object for uncomplimentary comparison with the juvenile court in the Mack rhetoric was obviously the criminal court.

Despite the due process reforms of juvenile court procedures pursuant to *In re Gault*,⁴ the Supreme Court in *McKeiver v. Pennsylvania*⁵ remained ideologically committed to the traditional “treatment” rationale of the juvenile court. The right to treatment for juvenile offenders has been affirmed in U.S. Supreme Court decisions beginning with *Gault*. The central justification for the separation of juvenile and adult jurisdiction is the distinction between punishment and treatment. Punishment involves the imposition of burdens (i.e., deprivation of liberty) on an individual, based on past or current offenses, for purposes of retribution or deterrence. Treatment focuses on the present and future well being of the individual rather than the commission of prohibited acts. Disproportionate responses to comparable individuals were tolerated, if underlying factors or mitigating circumstances were found, especially if illegal behaviors were attributed to modifiable social or psychological deficits. Concerns with punishment, retribution, just desserts, or deterrence were secondary concerns in the origins of the concept of “sanction” in the juvenile court. To prevent contamination of juvenile offenders by adult criminals, youth were detained and treated in separate facilities. The distinctions between juvenile and criminal sanctions thus were not limited to the nature of the proceedings, but to the very distinction between treatment and custody.

B. *The Shift to Punishment*

Since the 1970s, however, legal and social institutions throughout the United States have mobilized to strengthen the punitive element of legal sanctions for adolescent offenders. Two widely held perceptions fueled these legislative efforts: that rehabilitation was ineffective, undermining the *sine qua non* of the juvenile court, and that punishment was discounted in the juvenile court setting. Harsher punishment was

3. Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909). To further distance the juvenile court approach, juvenile proceedings were defined as civil rather than criminal, and therefore less stigmatizing in intent. A separate language developed which further symbolized the separate, benign jurisdiction of the juvenile court. Juveniles were not arrested but were apprehended, found delinquent rather than convicted, and placed instead of sentenced.

4. 387 U.S. 1 (1967).

5. 403 U.S. 528 (1971).

viewed as according greater community protection, more effective deterrence of future crime, and more proportionate retributive responses to serious crimes.

States have adopted a variety of statutory and administrative mechanisms to make punishment the policy goal of youth crime policy. This is by now a well-known story. One part of the story is the increase in the rate of transfer of juveniles to the criminal court. Since 1990, almost every state has expanded the mechanisms for transfer to criminal court. These have included judicial, prosecutorial, or legislative actions. In each action, the intent was to increase the certainty and length of punishment, and in some cases, to invoke harsher punishment conditions.⁶

In the juvenile court, punishment is now an explicit part of juvenile court dispositions. For example, some states allow "blended" sentences, where incarceration begins in juvenile corrections institutions and is continued in adult facilities or programs when the adolescent reaches the age of majority. Other states provide for enhanced sentences within the juvenile court.⁷ For example, the state of Texas gives the juvenile court authority to sentence juveniles to lengthy prison terms for "aggravated felonies," while New Jersey allows for thirty-year sentences for juveniles adjudicated delinquent for murder.⁸ In both these states, the juvenile is transferred to adult institutions upon reaching the age of majority.

Still other states have removed discretion from judicial decisions on type and length of punishment by mandating specific terms for punishing adolescents in juvenile court. Washington state mandates specific types and lengths of punishment for juvenile delinquents. Using an elaborate numerical formula, offense history and severity calculations determine the severity and length of placement. Mandatory confinement in secure institutions, often with minimum lengths of stay, has been legislatively enacted in several states.⁹ Such laws specify certain classes of offenses (usually violent crimes) or offenders (often persistent offenders) for placement in state corrections agencies for

6. See generally SIMON I. SINGER, *RECRIMINALIZING DELINQUENCY* (1996).

7. See generally PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, *STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME* (1996).

