

JUVENILE JUSTICE REFORM IN NEW JERSEY

The verdict came back on January 23, 1980. The jury deliberated for two hours before finding an unemotional Brian Phelps guilty of the January 12, 1979 murder and robbery of Max Remer, an Irvington printer. Phelps attacked Remer outside Remer's apartment door, stabbing him in the left eye and leaving him to bleed to death within minutes. With forty dollars of stolen money in hand, Brian Phelps returned to the party he was attending before the incident occurred¹ and bragged of the robbery and murder.²

The all too familiar occurrence of murder had an unusual twist this time. The defendant was a fourteen year old boy, a seventh grader at Newark's Clinton Place Junior High School, and the youngest person in the modern New Jersey court system to be tried for murder as an adult.³

The harsh reality of such serious juvenile crime, coupled with a staggering forty percent recidivist rate⁴ and the failure of institutional facilities to rehabilitate⁵ and adequately house these offenders⁶ are issues of such magnitude that they cannot be ignored by society and the legislature. Statistics indicate that there has been a "substantial increase in criminal arrests in New Jersey,"⁷ thirty-four percent of

¹ Malcolm, *Boy 14, Found Guilty of Murder*, Herald News, Jan. 24, 1980, at 5, col. 1 (Clifton-Passaic ed.).

² *Id.* at 5, col. 2.

³ *Id.* at 5, col. 1. Brian Phelps was subsequently sentenced to 15 years in state prison. Sentencing Report, Essex County Hall of Records. Until 1977, waiver to adult court would have been impossible for youths under age 16. The age for waiver, however, was lowered to 14, permitting the transfer of juveniles to adult court. N.J. STAT. ANN. § 2A:4-48 (West Cum. Supp. 1981-1982). Had Brian Phelps' case been heard in juvenile court, he would not have been labeled a criminal upon adjudication, *id.* § 2A:4-64, nor would he have been sentenced to state prison. *Id.* § 2A:4-61. The waiver to adult court, though, brought the stigma and sanctions of criminality when the sentence was handed down. *Id.* § 2A:4-50.

⁴ Telephone interview with James Stabile, Public Information Officer (Apr. 20, 1982). The recidivist rate is based on the commission of actual new offenses rather than parole violations by both juveniles and adults. Cf. NEW JERSEY STATE PAROLE BD., ANNUAL REPORT 36-37 (Feb. 23, 1982), (defines recidivism "as a return to custody as a result of the violation of the conditions of parole"). The board has determined that the recidivist rate based on this definition is 10%. *Id.*

⁵ See *supra* note 4. The recidivist rate reflects the failure of the prison and correctional system to rehabilitate juvenile and adult offenders.

⁶ Peet, *The "Terrifying" Upsurge in Juvenile Crime*, Star Ledger, Apr. 11, 1982, at 15, cols. 2-4.

⁷ NEW JERSEY CRIMINAL DISPOSITION COMM'N, REPORT 4 (Feb. 13, 1981) [hereinafter cited as REPORT]. The Commission's membership is comprised of representatives of the New Jersey Supreme Court, Attorney General, Public Advocate, Commissioner of Corrections, Chairman of the Parole Board, the Legislature and Governor, pursuant to N.J. STAT. ANN. § 2C:48-1 (West Supp. 1982). The Commission provides a means for "regular and systematic consultation among all important elements of the criminal justice system" in order to review disposition, parole,

which are juvenile arrests,⁸ and that violent offenses committed by juveniles rose to forty-two percent of the total percentage of arrests,⁹ which is also increasing.¹⁰ Additionally, admissions to youth correctional facilities¹¹ have risen.¹² Furthermore, while both the overall crime rate and sentencing rate continued to surge,¹³ mid-1981 marked the crisis point for many of the state's institutional facilities regarding their ability to house these juvenile offenders.¹⁴

The pre-1982 juvenile justice code (old code),¹⁵ failed to provide answers to these problems. Critics of the old code contended that it favored juveniles involved in heinous crime by allowing these youths to escape the graver sentences meted out in adult court by disposing of their cases with lenity in juvenile court.¹⁶ Societal concern that this lenity was too high a price to pay resulted in a push for legislative reform.¹⁷ Consequently, the New Jersey Code of Juvenile Justice (new code)¹⁸ was enacted on July 23, 1982, and will go into effect on September 1, 1983.¹⁹ The new code will no doubt have a substantial

probation and supervisory treatment in accordance with N.J. STAT. ANN. § 2C:48-2 (West Supp. 1982). REPORT, *supra*, at 1. With the wealth of data available to the Commission, it began integrating the data in order to provide a useful tool in assessing the problems of criminality.

⁸ Peet, *supra* note 6, at 1, col. 3.

⁹ *Id.*

¹⁰ REPORT, *supra* note 7, at 4. The increases in the juvenile system parallel the adult system. During the first six months of 1980 violent crime rose by 15% and nonviolent crime by 10%. *Id.* at 4.

¹¹ The generic term "correctional facility" refers to prisons, jails, training schools and other places that administer discipline, treatment, and rehabilitation during the period of confinement.

¹² REPORT, *supra* note 7, at 8 app. (appended table of "Resident Population Counts by Quarters"). The table indicates that within the last three months of 1980, youth correctional populations rose by 4%. Correctional populations in general have increased by 5% during this same period. *Id.* Indications suggest that these conditions are of a permanent nature due to passage of the Parole Act of 1979, ch. 31, 1981 N.J. Sess. Law Serv. 76 (West), which increased the number of crimes which call for mandatory sentences of imprisonment. REPORT, *supra* note 7, at 8 app. (appended Interoffice Memo to Robert D. Lipscher, Esq., from John P. McCarthy, Jr., Esq., Administrative Office of the Courts (Feb. 11, 1981)).

