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WHAT TO DO WITH THE SHEEP IN WOLF'S CLOTHING: THE
ROLE OF RHETORIC AND REALITY ABOUT YOUTH OFFENDERS
IN THE CONSTRUCTIVE DISMANTLING OF THE
JUVENILE JUSTICE SYSTEM

SACHA M. COUPET[†]

Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.¹

INTRODUCTION

In October 1998, at the close of the 105th Congress, Senator Patrick Leahy, lamenting the failure of the Senate to pass juvenile crime legislation, urged the majority leader to make this issue one of the top legislative priorities in the 106th Congress.² For better or for worse, he got his wish. In the immediate wake of the April 1999 shooting in

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¹ Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

² See 144 CONG. REC. S12644-45 (daily ed. Oct. 15, 1998) (statement of Sen. Leahy) (praising the bipartisan efforts at the end of the 105th Congress, but voicing concern that the efforts came so late in the session and urging a quick completion in the beginning of the next).

Littleton, Colorado,³ the Senate and the House of Representatives abruptly began to draft extensive juvenile justice reform measures.⁴ The massacre at Columbine High School was one of the worst episodes of school violence in U.S. history, and it, along with a number of other killings by juveniles,⁵ confirmed the public's worst fears and dire predictions concerning juvenile crime. For the federal government, as it was for forty-seven states and the District of Columbia between 1992 and 1997,⁶ juvenile justice was once again at the top of the legislative agenda.⁷ The ongoing debate concerning juvenile justice reform at both the national and state levels is but another chapter in the saga of an adjudicative arena that has been in flux since its inception in 1899.⁸ Now, as the United States marks the 100th anniversary of

³ See Patrick O'Driscoll, *Colorado Police Probing Whether Schoolyard Gunmen Had Help*, USA TODAY, Apr. 22, 1999, at 1A (describing the investigation of the shooting in Littleton, Colorado).

⁴ House Bill 1501, 106th Cong. (1999) and Senate Bill 254, 106th Cong. (1999) were passed by the House and Senate, respectively, and are now in conference. Both the House and Senate bills are aimed at increasing offender accountability through various means, including implementation of graduated sanctions for juveniles, expansion of correctional and detention facilities, see H.R. 1501, § 2, and lowering to 14 the minimum age for federal prosecution of certain crimes, see S. 254, § 102.

⁵ One year prior to the Columbine shooting, in March 1998, two boys, 11 and 13, were arrested in Jonesboro, Arkansas for killing four classmates and a teacher and wounding 10 others. See Brenda Warner Rotzoll, *Kids Ambush Kids, Four Arkansas Girls Die, Renewing Concern for School Safety*, CHI. SUN-TIMES, Mar. 25, 1998, at 1 (describing the attack at an Arkansas middle school). Two months later, in Springfield, Oregon, a 15-year-old boy killed his parents and subsequently went on a shooting spree in his high school, killing two classmates. See Brad Cain, *Oregon Teen Arraigned in High School Rampage*, ORANGE COUNTY REG., June 17, 1998, at A18 (describing the shooting and the arraignment).

⁶ HOWARD N. SNYDER & MELISSA SICKMUND, NATIONAL CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 89 (1999) [hereinafter NATIONAL REPORT] (noting that "[f]rom 1992 through 1997, legislatures in 47 [s]tates and the District of Columbia enacted laws that made their juvenile justice systems more punitive").

⁷ Continued impassioned debate from the floor of the House of Representatives reflects the urgency of juvenile legislation. See 145 CONG. REC. H8595-96 (daily ed. Sept. 23, 1999) (statement of Rep. McCarthy) (urging the committee of conference to reach a compromise on the gun control provisions of the juvenile justice bill and stating that "[e]very day Congress fails to advance juvenile justice legislation is another day that we lose 13 children to gun violence").

⁸ See generally THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 31-33 (1992) (advancing the notion that juvenile justice reform has been longstanding and cyclical in nature and that virtually every decade of this century has been marked with the fear of rising rates of juvenile delinquency and crime). Note also the significant changes to the juvenile court brought in with the Warren Court's "due process revolution." Recent debate over reform has involved a range of views, from that advanced by Barry C. Feld, who favors elimination of a separate juvenile justice system, see Barry C. Feld, *The*

the creation of a separate system to address the actions of young offenders, debate on how best to respond to juvenile crime continues. At the extreme, abolitionists⁹ call for its demise, favoring instead the trial of juveniles in adult criminal courts with sentences mitigated by age or other offender variables.¹⁰ Reformers propose altering the system, sometimes beyond recognition, through "get tough" measures including increasing the use of transfer waivers to try children in adult court, lowering the minimum age for transfers, increasing the use of detention and incarceration, and limiting confidentiality and expungement privileges.¹¹ In the dawn of the new millennium, the juvenile justice system may have taken a step back into the nineteenth century. Current juvenile reform measures that move greater numbers of juvenile offenders into adult criminal court, with increasingly punitive sanctions for juveniles, harken back to pre-1899, when chil-

Transformation of the Juvenile Court, 75 MINN. L. REV. 691, 723-24 (1991) (advocating for the abolition of the juvenile court), to that advocated by Justice Lawrence Koontz of the Supreme Court of Virginia, favoring preservation of the system, see Lawrence L. Koontz, Jr., *Reassessment Should Not Lead To Wholesale Rejection of the Juvenile Justice System*, 31 U. RICH. L. REV. 179, 188-89 (1997) (cautioning against the eradication of the juvenile justice system).

This Comment primarily addresses the juvenile delinquency component of the juvenile court; references to the juvenile court are intended to refer to delinquency, not dependency, proceedings. Note also that this Comment focuses primarily on the way in which the system responds to crimes against persons or property committed by juveniles as opposed to status offenses such as truancy or running away, or to situations in which children have been brought before the juvenile court due to parental abuse or neglect.

⁹ By "abolitionists," I am referring to the term Michael K. Burke applies to those whose aim it is to dismantle the current juvenile court structure and incorporate children into the adult criminal court system. See Michael Kennedy Burke, *This Old Court: Abolitionists Once Again Line Up the Wrecking Ball on the Juvenile Court When All It Needs Is a Few Minor Alterations*, 26 U. TOL. L. REV. 1027, 1027-28 n.10 (1995) (defining "abolitionist" as used in his article).

¹⁰ See Feld, *supra* note 8, at 723 (favoring the abolition of the juvenile court and asserting the futility of reform). Feld notes that "[c]oupling the emergence of punitive policies with our societal unwillingness to provide for the welfare of children in general, much less to those who commit crimes, there is simply no reason to believe that the juvenile court can be rehabilitated." *Id.* at 723.

¹¹ House Bill 3, 105th Cong. (1997) was passed in May 1997, but was not enacted, and would have advanced all of these punitive measures. See 143 CONG. REC. H5384-85 (daily ed. July 16, 1997) (statement of Rep. Stupak) (criticizing H.R. 3 for mandating trying 15-year-old children as adults, transferring 14-year-old children to adult courts, and increasing the number of children locked up as adults); see also T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885 (1996) (advocating the limiting of the use of expungement statutes in many situations to ensure a complete picture of the youth offender); Koontz, *supra* note 8, at 180-81 (highlighting radical juvenile justice reform measures and advocating for temperance instead).

dren were tried in the same courts of law as adults and received similar forms of punishment served in the same adult penal institutions, houses of refuge, or other correctional facilities.¹² At that time, beyond the common law's substantive infancy defense that only relieved children under the age of seven of culpability, "neither statute nor court decision provided for treating children charged with crimes differently from adults, substantively or procedurally."¹³

Reformers in the early juvenile court movement constituted a group of advocates who, understanding the needs and circumstances of young offenders, pressed for the development of an entirely separate adjudicative system that rested on the notion that "juveniles are different."¹⁴ Those reformers uniformly favored rehabilitation and treatment over punishment as the most effective means of dealing with juvenile delinquents.¹⁵ Today, the most vocal group of reformers call for increasingly more punitive measures that threaten to put juvenile offenders on par with adult criminals. These reformers' successful legislative efforts have nearly drowned out the call of those who press for innovative rehabilitative and preventive programs. The dominant theme of contemporary juvenile justice reform indeed strikes a different note from the traditional wholly rehabilitative philosophy of the original juvenile court.¹⁶ A drive to punish young of-

¹² Placement in detention facilities remains the "program of choice" for juvenile offenders "[d]espite the rehabilitative paradigm's symbolic goal to protect youths." SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, *BALANCING JUVENILE JUSTICE* 9-10 (1996).

¹³ Sanford J. Fox, *The Early History of the Court*, *FUTURE OF CHILDREN*, Winter 1996, at 31; see also NATIONAL REPORT, *supra* note 6, at 86 (noting that "[t]hroughout the late eighteenth century . . . children as young as 7 . . . could stand trial in criminal court . . . and, if found guilty, could be sentenced to prison or even to death"). At common law in Pennsylvania, for example, children under 7 years of age were conclusively presumed incapable of committing crimes. For those 7 to 14, however, this presumption could be rebutted by evidence that the child understood the wrongfulness of his or her act. For a child 14 years and above, the presumption of incapacity was generally unavailable. See Barbara Margaret Farrell, *Pennsylvania's Treatment of Children Who Commit Murder: Criminal Punishment Has Not Replaced Parens Patriae*, 98 DICK. L. REV. 739, 741-42 (1994) (describing common law treatment of children).

¹⁴ David Yellen, *The Enduring Difference of Youth*, 47 U. KAN. L. REV. 999 (1999).

¹⁵ See GUARINO-GHEZZI & LOUGHRAN, *supra* note 12, at 5-6 (describing the liberal or "progressive" view that shaped the early juvenile court, marked by a de-emphasis on offenses and an emphasis on treatment and on the rehabilitative needs of young offenders).

¹⁶ See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 14 (1999) (stating that get tough policies and the retributive philosophy advanced by some legislators may erase differences between children and adults by sentencing "transferred youths under the same laws and to the same facilities as they sentence other adult offenders"); see also BERNARD, *supra* note 8, at 162 (noting that "[t]he

fenders for their supposed increasingly violent behavior has guided reform measures over the past three decades and has steered the juvenile justice system from rehabilitative to retributive aims.¹⁷ The general public's concern about perceived increases in youth criminal activity "bolster policies to repress rather than rehabilitate young offenders."¹⁸ Despite the fact that "many knowledgeable criminologists have seen little evidence of a profound difference in the rate of serious crime among adolescents over the past thirty years,"¹⁹ rhetoric about explosions in juvenile crime rates and "a coming wave of juvenile 'superpredators'" continues to fuel the public's hysteria.²⁰ Rather than educating their constituents about the complex nature of youth crime and the juvenile justice system's limited ability to reduce it, "politicians propose simplistic 'get tough' policies and pander to people's fears."²¹ Even in the face of valid social science research indicating that a retributive "just desserts" response—a core tenet of the adult criminal system—is not the most effective long-term intervention to reduce or prevent juvenile crime,²² the reform rhetoric is replete with calls for retribution, punishment, and confinement.²³

Part I of this Comment addresses the historical origins of the ju-

'get tough' movement has proposed the idea that juvenile delinquents are hardened criminals").

¹⁷ See Yellen, *supra* note 14, at 996 ("[T]he juvenile court has survived by becoming more overtly punitive. More young people than ever are being transferred to adult courts, and more punitive sentences are imposed on those youths who remain in the juvenile court."); see also KATHLEEN M. HEIDE, *YOUNG KILLERS: THE CHALLENGE OF JUVENILE HOMICIDE* 21 (1999) (describing federal and state legislative efforts to get tough on crime, including lowering the age of majority or making it easier to try juveniles in adult criminal court); ANNE L. SCHNEIDER, *DETERRENCE AND JUVENILE CRIME* 1 (1990) (noting changes in juvenile justice "toward more punishment-oriented policies for juvenile offenders). In noting the punitive effect of recent juvenile legislation, Heide states that "[i]n some states today, . . . youths as young as 13 years old can be tried in adult court for any crime." HEIDE, *supra*, at 21. Those convicted of adult crimes could receive "longer periods of incarceration, life without parole, or (in some cases) the death penalty." *Id.*

¹⁸ FELD, *supra* note 16, at 287.

¹⁹ JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN AMERICANS IN THE CRIMINAL JUSTICE SYSTEM* 40 (1996).

²⁰ Yellen, *supra* note 14, at 998.

²¹ FELD, *supra* note 16, at 287.

²² See *infra* Part II.A.1 (discussing the lack of consistent deterrent effects of punitive measures on youths).

²³ See *infra* Part II (discussing statutes that move the juvenile court substantively and procedurally closer to adult criminal courts); see also Michele M. Jochner, *An Overview of the Juvenile Justice Reform Provisions of 1998*, 87 ILL. B.J. 152 (1999) (summarizing changes in Illinois state juvenile legislation including terminology, use of waivers, and extended jurisdiction of juvenile prosecutions).

venile justice system, highlighting the goals and original intent of this adjudicative system: to be sensitive to the needs and capacities of children. Part II examines state and federal juvenile crime legislation spurred by “get tough” rhetoric and its actual and potential effects on juvenile crime. Part III analyzes the role that public perception has played in creating a cyclical response to juvenile delinquency throughout history. It also examines sources of information and misinformation relied upon by “get tough” reformers, and presents empirical social science evidence that both debunks “get tough” rhetoric and also supports alternatives to incarceration. Part IV presents a model of restorative justice as an alternative to purely retributive or purely rehabilitative aims.