8. See generally JAMES C. HOWELL, *JUVENILE JUSTICE AND YOUTH VIOLENCE* (1997).

9. See generally Robert O. Dawson, *A Judicial Waiver in Practice and Theory*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* (Jeffrey Fagan & Franklin E. Zimring eds., forthcoming).

minimum terms. These actions in effect remove the disposition, placement and release authority from "traditional" juvenile justice authorities (i.e., judges, juvenile corrections agencies or parole boards) to a legislative forum.¹⁰

In some states, juvenile corrections agencies have pre-empted legislative intervention by developing "classification guidelines" to guide the placement and length of stay decisions. But the underlying intent of legislatures and correctional agencies is quite different. For legislatures, concerns for community protection plus the public's demand for retribution and punishment have motivated policy changes that increase the certainty and severity of juvenile sanctions.¹¹ For correctional agencies, anticipating the actions of legislatures' and prosecutors' efforts to exclude certain juvenile offender groups, guidelines lend proportionality to correctional punishment while increasing its certainty and severity.¹²

Today, punishment has pre-empted treatment intervention in juvenile court dispositions and criminal court sentences for juvenile offenders, completing a revolution in the philosophical foundations of the juvenile court. Even the most aggressive advocates of a treatment-oriented juvenile court have constructed theoretical and philosophical rationales for viewing punishment as a valid part of dispositions. For example, the retributive component of punishment satisfies the demands of both punishment and treatment advocates for instilling "accountability" in juvenile offenders. Advocates of just desserts models of punishment embrace the fairness of punitive components of dispositions that scale incarceration to the severity of the offense. Social learning theory justifies the integration of punishment with treatment as a reinforcement mechanism within the rehabilitative process.¹³ Social control theorists argue that treatment interventions will

10. See generally Barry C. Feld, *Legislative Transfer to Criminal Court Jurisdiction*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* (Jeffrey Fagan & Franklin E. Zimring eds., forthcoming).

11. See generally FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* (1999).

12. See HOWELL, *supra* note 8.

13. See generally *id.*; Mark W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytical Inquiry into the Variability of Effects*, in *META-ANALYSIS FOR EXPLANATION: A CASEBOOK* 83 (Thomas Cook ed., 1992).

not be effective without the coercive element of punishment to motivate treatment participation.¹⁴

C. Rethinking the Past: The Confounding of Treatment and Punishment

These developments may be less a revolutionary change than an incremental step in a longer historical process. For many years, treatment interventions for juvenile offenders have been implemented in a context of "legal control." For example, the Provo, Silverlake and Highfields experiments epitomized an era of psychosocial interventions involving residential care for adjudicated delinquents.¹⁵ Each experiment was implemented within a juvenile court or a state juvenile corrections agency, although treatment was separate and autonomous within the juvenile corrections agencies. Perhaps most important, treatment overlapped with punishment, and often was a substitute for harsher forms of confinement.

Criticisms of this style of juvenile justice focused on the liability for longer terms of confinement that juveniles faced if treatment was ineffective. Commitments often were indeterminate, with release contingent on success in treatment programs. There were strong incentives for active participation in treatment to shorten one's length of stay.¹⁶ Although the conditions of confinement were less harsh in many residential treatment programs, most treatment nevertheless involved removal from home and deprivation of liberty. And if there were problems in treatment, the offender faced the liability of both a return to an institutional setting and a longer term of confinement.¹⁷

In effect, the coercive elements of treatment under contemporary sentencing practices were present all along, and efforts to allocate

14. See Jeffrey Fagan & Martin Forst, *Risks, Fixers and Zeal: Implementation, Innovation, and Experimentation in Treatment of Violent Juvenile Offenders*, 76 PRISON J. 22-59, -80 (1996).

15. See generally JAMES O. FINCKENAUER, *JUVENILE DELINQUENCY AND CORRECTIONS* (1984); TED PALMER, *A PROFILE OF CORRECTIONAL EFFECTIVENESS AND NEW DIRECTIONS FOR RESEARCH* (1994).

16. One of the criticisms of this punishment philosophy was the uneven quality of treatment programs, and the possibility of longer stays in confinement due not to the offender's behavior but to the limitations and weaknesses of the program. See generally Fagan & Forst, *supra* note 14.