¹³ REPORT, *supra* note 7, at 8 app. (appended Interoffice Memo to Robert D. Lipscher, Esq., from John P. McCarthy, Jr., Esq., Administrative Office of the Courts (Feb. 11, 1981)).

¹⁴ Peet, *supra* note 6, at 15, cols. 2-4. Maximum capacity was reached at Jamesburg in June, 1981 and Yardville has a waiting list of 90 youths. The increases in sentencings are "coming at a time when the juvenile justice system is least equipped to handle it." *Id.* at 15, col. 2.

¹⁵ N.J. STAT. ANN. §§ 2A:4-42 to -68 (West Cum. Supp. 1981-1982).

¹⁶ See N.J. Assembly Bill No. 641 (Jan. 19, 1982) (statement 32).

¹⁷ Marks, *Legislators May Ease Teen Crime Reforms*, Star Ledger, Dec. 16, 1981, at 1, col. 2.

¹⁸ N.J. Assembly Bills Nos. 641-45 (Jan. 19, 1982).

¹⁹ Schwanberg, *Kean Enacts Juvenile Justice Code with Greater Focus on the Family*, Star Ledger, July 24, 1982, at 1, col. 1.

impact. More juveniles will be treated more severely²⁰ from the initial detention²¹ to the final sentencing,²² thus closing the gap that exists between a lenient juvenile and harsh adult system by giving little advantage to youths who remain in the juvenile system.²³

This "get tough" attitude should come as no surprise to those who are familiar with the juvenile justice system. While the general public has assumed for years that the juvenile system is basically lenient,²⁴ in actuality it is a "hostile"²⁵ system which weighs society's welfare against the juvenile's best interest²⁶ when disposing of the juvenile's case. This tension between society's need to protect itself and the conflicting need for juvenile rehabilitation and care has become more pronounced as the frequency and severity of juvenile crime has grown. The push, therefore, for a juvenile system in New Jersey that will apply a firmer hand in those cases in which it retains jurisdiction,²⁷ and relax its waiver rules in order to transfer more juveniles to adult court²⁸ is really only a legislative continuance of a trend that was set in motion some years ago.²⁹ The sociological "friendly"

²⁰ Marks, *supra* note 17, at 1, col. 2; *see also* N.J. Assembly Bill No. 641 (Jan. 19, 1982) (statement 27).

²¹ N.J. Assembly Bill No. 641, § 17 (Jan. 19, 1982). If the court waives the juvenile to adult court, there will be a hearing before the family court in order to decide whether the juvenile will be detained in a juvenile or adult facility. *Id.* The old code contains no such provision for this type of hearing.

²² Parole Act of 1979, ch. 31, 1981 N.J. Sess. Law Serv. 76 (West). With the increased numbers of waiver cases that will occur, transferring juveniles to adult court will bring with it the sanctions now available in adult court, such as mandatory sentencing. *See id.* The initial waiver will occur with greater frequency because the new code reduces the juvenile's chances of proving that he can be rehabilitated within the juvenile system, by reducing the age of majority from 21 to 19. N.J. Assembly Bill No. 641, § 7 (Jan. 19, 1982).

²³ *See* N.J. Assembly Bill No. 641 (Jan. 19, 1982) (statement 32).

²⁴ *See, e.g.,* Marks, *supra* note 17, at 1, col. 2; Peet, *supra* note 6, at 15, col. 3.

²⁵ Mead, *The Psychology of Punitive Justice*, 23 AM. J. OF SOC. 5, 577-80 (1918). Human nature is comprised of an organization of instincts that are subject to modification by experience and which produce complex acts. These acts are the consequences of instincts that have modified each other over the course of time. Such instincts have been classified into two diametrically opposing groups: "hostile" and "friendly." Hostility arises when individuals, who normally adjust themselves to each other in society, come into conflict with one another. This conflict, which produces nonconforming behavior, is the manifestation of the breakdown of the modification of human nature. *Id.*

²⁶ *See generally* Kent v. United States, 383 U.S. 541, 555 (1966).

²⁷ N.J. Assembly Bill No. 641 (Jan. 19, 1982) (statement 27).

²⁸ *Id.* (statement 28).

²⁹ *See generally* Kent v. United States, 383 U.S. 541, 555-56 (1966). Kent states that while theoretically the state is supposed to handle a juvenile case as *parens patriae*, this often breaks down in reality due to lack of personnel and facilities. The Court extended several, but not all of the constitutional rights afforded adults to guard against "procedural arbitrariness." *Id.* The Court, a few years later, once again emphasized this point when it remarked that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." *In re Winship*, 397 U.S. 358, 365-66 (1970).

model of treatment, which concerns itself with the juvenile's best interests while disregarding societal interest and subsequently poses no conflict in its *parens patriae* application,³⁰ was cast as the untenable alternative to the "hostile" model now employed in both the juvenile and adult systems at the disposition phase.³¹ In both the old and new codes, the legislature determined that, because many juveniles in trouble do not resort to self-help by seeking out psychologists, social workers, or parental guidance in accordance with the "friendly"³² model, society cannot be expected to pay the price.³³ By enactment of these codes a balance was struck, and as with any balancing of values, someone has made a sacrifice or has been sacrificed.³⁴

After coming to grips with this incompatibility of needs and the concomitant use of the adversarial court system,³⁵ the United States Supreme Court acknowledged that juveniles had the "worst of both worlds."³⁶ If tried as juveniles, these young offenders did not have the constitutional safeguards afforded adults in the adult system, yet the juvenile system mirrored the adult system in its hostile nature.³⁷ A trilogy of United States Supreme Court cases, *Kent v. United States*,³⁸ *In re Gault*,³⁹ and *In re Winship*,⁴⁰ extended adult rights to juveniles. *Kent* held that in accordance with due process and the right to counsel, the juvenile court must grant a hearing and allow the

³⁰ Mead, *supra* note 25, at 578. The "friendly" model at its base assumes that human nature is composed of parental and sexual instincts, which by definition present no conflict and therefore do not require legal administration.

