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RE-IMAGINING CHILDHOOD AND RECONSTRUCTING THE LEGAL ORDER: THE CASE FOR ABOLISHING THE JUVENILE COURT

JANET E. AINSWORTH*

Although the institution of the juvenile court developed rather recently in our legal system, it is now quite firmly established: every American state and nearly every industrialized nation has a juvenile court system in place. The juvenile court is not without its critics, however. In this Article, Professor Janet Ainsworth recommends its complete abolition. Professor Ainsworth contends that society's current view of the nature of adolescence no longer comports with the turn-of-the-century view that originally informed the development of an autonomous juvenile court, thus undermining the ideological legitimacy of a separate court system for juveniles. In addition, Professor Ainsworth argues that, because of the availability of procedural safeguards in the adult court system and because of the greater opportunity for effective assistance of counsel in the adult courts, juveniles will, in fact, benefit from being tried within a unified criminal justice system.

Using social constructivist theory as the foundation for her Article, Professor Ainsworth critically examines the changes in the social imagination of the nature of childhood and adolescence and proceeds to a re-evaluation of one specific legal institution in light of that changed social construct. Professor Ainsworth's analysis, however, has much broader implications for reshaping our legal system over time as society creates and recreates its collective notion of reality.

I. INTRODUCTION

Juvenile courts exist in all fifty states of the United States and the District of Columbia,¹ as well as in virtually all of the industrialized nations of the

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1. ALA. CODE § 12-15 (1986); ALASKA STAT. § 47.10.010 (1990); ARIZ. REV. STAT. ANN. § 8-202 (1989); ARK. STAT. ANN. § 9-27-101 (1991); CAL. WELF. & INST. CODE § 245 (West 1984); COLO. REV. STAT. § 19-1-104 (Supp. 1990); CONN. GEN. STAT. ANN. § 46b-121 (West Supp. 1990); DEL. CODE ANN. tit. 10, § 921 (1975 & Supp. 1990); D.C. CODE ANN. §§ 16-2302 to 16-2303 (1989); FLA. STAT. ANN. § 39.022 (West Supp. 1991); GA. CODE ANN. § 15-11-3 (1990); HAW. REV. STAT. § 571-11 (1985 & Supp. 1990); IDAHO CODE § 16-1803 (Supp. 1990); ILL. ANN. STAT. ch. 37, para. 801-1 (Smith-Hurd 1990); IND. CODE ANN. § 31-6-2-1.1 (Burns Supp. 1990); IOWA CODE ANN. § 232.8 (West 1985 & Supp. 1990); KAN. STAT. ANN. § 38-1604 (1986); KY. REV. STAT. ANN. § 610.010 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. §§ 1564, 1568.1, 1621 (West 1983 & Supp. 1991); ME. REV. STAT. ANN. tit. 15, § 3101 (1980 & Supp. 1989); MD. CTS. &

world.² So ubiquitous is the institution of the juvenile court in the contemporary world that one easily might forget that it did not always exist. In fact, the juvenile court is a relatively recent invention.³

The juvenile court system has come under increasing attack in recent years from both the right and left ends of the political spectrum. The right complains that the system coddles young criminals and sets them loose to prey on society after lenient sanctioning;⁴ the left decries the arbitrary railroading of predominantly lower class juveniles by paternalistic juvenile court judges.⁵ Ironically, as this Article will explain, both criticisms are predicated on identical views about the essential nature of childhood, views embodying a vastly different conception of childhood from the one that gave birth to the juvenile court.

This Article examines the development of the juvenile court, revealing that the system is premised on certain historically contingent beliefs and assumptions about the unique nature of childhood. After presenting an historical account of the socially constructed nature of childhood and adolescence, this study explores how those constructs informed the ideology and practice of the juvenile court. Next follows a discussion of how perceptions of youth have changed in the late twentieth century, showing that these changes undermine the ideological legitimacy of a separate juvenile court system. As a result, juvenile court has undergone both ideological and institutional change from its original form. These

JUD. PROC. CODE ANN. § 3-804 (1989); MASS. GEN. LAWS ANN. ch. 119, § 52 (Supp. 1990); MICH. COMP. LAWS ANN. § 712A.2 (West Supp. 1990); MINN. STAT. ANN. § 260.021 sub. 4 (West 1982); MISS. CODE ANN. § 43-21-107 (Supp. 1988); MO. ANN. STAT. § 211.021(3) (Vernon 1983); MONT. CODE ANN. § 41-5-203 (1989); NEB. REV. STAT. § 43-245(3) (Supp. 1990); NEV. REV. STAT. § 62.036 (1985); N.H. REV. STAT. ANN. §§ 169-B:2 to 169-B:4 (1990 & Supp. 1990); N.J. STAT. ANN. § 2A:4A-24 (West 1987); N.M. STAT. ANN. § 32-1-4 (1989); N.Y. JUD. LAW § 302.1 (McKinney 1983); N.C. GEN. STAT. § 7A-523 (1989); N.D. CENT. CODE § 27-20-03 (1974); OHIO REV. CODE ANN. § 2151.01.1(A)1 (Anderson Supp. 1990); OKLA. STAT. ANN. tit. 10, §§ 1101 to 1506 (West Supp. 1991); OR. REV. STAT. § 419.472(3) (1989); 42 PA. CONS. STAT. ANN. § 6321 (Purdon 1982); R.I. GEN. LAWS § 14-1-5 (1987); S.C. CODE ANN. § 20-7-400, 20-7-430 (Law. Co-op 1985 & Supp. 1990); S.D. CODIFIED LAWS ANN. § 26-8-1(5) (Supp. 1990); TENN. CODE ANN. § 37-1-102(14) (Supp. 1990); TEX. FAM. CODE ANN. § 51.04 (Vernon 1986 & Supp. 1991); UTAH CODE ANN. § 78-3a-3 (1987); VT. STAT. ANN. tit. 33, § 633 (1981); VA. CODE ANN. § 16.1-228 (Supp. 1990); WASH. REV. CODE ANN. § 13.04.030 (Supp. 1991); W. VA. CODE § 49-5-1 (1986 & Supp. 1990); WIS. STAT. ANN. § 48.03 (West 1987 & Supp. 1990); WYO. STAT. § 14-6-202 (1986).

2. See, e.g., J. CRAWFORD, AUSTRALIAN COURTS OF LAW 205-08 (1982); THE JAPANESE LEGAL SYSTEM 172 (H. Tanaka ed. 1976); WESTERN SYSTEMS OF JUVENILE JUSTICE (M. Klein ed. 1984) (Canada, England, Wales, Israel, Holland, Germany, Denmark, Sweden); Dahl, *The Scandinavian System of Juvenile Justice: A Comparative Approach*, in PURSUING JUSTICE FOR THE CHILD 327 (M. Rosenheim ed. 1976); Leon, *The Development of Canadian Juvenile Justice: A Background for Reform*, 15 OSGOODE HALL L.J. 71, 81-104 (1977); McGee & Adamo, *Juvenile Court Jurisdiction in Italy and Europe*, 29 AM. J. COMP. L. 139 (1981); Power, *Juvenile Justice in Great Britain: Cautions, Hearings and Courts*, in PURSUING JUSTICE FOR THE CHILD 299 (M. Rosenheim ed. 1976).

3. See *infra* notes 85-110 and accompanying text.

4. A succinct and forceful exposition of this position was given by Alfred Regnery, administrator of the federal Office of Juvenile Justice and Delinquency Prevention under the Reagan Administration. See Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 65 (Fall 1985).

5. See generally A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 4 (2d ed. 1977) (emphasizing use of juvenile court as instrument of social control over lower class youth); Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 695-709 (1980) (condemning paucity of procedural protections in juvenile court).

shifts in theory and practice are outlined here, with specific attention given to several United States Supreme Court decisions that significantly have affected juvenile court. The Court's jurisprudence both reflects and shapes the current social reality for juveniles in America.

Finally, this Article calls for the abolition of the juvenile court,⁶ suggesting that such a course would better reflect current American beliefs about adolescence. The Article will discuss the ideological costs of maintaining an institution that no longer comports with our cultural reality and the practical consequences of abolishing the juvenile court. In considering these consequences, this Article contends that the supposed benefits of juvenile jurisdiction do not depend on the existence of a separate juvenile court, and that juveniles would receive positive advantages from being tried within a unified criminal justice system.

On one level, this Article is an interpretive study of one institution, the juvenile court, which begins with a thick description⁷ of its historical and cultural context and proceeds to a call for specific legal reform. On a more abstract level, this study argues that consciousness of the nature of our interpretive constructs in general can have real-world consequences if we, as legal actors, choose to reshape our legal world in light of that consciousness.

II. THE INVENTION OF CHILDHOOD

The choice of the word "invention" for this subheading is meant to be subtly jarring. After all, it is human creations which ordinarily are said to be "invented," whereas aspects of the natural world are said to be "discovered." By calling childhood an invention, I am suggesting that childhood is better seen as a social fact than as a biological one.

Before further exploring the nature of childhood, I first will lay out the theoretical underpinnings for the remainder of this discussion. I premise this Article explicitly on social constructivism, a social theory of knowledge; therefore, a precis of social constructivist theory and its influence on contemporary thought will provide background for this study.

A. *Constructivist Social Theory*

Social constructivist theory⁸ originates from a radical epistemological skep-

6. In pressing for the abolition of the juvenile court in this Article, I am referring to juvenile court adjudication of criminal charges, a function of every state juvenile court system now in place. My analysis has obvious implications for juvenile court jurisdiction over so-called "status offenders" such as truants and runaways, and for juvenile court jurisdiction over allegations of child abuse and neglect. Addressing those other aspects of state juvenile court systems, however, is beyond the scope of this Article.

7. The term "thick description" was popularized by Clifford Geertz in his essay, *Thick Description: Toward an Interpretive Theory of Culture*, in C. GEERTZ, *THE INTERPRETATION OF CULTURES* 3 (1973). It refers less to a specific methodology than to a perspective that privileges multi-layered, contextualized narrative over purportedly objective analysis.

