Rehabilitation or Retribution

The discourse on juvenile justice administration reveals a core thematic dichotomy, which has informed the history of the juvenile court since its inception in the late nineteenth century. Rehabilitation and retribution stand in opposition as the two poles of response to youth delinquency. A rehabilitative approach relies on the assumption that adolescents’ social environments are to blame for their transgressions, while a retributive approach accepts that juveniles are accountable for their own actions. While the juvenile court originated out of rehabilitation theory, contemporary criminal justice policy emphasizes retribution over a benevolent treatment model. In this paper, I will consider how traditional liberal theorists – John Locke, Jean-Jacques Rousseau, and Immanuel Kant – would assess present-day juvenile justice administration. I will also discuss how their theories contribute to ongoing debates about whether juveniles are inherently less culpable, and whether a distinct juvenile court should in fact exist. While traditional liberal philosophers tend to advocate for a rehabilitative pares patrie approach to juvenile justice based on a belief in environmental determinism, contemporaries tend to advocate for retribution based on a belief in individual culpability. Present-day theorists, Barry C. Feld and Andrew von Hirsch, however, bridge this gap by arguing for a more protective and nurturing retribution. In doing so, they suggest that a rehabilitative, re-education approach to juvenile delinquency is preferable to purely punitive sanction. Underlying cultural and class circumstances reinforce this conclusion.

The history of the American juvenile court reveals the centrality of the rehabilitation-retribution dichotomy. A product of the Progressive Era, the juvenile court was created by child welfare advocates to adhere to the ideals of traditional and progressive liberalism. The founders were motivated by two tenets – that “criminal behavior [is] caused by unwholesome environment, especially the banal influence of squalid urban life;” and that “like other children, adolescents are not morally accountable for their behavior.” The first tenet legitimized state intervention. In fact, the proponents claimed that it was the obligation of the juvenile court to take on a parental role and exercise wide discretion over the delinquent in order to “save [him] from a life of crime.” Accordingly, many state courts aimed to “[remove] from a minor committing a delinquency the taint of criminality...by substituting therefore an individual program of counseling, supervision, treatment and rehabilitation.” Others sought to provide the minor with “such care and guidance...as will serve [his]
moral, emotional, mental, and physical welfare." These missions reveal the juvenile court’s paternalism. Second, in counting adolescents as children, the founders maintained that childhood is a discrete life stage marked by its own set of capabilities. They saw “the essential difference between the moral and cognitive capacities of the juvenile and those of the adult...[as absolving] the juvenile completely from criminal liability.” While the adult courts dealt out retributive sentences, the juvenile court’s “exclusive concern [was] for the social rehabilitation of needy youths.”

In the second half of the twentieth century, juvenile justice administrators lost faith in the rehabilitative ability of court sentences. Consequently, the emphasis “turned from assessing the social needs of the offender to assessing the social harm that the offender caused.” State juvenile courts changed their missions to emphasize “public safety, punishment and individual accountability” over the youth’s future welfare. As Janet Ainsworth writes, “sentences in the new punitive juvenile court are designed to hold the youth accountable for the offense committed; any rehabilitative services or programs provided during incarceration are incidental to the punishment meted out.” Statistics offer additional insight into the extent of this re-structuring. In 1923, there were 111 sentences to juvenile training school, 83 to detention and 23 to incarceration handed down for every 100,000 youth under the age of eighteen. By the mid-1990s, however, the numbers had jumped to 265, 872 and 304, respectively. This data reveals first an overall rise in juvenile criminalization, marked by the increase in the total number of sanctions. Second, the proportion of the sentences involving juvenile training schools fell from roughly 51 percent in 1923 to 18 percent in the mid-1990s. This is significant because juvenile training schools are primarily rehabilitative, rather than retributive. Their decreased proportional use indicates rehabilitation’s diminished influence in contemporary juvenile justice. The history of the juvenile court, therefore, exposes a fundamental disagreement over the court’s purpose – rehabilitation or retribution – and the root of delinquency – environmental determinism or individual culpability.