³¹ See *Kent v. United States*, 383 U.S. 554, 555-56 (1966); N.J. Assembly Bill No. 641 (Jan. 19, 1982) (statement 27).

³² Mead, *supra* note 25, at 578.

³³ N.J. Assembly Bill No. 641 (Jan. 19, 1982) (statement 27).

³⁴ Compare N.J. Assembly Bill No. 641, § 2 (Jan. 19, 1982) with N.J. STAT. ANN. § 2A:4-42 (West Cum. Supp. 1981-1982). These two provisions are basically the same in laying out the purposes of the old and new codes. Both seek to preserve family unity and provide adequate care and rehabilitation for the juvenile without the stigma of criminality. The two codes, however, take a balancing approach in the achievement of these objectives. Weighed against the juvenile's interests are the public's interests in its safety. If the court determines that the public safety weighs more heavily, the child may be removed from his family after being charged with delinquency and detained elsewhere. See N.J. Stat. Ann. § 2A:4-42; N.J. Assembly Bill No. 641 § 2.

³⁵ B. ZUPANCIC, *CRIMINAL LAW: THE CONFLICT AND THE RULES* 26 (1981). The conflict between the state's best interest as opposed to the juvenile's best interest is resolved through the adversary process which procedurally serves the purpose of impartiality by application of legal formalities and adherence to its rules. *Id.* See generally *id.* at 1-39.

³⁶ *Kent v. United States*, 383 U.S. 554, 556 (1966).

³⁷ Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 24.

³⁸ 383 U.S. 541 (1966).

³⁹ 387 U.S. 1 (1967).

⁴⁰ 397 U.S. 358 (1970).

juvenile's attorney access to records, probation and other such reports before waiving a juvenile to adult criminal court for prosecution.⁴¹ *In re Gault* held that to fulfill the requirements of due process and fair treatment the juvenile and his parents were entitled to written notice of the specific charges brought against the youth,⁴² notification of the right to counsel,⁴³ application of the fifth amendment's protection against self-incrimination,⁴⁴ and absent a confession, the opportunity to cross examine sworn testimony in delinquency and commitment proceedings.⁴⁵ Lastly, *In re Winship* held that a standard of guilt of "beyond a reasonable doubt" was to be applied to juvenile cases during the adjudicatory stage when the juvenile had committed an act which would have drawn criminal charges if otherwise committed by an adult.⁴⁶ For the court system to truly align itself with reality, it should continue the course set forth in the trilogy in order to prevent continued discrimination against juveniles caught up in a hostile juvenile system.

The sociological framework of the "friendly" and "hostile" models⁴⁷ provides a powerful foundation essential to any analysis and understanding of the pre-1982 juvenile justice code,⁴⁸ particularly the areas of detention,⁴⁹ disposition,⁵⁰ and waiver.⁵¹

Before any examination of these three areas is undertaken, the jurisdictional element that affects juvenile cases must be considered. The juvenile and domestic relations court's exclusive jurisdiction⁵² to

⁴¹ 383 U.S. at 561. The Court stated that the juvenile's hearing may be an informal one and that counsel must be given the necessary latitude to function on behalf of the juvenile. The requirement of counsel "is of the essence of justice" and without it, the right to a hearing would be rendered meaningless. *Id.*

⁴² 387 U.S. at 33. Notice of the charges as soon as possible allows the juvenile's attorney time to prepare his case. *Id.*

⁴³ *Id.* at 41.

⁴⁴ *Id.* at 47-50. Because a juvenile may be incarcerated as a result of a finding of delinquency, he must be given his constitutional right to invoke the plea of self-incrimination. The Constitution explicitly forbids compelling a witness to testify against himself when he runs the risk of losing his liberty. *Id.* at 50.

⁴⁵ *Id.* at 57.

⁴⁶ 397 U.S. at 368.

⁴⁷ See Mead, *supra* note 25, at 578.

⁴⁸ N.J. STAT. ANN. §§ 2A:4-42 to -68 (West Cum. Supp. 1981-1982).

⁴⁹ *Id.* § 2A:4-56. According to N.J. STAT. ANN. § 2A:4-43(c) (West Cum. Supp. 1981-1982), detention referred to the "temporary care of juveniles in physically restricting facilities pending court disposition." *Id.*

⁵⁰ *Id.* §§ 2A:4-61 to -62. After an adjudication of delinquency, the court selected from amongst a list of alternatives, the proper or most suitable one for that particular case. *Id.*

⁵¹ *Id.* §§ 2A:4-48 to -49. Waiver was the transfer of a juvenile with or without his consent to another court. *Id.*

⁵² *Id.* § 2A:4-46. The exceptions to exclusive jurisdiction were the waiver provisions. *Id.* §§ 2A:4-48 to -49.

decide these issues under the old code existed in all cases in which it was charged that a juvenile⁵³ had committed an act of "delinquency"⁵⁴ or was a "juvenile in need of supervision" (JINS).⁵⁵ The "jurisdictional net," indeed, was broad.⁵⁶ While delinquency encompassed homicide, other crime, disorderly persons offenses, and violations of ordinances and regulations,⁵⁷ JINS covered a wide variety of noncriminal acts such as incorrigibility, disobedience, and truancy.⁵⁸

After a youth was charged with delinquency or needing supervision under the old code, the presumption was in favor of release into the custody of one or both parents unless the juvenile's health, safety, or welfare would be adversely affected.⁵⁹ Those youths charged with delinquency could not be detained prior to disposition of their cases unless it was necessary to guarantee their presence at an upcoming hearing⁶⁰ or their release would jeopardize the community's safety.⁶¹ JINS could not be placed in shelter care⁶² prior to disposition unless there was no appropriate adult who would assume responsibility for the youth,⁶³ the shelter care was needed to offer protection to the juvenile⁶⁴ or assure the youth's presence at the next hearing,⁶⁵ or, the mental or physical health of the youth weighed against release.⁶⁶ A juvenile, furthermore, could be detained or sheltered only in those facilities designated by the State Department of Institutions and Agencies,⁶⁷ except that juveniles could not be detained in any prison, jail or lockup, including police stations. If no other facilities were reasonably

⁵³ *Id.* § 2A:4-43(a). Juveniles were defined as persons younger than 18 years of age. *Id.*

⁵⁴ *Id.* § 2A:4-44.