8. As the following exposition of social constructivist theory shows, I am intellectually indebted to many of the scholars whose work I later discuss in this Article. The synthesis that follows,

ticism, which holds that human knowledge cannot be grounded in either eternal or universal truths, be they truths of human nature, of the physical world, or of principles of logic or reason. Rejecting empiricism, with its reliance on experiential verification of reality, constructivism denies that commonly accepted categories of knowledge can be validated through objective observation. It instead posits that without pre-existing categorization, we could derive no meaning from our observations of reality.

To the constructivist, categories within which we understand reality do not correspond to that reality mapping, but rather are humanly created artifacts, produced by culturally and historically situated participants in a collective social enterprise. These socially created categories are propagated through social discourse, which is itself a culturally and historically situated practice. Thus, constructivism insists that all human knowledge, whether composed of experientially gathered information or the shared categories that impose meaning on that information, takes its form through social discourse.

These categories of knowledge are open-textured; in other words, they can be extended to accommodate circumstances and information outside the original parameters of the category. Consequently, these humanly fashioned interpretive constructs allow for competing understandings and are susceptible to change over time. Changes in these constructs, however, do not necessarily result from changes in external reality. Whether our shared understandings prevail over time depends not on the objectively verifiable validity of the construct but rather on the cultural⁹ and social processes that generate the constructs in the first place. Constructs may be abandoned or modified as the community comes to question their coherence and perspicuity. Conversely, interpretive constructs may be retained even in the face of what an outsider might see as contradiction or illegitimacy.

To say that all knowledge is situated—that our experience of reality is both culturally and historically contingent—is not to say that our constructs are invalid or false. The social constructivist critique of foundationalist epistemology is often misinterpreted as an attack on the value of certain categories of knowledge, a mistaken conflation of the real with the natural. Constructivism does not say that everyday visions of reality are false but rather that they are artificial, and being humanly made, conceivably can be unmade and remade in a different

however, is my own perspective on this theory, and I make no attempt to tease out the origins of each strand of the theory set out here, which informs this entire work.

9. Throughout this Article, I refer to “culture” and “cultural” construction as though culture represents a reified entity. Of course, it is nothing of the kind. Cultures do not operate as coherent, consistent unities, but as kaleidoscopic shifting fields on which the representation of meaning is constantly undergoing contest and change. I make use of the idea of culture because it is a useful construct, but like other constructs, it is deconstructible. Our representation of culture is no more a transparent correspondence to some external social reality than our other social constructs are unmediated reflections of reality. For a further discussion of the problems inherent in a simple unitary view of culture and its representation, see J. BOON, *OTHER TRIBES, OTHER SCRIBES* (1982); J. CLIFFORD, *THE PREDICAMENT OF CULTURE* (1988); K. DWYER, *MOROCCAN DIALOGUES: ANTHROPOLOGY IN QUESTION* (1982); G. MARCUS & M. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE* (1986); *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (J. Clifford & G. Marcus eds. 1986) [hereinafter *WRITING CULTURE*].

way. For this reason, social constructivism provides the intellectual premises for a social critique, as well as a mechanism to explain and promote social transformation.

Across the spectrum of academic disciplines, a large and influential group of scholars¹⁰ has based its scholarship on a constructivist view of social reality, asserting that the constituent elements of a society—its institutions, customs, practices, conceptual categories, values, and ideology—are socially constructed artifacts. The modern germinal exposition of this theory is Peter Berger's and Thomas Luckmann's *The Social Construction of Reality*.¹¹ Berger and Luckmann acknowledge the intellectual antecedents of modern social constructivism in such disparate sources as the relativistic historicism of Wilhelm Dilthey,¹² the phenomenological sociology of Alfred Schutz,¹³ and the self-styled ontogenetic social psychology of George Herbert Mead.¹⁴ Locating their theoretical project within the field of the sociology of knowledge,¹⁵ Berger and Luckmann address the epistemological¹⁶ and sociological implications of constructivism. The key insight derived from looking at society as a composite of humanly constructed artifacts is that even basic aspects of social life are neither natural nor inevitable, as they may appear to members of that society, but rather are culturally and historically contingent and mutable.¹⁷ The contingency and mutability of social reality are largely invisible to those within the society. Therefore, dramatic changes may occur in the created meaning of a social artifact—be it a concrete artifact such as an institution or practice, or an abstract artifact such as a value system or conceptual category¹⁸—without members of the society expressly desiring or even consciously registering those changes. In-

10. Categorizing these scholars by discipline is problematic, given the blurring of methodological boundaries and the intellectual cross-fertilization in contemporary academia. See C. GEERTZ, *Blurred Genres: The Refiguration of Social Thought*, in LOCAL KNOWLEDGE 19 (1983). According to Geertz:

[T]he present jumbling of varieties of discourse has grown to the point where it is becoming difficult either to label authors (What is Foucault—historian, philosopher, political theorist? What [is] Thomas Kuhn - historian, philosopher, sociologist of knowledge?) or to classify works (What is George Steiner's *After Babel* - linguistics, criticism, culture history? What [is] William Gass's *On Being Blue* - treatise, causerie, apologetic?).

Id. at 20.

I nevertheless have taken a stab at identifying scholars by discipline both to indicate the breadth of scholarly interest in constructivism as well as to locate specific contributions within a traditional disciplinary framework. My categorization is, of course, somewhat arbitrary, as I was recently reminded in a conversation with a colleague when I referred to someone whom I identified as "James Clifford, the anthropologist." My colleague looked blank for a second or two, until light dawned: "Oh," he said, "You mean Clifford, the rhetorician."

11. P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966).

12. *Id.* at 7.

13. *Id.* at 16-17, 194-95.

14. *Id.* at 195-97.

15. *Id.* at 185-89.

16. Berger and Luckmann concede, however, that discussing epistemology within the context of a work dedicated to the sociology of knowledge is akin to trying to push a bus on which one is already riding. *Id.* at 13.

17. *Id.* at 147-63.

18. *Id.* at 69 (describing a process they term "sedimentation" to account for changes in meaning over time).

stead, members of a society tend to impose their current belief structures onto the past, attributing their version of social reality to those who came before them. Eternally proceeding from one state of certainty about the nature of reality to another different, incommensurate state of certainty, people are seldom if ever aware of how completely their world is their own creation.¹⁹

As Berger and Luckmann emphasize, the fact that reality is socially produced does not mean that the individual within society can, by an exercise of will, escape the coercive force of reality.²⁰ Rather, change in the social order occurs through a dialectic process in which the constituent aspects of society affect and are affected by the actions of the human beings who create them²¹ and who are created as subjects by them.²²

Social constructivist theory has been enormously influential in the humanities and in the social sciences, particularly in history,²³ psychology,²⁴ sociol-

19. Kenneth Keniston has called this tendency "chronocentrism," coining the term by analogy to ethnocentrism. Keniston observes that "every epoch tends to freeze its own unique experience into life-in-general." Keniston, *Psychological Development and Historical Change*, 2 J. INTERDISCIPLINARY HIST. 329, 332 (1971).

20. P. BERGER & T. LUCKMANN, *supra* note 11, at 60-62.

21. *Id.* at 116.

22. This tenet of constructivism, that the interplay of social practice and discourse is in fact constituent of ourselves as human subjects, has been expanded upon at length in the work of Michel Foucault. Foucault's notion of discourse is not primarily semiotic but, on the contrary, is an interpretive model of "practices that systematically form the object of which they speak." M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 49 (1972).

23. Edward Said's *Orientalism*, E. SAID, *ORIENTALISM* (1978), is a classic of constructivist history. Said's central thesis is that European culture systematically created the idea of the Orient and imposed this constructed reality for its own political ends. He explicitly warns the reader, however, that he neither "suggest[s] that there is such a thing as a real or true Orient" nor "make[s] an assertion about the necessary privilege of an 'insider' perspective over an 'outsider' one." *Id.* at 322. Rather, his truly constructivist move is to claim that all versions of "the Orient," including indigenous ones, are equally constructed; none are objective depictions of some supposed external reality. *Id.* at 272-73, 322.

Not all constructivist history takes the form of Said's polemical social critique, however. Another variation on constructivist history is the rhetorical constructivism of intellectual historian Hayden V. White. See generally H. WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* (1973) (using a taxonomy of narrative genres to classify modes of representation of historical reality); H. WHITE, *The Fictions of Factual Representation*, in *TROPICS OF DISCOURSE* 121 (1978) (historical writing, like fiction writing, uses tropological narrative modes of emplotment and explanation). For constructivist historiography, see J. MEILAND, *SCEPTICISM AND HISTORICAL KNOWLEDGE* v-vi, 7-8, 187-99 (1965); Goldstein, *History and the Primacy of Knowing*, *BEIHEFT 16 HIST. AND THEORY* 29 (1977). See also Ankersmit, *The Dilemma of Contemporary Anglo-Saxon Philosophy of History*, *BEIHEFT 25 HIST. AND THEORY* 1 (1986) (providing an excellent survey of constructivist philosophy of history).

24. See generally R. HARRE, *PERSONAL BEING: A THEORY FOR INDIVIDUAL PSYCHOLOGY* 9-30 (1984) (rejecting both Freudian psychodynamic and cognitive psychological models to explain the perceived unity of the self and adopting a constructivist alternative). "Everything that appears to each of us as the intimate structure of our personal being, I believe to have its source in a socially sustained and collectively imposed cluster of theories." *Id.* at 21; see also P.D. ASHWORTH, *SOCIAL INTERACTION AND CONSCIOUSNESS* (1979) (grounding human consciousness in socially constructed systems of meaning); J. COULTER, *THE SOCIAL CONSTRUCTION OF MIND: STUDIES IN ETHNOMETHODOLOGY AND LINGUISTIC PHILOSOPHY* (1979) (psychology influenced by the linguistic philosophy of Wittgenstein and the ethnomethodology of Garfinkle). For a constructivist perspective on psychoanalysis, see R. SCHAFFER, *THE ANALYTIC ATTITUDE* 225 (1983) (calling psychoanalysis a "second reality" but noting that so-called "ordinary reality" equally is a construction). Schaffer correctly observes that the constructed nature of both of these realities makes them no less useful to us. *Id.* at 225-26; see also J. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* (1982) (anger as social construct); J. BRUNER, *IN SEARCH OF MIND: ESSAYS IN AUTOBI-*

ogy,²⁵ and anthropology.²⁶ Antifoundationalists such as philosophers Richard Rorty²⁷ and Nelson Goodman,²⁸ literary critic Stanley Fish,²⁹ and political theorist Don Herzog³⁰ share the fundamental constructivist perceptions about the

OGRAPHY (1983) (cognitive psychologist arguing that no "aboriginal" reality exists, rather we create many realities from differing intentions); Averill, *A Constructivist Theory of Emotion*, in EMOTION: THEORY, RESEARCH AND EXPERIENCE (R. Plutnik & H. Kellermann eds. 1980) (explaining the constructivist's view of emotion); T. SARBIN & J. MANCUSO, SCHIZOPHRENIA: MEDICAL DIAGNOSIS OR MORAL VERDICT? (1980) (schizophrenia as culturally contingent categorization of symptoms).

