III. CRITIQUES OF THE LAW AND PRACTICE AFFECTING JUVENILE DETENTION IN THE DISTRICT OF COLUMBIA

THE ROLE OF THE PROBATION OFFICER IN INTAKE: STORIES FROM BEFORE, DURING, AND AFTER THE DELINQUENCY INITIAL HEARING

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INTRODUCTION

The juvenile probation intake officer stands at the threshold of the delinquency system, ideally positioned to attach to a child the label "bad," "sad," "mad," or "can't add"—or no label at all.[1] By attaching the delinquency system label of "bad," the probation intake officer determines who makes it into the delinquency system and, in a real sense, who "doesn't make it." The central hypothesis of this Article is that a carefully crafted role exists in the law for the juvenile probation office and that intake probation officers do not properly understand and execute their role before, during, and after initial hearings in delinquency cases.

District of Columbia probation officers in the juvenile intake unit are remarkably competent and effective, but they routinely perform the wrong job. They regularly present the case for pretrial detention of children—the job of a prosecutor; and they rapidly and efficiently process many cases—the job of a courtroom clerk. They are not sufficiently focused on keeping children out of detention and out of the delinquency system. They are not adequately promoting "probation" which, by definition, represents a system for maintaining offenders and alleged offenders in the community rather than in prison.

Before the initial hearing, an intake probation officer is largely responsible under District of Columbia Code Section 16-2305 for determining whether a case is formally charged.[2] Probation officers should keep more cases out of the delinquency system. Probation officers should speak with children and families confidentially, and, to the extent that the children and families voluntarily request

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1. "Bad" means delinquent; "sad" means neglect; "mad" means mental health; and "can't add" means special education. Robert G. Schwartz, Another Perspective: The Nation and Other States, Remarks to the Association for Children of New Jersey (Nov. 21, 1994) (crediting Bob Friedman of the Florida Mental Health Institute for coining the rhyming labels).

2. D.C. CODE ANN. § 16-2305(a) (1989 Repl.) ("If judicial action appears warranted under intake criteria established by rule of the Superior Court, the Director [of Social Services] shall recommend that a petition be filed.").

help, the probation officers should routinely refer children to relevant service providers in the community. Before the initial hearing, probation officers should release all children who are not dangerous and who do not present a risk of flight.[3] For children who are dangerous or who do present a risk of flight, and for whom probation officers can arrange satisfactory supervision in the community, probation officers should set up the supervision and release the children.

During the initial hearing, probation officers should be silent.

After the initial hearing, probation officers should find ways to get detained children out of the juvenile jail and to get accused children out of the delinquency system.

Not surprisingly, this Article has three principal sections: "Before . . .," "During . . .," and "After the Initial Hearing." Each section has three subsections: "The Premise," "Stories [from Before, During, or After the Initial Hearing]," and "Analysis." The analysis in each of the three sections promotes a central proposal for returning probation to its defining mission—keeping children out of incarceration.

I. BEFORE THE INITIAL HEARING

A. *The Premise*

The law assigns to the Director of Social Services (i.e., intake probation) the critical gatekeeping function of screening delinquency cases and, where appropriate, keeping children out of the delinquency system.[4] Intake probation officers are not doing an adequate job of screening cases and keeping children out of the system. This inadequacy is attributable in large part to a failure to understand and comply with intake probation's statutorily designated role.

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3. *See generally* Henry A. Escoto, *Pre-Initial Hearing Detention: Are the Police Department and Social Services Intake Following the Law?*, 3 D.C. L. REV. 193 (1995).

4. *See generally* D.C. CODE ANN. § 16-2305 (1989 Repl.). The text of § 16-2305 is reprinted, *infra*, n.15.

B. *Stories from Before the Initial Hearing*

THE "INITIAL" CASE

Representing Prentiss, a 15 year-old with a negligible record, my students and I[5] alleged a violation of the Section 16-2305 intake process and moved, on that basis, to dismiss the delinquency petition. It was the first case in which we had filed such a motion, and, to my knowledge, the first such motion litigated in District of Columbia Superior Court. For the first half of the hearing, the judge was curt with us and dismissive of our arguments. He appeared to regard the motion as mountains-from-molehills, procedural poppycock and, no doubt, had decided to dismiss it.

We called our star witness, the secretary from the prosecutor's office.[6] Through her, we introduced the form on which the intake probation officer recommends petitioning or not petitioning the case. The prosecutor's secretary had filled out that form, signed it for the intake probation officer, and initialed the signature. We were planning, or at least hoping, to show that the prosecutor's secretary filled out the form *after* the prosecutor had petitioned the case and that, furthermore, the call to the intake probation officer for permission was after-the-fact.

The judge's attitude and demeanor shifted suddenly as he sensed the significance of the initials on the form. He barked a few sentences regarding who he would like to see in court following a recess. During the recess, there was a hallway meeting between the head of probation and the chief prosecutor. The prosecutor then made an unopposed oral motion to dismiss the case.

ADVOCATING FOR LOREN

Loren was a pudgy, prepubescent 12 year-old. He had a smiley face, but I don't believe that I ever saw him smile. In school one day, a kid slung one of those "your mama" comments. Sammy, the target of the indignity, thought that Loren had been the purveyor of the insult, and so he hit Loren. Loren punched back

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5. "My students and I" refers to the author and students of the District of Columbia School of Law (DCSL) enrolled in the law school's Juvenile Law Clinic. Similarly, in the remainder of this Article "us" and "we" refer to the author and students of the DCSL Juvenile Law Clinic. Additionally, the names of the juveniles have been changed to preserve anonymity.

6. Section 16-2305 gives the responsibility of prosecuting juvenile cases to the Corporation Counsel. *See* D.C. CODE ANN. § 16-2305(c). For simplicity, this Article will refer to the Corporation Counsel's office as the prosecutor's office, and the Assistant Corporation Counsel as the prosecutor.

effectively. Subsequently, Sammy's mother insisted that the school and the police take action against Loren. The police arrested Loren on a charge of simple assault. The court appointed my students and I to represent Loren. We met him and his mom on the day of his initial hearing in Juvenile Court.

Little kids are a rarity in District of Columbia Juvenile Court; it struck me as peculiar that the intake probation officer had decided to recommend petitioning this simple assault case. Accordingly, following the initial hearing, my students and I interviewed the intake probation officer who informed us that the "social factors" for Loren were positive, i.e., she recognized that Loren was well behaved and that his family was supportive.[7] She said that she did not have information about the fight at school. We asked if she had spoken with the complainant; she answered that she had not.

Having garnered and recorded this information, we asked the intake probation officer why she had recommended petitioning. Her reply amazed us: because the prosecutor had already decided to proceed with the case, and because the intake probation officer had completed her paperwork for petitioning Loren's case before investigating the matter and examining the social factors in order to accommodate the prosecutor. She readily acknowledged that, based upon the social factors, Loren was not in need of "care and rehabilitation" and did not need to be in the delinquency system.[8]

Loren's mother reported to us—as she had reported to the probation officer—that this court involvement was profoundly disturbing to Loren. Since his arrest, he had been crying, throwing up, and he refused to leave the house. Loren's mother also had an incident report form from the school indicating that the other child had started the fight.

We did not know why the prosecutor had decided to petition the case. After doing some factual investigation, we obtained the probation officer's permission to inform the prosecutor that, based upon an assessment of the social factors, the probation officer saw no reason for the case to be in the system. Approximately one month after petitioning the case the prosecutor consented to a dismissal.

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7. *See* D.C. SUPER. CT. JUV. R. 48. Rule 48 permits the Corporation Counsel to file a dismissal of a petition. *Id.* Rule 48(a). Additionally, the judicial officer may dismiss the petition and terminate the proceedings at any time "if such action is in the interests of justice and the welfare of the [child]." *Id.* Rule 48(b).

8. *See* D.C. CODE ANN. § 16-2317 (1989 Repl.). Section 16-2317(d) provides that "[i]f the [court] finds that the child is not in need of care and rehabilitation it shall terminate the proceedings and discharge the child from detention, shelter care, or other restriction previously ordered." *Id.*

MEETING EAST AND WEST

We met Andrew East and Arlen West on the same day.[9] The court appointed us to represent them in delinquency cases. In unrelated events, each was arrested for and charged with the unauthorized use of a vehicle as a passenger. Neither East nor West had any prior arrests or, *a fortiori,* adjudications.[10]

The court released both East and West at their initial hearings that day. In neither case did the intake probation officer recommend, nor did the prosecutor seek, pretrial detention. We looked at the petition recommendation form executed by the intake probation officer in each of the two cases and found, again coincidentally, that for each child an intake probation officer had recommended against petitioning.

As part of our investigation in the East and West cases, we established that the intake probation officers had failed to contact the complainants (the owners of the allegedly stolen automobiles) to notify them of the recommendation against petitioning and that they (the complainants) had a right to appeal the recommendation to the prosecutor. In each case, we drafted and ultimately filed a motion to dismiss the petition based upon violations of the intake process as defined by Section 16-2305.

Both East and West were referred to the Consortium for Youth Alternatives (CYA) Diversion Program, a privately-run program for alleged first offenders. If a child accepts the referral, a CYA intake counselor assesses the child and the family for a period of approximately two weeks in order to devise a program of intervention based upon the needs of the child and the family. Such a program

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9. Although the names provided are fictitious to protect confidentiality, the two children we represented in the actual cases described did have surnames that coincidentally were opposite in meaning. I invite the reader to speculate on the real names.

10. The police officers and, subsequently, the Social Services representative at the Receiving Home (a juvenile detention facility in the District which was permanently closed in August, 1995), detained East and West prior to the initial hearing rather than releasing them to a parent or custodian. *See generally* Escoto, *supra* note 3 (police and probation should release children who are not dangerous and do not pose a risk of flight). East's mother told us that on the night her son was arrested, she had spoken on the telephone with someone from the Receiving Home who told her she could come and pick up her son. She took a bus from her home in southeast Washington to the Receiving Home in northeast. When she arrived, the person whom she encountered at the Receiving Home told her that she could not take her son.

West's mother was not told the night before that she could retrieve her son from the Receiving Home. Arlen West told us that, in the cellblock prior to the initial hearing, the United States Marshal had struck him without provocation. Andrew East confirmed that the marshal struck West; East observed the encounter and reported that West had done nothing to provoke the incident. West was not noticeably injured. We later filed a complaint with the U.S. Marshal Service. Nothing came of it.

typically includes group counseling for the child regarding drug abuse or deviant conduct. The program also may call for tutoring, recreation, or other services. The child and family may formally accept the program by signing a contract with CYA which specifies the terms of the intervention program. As part of the deal, the prosecutor agrees to a six-month, pretrial continuance of the delinquency case. If the child successfully participates in the program during that six-month period, the prosecutor then moves to dismiss the delinquency charge.

We reasoned that the intake probation officers' recommendations against petitioning in these cases represented conclusions that—even assuming guilt on the charges—neither child was in need of care and rehabilitation from the delinquency system. With the agreement of each client, we asked CYA personnel to use the CYA two-week assessment period in order to validate or contradict the intake probation officers' initial conclusions that East and West were not in need of services from the delinquency system generally or, indeed, from CYA particularly. After several discussions, a CYA representative informed us that CYA's contract would not allow its representatives to assess children who were not likely to be in its program.

Both East and West, based on our advice, declined to participate in the diversion program. Prosecutors agreed to dismiss both cases if, after a period of approximately three months, neither child had been re-arrested. Based on that arrangement, both cases were subsequently dismissed.

RAPHAEL'S RE-FILE

Raphael faced a drug charge, but the government was not ready for trial. On the second or third occasion that the government was not ready, the court dismissed the case "for want of prosecution."[11] The dismissal was without prejudice. The government "re-brought" the case approximately two months after the dismissal and six months after the alleged delinquent conduct.

The intake probation officer investigated the social factors and considered the nature and circumstances of the alleged offense prior to recommending the original petition. However, there was no intake procedure by probation prior to the re-petitioning. We argued that Section 16-2305 requires an investigation and

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11. At superior court, we refer to a dismissal for want of prosecution as a "DWIP." Actually, the word is a verb, *to wit*, the case was "dwipped." I've never known whether the correct spelling is "dwipped" or "dw'pped," but I've always felt that it would be more accurate to say that the case had been "dwopped."

recommendation prior to re-petitioning, just as in an original intake.[12] The re-petitioned case was dropped by the prosecutor.