⁵⁵ *Id.* § 2A:4-45. JINS has become the generic term which loosely refers to both the offender and types of violations.

⁵⁶ Empey, *Juvenile Justice Reform: Diversion, Due Process and Deinstitutionalization*, in *PRISONERS IN AMERICA* 17 (L. Ohlin ed. 1973). The author states that "[i]t is ironic, but true, that children can be found guilty and sanctioned, often severely, for acts which, if committed by an adult, might not even have resulted in arrest." *Id.* In many states a child can be adjudged a delinquent quite easily because of the breadth of the court's jurisdiction. *Id.* Such overreaching may produce more harm than good. Legal definition may be insensitive to the "subtle and difficult issues" of learning and socialization and the attendant needs of juveniles. *Id.* at 18.

⁵⁷ N.J. STAT. ANN. § 2A:4-44 (West Cum. Supp. 1981-1982). Juveniles 17 years of age or older would not be found delinquent, though, for motor vehicles violations.

⁵⁸ *Id.* § 2A:4-45.

⁵⁹ *Id.* § 2A:4-56(a).

⁶⁰ *Id.* § 2A:4-56(b)(1).

⁶¹ *Id.* § 2A:4-56(b)(2).

⁶² *Id.* § 2A:4-43(d). Shelter care was defined as the nonphysically restrictive temporary care of youths in facilities prior to court disposition. *Id.*

⁶³ *Id.* § 2A:4-56(c)(1).

⁶⁴ *Id.* § 2A:4-56(c)(2).

⁶⁵ *Id.* § 2A:4-56(c)(3).

⁶⁶ *Id.* § 2A:4-56(c)(4).

⁶⁷ *Id.* § 2A:4-57(b).

available, though, a youth could be held in a police station, apart from any detention places and any adults charged or convicted of crimes, for a brief period until his parents came for him or another facility was made available.⁶⁸

Upon adjudging the juvenile to be a delinquent,⁶⁹ the court, under the old code, could dispose of the case in a variety of ways.⁷⁰ The court could delay formal entry for up to a year and then dismiss the case if a youth made satisfactory progress⁷¹ or could release the child into the custody of his parents or guardian.⁷² Other dispositions included probation for up to three years;⁷³ transferral of custody to the child's relatives or other persons;⁷⁴ placement under the Division of Youth and Family Services;⁷⁵ placement under the Commissioner of the Department of Human Services in order to receive help from the Division of Mental Retardation;⁷⁶ commitment for treatment of mental disease if the child was not dangerous;⁷⁷ commitment to an institution for the rehabilitation of delinquency for an indeterminate period not to exceed three years, unless the act charged would constitute a charge of homicide if committed by an adult, in which case the indeterminate sentence was not to exceed the maximum sentence a convicted adult would receive;⁷⁸ and other dispositions not inconsistent with the code's intent.⁷⁹

Dispositions of JINS cases included the aforementioned dispositions applicable to delinquents except commitment to an institution for rehabilitation of delinquency.⁸⁰ Physical restriction of JINS was prohibited unless commitment was to an institution for mental retardation or for the care of individuals addicted to controlled dangerous substances.⁸¹

⁶⁸ *Id.* § 2A:4-57(c).

⁶⁹ See *supra* note 57 and accompanying text.

⁷⁰ See N.J. STAT. ANN. § 2A:4-61 (West Cum. Supp. 1981-1982).

⁷¹ *Id.* § 2A:4-61(a).

⁷² *Id.* § 2A:4-61(b).

⁷³ *Id.* § 2A:4-61(c).

⁷⁴ *Id.* § 2A:4-61(d).

⁷⁵ *Id.* § 2A:4-61(e).

⁷⁶ *Id.* § 2A:4-61(f).

⁷⁷ *Id.* § 2A:4-61(g).

⁷⁸ *Id.* § 2A:4-61(h).

⁷⁹ *Id.* § 2A:4-61(i).

⁸⁰ *Id.* § 2A:4-62(a).

⁸¹ *Id.* § 2A:4-62(b). Controlled dangerous substances include drugs and substances as described in Schedules I-V of Article 2 but exclude wine, distilled liquors and tobacco. *Id.* § 24:21-2.

In a small number of situations⁸² in which the juvenile was age fourteen or older,⁸³ charged with a serious crime,⁸⁴ a threat to society's welfare,⁸⁵ and had no reasonable prospects for rehabilitation by the age of majority within the juvenile system,⁸⁶ the court waived jurisdiction over the case and referred it to adult criminal court and the prosecuting authorities.⁸⁷ The effect of waiver was to process the case as if it had been instituted initially in adult court.⁸⁸ Yet, despite the waiver provisions, the clear presumption under the old code was in favor of treatment within the juvenile system,⁸⁹ rather than waiver to adult criminal court.

The new code,⁹⁰ replete with clarifications, expansions, and changes, signals the legislature's perception of the limitations and failures of the old code regarding detention, disposition and waiver. Prior to any discussion of these areas, the prerequisite jurisdictional element that affects such cases must be examined.

The new family court⁹¹ (previously the juvenile and domestic relations court) will retain jurisdiction over both delinquency cases⁹² and juvenile-family crises⁹³ (formerly JINS) under the new code.⁹⁴

⁸² See Marks, *supra* note 17, at 12, col. 2.