I. HISTORICAL ORIGINS OF THE JUVENILE JUSTICE SYSTEM

A. *Parens Patriae*

The earliest development of the child welfare system, prior to the juvenile justice model, was based on the *parens patriae* doctrine. This concept generally refers to the role of the state as the custodian of persons who suffer from some form of legal disability. It authorizes the state to substitute and enforce its judgment about what it believes to be in the best interests of the persons who presumably are unable to take care of themselves. The *parens patriae* doctrine “refers traditionally to [the] role of [the] state as sovereign and guardian of persons under a legal disability . . . [and focuses on] the principle that the state must care for those who cannot take care of themselves.”²⁴ This doctrine provides the basis for state laws that protect, rather than punish, citizens.

Although the *parens patriae* doctrine was initially used to protect the interests of minors, establish guardianships, or provide for the involuntary commitment of the mentally ill, it was rarely invoked to take control of or confine persons who had not committed a crime. In 1838, however, the Pennsylvania Supreme Court expanded the use of the *parens patriae* doctrine to detain a minor for the purposes of reform and rehabilitation in *Ex parte Crouse*.²⁵ Although she was not found guilty of any crime, Mary Ann Crouse was committed to the Philadelphia House of Refuge based upon her mother’s complaint

²⁴ BLACK’S LAW DICTIONARY 1114 (6th ed. 1990) (citation omitted).

²⁵ 4 Whart. 9 (Pa. 1838).

that she was beyond her control.²⁶

Despite the habeas corpus petition and Sixth Amendment challenge regarding Mary Ann's right to trial by jury filed on her behalf by her father, Mary Ann was incarcerated and detained. Basing its holding on the *parens patriae* doctrine, the Pennsylvania Supreme Court stated that the Constitution did not protect a minor from being confined against his or her wishes because the goal of detention was reformation and rehabilitation, not punishment. The court reasoned that there was no prohibition on restraints imposed for a child's own welfare.²⁷ *Crouse* was the first reported case in which confinement for the protection, not punishment, of minors was justified by a best interests rationale and the power invested in the state by virtue of the *parens patriae* doctrine.²⁸ Moreover, *Crouse* became the precedent for upholding juvenile commitments without the legal formalities and due process protections of a criminal trial.²⁹

Sixty years passed before the protection versus punishment justification for juvenile confinement prompted the creation of an entirely separate system for juvenile offenders. The *parens patriae* doctrine that originated in English chancery courts provided a theoretical justification for nonpunitive, yet coercive, intervention in the lives of children and families.³⁰ By applying the *parens patriae* doctrine to children and adolescents who had committed acts that, were they adults, would be considered criminal, judges were given broad discretion to take "up the burden of parenthood and [stand] between all children and the manifest dangers of parental laxness and urban temptation."³¹ Rehabilitation, over punishment, was intended to resemble the way in which a benevolent parent would care for his or her own child and to protect the child from the vices of crime.

In the context of demographic, social, and economic changes of

²⁶ See BERNARD, *supra* note 8, at 68 (stating that Mary Ann Crouse's mother filed the complaint, and that Mary Ann was growing up to be a pauper).

²⁷ See *Crouse*, 4 Whart. at 11-12 (stating the facts of the case and holding that Mary Ann was taken from a course that would have ended in depravity, and that there was no constitutional provision against restraining a child for her welfare).

²⁸ See Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1205 (1970) (stating that *Crouse* has served as the precedent for the twentieth-century view that juvenile courts do not need traditional legal formalities).

²⁹ See Fox, *supra* note 13, at 32 (describing *Crouse* as "the first reported case upholding the Refuge scheme").

³⁰ See FELD, *supra* note 16, at 52 (explaining that this doctrine originated in English chancery courts to ensure feudal succession).

³¹ ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE* 1097 (3d ed. 1995).

the early nineteenth century, the social construction of childhood was "institutionalized . . . as a period of dependency and exclusion from the adult world."³² Reformers regarded dependent, neglected, and especially delinquent youth as malleable objects requiring protection from corrupting influences, particularly poverty, poor home and neighborhood conditions, and misguided or flawed parenting. This social construction of childhood, coupled with fears of incipient pauperism, led to the development of formal social control efforts, such as houses of refuge.³³ Poor children of immigrant parents, the disproportionate objects of such social control,³⁴ were committed to houses of refuge under the belief that only by "removing them from evil influences" could reformers change these "deviants."³⁵

Since no formal juvenile court existed to distinguish between dependent and delinquent cases, either substantively or procedurally, only informal attempts were made to handle children facing abandonment and dependency issues differently from those whose law-breaking behaviors elicited a more punitive response. By the mid-nineteenth century, certain child-saving efforts were implemented to provide an alternative for some orphaned or neglected children, as distinct from those deemed delinquent.³⁶

³² FELD, *supra* note 16, at 44. According to Professor Feld, "childhood and adolescence constitute social constructs or cultural artifacts [that are influenced by] social, historical, and cultural contingencies." *Id.* at 17. Such contingencies during the early nineteenth century included the development of an urban industrial society which, in turn, altered the structure and function of families and created a divide between both work and home and between adult responsibilities and children's pursuits. Children were "encapsulated . . . within their families and in organizations of formal social control." *Id.* at 44.

³³ See Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 405 (1999). Professor Zierdt notes that repression of the impoverished, particularly immigrants, motivated the development of child saving efforts. She states that since poverty and crime were regarded as interchangeable, the placement of children in houses of refuge was based on a belief that, if left to live in poverty, these children would become "tomorrow's criminals." *Id.*

³⁴ FELD, *supra* note 16, at 36 (noting the efforts of Progressive reformers "to 'Americanize,' assimilate and acculturate immigrants and the poor to become sober, virtuous, middle-class Americans like themselves").

³⁵ *Id.* at 50.

³⁶ See Jeanne F. Cook, *A History of Placing-Out: The Orphan Trains*, 74 CHILD WELFARE 181, 182-84 (describing the history of the early child welfare movement, especially that of the Children's Aid Society and distinctions in the treatment of dependent and delinquent children). See generally Fox, *supra* note 13, at 32 (discussing "alternative placements for destitute and neglected children," but noting that "the typical practice of this era was to treat poor and/or neglected children and young criminals as a homogeneous group").

Charles Loring Brace and the Children's Aid Society, for example, made efforts to "place-out" noncriminal youth, shipping them from those crowded, unsafe, urban areas that were perceived to be the breeding ground of "environmental corruption," to families living in rural America.³⁷ Furthermore, to approximate the home and family-like settings made available to orphaned and neglected children, reformatories were established to further the efforts, begun in the houses of refuge, to rehabilitate delinquent youth.³⁸ The houses of refuge, and later reform schools, precursors to modern juvenile detention facilities, embodied some of the early goals of the juvenile system that had yet to be formally established: (1) segregation of youth from adult criminals, (2) rehabilitation as a goal, and (3) the restriction of this system to children regarded as amenable to treatment.³⁹

Placing-out dependent children only proved workable for a limited time.⁴⁰ Similarly, by the mid- to late-nineteenth century, houses of refuge and reformatories fell into disfavor, as they "had become little more than custodial warehouses."⁴¹ A minor's stay in these places of confinement was essentially indefinite, either until he or she reached majority or was "reformed" as determined by the reform school official.⁴² "Growing doubt about the success of reform schools in reducing delinquency led some to question the wisdom of applying an unlimited *parens patriae* doctrine to youth."⁴³ In response to the growing concern, in 1870 the Illinois Supreme Court held it unconstitutional to continue to order children who had not been formally charged with an offense or had not been accorded due process at trial to houses of refuge or reform schools.⁴⁴ Cases such as *Turner* led judges

³⁷ FELD, *supra* note 16, at 49.

³⁸ *See id.* at 54 (stating that penologists developed the reformatories to "shelter and reform young deviants").

³⁹ *See* Fox, *supra* note 13, at 30 (noting the goals and basic principles of operation of 19th-century institutions for juvenile offenders).

⁴⁰ *See* Cook, *supra* note 36, at 187 (noting reasons offered for the demise of the placing-out program, including "the initiation of new ways of coping with industrialization, the recognition of environmental factors as causes for some social problems, and the reforms of the Progressive Era, including compulsory school attendance and child labor laws").

⁴¹ FELD, *supra* note 16, at 55.

⁴² BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 24 (1993) (noting that the age of majority was 21 for boys and 18 for girls and that the length of confinement was the decision of reform school officials).

⁴³ *Id.* at 29.

⁴⁴ *See* Illinois *ex rel.* O'Connell v. Turner, 55 Ill. 280, 287 (1870) (holding that children should not lose their liberty without due process). The court also noted that the state could interfere with parental custody only upon proof of "gross misconduct or

and the public to question the quasi-penal character of reform institutions for youth and to challenge the lack of procedural safeguards in the process of making placement decisions.⁴⁵

By the end of the nineteenth century, progressive reformers in Cook County, Illinois were successful in enacting juvenile legislation that set the stage for the development of a distinctly separate juvenile justice system. The *parens patriae* philosophy, once invoked to confine children to houses of refuge and reformatories, was now extended to the entire court process.⁴⁶ While it did not establish an independent judicial structure for handling cases of dependent, neglected, and delinquent children, the 1899 Illinois Juvenile Court Act⁴⁷ articulated a set of rules specifically governing the treatment and control of "dependent, neglected and delinquent children."⁴⁸ According to the legislation, "the court may, for convenience, be called the 'Juvenile Court.'"⁴⁹ The rehabilitative philosophy of the juvenile court was widely embraced, and by 1925, all but two states had enacted similar legislation.⁵⁰

Judge Julian W. Mack, one of Illinois's first juvenile court judges, noted that the role of the juvenile court judge was to replace, for all intents and purposes, the parent who was no longer able to adequately raise the child in question.⁵¹ Using broad discretion, the juvenile court judge was to provide the necessary help and guidance to a young person who might otherwise proceed further down the path of chronic crime.⁵² Again relying on the *parens patriae* doctrine, dispositions or interventions by the juvenile court focused on the absence of appropriate parental models and the resulting effects on the child, rather than on his or her inappropriate conduct. A certain level of presumed innocence was therefore accorded the children who en-

almost total unfitness on the part of the parent." *Id.*

⁴⁵ See KRISBERG & AUSTIN, *supra* note 42, at 28 (noting cases that led judges to wonder whether there should be procedural safeguards for children charged with delinquency).

⁴⁶ See *id.* at 30 (discussing the extension of the *parens patriae* doctrine).

⁴⁷ 1899 Ill. Laws 131.

⁴⁸ KRISBERG & AUSTIN, *supra* note 42, at 30.

⁴⁹ 1899 Ill. Laws 131, § 3.

⁵⁰ See NATIONAL REPORT, *supra* note 6, at 86 (discussing the establishment of juvenile courts and their notion of rehabilitation).

⁵¹ See Mack, *supra* note 1, at 107 (discussing "the thought that the child . . . is taken in hand by the state . . . because [of] either the unwillingness or inability of the natural parents").

⁵² See Fox, *supra* note 13, at 35 ("The social responsibility for reforming children . . . became . . . the quintessential function of juvenile courts.").

tered the juvenile court system. Questions of capacity or culpability as to the delinquent conduct remained relatively insignificant in devising a disposition focused on treatment and rehabilitation, as had been the case in youth commitments to houses of refuge and reformatories. In fact, Professor Feld notes that indeed the "earlier generations of refuge and reformatory innovators formulated most of the elements" of the new juvenile court.⁵³

The underlying assumption of the original juvenile system, and one that continues to prevail despite attack, was that juveniles were generally more amenable to rehabilitation than adult criminals. They did not merit adult punishments because essentially "kids are different."⁵⁴ Thus, the rehabilitative aims of the juvenile justice system existed wholly apart from the seriousness of the offense or the determination of guilt or innocence. The inquiry during trial accorded minimal significance to the offense committed by the juvenile, as it was believed to indicate little about the child's real needs. At hearings and dispositions, the court directed its attention first and foremost to the child's character and lifestyle.⁵⁵ Since children could not be held responsible for the life circumstances in which they were raised, however, retributive responses aimed at punishing them for their illegal acts did not appear warranted.⁵⁶ Fundamentally, the purpose and functioning of the juvenile court embodied the broad societal "interest in rehabilitating *all* juvenile delinquents, irrespective of the nature of their delinquent acts."⁵⁷

The focus on rehabilitation and on the broad discretion granted to juvenile court judges had both positive and negative consequences for the adjudicative process:

[S]ince the underlying justification was prevention, not punishment, proof that a youth in fact committed a particular crime was traditionally thought less relevant than the youth's need for rehabilitation; judges were given broad discretion with regard to dispositions; and the length of the sentences was typically indeterminate, so that "treatment" could

⁵³ FELD, *supra* note 16, at 55.

⁵⁴ *Id.* at 6.

⁵⁵ See Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 825 (1988) ("Juvenile court proceedings concentrated on the child's background and welfare rather than the details surrounding the commission of a specific crime.").