17. Moreover, extended stays in secure confinement may postpone developmental transitions to adult roles, or skew developmental outcomes toward antisocial behaviors. In 1970, Irwin defined the concept of "state-raised youth" as a prisonized adolescent whose normative values were shaped during crucial developmental periods spent in prison or training schools.

offenders to types of treatments consistent with their diagnosed needs were minimal. There were relatively few programs, and there were very few opportunities for client matching to achieve "responsivity."¹⁸ There were problems in the quality of treatment and, naturally, in its effectiveness. Because of weak treatment, weak evaluation designs, and poor matching leading to inappropriate treatment, treatment appeared to be ineffective, giving rise to a call for greater emphasis on punishment. These limitations on the effectiveness of treatment interventions motivated the demand to replace treatment with punishment, and to make punishment the primary focus of juvenile court dispositions.¹⁹

In addition to the perceived weakness of treatment interventions, several other processes contributed to the triumph of punishment in juvenile justice policy. First, the political demand for punishment led to a spiraling legislative process with continuing revision of juvenile codes. Longer terms of incarceration, mandatory minimum punishment, and exclusions of offense and offender types continually narrowed the discretion of the juvenile court to include treatment elements in correctional dispositions. Second, a growing correctional industry competed with providers of community-based treatment for scarce correctional resources. Fueled by demands for public safety and the political weakness of proponents of treatment, legislation reflected the interests and concerns of this industry. Third, delinquency theory was recast to incorporate the elements of punishment as a component of treatment. Defining punishment as treatment conflated the traditional distinction between the two perspectives, and questions of the balance between services and custody were obscured. Whatever debate remained was effectively neutralized, leading to the current array of state legislation and administrative practices.

D. The Completed Revolution: The Primacy of Punishment and the Decline of Treatment

Today, the interface between punishment and confinement is explicitly acknowledged in law and policy. Despite the small number of well designed, evaluated and effective treatment programs in institutions

18. Don A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 *CRIMINOLOGY* 369, 397 (1990).

19. See Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 *CRIM. JUST. & BEHAV.* 93, 95 (1990); John J. Kerbs, *(Un)Equal Justice: Juvenile Court Abolition and African Americans*, 564 *ANNALS* 109, 112 (1999).

and in communities, punishment dominates law and policy.²⁰ The length of treatment is a secondary consideration. Prior record and severity of committed offense are the primary determinants of the length of commitment and the location of commitment. These commitment terms are often set by legislatures, and there is little margin for modification based on the outcomes of treatment. Confinement often is not shortened when treatment outcomes are positive, but it certainly may be lengthened if treatment is not successful.

Punishment and treatment have converged conceptually, as well. Punishment has become an integral part of treatment, a lesson that teaches the "cost of crime" for the punished offender, and serves as a general deterrent threat for the putative offender.²¹

However, lost in the transition from the rehabilitative ideal to a punishment-focused juvenile court, are complex organizational and substantive questions about both punishment and treatment intervention. What constitutes "punishment" and "treatment" varies extensively across correctional systems and juvenile courts. This raises critical questions about the nature of both treatment and punishment, and the interaction between the two. If punishment is the organizational context for treatment, the variations in both of these dimensions suggests extreme variability in how juvenile offenders experience correctional interventions and how effective they are in reducing future crimes. In other words, can treatment be effective in a context of punishment, or does the primacy of punishment concerns, such as security and control, neutralize the elements of treatment that make it effective?

This is a critical question because trends over the past decade suggest that achieving other than the retributive goals of a unified punishment-treatment construct may be unattainable. Rising crime rates throughout the 1980s followed a decade or more of legislation, beginning in the late 1970s, that reversed the primacy of treatment and increased the punitive content of juvenile court dispositions.²² Moreover, many of the punishments imposed may have damaging, if not iatrogenic, consequences.²³ Some may even be "disfiguring," a consequence from which there is little chance of recovery.²⁴