CARY, THE THROWBACK

Before he became our client, Cary had one prior adjudication for a relatively minor charge. Cary is mildly mentally retarded and, when we met him, functioned academically in the early elementary grade levels. He lived in run-down housing; his mother, who was illiterate, had a difficult time managing her children and her household. The diagnostic probation officer recommended commitment for Cary on a first adjudication because, most likely, the probation officer was hardened to the devastating impact that incarceration can have on a child or simply did not know what else to do with this child. Cary was committed on that first adjudication and confined at Cedar Knoll, a medium security training school. While incarcerated, he attempted suicide. After incarcerating Cary for eight months, the executive branch personnel responsible for Cary released him to "aftercare."[13] Shortly thereafter, Cary was arrested for the unauthorized use of a motor vehicle, and he became our client.

We looked at the petition recommendation form. In the place for the intake probation officer's signature were the printed letters "DHS," standing for the "Department of Human Services." There are boxes on the form indicating whether an investigation was conducted and whether the child was interviewed, etc. None of the boxes was checked. We surmised that the intake probation officer had not investigated the case; rather, either the intake probation officer had relied on a DHS worker's conclusion that the case should proceed, or the intake probation officer had recommended petitioning merely because Cary had a previous adjudication and was still on aftercare. Interviews with the intake probation officer and the supervisor of that office did not change our assumptions about their failure to investigate or exercise discretion in the matter.

In the middle of the hearing on our written motion to dismiss the petition (based upon alleged violations of the Section 16-2305 intake process), we learned that Cary had misstated his age. He was 16, not 15. District of Columbia Superior

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12. Section 16-2305(a) requires the Director of Social Services to "conduct a preliminary inquiry to determine whether the best interests of the child or the public require that a petition be filed." D.C. CODE ANN. § 16-2305(a) (1989 Repl.).

13. Aftercare, in the juvenile system, is a kinder name for parole. *See* D.C. CODE ANN. § 16-2301(18) (1989 Repl.).

Court Juvenile Rule 103(a)(2)(B) mandates that an intake probation officer recommend petitioning if the child is 16 or older and is already committed in another matter to the legal custody of the government.[14] Therefore, intake probation was required to recommend petitioning in Cary's case. Accordingly, in the middle of the hearing we orally moved to withdraw the motion. In its written opposition to our motion to dismiss, the government had not raised Rule 103(a)(2)(B), and, in discussions prior to his testimony, the intake probation officer had not offered the Rule as a justification for the petition recommendation in Cary's case. Ironically, no one seemed to understand our reasons for withdrawing the motion.

C. *Analysis*

Section 16-2305 of the District of Columbia Code establishes a process for petitioning delinquency cases with two stages of decision-making.[15] The intake

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14. Rule 103(a)(2)(B) states, in relevant part, that a "petition shall be recommended in all cases . . . where the respondent is 16 or more years of age and is already under commitment to an agency or institution as a delinquent child." D.C. SUPER. CT. JUV. R. 103(a)(2)(B).

Hereinafter, all references in the text of this Article to Superior Court Juvenile Rules will be provided without the words "Superior Court Juvenile." The reader is to assume that any reference to a Rule is to a Superior Court Juvenile Rule unless otherwise specified.

15. D.C. CODE ANN. § 16-2305(a), (c) (1989 Repl.). Section 16-2305 provides:

(a) Complaints alleging delinquency, need of supervision, or neglect shall be referred to the Director of Social Services who shall conduct a preliminary inquiry to determine whether the best interests of the child or the public require that a petition be filed. If judicial action appears warranted, under intake criteria established by rule of the Superior Court, the Director shall recommend that a petition be filed. If the Director decides not to recommend the filing of a petition, the complainant in a delinquency or neglect case shall have a right to have that decision reviewed by the Corporation Counsel, and the Director shall notify the complainant of such right of review. Complaints alleging neglect submitted by the Child Protective Services Division of the Department of Human Resources [Department of Human Services] shall be referred directly to the Corporation Counsel of the District of Columbia.

(b) Petitions initiating judicial action may be signed by any person who has knowledge of the facts alleged or, being informed of them, believes they are true, except that petitions alleging need of supervision may only be signed by the Director of Social Services, a representative of a public agency or a nongovernmental agency licensed and authorized to care for children, a representative of a public or private agency providing social service for families, a school official, or a law enforcement officer. Petitions shall be verified and verification may be upon information or belief.

(c) Each petition shall be prepared by the Corporation Counsel after an inquiry into the facts and a determination of the legal basis for the petition. If the Director of Social Services has refused to recommend the filing of a delinquency or neglect petition, the Corporation Counsel, on request of the complainant, shall review the facts presented and shall prepare and file a petition if he believes such action is necessary to protect the community or the interests of the child. Any decision of the

probation officer and the prosecutor each is responsible for one stage. In the first stage of the process, the intake probation officer is to review the social factors and the nature and circumstances of the charges before recommending whether to file a petition.[16]

If the intake probation officer recommends filing a petition, then, in the second stage of the process, the prosecutor exercises independent discretion based upon all relevant considerations.[17] If, on the other hand, the intake probation officer decides not to recommend petitioning, the statute requires that the intake probation officer contact the complainant to inform him or her of the recommendation against petitioning.[18] The intake probation officer must also inform the complainant that he or she may appeal that recommendation to the prosecutor.[19] If the complainant appeals the recommendation not to petition, the prosecutor can either override or concur with the intake probation officer's recommendation.[20]

Analysis of this statutory scheme raises several questions. First, why did the drafters of the statute assign the duty of recommending petitioning to the intake probation officer? Second, why call it a "recommendation" if it was potentially a pivotal or final decision against petitioning? Third, why assign the job of contacting the complainant to the intake probation officer rather than to the

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Corporation Counsel on whether to file a petition shall be final.

(d) A petition shall be filed by the Corporation Counsel within seven days (excluding Sundays and legal holidays) after the complaint has been referred to the Director of Social Services, except as otherwise provided in section 16-2312. A petition shall set forth plainly and concisely the facts which give the Division jurisdiction of the child under section 11-1101 (13). In delinquency cases the petition shall also state the specific statute or ordinance on which the charge is based. If delinquency or need of supervision is alleged, a statement shall be included in the petition that the child appears to be in need of care or rehabilitation. The petition shall contain such other facts and information as may be required by rules of the Superior Court.

(e) A petition may be amended by leave of the Division on motion of the Corporation Counsel or counsel for the child, at any time prior to the conclusion of the factfinding hearing. The Division shall grant the Corporation Counsel, the child, and his parent, guardian, or custodian notice of the amendment and, where necessary, additional time to prepare.

(f) The District of Columbia shall be a party to all proceedings under this subchapter.

Id.

16. *Id.* § 16-2305(a).

17. *Id.* § 16-2305(c). In addition to the considerations relevant to the intake probation officer, the prosecutor considers whether there are any legal impediments to petitioning the case. *See In re* T.G.T., 515 A.2d 1086, 1089 (D.C. 1986). For example, the prosecutor may interview a police officer and conclude that a court might find that the police obtained critical evidence in violation of the Fourth Amendment. In that kind of situation, the prosecutor would likely decide not to proceed with the case.

18. D.C. CODE ANN. § 16-2305(c) (1980 Repl.).

19. *Id.* § 16-2305(a).

20. D.C. CODE ANN. § 16-2305(a), (c) (1989 Repl.).

prosecutor or, as a preemptive measure, to the police officer who originally interviewed the complainant? Fourth, who is the complainant? Fifth, what happens if the complainant does not appeal a recommendation against petitioning? Sixth, what if there is no complainant?

Prior to the District of Columbia Court Reorganization Act of 1970[21] that transformed the handling of delinquency cases, the intake probation officer had a much larger role in the petitioning process; essentially, the intake probation officer made the petitioning decision.[22] The 1970 changes reduced that role to the present first-stage decision-making. Further, maintaining the influence of the intake probation officer to affect the petition decision provides legitimacy to the process, much like the significantly neutral influence of a grand jury in indicting an adult felon. The District of Columbia Court of Appeals has recognized on at least two occasions the importance of the petitioning process as a guarantee of legitimacy.[23]

The case studies previously mentioned demonstrate that intake probation officers and prosecutors do not comply with the intake process required by Section 16-2305 and Rules 102 and 103. In Prentiss's case, the initials of the prosecutor's secretary on the intake probation officer's petition recommendation form provided "smoking gun" evidence that the prosecutor had usurped the function of the intake probation officer. Similarly, the intake probation officer in Loren's case admitted that she recommended petitioning as a *pro forma* matter, not having investigated the case beforehand, in order to accommodate the prosecutor's petitioning schedule. The intake probation officer violated the law by neglecting to complete the required investigation and inquiry before making a petitioning recommendation. In addition, the non-exercise of discretion by the intake probation officer constituted, arguably, an abuse of that discretion. Both the prosecutor and the intake probation officer ignored the statutorily prescribed process and order for the intake of a delinquency case. As a result, Loren and his mother needlessly suffered a month of distress; those who comprise "the system" squandered court time, prosecutorial effort, and defense effort by processing, investigating, preparing, and litigating (through an initial hearing and a status hearing) a case that should never have been petitioned in the first place.

The intake probation officer released Loren from custody prior to his initial

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21. Pub. L. No. 91-358, 84 Stat. 475 (1970).

22. *See, e.g.,* Fare v. Michael C., 442 U.S. 707, 720 n.5 (1979) (petition filed by probation officer initiates action in Juvenile Court).

23. *See In re* C.Y., 466 A.2d 421, 425 (D.C. 1983), and M.A.P. v. Ryan, 285 A.2d 310, 316 (D.C. 1971).

court hearing (a so-called "community case" or "release case"), precipitating a week's delay between the referral of the complaint to Social Services and the initial hearing. The court did not appoint us to represent Loren until the day of the initial hearing.[24] Generally, as in Loren's case, the probation officer and the prosecutor have completed the intake and petitioning process before the appointment of defense counsel. As a practical matter, therefore, defense attorneys ordinarily are not in a position to intervene at the intake stage.

One cannot assume, even if available prior to intake and petitioning, that defense counsel would or could intervene to inform the prosecutor that the social factors weigh against petitioning; similarly, defense counsel is not in a position, even if appointed prior to petitioning, to persuade the intake probation officer to communicate directly with the prosecutor in order to halt the petitioning of a case in which positive social factors should rule out petitioning. A challenge to the validity of the petition after the fact, however, is entirely appropriate. The defense is entirely within its rights to challenge a violation of the statute and rules by the prosecutor and the probation officer. Counsel could also seek injunctive relief and, in theory, could certify a class to challenge habitual violations of the intake and petitioning process.

We determined that it was necessary to memorialize the intake probation officer's statements (regarding social factors, etc.) and to investigate the facts of the case before approaching the prosecutor to suggest a dismissal. Interviewing the intake probation officer is an action that defense attorneys often do not take; when they do interview the intake probation officer, the substance of the discussion is the recommendation for release or detention pending the status hearing and trial rather than the intake probation officer's adherence to the statutorily prescribed intake and petition recommendation procedures. If Loren had an attorney who neglected to interview the intake probation officer and who did not adequately investigate the facts, the case could have easily resulted in Loren's entering a diversion program or agreeing to a consent decree.

The East and West cases demonstrate intake probation's typical non-adherence

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24. The delay in bringing community cases into court—typically a delay of one week—is unnecessary. The delay is nothing more than an historical anomaly, probably attributable to the seven-day period allowed by statute for petitioning a delinquency case pursuant to D.C. CODE ANN. § 16-2305(d) (1989 Repl.). Moreover, the delay is prejudicial to the defense because, *inter alia,* the government is able to begin its investigation a week before the defense can begin its investigation. There is no reason why the initial hearing in community cases could not commence within one or two days of the intake of the case. Court congestion does not justify the delay. Either way, whether community cases are heard the next day or a week later, there will be the same number of cases per day.

to the statutorily prescribed process and order for the intake of a delinquency case. In each case, the intake probation officer recommended against petitioning; with no appeal from a complainant, the prosecutor petitioned each case. Neither case should have proceeded to the petitioning stage. Consequently, judges, prosecutors, defense attorneys and investigators, intake probation officers, and CYA diversion program personnel spent needless hours on these two cases.

The East and West cases prompt one to question the legal significance of the intake probation officers' recommendations against petitioning. The statute does not define "recommendation" or otherwise explain the choice of that term. One might assume that the choice of the term "recommend" suggests that it is not incumbent upon the complainant to adopt or follow the petitioning recommendation of the intake probation officer; the complainant should not feel compelled to follow the intake probation officer's recommendation. The complainant, a victim of a crime, has a significant stake in the proceedings. The victim should obtain from the delinquency system a sense of substantive, procedural, and psychological satisfaction. Presenting the victim with a decision by the intake probation officer not to petition could send the wrong message.

The intake probation officer is the correct person to talk with the complainant because the intake probation officer presumably has social worker sensitivity to the needs of the child and the victim. Moreover, having examined the nature and circumstances of the charge, as well as the social factors associated with the accused child, the intake probation officer is in a position to present a balanced picture to the complainant in explaining a recommendation against petitioning. Having recommended against petitioning, the intake probation officer typically will be defending a conclusion that the child is not in need of care and rehabilitation to a victim whose immediate inclination will be to exact a pound of flesh.