⁸³ N.J. STAT. ANN. § 2A:4-48(a) (West Cum. Supp. 1981-1982).

⁸⁴ *Id.* § 2A:4-48(b).

⁸⁵ *Id.* § 2A:4-48(c).

⁸⁶ *Id.* The age of majority was interpreted as age 21. State *in re* G.T., 143 N.J. Super. 73, 362 A.2d 1171 (App. Div.), *certif. denied*, 71 N.J. 531, 366 A.2d 687 (1976); see Comment, 3 SETON HALL LEGIS. J. 89-93 (1977).

⁸⁷ N.J. STAT. ANN. § 2A:4-48 (West Cum. Supp. 1981-1982). This provision provided for waiver without the juvenile's consent. *Id.* Voluntary waiver was available as well, to juveniles charged with delinquency who were age 14 or older. *Id.* § 2A:4-49.

⁸⁸ *Id.* § 2A:4-50.

⁸⁹ See State v. Tuddles, 38 N.J. 565, 571, 186 A.2d 284, 287 (1962). The emphasis in juvenile cases was placed on rehabilitation rather than punishment. *Id.* Prior to 1977 when the age of waiver was 16, considering the presumption in favor of rehabilitation by the age of majority most juveniles could persuade a court that they should remain within the juvenile system rather than be waived over to adult court. After 1977, when the age for waiver was lowered to 14 by the legislature, the juvenile had an even easier time arguing that his case should be heard in juvenile rather than adult court. The age of majority was interpreted by the courts as 21, and this gave the juvenile 3-7 years for rehabilitation. See *supra* note 86. This judicial decision effectively undercut the legislature's efforts since the legislative intent was to have waiver occur with greater, not lesser frequency by changing the age from 16 to 14. Comment, 3 SETON HALL LEGIS. J. 92-93 (1977).

⁹⁰ N.J. Assembly Bills Nos. 641-45 (Jan. 19, 1982).

⁹¹ *Id.* No. 642, §§ 1, 2.

⁹² *Id.* No. 641, § 4. This provision is worded substantially the same as the prior law. Compare *id.* with N.J. STAT. ANN. § 2A:4-44 (West Cum. Supp. 1981-1982).

⁹³ N.J. Assembly Bill No. 641, § 3(g) (Jan. 19, 1982). This definition is similar to the definition found in the prior law. Compare *id.* with N.J. STAT. ANN. § 2A:4-45 (West Cum. Supp. 1981-1982).

⁹⁴ N.J. Assembly Bill No. 642, § 3 (Jan. 19, 1982).

The juvenile's family,⁹⁵ however, will also be subject to the court's jurisdiction in matters of delinquency and juvenile-family crises.⁹⁶

Once jurisdiction is established and the youth is charged with delinquency under the new code, the presumption of release is triggered, similar to the old code.⁹⁷ While the old and new codes' criteria for detention are basically the same,⁹⁸ the new code provides for a hearing to determine whether a juvenile, who has been waived to adult court, will be detained in an adult or juvenile facility.⁹⁹ The legislature has determined that the family court is in the most advantageous position to decide which facility best serves the interests of both the juvenile and society.¹⁰⁰ The new code additionally gives a list of factors to be considered in making such a judgment: the juvenile's age; maturity; the nature of the offense; and the youth's prior record.¹⁰¹ Furthermore, until such a hearing is conducted, no juvenile who has been waived over may be remanded to an adult detention facility.¹⁰²

Not only have the detention provisions been expanded,¹⁰³ but the disposition terms¹⁰⁴ have been broadened by adding new alternatives beyond what was previously available.¹⁰⁵ These include fines,¹⁰⁶ restitution,¹⁰⁷ community service,¹⁰⁸ and vocational training.¹⁰⁹ The

⁹⁵ *Id.* No. 641, § 3(a). This provision is consistent with the prior law which defines juveniles as persons under the age of 18. See N.J. STAT. ANN. § 2A:4-43(a) (West Cum. Supp. 1981-1982).

⁹⁶ N.J. Assembly Bill No. 642, § 3 (Jan. 19, 1982).

⁹⁷ *Id.* No. 641, § 15. Provisions for the release to parents or the temporary care of juveniles are basically the same under both codes. Compare *id.* No. 644, §§ 5, 13, 14 with N.J. STAT. ANN. § 2A:4-56(c)(1-4) (West Cum. Supp. 1981-1982).

⁹⁸ Compare N.J. STAT. ANN. § 2A:4-56(a)-(b) (West Cum. Supp. 1981-1982); with N.J. Assembly Bill No. 641, § 15 (Jan. 19, 1982).

⁹⁹ N.J. Assembly Bill No. 641, § 17(a) (Jan. 19, 1982).

¹⁰⁰ *Id.* (statement 30).

¹⁰¹ *Id.* § 17(a).

¹⁰² *Id.* § 17(b).

¹⁰³ See *supra* note 99 and accompanying text.

¹⁰⁴ N.J. Assembly Bill No. 641, § 24(b) (Jan. 19, 1982).

¹⁰⁵ *Id.* (statement 31).

¹⁰⁶ *Id.* § 24(b)(8).

¹⁰⁷ *Id.* § 24(b)(9). See *infra* note 143.