⁵⁶ See *id.* at 900 (noting that society is partially at fault for children's offenses).

⁵⁷ Andrew D. Roth, Note, *An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286, 296 (1985).

continue so long as it was thought appropriate.⁵⁸

Given the broad discretion granted to judges, juvenile proceedings and outcomes for children risked being heavily influenced by the temperament and generosity of a particular judge.⁵⁹ Two natural consequences of such a flexible and discretionary process were disparities in juvenile sentencing and the loss of due process protections afforded adults in criminal courts.

B. *Due Process Protections at a Cost*

Since its inception, critics have raised concerns about the lack of procedural protections for children adjudicated in the juvenile justice system.⁶⁰ With its open-ended, informal, and highly flexible policies designed to address the rehabilitative needs of each child who comes before the juvenile court judge, critics saw the court as failing to afford juveniles the procedural parity and constitutional safeguards available in general criminal court proceedings. Failure to apply constitutional protections to juvenile proceedings was justified under the "legal fiction" of protective confinement and rehabilitation instead of criminal punishment. Since children were being treated and not punished through the court's intervention and since the court was functioning in the capacity of a loving and responsible parent, the children whom it was treating were not believed to be in need of formal due process protections.⁶¹ Critics asserted that such a system only harmed children by denying them necessary constitutional protections and by exposing them to the risk of judicial whim.

Four critical Supreme Court cases marked the beginning of a wave of juvenile justice reform that restricted the power and discretion of juvenile court judges and marked the boundaries of the constitutional due process protections available to juveniles.⁶² *Kent v. United States*

⁵⁸ MNOOKIN & WEISBERG, *supra* note 31, at 1081.

⁵⁹ See Fox, *supra* note 13, at 36 (noting concerns over "having the effectiveness of the court depend so much on the personality of the judge").

⁶⁰ See Feld, *supra* note 55, at 826-31 (discussing a series of Supreme Court decisions that emphasized "procedural regularity in the determination of criminal guilt as a prerequisite to a delinquency disposition").

⁶¹ See Jeanne 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, 324 (1995) ("Because the children were being helped and not punished . . . they did not need formal due process protections.").

⁶² The cases cited in the text are by no means exhaustive. Following the four landmark decisions handed down during the Warren Court's "due process revolution," subsequent Supreme Court cases have further defined the scope of constitutional

began a period of re-analysis of the juvenile justice system, focusing on the unconstitutionality of a judicially determined juvenile transfer into the adult criminal system.⁶³ Morris Kent Jr., a sixteen-year-old charged with rape and robbery, was waived into adult criminal court and sentenced to thirty to ninety years in prison without a transfer hearing. The Court struck down the waiver, stating that Kent was entitled to "the essentials of due process and fair treatment"⁶⁴ which would have included a transfer hearing and an opportunity for Kent to challenge the juvenile court's waiver of jurisdiction. The Court's decision in *Kent* challenged the constitutionality of the *parens patriae* doctrine as the justification for both punitive and rehabilitative juvenile court intervention. According to the Court, "the child receives the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."⁶⁵ What he or she does receive is essentially punishment in the form of a deprivation of his or her liberty without due process of law.

In the landmark case of *In re Gault*,⁶⁶ the Supreme Court again highlighted the dangers inherent in permitting a judge's *parens patriae* role to justify a lack of procedural due process safeguards. After only an informal adjudication hearing, Gerald Gault, a fifteen-year-old charged with making obscene phone calls, was committed to a juvenile correctional facility for an indefinite period not to extend beyond his twenty-first birthday. In the hearing, Gault was not afforded essential procedural protections including representation by counsel, an

rights available to youth in juvenile proceedings. Procedural parity between juvenile court and adult court, however, threatens to blur key distinctions between them. *See, e.g.,* *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that a state's use of age 16 as the minimum age for the imposition of the death penalty does not violate the Eighth Amendment); *Schall v. Martin*, 467 U.S. 253, 281 (1984) (upholding the constitutionality of New York's preventive detention statute and reasserting the *parens patriae* interests of the state in promoting the welfare of children); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979) (holding that a state cannot punish the publication of an alleged juvenile delinquent's name legally obtained from a source outside the court); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (holding that a court order barring the press from publishing a legally obtained photograph of a youth involved in juvenile proceedings is an unconstitutional infringement upon the freedom of the press); *Breed v. Jones*, 421 U.S. 519, 541 (1975) (holding that the prosecution of the minor respondent as an adult, following findings in juvenile court that he had violated a criminal statute and was unfit for treatment as an adult, constitutes double jeopardy); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (holding that jury trials are not constitutionally required in juvenile court proceedings).

⁶³ 383 U.S. 541 (1966).

⁶⁴ *Id.* at 562.

⁶⁵ *Id.* at 556 (citation omitted).

⁶⁶ 387 U.S. 1 (1967).

opportunity to question witnesses or confront his accuser, and protection against self-incrimination.⁶⁷ Gault received an extremely harsh sentence based only on the account of the recipient of the obscene calls; had he been an adult at the time, Gault would have received only a maximum sentence of sixty days in jail or a fifty-dollar fine.⁶⁸ Again registering displeasure with the informality of the juvenile court process and its reliance on the doctrine of *parens patriae*, the Court held that, although the juvenile court may have intended benevolent intervention, denying children the basic due process protections is unconstitutional.⁶⁹

Three years later, the Court's decision in *In re Winship* imposed a requirement of proof beyond a reasonable doubt—the standard of proof required in adult criminal prosecutions—for the juvenile court conviction of delinquent acts.⁷⁰ In *Winship*, a juvenile was found guilty of stealing money from a woman's purse based on a preponderance of evidence standard.⁷¹ As commentators have noted, the Supreme Court reasoned that “when a youth's liberty is at stake, due process required that the standard of evidence necessary for conviction be as exacting as that applied in adult proceedings.”⁷²

As a result of *Kent*, *Gault*, and *Winship*, basic due process protections were extended to juveniles charged with delinquent behavior, including the right to counsel, confrontation, and cross-examination; the privilege against self-incrimination;⁷³ and a standard of proof on

⁶⁷ See *id.* at 4-8 (describing the circumstances of Gault's appearance before a juvenile court judge).

⁶⁸ See *id.* at 8-9 (noting the Arizona Criminal Code's provisions for persons who “in the presence or hearing of any woman or child . . . uses vulgar, abusive or obscene language”). The Court also mentions that, in response to Gault's mother's request that the woman who received the phone call be present at the hearing, the judge responded that “she didn't have to be present at the hearing.” *Id.* at 7.

⁶⁹ See *id.* at 18 (“Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and practice.”).

⁷⁰ 397 U.S. 358, 368 (1970) (“[T]he constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*.”).

⁷¹ See *id.* at 360 (noting the adjudicating court's reliance on a New York statutory provision requiring only a preponderance of evidence).

⁷² BARRY NURCOMBE & DAVID F. PARTLETT, *CHILD MENTAL HEALTH AND THE LAW* 276 (1994) (discussing *In re Winship*, 397 U.S. at 365 (“The same considerations that demand extreme caution in fact finding to protect the innocent adult apply as well to the innocent child.”)).

⁷³ Asherman-Jusino, *supra* note 61, at 325 (discussing the procedural protections applied in *Gault*).

par with that required for the conviction and confinement of adult criminals.⁷⁴ While the due process guarantees secured by these and subsequent cases appear to have provided safeguards for children who enter the juvenile justice system, critics argue that the reforms have made the juvenile court “more formalized, legalistic, and adversarial”⁷⁵ at best and a “scaled-down second-class criminal court for young people”⁷⁶ at worst. Despite the efforts to reconcile judicial discretion with due process rights, conflict between these interests continues to present a public policy dilemma.⁷⁷

II. LEGISLATIVE EFFORTS TO ADDRESS JUVENILE VIOLENT CRIME

Contemporary abolitionists seek to reform the juvenile justice system by addressing, among others, two primary concerns: (1) due process protections that, although substantially ameliorated since the juvenile court’s inception, still do not provide adequate safeguards for young offenders, and (2) insufficient consequences for young offenders who commit adult-like offenses.⁷⁸ This Part focuses on recent legislative responses to the latter concern and addresses the potential effects of “get tough” initiatives that shift the court from treatment to punishment.

A. State Legislation

With regard to legislative reform of juvenile justice, state statutes understandably provide a more comprehensive response to juvenile crime than those proposed on the federal level. Consistent with the ideals of federalism, juvenile justice, along with other areas of criminal law, remains primarily within the purview of individual states to regulate. Following the 1994 peak in juvenile violent crime, several states

⁷⁴ Koontz, *supra* note 8, at 187 (discussing the Court’s application of the reasonable doubt standard in *Winship*).

⁷⁵ Carol S. Stevenson et al., *The Juvenile Court: Analysis and Recommendations*, FUTURE OF CHILDREN, Winter 1996, at 10.

⁷⁶ FELD, *supra* note 16, at 287.

⁷⁷ See BERNARD, *supra* note 8, at 136 (noting the divergent costs and benefits of providing due process protections on one hand and allowing judicial discretion on the other).

⁷⁸ See Burke, *supra* note 9, at 1029 (discussing the reasons cited by abolitionists for eradicating the juvenile court system); see also Larry R. Abrahamson, *The Need to Get Back to Basics in Juvenile Justice*, 33 PROSECUTOR 28, 30 (1999) (advancing a “get tough” approach in stating that “[t]hose who have developed a liking for antisocial behavior . . . must also be presented with a ‘fear factor’ only with added teeth”).

enacted sweeping changes in their juvenile crime bills. In the context of substantially elevated fear regarding increases in juvenile crime and backlash against the perceived failure of the rehabilitative model,⁷⁹ almost all states responded to the public concern by passing harsher and more punitive reform measures. While on their face state measures appear to place an equal emphasis on the three interventions of public safety, accountability, and competency development, in practice they favor societal protection and personal accountability over rehabilitation. "Some laws removed certain classes of offenders from the juvenile justice system and handled them as adult criminals in criminal court. Others required the juvenile justice system to be more like the criminal justice system and to treat certain classes of juvenile offenders as criminals but in juvenile court."⁸⁰ By and large, the most radical measures enacted by the majority of states⁸¹ occurred in three areas: transfer provisions; sentencing authority; and confidentiality provisions.⁸²

1. Transfer Provisions

One way in which "get tough" advocates have supported a merger between the adult criminal and juvenile systems is by expanding the scope of transfer provisions or waivers that bring children under the jurisdiction of the adult criminal system. While waivers are not new, they have been highlighted as a means of getting tough on crime, a politically popular mantra for at least the past twenty years. Juveniles can end up in adult criminal court through one of three waivers: legislative or statutory exclusion, prosecutorial waiver, or judicial waiver. Legislative exclusions involve state and federal statutes that automatically exclude certain types of crimes or chronic offenders from juvenile court jurisdiction. Legislative waivers make transfer automatic in thirty-seven states and the District of Columbia. Prosecutorial waivers permit prosecutors in some states to exercise discretion by directly filing certain cases in either juvenile or adult criminal court. In ten states and the District of Columbia, prosecutorial waivers are used to

⁷⁹ See *infra* Part III.A (discussing the cyclical nature of juvenile justice and predictions based on Bernard's cycle that came to pass in the state reforms enacted in the mid-1990s).

⁸⁰ NATIONAL REPORT, *supra* note 6, at 88.

⁸¹ See *id.* at 89 (noting that between 1992 and 1997, all but three states changed laws to make their juvenile justice systems more punitive).

⁸² See *id.* (noting that changes in the juvenile justice system occurred primarily in these three areas).

transfer children to adult criminal court. Judicial waivers permit juvenile court judges to transfer cases to adult criminal court following a transfer hearing. Judicial discretion has been exceedingly curtailed as the list of statutory exclusions and the discretion of the prosecutorial waivers have expanded. Between 1992 and 1995, forty states and the District of Columbia restricted their juvenile court jurisdiction in a variety of ways, including expanding legislative and prosecutorial waivers while restricting juvenile court jurisdiction.⁸³ Where judicial discretion is employed, the judge may consider broad criteria in assessing whether a juvenile should remain or be transferred to adult criminal court. All criteria are aimed at assessing a juvenile's amenability to treatment within the juvenile system and the juvenile's ability to benefit from treatment services rather than punishment and confinement.⁸⁴

There are several dangers inherent in each of the waiver approaches.⁸⁵ A particular risk of prosecutorial waivers is that "[a] prosecutor's decision to file a case directly in adult criminal court is made unilaterally without the benefit of a hearing where defense counsel and probation officials can provide important information about the juvenile in question."⁸⁶ Critics of transfer waivers raise the concern that, due to political pressures, legislators and prosecutors, as

⁸³ See Stevenson et al., *supra* note 75, at 9 (stating that between 1992 and 1995, 40 states changed their laws to restrict juvenile court jurisdiction).

⁸⁴ See, e.g., 42 PA. CONS. STAT. ANN. § 6355(a)(4)(iii)(A) (West 1982) (listing the criteria used by judges in determining amenability to treatment in a transfer motion hearing in Pennsylvania, including: (1) age; (2) mental capacity; (3) maturity; (4) degree of criminal sophistication; (5) previous records; (6) nature and extent of any prior delinquent history, including the success or failure of any previous attempts to rehabilitate the child; (7) whether the child can be rehabilitated prior to the expiration of Juvenile Court jurisdiction; (8) probational or institutional reports; (9) nature and circumstances of the acts for which the transfer is sought; and (10) any other relevant factors). No further guidance is outlined within the statute to determine exactly how the factors should be weighted.