20. See generally BARRY FELD, *BAD KIDS* (1999); Zimring, *supra* note 11.

21. See generally Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1998).

22. See generally Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. ANN. REV. RES. 197 (1993).

23. See generally Jeffrey Fagan, *The Comparative Impacts of Juvenile and*

Accordingly, this essay raises two questions that address the implementation of punishment-oriented treatment interventions, and the organizational and substantive issues that may influence recidivism. First, there is extensive literature on the components and characteristics of effective treatment.²⁵ To what extent does the contextualization of treatment within punishment mitigate the salience of those components? There also is extensive literature on the organizational contexts that make treatment effective.²⁶ To what extent do the organizational contingencies of punishment mitigate the necessary organizational structures for effective treatment? We also may ask whether the goals of treatment are enhanced by their integration with punishment.

Second, there is a wide array of organizational and programmatic variables that comprise punishment and treatment. This offers an opportunity to consider alternative structures for achieving the policy goal of blending punishment and treatment while improving the effectiveness of these combined correctional interventions. Accordingly, the second concern of this essay is to consider alternatives to the current limited structures. We can consider the matrix of treatment interventions and the alternative forms of punishment to fashion innovative concepts in correctional interventions for juvenile offenders.

II. ISSUES AND CHALLENGES

A. *What Treatment? What Punishment?*

A broad range of activities are defined as "treatment" and "punishment." Punishments range from secure care to intensive community-based programs that entail restricted liberty and heavy reporting demands. Treatment interventions may range from therapeutic services to informal or peer counseling. Some programs

Criminal Court Sanctions on Adolescent Felony Offenders, 18 LAW & POL'Y 77 (1996); Donna Bishop & Charles Frazier, *Consequences of Waiver*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., forthcoming).

24. See generally ZIMRING, *supra* note 11.

25. See generally PALMER, *supra* note 15; Andrews et al., *supra* note 18, at 369-97.

26. See generally ALDEN D. MILLER & LLOYD E. OHLIN, COMMUNITIES AND CRIME (1994); Fagan & Forst, *supra* note 14; Feld, *supra* note 10.

confound treatment and punishment by including elements of both.²⁷ The settings of both treatment and punishment vary along these lines. Thus, for example, some treatment may occur in settings that are very restrictive, while punishments may occur in relatively relaxed settings.

Definitions become critical in sorting out whether there is a balance between treatment and punishment, and whether punishment has primacy in forming correctional interventions. What may be intended as a harsher form of punishment may in fact be viewed by offenders as less stringent. Some adult offenders, for example, elect shorter terms of incarceration followed by traditional parole supervision in lieu of longer and more demanding periods of intensive probation supervision, even when supervision includes treatment services.²⁸ Yet most citizens would likely view the non-incarcerative alternative as more lenient. The gap between intended and perceived actions for both treatment and punishment suggests that what is intended as treatment may be perceived as punitive, and that what is intended as punitive may be seen as less burdensome than rigorous treatment.

This diversity suggests that the balance between treatment and punishment depends on the type of treatment and the type of punishment. There are elements of treatment in punitive settings, and elements of punishment in certain forms of treatment. A treatment that involves lengthy periods of confinement or removal from home has a punitive dimension regardless of its therapeutic integrity and effectiveness. This may be beneficial and compatible with treatment, if the punitive dimension also has therapeutic value.

Whether punishment and treatment compete for primacy also will vary by offender characteristics. Confinement may be necessary on therapeutic grounds, but by definition has punitive elements. For example, control is an integral part of therapeutic intervention for offenders whose behaviors are dangerous to themselves or others. The concentration of services within a residential setting, including behavioral controls, often is necessary for adolescents who are violent, impulsive, or self-destructive. Here, confinement has both therapeutic

27. For example, a generous interpretation of physical discipline programs such as boot camps would see a treatment component in the potential for building self-esteem. Others might prefer to see punishment in the demanding physical regimens imposed in these programs. Many drug treatment programs use harsh confrontational tactics to reconstruct personality and behavioral styles, often in secure or closed residential settings with strict limitations on personal freedom.

28. See generally Ben M. Crouch, *Is Incarceration Really Worse? Analysis of Offender Preferences for Prison over Probation*, 10 JUST. Q. 67 (1993).

value *and* punitive content. Youths with mental disorders or serious drug or alcohol problems may also benefit (at least at the outset) from confinement in a closed secure setting with concentrated therapeutic services.