The victim, perhaps more than any other person, is in a position to contest the conclusion that the child is not in need of care and rehabilitation. The victim may have seen an aggravated and apparently dangerous young person and, accordingly, may convince the intake probation officer that the child does need court intervention. If, in speaking with the complainant, the intake probation officer maintains a view that the case should not be petitioned, and convinces the victim that the child should not be held accountable in a court of law, the public's will and the public interest have indisputably been served. One could not expect, over the course of time, the same response from a prosecutor or a police officer *vis-a-vis* complainants. On the contrary, prosecutors and police officers are advocates in an adversarial process. They would be much more inclined to pressure the complainant to pursue the case.

If the intake probation officer continues to oppose petitioning after speaking with the complainant, the complainant can "appeal" to the prosecutor.[25] The statute explicitly provides that the intake probation officer is to notify the complainant of his or her right to appeal.[26] The prosecutor, as the appellate decision-maker, does not solicit the appeal. Furthermore, one might assume that a complainant who contacts the prosecutor following notification by the probation officer of a decision against petitioning would likely be an active and reliable witness.

The statute does not explicitly address what happens if the complainant does not appeal the intake probation officer's recommendation against petitioning. An appeal is, by definition, a means for overriding or overturning a decision. The complainant's right to an appeal would be superfluous if the prosecutor could act, in the absence of such an appeal, to override the intake probation officer's assessment and determination against petitioning.

In addition, the statute does not explicitly address what happens (or what does not happen) if there is no complainant. However, the absence of a complainant means that the alleged delinquent act is a "victimless crime." There is no societal justification to prosecute a victimless crime allegedly committed by a child if the intake probation officer concludes that the child is not in need of care and rehabilitation from the court. In sum, one must arguably conclude that the statute does not provide the prosecutor with an opportunity to petition in circumstances where the complainant has not appealed the intake recommendation against petitioning, and in circumstances where there is no complainant.

There is no evidence from the plain language of the statute or from the legislative history that the term "complainant" can refer to the arresting police officer in a victimless crime case.[27] Remarkably, the statute and the Rule—prior to amendments in August, 1995—contained different language. The statute uses the term "complainant,"[28] but the Rule employed the phrase "the person making the complaint."[29] One might reasonably construe "complainant" as referring only to the victim and "the person making the complaint" as including both the victim *and* a police officer who lodges the complaint with the prosecutor. Indeed, the

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25. D.C. CODE ANN. § 16-2305(a) (1989 Repl.) ("If the Director decides not to recommend the filing of a petition, the complainant . . . shall have a right to have that decision reviewed by the Corporation Counsel, and the Director shall notify the complainant of such right to review.").

26. *Id.*

27. Although, of course, a police officer can be the victim of an assault, it is not clear that a police officer who executes an undercover purchase of drugs would or should qualify as a complainant.

28. *See* D.C. CODE ANN. § 16-2305(a), (c) (1989 Repl.).

29. D.C. SUPER. CT. JUV. R. 102(a).

comment to Rule 102 stated that "[t]he 'person making the complaint' . . . may be the police officer filing the complaint, the victim of the alleged offense, or, in appropriate cases, both."[30] This language was deleted in the August, 1995 amendments.[31] Applying the interpretation that the "complainant" may be the "person filing the complaint" (e.g., a police officer) distorts and frustrates the statutory scheme.

The 1995 amendments further obfuscate the statutory scheme by deleting altogether any reference to the role of probation (i.e., the intake unit) in notifying the complainant. With the deleted portions lined out and the new language italicized, Rule 102(d) currently reads as follows:

> RECOMMENDATION OF THE INTAKE UNIT. ~~If Division action appears warranted under~~ *Upon conclusion of the preliminary investigation, the intake unit shall make a written recommendation as to whether a petition should be filed using* the criteria set forth in SCR-Juvenile 103.~~, the intake unit may recommend that a petition be filed. It may also make recommendations with respect to the consolidation or disposition of cases before the Division relating to members of the same family or household. If the intake unit decides to recommend against the filing of a petition in a delinquency case, it shall notify the person making the complaint of the right to have that decision reviewed by the Corporation Counsel.~~ *A copy of this recommendation shall be forwarded to the Corporation Counsel.*[32]

Equally "striking" is the deletion of the following language from the comment to Rule 102:

> This Rule implements D.C. Code §16-2305. The involvement of the Director of Social Services in the petitioning decision is a unique feature of the juvenile process. Besides setting out the decision-making process itself, the Rule requires that the respondent and his parents, guardian, or custodian be kept informed of relevant rights and procedures.[33]

This portion of the comment contained an explicit recognition that Section 16-

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30. D.C. SUPER CT. JUV. R. 102 cmt.

31. The amended Juvenile Rules were published on July 24-26, 1995. *See* 123 Daily Wash. L. Reptr. 1441-1476 (D.C. Super. Ct.).

32. D.C. SUPER. CT. JUV. R. 102(d).

33. D.C. SUPER. CT. JUV. R. 102 cmt.

2305 establishes a "decision-making process," and that probation's involvement in the petitioning decision is a feature unique to the juvenile system. Deleting this portion of the comment and changing the Rule, however, does not and cannot alter the statute.

As to the re-petitioning of a case, the statute is silent regarding whether the Section 16-2305 intake process applies.[34] In Raphael's case, six months passed between the dismissal of the original petition and re-petitioning. We reasoned that a child's social factors can change significantly in the period of six months. Moreover, the child's very involvement in the initial court proceeding that led to the dismissal without prejudice may have had a sobering and rehabilitative effect. The delay may have changed the equation in other ways. For example, if the intake probation officer originally recommended against petitioning and the complainant had successfully appealed, the complainant—following several court appearances in which the government was not prepared—may not wish to appeal a second recommendation against petitioning.[35]

Cary received no real care and rehabilitation from the delinquency system by having been committed to a training school on a first adjudication (for a non-violent offense). The recommendation to petition the charges in his second case, thus recycling Cary through the adjudicatory process, was misguided. Adult sentencing provides for consecutive sentences as punishment for multiple offenses, but the juvenile system, premised on *parens patriae*, offers the promise of treatment. A second commitment for treatment is redundant.[36] Cary was already committed to the legal custody of DHS for care and rehabilitation. He did not require another court order for treatment.[37] DHS personnel failed to diagnose and meet Cary's needs during the first commitment. That failure did not excuse, but

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34. *Cf. In re* D.H., No. 91-FS-1073, 1995 WL 571995 (D.C. Sept. 29, 1995) (statute not clear on its face regarding whether § 16-2305(d) seven-day limit for filing petition following referral of complaint to Director of Social Services is mandatory and thus jurisdictional).

35. It is unlikely that the government would re-petition a case if its previous unpreparedness was attributable to the complainant's failure to appear for trial.

36. The principal problem, however, was resorting to commitment in the first case. Cary was not dangerous and, with much-needed services, he could have remained at home on probation following the adjudication of his first offense. In contrast, he received no demonstrable rehabilitation from incarceration; rather, he simply served his time and, during that time, became desperately depressed.

37. Society does have a legitimate interest in solving and resolving a crime by determining guilt or innocence in a trial. In addition, society has an interest in holding a child accountable for a specific offense. However, these reasons do not justify petitioning Cary's second case. Police officers caught Cary using the car. He knew that he had been caught. In addition, the executive branch agency with legal custody of Cary could move to revoke his aftercare (parole) based upon the new violation.

did in part explain, Cary's continuing delinquency. Intake probation should have held DHS personnel accountable for failing to provide care and rehabilitation. Probation intake can hold DHS accountable by refusing to petition another relatively minor case for a child who is already committed to DHS. In essence, probation intake, an arm of the judicial branch, should provide checks and balances to deter incompetence and malevolence by DHS, an arm of the executive branch. Intake probation, therefore, should refuse to accept and rubberstamp a petition recommendation from DHS for a child, like Cary, who is already committed to the custody and care of DHS.

Cary's case further demonstrates that the Rule arbitrarily limits the intake probation officer's discretion to recommend against petitioning when the child is age 16 or older.[38] Cary's first adjudication led to an ill-advised commitment and no meaningful treatment. At 16, he did not benefit from the adjudication of another case except for the unintended benefit of access to new counsel who challenged the petition and spotlighted the failure to provide treatment in the previous case.

II. During the Initial Hearing

A. *The Premise*

In current District of Columbia delinquency practice, the intake probation officer dominates the initial hearing. The prosecutor and the court virtually always concur in the probation officer's recommendation for release or detention, and the defense attorney practically never affects the detention decision. The intake probation officer improperly injects into the detention decision and into the initial hearing information about the child's home and school adjustment. Consequently, irrelevant and highly prejudicial social considerations influence the decision to preventively detain children, and the detention rate is disturbingly and disgracefully high. The intake probation officer should not participate at the initial hearing unless the court determines that secure detention is necessary; at that point, the intake probation officer should intercede, to the greatest extent possible,

38. The limitation in Rule 103(a)(2)(A) (intake must recommend petitioning if the child is currently on probation and the charge is a felony) is, similarly, not a well-reasoned restriction on the exercise of discretion by intake probation. Neither subsection (A) nor (B) in Rule 103(a)(2) has a discernible basis in the statute. Indeed, one might conclude that the Rule contradicts the statutory framework that empowers the intake probation officer to recommend against petitioning. In retrospect, I conclude that, in Cary's case, we should have challenged the validity of the Rule as inconsistent with the governing statute.

to point out social factors that support continued placement of the child in the community.

B. *Stories from the Initial Hearing*

THE FIRST OFFENDER

In January, 1992, on a snowy day in Washington, D.C., I met Sheresh, my first delinquency client. The charge was petty larceny. An engaging veteran of the delinquency system, Sheresh had, as they say, "a record as long as your arm." He had been arrested approximately 15 times; at least 5 of the arrests had become adjudications.[39] Most were minor property offenses, although, as I recall, a couple were drug possessions or sales. His father was not in the picture. His mother was not willing to come to court. She said that she was frustrated by Sheresh and exhausted from running after him when he got into trouble. She also said that he "needed to learn a lesson."[40] The probation officer intended to recommend detention.

I asked Sheresh to explain his circumstances to me and to give me the name of any adults who might be willing to come to court, vouch for him, and take him home to his mother. He gave me, among others, the name of his teacher, Mr. Moreh. With Sheresh's permission, I contacted the teacher by telephone and explained the situation. He came to court, vouched for Sheresh, and walked Sheresh out of court.

Sheresh and I spent much time together preparing his case. I learned more about his family and his history of fending for himself on the streets of Washington, D.C. Sheresh's mother had a drinking problem, and his younger sister was a prostitute at the age of 13. I do not know what happened to them, but I am aware that Sheresh's delinquent conduct became infrequent and then ended. I recently saw Sheresh. He was working a steady job as a bicycle courier and

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39. An "adjudication" in the juvenile context is a judicial determination of involvement in a delinquent act (i.e., a determination of guilt).

40. I report these expressions and attribute them to Sheresh's mother based upon memory of the events, without benefit of notes or a transcript. While I believe that they are accurate, they represent, as well, comments to me from scores of parents over the years whose children have been charged with delinquent conduct. Like Sheresh's story more generally, his mother's comments are illustrative of people's reactions to the delinquency system. Sheresh's mother was prepared to teach the lesson that she would not always "chase after him" or "clean up his messes." She did not foreclose his returning home; but she was not going to come and bring him home. More typically, parents unwilling to come to court state that they want the child to "learn a lesson" from being incarcerated (preventively detained).

claimed to be free of court involvement.

VINCENT THE VENDOR

Vincent helped take care of his brother who was disabled. Although Vincent was unsuccessful in school,[41] he helped financially support the family by working a full-time job selling flowers with a vendor on a District street corner. But he also seemed to have a bad vending machine habit. He liked to get the coins out of them, or at least try.

I met him on his third charge of breaking and entering a vending machine. He was an incompetent bandit not only by virtue of getting caught, but also in having a terrible sense of timing. He pleaded guilty in the first case just before picking up the second case; and then he pleaded guilty to the second case just before picking up the third case, in which I represented him.

At the initial hearing, I argued that it was improper to preventively detain a child on a minor property offense, particularly where there was no evidence of "serious loss or damage" to property in the prior offenses.[42] The judge, who was from "the old school," locked Vincent up. The judge even said something about Vincent not learning his lesson. I filed a motion to reconsider the level of detention, playing up the "social factors." The judge let Vincent out before trial; he probably figured that Vincent had learned a lesson.