⁸⁵ Problems with waivers in some jurisdictions include lack of funding for services needed in transfer hearings, denial of services to youth waived into the adult system, and delays in the adult criminal system. As to the funding matter, clients who do not have resources to pay for outside evaluators may have difficulty proving amenability to treatment to a judge during a transfer hearing. In addition, critical treatment and rehabilitative services are not available until the matter of jurisdiction is resolved, sometimes for a period of up to six months. Particularly problematic for youth and defense attorneys are the long delays inherent in the adult criminal system. While the juvenile system provides for hearings within 10 days of being taken into custody, the adult system provides no such guarantees. Telephone Interview with David Rosen, Juvenile Special Defense Unit, Defender's Association of Philadelphia (Nov. 12, 1998).

⁸⁶ Stevenson et al., *supra* note 75, at 9-10.

compared to non-elected judges, may institute purely reactionary measures in response to the demands of their constituencies. The "politicization" of crime appears to have forged an unbreakable link between the mercurial nature and often inaccurate rhetoric of public opinion, the desire to garner votes, and the resulting juvenile justice policy.⁸⁷ In states where judges are elected, political pressures may prompt similarly motivated biases in judicial waiver decisions.⁸⁸

Reformers who call for harsher treatment of juvenile offenders, including increased use of criminal waivers, adult prosecution for a wider range of violent offenses, and confinement for even minor status offenses, such as truancy or running away, appear to adhere to a yet unproven belief in the deterrent effect of such policies and practices.⁸⁹ Supporters of a rehabilitation-focused system are quick to point out the lack of efficacy of the deterrence theory as it applies to juvenile offenders. In her critique of the misplaced faith in harsh juvenile reform, Professor Zeirdt analyzes two studies comparing the treatment of juvenile offenders in juvenile versus adult criminal court. One study found that "juveniles were more likely to be found guilty of the same or similar crime in juvenile court than in adult court."⁹⁰ The second study found that juveniles transferred to adult court for property offenses tended to receive more lenient sentences than those ordered by juvenile courts.⁹¹ In some cases, transfers may fail to achieve the aim of punishing juveniles more severely and are therefore unlikely to have the desired deterrent effect.⁹² Even in the face of evi-

⁸⁷ See WILLIAM J. CHAMBLISS, *POWER, POLITICS, AND CRIME* 46 (1999) (noting that "[p]anic over youth crime is . . . like so many other alarms, . . . based on political and law enforcement propaganda, not facts"); see also *infra* Part III.A. (noting the role of politics in the reporting of juvenile crime statistics).

⁸⁸ See FELD, *supra* note 16, at 217 (noting that, in reference to juvenile court judges, "organizational or political concerns may explain as much about waiver decisions (and transfers to adult criminal court) as the dangerousness or treatability of a youth")

⁸⁹ See generally SCHNEIDER, *supra* note 17, at 5 (summarizing findings that incarceration and detention, typically perceived as harsher and more punitive than other forms of treatment, "do not reduce recidivism to a greater extent than restitution programs"). Schneider defines deterrence theory as the view that "criminal or delinquent behavior can be reduced by increasing the certainty, severity, and celerity (speed) of punishment." *Id.* at 2.

⁹⁰ Zierdt, *supra* note 33, at 413 (citing Lisa A. Cintron, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 N.W. U. L. REV. 1254, 1256 (1996)).

⁹¹ See *id.* at 413 (citing Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 197-98 (1994)).

⁹² For example, according to Marion County, Indiana Superior Court Judge James W. Payne,

dence that suggests that punishment alone does not work, transfers appear to have symbolic value, as they appease a voting public that favors punishment over rehabilitation. In an era when no policy maker would wish to be labeled as “soft” on crime, the increased use of transfers—regardless of effects—represents to the public that juvenile crime is taken seriously.

Not only does transfer to adult court appear to lack consistent deterrent effects, but incarceration seems equally ineffective. “The position that incarceration deters youths from delinquency because they fear punishment has little scientific support.”⁹³ A longitudinal study by researcher Anne Schneider further confirms the fallacy of the belief that punitive reforms such as confinement serve as a deterrent for offending youth.⁹⁴ Comparing punitive measures such as detention and incarceration with more rehabilitation-focused programs such as community restitution, Schneider found that “detention and incarceration did not enhance perceptions [by juveniles] of certainty or severity of punishment[,] and did not reduce recidivism to a greater extent than restitution programs.”⁹⁵

Although the United States stands alone as the only Western industrialized nation permitting the execution of individuals for murders committed as juveniles,⁹⁶ the United States continues to have one of the highest rates of adolescent homicide, serving as further proof that even the most severe deterrence-based reforms have failed to reduce significantly juvenile criminal activity. While seventy-two nations worldwide, including Russia and Libya, expressly prohibit the juvenile

when a 16- or 17-year old gets arrested committing a felony with a gun, he can be tried as an adult. But typically, he posts bond and immediately gets out of jail and back to the streets. When he is finally tried, he serves maybe five to 20 days in jail. That same youngster, if he remained in the juvenile system, would be kept in detention until a hearing and then go to the Department of Corrections for a minimum of one year.

David Rohn, *Experts Say Juvenile Justice Needs Reform*, INDIANAPOLIS STAR, Oct. 15, 1999 <http://www.starnews.com/news/citystate/99/oct/1015st_juv.html>. Although the possibility exists for a lighter sentence following transfer to adult court, a study compiling statistics from the nation’s 75 largest counties for the years 1990-1994 revealed that 68% of transferred juveniles convicted of felonies were sentenced to prison, with 32% released on probation or with a fine. See NATIONAL REPORT, *supra* note 6, at 175.

⁹³ Asherman-Jusino, *supra* note 61, at 322 (citing RICHARD J. LUNDMAN, PREVENTION AND CONTROL OF JUVENILE DELINQUENCY 204-38 (1993)).

⁹⁴ See SCHNEIDER, *supra* note 17, at 5 (examining the links between incarceration and recidivism).

⁹⁵ *Id.*

⁹⁶ See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment on any person who murders at 16 or 17 years of age does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment).

death penalty, the United States remains in the company of countries such as Iran, Iraq, and Pakistan in continuing the execution of criminals for crimes they committed as juveniles.⁹⁷ "Indeed, the United States reported the most juvenile executions" from 1981 to 1991, with the execution of four juvenile offenders.⁹⁸ Despite the use of juvenile executions, serious juvenile crime persists. Based on data obtained by the Centers for Disease Control and Prevention for the year 1993, the number of homicides per 100,000 children under the age of fifteen was five times higher in the United States than in fifteen other industrialized nations combined.⁹⁹ Given the equally high rates of confinement of juveniles, these figures suggest that extremely harsh and severe punishments are a poor deterrent of juvenile crime.

Despite the wealth of evidence to the contrary, an "abiding faith" prevails in the belief that tougher punishments are the solution to juvenile crime.¹⁰⁰

2. Sentencing Authority

Traditionally, juvenile court jurisdiction has extended to the age of majority with confinement not to exceed that period. Nevertheless, changes in sentencing authority laws in thirty-one states have resulted in an expansion of sentencing options available to criminal and juvenile courts.¹⁰¹ "Through extended jurisdiction mechanisms, legislatures enable the court to provide sanctions and services for a duration of time that is in the best interests of the juvenile and the public, even for older juveniles who have reached the age at which original juvenile court jurisdiction ends."¹⁰² In some states that have recently changed the jurisdictional aspects of the juvenile court, "blended sentencing" has been used to maintain control over juveniles who have

⁹⁷ See Cathleen E. Hull, "Enlightened by a Humane Justice": *An International Law Argument Against the Juvenile Death Penalty*, 47 U. KAN. L. REV. 1079, 1094-95 (1999) (noting that 72 countries expressly prohibit juvenile executions, while only six continue to execute juveniles).

⁹⁸ *Id.* at 1095.

⁹⁹ See NATIONAL REPORT, *supra* note 6, at 25 (noting that the number of homicides per 100,000 children under 15 was 2.57 in the United States versus 0.51 in the other countries).

¹⁰⁰ See SCHNEIDER, *supra* note 17, at 1 ("Americans have an abiding faith in punishment. . . . Policy changes reflecting shifts toward more punishment-oriented policies for juveniles have been widely documented. . . .").

¹⁰¹ See NATIONAL REPORT, *supra* note 6, at 89 (noting that changes in laws designed to crack down on juvenile crime have led to increased sentencing options in these states).

¹⁰² *Id.* at 93.

aged out of the system.¹⁰³ In this manner, juvenile courts may impose adult sentences on adjudicated delinquents that result in confinement beyond the maximum age of juvenile court jurisdiction.¹⁰⁴ This reform measure appears to be more in sync with the rehabilitative philosophy of the original juvenile court than other state legislative efforts. As Professor David Yellen notes, blended sentencing “reveals an unwillingness to abandon all serious juvenile offenders to the harsh world of the adult criminal court. If the offender satisfies the terms of the juvenile sentence, the adult sentence is vacated.”¹⁰⁵ The use of blended sentencing as a safeguard for youth who do not benefit from rehabilitation was most recently questioned in the case of thirteen-year-old Nathaniel Abraham, a Michigan resident who at age eleven became the youngest person to be tried and convicted as an adult.¹⁰⁶ Rather than rely on Michigan’s blended sentencing provisions, the sentencing judge issued a “sweeping condemnation of Michigan’s get-tough juvenile offender laws” and ordered Nathaniel to a sentence of juvenile detention until age twenty-one with no threat of a pending adult sentence.¹⁰⁷ According to the sentencing judge, blended sentencing “take(s) everyone off the hook” by holding out “incarceration as a long-term solution” and diverting resources from meaningful rehabilitative efforts.¹⁰⁸ Professor Yellen notes, however, that blended sentencing provides juvenile offenders with a “last chance” for rehabilitation through treatment services in a juvenile setting and “hold[s] out hope for the possibility of redemption.”¹⁰⁹

3. Confidentiality

When a general rehabilitative philosophy dominated juvenile justice policies, juveniles were permitted (and in a few jurisdictions continue to be permitted) to proceed into adulthood with a clean slate. Recent state legislation in forty-seven states resulted in changes in the

¹⁰³ *Id.*

¹⁰⁴ *See id.* (defining “blended sentencing”). Such a response is particularly useful in the case of a borderline juvenile, one who is quite close to aging out of the system and whose amenability to treatment is conditioned upon continued confinement.

¹⁰⁵ Yellen, *supra* note 14, at 997 (footnotes omitted).

¹⁰⁶ *See* Louise Knott & Oralandar Brand-Williams, *Young Killer Gets Juvenile Detention: State’s Get-Tough Policy Blasted by Sentencing Judge*, DETROIT NEWS, Jan. 14, 2000, at A1.

¹⁰⁷ *Id.* (noting Judge Eugene Moore’s denunciation of Michigan’s “get tough” measure allowing children under 14 to be tried as adults and his decision to sentence Nathaniel Abraham as a juvenile).

¹⁰⁸ *Id.*

¹⁰⁹ Yellen, *supra* note 14, at 998.

confidentiality provisions, including expungement, making records and proceedings more open.¹¹⁰ These legislative reforms fail to recognize the important policy motivations behind expungement. Expungement grants the juvenile confidentiality with regard to offenses committed while under juvenile court jurisdiction. The varying state statutes governing expungement are written with the goal of avoiding stigmatization of juveniles and preventing negative labeling of an individual who may have since reformed.¹¹¹ Without expungement, the permanent stigma of juvenile delinquency may significantly hinder a young person's functioning in society. Public access to records of youthful offenses may tend to negatively influence decisions regarding admission to higher education or applications for employment. Adults with offenses perhaps from as long as twenty years ago may be severely prejudiced with hampered opportunities for economic and social advancement. "Expungement statutes . . . are at minimum attempts to lessen the additional penalty that public opinion places upon former offenders and to overcome the reality that, as Lord Coke stated, '*peona mori potest, culpa perennis erit*'—though punishment can terminate, guilt endures forever."¹¹²

Despite the move toward harsher juvenile justice policies and practices, as demonstrated by increased use of waivers, changes in sen-

¹¹⁰ "As of the end of the 1997 legislative session, juvenile codes in 47 States and the District of Columbia allowed information contained in juvenile court records to be specifically released to at least one of the following parties: [t]he prosecutor; [l]aw enforcement; [s]ocial agencies; [s]chool(s); [t]he victim(s); [t]he public." NATIONAL REPORT, *supra* note 6, at 101. In addition, during the 1996 and 1997 legislative sessions, 11 states enacted new laws either allowing or requiring school notification regarding juveniles charged with committing a serious crime. *See id.* In a similar effort to discard traditional confidentiality provisions, by the end of 1997, 46 states and the District of Columbia had enacted legislation allowing fingerprinting of juveniles; similarly, 45 states and the District of Columbia now allow photographing of juvenile offenders in order to maintain a record of criminal history. *See id.* The most radical departure from traditional confidentiality provisions is the passage of legislation permitting names of juveniles, and sometimes pictures and court records, to be released to the media. Such provisions contradict the benefits of expungement of juvenile records, making knowledge of a juvenile's offense all but permanent.