Organizational factors may also tip the balance between punishment and treatment. Systems with limited resources have little choice about where to mount interventions. Communities with limited professional resources also may be unable to develop therapeutic interventions. In both instances, interventions may by necessity occur within punitive settings such as training schools or closed facilities. Correctional agencies committed to small residential facilities and extensive contracting may avoid this problem, but this requires an extensive pool of professional resources. Systems that have closed training schools, and replaced them with smaller units combining secure care with intensive interventions, strike such a stable balance. This orientation requires a strong organizational commitment, adequate funding, and political capital to take risks and weather failures.²⁹

The diversity of offenders, treatments and punishments presents new challenges in fashioning effective juvenile court dispositions that balance treatment and punishment. There is little reason to expect punishment to have significant effects on recidivism rates except when mediated through interventions that interact with offender characteristics.³⁰ The integration of treatment and punishment has implications for correctional policy in three ways: in the structuring of punishments to incorporate elements of effective interventions, in the design of substantive interventions that respond to the individual characteristics of offenders, and in the design of punishment-intervention combinations that are rationally allocated to the various types of violent offenders. In turn, striking a balance between treatment and punishment depends on several factors: the behavioral problems at which treatment is aimed, the type of treatment, and the type of punishment. The type of treatment and type of punishment in turn are functions of exogenous factors: resources committed to create a balance, professional resources to develop quality interventions, and the political context that permits innovation to develop settings specifically designed to balance punishment and treatment.

29. See generally Fagan & Forst, *supra* note 14.

30. See generally Andrews et al., *supra* note 18, at 369-97.

B. Punishment and the Components of Effective Treatment

Several evaluations and literature reviews have identified the components of effective treatment programs.³¹ By decomposing program evaluation results into their discrete elements, these studies were able to determine analytically which organizational features and therapeutic interventions were evident in effective correctional treatment programs.

The compatibility of these program components with the demand for punishment has not been analyzed, although there are logical reasons to do so. Some features of successful programs may be neutralized by punishment concerns that demand long periods of secure confinement. Others may lend themselves to a variety of settings, including the most secure and restrictive. In the sections below, the issue is the compatibility of each of three key treatment dimensions with punishment concerns. Here, punishment is assumed to involve secure confinement for fixed or minimum terms in placements that are centralized at some distance from the home communities of young offenders.

1. Responsivity

The complexity of juvenile criminality suggests that a range of treatment interventions will be needed. Responsivity, or matching offenders with needs, recognizes that there is diversity among offenders just as there is among programs. Treatment outcomes and recidivism are the product of interactions of individual characteristics with services. In successful programs, responsivity was maximized by comprehensive diagnostic procedures and careful matching of offenders to services. This, in turn, required active case management and the availability of multiple interventions for multiple problem youths.³²

There often are few options for adolescents designated for punishment-oriented placements. Most states maintain a small number of correctional placements for adolescents, and most of these have a limited number of treatment options. Even when services are available,

31. See generally PALMER, *supra* note 15; Andrews et al., *supra* note 18; Lipsey, *supra* note 13, at 83; Patrick H. Tolan & Nancy G. Guerra, *What Works in Reducing Adolescent Violence? An Empirical View of the Field* (1994) (unpublished manuscript, on file with the Center for the Study and Prevention of Violence, University of Colorado, Boulder).

32. See generally Andrews et al., *supra* note 18.

they generally are not provided at a level of intensity necessary for many offenders. Security concerns also may limit the range of options. There are few placements that can provide intensive therapeutic or behavioral interventions for youth who also are classified as security risks.³³

Obviously, this does not bode well for maintaining responsiveness of treatments. Treatment may be postponed during the period of secure confinement and begun when juveniles return to communities or residential placements. The limited number of placements may result in waiting lists; confinement may be lengthened when placements are unavailable but returning home is not an option. The alternative is to treat offenders as a homogeneous group, and provide the same interventions (therapeutic, educational, or vocational) to all, regardless of need or skill level. Although some may succeed, meta-analyses suggest that more will fail when all juveniles are assigned to the same treatment.