¹⁰⁸ N.J. Assembly Bill No. 641, § 24(b)(10) (Jan. 19, 1982). Community service is compulsory if ordered by the court but must be reasonable in its application. The juvenile need not be compensated for such service, but all monies earned are to be applied towards restoring the victim or payment of the fine levied on such juvenile. *Id.* The code, as it stands, gives no concrete examples of community service. *Id.*

¹⁰⁹ *Id.* § 24(b)(11). Vocational training consists of work programs "designed to provide job skills and specific employment training to enhance the employability of job participants." *Id.* Similar to the community service provisions, the juvenile need not be compensated for his participation, provided that restitution or fines be paid from the money earned. *Id.*

court, in deciding on the appropriate action,¹¹⁰ may order the parents to participate in the disposition¹¹¹ and will consider the same criteria as those used in determining the proper detention facility when waiver has occurred.¹¹² Finally, there is one other new provision on which the courts can rely, short term incarceration,¹¹³ which stands apart from the standard term of incarceration.¹¹⁴ The legislative intent is that such incarceration, which may not exceed sixty days,¹¹⁵ will deter the commission of future crimes by youths who have previously committed certain serious offenses currently undefined in the new code.¹¹⁶ This deterrence value is sought within a scheme of rehabilitation.¹¹⁷ Short term incarceration, however, is permissible only in those juvenile facilities located in counties which have met the physical and program standards required by the Department of Corrections.¹¹⁸ Furthermore, an agreement must be reached by the county and the Department,¹¹⁹ and the actual facilities cannot have exceeded fifty percent of maximum capacity¹²⁰ in order to place juveniles into these facilities. These stipulations effectively curtail the use of this disposition as an alternative to the other dispositions.¹²¹

Besides the broadening of the disposition provisions,¹²² the new legislation also includes a presumption of imprisonment for certain serious crimes such as homicide, robbery, and rape.¹²³ Because stiffer sentences will now be available in juvenile court, there will be less dependency on waiver to adult court.¹²⁴ At the other end of the continuum there is a presumption of nonincarceration for juveniles who have committed crimes of the fourth degree or less and have no prior record.¹²⁵

¹¹⁰ The new code contains other dispositions as well, such as participation in outdoor programs, *id.* § 24(b)(12), and academic and/or vocational counseling, *Id.* § 24(b)(13).

¹¹¹ *Id.* § 24(b)(15).

¹¹² See *supra* note 101 and accompanying text.

¹¹³ N.J. Assembly Bill No. 641, § 24(c)(1) (Jan. 19, 1982).

¹¹⁴ *Id.* (statement 32).

¹¹⁵ *Id.* § 24(c)(1).

¹¹⁶ *Id.* (statement 32). The legislature has not stated which crimes are encompassed by this provision. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 24(c)(1).

¹¹⁹ *Id.* § 24(c)(2). The agreement concerns the use of the institution for sentenced juveniles. *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (statement 32). The use of short term incarceration is limited because of the overcrowded conditions in the state's youth correctional institutions. Many of the facilities have surpassed not only 50% of capacity, but maximum capacity as well. See Peet, *supra* note 6.

¹²² See *supra* notes 104-10 and accompanying text.

¹²³ N.J. Assembly Bill No. 641 (statement 32) (Jan. 19, 1982).

¹²⁴ *Id.* (statements 32 & 33).

¹²⁵ *Id.* § 25(b)(1).

The need for a definite hardline approach has also impacted the sentencing portions of the code.¹²⁶ The old code's provisions for indeterminate sentences¹²⁷ have been supplemented with maximum sentences,¹²⁸ allowances for extended sentences,¹²⁹ and parole qualifications.¹³⁰

Finally, the area of waiver¹³¹ has undergone change by enactment of the new legislation. Waiver will occur based on the same serious charges incorporated into the old code,¹³² but with greater frequency.¹³³ Under the new code a juvenile must show by a preponderance of the evidence that he can be rehabilitated by the age of nineteen in order to avoid waiver.¹³⁴ Lowering the age from twenty-one to nineteen makes it more difficult for a juvenile to establish that he can be rehabilitated within the juvenile system.¹³⁵ The conclusion to be drawn from these changes is that untold numbers of youths will have their cases heard in adult criminal court, adding one more burden to an already overburdened system.¹³⁶ After waiver has taken place, and consistent with the prior law, these juveniles will be treated as though their cases were initiated in the adult court in the first instance.¹³⁷

The assumption, of course, is that society will benefit from the new legislation. In many ways the new code is a vast improvement

¹²⁶ *Id.* § 25(d)(1).

¹²⁷ See *supra* text accompanying note 78.

¹²⁸ N.J. Assembly Bill No. 641, § 25(d)(1) (Jan. 19, 1982). The maximum sentence imposed on a juvenile cannot exceed the maximum applied to adults convicted of the same offense. *Id.*

¹²⁹ *Id.* § 25(d)(3)(4). A juvenile may be sentenced to an extended term of incarceration for those acts considered to be crimes of the first, second, or third degree if committed by an adult. This sentence is possible only if the juvenile has previously been adjudged a delinquent on a minimum of two distinct occasions for offenses which would have constituted crimes of the first or second degree if committed by an adult and he was committed to an adult or juvenile correctional institution. *Id.*

¹³⁰ *Id.* § 25(d)(2). The length of actual incarceration and parole taken together cannot exceed the maximum sentence provided for the offense. *Id.* Juveniles, however, can be approved for parole very soon after the initial incarceration with the approval of the sentencing court. *Id.*

¹³¹ See *supra* notes 82-87 and accompanying text.

¹³² N.J. STAT. ANN. § 2A:4-48 (West Cum. Supp. 1981-1982).

¹³³ See N.J. Assembly Bill No. 641 (Jan. 19, 1982) (statement 28). Juveniles may still elect waiver under the new code. *Id.* § 8. Cf. N.J. STAT. ANN. § 2A:4-49 (West Cum. Supp. 1981-1982).

¹³⁴ N.J. Assembly Bill No. 641, § 7(a)(4) (Jan. 19, 1982).

¹³⁵ See *supra* notes 86 & 89. Instead of a 3-7 year term for rehabilitation, a youth will have 1-5 years for rehabilitation. For some youths it will become more difficult to sustain the burden of proving they can be rehabilitated within the juvenile system. N.J. Assembly Bill No. 641, § 7(a)(4) (Jan. 19, 1982).