¹¹¹ Rates of recidivism demonstrate that 54% of first-time male and 73% of first-time female juvenile offenders do not reenter the juvenile system. *See id.* at 80 (discussing gender differences in recidivism patterns). Although expungement policies are criticized as providing a veil of secrecy for violent offenders, the policies would appear to benefit the majority of children within the system. Those with only one juvenile offense who have been appropriately "scared straight" are not burdened with lasting repercussions from a one time brush with the law.

¹¹² T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 891 (1996).

tencing authority, and erosion of confidentiality provisions, several states have incorporated restorative justice language of the Balanced Approach and Restorative Justice Model ("BARJ") into their juvenile delinquency provisions.¹¹³ Pennsylvania, for example, in enacting the Juvenile Act,¹¹⁴ simultaneously elevated the importance of criminal sanctions in response to juvenile offenses while also promoting interventions to the treatment and rehabilitation of children. Although such state measures reflect a retainment of core tenets of the original juvenile justice system, the beneficial aspects of these measures are mitigated by an additional emphasis on punishment.¹¹⁵ The inclusion of punishment language reflects an ascendance of what Professor Feld terms the "Principle of Offense" and represents a growing departure from the original rehabilitation-oriented juvenile court.¹¹⁶ While some states codify a balanced model in their juvenile statutes, they often fail to realize a balanced system. Instead, they de-emphasize the role of competency development within the purpose clause of juvenile codes and replace it with language suggesting a retributive approach. As of 1997, nine states stressed punishment as a philosophical goal in their juvenile code purpose clauses while thirty-two listed both treatment and punishment, similar to Pennsylvania's statute.¹¹⁷ The trend of employing a retributive philosophy, as compared to a rehabilitation-treatment based model, is further illustrated in the specific terminology employed in recent juvenile legislation.¹¹⁸

¹¹³ See NATIONAL REPORT, *supra* note 6, at 87 (listing the states that have incorporated restorative justice language in their juvenile codes); *infra* text accompanying notes 219-22 (describing the restorative justice model that emphasizes offender accountability, public safety, and competency development).

¹¹⁴ See 42 PA. CONS. STAT. ANN. § 6301 (West 1982) (citing the purposes of the Juvenile Act).

¹¹⁵ Pennsylvania's Juvenile Act, for example, articulates the following as one of its legislative purposes:

Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.

§ 6301(b)(2).

¹¹⁶ Feld, *supra* note 55, at 821-22.

¹¹⁷ See NATIONAL REPORT, *supra* note 6, at 87 (noting states that include punishment, treatment, or both, in the purpose clause of their juvenile codes).

¹¹⁸ See Feld, *supra* note 55, at 821-22 ("Changes in juvenile courts' 'purpose clauses' to emphasize characteristics of the offense rather than the offender reflect the ascendance of the Principle of Offense. . . . Recent legislative changes in juvenile sentencing statutes and correctional administrative guidelines emphasize proportional and de-

B. Federal Legislation

Federal legislation has been guided by the same primarily punitive philosophy that has shaped legislation at the state level.¹¹⁹ In 1997, the House proposed, and referred to the Senate, House Bill 1818, the Juvenile Crime Control and Delinquency Prevention Act,¹²⁰ the aim of which was to amend the Juvenile Justice and Delinquency Prevention Act of 1974,¹²¹ bringing it more in line with the punishment orientation prevalent in recent crime legislation. This bill marked a shift in philosophical approach, as evidenced by the proposal to rename the Office of Juvenile Justice and Delinquency Prevention as the Office of Juvenile Crime Control and Delinquency Prevention.¹²² It also provided states with financial incentives to redevelop and redefine their own juvenile systems.¹²³ The bill conditioned eligibility for incentive grants upon states' enacting certain punitive juvenile justice reforms, including a requirement that all violent juvenile delinquents be fingerprinted and photographed and that records be made available to schools.¹²⁴

Additionally, the Senate Judiciary Committee considered Senate Bill 10, the Violent and Repeat Juvenile Offender Act of 1997.¹²⁵ The bill, however, was never put to a vote. It proposed to eliminate a long-standing requirement that federal courts only hear juvenile prosecutions in cases of concurrent jurisdiction or when the state declined to prosecute the juvenile.¹²⁶ Critics were especially skeptical about this

terminate sentences based on both the present offense and prior record.”). An additional example of such legislative changes, Jochner explains, appears in terminology employed in the Illinois Juvenile Justice Reform Provisions of 1998. *See* Jochner, *supra* note 23, at 152. She notes that, “[f]or example, ‘adjudicatory hearings’ are now labeled ‘trials,’ and ‘dispositional hearings’ are now called ‘sentencing hearings.’ Similarly, juveniles are no longer ‘taken into custody;’ instead, they are ‘arrested.’” *Id.* (footnotes omitted).

¹¹⁹ *See* 142 CONG. REC. S10,192, S10,194-95 (daily ed. Sept. 10, 1996) (statement of Sen. Domenici) (calling the Senate to “change the focus of Federal juvenile crime and delinquency prevention efforts” because “our juvenile courts have focused too heavily on rehabilitation and not enough on punishment”).

¹²⁰ H.R. 1818, 105th Cong. (1997).

¹²¹ 42 U.S.C. §§ 5601-5785 (1994 & Supp. III 1997).

¹²² *See* H.R. 1818, § 104.

¹²³ *See id.* § 110 (authorizing incentive grants to states “to carry out projects designed to prevent juvenile delinquency”).

¹²⁴ *See id.* (requiring specific punitive juvenile justice reform by a state in order for it to be eligible for incentive grants).

¹²⁵ S. 10, 105th Cong. (1997).

¹²⁶ *See id.* § 102 (1997) (granting United States attorneys the discretion to try juveniles in the United States District Courts “if the juvenile is charged with a federal of-

measure for fear that it would serve to federalize juvenile crime.¹²⁷ In the spirit of the get-tough movement, Senate Bill 10 included a provision to lower the age minimum for trial of capital cases from eighteen to sixteen years.¹²⁸

Rhetoric and public opinion have once again emerged as powerful players in the most recent debate over juvenile crime reform. Not surprisingly, the two bills that remain in conference at the time of this writing—the Consequences for Juvenile Offenders Act of 1999¹²⁹ and the Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999¹³⁰—both favor punitive measures for juvenile delinquents, particularly violent and repeat offenders.¹³¹ Responding to these bills, the Children's Defense Fund ("CDF"), a leading child advocacy organization, stated that House Bill 1501 could harm young offenders by expanding prosecutorial waivers and broadening the scope of federal statutory exclusions, which runs counter to research suggesting that trying children as adults actually increases crime.¹³² Moreover, CDF notes the danger of provisions that: (1) allow children to come into contact with adults while detained in adult facilities, thus placing them at an increased risk of harm,¹³³ (2) impose mandatory minimum sentences for certain offenses,¹³⁴ and (3) remove

fense").

¹²⁷ See 144 CONG. REC. S12,644, S12,644-45 (daily ed. Oct. 15, 1998) (statement of Sen. Leahy) (expressing concern regarding the federalization of juvenile crime and the fear that S. 10 would "impos[e] on the States a one-size-fits-all uniform sewn-up in Washington for dealing with juvenile crime").

¹²⁸ See S. 10, § 103.

¹²⁹ H.R. 1501, 106th Cong. (1999).

¹³⁰ S. 254, 106th Cong. (1999).

¹³¹ The Senate bill points to the "inadequa[cy] and inappropriate[ness]" of the rehabilitative model for some juveniles, *id.* § 2(a)(6), and notes that public safety and accountability are "paramount concerns," *id.* § 2(b)(1). This retributive philosophy appears to be based on the belief, as expressed by Senator Orrin Hatch (R-UT), that "[w]hen a juvenile commits an act as heinous as the worst adult crime, he or she is not a kid anymore" and should not be treated like one. 145 CONG. REC. S4981, S4984 (daily ed. May 11, 1999).

¹³² See Children's Defense Fund, *H.R. 1501, The Consequences for Juvenile Offenders Act: A Danger to Children* (visited Nov. 11, 1999) <<http://www.childrensdefense.org/juvenilejustice/hr1501.html>> (faulting the bill for "ignoring studies" demonstrating the adverse effects of trying children as adults).

¹³³ See *id.* (noting that "children are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and twice as likely to be assaulted by staff in adult jails than in juvenile facilities").

¹³⁴ See *id.* (noting that "draconian mandatory minimums would likely impose harsher penalties on youthful offenders than adult criminals guilty of the same offenses").

confidentiality protections of juvenile records.¹³⁵ CDF also criticizes Senate Bill 254 for provisions that would expand prosecutorial waivers, weaken protections against detention of in adult jails, and remove the requirement that states “address the disproportionate confinement of minority juveniles in secure facilities.”¹³⁶ There was, however, a clear effort to strike a balance (at least on paper) between the need for “public safety”¹³⁷ and rehabilitation and “correction”¹³⁸ of juvenile offenders.

III. DON'T BELIEVE THE HYPE: STATISTICS AND STEREOTYPES

This section presents a model for understanding the cyclical nature of legislative and public responses to juvenile crime and investigates the sources of information (or misinformation) that have recently driven the cycle. It also explores several correlates of juvenile crime and stereotypes about delinquency that have a disproportionately damaging impact on poor and minority juveniles.

A. *Everything Old Is New Again*

According to noted researcher Thomas J. Bernard, juvenile justice and reform policies are inherently cyclical in nature: policies are shaped directly by changing social responses to juvenile crime and rhetoric about juvenile delinquents, rather than actual increased criminality.¹³⁹ “The cycle begins,” he asserts, “when justice officials and the general public are convinced that juvenile crime is at an exceptionally high level, and there are many harsh punishments but few lenient treatments for juvenile offenders.”¹⁴⁰ Justice officials next conclude that the limited availability of lenient programs contributes to the problem; accordingly, they increase lenient options for juveniles as a means of decreasing the level of offending.¹⁴¹ Bernard posits,

¹³⁵ See *id.* (arguing that such measures “would have devastating consequences for the future employment and education of many children”).

¹³⁶ Children’s Defense Fund, *Background on S. 254, the Violent and Repeat Offender Act* (visited Nov. 11, 1999) <<http://www.childrensdefense.org/juvenilejustice/s254.htm>>.

¹³⁷ S. 254, 106th Cong. § 2(b)(1) (1999).

¹³⁸ S. 254, § 2(a)(12).

¹³⁹ See BERNARD, *supra* note 8, at 3-4 (introducing the concept of a “cyclical pattern in juvenile justice policies”).

¹⁴⁰ *Id.* at 3.

¹⁴¹ See *id.* (suggesting that officials at this stage of the cycle are reluctant to impose harsh punishments because they believe such treatments “will make the minor offender worse”).

however, that because juvenile crime is a “continuing presence in modern society,”¹⁴² justice officials will have little success in significantly reducing crime or allaying the public’s fears.¹⁴³ When juvenile crime either remains static or fails to abate, justice officials blame the leniency of treatment and respond with increasingly punitive “get tough” measures; the number of punitive programs subsequently increases while, concurrently, lenient and treatment-oriented programs decline.¹⁴⁴ Following a period of extreme harshness and largely punitive policies, when the level of juvenile crime remains exceptionally high, “justice officials . . . are forced to choose [once again] between harshly punishing juvenile offenders and doing nothing at all. The cycle has returned to where it started.”¹⁴⁵

Most notably, Bernard concludes that “[a]t every stage of the cycle, justice officials and the general public believe three ideas: that juvenile crime is at an exceptionally high level, that present juvenile justice policies make the problem worse, and that changing those policies will reduce juvenile crime.”¹⁴⁶ Although Bernard’s thesis was published before the 1993 peak in juvenile crime, his predictions have proven accurate. Based on the driving principles of his cyclical model, he quite accurately predicted in 1992 that

[j]uveniles will continue to be a high crime rate group, and they also will continue to receive less punishment than adults who commit the same offenses. Adults will continue to be convinced that there is a “juvenile crime wave” that started in the last thirty or forty years, and they will continue to believe that lenient punishments are the cause of that crime wave.¹⁴⁷

In every decade since the 1960s, each time that public confidence in a treatment and rehabilitation model has diminished, it was replaced by a strong desire to punish juvenile offenders with measures corresponding to the seriousness of their offenses. Applying Bernard’s thesis, a “get tough on crime” approach would have been predictably favored in the mid-to-late 1990s because the public both subscribed to the rhetoric about “superpredators” and perceived the

¹⁴² *Id.* at 8.

¹⁴³ *See id.* (noting that juvenile justice policies are often based on an “illusion that delinquency is a problem that can be solved”).