A new development in criminal justice theory inspired the change in juvenile justice administration in the latter part of the twentieth century. Contemporary theorists reject the paternalistic function of the juvenile court as unconstitutional and overly deterministic. In In re Gault, the Supreme Court undermined the parens patrie court’s legitimacy by asserting that it violates juveniles’ “constitutional protections,” specifically “the fundamental requirements of due process.” Consequently, concern for the rights and personhood of juveniles became central to the backlash against the protective quality of the juvenile court. Other theorists, like Barry C. Feld, argue
that paternalism relieves the adolescent of personal accountability. Such a court "[characterizes] delinquents as victims rather than perpetrators," he claims, "[denies] youths' personal responsibility," and "[reduces] offenders' duty to exercise self-control." Thus, in some of his writing, he articulates the majority viewpoint in contemporary juvenile justice – that juveniles possess "sufficient moral reasoning, cognitive capacity and volitional control" to hold them primarily responsible for their actions. Only a retribution approach, present-day theorists hold, acknowledges the youth's individual autonomy and accountability, and treats him as a rational actor.

In contrast, traditional liberal theorists do not perceive adolescents to be independent and reasonable. Rather, they view dependency and conformance as distinctive characteristics of childhood. Children, they hold, are different from adults in their inherent malleability. Accordingly, the youth's educational environment has the power to mold him for a life of moral goodness. Though Locke, Rousseau and Kant preceded the inception of the juvenile court, their theories on education are applicable to the juvenile justice discourse. The emphasis they place on education and their belief in children's impressionability suggest a powerful preference for rehabilitation, which involves the re-educating and re-training of delinquents. Thus, Locke, Rousseau and Kant would maintain that to reform transgressors, they must be given a paternalistic environment in which to be rehabilitated.

John Locke argues that education is the only vehicle by which to secure morality in a child. "This I am sure," he claims, "that if the foundation of [virtue] not be laid in the education and principling of youth, all other endeavors will be in vain." These other endeavors, punishment included, are incapable of turning an adolescent to good because they do not provide the moral framework or habits that will "sway and influence his life." Likewise, he warns against treating the child as a fully autonomous and accountable being. In his Second Treatise on Government, he declares that turning the child "loose to an unrestrain'd Liberty, before he has reason to guide him, is not allowing him the privilege of his Nature, to be free; but to thrust him out amongst Brutes." Hence, Locke believes that the youth must be safeguarded. The fettered autonomy and sheltering Locke calls for are only possible within a rehabilitation framework. Moreover, Locke explicitly decies punitive sanction, claiming that "punishment does...great harm in education...those children who have been most chastised seldom make the best men." Instead, the overseer must "strip" the transgressor of his vice and "undo again" his corrupted education, re-training him to be virtuous. According to Locke, education is the only way to "[set] the mind right" and correct for juvenile delinquency.
Jean-Jacques Rousseau echoes Locke's emphasis on education and asserts that all children, including wrongdoers, must be given a loving protective environment in which to discover right. He believes that "man is by nature good" but is "depraved and perverted by society." Accordingly, juvenile delinquents must be isolated from corrupting influences and rehabilitated to recapture their potential for morality. Like Locke, Rousseau firmly denounces punishment as ineffective in deterring transgression. "We learn nothing from a lesson we detest," he claims; "do not stifle [the child's] imagination, but direct it lest it should bring forth monsters." Punitive sanction will only motivate the child to rebel again, he contends. Furthermore, he believes that children cannot fundamentally understand the law and thus should not be held accountable to it. "By imposing on [children] a duty which they fail to recognize," he maintains, "you make them disinclined to submit... you turn away their love; you teach them deceit, falsehood, and lying." Hence, Rousseau would view retribution as both unproductive and detrimental. He would instead call for the rehabilitation of juvenile wrongdoers in a nurturing environment away from society's perversion.