25. See D. BLOOR, KNOWLEDGE AND SOCIAL IMAGERY (1976); S. FULLER, SOCIAL EPISTEMOLOGY (1988); Schneider, *Social Problems Theory: The Constructionist View*, 11 ANN. REV. OF SOCIOLOGY 209 (1985). Sociologists studying the world of scientific research use constructivist insights to explain how scientists develop the subjects of scientific inquiry and transmit scientific knowledge among the research community. See M. ARBIB & M. HESSE, THE CONSTRUCTION OF REALITY (1986); H. COLLINS, CHANGING ORDER: REPLICATION AND INDUCTION IN SCIENTIFIC PRACTICE (1985); E. KELLER, REFLECTIONS ON GENDER AND SCIENCE 150-57 (1985); B. LATOUR & S. WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (1979).

Current work in the sociology of science obviously is indebted to Thomas Kuhn's constructivist philosophy of science. Kuhn posited that scientific inquiry proceeds on the basis of paradigms or meta-theories about the nature of reality, which then generate specific scientific theories commensurate with the paradigms. Paradigms organize and constrain scientific research, making some questions seem natural, leading to potentially fruitful avenues of research, and others irrelevant, dead-end, perverse or even literally unthinkable. Kuhn termed science that was operating securely within a paradigm "normal science." However, when scientific data or theories violate the paradigmatic assumptions, the results first may be ignored, or treated as anomalous, or assumed to be the product of flawed methodology. Eventually a growing body of anomalous information leads to confusion, anomie and disillusionment within the scientific community, and persists unless and until a new paradigm capable of incorporating the new data and theory supplants the old in the field. See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

26. Not surprisingly given its heritage of cultural relativism, contemporary cultural anthropology has been a fertile field for constructivist theory and practice. In a series of dazzling essays, Clifford Geertz has persuasively argued that ideology, law, art, and even common sense are socially constructed and culturally contingent symbolic systems through which, in an endless social hermeneutic circle, we create our world and in turn are created by it. C. GEERTZ, THE INTERPRETATION OF CULTURES (1973); C. GEERTZ, LOCAL KNOWLEDGE (1983); Geertz, *Anti Anti-relativism*, 86 AM. ANTHROPOLO. 263 (1984); see also Becker, *Text-Building, Epistemology, and Aesthetics in Japanese Shadow Theatre*, in THE IMAGINATION OF REALITY: ESSAYS IN SOUTHEAST ASIAN COHERENCE SYSTEMS 211 (A. Becker & A. Yengoyan eds. 1979) (an Indonesian case study of symbolic systems as constituent of social reality).

Post-modernist anthropologists have carried this insight one step further, applying it reflexively to their own work. See, e.g., K. DWYER, *supra* note 9 (discussing how both social reality and ethnographic accounts of that reality are constructs, giving a self-referential quality to contemporary anthropological fieldwork and implicitly leading to problems of intellectual infinite regress). For others contributing to the reflexive turn to contemporary anthropological work, see J. CLIFFORD, *supra* note 9 (recognizing that anthropologists affect the subjects they study by the act of writing ethnography); G. MARCUS & M. FISCHER, *supra* note 9 (same); WRITING CULTURE, *supra* note 9 (same).

27. See generally, R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 155-64, 315-94 (1979) (rejecting Cartesian foundationalism in favor of a pragmatic relativistic epistemology).

28. See N. GOODMAN, WAYS OF WORLDMAKING 1-22, 109-29 (1978) (reality can only be experienced or described under one or more systems of interpretive constructs, which Goodman calls "frames of reference").

29. See S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 1-17, 338-55 (1980) (interpretive communities produce meaning, and so reality, through shared values, assumptions, and ideology); Fish, *Consequences*, in AGAINST THEORY 107, 112 (W.J.T. Mitchell ed. 1985) ("The norms and rules that foundationalist theory would oppose to history, convention, and local practice are in every instance a function or extension of history, convention, and local practice."). For a perceptive critique of Fish's concept of interpretive communities, see Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 42-50 (1987).

30. D. HERZOG, WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY 224-43 (1985) (urging contextual justification over foundationalist justifications in grounding the moral and political order).

socially created nature of meaning and reality.

Given the impact of constructivist thought throughout the academy, it is unsurprising that contemporary social science scholarship on the law has incorporated its insights.³¹ Social scientists see the role of law in society³² as, in the words of Clifford Geertz, "constructive, constitutive and formational [L]aw is local knowledge not placeless principle and . . . is constructive of social life not reflective or anyway not just reflective of it"³³

Constructivist theory has deeply influenced scholarship within legal academia as well. More than fifty years ago, legal realists rejected the received wisdom that law was determined by abstract legal principles or reasoning; rather, they believed that law was created by judges influenced by external social conditions.³⁴ Contemporary constructivist legal scholarship carries this insight one step further, describing law as both constituent of social reality and as created by it in a dialectic process,³⁵ a kind of constitutive hermeneutics.³⁶ This constructivist view of the law has two corollary implications: first, that the apparent intrinsicity and immutability of basic legal doctrine is illusory;³⁷ and second, that understanding the process through which reality is constructed provides a mechanism for meaningful change in the law.³⁸

31. See *infra* notes 35, 37-38 and accompanying texts.

32. Two recent contributions to the project of assessing the role of law and legal process in constituting society are Greenhouse, *Interpreting American Litigiousness* and Rosen, *Islamic 'Case Law' and The Logic of Consequence*, both found in *HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY* 252, 302 (V. Starr & J. Collier eds. 1985).

33. C. GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE* 218 (1983). Geertz refers to law as a symbol system for the "perception, understanding, judgment, and manipulation of the world." Geertz, *Ideology as a Cultural System*, in C. GEERTZ, *THE INTERPRETATION OF CULTURES* 217 (1973) (undertaking a semiotic analysis of the structures of signification in ideology).

34. Two of the most influential articles outlining the Legal Realist approach to jurisprudence are Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935), and Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431 (1930). As companion pieces, they form a useful introduction to the scholarly project undertaken by the Legal Realists. For an analysis putting Legal Realism into its historical context, see E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 74-94, 139-46 (1973). For a capsule account of Legal Realism, see Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037, 1037-39 (1961).

35. See, e.g., Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 *U. PA. L. REV.* 685, 780 n.270 (1985) ("[T]his suggests the operation by which we make sense of the world—using the available reservoirs of cultural meaning for purposes that both shape and are shaped by the process in which we are engaged.").

36. I borrow the term from Steven Mailloux, who used it to describe constructivist epistemology in literary theory. Mailloux, *Truth or Consequences: On Being Against Theory*, in *AGAINST THEORY* 65, 68 (W.J.T. Mitchell ed. 1985).

37. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 288-89 (D. Kairys ed. 1982). Gordon refers to law as "manufactured necessity" in which "people . . . build (legal) structures, then act as if (and genuinely come to believe that) the structures they have built are determined by history, human nature, and economic law." See also R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 18 (1986) (modern legal doctrine acts to mask the degree to which the social order is constructed).

38. See Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591, 600-69 (1981) (interpretive legal constructs, such as the time frame of the legally significant occurrence, underlie our perceptions of fact and our legal doctrinal deductions); Winter, *Bull Durham and the Uses of Theory*, 42 *STAN. L. REV.* 639, 677-93 (1990) (arguing against Stanley Fish's assertion that anti-foundationalist theory has no practical consequences). Winter contends, correctly I think, that self-conscious awareness of our own interpretive constructs is both possible and neces-

B. *The Social Construction of Childhood and Adolescence*

It is one thing to recognize that aspects of society such as parliamentary democracy, the exclusionary rule, and rugged individualism are socially contingent artifacts, but perhaps harder to accept that the life-stage we call "childhood" is likewise a culturally³⁹ and historically⁴⁰ situated social construction. Of course, infants and young children are physiologically and psychologically⁴¹ different from older youths and adults; these differences undoubtedly persist across time and place. As anthropologist Ruth Benedict once observed, however, "The facts of nature are 'doctored' in different ways by different cultures."⁴² Human biology may set the outside limits on our social definition of ourselves, but, since biological constructs are themselves human artifacts,⁴³ social reality constrains what we imagine to be biological necessity as well.⁴⁴

Social definitions of reality determine which biological attributes will be considered authentic, meaningful, and constituent of identity, and which will be trivialized, ignored, suppressed, or even explicitly denied.⁴⁵ For example, the biological differences between human males and females might seem to be an obvious instance where immutable biology invariably overrides any of society's attempts to deny or evade its constraints. No human society, one might think, could define males as the producers of young in light of the inescapable biological fact that males cannot give birth. Yet for many years, Western natural science actually did credit males with creating the fetus without any contribution from the female; scientists even "observed" tiny homunculi when they examined sperm under primitive microscopes.⁴⁶ More generally, much research in psy-

sary, and that it enables us to imagine a different legal order. *Id.*; see also Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983) (discussing narrative production of the codes that constitute both our normative universe and our social reality, thereby constraining concepts of the possible in law).