INNOCENT ARPAZIA

The police arrested Arpazia for hitting her mother, and Arpazia spent the night in detention awaiting an initial hearing. In the morning, the prosecutor determined that the mother had probably hit Arpazia first. Accordingly, the prosecutor "no-papered" the case.

Ordinarily, when a case is no-papered, the child is released immediately from the cell behind the courtroom and returned to the custody of a parent. Arpazia's mother, however, had informed the intake probation officer that she was unwilling

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41. He obviously had some combination of learning disabilities that—as I recall—were undiagnosed at the time I was representing him.

42. Rule 106(a)(2) requires a finding that a child poses a risk of serious loss or damage to property to justify preventive detention. Moreover, prior adjudications for property offenses are not cognizable in the detention calculus unless they involve "serious loss or damage [to property]." *Id.* The instant charge, i.e., the subject of the hearing, by contrast, is relevant without regard to the degree of loss involved. D.C. SUPER. CT. JUV. R. 106(a)(1)(iii), (a)(2)(ii).

to take Arpazia home. The intake probation officer instructed the marshal to keep Arpazia in the cell and arranged a placement for Arpazia at a privately-run facility for runaway children. We were informed that Arpazia would be transported from the court cellblock to the Receiving Home, a lock-up facility, from where she would be "released" to the custody of the runaway facility personnel. Not surprisingly, Arpazia told us that this plan was not acceptable. She preferred to be released to go home!

We demanded that the case be called. At the hearing, we informed the judge that there was no case against Arpazia and that, consequently, the court had no jurisdiction—either through probation or directly—to place the child in custody outside of her home. The probation officer told the judge about the mother's refusal to take Arpazia home and of the allegation that Arpazia had hit her mother. The judge grudgingly agreed that he had no jurisdiction to keep the child incarcerated or to order placement. Before bowing out, however, the judge launched into a lecture, commanding Arpazia to be a more compliant daughter.

The judge did not know that, approximately a year earlier, the mother's boyfriend had raped Arpazia.[43] The mother had thrown the boyfriend out of the house, but there had been tremendous stress and a great deal of tension between the mother and Arpazia since those events.

TYLER

Tyler was 17 and had no previous record of arrests or adjudications. Police officers patrolling a high-drug area in southeast Washington, D.C. drove their squad car over the curb and across a play area in order to disperse a small crowd. The officers were concerned that persons in the crowd were involved in drug activity.[44] Tyler was there. The officers claimed that he dropped loose rocks of crack as the police car approached. They arrested him, and the prosecutor charged Tyler with possession of crack cocaine with the intent to distribute it.[45]

Tyler's parents had become homeless about three months before his arrest. His father was terminally ill with cancer and was an alcoholic; he had lost his job.

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43. I am reporting from memory on the intake probation officer's comments, without the benefit of a transcript or notes from that hearing. I do not know whether the intake probation officer knew that Arpazia was raped.

44. The officers later acknowledged to me, to my surprise, that they would not employ this tactic of driving toward a crowd in another section of the District.

45. My students and I subsequently filed a weak, but creative motion to suppress the evidence (i.e., the drugs) on Fourth Amendment and First Amendment (right of association) grounds.

Tyler's mother experienced periodic and severe mental problems and had been hospitalized a number of times. Tyler had been living with an adult sister, but her home was crowded with many relatives. He reported that, at the time of his arrest, he had been staying with a friend. However, he could not remember the friend's last name and could not provide an exact address. The friend's family did not have a telephone.

At the initial hearing, the intake probation officer acknowledged that, but for Tyler's homelessness, the recommendation would be for release. Having obtained Tyler's consent in advance, I argued at the initial hearing that Tyler met the definition of "neglected child"[46] and that the court should release Tyler and instruct the probation officer to deliver Tyler to the neglect emergency intake office.

The judge found, however, that Tyler was a danger to other persons under Rule 106[47] and ordered placement in a youth shelter house, with Oak Hill placement pending space in a shelter house. Within a couple of weeks, we prevailed on a motion to reconsider the level of detention, and Tyler was released to the custody of his girlfriend's mother.

C. *Analysis*

The initial hearing in a District of Columbia juvenile delinquency case is a game of Follow-the-Leader, with the judge, prosecutor, and even the defense attorney unwittingly following the probation officer. The intake probation officer, in each case, recommends release, shelter house placement, or secure detention; the prosecutor practically always concurs; and the judge usually falls in line. Inexplicably, the defense attorney often does not object, even when the recommendation is for secure detention. When the defense attorney does object, it is virtually never effective in diverting the court from the path marked by the intake probation officer. Furthermore, in the majority of detention cases, the intake probation officer leads the other players away from the legal standards for judging dangerousness and into a discussion of social factors.

Out of 180 initial hearings monitored in the Superior Court of the District of

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46. A "neglected child" is one "who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary to his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or the custodian." D.C. CODE ANN. § 16-2301(9)(B) (1989 Repl.).

47. *See* D.C. SUPER. CT. JUV. R. 106(a)(1)(i)-(vi) (listing relevant factors to determine if detention is necessary to protect the person of others).

Columbia in February, 1995, intake probation recommended detention 52 times.[48] The prosecutor concurred with the probation officer's recommendation, both for detention and for the specific level of detention, on every occasion except one. On that occasion, the prosecutor requested placement of the child in a youth shelter house in the absence of a shelter-house request by intake. The court followed the intake probation officer's recommendation regarding whether to detain and the specific level of detention on all but seven occasions. The court ordered detention (secure detention, youth shelter house, or other detention) a total of 48 times. Out of 26 requests by intake probation for secure detention (all of which the prosecutor endorsed), there was only 1 occasion in which the judge declined and ordered youth shelter house. These data illustrate the power of intake probation's influence exerted over the prosecutor and the court.

In contrast, the defense attorneys in the 180 cases monitored appear to have maintained a low profile and exerted practically no influence. The monitors reported that defense attorneys objected to a detention recommendation only 22 times. Hence, from analyzing the monitoring results, one might infer that defense attorneys did not object to detention recommendations in more than 60% (32 of 52) of the cases in which the intake probation officer recommended some level of detention. In addition, the "[d]efense attorney objected to the presentation of charges NOT currently pending and NOT adjudicated" in only five cases.[49] Asked to note objections based categorically upon Rule 106(a)(1)-(4) detention factors, the monitors recorded none, but did record objections of some sort in 10 cases.[50]

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48. The monitors recorded that intake probation recommended secure detention 26 times; the prosecutor concurred on all 26 occasions. The court ordered youth shelter house in one of those 26 cases, and declined to order secure detention in just two of the remaining 25 cases. Intake probation recommended youth shelter house placement 19 times; the prosecutor concurred with that recommendation 18 times. Intake probation recommended "other" detention 7 times (presumably detention at some facility other than Oak Hill or a youth shelter house, e.g., St. Elizabeth's Hospital). On each occasion the prosecutor concurred and the court issued the order. *See infra* Appendix B, at 454.

49. The quoted language comes from the instrument used by the monitors in the 180 cases and is on file with the *District of Columbia Law Review.*

50. *See infra* Appendix B, at 455. Two of the ten objections recorded were simply requests for probable cause hearings. The other eight were conclusory objections (e.g., "argued for release"). Only one of the eight notations regarding defense objections to detention recommendations relates to the detention criteria. That comment was "based upon prior convictions." *Id.*

One might suspect that the monitors were ill-equipped to recognize Rule 106 arguments. However, the monitors were themselves attorneys with some exposure to delinquency proceedings. If, indeed, defense attorneys attempted to make Rule 106 arguments that other defense attorneys did not detect, one might safely conclude that the arguments were not effective.

One attorney argued the case of *In re M.L. DeJ.*[51]

The monitoring also established that when the intake probation officer recommended release, the other players followed along. As convincingly demonstrated by Henry Escoto in his Note in Section II of this Symposium,[52] the statutory scheme requires that probation release every child prior to the initial hearing unless the probation officer determines that the child is dangerous or poses a risk of flight under Section 16-2310 and Rule 106. Because the probation officer is required to make this determination and then release children who are neither dangerous nor flight risks, there should not be initial hearings in which the intake probation officer recommends release.[53] Probation should have released those children, requiring that they return for a *pro forma* initial hearing.[54]

The job of judges is to engage only those matters in which there is a controversy. It is unnecessary and inefficient for the court to hear a presentation of the child's record (or lack thereof) and then rule on detention in cases where everyone agrees that release is in order.[55] It is also unnecessary for prosecutors to attend initial hearings in community cases. Hence, full and contested initial hearings should occur in only a fraction of the cases now clogging New Referrals on a daily basis.[56]

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51. 310 A.2d 834 (D.C. 1973). *In re* M.L. DeJ. is the only case from the District of Columbia Court of Appeals that addresses, albeit ambiguously, the legality of detaining a child facing a first charge.

52. Escoto, *supra* note 3.

53. Even if the probation officer determines that a child meets the criteria for secure detention under Rule 106(a), the probation officer "may nevertheless consider whether the respondent's living arrangements and degree of supervision might justify release pending adjudication." D.C. SUPER. CT. JUV. R. 106(a)(5). This Rule applies to any "person making the detention decision." *Id.* In a close case in which the child meets the criteria for secure detention, but may possibly qualify for release under Rule 106(a)(5), the probation officer might decide to leave the final decision for a judge. Thus, one can imagine a situation in which it would be proper or acceptable for a probation officer to detain the child prior to an initial hearing and then, at the initial hearing, recommend release.

54. The initial hearing is necessary to inform a child and the parent or guardian whether charges have been filed, and if so, what the charges are. *See* D.C. CODE ANN. § 16-2308 (1989 Repl.). Also, the court ensures that the child has counsel or, if indigent, that there is court-appointed counsel. *Id.* § 16-2304. In addition, the court informs the child and the family of the next court date. *Id.* § 16-2308.

55. If a judge were to detain a child where the recommendation is for release, the detention would likely violate the statutory preference for release. Regardless, as noted above, judges virtually never detain children if probation has recommended release.

In current practice, initial hearings in community cases occur approximately one week after the child is arrested and released. The easiest and most equitable approach, however, is to hold the initial hearings for community cases the day following the child's arrest (i.e., the day after the child is released by the police or by probation). *See supra* note 8. If, on the day after arrest in a community case, the prosecutor needed additional time in which to decide whether to petition, the prosecutor could request an additional five days. D.C. CODE ANN. § 16-2312(g) (1989 Repl.).

56. The contested cases should be the 25-30% of cases in which probation and the prosecution does not

This focus on the cases in which detention is recommended will result in better-considered decisions and, one must predict, a lowering of the overall detention rate.

For a child properly held by probation intake prior to the initial hearing, the proper subject matter for the initial hearing is whether the child is dangerous and whether the child presents a risk of flight. Social factors are not relevant to the detention calculus. Indeed, considering social factors adulterates the detention decision and results in the unnecessary detention of children who are neglected, but not dangerous;[57] children who are disabled, but not dangerous;[58] and children who are poor and from underrepresented groups, but not dangerous.[59]

Arpazia's case demonstrates dramatically why intake probation officers should not base detention determinations on social factors. In response to a pressing and painful family problem, the intake probation officer attempted to orchestrate an illegal placement of the child outside of the home. In theory, the intake probation officer might have uncovered the sexual abuse of the child and referred the matter for an investigation, including an investigation of the mother for failing to protect the child. The possibility that the mother hit the child also could have engendered a neglect referral. Moreover, the mother's refusal to keep the child at home is arguably another manifestation of child neglect. Simply put, it is neglectful to reject one's child. An intake probation officer is a "social services worker" and, as such, is categorically required by law to report suspected child neglect.

Unfortunately, the neglect system in the District of Columbia is the ineffective twin of the delinquency system; neither seems capable of meaningfully addressing children's needs.[60] All too often, the neglect system's only response to physical or sexual abuse of a child is to exile the child from the home.[61] Hence, a neglect

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agree to release. By focusing on these cases and streamlining the release cases, the court will have more time to hear evidence on probable cause and to attend to other pressing matters. The New Referrals judge also hears neglect initial hearings; often those hearings are rushed and there is not enough time for all of the parties to express themselves adequately on the issue of out-of-home, pre-trial placement of the allegedly neglected child.

57. *See generally* Margaret Beyer, Ph.D, *Juvenile Detention to "Protect" Children From Neglect*, 3 D.C. L. REV. 373 (1995).

58. *See generally* Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995).

59. *See generally* Arthur L. Burnett, Sr., *Race and National Origin as Influential Factors in Juvenile Detention*, 3 D.C. L. REV. 355 (1995).

60. *See, e.g.*, LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991), *aff'd in part and remanded in part*, 990 F.2d 1319 (D.C. Cir. 1993); Jerry M. v. District of Columbia, C.A. No. 1519-85 (D.C. Super. Ct. July 24, 1986) (consent decree).