Immanuel Kant would argue too that retribution is a flawed solution for wrongdoing. "If we wish to establish morality, we must abolish punishment," he declares outright. Rather, the youth must be educated to choose goodness on his own. It is "not enough that children should be merely broken in; for it is of greater importance that they shall learn to think," he posits. Accordingly, "moral culture must be based upon 'maxims' not upon discipline; the one prevents the evil habits, the other trains the mind." For Kant, punishment only deters, while training secures the youths future moral soundness by making it "that he should choose none but good ends." This youth will then be free, Kant asserts, as he will have learned the lifelong lesson of seeing good as an end in itself. Thus, Kant would embrace a rehabilitative approach to juvenile justice that maximizes the moral potential of each youth. He would, in turn, denounce retribution for relegating adolescents to a childish state, from which they will be permanently incapable of making the right decisions.

From this discussion, it is evident that for Locke, Rousseau and Kant, the critical determinant of a youth's virtue is the environment in which he is educated and nurtured. According to Locke, "nine parts of ten [men] are what they are, good or evil, useful or not, by their education." Kant corroborates this view when he writes, "[man] is what education makes him." For these theorists, education molds the child, towards virtue or vice. It follows then, that they would agree with the first tenet of the original juvenile court: an improper rearing is to be blamed for juvenile transgression. In this framework, youth are passive actors who possess negligible agency
to improve on their upbringing. Accordingly, Locke, Rousseau and Kant would perceive children to be necessarily less culpable than adults. The current retributive function of the juvenile court reveals that contemporary legal theorists do not share this notion of environmental determinism. Rather, today blame is generally considered to lie with the offender. In a society where youth is treated as a nearly autonomous state, juveniles are held wholly accountable for their actions.

Within this retribution camp, however, there exist present-day theorists like Barry C. Feld and Andrew von Hirsch who blend the juvenile culpability model with a more protective, nurturing approach to juvenile sentencing. These theorists assert that by the very nature of their youthfulness, juveniles are inherently less culpable than adults. According to Feld,

Developmental processes affect adolescent’s quality of judgment and self-control, directly influence their degree of criminal responsibility and deserved punishment, and justify a different criminal sentencing policy. While young offenders possess sufficient understanding and culpability to hold them accountable to their acts, their crimes are less blameworthy than adults’ because of reduced culpability and limited appreciation of consequences and also because their life circumstances understandably limit their capacity to learn to make fully responsible choices.39

Similarly, von Hirsch argues that while juveniles should be subject to just dessert sentencing, their deserved sanction should be greatly reduced from the adult equivalent for three reasons. First, like Feld, he maintains that adolescents have a reduced culpability due to their underdeveloped capacity for moral reasoning, self-impulse-control, and resistance to peer pressure. Second, he claims that punishment is “more onerous” for youths than adults, as it interferes with their schooling, socialization, nurturing and self-esteem.30 Lastly, von Hirsch agrees with Rousseau and Kant that youth is the time for learning to live freely. “Because adolescence is a time of testing,” he contends, “we must have tolerance. Learning autonomy requires some leniency to make mistakes.”31 For Feld and von Hirsch, all of these concerns – juveniles’ lesser culpability, “punitive bite” and the need for tolerance – diminish as the youth advances through adolescence and presumably gains in maturity. Consequently, Feld recommends the use of “a sliding scale of criminal responsibility” in sentencing, whereby “younger adolescents bear less responsibility and deserve proportionally shorter sentences than older youths.” 32 Hence, they seek to divide the juvenile period into a series of age categories with corresponding age-appropriate penalties. This model challenges the rigid sentencing split imposed by separate juvenile and adult courts. Thus, Feld and von Hirsch call for the dissolution of the juvenile court as we know it.
The question of whether there should in fact be a separate juvenile court has long consumed public policy debate. Beyond the rehabilitation-retribution dichotomy, this debate begins with a discussion of whether childhood and adulthood are mutually exclusive life stages. Advocates of a separate juvenile court consider childhood to be a distinct period – marked by discrete capabilities – which render the youth’s culpability categorically different from that of adults. On the other hand, proponents of a single justice system argue that childhood and adulthood blend together chronologically. For them, development occurs along a continuum. Given these contending strands, the traditional liberal theorists would support a separate juvenile court.