39. For an exploration in a non-Western context of how a legal system could shape and be shaped by concepts of childhood, see Bodde, *Age, Youth, and Infirmary in the Law of Ch'ing China*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 137 (1980) (childhood in late Imperial China seen by the Chinese as similar to old age, justifying mitigation of punishment based on Confucian ideals of compassion for the weak, in contrast to Western notion that children should not be punished because they lack the capacity to form the requisite mental state for criminal liability); Waltner, *The Moral Status of the Child in Late Imperial China: Childhood in Ritual and in Law*, 53 SOC. RES. 667, 679-84 (1986).

40. See *infra* notes 54-70 and accompanying text.

41. The psychological literature suggesting that age seven is the critical watershed dividing infants and young children from older children and adults in their cognitive and psychological characteristics is surveyed in Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 543 (1984).

42. Benedict, *Continuities and Discontinuities in Cultural Conditioning*, 1 PSYCHIATRY 161 (1938), quoted in Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROBS. 38, 43 (Summer 1975).

43. See the discussion of the social construction of scientific knowledge, *supra* note 25.

44. See P. BERGER & T. LUCKMANN, *supra* note 11, at 180 (referring to the "dialectic between the individual's biological substratum and his socially produced identity").

45. *Id.* at 180-83.

46. In the seventeenth and eighteenth centuries, such eminent natural scientists as Leeuwenhoek, Andry, Gautier, Dalenpatius and Hartsoeker all claimed to have observed miniature, perfectly formed humans curled up in the heads of spermatozoa. J. NEEDHAM, *A HISTORY OF EMBRYOLOGY* 205-06 (1959). Joseph Needham called this preformational theory of embryonic origin "one of the most striking victories of the imagination over the understanding." *Id.* at 238.

chology,⁴⁷ sociology,⁴⁸ and anthropology,⁴⁹ as well as feminist theory,⁵⁰ confirms the socially constructed nature of gender identity and much of what are often assumed to be natural gender characteristics.

Similarly, the socially constructed aspects of human life-stages such as childhood and adolescence far outweigh their invariant biological attributes. The number of stages into which an individual's life is divided and the essential qualities deemed characteristic of each stage in the life-cycle have varied over time⁵¹ and across cultures.⁵² Indeed, the very concept that human lives pass through life-stages with distinct characteristics has not always held the social and legal significance that it does in the contemporary West.⁵³

Those of us inhabiting a post-Kuhnian world might call it an archetypal instance of normal science, in which theory tends to determine data rather than the other way around.

47. Several branches of contemporary psychology have contributed to this insight. A psychoanalytic approach to the development of gender characteristics in early childhood is taken by Nancy Chodorow. See N. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* (1989); N. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978). For a collection of essays grounded in social psychology exploring this subject, see *MAKING A DIFFERENCE: PSYCHOLOGY AND THE CONSTRUCTION OF GENDER* (R. Hare-Mustin & J. Marecek eds. 1990). A psycholinguistic approach appears in Bem, *Gender Schema Theory: A Cognitive Account of Sex Typing*, 88 *PSYCHOLOGICAL REV.* 354 (1981).

48. See C. FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* (1988); J. MONEY & P. TUCKER, *SEXUAL SIGNATURES: ON BEING A MAN OR A WOMAN* (1975).

49. See H. MOORE, *FEMINISM AND ANTHROPOLOGY* 12-41 (1988); *SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY* (S. Ortner & H. Whitehead eds. 1981); Ortner, *Is Female to Male as Nature Is to Culture?*, in *WOMAN, CULTURE AND SOCIETY* 67 (1974).

50. The literature here is far too extensive to canvass adequately. Any listing would have to begin with de Beauvoir. S. DE BEAUVOIR, *THE SECOND SEX* (1949). Subsequent French feminist thought has continued to wrestle with the issue of the degree to which the nature of woman is socially imposed. See, e.g., Kristeva, *Woman Can Never Be Defined*, in *THE NEW FRENCH FEMINISMS* 137 (E. Marks & I. de Courtivron eds. 1980) (discussing contingency of the definition of "woman" using the example of China, where author saw a different distribution of sexual attributes than in the West); see also *Variations on Common Themes*, in *THE NEW FRENCH FEMINISMS*, *supra*, at 212, 230 ("Woman" as defined exists only as an instrument of exploitative social hierarchy.).

A representative perspective on this topic in current American feminist jurisprudence is Olsen, *Feminist Theory in Grand Style*, 89 *COLUM. L. REV.* 1147, 1166 (1989) (maintaining that the attributes typically ascribed to women are socially contingent). *But see* West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 3 (1988) (contending that women's corporeal experience of menstruation, childbirth and breast-feeding gives rise to a specifically female sense of interpersonal connection that contrasts to the masculine alienated autonomous self); cf. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (arguing that women's moral reasoning differs from that of men, although Gilligan does not expressly adopt either a cognitive essentialist or social constructivist origin of the difference).

51. See *infra* notes 54-67 and accompanying text.

52. Anthropological evidence suggests that adolescence, for example, is by no means universally recognized. Some cultures recognize a gradual transition from childhood into adult activities and responsibilities; others observe puberty as the event marking the passage from childhood to adulthood without any intermediate transitional phase corresponding to adolescence in the modern West. Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 *LAW & CONTEMP. PROBS.* 61-63 (Summer 1975). The breadth of cultural variability in defining the meaning of childhood is demonstrated in the essays collected in *CHILDHOOD IN CONTEMPORARY CULTURES* (M. Mead & M. Wolfenstein eds. 1955) (discussing topics such as child-rearing literature and children's imaginative productions); cf. *THE CULTURAL CONTEXT OF AGING* (J. Sokolovsky ed. 1990) (exploring cultural variability in defining the attributes and significance of old age).

53. For example, though the Latin language had vocabulary to name the stages of a person's life, these categories were vague abstractions, in no sense central to the ancient Roman's sense of self-identity. P. ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 20-32 (1962) (discussing stages of life in other civilizations and cultures). Our culture appears singular in

The definition of childhood—who is classified as a child, and what emotional, intellectual, and moral properties children are assumed to possess—has changed over time in response to changes in other facets of society.⁵⁴ Historian Philippe Aries first pointed out the dramatic contrast between the modern Western conception of childhood and the conception held in the medieval European world.⁵⁵ As he observed, “In medieval society, the idea of childhood did not exist. . . . [The] awareness of the particular nature of childhood . . . which distinguishes the child from the adult . . . was lacking.”⁵⁶ At that time, the primary age-based boundary was drawn between infancy, a time of physical dependence ending roughly at age seven, and full personhood.⁵⁷ Those persons older than seven, especially those in the lower social classes,⁵⁸ participated in the normal range of adult activities: they were apprenticed to begin their working lives,⁵⁹ drank in taverns,⁶⁰ shared the same games and amusements as adults,⁶¹ gambled,⁶² and were exposed to sexual behavior and jokes.⁶³ Wearing the same kind of clothing, these young people even looked like adults. Not surprisingly, then, medieval art depicted them as miniature adults.⁶⁴ In short, within the medieval world, the young were fully integrated members of the community. No one believed that young people were innocent beings who needed to be quarantined from a harsh adult world.⁶⁵

In later centuries, the period between the end of infancy and sexual maturity was redefined as a discrete stage in human development. Two seemingly contradictory strands of Western thought gave rise to this refiguration of childhood. On the one hand, the Calvinist doctrine of infant depravity characterized the young as inherently sinful and doomed to spiritual death absent coercive

its “sharp discontinuities” and dichotomies between childhood and adulthood. Skolnick, *supra* note 52, at 65.

54. P. BERGER & T. LUCKMANN, *supra* note 11, at 136-37; H. MOORE, *supra* note 49, at 204 n.18; J. SOLOMON, *THE SIGNS OF OUR TIME* 45-48 (1988).

55. P. ARIES, *supra* note 53. Aries’s ground-breaking historical study has been followed by subsequent scholarship, confirming his central thesis on the temporal variability of the treatment of children flowing from the changing social definition of children. See, e.g., J. DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* xiii (1970) (children and family life in colonial America); J. GILLIS, *YOUTH AND HISTORY* (1974) (European history of children from the eighteenth century on); D. HUNT, *PARENTS AND CHILDREN IN HISTORY: THE PSYCHOLOGY OF FAMILY LIFE IN EARLY MODERN FRANCE* (1970) (status of the child during the French *ancien regime*). But see L. POLLOCK, *FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500-1900* (1983) (arguing that a distinct stage of childhood was observed somewhat earlier than Aries claimed, but generally agreeing with Aries that the idea of childhood is historically contingent).

56. P. ARIES, *supra* note 53, at 128.

57. *Id.* at 329.

58. *Id.*

59. J. GILLIS, *supra* note 55, at 7-8; see also P. ARIES, *supra* note 53, at 366-68 (discussing the apprenticeship system).

60. P. ARIES, *supra* note 53, at 368.

61. *Id.* at 62-71.

62. *Id.* at 71, 81-84.

63. *Id.* at 100-03.

64. *Id.* at 33-35.

65. *Id.* at 106.

discipline by adults.⁶⁶ In contrast, Enlightenment philosophy and the later romanticism of Rousseau saw children as innately innocent beings whose potential should be nurtured by parents without corrupting their natural goodness.⁶⁷ What both of these conceptions of childhood shared, however, in contrast to the earlier medieval construction, was the belief that children are essentially *different* from adults and that one aspect of that difference is their intrinsic malleability.

The late nineteenth and early twentieth centuries saw an extension of this dramatic reconstruction of childhood.⁶⁸ In the academy, experts dedicating their scholarship to the study of the child placed great emphasis on how inherently and essentially different children are from adults. The so-called "child-study" movement was predicated on the belief that childhood is composed of stages, each with characteristic emotions, capacities and needs. Appropriating from the theory of evolution the slogan "ontogeny recapitulates phylogeny,"⁶⁹ proponents of child study now had a model justifying scholarly focus on childhood. Because they believed that the chronological development of the individual human echoes the historical development of human civilization,⁷⁰ studying childhood was thought to provide a window on the otherwise unknowable human past. By the same token, child study proponents reasoned, what society knew of the past would teach it how best to socialize the young.