¹⁴⁴ *See id.* at 4 (noting that treatment-oriented measures are phased out until “there are many harsh punishments available for responding to juvenile offender but few lenient treatments”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 155.

failing juvenile justice system as too lenient.¹⁴⁸ Applying the same logic, a “get tough” approach, however, would not have been warranted if the public more widely accepted documented declines in juvenile crime as true. Bernard’s thesis is therefore borne out and the cycle of reform perpetuated even when public perception about elevated levels of juvenile crime is largely inaccurate.¹⁴⁹

B. *The Appeal of Pulp Fiction*

“Contrary to popular belief ‘[violent] juvenile crime is not rising out of control.’”¹⁵⁰ Nevertheless, “[a]lthough violent crime rates, including rates of violent juvenile crime, are down in most major cities, . . . the public still fears teen violence.”¹⁵¹ The public’s widespread and angry sentiment toward young offenders has fueled the most recent calls for reforming the juvenile justice system. This punitive attitude is related to the perceived inability of the system to effectively and permanently to reduce juvenile crime rates, something that Bernard notes is nearly impossible. With regard to the longstanding nature of the public’s misperception, he states that

[s]imilar alarms were raised in the [1960s, 1950s], 1940s, 1930s, and 1920s. At those times, people believed (as they do today) that the country was being overwhelmed in a rising tide of juvenile delinquency and crime, and that it had not been a serious problem only forty or fifty years ago. Juvenile crime itself seems to go up and down, but the quotations about how terrible juveniles are seem to stay the same.¹⁵²

The public’s misguided perceptions of a national increase in juvenile crime are largely a product of the media. In part, the media’s disproportionate coverage of high-profile incidents of violent teen behavior excites the public’s worst fears.¹⁵³ As Professor Zierdt notes,

¹⁴⁸ See BERNARD, *supra* note 8, at 162 (noting that the contemporary “get tough” advocates view juvenile delinquents as hardened criminals who “use leniency as an opportunity to commit more frequent and serious offenses without fear of the consequences”).

¹⁴⁹ See Zierdt, *supra* note 33, at 412 n.85 (noting that although “the predictions of an onslaught of violent juvenile crime have been proven wrong 2 years in a row,” the call to get tough persists).

¹⁵⁰ Burke, *supra* note 9, at 1027 (text altered in the original).

¹⁵¹ Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15-16 (1998).

¹⁵² BERNARD, *supra* note 8, at 33 (citation omitted).

¹⁵³ See NATIONAL REPORT, *supra* note 6, at 51 (“Public perceptions of juvenile offending have been influenced by attention focused on high-profile incidents.”); see also Lisa Belkin, *Parents Blaming Parents*, N.Y. TIMES, Oct. 31, 1999, (Magazine), at 60

"[a.]most every article written today concerning juvenile justice seems to publicize the most heinous crimes committed by juveniles. The resulting hysteria has caused the public to demand swift action to curb escalating juvenile crime . . ." ¹⁵⁴ Indeed, contemporary reform measures at the state and federal levels that call for more severe responses to the growing threat of juvenile crime feed off this hysteria. Despite confusion about the true nature of juvenile crime trends, or perhaps *because* of it, a blanket statement that the rate of violent juvenile delinquency is continuing to increase does not appear to be supported by overwhelming data.

In fact, juvenile crime is on the decline. The authors of the National Report, upon analyzing the Bureau of Justice Statistics's National Crime Victimization Survey ("NCVS"), concluded that although the rate of serious juvenile violence peaked in 1994 at 1,230,000, the highest recorded level since the NCVS began collecting data in 1973, serious violence by juveniles dropped by thirty-three percent between 1993 and 1997. ¹⁵⁵ Moreover, the proportion of violent offenses committed by juveniles has not increased, but instead remained relatively unchanged over the last twenty-five years. ¹⁵⁶ In addition, although incidents of violent juvenile crime continue to capture headlines, garner support for crackdowns on crime, and play a large role in influencing juvenile justice reform, the majority of juvenile court cases involve nonviolent property, not person, offenses. ¹⁵⁷ Indeed, the Coordinating Council on Juvenile Justice and Delinquency Prevention reported in 1996 that "only a fraction of youth (one-half of 1 percent), is arrested for violent crimes each year," a figure that places the problem of violent juvenile crime appropriately in context. ¹⁵⁸

(commenting on the recent "roll call of high school tragedy" making headlines within the past three years). Belkin lists the stories of each juvenile: 16-year-old Luke Woodham who, in October 1997 in Pearl, Mississippi, stabbed his mother and then shot nine fellow students, killing two; 14-year-old Michael Carneal, who, one month later, shot and killed three classmates in West Paducah, Kentucky; 11-year-old Andrew Golden and 13-year-old Mitchell Johnson who "staged a false fire alarm and then opened fire on the exiting crowd," killing five in Jonesboro, Arkansas in October 1998. *Id.* "And then there was Columbine, the massacre that, because it played out on television, seems to have crystallized all the others." *Id.*

¹⁵⁴ Zierdt, *supra* note 33, at 402.

¹⁵⁵ See NATIONAL REPORT, *supra* note 6 at 62 (noting the 33% drop in violent crime rates).

¹⁵⁶ See *id.* (analyzing violent juvenile crime rates from 1973 to 1997).

¹⁵⁷ See Stevenson et al., *supra* note 75, at 7 ("Although violent juvenile crimes grab headlines, the bulk of the court's delinquency work is in the handling of a large volume of crimes against property such as larceny, vandalism, and motor vehicle theft.")

¹⁵⁸ COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION,

Because a "get tough on crime" stance serves a "get elected" strategy, contemporary decision makers like legislators, prosecutors, and judges, must make knee-jerk political responses based on the public's unsubstantiated fears.¹⁵⁹ Voters, spurred by underlying feelings of social unrest and strong retributive reactions to sensational incidents of juvenile violence, call for increased confinement and incarceration. As Professor Feld notes, "[p]oliticians have exploited [the public's] . . . fears, decried a coming generation of 'superpredators' suffering from 'moral poverty,' and demonized young people in order to muster support for [punitive] policies."¹⁶⁰ Although the hype about violent juvenile crime makes good news and great headlines, it does not necessarily translate into good policy nor serve as a meaningful barometer of crime. As Judge Koontz notes, some critics suggest that "reforms represent no more than a swing in the pendulum of public opinion undoubtedly fostered by the mass media's exposure of the whole topic of juvenile delinquency and sensational reporting of particularly violent crimes involving juveniles."¹⁶¹

It is possible that the increased attention to juvenile crime and the frequent calls for harsh reforms are related to a shift in both the visibility of juvenile crime and the characteristics of young perpetrators. Quite reasonably, the occurrence of crime in areas previously sheltered from such incidents has prompted increased pressure for judicial and legislative intervention and fueled the perception that juvenile crime is rampant and on the rise. No longer confined by the boundaries of urban poverty and the inner city, incidents of violence are occurring in suburban and rural areas at slightly increased rates,¹⁶² bringing the problem closer to home for many citizens.

C. *Understanding Juvenile Delinquency: Causes and Correlates*

According to Thomas Bernard, since "[j]uveniles have always been

COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 1 (1996).

¹⁵⁹ See SIMON I. SINGER, RECRIMINALIZING DELINQUENCY 7 (1996) (suggesting that New York's early recriminalization movement in the late 1970s was spurred in part by a political agenda and a need to avoid appearing "soft" on crime); see also MILLER, *supra* note 19, at 142 (quoting theorist David Frum's observation that "[y]ou no longer get far in public life by preaching . . . that criminals can be rehabilitated"); FELD, *supra* note 16, at 208 (noting that reform efforts are often guided by "[p]olitical slogans, rather than empirical research evidence or evaluation research").

¹⁶⁰ FELD, *supra* note 16, at 208.

¹⁶¹ Koontz, *supra* note 8, at 180-81.

¹⁶² See HEIDE, *supra* note 17, at 7 ("Although most young killers live in cities, increasing numbers reside in rural and suburban areas.")

a high-crime-rate group, going back to when Cain killed Abel. . . . [W]e can expect that juveniles are always going to be a high-crime-rate group."¹⁶³ What we can derive from Bernard's theory is that the cyclical and long-standing nature of juvenile delinquency suggests that there is perhaps no new and unique source of harm, no juvenile crime virus of the 1990s.¹⁶⁴ A solution to the problem, if any truly exists, relies on a thorough understanding of the overt and latent harms that continue to inflict widespread damage on communities and give rise to juvenile crime.¹⁶⁵

Johnson's 1964 war on poverty, which took place in the context of efforts to combat juvenile crime, ushered in the federal government's first national response to juvenile delinquency. It is not surprising that the issues of poverty and juvenile crime were linked in this manner, as they had been since the child-saving efforts of the progressive reformers and, later, the inception of the juvenile court.¹⁶⁶ As Professor Adler notes, the problems encountered in the war on poverty of the 1960s have worsened due to changes in the economy and disintegration in the social fabric of inner cities and areas of concentrated poverty.¹⁶⁷ Mediating institutions, such as family, churches, schools, and community centers, that at one time provided the structural, emotional, and spiritual infrastructure of life have "decayed concurrently with the real estate, leaving a spiritual landscape as ominous as the physical one."¹⁶⁸ Noted sociologist William Julius Wilson echoes this sentiment, concluding that "[n]eighborhoods plagued by high levels of joblessness are more likely to experience low levels of social organization: the two go hand in hand."¹⁶⁹ In economically depressed and isolated urban communities, despair and sociopathological activities such as gangs, drugs, and violence permeate young peoples' daily lives, all against the backdrop of "family breakups and problems in the

¹⁶³ BERNARD, *supra* note 8, at 165.

¹⁶⁴ See *id.* at 186 (noting that "the problem of juvenile delinquency . . . in one way or another . . . is a permanent and unchanging product of human nature").

¹⁶⁵ See *id.* ("Solving [the juvenile delinquency] problem . . . requires changing the larger social conditions that gave rise to the problem in the first place.").

¹⁶⁶ See *supra* notes 20-28, 200-08 and accompanying text (discussing the historical link between poverty and juvenile delinquency).

¹⁶⁷ See George Adler, *Community Action and Maximum Feasible Participation: An Opportunity Lost but Not Forgotten for Expanding Democracy at Home*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 547, 567 (1994) (suggesting that the war on poverty may offer valuable lessons applicable to an analysis of cities today).

¹⁶⁸ *Id.*

¹⁶⁹ WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 21 (1996).

organization of family life."¹⁷⁰ The cumulative effect of these pronounced risk factors poses a monumental challenge for policymakers intent on reducing the incidence of juvenile crime. Understanding the complex nature of the problem is necessary to create an effective solution.

Theories about the multiple causes of delinquency abound, yet none has conclusively narrowed a precise causal pathway, as perhaps no single explanation suffices.¹⁷¹ Longitudinal empirical research into the relationship between family variables and delinquency reveals that several negative family variables are associated with delinquency.¹⁷² Poor discipline, poor guidance, poor supervision, poor problem-solving, and intrafamilial stress and conflict were all associated with official reports and self-reports of delinquency and rates of delinquent recidivism.¹⁷³ Social scientists James Snyder and Gerald Patterson propose an analysis of delinquent behavior that focuses on "defective socialization, arising first at home and subsequently via antisocial peers."¹⁷⁴ That these harmful effects are not "countered by satisfactory adult models" in the home, at school, or in the community poses an even more troubling problem.¹⁷⁵ In assessing the quality of delinquent children's earliest experiences, researchers note that "[h]omes that produce delinquents are characterized by poor discipline. Parents fail to label behavior as unacceptable, fail to track unacceptable behavior in different settings, and fail to manage it in a consistent manner. . . . Of all parental variables, poor supervision has the strongest association with delinquency."¹⁷⁶ Essentially these risk factors collectively illustrate a downward spiral towards delinquency. Troubled familial environments breed troubled children who, in association with devi-

¹⁷⁰ *Id.*

¹⁷¹ Difficulty in pinning down a cause is furthered by the inability to define more precisely what exactly is meant by the non-legal term "juvenile delinquent." Depending on how it is conceptualized, delinquent behavior may range from normal adolescent "acting out" behavior to egregious, abnormal, or even psychopathological behavior. For one view that describes the term "juvenile delinquent" as a euphemism for "young criminal" and notes that use of the term shifts the focus away from punishment and toward the potential for rehabilitation, see BERNARD, *supra* note 8, at 49.

¹⁷² Correlations like those discussed in the cited studies may demonstrate the strength of a concurrence of variables, but only allow one to make inferences about possible causes of delinquency. The complex nature of juvenile delinquency, composed of infinite confounding variables, precludes making statements about direct causes.

¹⁷³ See NURCOMBE & PARTLETT, *supra* note 72, at 294-95 (describing psychological research on the relationship between family interaction and social learning).

¹⁷⁴ *Id.* at 295.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

ant peer groups, act out impulsively and destructively.