¹³⁶ De Muro, *Revamp Opposed on Juvenile Code*, Star Ledger, Nov. 28, 1981, at 10, col. 2.

¹³⁷ N.J. STAT. ANN. § 2A:4-50 (West Cum. Supp. 1981-1982); N.J. Assembly Bill No. 641, § 9 (Jan. 19, 1982).

over the old code. The juvenile justice system will be improved by the expansions and clarifications of both the detention and disposition provisions. The detention provisions clearly set forth the criteria to be considered in making the judgment to detain a juvenile and furthermore formally place responsibility for the first time on the family court to determine at a hearing the appropriate place of detention for those same juveniles waived to adult court. In addition to the improvements in the area of detention, the disposition provisions have been changed for the better. Dispositions such as fines and restitution help remove the profitability of crime while attempting to restore the victim to the position he was in prior to the commission of the crime.¹³⁸ Also, vocational training provides skills that will help these youths earn a decent wage and lead productive lives.¹³⁹ Yet although these changes are for the better, the code is flawed.

Initially, some of the individual provisions are inadequate. Specifically, the jurisdictional net should be narrowed to encompass delinquency cases only.¹⁴⁰ Handling status offenders (formerly JINS) in juvenile court has little or no relation to the reduction of juvenile crime and occupies valuable time that could be better spent dealing with dangerous juveniles who have criminally misbehaved.¹⁴¹

Furthermore, the new code falls short in its failure to lay down guidelines regarding restitution as an alternative disposition.¹⁴² Such guidelines are necessary to provide standards of applicability, size of penalty, and timeliness of payment.¹⁴³

The code additionally lacks provisions for the increased supervision of juveniles after they are released and about to reenter society.¹⁴⁴ Incarceration outside of the juvenile's community for prolonged periods causes instability.¹⁴⁵ This factor coupled with the emotional trauma of adolescence or post adolescence creates a volatile

¹³⁸ H. ACTON, PUNISHMENT: FOR AND AGAINST 47-48 (1971).

¹³⁹ D. ZELINSKI, PROGRAMS OF THE YARVILLE YOUTH RECEPTION AND CORRECTION CENTER 9-10 (1981). The types of programs available include auto mechanics and body repair, culinary arts, masonry and construction work. *Id.* at 10.

¹⁴⁰ See *supra* notes 52-56 and accompanying text.

¹⁴¹ See De Muro, *supra* note 136, at 10, col. 3.

¹⁴² N.J. Assembly Bill No. 641, § 24(b)(9) (Jan. 19, 1982).

¹⁴³ The restitution provision broadly states that the court will determine the amounts and conditions of restitution, and exempts those individuals who cannot pay now and will not be able to pay later. *Id.*

In some cases such as murder, restitution may not be appropriate at all, and in other cases, the offender may be unwilling to restore property to the victim, which would leave the authorities in a position of constantly having to pursue those who must pay. H. ACTON, *supra* note 138, at 48.

¹⁴⁴ De Muro, *supra* note 136, at 10, col. 3.

¹⁴⁵ BEHIND BARS 72 (R. Kwartzler ed. 1977).

situation that can be avoided by providing adequate supervision at reentry.

Apart from these singular inadequacies, the new legislation, viewed in its entirety, has even greater flaws. The new code displays an inconsistent attitude by providing for harsher dispositions within the juvenile system¹⁴⁶ while relaxing waiver standards¹⁴⁷ which will transfer greater numbers of juveniles to adult court. With the wide choice of dispositions available in juvenile court, there should be little if any need for waiver to adult court. Retention of the waiver provisions, therefore, can only be justified as a method of appeasing society, and this will hardly be necessary once society becomes aware of the changes in the juvenile system. Voluntary waiver which will be retained in the new code¹⁴⁸ should also not be seen as a justification of the waiver provision; this election simply indicates that the deficiencies of the juvenile system, namely the failure to accord juveniles full constitutional rights in a "hostile" juvenile system, have yet to be corrected. This denial of rights to juveniles,¹⁴⁹ particularly indictment, trial by jury, and bail, is the warning light that the code's overall approach to juvenile crime is seriously misguided. Fairness demands that in an adversarial system, procedurally both parties be on equal footing. Yet, the juvenile system's attitude toward disposition is becoming harsher while juveniles remain deprived of their basic rights in order to have a fair hearing. The legislature can no longer ignore the fact that once a juvenile is handed over to the legal system, conflict arises between the state's interest in guarding its citizen's welfare and the juvenile's best interest,¹⁵⁰ and no amount of masking or label swapping will alter this basic tenet.¹⁵¹

Finally, no study of the new code is complete in a vacuum. There are two external factors which exert pressure on the code that must be considered: societal fear of escalating crime¹⁵² and the overburdened prison and correctional system.¹⁵³

It may be assumed that in a newly formed and developing society, the normal evolutionary process is that societal alarm due to deviant behavior affects the development of criminal laws which in

¹⁴⁶ See *supra* notes 113-17 and accompanying text.

¹⁴⁷ See *supra* notes 131-37 and accompanying text.

¹⁴⁸ See *supra* note 133.

¹⁴⁹ N.J. Assembly Bill No. 641, § 21 (Jan. 19, 1982).

¹⁵⁰ See Mead, *supra* note 25, at 582-603.

¹⁵¹ See, e.g., N.J. Assembly Bill No. 642, § 1 (Jan. 19, 1982). The new legislation changes the name of the court to the family court.

¹⁵² Marks, *supra* note 20, at 1, col. 2.

¹⁵³ See REPORT, *supra* note 7; see also *supra* note 12 and accompanying text.

turn lead to the construction of lock up facilities and the creation of sentencing alternatives to deal with the offenders. This course of development, however, has long passed in New Jersey. The state is presently at the stage where widespread societal alarm and overcrowded institutions are the status quo. What remains in flux is the law, which has yet to address the external pressures coming to bear on it.