As this "child-study" movement gained momentum, prominent universities such as Harvard, Yale and Princeton rushed to set up departments of child development.⁷¹ In medicine, the perception of the uniqueness of childhood led to

66. Skolnick, *Children's Rights, Children's Development*, in *THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE* 138, 150 (L. Empey ed. 1979).

67. *Id.*; L. EMPEY, *AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION* 50 (1978). The impact of this concept on juvenile court ideology is noted in E. RYERSON, *THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 28-30 (1978).

68. Without attempting full discussion of the changes in American society at the turn of the century that led to the reconstruction of childhood and the invention of adolescence, the following brief sketch is intended to provide a sense of historical context for the refiguration of childhood.

Due to population growth in urban areas and the increasing industrialization of the American economy during this period, the United States underwent a metamorphosis from a predominantly rural agrarian society into an urban industrial one. Industrialization physically displaced work from workers' homes, making child labor logistically more impractical. Simultaneously, child labor became less attractive to industrial employers, who had fewer and fewer jobs suitable for children, who were less skilled and physically weaker than adult workers. Additionally, the surge of immigrants from Southern and Eastern Europe, considered more culturally resistant to assimilation than earlier waves of immigrants, made longer education seem an attractive vehicle for their socialization. All of these factors made it possible, even desirable, to postpone the entry of teenagers into the adult work force. See D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 205-07 (1980); Demos & Demos, *Adolescence in Historical Perspective*, 31 *J. MARRIAGE AND THE FAM.* 632, 636-37 (1969); Empey, *Introduction*, in *THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE* 1, 17-20 (L. Empey ed. 1979).

69. In embryology, the phrase "ontogeny recapitulates phylogeny" refers to the concept that fetal development replicates what evolutionary theory teaches are the developmental stages of species evolution. B. BALINSKY, *AN INTRODUCTION TO EMBRYOLOGY* 8 (4th ed. 1975). As used by the turn of the century "child study" movement, the phrase assumed a teleological view of historical progress, with human society inevitably passing from primitive to advanced stages as surely as babies grow into adults.

70. S. TIFFIN, *IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA* 21 (1982); Skolnick, *supra* note 52, at 49, 58-59.

71. S. TIFFIN, *supra* note 70, at 22.

the birth of pediatrics and the founding of specialized children's hospitals.⁷² On the political front, Congress, in 1912, passed a federal bill to establish a special Children's Bureau within the Cabinet Department of Commerce and Labor.⁷³

At the same time that academic and governmental attention was focusing on childhood, the temporal contours of childhood were extended through the creation of a new stage of pre-adulthood—adolescence.⁷⁴ Although the word "adolescence" was not actually invented during this period,⁷⁵ the term rarely was used prior to the late nineteenth century, and little or no attention paid to any special characteristics that teenagers might have.⁷⁶ By the turn of the century, the attributes of childhood⁷⁷ were being applied to teenagers, who only a generation earlier would not have been distinguished from older adults. Since as children they were assumed to be vulnerable, malleable, and in need of adult guidance, training, and control before they could graduate to full personhood, adolescents now became targets of paternal adult attention. Compulsory school attendance laws, which earlier had been ignored in those few jurisdictions that enacted them, were passed in state legislatures and were increasingly enforced.⁷⁸ Between 1900 and 1930, the number of high school graduates increased 600 percent.⁷⁹ At the same time, legislatures promulgated child labor laws establishing a minimum age for workers, limiting the hours that could be worked, and regulating the conditions of employment.⁸⁰ As a result, the number of people

72. H. CHUDACOFF, *HOW OLD ARE YOU? AGE CONSCIOUSNESS IN AMERICAN CULTURE* 44-45 (1989).

73. S. TIFFIN, *supra* note 70, at 236; see Children's Bureau Act, Pub. L. No. 116, ch. 73, 37 Stat. 79 (1912).

74. The emergence of adolescence as an accepted social "fact" in the late nineteenth and early twentieth century has been well-documented. See, e.g., J. DEMOS, *PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY* 13 (1986); J. KETT, *RITES OF PASSAGE: ADOLESCENCE IN AMERICA—1790 TO THE PRESENT* 111-264 (1977); Bakan, *Adolescence in America: From Idea to Social Fact*, 100 *DAEDALUS* 979, 979-84 (1971); Lapsley, Enright & Serlin, *Toward a Theoretical Perspective on the Legislation of Adolescence*, 5 *J. OF EARLY ADOLESCENCE* 441, 443-44 (1985); Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, *LAW & CONTEMP. PROBS.* 78-88 (Summer 1975); Skolnick, *supra* note 52, at 61-63.

75. Although the existence of the word antedates this period, it was little used before the turn of the century. Demos & Demos, *supra* note 68, at 632. The term was popularized by G. Stanley Hall in his influential, and dauntingly titled, two-volume work: G. HALL, *ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION* (1904). For an assessment of Hall's far-reaching influence on the scholarship and public policy of the period on adolescence, see D. ROTHMAN, *supra* note 68, at 207-11; S. TIFFIN, *supra* note 70, at 20-23; Skolnick, *supra* note 52, at 58-59, 62. For a general biography of Hall, see D. ROSS, G. STANLEY HALL: *THE PSYCHOLOGIST AS PROPHET* (1972).

76. To illustrate, popular literature on child-rearing of the nineteenth century displayed little concern for the attributes or problems of the post-pubescent. By the turn of the century, however, this literature was filled with helpful advice for parents of teenagers. Demos & Demos, *supra* note 68, at 632.

77. Adult and child were seen as binary opposites, with dichotomous natures: "Adults work and are responsible, children play and are irresponsible; adults are controlled and rational, children are emotional and irrational; adults think abstractly, children think concretely; adults are sexual, children asexual; and so on." A. SKOLNICK, *THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY* 339 (4th ed. 1987).

78. Lapsley, Enright & Serlin, *supra* note 74, at 444-45.

79. *Id.* at 450.

80. H. CHUDACOFF, *supra* note 72, at 87-91; S. TIFFIN, *supra* note 70, at 145-46.

between the ages of ten and fifteen who were gainfully employed declined seventy-five percent from 1910 to 1930.⁸¹ The minimum age for marriage was raised to discourage early marrying.⁸² The consequences of this spate of law reform prolonged the economic dependence of adolescents, increased the amount of age stratification in society,⁸³ and established a greater degree of formal social control over the young than had existed previously.⁸⁴

III. THE INVENTION OF ADOLESCENCE AND THE IDEOLOGY OF JUVENILE COURT

Among all of the law reforms adopted during the Progressive Era to accommodate the new perception of the adolescent's nature and needs, the creation of the juvenile court undoubtedly ranks as the most far-reaching achievement.⁸⁵ The rapidity⁸⁶ with which the concept spread is striking. In 1899, Illinois passed the Juvenile Court Act, founding a juvenile system widely acknowledged at the time as the model for other states to follow.⁸⁷ And follow they did; within twenty years all but three states had similar juvenile justice systems in place.⁸⁸

81. Lapsley, Enright & Serlin, *supra* note 74, at 450.

82. H. CHUDACOFF, *supra* note 72, at 86.

83. One obvious instance of this age stratification occurred in education. Age-grading in the classroom was based on the assumption that a child's abilities, needs and interests were most compatible with those of children of a similar age, and that age segregation in a child's daily life was both natural and beneficial. Before the turn of the century, the practice was almost unknown. H. CHUDACOFF, *supra* note 72, at 30-40; L. EMPEY, *supra* note 67, at 65-67; Bittner, *Policing Juveniles: The Social Context of Common Practice*, in *PURSuing JUSTICE FOR THE CHILD 70-71* (M. Rosenheim ed. 1976). David Rothman contends that increased age stratification operated as a vehicle for social control of youths. Rothman, *Documents in Search of a Historian: Toward a History of Childhood and Youth in America*, 2 J. INTERDISCIPLINARY HIST. 367, 377 (1971).

84. Lapsley, Enright & Serlin, *supra* note 74, at 443-44; Empey, *Introduction*, in *THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE 18-20* (L. Empey ed. 1979).

85. The juvenile court has been described as "one of the . . . innovations in an era renowned for its solicitous attention to children." S. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT 66* (1977). For a more detailed description of the historical development of the juvenile court, see A. PLATT, *supra* note 5, at 3-152; E. RYERSON, *supra* note 67, at 16-56; S. SCHLOSSMAN, *supra* at 55-156; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1221-30 (1970); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205, 207-55 (1971).

86. As the speed of its adoption would indicate, the juvenile court was not a complete break with then-existing practices. Its antecedents can be seen in the 'houses of refuge' of the earlier nineteenth century, and in the penological reform movement that sponsored the reformatory as the model for corrections. See A. PLATT, *supra* note 5, at 46-55, 101-36; Fox, *supra* note 85, at 1187-1230. For a detailed account of the houses of refuge, see R. PICKETT, *HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857* (1969). Juvenile institutions are discussed in comparison with other incarcerating institutions of the period in D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 206-16* (1971) (institutions in early and mid-nineteenth century) and in D. ROTHMAN, *supra* note 68, at 205-18 (asylums in Progressive Era). The penitentiary correctional movement is examined in M. IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION* (1978), and in T. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* (1987), a study heavily influenced by the work of Michel Foucault. Cf. M. FOUCAULT, *DISCIPLINE AND PUNISH* (1979) (the penitentiary model of corrections as an exemplar of the transformation of social power from an order marked by relationships of sovereignty to one marked by relationships of discipline).

87. A. PLATT, *supra* note 5, at 9-10.

88. *Id.*; D. ROTHMAN, *supra* note 68, at 215; E. RYERSON, *supra* note 67, at 81.

The desirability, even necessity, for a separate court system to address the problems of young people appeared obvious, given the newly emerging view of the adolescent as an immature creature in need of adult control. When parental control failed, the benevolent, if coercive, hand of the state could provide the corrective molding needed by the errant youth.⁸⁹ By categorizing the adolescent as a sub-class of the child rather than as a type of adult, the Progressives fashioned a discrete juvenile justice system premised upon the belief that, like other children, adolescents are not morally accountable for their behavior. Thus, ordinary retributive punishment for the adolescent would be inappropriate. The Progressives treated lawbreaking by juveniles as a symptom justifying, in fact humanely requiring, state intervention to save them from a life of crime that might otherwise be their fate.