Familial and environmental factors clearly play a significant role in creating a context for juvenile crime, but they do not do all the work in explaining why many other young people engage in delinquent and, in particular, violent crimes. Examining the broader context of juvenile crime, psychologist Kathleen Heide has identified fifteen variables believed to be related to serious juvenile violence,¹⁷⁷ grouping them into the following five main categories: (1) situational factors, (2) societal influences, (3) resource availability, (4) personality characteristics, and (5) their cumulative or interactive effects.¹⁷⁸ Situational factors include child abuse and neglect and an absence of positive parental, particularly male, role models.¹⁷⁹ Societal influences, she explains, include a crisis in leadership, a lack of heroes, and exposure to and victimization by acts of violence within the community and especially in the home.¹⁸⁰ Resource availability is defined as access to guns, involvement with illegal substances, subjection to poverty, and a lack of developmental resources.¹⁸¹ According to Heide, the sociocultural risk factors for delinquency occur against a backdrop of risk-creating personality characteristics that include low self-esteem, inability to deal with strong negative feelings, lack of opportunity for constructive involvement, poor problem-solving ability, poor interpersonal skills, poor communication skills, and prejudice and hatred.¹⁸² For the most part, such shortcomings may highlight the failure of adults to instill in all children and adolescents a sense of belonging and purpose. Noting the impact of this failure, Bernard states that “[j]uveniles who engage in delinquency . . . lack just such a sense of having a role and place in the larger society.”¹⁸³

In light of the embeddedness of youth in society-at-large, delinquent behavior has also been attributed to juveniles' underdeveloped sense of identity,¹⁸⁴ which leaves them more vulnerable to the influ-

¹⁷⁷ See HEIDE, *supra* note 17, at 36-37 (identifying and listing the 15 variables). While Heide presents these variables in the context of understanding serious juvenile violence, particularly juvenile homicide, I argue that they apply equally well to an understanding of less serious offenses against persons as well as other destructive behaviors such as property crimes.

¹⁷⁸ See *id.* (identifying the five categories).

¹⁷⁹ See *id.* at 37-41.

¹⁸⁰ See *id.* at 41-44.

¹⁸¹ See *id.* at 44-46.

¹⁸² See *id.* at 46-48 (commenting on the importance of personality characteristics).

¹⁸³ BERNARD, *supra* note 8, at 187.

¹⁸⁴ See *id.* at 187 (noting that juvenile delinquency is lower in societies where juve-

ence of peer pressure and of increasingly widespread negative and violent images in the media. Psychoanalytic theory postulates that diminished attachment to parents with whom children may already have a conflicted or strained parent-child relationship creates the impetus for juvenile delinquency, particularly during adolescence when the child is attempting to establish an independent self.¹⁸⁵ In the transition required by this task of adolescent development, "acting out" behavior is more likely to manifest in the context of weakened internalized social and parental control.¹⁸⁶

With respect to the cumulative effect of risk factors and conditions that encourage the development of juvenile delinquency, Heide remarks that children growing up in the presence of a number of the above-mentioned variables have "little or nothing left to lose"¹⁸⁷ and describes them as those:

who are angry, frequently in pain, and too often unattached to other human beings due to experiences in their home and neighborhood environments. . . . Many of these youths lack . . . the resources to improve their lives. . . . As a result, many juveniles today are living under extreme stress and are severely alienated. . . . Often chronically bored, they . . . commit crimes for fun. They live in the moment. To them, thrills—and lives—are cheap.¹⁸⁸

Defining causes and correlates of juvenile delinquency has significant legal consequences. Were juvenile crime to be understood as a phenomenon caused entirely by negative environmental influences working upon the innocent individual, the public might favor a continued parentalistic rehabilitative approach of the original juvenile court. If, as Professor Beschle notes, juvenile delinquents are understood as autonomous beings capable of making rational choices as well as adults, thus granting less weight to the influence of environmental forces as direct causes of delinquency, then a retributive response would be warranted.¹⁸⁹ Adolescents with the capacity to form

niles are "firmly embedded in a larger social context . . . with a clear understanding of the roles they would play and the functions they would have in the larger society").

¹⁸⁵ See NURCOMBE & PARTLETT, *supra* note 72, at 297 (citing the work of attachment theorist John Bowlby).

¹⁸⁶ Martin Gold & Richard J. Petronio, *Delinquent Behavior in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 495, 501 (Joseph Adelson ed., 1980) (surveying psychoanalytic theories of adolescent "acting out").

¹⁸⁷ HEIDE, *supra* note 17, at 49 (describing the cumulative effect of risk factors for juvenile delinquency).

¹⁸⁸ *Id.* (citations omitted).

¹⁸⁹ See Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J.

the requisite mens rea could reasonably be found guilty of adult crimes. Professor Feld, in his examination of this issue, notes that, although as physically capable as adults of inflicting harm, and perhaps "abstractly aware of 'right from wrong,' [juveniles] are less capable than adults of making sound judgments or moral distinctions."¹⁹⁰ Although he favors abolishing the juvenile court as a separate institution, Feld argues that juveniles are less responsible and hence less blameworthy than adults and that their diminished responsibility justifies a lesser punishment. Most importantly, he highlights the role of societal forces in guiding the development of delinquency, noting that "the crimes of children are seldom their fault alone; society shares at least some of the blame for their offenses as a result of their truncated opportunities to learn to make correct choices."¹⁹¹

Not only are youth limited in their ability to be responsible due to a lack of experience making responsible choices, but they are far more susceptible to peer group influences and group dynamic processes than their adult counterparts. Professor Morse argues that since children and adolescents are more vulnerable to peer pressure and may "lack normative competence because they are generally unable to grasp the good reasons not to breach an expectation," they should be accorded a "youth discount" in sentencing.¹⁹² Professor Feld similarly reasons that since "[j]uveniles are less responsible, hence less blameworthy, than adults . . . they 'deserve' a lesser punishment than an adult who commits the same crime."¹⁹³ In practice, a youth discount would result in a "legislatively-mandated reduction in punishment for all partially responsible adolescents."¹⁹⁴ Under a youth discount policy, juveniles could be tried in adult courts and receive more lenient sentences mitigated by age or other offender-oriented variables.

In *Thompson v. Oklahoma*,¹⁹⁵ the Supreme Court supported reduced culpability for juveniles, holding that execution for crimes committed when the defendant was under sixteen years of age at the time of his or her offense violated the Eighth Amendment's prohibi-

65, 101-05 (1999) (discussing the policy implications of assuming that adolescents can make mature life decisions).

¹⁹⁰ Feld, *supra* note 55, at 899.

¹⁹¹ *Id.* at 900.

¹⁹² Morse, *supra* note 151, at 23. Professor Morse concedes that "in comparison to the case of adults, poor judgment more substantially affects the criminal conduct of adolescents as a class," but posits that this factor may not be a sufficient reason for holding mid- to late-adolescents less accountable for their actions. *Id.* at 56.

¹⁹³ Feld, *supra* note 55, at 900.

¹⁹⁴ Morse, *supra* note 151, at 66.

¹⁹⁵ 487 U.S. 815 (1988).

tion on cruel and unusual punishment.¹⁹⁶ The Court concluded that “a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.”¹⁹⁷ Fundamentally, “youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”¹⁹⁸ Even within a “get tough” retributive approach, therefore, what appears important in decision making is the degree to which we discount the culpability of youth due to the influence of familial and environmental forces and related psychological harm. Environmental and individual factors are used to both discount culpability and mitigate punishment of juvenile offenders while advocating for treatment or rehabilitation. It is quite possible, however, that the same environmental and individual factors used to protect children from punishment may also be used to further punitive aims and target certain “suspect” groups. In this manner, the mitigating factors that exist in reality can, through hype, become the hysterical rhetoric that drives the cycle of punitive juvenile justice reform.

This phenomenon is particularly likely when the environmental and individual factors are poverty and race. Poverty and youth crime have shared a long association, as “the original idea of juvenile delinquency was derived from and merged with the earlier idea of pauperism.”¹⁹⁹ As Bernard notes, the development of the juvenile court was a result of benevolent reforms as well as efforts to control the threat to social order posed by paupers.²⁰⁰ Paupers were pejoratively defined as “undeserving” poor people whose circumstances were due to their own vice, corruption, and moral depravity.²⁰¹ “[J]uvenile delinquents’ originally were lower-class juveniles who stole property from middle- and upper-class adults in urban settings.”²⁰² Indeed, houses of refuge were developed to rescue such children from their inferior settings and from potential pauperism by altering “their weak moral natures.”²⁰³ Revisionist historians characterize the development of the juvenile courts as “expansive agencies of coercive social control that

¹⁹⁶ See *id.* at 833-38 (explaining why this punishment offends the prohibition on cruel and unusual punishment).

¹⁹⁷ *Id.* at 823.

¹⁹⁸ *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)).

¹⁹⁹ BERNARD, *supra* note 8, at 66-67.

²⁰⁰ See *id.* at 60 (discussing public perceptions that paupers were poor due to their “nasty characteristics”).

²⁰¹ *Id.*

²⁰² *Id.* at 48.

²⁰³ *Id.* at 64.

used their discretionary powers primarily to impose sanctions on poor and immigrant children.²⁰⁴ According to Feld, progressive reformers, generally elite and industrial middle-class, native-born Americans, responded to the nineteenth-century social changes of urbanization and immigration with social control measures that distinguished between “middle-class children like their own and . . . ‘other people’s children.’”²⁰⁵ Not surprisingly, poor immigrant children, viewed as genetically inferior and predisposed to vice, disproportionately populated the juvenile courts.²⁰⁶ The juvenile courts, designed to reform and rehabilitate children whose behaviors placed them outside the norms of middle-class society, asserted their hold and “prevailed most easily over lower-class, immigrant youths and their parents.”²⁰⁷

Feld notes that “[f]rom the early nineteenth century to the present, the juvenile justice system has systematically singled out lower-class children for punishment and ignored middle- and upper-class youth,” ordering more lenient treatment to children like the judges’ own and sending “foreign” or “alien” youth to institutions.²⁰⁸ The current overrepresentation of minority, particularly black, youth in the juvenile courts and the disproportionate confinement of minority youth in juvenile facilities may arguably be an extension of this process. Whereas “the disproportionate number of [European] immigrants involved in crime [including juvenile crime] moderated as [they] . . . were assimilated into American culture, things were always different for African-Americans. . . . [They] were never assimilated in the ways primarily European whites had been.”²⁰⁹ In contrast, African-American youth, particularly males living in poor urban areas, remain “the ultimate out-group.”²¹⁰

Research examining disproportionate minority involvement in the juvenile justice system reveals gross overrepresentation of young black males. “In 1996, black juveniles were referred to juvenile court at a

²⁰⁴ FELD, *supra* note 16, at 56.

²⁰⁵ *Id.* at 73.

²⁰⁶ *See id.* at 65 (arguing that because these poor immigrant children disproportionately populated the juvenile courts, the juvenile court’s status jurisdiction provided for paternalistic intervention for vulnerable girls).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 73.

²⁰⁹ MILLER, *supra* note 19, at 51.

²¹⁰ Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 869 (1997) (noting race-consciousness in the criminal justice system that disfavors “the ultimate out-group in the United States—African Americans”).

rate more than double that for whites."²¹¹ From 1987 through 1996, "the person offense case rate for black juveniles was more than three times the rates for white juveniles" and the "property offense case rate" for black juveniles was double that for white juveniles.²¹² Disparities similar to those in intake and referral are observed in the rate of detention and confinement for black youth. "Secure detention was nearly twice as likely in 1996 for cases involving black youth as for cases involving whites, even after controlling for [one of the factors used to determine appropriateness of detention and seriousness of the] offense."²¹³ Some argue that these disparities can be accounted for by disparities in the rates of offenses; however, research reveals that such disparities are not so easily explained.²¹⁴ In a 1987 study, sociologist Barry Krisberg found no support for the hypothesis that differences in incarceration rates among racial groups can be explained by differences in the types of offense behavior committed.²¹⁵ Instead, rhetoric about young black "thugs," broadcast widely in the media and implanted in the psyche of the general public, may play a role in explaining their disproportionate representation in the juvenile justice system.²¹⁶ As Professor Feld notes, the increasingly disproportionate representation of black youth may be a "graphic illustration of the conversion of public fear of and hostility toward other people's children into harsh and punitive social control practices."²¹⁷

²¹¹ NATIONAL REPORT, *supra* note 6, at 150.

²¹² *Id.* at 151.

²¹³ *Id.* at 154.

²¹⁴ See Howard N. Snyder, *The Juvenile Court and Delinquency Cases*, FUTURE OF CHILDREN, Winter 1996, at 53, 59-60 (citing statistics concerning the rates of offenses).

²¹⁵ KRISBERG & AUSTIN, *supra* note 42, at 120 (noting that Krisberg's conclusions were similar to those of a 1987 study by Huizinga and Elliot).

²¹⁶ See MILLER, *supra* note 19, at 149-50 (noting that images of African-American youth as criminals that are "hammered home nightly on the TV news and exploitive crime shows" reinforce the myth of "dark-skinned predators").

²¹⁷ FELD, *supra* note 16, at 337. The examples that I provide in this Comment are of sensational juvenile crimes, notably school killings, that due to their shocking nature tend to be extremely powerful in influencing public perception about crime. Using these sensational crimes as examples of incidents that give the appearance of an overall crime epidemic may inappropriately suggest that middle-class or even privileged white youth are the primary targets of punitive juvenile justice reform. Statistics reflect, however, that poor minority youth continue to disproportionately bear the burden of punitive juvenile criminal policies. White offenders, however, once they commit heinous sensational crimes that mobilize "get tough" reformers, are also regarded as "other people's children." See 145 CONG. REC. H4350, 4351 (daily ed. June 16, 1999) (statement of Rep. Dreier of California) (noting that "[o]ur children are not reflected in the twisted rage of Columbine's killers").