61. *See generally* Beyer, *supra* note 57 (arguing for better understanding the child's and family's needs and then addressing those needs rather than using detention as a short-term avoidance of those needs); Jeanne

referral by the intake probation officer of Arpazia's case may have resulted, ironically, in the court separating the child from her mother, just as the mother had requested. Two commentators, however, suggest that the most effective approach would be to help the child by concentrating on helping the child's family: even children who have been physically or sexually abused can experience debilitating loss when separated from their families. A better solution often requires helping the whole family, and, through them, the child. The best family service approaches are exemplified by individualized, wraparound service programs that focus on the actual needs of the child and family.[62]

Arpazia's case also demonstrates that a judge at an initial hearing should not engage in discussion with the intake probation officer about the circumstances of a child's life. Typically, the judge cannot obtain in a brief hearing within hours of the intake interviews sufficient reliable information to safely engage complex family issues. Even if the probation officer provided accurate information, the courtroom would not be a suitable environment to conduct discussions—much less counseling— about devastatingly sensitive family crises such as the rape of a child by a person *in loco parentis*.[63] The result will almost inevitably be as destructive and humiliating as the judge's lecture to Arpazia about the need to be more compliant.[64]

A court focusing only on the proper questions of dangerousness and risk of flight when contemplating preventive detention of juveniles would have no reason to rely on intake probation for information. The probation officer is not the right person to present a child's record of adjudications and pending charges. The prosecutor has access to the child's record including what facts were established in previous cases, and is better trained to accurately present the legal disposition of a previous case. Moreover, by presenting the child's record of dangerous conduct or abscondences

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Asherman-Jusino, *The Right of Children in the Juvenile Justice System to Inclusion in the Federally Mandated Child Welfare Services System*, 3 D.C. L. REV. 311 (1995) (discussing the need to refer families for services via the *LaShawn* plan whether they enter through the delinquency system or the neglect system).

62. PETER R. BREGGIN, M.D. & GINGER ROSS BREGGIN, THE WAR AGAINST CHILDREN 173 (1994).

63. *Cf. generally* Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617, 627 (1994) (describing the importance of protecting patient secrets and insights revealed in a therapeutic environment from disclosure).

64. We might charitably characterize the judge's lecture as well-intentioned. I remember another judge counseling parents that perhaps they needed "to take the child behind the woodshed." Outside of the questionable philosophical and developmental predicates supporting such a statement, one must also marvel at the judge's disregard for the possibility of past, present, or future physical abuse of the child.

Therapeutic intervention is characterized by its non-judgmental quality. Often situations worsen when subjected to judgments and commands.

in order ostensibly to justify detention, the probation officer assumes an adversarial stance against the child. This adversarial stance, appearing to favor detention, is unnecessary. Because the intake probation officer is an employee of the court, the probation officer's stance against the child suggests that the court is biased toward the government's position.

One might argue, however, that because the intake probation officer has interviewed the family and the child and can exercise clinical judgment, the intake probation officer is well positioned to advise the court on the danger that the child poses.[65] This argument fails in every respect. First, the intake probation officer is not adequately trained to provide a clinical diagnosis, much less a prediction of whether a particular individual will commit a violent act if released. Indeed, psychiatrists work with patients over long periods of time and are trained to provide clinical diagnoses; yet, even psychiatrists have limited ability to predict dangerousness.[66] Second, the intake probation officer's interviews are not extensive enough to provide the basis for a clinical assessment of dangerousness, and the intake probation officer does not have access to the child's social and medical history. This information would be essential for assessing dangerousness.[67]

Fundamentally, the standard for determining dangerousness for purposes of preventive detention of children in the District of Columbia is the legal standard in the statute as delineated in Rule 106.[68] This standard, rather than *ad hoc* clinical diagnostic judgments, governs "all persons" who make detention decisions,

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65. Risk of flight is the other basis for preventively detaining a child. For simplicity, I will refer in this analysis only to dangerousness, although the arguments are essentially identical for risk of flight. *See* D.C CODE. ANN. 16-2310(1)-(2) (1989 Repl.).

66. *Cf.* BREGGIN & BREGGIN, *supra* note 62, at 65 (although psychiatrists predict dangerousness in the criminal justice system, they denied that predictive power through an American Psychiatric Association brief in the watershed case of Tarasoff v. Regents of the Univ. of California, 551 P.2d 334 (Cal. 1976) (en banc), that ultimately established therapists' duty to protect intended victims of patients).

67. At initial hearings in juvenile matters in the District of Columbia, the probation officer is essentially testifying as an expert witness on the issue of dangerousness. However, the probation officer has not been qualified as an expert and, in fact, is not qualified as an expert. The probation officer is not under oath and is not subject to cross-examination. The entire picture is reminiscent of the unconstitutional waiver process in the District of Columbia, ultimately outlawed by the Supreme Court in Kent v. United States, 383 U.S. 541 (1966). The probation officer provides no services to the child, and the child cannot exclude or challenge the improper testimony of the probation officer. The result is unjust detention in individual cases, and an inflated detention rate overall.

68. The August, 1995 amendments to Rule 106 appear to allow the person making the detention determination to consider factors not delineated in the Rule. *See, e.g.*, D.C. SUPER. CT. JUV. R. 106(a)(3) ("In determining whether detention is necessary . . . relevant factors include *but are not limited* to the following.") (emphasis added). This unbounded expansion of the Rule is an affront to the statutory scheme, to substantive and procedural due process, and to the primacy of legal standards over subjectivity.

including probation officers.[69] Judgments regarding whether the child poses a danger to him or herself (Rule 106(a)(3)) should rest on documented instances of illegal drug use and hospitalizations for overdoses, expert opinions on suicide risk, and similar information.[70] When in doubt, the court is authorized to order a physical or mental examination of the child.[71]

Rule 102(f), deleted in the August, 1995 amendments to the Rules, required confidentiality regarding information provided by a child or by the child's family to the intake probation officer. Rule 102(f) nominally ensured that no statement made by the child or by the family members was admissible at any hearing prior to the disposition.[72] One can identify at least two elements of the rationale behind this Rule: first, to encourage an open dialogue between the child and family with the intake probation officer by assuring confidentiality;[73] and second, to allow the probation officer, functioning as a social services worker, to provide services or referrals for services.

Both of the elements—encouraging an open dialogue and providing services and referrals—promote the Juvenile Court's fundamental purpose of providing care and, where appropriate, rehabilitation for children. Baring the soul is the first step to recovery. Hence, providing a child with an opportunity to confide in a probation officer some of the problems that may be provoking anti-social and delinquent behavior is critically important. The second step, a natural response to the child's revelations, is for the intake probation officer to offer the child counseling that includes, most significantly, referrals for relevant services. Such referrals might include individual psycho-therapy, drug or alcohol counseling, recreational programs, family counseling, tutoring, educational testing, and special education

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69. D.C. CODE ANN. § 16-2311 (1989 Repl.). *See* Escoto, supra note 3, at 202-03.

70. *See* D.C SUPER. CT. JUV. R. 106(a)(3)(i)-(iv).

71. D.C. CODE ANN. § 16-2315 (1989 Repl.).

72. Prior to the 1995 amendments, Rule 102(f) read as follows:

Evidence. Statements made by a child or his parents, guardian, or custodian to the intake unit during a preliminary inquiry, or to the Corporation Counsel prior to the filing of a petition, shall not be admissible for any purpose at any hearing prior to the dispositional hearing, or in a criminal proceeding at any time prior to conviction.

D.C. SUPER. CT. JUV. R. 102(f). Other jurisdictions have created similar privileges. *See,* Glynn, *supra* note 63, at 623 n.14 (adult's probation officer, children's probation officer, and social services worker privilege). *But cf.* Fare v. Michael C., 442 U.S. 707, 722-23 (1979) (relationship of child to probation officer not analogous to attorney-client relationship for purposes of *Miranda* protection).

73. Indeed, the relevant portion of the comment to the Rule, deleted along with Rule 102(f), stated that "[s]ection (f) is added to insure that there will be a meaningful exchange of information during the intake process." D.C. SUPER. CT. JUV. R. 102 cmt.

advocacy.[74] Self-evidently, allowing or requiring an intake probation officer to reveal at the initial hearing information provided by the child and the family during the intake interview will chill the genuine exchange of sensitive information. Indeed, with the formal demise of Rule 102(f), attorneys should advise their clients in delinquency matters not to divulge information to the intake probation officer.[75]

The comment added to Rule 102 following the recent deletion of Rule 102(f) asserts, *inter alia,* that "the additional information provided by the statements will permit a more informed determination at the initial hearing."[76] For a number of reasons, this assertion is incorrect. In actuality, the converse is true: if Rule 102(f) were reinstated and adhered to, initial hearings and the intake process altogether would produce more effective and more just results.

Virtually without exception, no judge or hearing officer honored Rule 102(f)'s explicit prohibition against admitting intake interview statements at the initial hearing.[77] Defense attorneys did not object when, in violation of Rule 102(f), probation officers at initial hearings introduced statements from the child or the

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74. In addition, an intake probation officer is in a position to counsel a child who is suffering from abuse and neglect or coping with the fall-out of parents' drug or alcohol addictions. Indeed, an intake probation officer is obligated by statute to report suspected abuse and neglect. *See* D.C. CODE ANN. § 2-1352(b) (1994 Repl.).

75. Typically, defense counsel is appointed only after the intake interview tales place between the probation officer and the child; hence, attorneys will be in a position to advise clients not to divulge information to the probation officer following the intake interview and in any future cases. If, at an initial hearing, the probation officer provides information to the court obtained from the child, the child will learn not to trust the probation officer. This effect will likely chill the child's willingness to discuss relevant problems and concerns with the diagnostic probation officer and with a probation officer supervising post-disposition probation.

76. D.C. SUPER. CT. JUV. R. 102 cmt. The comment reads in relevant part:

> Paragraph (c) of this Rule has been amended to clarify and narrow the former prohibition on use of a respondent's and parents' statements at an intake interview. Under former SCR-Juvenile 102(f), there was disagreement about whether statements made by the respondent or the respondent's parent, guardian or custodian to the intake unit or to the Corporation Counsel prior to the filing of a petition could be admitted at any hearing (evidentiary or otherwise) prior to the disposition hearing, or in a criminal proceeding, at any time prior to conviction. Paragraph (c) as revised bars only the admission of the respondent's statements, but not the parent's, at a factfinding hearing or a criminal trial based on the allegations of the juvenile complaint. This amendment permits use of the respondent's and parent's intake interview statements at an initial hearing. There is no statute that precludes use of such statements at the initial hearing, and the additional information provided by the statements will permit a more informed determination at the initial hearing.

Id.

77. I actually encountered one hearing commissioner who, on at least one occasion, upheld the Rule 102(f) prohibition.

family. As noted above, monitoring demonstrated that defense attorneys register few objections of any sort to detention; *a fortiori,* one might expect that attention to particular rules is absent. No monitor recorded a Rule 102(f) objection.[78] With Rule 102(f) nominally in force, intake probation officers routinely provided information in initial hearings that they obtained from children and their families.[79] Therefore, the deletion of Rule 102(f) certainly should not demonstrably increase the information available at the initial hearing. On the contrary, the intake probation officers' practice of divulging information obtained from children and families chills the honest exchange of information; attorneys should advise children not to share information with intake probation officers.

The assertion that deleting Rule 102(f) will increase the information available to the judge at the initial hearing is flawed for another reason. Judges at the initial hearing have always been in a position to ask the child's parent or guardian questions about the child. With defense counsel present, the judge also could ask whether the child wants to provide information to the court, either directly or through counsel. In practice, however, judges rarely ask these questions. Questions to parents and children about adolescent behavior and parental supervision typically elicit conflict or reticence. Judges are not qualified to process the answers effectively; they are often impatient with the responses. Perhaps judges recognize that such questions would elicit painful or, at least, confused responses from practically any family, without regard to whether the child is involved in the delinquency system.

Social factors are relevant at an initial hearing for one purpose only. If, after

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78. *See infra* Appendix B, at 455. Unfortunately, there was no specific question directing the monitors to record Rule 102(f) objections. There was, however, a space for detailing the nature of defense objections. As mentioned, no monitor recorded a Rule 102(f) response. *Id.*

Anecdotal reports and years of attending initial hearings reinforce my conclusion that one rarely hears an objection in an initial hearing based upon Rule 102(f). Law students from DCSL, Georgetown, and D.C. Law Students in Court are probably the only advocates who ever make Rule 102(f) objections.

Prosecutors often reacted to Rule 102(f) objections with disdain and disbelief. They often would offer no argument, secure in the knowledge that a judge would not sustain a Rule 102(f) objection. Probation officers typically reacted to Rule 102(f) objections as if personally affronted; the objection constituted a challenge to their role and to their authority. This reaction must be understood in light of their uniform domination of initial hearings.