These theorists are consistent in their recognition of childhood’s distinction. Rousseau unambiguously divides childhood and adulthood. “Childhood has its place in the sequence of human life,” he asserts; “the man must be treated as a man and the child as a child. Give each his own place, and keep him there.” He also warns against confusing childhood and adult capabilities, claiming that “childhood has its own way of seeing, thinking and feeling; nothing is more foolish than trying to substitute [adult] ways.” Kant, too, is unequivocal in his distinction. “Let a child be clever after the manner of childhood...but not cunning like a man,” he writes; “The latter is as unsuitable for a child as a childish mind is for a grown-up person.”

According to Kant, when a child is held to an adult moral standard, he loses the opportunity to discover and fully comprehend morality for himself and will not learn to choose right of his own volition. Hence, for both theorists, the unnatural blending of adulthood with childhood is a detriment to the child and compromises the integrity of this primary developmental phase.

While Locke is less overt, it can be inferred from “An Essay on the Poor Law” that he would agree with this life stage differentiation. In the essay, Locke bounds childhood by age and prescribes such children to special working-schools. He defines as “children” those “above 3 and under 14 years of age.” Accordingly, “men” are “above 14” and are not subject to any of the protectionism granted children. Thus, Locke, like Rousseau and Kant, categorically distinguishes between the proper treatment of children and adults based on their discrete capacities and malleability. For this reason, the traditional liberal theorists would agree with Feld and von Hirsch that juveniles – by the very nature of their youthfulness – are inherently less culpable in any transgression. Yet, they depart from Feld and von Hirsch when they divide life into two irreducible stages.

Contemporary theorists dismiss this child-adult dichotomy and consequently call for the abolition
of the juvenile court. Feld argues that “the binary distinctions between children and adults that provide...the jurisprudential foundation of the juvenile court ignore the reality that adolescents develop along a continuum.” Accordingly, he argues that the juvenile period should be subdivided into age categories with the youngest of such groups receiving the greatest discount in sentencing and each progressive group receiving less and less discount until the adult standard is reached. This model, he asserts, would require a sole integrated criminal justice system in which “juveniles” simply received “categorical fractional reductions of adult sentences.” Janet Ainsworth also criticizes the current juvenile court, pointing to actual juvenile justice policies as proof that childhood and adulthood intermix in present-day society. Waivers, especially automatic waivers, she claims, discredit the juvenile system by bypassing its jurisdiction and transferring serious adolescent crimes and repeat offenders to adult criminal court for prosecution. “[W]aiver statutes break down the child-adult dichotomy completely,” she maintains, by “assuming that nothing inherent in the nature of children...prevents holding the juvenile offender criminally responsible for breaking the law.” By invoking policy, Ainsworth reveals the institutionalized consensus among present-day thinkers—including those charged with overseeing the juvenile court system—that childhood and adulthood are not mutually exclusive. More importantly, Ainsworth provides an explanation for this re-conceptualization of childhood. Pointing to changed social constructs, she attempts to clarify why contemporary theorists view the developmental process differently than eighteenth and nineteenth century theorists did.

According to Ainsworth, the change in theoretical discourse can be attributed to shifting cultural understandings of childhood. Childhood, she begins, is a “socially-constructed invention,” hence “the definition of childhood—who is classified as a child, and what emotional, intellectual, and moral properties children are assumed to possess—has changed over time in response to changes in other facets of society.” Adolescence, for instance, wasn’t a term used in Locke, Kant and Rousseau’s time. Essentially, children learned and adults worked with a negligible transition period in between. Yet, in the second half of the twentieth century, she explains, “the human life cycle was subdivided into more and more stages.” In the process, “youth” was invented as a new life phase between adolescence and adulthood. As a result of this fragmentation, Ainsworth upholds, it is “harder to see each stage as absolute and dichotomous;” today youth no longer appear “inherently and essentially different from adults.” Vietnam, the lowered suffrage age, the sexual revolution, increased youth consumerism, and the freedom afforded by cell phones and the Internet have shaped cultural conceptions of childhood, Ainsworth would posit.
These and other twentieth century phenomena have cast youths as free-thinking, independent actors in the minds of most Americans. Marc Jans strengthens Ainsworth’s social constructivist argument by pointing to the “ambivalence” of present-day childhood. On one hand, he says, children today are “expected to be autonomous, independent and responsible,” while on the other, “their living situation...supposes dependency and inequality.”