The allusion to medical treatment suggested by the word "symptom" is not accidental; the Progressives frequently compared social deviance to physical disease.⁹⁰ Although Progressive ideology entertained an eclectic set of conflicting notions about the causes of deviant behavior, including physiological, genetic, and environmental theories, the belief that criminal behavior was caused by unwholesome environment, especially the baneful influence of squalid urban life, came to dominate correctional thinking.⁹¹ Juvenile misbehavior was seen as merely the overt manifestation of underlying social pathology. Like physical pathology, social pathology could not be ignored or the "disease" might progressively worsen. With proper diagnosis and treatment, however, social pathology was considered as susceptible to cure as physical ailments. Particularly in light of the supposedly malleable nature of juveniles, the Progressives exuded confidence in their ability to cure juvenile delinquency.⁹²

The juvenile court movement gained momentum from the proselytizing efforts of some of its early judges.⁹³ In stump speeches to civic groups, in editorials

89. D. ROTHMAN, *supra* note 68, at 207.

90. For instance, one turn of the century commentator wrote: "The time will come . . . when moral defects will be treated . . . as pathological cases, symptomatically, and not as punishable crimes." Grossman, *Criminality in Children*, 22 THE ARENA 645 (1899), quoted in E. RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 24 (1978). Boston Juvenile Court Judge Baker carried the analogy even further. In a 1910 article promoting the juvenile court system, Judge Baker compared the judge to a "physician" engaged in a proper diagnosis of the case, of the "outbreak" of criminal behavior. Once treatment had begun, the judge must check up on the progress of the probationer "just as a physician might do, in the case of a burn or a bruise." Even tighter supervision would be needed to cure more intransigent cases of deviance, which Judge Baker likened to "tuberculosis or typhoid." Baker, PROCEDURE FOR THE BOSTON JUVENILE COURT, quoted in L. EMPEY, AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION 499-50 (1978). For a general discussion of the hold that the "medical model" of criminal behavior had on criminology of the period, see T. DUMM, *supra* note 86, at 89-96.

91. A. PLATT, *supra* note 5, at 18-55; D. ROTHMAN, *supra* note 68, at 210-12.

92. E. RYERSON, *supra* note 67, at 120.

93. Among the most influential advocates of the juvenile court were the architects of the model system in Illinois, including Timothy Hurley, the chief administrator of the system; Richard Tuthill, an Illinois juvenile court judge; and Julian Mack, the Cook County juvenile court judge whose 1909 Harvard Law Review article, Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909), was so influential that it is among the most-cited law review articles of all time. THE MOST-CITED LAW REVIEW ARTICLES iii (F. Shapiro ed. 1987) (fifth most frequently cited article written prior to 1947). For more details on the early promoters of the juvenile court, see D. ROTHMAN, *supra* note 68, at 210-18.

als in the popular press, and in articles in professional journals, these advocates of the new juvenile court system tirelessly promoted the redemptive message embodied in juvenile court ideology. One such advocate, Judge Julian Mack, attributed the necessity for a separate juvenile court system to its exclusive concern for the social rehabilitation of needy youths. In contrast, criminal courts focused on the judgment of whether the accused had violated the law and if so, what penalty was warranted. He wrote, "The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."⁹⁴ To the advocates of the juvenile court, the essential difference between the moral and cognitive capacities of the juvenile and those of the adult did not serve merely to mitigate juvenile culpability for breaking the law, but to absolve the juvenile completely from criminal liability.⁹⁵

Juvenile court philosophy made no distinction between criminal and non-criminal behavior, as long as the behavior was considered deviant or inappropriate to the age of the juvenile. Behavior such as smoking, sexual activity, stubbornness, running away from home, swearing, and truancy could trigger juvenile court jurisdiction as validly as could breaking a criminal law.⁹⁶ Because the child was not being punished, but rather protected by the state, juvenile court had a mandate to assume liberal jurisdiction over the wayward young, much as it might over other helpless and needy members of society.⁹⁷ The idea that the peculiar vulnerability of children justified state control over them was analogized to the well-established chancery court principle, *parens patriae*, which gave the state authority over parentless children.⁹⁸ Invoking a chancery court pedigree for juvenile court jurisdiction, the *parens patriae* doctrine lent legitimacy to the new court system while it obscured the extent to which juvenile court marked an unprecedented expansion of state social control over adolescents.

Every aspect of the *parens patriae* juvenile court was designed to mold way-

94. Mack, *supra* note 93, at 119-20.

95. In the words of one participant in the 1902 National Conference on Charities and Correction, "It is hard that children should be brought into court for 'committing a crime.' A child cannot commit a crime: they are in the same class as the insane in this respect." E. RYERSON, *supra* note 67, at 75.

96. See Schlossman & Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 70, 81 (1978); see also Mack, *supra* note 93, at 107 (lumping together "the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance").

97. See, e.g., *In re Holmes*, 379 Pa. 599, 109 A.2d 523 (1954). According to the court, the juvenile court's "purpose is not penal but protective The State is not seeking to punish an offender but to salvage a boy who may be in danger of becoming one." *Id.* at 603, 109 A.2d at 525. The court equated the system's response to delinquent juveniles with that given the "neglected, destitute or physically handicapped." *Id.*

98. See generally Rendleman, *supra* note 85, at 211-23 (history of the application of the *parens patriae* doctrine in the United States, noting the hostility with which chancery jurisdiction was received in early America); E. RYERSON, *supra* note 67, at 63-72 (same). But see A. PLATT, *supra* note 5, at 159 (arguing that juvenile court doctrine was nothing like equity jurisdiction, and that the adoption of *parens patriae* was "an *ex post facto* fiction" designed to give spurious legitimacy to the new court).

ward youths into good citizens.⁹⁹ The hallmark of the system was its disposition, individually tailored to address the needs and abilities of the juvenile in question.¹⁰⁰ To that end, judges were given almost limitless discretion¹⁰¹ in crafting the disposition to facilitate whatever the judge thought would "cure" the youth. Juveniles could be put on probation until their majority, giving the juvenile court total control over every aspect of the probationer's life.¹⁰² If the juvenile was incarcerated in a juvenile detention facility, the commitment would be for an indeterminate period,¹⁰³ because the judge could not perfectly predict

99. Anthony Platt observed that the system taught "lower class skills and middle class values" to its juvenile charges. A. PLATT, *supra* note 5, at 69.

100. Some states premised their juvenile court systems on the court's duty to act in the best interests of the child. *See, e.g.*, GA. CODE ANN. § 15-11-35(a) (1990); IND. CODE ANN. § 31-6-15.5 (Burns 1986); N.J. STAT. ANN. § 2A:4-37 (West, repealed 1974); N.D. CENT. CODE § 27-20-31 (Supp. 1989); VT. STAT. ANN. tit. 33, § 657 (1981). In an analogous formulation, some states statutorily charged the juvenile court with providing care and custody for the juvenile equivalent to that which the parent should have provided. *See, e.g.*, ILL. ANN. STAT. ch. 37, para. 801-2 (Smith-Hurd 1990); IND. CODE ANN. § 31-6-4 to 31-6-12 (Burns 1986); IOWA CODE ANN. § 232.1 (West 1985); ME. REV. STAT. ANN. tit. 15, § 2501 (repealed 1977); NEV. REV. STAT. § 62.031 (1985); N.J. STAT. ANN. § 2A:4-2 (West, repealed 1982); R.I. GEN. LAWS § 14-1-2 (1981); S.C. CODE ANN. § 14-21-160 (Law. Co-op, repealed 1981). Similar statutory expressions of purpose include ARK. STAT. ANN. § 45-402 (repealed 1989) ("as far as practicable, the juvenile shall be treated not as a criminal, but as misdirected, misguided, and in need of aid, encouragement, assistance, and counseling"); MISS. CODE ANN. § 43-21-605 (1972 & Supp. 1989) ("No proceeding . . . shall be a criminal proceeding but shall be entirely of a civil nature concerned with the care, protection and rehabilitation of the child in question."); N.C. GEN. STAT. § 7A-516(3) (1989) ("[t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety"); 42 PA. CONS. STAT. ANN. § 6301(2) (Purdon 1982) (mandating its court "to remove . . . the consequences of criminal behavior and substitute . . . supervision, care, and rehabilitation").

101. Among statutes that had given juvenile judges wide sentencing latitude were: ARIZ. REV. STAT. ANN. § 8-241(2) (1990); CONN. GEN. STAT. ANN. § 46b-140 (West 1990); D.C. CODE ANN. § 16-2320 (1989); FLA. STAT. ANN. § 39.11(2) (West, repealed 1990); GA. CODE ANN. § 15-11-33, 35 (Harrison 1990); HAW. REV. STAT. § 571-48(1)(A-C) (1984); ILL. ANN. STAT. ch. 37, para. 705-1 (Smith-Hurd, repealed 1982); IND. CODE § 9-3215 (date); IOWA CODE § 232.52(2) (1985 & Supp. 1990); KY. REV. STAT. ANN. § 208.200 (Michie/Bobbs-Merrill, repealed 1984); ME. REV. STAT. ANN. tit. 15, § 2611 (repealed 1977); MISS. CODE ANN. § 43-21-605 (1972 & Supp. 1989); NEV. REV. STAT. § 62.211 (1985); N.H. REV. STAT. ANN. § 169-B:19 (1990); N.J. STAT. ANN. § 2A:4-37 (West, repealed 1977); N.C. GEN. STAT. § 7A-647 (1989); OHIO REV. CODE ANN. § 2151.35 (Anderson 1990); OR. REV. STAT. § 419.507 (1989); 42 PA. CONS. STAT. ANN. § 6352 (Purdon 1982); R.I. GEN. LAWS § 14-1-32 (1990); S.C. CODE ANN. § 14-21-620 (Law. Co-op, repealed 1981); VT. STAT. ANN. tit. 33, §§ 655, 657 (1981); VA. CODE ANN. § 16.1.279 (1990).