2. *Autonomy*

Successful programs tend to have relatively high degrees of autonomy with respect to decisions about setting treatment goals and rewarding treatment gains with a relaxation of the terms of confinement.³⁴ Rewards may include greater personal liberties (lights out, room amenities, increased responsibilities and status, dress options), personal freedom (weekend furlough, visitation), or movement to less restrictive settings (residential group homes, community supervision). The decision to exercise these options in autonomous programs rests with treatment personnel, and is keyed directly to attainment of treatment goals. Time has a lower priority in decision making than does treatment outcome.

It is not hard to imagine how punishment requirements would oppose autonomy. Mandatory minimum commitment terms, or administrative guidelines for release decision making, may force young offenders to remain in secure care or custody for some time after achieving the treatment goals proscribed by a diagnostic assessment process. In addition, organizational characteristics may oppose

33. See generally DENNIS ROMIG, *JUSTICE FOR OUR CHILDREN* (1978); DALE PARENT ET AL., U.S. DEP'T OF JUSTICE, *CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES* (1993).

34. See generally Fagan & Forst, *supra* note 14; PALMER, *supra* note 15.

autonomy. The ability to mount innovative treatments in correctional settings often is compromised by a variety of internal organizational processes and contexts. For example, staff inadequately trained to implement a specific form of treatment may implement it poorly or not at all. Decision making regarding treatment may conflict with institutional rules; accordingly, where residents may earn privileges through successful treatment, the range of available privileges may be constrained by the climate of the institution or program.

In both these instances, the incentive for young residents to do well in treatment is neutralized by the organizational contexts and boundaries of the institution or program setting. These constraints on treatment undercut its efficacy, and can produce adverse outcomes that cast the treatment concept itself in a bad light. In reality, the concept may be quite sound, but its implementation is so impeded by organizational boundaries as to make it seem ineffective. These problems of implementation also create disincentives for staff to experiment and innovate, and most important, to provide opportunity structures where youths can excel.

The conflict between punishment and autonomy challenges the development of effective treatment. Keeping residents in secure settings long after they reach the maximum potential for behavioral and skill development in that setting will be counterproductive. However, the risks entailed in moving youngsters from more to less secure settings are quite high in a context of political demand for public safety. One well publicized failure can create a fatally hostile climate for innovation and autonomy. Minimizing this risk through improved diagnostic and classification procedures is one key to restoring autonomy to treatment programs. Building security through tracking and supervision in non-custodial settings also offers a solution to the dilemma of risk within treatment.³⁵

A second dimension of autonomy involves responses to program failure. Failure in a risk-averse setting is likely to evoke a punitive response: removal from treatment, new charges, and the possibility of additional confinement. In an autonomous setting, failure may be considered a *relapse*, and an opportunity for correction of the treatment plan and goals, as well as an opportunity to learn about whether redesign of the treatment itself, may be needed. Desistance from delinquency is likely to be a gradual, incremental process. Recognition

35. See generally Fagan & Forst, *supra* note 14.

of the likelihood of fits and starts toward a complete cessation should be part of program guidelines, including the response to relapse. The degree to which these responses are independent of the larger setting and reflect program goals directly reflects the treatment program's autonomy.

The third dimension of autonomy, the ability to mount special or intensive treatments within an institutional setting, also poses a challenge for proponents of treatment. Resource limitations, both human and fiscal, may limit what can be done within institutions. Correctional agencies have elements of military organization and regimen, making treatment complex and often at odds with the everyday climate of the institution. The difficulty of integrating treatment with the punitive routines of the institution also is an organizational challenge to autonomy. Here, leadership is basic to the success of innovation.³⁶ The ability to make change, to reallocate incentives and resources within an organization, to attract quality staff and provide opportunities for them to succeed, and to integrate custodial and treatment concerns within a seamless program setting are challenges best met by leaders willing and able to take on the risk of failure.