79. See *infra* Appendix B, at 455. Monitors found 3 cases in which information provided by the intake probation officer could only have come from the child, and found 19 cases in which information provided by the intake probation officer to the court could only have come from the parent. *Id.* These numbers are relatively low; ordinarily, it is not absolutely clear to a monitor that the information reported by the intake probation officer to the court at the initial hearing comes from the child or parent (as opposed to coming from a school source or elsewhere).

considering objective evidence of the child's dangerousness (i.e., a record of dangerous conduct) and risk of flight (i.e., a record of non-appearances for court hearings and abscondences from institutions), the judge determines that secure detention is justified, then, pursuant to Rule 106(a)(5), the judge "may nevertheless consider whether the respondent's living arrangements and degree of supervision might justify release pending adjudication."[80] In theory, only a finding of actual dangerousness or risk of flight can propel a child through the back door of the courtroom to secure detention; but social factors can re-open the door and usher the child back into the community. In practice, judges often use social factors (e.g., conflict at home or poor attendance at school) to detain children; defense attorneys, intake probation officers, and judges rarely ask whether the child's living arrangements and degree of supervision can redeem the child from detention.[81]

In recent months, private programs have been providing pretrial supervision for District of Columbia children in order to facilitate home and community-based placements for children who otherwise would be securely detained. One organization that conducts such programs is the Center for Juvenile and Criminal Justice (CJCJ). These programs account for a significant decline in the District's juvenile detention population.[82] Unfortunately, a number of children do not get into a program until after having spent time at Oak Hill in preventive detention; other children who could be maintained in the community prior to trial do not get into a program at all and, therefore, remain in secure detention.

Rule 106(a)(5) provides that "the person making the detention decision" may consider releasing the child if the child's "living arrangements and degree of supervision might justify release" even if detention is justified.[83] The intake probation officer is a "person making the detention decision" prior to the initial hearing.[84] Therefore, if the intake probation officer can arrange satisfactory supervision through CJCJ or another organization prior to the initial hearing for a

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80. D.C. SUPER. CT. JUV. R. 106(a)(5). Questions by the judge to the family or the child about living arrangements and degree of supervision arguably would be irrelevant prior to a determination by the judge regarding whether the child either was dangerous or posed a risk of flight.

81. According to the February, 1995 monitoring report, defense attorneys mentioned Rule 106(a)(5) in only four cases. *See infra* Appendix B, at 458. Without a doubt, defense attorneys should have argued Rule 106(a)(5) in every case in which a judge ordered secure detention or youth shelter house. Moreover, the attorney should have presented alternatives to detention.

82. *See* "Twenty-Ninth Report of the Monitor," Jerry M. v. District of Columbia, C.A. No. 1519-85, at 3 (D.C. Super. Ct. Oct. 5, 1995).

83. D.C. SUPER. CT. JUV. R. 106(a)(5).

84. *See* D.C. CODE ANN. § 16-2311(c) (1989 Repl.).

child who otherwise meets the Rule 106(a)(1)-(4) criteria for secure detention, the intake probation officer can and should release the child. Intake probation need not allow a case to go to the judge for a detention determination if it can arrange a satisfactory alternative to secure detention.[85] In essence, intake probation officers can avoid arguing social factors in initial hearings by arranging appropriate alternatives to detention and releasing children. Thus, given the advantages to maintaining confidentiality between the child, family, and probation officer, the probation officer's power to release the child, and the judge's power to question a family directly in court at the initial hearing, a probation officer should not divulge sensitive social information provided by the child or by the family.[86]

When the intake probation officer cannot arrange or devise an alternative set of services that will allow the probation officer to release an otherwise dangerous or risk-of-flight child, then the case will go to the New Referrals court for an initial hearing at which the judge will determine whether to detain the child. At that hearing, the prosecutor—not the intake probation officer—should present to the court the child's history of relevant prior offenses and pending charges. If the judge finds probable cause to believe that the child committed the alleged offense[87] and finds, by clear and convincing evidence,[88] that detention is necessary, then the judge may nevertheless review whether the child can be safely maintained in the community pending the factfinding hearing.[89]

The court should bifurcate the initial hearing, considering in the first phase whether detention is necessary based strictly upon evidence of dangerousness and risk of flight. In this first phase, the court should hear and read nothing about social factors pertaining to the child. This phase should include the probable cause

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85. The *Jerry M.* consent decree requires the District of Columbia to establish sufficient alternatives to detention. Jerry M. v. District of Columbia, C.A. No. 1519-85, at 1 (D.C. Super. Ct. July 24, 1986) (consent decree). *See* Susan M. Johlie, *Substituting Secure Detention for Shelter Care: An Illegal Deprivation of Liberty*, 3 D.C. L. REV. 223, 231-33 (1995).

86. There are exceptions. *See, e.g., Fare*, 442 U.S. at 720 (probation officer obligated to report wrongdoing by the child, even when information about the conduct came from the child); *see also* D.C. CODE ANN. § 2-1352(a) (1994 Repl.) (requiring social service workers with "reasonable cause to suspect that a child known to him or her professional or official capacity has been or is in immediate danger of being a mentally or physically abused or neglected child" to report such knowledge to either the police or Department of Human Services).

87. D.C. CODE ANN. § 16-2312(e) (1989 Repl.) (probable cause finding prerequisite to order for detention).

88. *See* Julia Colton-Bell & Robert J. Levant, *Clear and Convincing Evidence: The Standard Required to Support Pretrial Detention of Juveniles Pursuant to D.C. Code Section 16-2310*, 3 D.C. L. REV. 213 (1995).

89. D.C. SUPER. CT. JUV. R. 106(a)(5).

hearing when the court considers ordering preventive detention. In any case for which the judge determines that preventive detention is necessary, the judge should recess the initial hearing and reconvene it at a later point during the day. In the second phase of the initial hearing, the child and the family, through the defense attorney, should present information regarding the child's living arrangements and degree of supervision that might justify release pending the hearing. By prohibiting consideration of social factors during the detention decision, and by then recessing and reconvening to consider social factors as a means for release, the court would decrease the chances of ordering preventive detention based upon social reasons.

Bifurcating the hearing also would largely preclude the practice of parents (or guardians) using the initial hearing process to distance themselves, literally, from their children. Often parents whose children are the subjects of delinquency petitions feel overwhelmed by (among other problems) the problems the child presents, and are discouraged by the lack of available help. Parents correctly perceive that they have no formal role in the processing of a delinquency case and that they can obtain a respite from the demands associated with being responsible for the child. More fundamentally, their perception of self-interest often is that no amount of energy from them will make a difference regarding their child's deviant or oppositional behavior and that programmatic or counseling assistance is neither available nor effective. They typically fail to consider the long-term implications for themselves and their child of acceding to or promoting preventive detention of the child.[90]

The child becomes demoralized and increasingly angry and isolated when the parents advocate for incarceration or fail to advocate for release.[91] Even assuming a short-term benefit exists to the child who experiences a consequence (e.g., incarceration) for allegedly bad conduct, that benefit dissipates and evaporates in the violent and alienating environment of a juvenile prison. Moreover, children

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90. *See* Bart Lubow & Joseph B. Tulman, Symposium, *The Unnecessary Detention of Children in the District of Columbia, Introduction*, 3 D.C. L. REV. i, xv-xvii (1995).

91. Rejecting a child who is in trouble is anti-therapeutic. The child will likely internalize the message that the only option is continued distancing from authority. *See* BREGGIN & BREGGIN, *supra* note 62, at 187-90. Also, one must consider the likelihood that the parents share the responsibility for the child's behavior; violent children are themselves often the victims of abuse. *Id.* at 63-64. A child will likely recognize detention as a product of collusion between the court (including intake) and the parents to blame the child and ignore abuse of the child. In essence, the court compounds the abuse by incarcerating the child in the predatory prison environment. The ultimate and unfortunate message, utterly consonant with the message beaten into a child in an abusive home, is that the child will be a victim of abuse until the child becomes sufficiently violent to be a predator. *Id.* at 64.

often recognize the hypocrisy inherent in inflicting punishment upon them before a trial. Similarly, a child who understands that preventive detention is predicated on a need to protect the child (under Rule 106(a)(3)) will recognize the hypocrisy of imposing incarceration in a violent, drug-infested prison as a measure nominally intended for protection.

III. After the Initial Hearing

A. *The Premise*

The period after the initial hearing and prior to a factfinding hearing (trial) in a delinquency case presents an opportunity to weed out cases by prompting a child, with help from supportive adults, to get help for any problems that may have led to the alleged delinquent conduct. The period between initial hearing and disposition (sentencing) presents an opportunity for a child to become attached to and develop trust for an adult who will provide guidance and not reject the child; this adult could also act as a case manager, referring the child and the child's family to appropriate services. The probation officer could discharge this role and perform these functions.

In current practice in the District of Columbia, the intake probation office administers a largely successful and expanding process for diverting selected children into a set of diversion programs.[92] This diversion process is laudatory. Other than selecting children for the diversion programs, however, probation officers play essentially no role *vis-a-vis* children during the period prior to trial.

Between trial and disposition, a second probation officer, called the "diagnostic probation officer," prepares a pre-disposition report informing the court about the child's circumstances and advising the court regarding dispositional alternatives.[93] Thus, the system briefly exposes the child to the intake probation officer, and typically for a period of two to six weeks, to a diagnostic probation officer. A child ordered at disposition into probation encounters a third probation officer who provides post-disposition supervision. This trifurcated arrangement of probation minimizes the chance that a child will develop a trusting relationship with any of the three adults the system provides to interact with the child. Therefore, the

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92. Another diversion option is a six-month period of probation-before-judgment termed a "consent decree." *See* D.C. Code. Ann. § 16-2314 (1989 Repl.).

93. D.C. Code Ann. § 16-2319 (1989 Repl.).

chances that the child will receive, or indeed accept, assistance is also minimized.

Moreover, this trifurcation of probation practically ensures that structural incentives and disincentives work against individual probation officers who, at any point during the processing of a delinquency case, put in the considerable effort necessary to help children successfully conform to community norms and placement at home. Intake probation officers process a batch of cases each day and then, essentially, move on to another batch of cases the next day. An intake worker who continues to work with a child after the initial hearing probably will have a difficult time keeping up with the subsequent batch of new cases. Diagnostic probation officers similarly carry a large caseload, each of which has an impending, short deadline for disposition. This burden results in a reward for the production of boilerplate language rather than comprehensive treatment plans. A probation officer responsible for the post-disposition supervision of a child can initiate probation revocation if the child is non-compliant; a revocation usually results in transfer of legal custody of the child to the executive branch, thus taking the "difficult" child off of the probation officer's caseload.

A system that expands the child's options and sense of control prior to the hearing and disposition enhances the chances that the child will choose to cooperate with adult authority figures and conform with normative expectations.[94] After all, as the old punch-line instructs: "the lightbulb has to want to change."[95] A child who lacks proper parental supervision, who fends for survival on the street, who fights and, in general, displays deviant or oppositional behavior, is unlikely to succumb to threats and coercion from the judge or probation officer (as surrogate for the judge). On the other hand, prior to the hearing and disposition, a probation officer can confidentially explain to a child that services are available,[96] and that the child has the opportunity to solve problems and thereby lessen the punitive responses flowing from the system. In other words, a child who confidentially and successfully pursues services with the guidance of a probation officer as casemanager can create a scenario in which the system is less coercive, more forgiving, and more nurturing.

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94. The same probably could be said for adults as well.

95. Q: How many psychiatrists does it take to change a lightbulb?
A: Only one, but . . .

96. Of course, this scenario rests in part on the system creating and providing more genuinely helpful services in the community.

B. *Stories from After the Initial Hearing*

Louis M.'s Debut

At nine years of age, Louis M., accompanied by two other nine year-olds and a thirteen year-old, attempted to sneak into a movie at the Air and Space Museum. Security guards broke up the caper and sent the children off to court. I subsequently learned that the Smithsonian had an agreement with the prosecutor's office that everything gets papered; Louis and his accomplices got booked.

Probation intake referred all four boys to the Consortium for Youth Alternatives diversion program. I contacted the diversion program to enquire how they might adapt their program to accommodate nine year-olds. They proposed no alterations; Louis would participate in the program with the regular complement of teenagers, attending group sessions and whatever social activities were planned for the entire group. In part because of the pettiness of the alleged offense and the fact that any child could make the same mistake (assuming *arguendo* that the allegations were true), and in part because Louis' participation with pre-delinquent and delinquent teenagers would have been a corrupting experience, I advised Louis and his mother that we should attempt to obtain a dismissal of the charge rather than accept the invitation to participate in the diversion program. The government attorney was reticent to dismiss and did not agree until I convinced the defense attorneys who were representing the other three boys to present a united front rejecting the diversion alternative.