102. The early advocates of the juvenile court considered probation essential to its functioning. Illinois juvenile court administrator Timothy Hurley considered probation "the keystone which supports the arch of this law;" Illinois Judge Richard Tuthill echoed the sentiment, calling probation "the cord upon which all of the pearls of the juvenile court are strung . . . Without it, the juvenile court could not exist." D. ROTHMAN, *supra* note 68, at 218.

103. The following state statutes are among those that originally provided for indeterminate juvenile sentencing: ALA. CODE § 12-15-71(c)(3)(a), 12-15-74 (1986 & Supp. 1990); ARIZ. REV. STAT. ANN. § 8-241 (1989); ARK. STAT. ANN. § 9-28-209 (1987); CAL. WELF. & INST. CODE § 607 (West 1984); CONN. GEN. STAT. ANN. § 46b-141 (West 1986); D.C. CODE ANN. § 16-2322 (1990); FLA. STAT. ANN. § 39.11(4) (West 1988); HAW. REV. STAT. § 571-48(3) (Supp. 1990); ILL. ANN. STAT. ch. 37, paras. 802-23(3), 803-24(3), 804-21(3) & 805-23(3) (Smith-Hurd 1990); IND. CODE ANN. §§ 31-6-4-15.5, 31-6-4-19(g)-(i) (Burns 1986); IOWA CODE ANN. § 232.53 (West 1985); KY. REV. STAT. ANN. §§ 208.240, 208.430 (Michie/Bobbs-Merrill 1972, repealed 1984); LA. REV. STAT. ANN. § 13:1580 (West 1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 15, § 2714 (1980 & Supp. 1990); MISS. CODE ANN. §§ 43-21-605(g)(iii) (1972 & Supp. 1990); NEV. REV. STAT. ANN. §§ Code § 12-15-71(c)(3)(a), 12-15-74 (1986 & Supp. 1990); ARIZ. REV. STAT. ANN. § 8-241 (1989); ARK. STAT. ANN. § 9-28-209 (1987); CAL. WELF. & INST. CODE § 607 (West 1984); CONN. GEN. STAT. ANN. § 46b-141 (West 1986); D.C. CODE ANN. § 16-2322 (1990); FLA. STAT. ANN. § 39.11(4) (West 1988); HAW. REV. STAT. § 571-48(3) (Supp. 1990); ILL. ANN. STAT. ch. 37, paras.

in advance the amenability of the youth to rehabilitative treatment. Once rehabilitated, the youth would be released from further court control, regardless of the seriousness of the offense that gave rise to juvenile court jurisdiction, because the court's basis for its disposition was treatment, not punitive sanction. Indeed, the juvenile court judge could, at least in theory, discharge the juvenile offender immediately after the dispositional hearing if the judge believed that the youth had no need for court-monitored treatment or services, even if the juvenile had committed a serious offense.¹⁰⁴

Some states deliberately eliminated the usual procedural formalities of criminal adjudication from juvenile court.¹⁰⁵ These formalities were considered both unnecessary and undesirable: unnecessary because the role of the court was not to adjudicate guilt and punish, but to prescribe treatment;¹⁰⁶ undesirable because informality itself was deemed a part of the rehabilitative process.¹⁰⁷

802-23(3), 803-24(3), 804-21(3) & 805-23(3) (Smith-Hurd 1990); IND. CODE ANN. §§ 31-6-4-15.5, 31-6-4-19(g)-(i) (Burns 1986); IOWA CODE ANN. § 232.53 (West 1985); KY. REV. STAT. ANN. §§ 208.240, 208.430 (Michie/Bobbs-Merrill 1972, repealed 1984); LA. REV. STAT. ANN. § 13:1580 (West 1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 15, § 2714 (1980 & Supp. 1990); MISS. CODE ANN. §§ 43-21-605(g)(iii) (1972 & Supp. 1990); NEV. REV. STAT. ANN. §§ Code § 12-15-71(c)(3)(a), 12-15-74 (1986 & Supp. 1990); ARIZ. REV. STAT. ANN. § 8-241 (1989); ARK. STAT. ANN. § 9-28-209 (1987); CAL. WELF. & INST. CODE § 607 (West 1984); CONN. GEN. STAT. ANN. § 46b-141 (West 1986); D.C. CODE ANN. § 16-2322 (1990); FLA. STAT. ANN. § 39.11(4) (West 1988); HAW. REV. STAT. § 571-48(3) (Supp. 1990); ILL. ANN. STAT. ch. 37, paras. 802-23(3), 803-24(3), 804-21(3) & 805-23(3) (Smith-Hurd 1990); IND. CODE ANN. §§ 31-6-4-15.5, 31-6-4-19(g)-(i) (Burns 1986); IOWA CODE ANN. § 232.53 (West 1985); KY. REV. STAT. ANN. §§ 208.240, 208.430 (Michie/Bobbs-Merrill 1972, repealed 1984); LA. REV. STAT. ANN. § 13:1580 (West 1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 15, § 2714 (1980 & Supp. 1990); MISS. CODE ANN. §§ 43-21-605(g)(iii) (1972 & Supp. 1990); NEV. REV. STAT. ANN. §§ Code § 12-15-71(c)(3)(a), 12-15-74 (1986 & Supp. 1990); ARIZ. REV. STAT. ANN. § 8-241 (1989); ARK. STAT. ANN. § 9-28-209 (1987); CAL. WELF. & INST. CODE § 607 (West 1984); CONN. GEN. STAT. ANN. § 46b-141 (West 1986); D.C. CODE ANN. § 16-2322 (1990); FLA. STAT. ANN. § 39.11(4) (West 1988); HAW. REV. STAT. § 571-48(3) (Supp. 1990); ILL. ANN. STAT. ch. 37, paras. 802-23(3), 803-24(3), 804-21(3) & 805-23(3) (Smith-Hurd 1990); IND. CODE ANN. §§ 31-6-4-15.5, 31-6-4-19(g)-(i) (Burns 1986); IOWA CODE ANN. § 232.53 (West 1985); KY. REV. STAT. ANN. §§ 208.240, 208.430 (Michie/Bobbs-Merrill 1972, repealed 1984); LA. REV. STAT. ANN. § 13:1580 (West 1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 15, § 2714 (1980 & Supp. 1990); MISS. CODE ANN. §§ 43-21-605(g)(iii) (1972 & Supp. 1990); NEV. REV. STAT. ANN. §§ 62.082, 62.211 (Michie 1985); N.H. REV. STAT. ANN. § 169-B:19(D)(j) (1986 & Supp. 1990); N.J. STAT. ANN. § 2A:4-37 (West 1984); OHIO REV. CODE ANN. § 2151.355(A)(4),(5),(6) (Anderson 1983 & Supp. 1990); OR. REV. STAT. § 419.511(1) (1989); 42 PA. CONS. STAT. ANN. § 6353 (Purdon 1987 & Supp. 1990); UTAH CODE ANN. §§ 78-3a-39, 78-3a-40 (Supp. 1990); VT. STAT. ANN. tit. 33, § 657 (1981); VA. CODE ANN. § 16.1-285 (1988).

104. See *supra* note 101 for statutes giving juvenile court judges almost total discretion in sentencing.

105. Some state statutes guaranteed the juvenile an informal proceeding. See, e.g., HAW. REV. STAT. § 571-41(a) (1985); IDAHO CODE § 16-1807A (Supp. 1990); IOWA CODE ANN. § 232.29 (West 1985); KY. REV. STAT. ANN. § 208.060 (Michie/Bobbs-Merrill 1982) (repealed 1984); LA. REV. STAT. ANN. § 13.1579 (West 1977, repealed 1978); MISS. CODE ANN. § 43-21-405 (Supp. 1988); NEV. REV. STAT. ANN. § 62.193 (Michie 1985); N.D. CENT. CODE § 27-20-24 (Supp. 1989); OHIO REV. CODE ANN. § 2151.35 (Anderson 1990); OR. REV. STAT. § 419.498 (1989); 42 PA. CONS. STAT. ANN. § 6336(a) (Purdon 1987 & Supp. 1990); UTAH CODE ANN. § 78-3a-33 (1987).

106. Minnesota juvenile court judge Grier Orr acknowledged that procedural rules such as the rules of evidence "are sometimes forgotten or overlooked, because the juvenile court was a court of inquiry and not of prosecution; it is to find out the good that is within the boy or the child and to point out the way to reform, not to punish." D. ROTHMAN, *supra* note 68, at 216. Since procedural rules are designed to protect the accused from overreaching by the state, the protective aims of the court rendered them unnecessary. E. RYERSON, *supra* note 67, at 38-39; D. ROTHMAN, *supra* note 68, at 216-17.

107. Procedural informality extended even to the recommended physical layout of the court-

For this reason, trial by jury was eliminated in most juvenile courts as irrelevant to the proper determination before the court, because the court was less concerned with factually determining whether the child had broken the law than with sensitively diagnosing and treating the child's social pathology. As the Pennsylvania Supreme Court observed, "Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it."¹⁰⁸

The object of what Judge Mack termed "not so much the power, as the friendly interest of the state"¹⁰⁹ was invariably referred to as "the child," the "boy or girl" or "the lad."¹¹⁰ Calling teenaged lawbreakers "children" was not disingenuous rhetoric. Rather, it demonstrates that the social construction of adolescence as a species of childhood powerfully informed the ideology and practice of the *parens patriae* juvenile court.

IV. THE REFIGURATION OF THE LIFE CYCLE IN THE LATE TWENTIETH CENTURY

From our vantage point in the late twentieth century, the Progressives' use of the word "child" to describe the adolescent youth accused of violating the law seems incongruous if not willfully perverse. Just as the turn of the century Progressives reconstructed childhood and adolescence,¹¹¹ so too Americans in the last half of the twentieth century have limned a new refiguration of the human life cycle in which childhood and adolescence have been re-imagined. As a result, the Progressives' view of childhood now seems so foreign to our current assumptions that it may be difficult for us to credit that they seriously believed in it.