Hence, far from being mutually exclusive, the characteristics attributed to adulthood now apply equally to children, and carry the same weight as traditional youthful attributes. “The juvenile court,” Ainsworth asserts, “depends for its legitimacy upon the belief that the young inherently differ from adults in their capacity to make responsible choices.” Thus, this fundamental change in the social construction of childhood motivates Ainsworth to condemn the juvenile court system as “outmoded” and illegitimate.

Taking into account the evolving concept of childhood, rehabilitation appears to be the consistently favored pole in juvenile justice theory. Yet, rehabilitation in its paternalistic nineteenth century form can no longer exist, due to changes in juvenile justice policy and the contemporary cultural environment Ainsworth describes. Rather, a theoretical middle ground, which champions youth reform as the aim of juvenile justice, dominates the present-day discourse. This modern-take on rehabilitation continues the legacy of the traditional liberal theorists, revealing a lasting consensus on the part of juvenile justice theory. Such a middle ground position is exemplified by von Hirsch. Despite his root in the modern construction of childhood, he laments the way that punishment “compromises [the] interests” of juveniles, including their need of “adequate schooling and learning opportunities...a reasonable nurturing atmosphere...[and] exposure to adequate role models.” Similarly, Feld reveals a preference for the protection and reform of delinquents, though he finds exclusive rehabilitation problematic. “[The] state should provide [young offenders] with resources for self-improvement,” he contends; “sentencing and correctional policy must offer youths room to reform and provide opportunities and resources to facilitate young offenders’ constructive use of time.” These arguments, though far from endorsing the total rehabilitation Locke, Rousseau and Kant would support, clearly align with the traditional liberal theorists’ belief that adolescents’ characters are pliable and that moral goodness may be taught through re-education.

Ainsworth demonstrates that the current emphasis on retribution in juvenile justice administration is merely a response to changed cultural norms – whereby youth are held more accountable for their actions and are further integrated into society as autonomous beings. It
follows logically that as children are treated increasingly like adults in society, this treatment has carried over into the courtroom. However, even with the greater independence of children, there is an equally strong nurturing force at work today. Accordingly, Marc Jans labels the contemporary period the “era of the ‘cherished child.’” Youths’ minds are nurtured more intensely and for a longer duration than ever before, he asserts. In the home, parents take an increasingly active interest in their children’s development, while society has witnessed a proliferation of childhood programming, a greater emphasis on education, and an immense increase in college matriculation. Beyond simply discrediting the impact of retribution theory then, an analysis of contemporary cultural norms reveals an invigorated emphasis on education. The dominant public discourse today assumes – like Locke, Rousseau and Kant did – that youth are inherently malleable and is devoted to providing stimulating and nurturing environments in which children’s minds can be cultivated. Hence, the underlying beliefs that would have inspired the traditional liberal theorists to embrace a rehabilitative approach to juvenile justice still resonate today. Even though cultural circumstances have rendered rehabilitation alone inapplicable, a strong preference for a re-education, treatment approach to juvenile delinquency still predominates.