Billy G.

Billy had a previous consent decree[97] for an unauthorized use of a motor vehicle. Billy's student representative from the DCSL Juvenile Law Clinic had once been a police officer. The student arranged for a police diversion program to accept Billy. The diversion program was established for children whom the police decided not to refer for petitioning to court. The arrangement for Billy to participate in the program was unusual in that his case had been referred to court and petitioned. On the other hand, Billy's participation did not violate (to our knowledge) any law, rule, or policy. The prosecutor and the probation officer opposed allowing Billy's participation in the program to trigger a diversion of the case from the trial

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97. *See supra* note 92.

calendar. The student representative, in response to this opposition, filed a motion to challenge the intake process and a separate motion—based upon Billy's participation in the police diversion program—to dismiss the case for social reasons. The judge denied the first motion, but at the same hearing, granted the motion to dismiss for social reasons.

MEDIATING MARY'S MATTER

In a school melee, Mary and four other girls allegedly assaulted another girl. The government charged each of the five girls with simple assault. None of the girls had a previous adjudication or court contact. We learned from officials at the school that there was an active conflict between a number of girls and that the charged incident was not the only incident of fighting between the girls. Ultimately, rather than accept a consent decree (probation before adjudication), Mary and her co-respondents participated in a mediation that we arranged. The co-mediators were an adult and a high school student. The parties to the conflict reached an agreement aimed at stopping the conflict. This approach saved probation supervision resources and also may have more directly addressed continuing conflict between groups of girls in the school.

READING MARCEL'S MIND

Marcel is 13 and incarcerated at Oak Hill, the maximum security facility for District juveniles. He has been there for several months, and there is no plan to get him out. He has a record of minor offenses and non-compliance with conditions of probation. The adjudication for which he is incarcerated is for threatening a teacher with a knife. No one was physically injured in that assault.

A law student and I recently began representing Marcel and his mother in order to obtain special education services for Marcel.[98] Marcel did well in kindergarten and first grade. When he was in the second grade, however, he was on his bicycle and had an accident with a car. Marcel was injured and, following the accident, he could not remember letters in the alphabet; he lost the ability to read, and he has never regained that ability. Marcel is obviously quite intelligent. He is reportedly also a gifted actor, but he could not (or would not) try out for the lead in a play at

98. The Special Education section of the DCSL Juvenile Clinics represents the rights of children with disabilities to special education and related services under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq* (1988 & Supp. V 1993).

Oak Hill. We believe his inability to read kept him from trying out. Marcel reports that he is able to dominate the other children in his cottage at Oak Hill; he has also forged defensive alliances with other children and is keenly aware of alliances that other children have for their protection.

Marcel's mother reportedly has a severe drug problem, and no one has identified another adult in Marcel's extended family who is capable of and prepared to care for Marcel. Prior to being incarcerated, Marcel was in shelter houses and in foster care.

Despite having been previously identified as eligible for special education, Marcel did not receive the appropriate education services. He still functions academically at the early elementary school level. With Marcel and his mother, to the extent that she is available, we are developing goals and strategies centered on locating appropriate special education services. We intend to reinforce and reinstate the former foster care placement and continue to work with Marcel's natural family toward reunification.

CARY THE THROWBACK - REVISITED

Cary is the child who, on a first adjudication for a non-violent offense, was incarcerated in Cedar Knoll.[99] As previously described in the stories from before the initial hearing, my students and I challenged the intake probation officer's rubber-stamping of the executive branch recommendation to petition Cary's second case.[100] His family was in crisis regarding problems that are familiar: lack of income and housing and difficulty managing daily tasks. Like Cary, his mother could not read and could not negotiate most aspects of the system. Cary was not successful in school or in other legitimate endeavors. On the streets, he was a follower, but not an effective criminal.

A highly experienced and empathetic psychologist agreed to evaluate Cary, with payment guaranteed under a court voucher. The psychologist also agreed to continue working with Cary on a regular basis without pay in order to help stabilize his situation. This regime was fairly effective. On his second adjudication, he did not return to incarceration; rather, he remained in the community and participated in therapy with the psychologist.

The second case, like the first case, was an unauthorized use of a motor vehicle. The car in question belonged to a priest. We attempted to arrange mediation

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99. Cedar Knoll was a District of Columbia detention facility which has subsequently been closed.
100. *See supra* section I.B.

between the priest and the child, but the prosecutor refused to agree to this proposal and advised the priest to reject mediation. Based upon the fact that Cary was still committed in the first case (the government had not provided services in that case), and the fact also that Cary was productively working with a therapist on an essentially volunteer basis, we moved to dismiss the case for social reasons. Without explanation, the judge continued a hearing on the motion. On the day that the judge finally heard the motion, he treated the psychologist with little respect and denied the motion. The judge was apparently more concerned with the fact that Cary had been previously incarcerated but had not learned his lesson.

MAURICE, BACK FROM THE STREETS

Maurice, who is now almost 18 years old, was testing as high as the 98th percentile academically in elementary school before his mom and dad developed drug problems. After his mom's incarceration, and coincident with his dad's leaving home, Maurice went to stay with an aunt. He repeated the seventh grade three times. At some point during those three years, he went to stay with a 21 year-old cousin. Maurice became our client following a school fight (for which he was suspended from school and charged in court).

Maurice's cousin had a child and was about to have another; she said that she was no longer able to supervise Maurice. We subsequently learned that Maurice had been spending much of his time with friends in crack houses, earning money through drug sales to survive. With Maurice's cooperation, we convinced his aunt to take him back. We also helped Maurice make contact with his mother where she was incarcerated. During this period, Maurice picked up two drug charges. Following the arrest for the second drug charge, the court detained Maurice for a week at Cedar Knoll and for an extended period at a youth shelter house. Some months thereafter he was arrested for driving a car without a license.

Maurice had never been evaluated or identified as eligible for special education services. Prior to our involvement, virtually no attention had been given to his school-related problems. Through the advocacy of a law student, D.C. Public Schools (DCPS) placed Maurice into an appropriate special educational program with necessary psychological and speech services. We arranged a successful mediation to resolve the school fight case. We also won the second drug charge on a dispositive pretrial motion, demonstrating that, as a matter of law, there was insufficient evidence to convict Maurice. In the meantime, Maurice reunited with his dad and for a time received tutoring from a DCSL law student. With a barrage of pretrial motions and procedural claims, we delayed the first drug

charge for well over a year. In the meantime, Maurice participated in the special education program and continued to live at home. On the basis of this positive adjustment and the services available to Maurice, a law student convinced the judge to dismiss the case for social reasons. Soon thereafter, the court also dismissed the traffic offense for social reasons.

Maurice decided not to continue attending the special education program. He opted for a vocational school as an alternative, but stopped attending that program as well. Maurice was arrested in the District and charged two more times, both drug possession charges. We consulted with Maurice and his father and prepared to seek a residential therapeutic placement for Maurice, either through the school system or through the court. Eventually, notwithstanding continuing marginal behavior, the court ordered Maurice into probation. He continued to function, albeit marginally, in the community. Accordingly, based on Maurice's wishes, we discontinued our efforts to arrange residential treatment.

Law students continued for the next two years to tutor and informally counsel Maurice regarding education and other issues. They helped him enroll in an afternoon General Equivalency Diploma (GED) program and re-enroll in a morning vocational program. Maurice has remained in the community without re-arrest while living with his father for an extended period of time. Maurice's mother has been released from prison, but she has AIDS and is in failing health. Maurice's current goal is to obtain a GED and get a job.

C. *Analysis*

"Probation" for juveniles in the District of Columbia, by definition, has two elements: a surveillance process and a helping process.[101] This definition applies to

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101. *Handbook for Family Division Social Services, Chapter IX Juvenile Supervision*, at 2 [hereinafter *Probation Handbook*]. The *Probation Handbook* provides, in part:

> 4. Probation constitutes a principal means through which the Court provides surveillance of an individual placed in . . . [the] legal status [of probation]. The object of this surveillance is to insure that the conditions of probation are being met and that the probationer's social adjustment is consistent with the interest, security, and welfare of the community.
>
> 5. Probation may also be defined as a helping process. As such, probation is designed to strengthen the probationer's efforts to deal with his problems in living without resorting to anti-social behavior and hopefully to help him achieve a personally satisfying and socially acceptable adjustment in his own home and community. Changes are necessarily required in the behavior of the probationer and in those attitudes which underlie it. Helping the probationer to make such changes is an important part of the probation officer's task. Referral of probationers for services to existing community resources for their fullest utilization is a very important part of the probation officer's approach in helping his client to achieve a sound social adjustment. This will be accomplished through referrals

supervision of consent decrees, the diagnostic phase (between adjudication and disposition), as well as to probationary supervision following disposition.[102] There is no evidence that, as a practical matter, intake probation officers consider the "helping process" aspect of probation supervision as in any way relevant to the intake function.[103] There is scant evidence upon which to argue that probation officers at the diagnostic or supervision stages are often actively engaging in the non-mandatory helping process;[104] they seem to stress instead the surveillance function. The stories in this section suggest that probation officers could provide more referrals for services and, in general, advocate for children prior to the factfinding hearing and disposition.[105]

The primary means by which probation offers services to children and families prior to trial is through structured diversion programs. Together with the executive branch, the court has established and currently administers, primarily through private service providers on contract, several diversion programs. Probation is now actively working to expand the number of programs and the number of positions available for diversion. For example, plans for a "Youth Court" diversion program are extant with a goal of implementation in early 1996 and the potential to create hundreds of additional diversion slots.

For a child who is new or relatively new to the delinquency system, and for whom the probation officer cannot find a way to recommend against petitioning, the probation officer should seek to divert the child from the system following the initial hearing. In the right circumstances, diversion is a terrific opportunity for a

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to Purchase of Services, Branchwide Treatment Services and referrals to the public sector. *Id.*

102. *Probation Handbook*, supra note 101, at 2. The definition addresses the function of probation supervision and applies on its own terms only to "three statuses: Social Study, Consent Decree or probation [post-disposition]." *Id.* at 1.

103. Consent decrees occur prior to adjudication, at the intake phase, but children with consent decrees are assigned to regular supervision probation officers rather than to intake probation officers. *See* D.C. CODE ANN. § 16-2314 (1989 Repl.). *See also supra* note 92.

104. Probation *may* also be defined as a helping process. *Probation Handbook*, *supra* note 101, at 2.

105. I have not related stories illustrating a particularly productive involvement of probation officers in the lives of children and families prior to the factfinding hearing in delinquency cases. This paucity of examples is a function of not having observed probation acting in the ways described in the stories in this section. I have provided, therefore, counter-narratives: cases in which probation could have been more productively involved, or in which other people did constructively interact with children and their families.

My impression is that probation officers more regularly attempt to intervene after the initial hearing and before trial in Person in Need of Supervision (PINS) cases. Those cases often present a situation in which a family and a child clearly need services; furthermore, prosecutors and judges more readily recognize that in PINS cases, the formal adjudicatory process adds little to the prospects for a positive outcome.

child and his or her family. By maintaining, and now significantly expanding, available space in diversion programs, the intake probation office could more thoroughly and effectively serve District residents.

Of course, there is pressure to use diversion for children who should not be in the system at all. East and West, whose cases were described in the section of this Article presenting stories from before the initial hearing,[106] are two such children. Louis M., similarly, was offered diversion to the Consortium for Youth Alternatives; however, at the age of nine and facing charges of sneaking into a movie at a museum, he did not need the diversion program. On the contrary, exposing Louis M. to a program populated by delinquent teenagers would have been a bad experience for him. One need only consider the socialization inherent in his participating, for example, in a group counseling session for teenagers regarding car theft, drug use, or other illegal conduct. Our advocating against diversion and encouraging the attorneys representing the other two nine-year-old respondents not to accept diversion probably prevented an otherwise certain scenario in which the children would have accepted the diversion program.

The pressure to use diversion for children who do not need intervention derives also, in part, from the impulse to provide more, rather than fewer, services for a child who may be at risk for behaving in a significantly deviant manner. The impulse to provide services is entirely understandable; decision-makers should also consider, on the other side of the ledger, the negative impact on the child of wearing the delinquency label (albeit only in a pretrial diversion context).[107]

Mary's case—the school fight in which she and four accomplices allegedly assaulted another girl—provides another example of a case that was better suited to alternative dispute resolution than to handing out probation stints (under consent decrees) to the five girls. The school officials had a problem with continuing conflict between groups of girls. We assume that the conflict subsided following the mediation.[108]

Some children who enter the delinquency system on a second or third alleged

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106. See *supra* section I.B.