The current state of affairs is analogous to a nut in a nutcracker. No matter how hard and tough the law is, with pressure from both prongs, societal alarm and overcrowded penal institutions, it is bound to crack, and any legislature that fails to address and alleviate these external pressures will find its solution to be an exercise in futility. The most stinging criticisms of the new code to date suggest that these problems have been ignored.¹⁵⁴

Yet despite such neglect, certain changes can be made to reduce these external pressures. First, societal fear can be reduced by enactment of laws which afford average citizens greater latitude in protecting themselves when subject to criminal attacks.¹⁵⁵ Second, pressure stemming from overburdened correctional facilities can be relieved as well. With the passage of the new code, added numbers of juveniles in the juvenile and adult correctional facilities will create the need to expand existing facilities at a cost of approximately \$65,000 per correctional bed.¹⁵⁶ Yet large, expensive facilities have never proven to be the solution to the delinquency problem; they exist primarily to warehouse bodies.¹⁵⁷ The legislature must focus elsewhere in order to reduce the incidence of first-time offenses and the recidivist rate, thereby cutting down the number of delinquents and the need for more beds. It should provide funding for more community based, free mental health clinics, as preventative measures which stand apart from the legal system.¹⁵⁸ These clinics should be staffed to handle problems that have not yet blossomed into juvenile-family crises and

¹⁵⁴ See De Muro, *supra* note 136, at 10, col. 3.

¹⁵⁵ Citizens should be permitted to carry chemical substances such as mace to be used in situations of self defense.

¹⁵⁶ See De Muro, *supra* note 136, at 10, col. 3. As of July 22, 1981, correctional institutions housed a total 6,969 inmates, of whom 41% were serving 1-5 years, 26% were serving 6-15 years, 24% were serving 15 years or longer, and 8% were serving life sentences. N.J. DEP'T OF CORRECTIONS, INMATES IN NEW JERSEY CORRECTIONAL INSTITUTIONS ON JULY 22, 1981: TOTAL TERM AT ADMISSION (1981). The age breakdown for adolescents revealed that 3% of the total number of incarcerations were 15 years or younger and 17% were 16-20 years of age. See also Peet, *supra* note 6, at 15, cols. 2-4.

¹⁵⁷ See N. MORRIS, THE FUTURE OF IMPRISONMENT (1974).

¹⁵⁸ See G. WHEELER, COUNTER-DETERRENCE 124 (1978).

those which have become crises, which in turn should be removed from the family court's jurisdiction.

Other inroads must be made, also, in order to prevent crime. Most communities have few, if any, recreational facilities so essential to channeling adolescent energy into constructive behavior. With nowhere to go and no supervision on the streets, it is little wonder youths end up in gangs involved in destructive activity.

Community mental health centers and recreation facilities, are two social approaches to the problem of reducing the number of first time offenses. They serve as examples to show that there are nonlegal as well as legal solutions available to prevent crime.

In the legal realm, children should be placed in crisis intervention programs replete with family counseling within their own community when first time arrests occur.¹⁵⁹ With the exception of a few extremely dangerous juveniles, no children should be incarcerated.¹⁶⁰ To this extent, all New Jersey state training schools¹⁶¹ should be closed down¹⁶² and the highly dangerous youths transferred to smaller community units for intensive rehabilitative treatment and care.¹⁶³ The effect of such a community approach should be a lowered recidivist rate in New Jersey.

The above nonlegal and legal solutions to the problems of crime prevention and rehabilitation are community oriented. Given that juvenile offenses often stem from community conditions and that these juveniles wish to productively function in these same communities, it is only reasonable to expect that these communities should take responsibility for providing the necessary programs and support to aid these youths.¹⁶⁴

This movement toward community based programs in an effort to curtail crime and alleviate the pressure stemming from the over-

¹⁵⁹ K. WOODEN, *WEeping IN THE PLAYTIME OF OTHERS* 234 (1976).

¹⁶⁰ *Id.* The ability to make accurate decisions concerning those that will be incarcerated will depend on how advanced the fields of psychology and sociology are.

¹⁶¹ The term, "training school" generally connotes a correctional facility that attempts to reeducate juveniles often times through vocational training.

¹⁶² See Wooden, *supra* note 159, at 234.

¹⁶³ *Id.*; see Kwartzler, *supra* note 145, at 136-37. Most prison administrators contend that 30-40% of inmates in adult correctional facilities could be transferred to community programs. *Id.* at 137. These statistics should apply equally to juveniles who need the nurturing effects of their families and communities.

¹⁶⁴ See generally N.J. DEPT OF CORRECTIONS, *INMATES IN CORRECTIONAL INSTITUTIONS ON JUNE 24, 1981: ETHNIC IDENTIFICATION* (1981). The ethnic makeup of all incarcerated offenders was 59% black, 30% white, and 10% hispanic. *Id.*

crowded prison and correctional system will no doubt require a great deal of time and large sums of money.¹⁶⁵

More than time and money, however, these programs require commitment from society. Unfortunately, the obvious dearth of such programs is illustrative of a further reaching problem. American society has never placed a premium on rehabilitating people,¹⁶⁶ be they juveniles or adults, whether in a community setting or in correctional facilities. It is a sad commentary that this society, presently, as in the past, has taken only a half-hearted look at a problem from which it would rather look away.

And while society may be aware from crime statistics that it has been victimized in the past, it has never grasped hold of how, each time the jail door closes, the losses of talent, creativity, and potential contribution have made it victim once again.

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¹⁶⁵ Despite the costs incurred by instituting community based programs, these programs are less expensive than expanding the current, warehouse type facility. See *supra* notes 136 & 156 and accompanying text.

¹⁶⁶ See generally Allen, *Legal Values and the Rehabilitative Ideal*, in 2 CRIME AND JUSTICE 10-18 (L. Radzinowicz ed. 1977).