The predilection for rehabilitation is further supported by a class-based argument. The core debate over rehabilitation versus retribution overlooks the issue of class, which is integral to traditional liberal theory. Locke prescribes benevolent treatment and a nurturing educational environment exclusively for elite youth. Rather, for poor children he recommends essentially penal, labor sentences. He considers poverty and delinquency to spring from the same source – “the relaxation of discipline and corruption of manners.” Accordingly, in “An Essay on the Poor Law,” Locke condemns child beggars to the “working school…to be soundly whipped, and kept at work till evening.” While Locke’s aim, “to [restrain] [the poor’s] debauchery,” is rehabilitative in nature, his means – corporal punishment and forced labor – approximate retribution. Kant’s theory also reveals an overt elitism. He prescribes a distinct, more intensive education for “those of high rank” – society’s future “rulers” – and emphasizes the importance of teaching “refinement.” Moreover, in Education, he assumes that the child’s parents are educated and sufficiently wealthy to afford to hire a private tutor. This indicates that his philosophy is oriented towards a well-off, aristocratic audience. Kant does not offer an explicit theory for lower class youth, but it is likely that it would lack the intensive cultivation and protective environment of his elite education.
Present-day juvenile courts deal disproportionately with poor, minority youths. According to Children’s Defense Fund statistics, “[by] the end of the nineties, seven out of ten youth held in secure confinement were African American, Latino, or other minorities.”

“It is a constant fact,” Peter Edelman cites, “that African Americans are overrepresented throughout the criminal justice system, from arrest through incarceration.”

Retribution, then, is the treatment afforded underprivileged youth in present-day society. They have unduly born the burden of the policy transition to a punitive model. In contrast, the middle and upper classes have evaded the effects of this shift through privilege and careful strategy. According to Edelman, if their child has a problem: people of means can buy their way out, by way of military schools, private psychiatrists, and expensive residential facilities for the emotionally disturbed. Parents with higher incomes can purchase music and ballet lessons and pay for soccer leagues, computer camps, and all of the other out-of-school enrichments that contribute to child and youth development.

In the present-day as in the eighteenth and nineteenth centuries, rehabilitation-like nurturing is a luxury of the upper echelons. And dominant society is still more rehabilitative to its own than to the offspring of the lower economic classes. That those with means choose to spend their money on the cultivation and reform of their children reveals a clear preference for rehabilitation. Both traditional liberal theorists and the upper classes today, then, prioritize the protective care and re-education of juveniles, and have used the resources at their disposal to avoid retribution.

This class-based argument further supports my claim that a critical mass of both traditional liberals and contemporaries favor rehabilitation in juvenile justice. While Locke, Rousseau, and Kant would unequivocally endorse rehabilitation, present-day theorists also believe that rehabilitative elements are integral in juvenile sentencing. A purely rehabilitative juvenile court would deny the autonomy of adolescents in today’s society, but retribution alone without a benevolent treatment component would deny adolescents’ malleability and future potential.

Thus, the middle ground articulated by Feld and von Hirsch is the best reformulation of Locke, Rousseau and Kant’s rehabilitative theories for modern-day society, and should inform the future of the juvenile justice system.

---

2 Ibid.
4 Ibid.
5 Ainsworth.
6 Ibid.
7 Ibid.
9 Ibid.
11 In re Gault. 387 U.S. 1 (1967).
13 Ibid.
15 Some Thoughts Concerning Education, 31-32.
17 Some Thoughts Concerning Education, 34.
18 Some Thoughts Concerning Education, 47.
19 Some Thoughts Concerning Education, 25.
21 Rousseau, 290.
22 Rousseau, 55.
24 Kant, 20.
25 Kant, 83.
26 Kant, 20.
27 Some Thoughts Concerning Education, 10.
28 Kant, 5.
33 Rousseau, 44.
34 Rousseau, 54.
35 Kant, 32.
36 Kant, 93.
40 Ibid.
41 Ainsworth.
42 Ibid.
43 Ibid.
44 Ibid.
46 Ainsworth.
47 Ibid.
48 von Hirsch, 228.
50 Jans, 33.
51 “An Essay on the Poor Law,” 184
52 “An Essay on the Poor Law,” 187
53 “An Essay on the Poor Law,” 184
54 Kant, 5.
55 Kant, 29.
57 Ibid.
58 Edelman. 328.