3. *Reintegration*

Reintegration is an intervention principle that focuses treatments on developing skills and resources necessary to sustain behaviors during the transition from institutional to family and community life on the streets and in the workplace. In some programs, reintegration is the primary goal of the interventions—that is, interventions are contextualized to the neighborhood conditions where youths would eventually return. It suggests that interventions are continuous, from residential care through supervision phases, after return to the community. Instead of the traditional forms of parole supervision, reintegration requires active treatments while the adolescent is in the community. Reintegration, or aftercare, requires not only the continuation of interventions after return to the community, but that resources be allocated for treatments during this phase.

There are several practical reasons why reintegration is difficult to implement in a correctional context where punishment has primacy. First, reintegration requires that some portion of the term of correctional or program supervision be completed in the community. This

36. See generally *id.*; MILLER & OHLIN, *supra* note 26.

challenges the trend toward longer commitment terms that bump up against the ceiling of juvenile corrections jurisdiction. Reintegration is necessary to translate acquired behavioral and social skills from confinement to community, but a period of time too short for a successful transition may undermine the effectiveness of treatment. Second, reintegration requires resources, not just for supervision and case management, but also for access to services for in-community treatment. The lopsided allocation of correctional resources toward institutional care reduces the share available for reintegration programming.

A third complexity in reintegration reflects the concerns stated earlier about relapse. How conflicts between therapeutic supervision and social control supervision are resolved while youths are in the community may determine the course of reintegration. Violation of program rules (e.g., reporting) will evoke a response, but may include either a "terminal" revocation, or a temporary suspension of liberties. This is a critical decision that reflects the competing philosophies of correctional agencies where punishment is the primary concern, and treatment agencies where punitive responses are planned with a therapeutic content. But the decisions and resolutions of conflicts also will influence assessments of whether treatment and reintegration are effective.

Reintegration differs from parole or probation supervision—it involves the transfer and continuation of therapeutic interventions to the community, set in a context where there are real-life contingencies that shape behavior. Parole and probation are surveillance, primarily, designed to detect wrongdoing and suppress it with the threat of punishment. Where punishment is primary, there will be a commensurate emphasis on surveillance and detection, and correction of behaviors is a lower concern. The ability to reintegrate, including the commitment of resources and the implementation of a philosophy of therapeutic interventions *in situ*, is a sharp departure from the current trend toward punishment. There are profound implications for the success of individuals re-entering the community from residential or institutional treatment, and the direction of reintegration will in turn have a strong influence on the effectiveness of treatment programs.

There need not be a conflict between punishment and treatment in this area. Balancing these concerns can be accomplished by reorienting the responses of close supervision to detected wrongdoing. That is, the continuation of a treatment philosophy into the response to violations in

the community offers the promise of a balanced approach to using incremental punishments as tools for learning.

C. Balancing Punishment and Treatment

There are alternatives to the displacement of treatment by punishment; alternatives that can effectively integrate punishment and treatment. First, there are many programs that effectively combine treatment with control.³⁷ These programs do not sacrifice the public safety dimensions of juvenile court dispositions, but they do de-emphasize the retributive function of punishment in favor of a utilitarian model where control and crime reduction are paramount. Control is itself a form of deprivation of liberty, the essence of punishment. Treatment need not be relegated to a secondary goal when it is well integrated in a theory of behavioral change.

This raises the second and related issue in balancing punishment and treatment: the re-definition of punishment to accommodate its intrinsic therapeutic elements. It is cynical and self-serving to say that punishment is treatment: creating aversions to illegal behavior through harsh confinement over long periods of time does not serve a restorative and transformative purpose. A humane view of punishment can incorporate elements of treatment: punishment that instills respect and moral authority upon the punisher, proportionate and fair punishment that provides for a relaxation of restrictions in return for compliance, and punishment that is fairly administered.