107. In addition, one may speculate that certain programs gravitate over time to accepting a higher percentage of children who are not as difficult because there is less wear and tear on staff and because it is easier to produce and document a higher success rate. Also, adults do not tolerate failure very well. When children do not succeed in a program, staff and administrators sometimes become less flexible and less forgiving regarding who enters and who remains in the program.

108. This assumption may be unfounded; we did not follow up to check on Mary's progress after the case was dismissed. One might propose the initiation of dispute resolution programs in each junior and senior high school as an ongoing mechanism for managing the kind of conflict that led to Mary's case.

offense, who may have a prior consent decree or a prior stint in a diversion program, nevertheless can succeed in a second diversion program. While it is efficient to have standard criteria for accepting children into diversion programs, there should be more flexibility. Or, in the alternative, probation should establish one or two diversion programs that accept children who, by virtue of prior misconduct and blown opportunities, would not qualify for a regular diversion program. If a child and family, along with an attorney or other representative, advocate for a child, it may be quite effective to allow that advocacy to achieve results in the form of a concession that the child can participate in diversion. Billy G.'s case exemplifies such a situation. The student representative managed to obtain a program for Billy, administered by the police, that otherwise was not available to him. The prosecutor and probation officer refused to support diverting Billy's case based upon his participation in the program. Apparently displeased by the position taken by the government and intake probation, the judge dismissed the case for social reasons.

Some children enter the system with no previous record but present problems that appear more intractable than the standard diversion program can effectively address. Often a child is not responsive to standard requests to meet with the probation officer or to attend drug testing sessions. For a child who does not present a danger to the community, it is counterproductive and unconscionable to incarcerate the child. Cary's case exemplifies this situation. Following his first adjudication, no one worked effectively with Cary and with his family. On the second case, in contrast, the psychologist spent time working with them to understand the challenges and crises that they faced on a daily basis. The psychologist helped Cary achieve significant progress.

Maurice also entered the delinquency system on a minor charge of fighting in school, but his problems were profound. In essence, he was living on the streets. When his family had fallen apart he had largely given up. He was depressed, angry, and uncommunicative. Over time, ironically, Maurice and his father became increasingly involved with the DCSL law students and participated in the advocacy of Maurice's cases. Although it would be misleading to paint a glowing picture, it is fair to say that Maurice and his father developed hope that the system could work with them and, to an extent, for them. At the base of that hope was the stable relationship with student representatives developed over a course of seven cases (six delinquency and one special education). We presume, with some assurance, that absent the stable relationship and involvement in his own advocacy, Maurice would have remained in the crack houses and would have been

incarcerated early and often.[109]

Marcel is much like Maurice, but we met him only after the system had essentially given up and incarcerated him. Like Maurice, Marcel at thirteen has no stable home. No one dealt effectively with his crushing educational deficiencies or with his mother's drug addiction. Hence, he has become somewhat despondent and is, by default, using his intelligence and other talents to chart and control internecine battles in his cottage at the juvenile prison. We will attempt to develop a strong relationship with Marcel and to demonstrate for him and with him that he has opportunities to succeed.

Children who are heavily involved in delinquent conduct tend to lack parental or adult supervision. This assertion seems common-sensical and irrebuttable; basically, it is the premise for imposing the court's embrace on the child. But the court (through probation) does almost nothing in most cases to strengthen and secure the parent's nurturance of the child, and does almost nothing, in the alternative, to construct a substitute for parental nurturance. On the contrary, the court accords children only fleeting and contrived encounters with adults. Children who desperately need meaningful relationships with adults encounter abstract parental figures like a judge or an intake probation officer.[110]

The intake probation case management system functions much like an industrial assembly line. Intake probation handles an active caseload of approximately 1,000 cases with ten probation officers. Two or three intake probation officers handle the load of cases going into New Referrals court for initial hearings on any given day. They process those cases—conducting interviews and investigations required by Rules 102 and 103—in two or three hours before the hearings begin. They spend relatively little time with the child or with the family and, after the initial hearing, they devote practically no additional time to the case.

If the child pleads guilty or is found delinquent at a trial, a probation officer from the diagnostic team prepares a pre-disposition report.[111] If the court at disposition orders a period of probationary supervision, the child is assigned to a probation officer. Thus, intake probation, as currently structured, will likely expose

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109. The system arguably saved resources because Maurice was not incarcerated for long and because we did not resort to residential treatment. I also would assert that the number of drug sales and other delinquent acts committed by Maurice were lower than they would have been if Maurice alternated placement between the crack houses and prison.

110. BREGGIN & BREGGIN, *supra* note 62, at 192 ("Most importantly, every child needs a loving, secure, and trustworthy connection with at least one adult. Compared to that need, all others pale. When a positive relationship is made with a mature adult, most other things begin to fall into place.").

111. *See generally* D.C. CODE ANN. § 16-2319 (1989 Repl.).

a child to three different probation officers during the pendency of a delinquency case.

This trifurcated probation structure (intake, diagnostic, and supervision) is antithetical to building trust. The child endures three separate investigations or diagnoses. A child who accepts the system on its own terms (a proposition that is unlikely if the child tends to be delinquent or defiant) must attempt to win over three different probation officers. Moreover, there is a disjuncture between what the child wants and what the probation officers provide.

The only probation officer who is with the child long enough to bond is the third one. At that point in the case, however, the child has lost the need for an adult ally. The intake probation officer handled the critical detention issue and most likely betrayed the child's trust by repeating in court sensitive and confidential information provided by the child. At a disposition hearing, the diagnostic probation officer re-told the court sensitive details about the child, probably asked the judge to do something that the child did not like, and then essentially abandoned the child. From the perspective of a child in the system, the third probation officer (the one who supervises the period of probation) cannot really help the child. That probation officer only poses a threat of *revocation*: all stick and no carrot. This serial exposure to different adult supervisors is virtually guaranteed to further alienate the child.

The probation structure, as currently implemented, also fails to take advantage of the incentives for the child inherent in the system. Prior to the hearing, the child—particularly a child who is new to the system—is likely to be apprehensive, distressed, and disconcerted. The child does not enjoy facing the judge and, even if somewhat seasoned, is afraid of being locked up. In essence, the system repeatedly threatens the child with incarceration without providing sufficient adult assistance to avoid incarceration. The only nominal ally is the lawyer, and the lawyer typically will not effectively address non-legal issues and will not bond with the child on any meaningful level. Most lawyers have neither the training nor the temperament to be social workers.[112]

The intake probation officer could and should be the child's confidant and champion. Rule 102(f)—deleted in the recent amendments to the Juvenile Rules—provided for confidentiality prior to disposition, but lifted the confidentiality barrier at disposition. This timing was not coincidental. Prior to disposition, the court—and derivatively the probation officer—has no power to

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112. *See generally* Glynn, *supra* note 63, at 618-20.

order the child to participate in treatment; in fact and in law, prior to disposition no evidence beyond a reasonable doubt exists to justify treatment. If, however, the child voluntarily exposes his or her vulnerabilities and needs to the probation officer and, in so doing, the child recognizes an interest in obtaining treatment, the intake and pre-disposition phases of a delinquency proceeding can be tremendously productive and therapeutic for the child. Moreover, the statutory scheme and the Juvenile Rules reward this kind of productive awareness and facilitated self-help. At the disposition, the probation officer can reward the child for having addressed the treatment needs by reporting that the child is no longer in need of care and rehabilitation from the court. A child who is not in need of care and rehabilitation from the delinquency system is, by definition, not delinquent.[113] An attorney representing a child who does not need care and rehabilitation can move to dismiss the delinquency case "for social reasons".[114] A dismissal for social reasons is appropriate as well when the child does, in fact, need care and rehabilitation but is able to obtain suitable services from outside of the delinquency system.

A child who is delinquent or defiant, and who may be without proper parental control and guidance, will likely understand how to fight or resist a parental figure who is perceived as abusive and bullying.[115] If we force a confrontation with the judge, the child will likely engage the battle. The child may manipulate by "fronting" and "programming,"[116] but there is undeniably a battle underway between the court and the child. Moreover, many of the children facing this clash

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113. D.C. CODE ANN. § 16-2301(6) (1989 Repl.). The term "delinquent child" refers to a child who has committed a delinquent act and is in need of care and rehabilitation. *Id.* The need for care and rehabilitation is an element of any delinquency offense; the government must allege in the petition that the child is in need of care and rehabilitation, and the government carries the burden of proof. *In re* M.C.F., 293 A.2d 874, 877 (D.C. 1972). By proving the other elements of a charge, however, the government gains the presumption that the child is in need of care and rehabilitation. The defense would have an opportunity, presumably at a disposition or perhaps as an affirmative defense at trial, to attempt to rebut the presumption. *Cf. In re* C.S. McP., 514 A.2d 446 (D.C. 1986) (where government in plea agreement waived right to allocute at disposition, defense entitled to move for social reasons dismissal without government opposition).

114. Rule 48(b) provides that the court can "dismiss a petition and terminate the proceedings . . . if such action is in the interests of justice and the welfare of the [child]." D.C. SUPER. CT. JUV. R. 48(b).

115. Rebelliousness is a common and perhaps natural companion of adolescence. In this regard, children in the delinquency system are typical teenagers. However, a percentage of children in the delinquency system are also veterans of living on the street, making ends meet without adequate adult support or supervision. Some of these children are undersocialized or conduct disordered. Children from financially privileged families who may experience different forms of parental abuse and neglect, and who may exhibit corresponding psychological problems, are not likely to find their way into the D.C. delinquency system.

116. "Fronting" and "programming" refer to a child who is an experienced participant in the juvenile delinquency system and, in order to successfully navigate the system, cooperates with program requirements for the sake of appearance and tells intake probation, the judge, and others what they want to hear.

with authority have fought worse fights with parents, guardians, and school personnel. Therefore, by engaging in a power struggle with the child, the court is unconsciously reconstituting in many cases a pathological dynamic from the child's home and school life.

Many children also perceive that they have little to lose by their incarceration. They may have parents and friends who are incarcerated; thus, they may have internalized a vision for themselves of being incarcerated. Also, life on the streets for a child who is essentially homeless is, in many ways, more difficult than life in the juvenile prison. Maurice fit this pattern; he had largely given up when we met him.

Fundamentally, actors in the system seek to negate the power of delinquent children because that power is understood to be dangerous and frightening. The model of rehabilitation is primarily punishment and incapacitation, rather than care and empowerment.

These dynamics will not sufficiently change without a fundamental re-ordering of probation. In its current trifurcated design, the probation system provides few incentives for probation officers at any stage to participate in the helping process or to bond with the child. On the contrary, given the large caseloads and daily demands of the job, the surveillance process is more manageable and allows probation officers to move non-compliant children out of the probation system and into the executive branch.

The juvenile probation system should not have three separate components. Rather, each probation officer should do intake, diagnostic, and supervision, and each probation officer should be assigned at random to the same number of cases for intake. If the probation officer can orchestrate the child's exit from the system by way of a recommendation against petitioning, diversion, or appropriate services prior to disposition, the probation officer should gain the benefit of a lighter (by one case) caseload. However, if that child re-enters the system, the same probation officer would have to handle the new case. In that way, there would be balanced incentives for the probation officer to get children out of the system but only when it is safe to do so. One might predict that probation officers would more carefully study the child's circumstances in order to help attach the right level of services. Also, probation officers would have a reason to monitor the progress of children in diversion programs and other services.[117]

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117. In addition, there should be a structural disincentive against recommending that the child be committed to the executive branch. If, for example, a probation officer successfully recommends commitment at disposition or probation revocation leading to commitment, that probation officer should be required to pick

Essentially, the system must provide a helper for the child and for the family, an adult with social work skills to build trust with the child and with the family and to advocate with them for the child to be empowered and creative in a positive way. In the most difficult cases, this process of bonding, advocacy, and empowerment will require years of ups and downs. As in Maurice's case, one can expect that the child will take two steps forward and one step backward. In the end, the child will emerge far ahead of where one would have predicted, and without the animus toward the system.

CONCLUSION

If you were a mild and guileless child,
Or perchance a wild, chided child,
Who would you want your champion to be?

If you were the parent of the decried,
Or perchance the brother who died,
Who would you want your loved one to see?

If you were a winsome, wealthy child,
Had perchance a stealthier style,
Where would your case from the whine seller sit?
Who would object if it wasn't a fit . . .
And your score on the court was love?

Who would be taken in?

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up two additional intake cases. This re-structuring would also require that administrators from probation and from the executive branch agency (Youth Services Administration) design agreements regarding the pooling of money for services and regarding how to reach decisions regarding when services can be ordered by the court. *Cf. In re* J.J., 431 A.2d 587 (D.C. 1981) (court not empowered to order the executive branch agency to provide services for child on probation).