IV. TOWARDS A BALANCED APPROACH TO JUSTICE FOR JUVENILES

According to Bernard, given the cyclical nature of juvenile crime, no solution to the problem will be derived from merely "introducing a new juvenile justice policy."²¹⁸ One way out of the cycle, however, is the creation of an entirely new model of juvenile justice. This Part briefly presents the core tenets of a restorative justice philosophy and the BARJ model as tailored to address juvenile delinquency.

As an alternative to the present system of retributive justice, which focuses primarily on punishment for past deeds and not on future needs for either the offender or his or her victims, restorative justice

focuses on the restoration of relationships as well as individual and social healing. . . . Under such guidelines the aim of justice is to meet needs and promote healing of (a) victims, (b) the community, (c) offenders, and (d) relationships between them. In a restorative system of justice, there is a recognition that violations create obligations and these obligations are bilateral—the offender must acknowledge and take responsibility for the harm done to victims and communities, and society acknowledges a responsibility to both victims and offenders.²¹⁹

According to Professor Howard Zehr, the current legal system, in framing crime as "harm to the state, not to people" ignores harm to people, communities and the relationships between them.²²⁰ A restorative system of justice instead promotes the recognition that crime violates people and the relationships between them and places emphasis on addressing that rupture by involving central figures including the victim and, often, other community members.

A balanced approach to combating juvenile crime that incorporates both offender- and offense-focused factors in accountability, public safety, and competency development appears to deliver appropriate consequences for delinquent conduct while maintaining a focus on long-term objectives for offenders.²²¹ As such, the principles of both the restorative system of justice and the balanced approach would provide an ideal resolution to what Professor Feld describes as

²¹⁸ BERNARD, *supra* note 8, at 186.

²¹⁹ SANDRA L. BLOOM & MICHAEL REICHERT, BEARING WITNESS: VIOLENCE AND COLLECTIVE RESPONSIBILITY 269 (1998).

²²⁰ *Weekend Edition Sunday: Use of Restorative Justice As an Alternative Sentencing Method for Offenders and To Allow Victims Some Peace of Mind* (NPR radio broadcast, Oct. 10, 1999) (transcript on file with the *University of Pennsylvania Law Review*) (discussing the notion of restorative justice in the American juvenile justice system) [hereinafter *Weekend Sunday Edition*].

²²¹ See *supra* Part II.A.3 (noting how certain states have incorporated a balanced approach in their juvenile justice statutes).

“the legal dichotom[y] and contradictory polic[y] inherent in . . . [the] binary formulation . . . either punishment or treatment.”²²² The balanced approach improves the current system by incorporating restorative justice principles while preserving the original intent of those who devised a separate system for children—to safeguard the rights of children who merit treatment and rehabilitation over pure punishment and incarceration.

BARJ is a program adapted from an adult rehabilitation model that balances the need for offender accountability to the victim and the community, the need to provide public safety, and the system’s goal of helping youth to become competent, contributing members of society. It has at its core the tenets of restorative justice, which hold that “when a crime is committed the offender incurs an obligation to restore the victim—and by extension the community—to the state of well-being that existed before the offense.”²²³ The three prongs of the balanced approach, particularly in the area of restitution and accountability, work well within a restorative system of justice. With regard to accountability, programs such as victim-offender mediations, victim restitution, and community service have been successfully employed. They strive to develop in the offender a sensitivity to his or her victim and an ability to see how the consequences of his or her actions have ruptured or harmed the community. Public safety concerns may be met through residential confinement or placement in supervised day programs that address other rehabilitative needs. Finally, competency development integrates education, work, and social skills that assist juvenile offenders in establishing a positive sense of themselves. In practice, this might involve use of classroom programs or even community mentors to replace the lack of positive role models in the lives of many young offenders. The strength of the BARJ model is that it comprehensively addresses the stated goals of the original juvenile justice system while balancing in a feasible way treatment and punishment needs tailored to the goals of long-term reform.²²⁴

²²² FELD, *supra* note 16, at 290.

²²³ Peter Freivalds, *OJJDP Fact Sheet #42: Balanced and Restorative Justice Project (BARJ)* (visited Jan. 16, 2000) <<http://ncjrs.org/txtfiles/91415.txt>>.

²²⁴ See generally Jennifer Michelle Cunha, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT’L L. REV. 283, 287-88 (1999) (examining use of restorative justice model in dealing with juvenile offenses). Cunha notes that the restorative justice model “[r]ather than forcing the parties to engage in a contest of legal sparring . . . attempts to bring them together and encourage[s] a unanimous and mutually beneficial solution.” *Id.* at 286; see

An additional component comprised in the balanced approach and restorative justice model is a focus on the role of educational and vocational programs and other activities in promoting pro-social opportunities for success and long-term competencies. Evidence from research with serious violent juvenile delinquents suggests that they have poor interpersonal skills and therefore may tend to be social isolates with very restricted social networks.²²⁵ In assessing the role of social relationships, researchers find that the more enmeshed one is in a wide social network, the lower the delinquency and general tendency to deviate from society's norms. "[I]t is not so much a matter of whether a youth lives in a ghetto or has unemployed parents, but rather how well that youth is worked into the social network of a society."²²⁶ Since social networks, including family, community, school, work, and peers are believed to play a protective role in diminishing or preventing delinquency, a balanced and restorative justice approach would seem effective in that it invites a wide network of social relationships to participate in integrating the offending youth back into the communities.²²⁷ In a restorative justice and balanced approach model, the need for treatment is not eclipsed by a need for punishment, and swift, consistent, but appropriate consequences to address the actions of serious juvenile offenders are combined with appropriate competency development. As Bernard warns, a juvenile reform approach that fails to balance punishment with treatment needs risks perpetuating the cycle of juvenile crime.²²⁸

Professor Feld argues that the juvenile court has failed "because of the inherent contradiction in [its] . . . two missions," that of delivering

also Amanda L. Paye, *Communities Take Control of Crime: Incorporating the Conferencing Model into the United States Juvenile Justice System*, 8 PAC. RIM L. & POL'Y J. 161 (1999) (analyzing restorative justice principles as alternatives to the retributive philosophy of the current juvenile justice system); Freivalds, *supra* note 223 (providing basic information about BARJ); *Weekend Edition Sunday*, *supra* note 220 (discussing the notion of restorative justice in the American justice system).

²²⁵ See HEIDE, *supra* note 17, at 46-48 (noting personality characteristics of juvenile delinquents).

²²⁶ CURT R. BARTOL & ANNE M. BARTOL, *JUVENILE DELINQUENCY: A SYSTEMS APPROACH* 290 (1989).

²²⁷ See *Weekend Edition Sunday*, *supra* note 220 (discussing the wide network of family, community, and legal personnel who took part in the restorative justice peace circle to address juvenile delinquents' behavior).

²²⁸ See *supra* Part III.A (discussing the cycle of juvenile crime). Bernard, however, might argue that the balanced approach is another form of lenient treatment that sets the stage for a corresponding punitive response in the future. See BERNARD, *supra* note 8, at 3-9.

social welfare services and providing criminal social control.²²⁹ Integrating the juvenile court into adult criminal court as he recommends, however, may invite the same problems of reconciling children's welfare needs with crime control, since children are (and will *always* be) different.²³⁰ While he proposes uncoupling these two functions by integrating the juvenile court into the adult system and employing a youth discount in sentencing juveniles in adult court, it is quite possible that we would instead witness an amplification of the worst features of both the juvenile and adult systems. Instead of being warehoused in juvenile settings, young children who would face no other option but to be tried in already overwhelmed adult courts might simply be warehoused in adult facilities where they face a known risk of harm.²³¹

There is a shortage of therapeutic interventions, educational resources, life skills, and social skills competency development for all children growing up in poor, crime-ridden communities. Moreover, due to the external risk factors that impinge upon healthy child and adolescent development and the fact that these risks have done little more than flourish in the 100 years since the inception of the juvenile court, the need for treatment and rehabilitation appears even greater now than ever before. Once detained and incarcerated, either as juveniles or as adults, they risk lagging farther behind educationally, emotionally, and developmentally, and are likely to lose permanently any semblance of a normal childhood.²³² Bernard notes that the most promising avenue in the search for a solution to juvenile crime does not lie in tailoring treatment interventions for specific rehabilitative aims, as that would tend to perpetuate the cycle by introducing additional policies, but in targeting "the larger social conditions that [give] rise to [juvenile crime] . . . in the first place."²³³ "The correct response to the question, 'What works?' is to reframe it as, 'What works, for which youths, in whose hands, under what conditions, and

²²⁹ FELD, *supra* note 16, at 289.

²³⁰ See Yellen, *supra* note 14, at 996-97 (noting that there are significant and enduring differences between children and adults).

²³¹ See Children's Defense Fund, *supra* note 132 (critiquing the holding of juveniles in adult facilities).

²³² See Morse, *supra* note 151, at 65 (noting that "[r]eformatories and prisons . . . are hardly the type of environments that provide firm but caring discipline or the graded freedom and responsibilities that give [children and] adolescents the best chance to develop mature, good reason").

²³³ BERNARD, *supra* note 8, at 186.

in what way?' The simple answer 'Nothing' is not acceptable."²³⁴

The Johnson administration's effort to eliminate poverty in the context of the debate on juvenile crime led James Sundquist, a member of the national task force to address poverty in America, to ask: "In the war on poverty, as in the war on youth crime, was the target the individual or the community?"²³⁵ The problem Sundquist identified over thirty years ago looms larger today, as the relationships among many social variables influencing juvenile crime have now become clearer.²³⁶ As a result, the question remains whether the juvenile justice system should aim to change the individual offender or to tackle the larger, more onerous and costly task of altering the pernicious environment.

Individualized justice, or treating young offenders on a case-by-case basis only *after* they have committed a crime, may serve to deflect attention away from the root causes of juvenile crime. This may be the case whether the juvenile is treated benevolently for rehabilitative and treatment purposes or harshly for retributive or punitive aims or even through a more balanced approach. Moreover, interventions that focus solely on the youth offender may offer limited solutions. They may, thus, fail to achieve the broader impact of a shattering and remaking of youth culture in America. Through shortsighted punitive measures that have the effect of simply warehousing young offenders, we may appear to be winning the battle.²³⁷ Yet if we continue to treat juvenile offenders as refuse to be ignored, carted away and locked up without ameliorating the blighted and dangerous communities from which they came, we will surely lose the war.

CONCLUSION

The problem of juvenile delinquency, like most social ills, is complex and multilayered. What is needed for reasoned and effective interventions is accurate reporting of the nature of the problem and a

²³⁴ NURCOMBE & PARTLETT, *supra* note 72, at 305.

²³⁵ Adler, *supra* note 167, at 552-53 (quoting JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY AND JOHNSON YEARS* 152 (1968)).

²³⁶ See *supra* part III.C (discussing President Johnson's war on poverty and efforts to combat crime).

²³⁷ The above statement appears true if the battle is defined solely as one of an immediate reduction of crime. Empirical data, however, suggests that extremely punitive measures, like incarceration or detention, are only minimally effective in deterring crime. See SCHNEIDER, *supra* note 17, at 5 (noting the effectiveness of community-based restitution programs over retributive approaches).

full understanding of the many interrelated risk factors that leave a population of children vulnerable to acting out in criminal ways. As the juvenile court marks its 100th anniversary, “get tough on crime” rhetoric has prompted reformers to enact legislation that threatens to replace the juvenile court as a forum for dealing with juvenile delinquents with an adult criminal counterpart. Policies including lowering the minimum age of adult criminal prosecution to prohibiting the expungement of juvenile records threaten to constructively dismantle this institution that has protected young offenders, albeit not entirely, who do not merit harsh adult punishments. New reforms should reflect the original intent of the juvenile court—rehabilitation and reform—which, according to social science research, is more effective than pure punishment. As Thomas Bernard’s cyclical model of juvenile justice would suggest, however, replacing old policies for new ones simply perpetuates a cycle of punishment and leniency. What we need is not to *better* the mousetrap, but to *reconceptualize* it. The philosophy of restorative justice and BARJ principles may serve this end, but only when they truly balance equally between public safety, accountability, and competency development for young offenders.

Given the power of rhetoric and the strong desire to punish, legislative restraint and public compassion, especially for those long viewed as “other people’s children,” will be necessary to refrain the advancement of even harsher juvenile bills, or the dismantling of the system entirely if or when it does not appear to deliver what it promises. Public hysteria and stereotypes will never produce effective and fair juvenile justice policy. Fundamentally, what is most needed is recognition that we all have a personal stake in finding the solution to youth crime and recognition that as a nation, we all stand to profit or pay for what becomes of our children. Without this realization, we are doomed to repeat flawed juvenile justice policies time and again while ignoring promising opportunities for the next generation.



A. LEO LEVIN

Fifty years ago, A. Leo Levin taught his first course as an Associate Professor at the University of Pennsylvania Law School. On behalf of his current and former students, the Board of Editors of the *University of Pennsylvania Law Review* takes great pleasure in publishing this Tribute to Professor Levin, the Leon Meltzer Professor of Law Emeritus, in recognition of this truly remarkable occasion.

Few other law professors ever will have the opportunity to celebrate their golden anniversary in teaching. But then, Professor Levin is like few other law professors.