Earlier, it was noted that punishment always was a form of social control and treatment of juvenile offenders. Its primacy has varied over the years, but today punishment dominates correctional interventions. While satisfying the public and political demand for punishment, these developments offer little gain in the control of juvenile crime and the corrected social and psychological development of juvenile offenders.³⁸ It is time to take stock of the results of this experiment, and to note the limited if not diminishing returns from the replacement of treatment with punishment.³⁹

37. See generally PALMER, *supra* note 15; Andrews et al., *supra* note 18; Lipsey, *supra* note 13.

38. See generally Fagan, *supra* note 23.

39. See Gordon Bazemore, *The Fork in the Road to Juvenile Court Reform*, 564 ANNALS 81, 81-82 (1999).

III. IMPLICATIONS FOR POLICY

The triumph of punishment has taken place by supplanting punishment with treatment rather than integrating and balancing these perspectives. However, there is no data to suggest that anything other than symbolic and retributive returns have been realized by the incarceration experiments of the past decade. Longer terms of incarceration and punishment have not brought crime control returns commensurate either with their fiscal costs or with the developmental costs for the youths affected.⁴⁰ Nevertheless, there also has not been overwhelming evidence of positive returns from treatment efforts, only the suggestion in meta-analyses and systematic reviews that there are strategically important dimensions of programs that are basic to effective treatment.⁴¹ These concerns can inform a research agenda for the coming decade.

Research is needed to determine the long-term, developmental outcomes of youths whose correctional sentences are served in punishment-oriented systems compared to therapeutically oriented placements. The future of punishment should be data driven—it is unlikely that business decisions would be made in the absence of data, and so too should juvenile corrections policy reflect empirical evidence. Evaluations of humane and therapeutic forms of punishment also should identify effective alternatives to the current models of long terms of secure confinement under harsh conditions.

A renewed commitment to evaluation research is needed to disentangle the complex relationship between punishment and treatment. Evaluation is needed to identify cost-effective interventions that avoid cost-intensive periods of incarceration, to examine the interactions between punishment and treatment, and to experiment with new concepts of punishment that maintain therapeutic integrity. To accomplish this goal, evaluation should be institutionalized within intervention programs and clinical trials incorporated within program designs. Comparison groups are obviously critical, and random assignment should not be avoided. Ethical concerns about withholding interventions can be balanced against the concerns of subjecting participants to interventions of unproved and possibly negative value. A variety of alternative design options are available for constructing

40. See generally *id.*

41. See generally PALMER, *supra* note 15; Andrews et al., *supra* note 18; Lipsey, *supra* note 13.

control groups. One design may include case controls from other programs or from a group receiving a competing intervention. Multiple baseline comparisons, prior program cohorts, and other alternatives to random assignment can produce results with high internal validity.

Other dimensions of evaluation should include careful measurement of treatment implementation, punitive elements of correctional care, and therapeutic integrity at the program level, as well as dosage to individuals within the program. Results should be desegregated, if sample sizes permit, to examine offender-intervention interactions. This will ultimately contribute to knowledge about responsiveness of treatment. Follow-up periods should be sufficiently long to determine the decay rates of treatment and the factors that bear on post-program failure. Evaluation should be made a requirement for support. Ongoing assessment of programs is good management, and control of risks and improvement of effectiveness are two dimensions of that assessment. While programs may rightfully fear the withdrawal of funds when programs are ineffective, there are two reasons to take that risk. First, ethical standards mandate that programs ensure they are not doing harm, and the costs of harm in a violence intervention are quite high. Second, poor results should be a cue for refinement of program design, not a sign to abandon efforts at improvement. Funders must be educated similarly that political risks are necessary for the evolution of successful and effective programs.

If public policy goals for juvenile corrections continue to emphasize the control of juvenile crime, policymakers must ask whether these goals are better served by more punishment or a revised concept of therapeutic punishment that integrates the critical role of treatment in adolescent development. This future continues to face challenges from the new realities of youth crime and violence and the limitations in the adjunct role of community in the social control of juvenile crime.⁴² The answers lie well beyond the construction of secure facilities.

42. See James C. Howell et al., *Trends in Juvenile Crimes and Youth Violence*, in *A SOURCEBOOK: SERIOUS, VIOLENT, & CHRONIC JUVENILE OFFENDERS* (James C. Howell et al. eds., 1995).