When adolescence was conceived at the turn of the century, it was assimilated into the familiar category of childhood. Children and adolescents were seen as sub-categories of one larger category, whose members were considered more like infants in their nature and needs than they were like adults.¹¹² The dichotomy between the essential natures of the child and adult remained intact. During the latter half of the twentieth century, however, the human life cycle increasingly was sub-divided into more and more stages of life.¹¹³ Beyond ado-

room. The judge was not to be seated above the courtroom on a bench, but was to be "[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him . . ." Mack, *supra* note 93, at 120.

108. *Commonwealth v. Fisher*, 213 Pa. 48, 54, 62 A. 198, 200 (1905). See generally D. ROTHMAN, *supra* note 68, at 216-17 (adjudication of guilt secondary to assessing social needs of the accused juvenile).

109. Mack, *supra* note 93, at 117.

110. I have culled those appellations from Judge Mack's law review article, *supra* note 93, at 117, 119, 120, in which he repeatedly uses them. Such usage is not peculiar to him, as can be seen elsewhere in this Article in the quotes from other juvenile justice advocates, as well as in the language chosen by states in statutorily framing their juvenile court system. See, e.g., statutes cited in *supra* note 100.

111. See *supra* notes 67-77 and accompanying text.

112. Skolnick, *supra* note 52, at 74.

113. See H. CHUDACOFF, *supra* note 72, at 157-90; J. DEMOS, *supra* note 74, at 114-31; L. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 169-75 (1990).

lescence, but before full adulthood, "youth" was defined as a new life stage encompassing those from their late teens into their twenties and even early thirties, roughly corresponding to the years spent in college and graduate education.¹¹⁴ Even adulthood was fragmented into life stages with attributed characteristics—old age was divided into the vigorous "young-old" and the truly "old-old,"¹¹⁵ and the prime of life was sub-divided into salient stages as well.¹¹⁶ Nor was this reconstruction of the life-cycle a preoccupation limited to academics; the mass media contributed "yuppies," "mid-life crisis," and the "menopausal male" to our vocabulary and to our vision of ourselves. By the latter part of the twentieth century, everyone was "just going through a phase."

As the life-cycle became fragmented into more stages, it became harder to see each stage as absolute and dichotomous.¹¹⁷ Age segregation, which followed from viewing life stages as discrete periods with characteristic attributes and needs, makes less sense when the life cycle is seen more as a continuum¹¹⁸ than as a sharply divided passage between childhood and adulthood. Boundaries delineating age-appropriate behavior have blurred, especially among the young, with both younger children¹¹⁹ and young adults adopting styles, attitudes, and activities that society formerly considered characteristic of adolescence.¹²⁰ Although at the turn of the last century, G. Stanley Hall confidently could delineate the quintessential and definitive characteristics of adolescence, researchers in the closing decades of this century saw a multiplicity of adolescences.¹²¹ From this later vantage point, adolescence did not seem to have any intrinsic and invariant characteristics.¹²²

114. Keniston, *Youth: A "New" Stage of Life*, 39 AM. SCHOLAR 631, 635 (1970); K. KENISTON, *YOUTH AND DISSENT* 7 (1971) (youth seen as a time of flexible experimentation in lifestyle, laying foundations for later stability in occupation, marital status and self-identity).

115. Neugarten, *Age Groups in American Society and the Rise of the Young-Old*, 415 ANNALS OF AM. ACAD. POL. & SOC. SCI. 187 (1974) (distinguishing between those in their sixties and seventies, as the young-old, and those over eighty, as the old-old).

116. Dannefer, *Adult Development and Social Theory*, 49 AM. SOCIOLOGICAL REV. 100, 101-04 (1984); Levinson, *A Conception of Adult Development*, 41 AM. PSYCHOLOGIST 3, 5-6 (1980); D. LEVINSON, *THE SEASONS OF A MAN'S LIFE* 18-33 (1978) (subdividing middle age).

117. As a general proposition, the greater the number of categories into which a field is divided, the less "fundamental" the categories seem. This may be because human beings are cognitively predisposed to organize information into simpler systems of meaning or because there really is a relationship between truth and elegance of explanation. Consider, however, the discomfiture of contemporary particle physics, with its multiplicity of "elementary" particles and its longing for a grand unified theory to impose elegant order on what are now seen as the four basic physical forces. See, e.g., S. HAWKING, *A BRIEF HISTORY OF TIME* 63-79, 155-69 (1988).

118. See, e.g., F. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 100 (1982) ("growing up is a process," not an event).

119. Some commentators have noted that childhood today appears attenuated in comparison with the childhood of our recent past, with children adopting adult values, attitudes and interests at earlier ages. See, e.g., N. POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 120-34 (1982); M. WINN, *CHILDREN WITHOUT CHILDHOOD* 3-7 (1983); Empey, *Introduction*, in *THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE* 27 (L. Empey ed. 1979).

120. Skolnick, *supra* note 66, at 164-65.

121. *Id.* at 160; J. DEMOS, *supra* note 74, at 107-13 (citing research in psychology and sociology suggesting that in the 1970s and 1980s, adolescence was no longer a salient life stage, at least among working-class youths).

122. Whereas it would have been unthinkable for 1950s teachers to have "rocked around the clock," and whereas many considered a miniskirt-clad thirty-year-old a pathetic figure of fun in the 1960s, by the 1990s the person in a neon jogging suit swaying to the beat of the latest pop tune could

Nor did the young appear to be as inherently and essentially different from adults as formerly had been assumed. Psychological research¹²³ showed that even comparatively young children possessed cognitive and reasoning abilities equivalent to those of adults.¹²⁴ The newer research showed that children were neither as incompetent as, nor adults as competent as, earlier psychologists had believed.¹²⁵ In the words of one sociologist, "In the post-industrial era . . . the institutional and psychological basis for conceiving childhood and adulthood as distinct stages of life may no longer exist."¹²⁶

Today we are witnessing the breakdown of the binary opposition¹²⁷ between child and adult, which provided the conceptual foundation of juvenile court jurisprudence. Conservatives¹²⁸ and liberals¹²⁹ may disagree on the poli-

plausibly be any age from six to sixty. Blue jeans, once the identifying uniform of the adolescent, now come in tiny infant sizes with snaps to allow easy diapering, and in sizes explicitly marketed for the older customer, cut to accommodate middle-aged spread. We seem to have come full circle, with young and old sharing styles of dress and amusement as they did in medieval days. See *supra* notes 58-65 and accompanying text.

123. The new psychological findings did not create the new construction of childhood. Rather, the changing social construction of childhood made the cognitive capacities of children an interesting area for research and made plausible the results that children and adults did not greatly differ in their cognitive attributes. For a discussion of the sociology of scientific research and Kuhnian paradigms, see *supra* note 25; see also N. SHOVER, A SOCIOLOGY OF AMERICAN CORRECTIONS 75-76 (1979) (research breakthroughs follow changes in social context, not vice versa). The resulting psychological literature lent support to the underlying cultural assumptions that children and adults were not dissimilar in their capacities and, in that way, reinforced the new construction of childhood.

124. For a survey of the psychological literature suggesting that children as young as 10 years old are as competent at decision-making as adults, see L. HOULGATE, THE CHILD AND THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS 61-73 (1980); Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 463-64 (1984); Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 153-58 (1989). Lawrence Kohlberg conducted the foundational study of moral reasoning in children. See Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11, 16 (1963) (observing that by age 14, the average child has reached the equivalent level of moral reasoning possessed by most adults); see also Skolnick, *supra* note 66, at 144-48 (providing later research on moral reasoning); Skolnick, *supra* note 52, at 52-55 (same).

125. Skolnick, *supra* note 52, at 56.

126. *Id.* at 74.

127. As a more general observation, binary oppositions thoroughly riddle-legal discourse. Examples include public versus private, subjective versus objective, fact versus value, substance versus procedure, rule versus standard, and so on, almost *ad infinitum*. Describing, decrying, and deconstructing these oppositions has given rise to an academic cottage industry. Out of the enormous body of scholarship which it has generated, I would, however, single out Pierre Schlag's playful yet deadly serious analysis of binary oppositions or "splits" in the law. See Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 930, 962-63 (1988); see also *id.* at 937-44 (discussing split proliferation and infinite regress). Professor Schlag's demonstration that the reflexive character of legal discourse leads splits to "cannibalize" the legal order suggests an intriguing comparison to the consequences of the breakdown of the adult-child dichotomy through split proliferation as well.

128. For example, a Reagan administration official rejected the idea that teenaged delinquents ought to be treated differently from adult offenders, saying, "[T]here is no reason why society should be more lenient with a 16-year-old first offender than a 30-year-old first offender." Regnery, *supra* note 4, at 68; see also E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 173-75 (1975) ("There is little reason left for not holding juveniles responsible under the same laws that apply to adults. The victim of a 15-year-old mugger is as much mugged as the victim of a 20-year-old mugger . . ."). Of course, while van den Haag's focus on the harm suffered by the victim is an appealing rhetorical device, it proves too much if it is read to eliminate the concept of *mens rea* from criminal law. The victim of an accidental contact may be just as injured as the victim of an intentional blow, but surely van den Haag would balk at imposing the

cies that ought to be implemented to deal with youthful criminal offenders, but both ends of the political spectrum agree that the child-adult distinction is a false dichotomy¹³⁰ that can no longer support disparate justice systems.

V. LEGAL IMPLICATIONS OF THE RE-IMAGINATION OF CHILDHOOD

As the socially constituted perception of adolescence and childhood has evolved during the late twentieth century, the premises of the *parens patriae* juvenile court no longer correspond to our cultural image of the young. Just as the invention of adolescence at the turn of the century made the Progressives' child welfare law reforms both possible and necessary, so, too, the contemporary change in the images of adolescence and childhood has legal implications that both reflect the change and at the same time reinforce it.

A. The 'Just Desserts' Juvenile Court

1. Rejection of Parens Patriae Ideology

The history of correctional philosophy in the second half of the twentieth century is a tale of steadily increasing loss of faith in positivistic penology.¹³¹ The original architects of the juvenile court were confident that juvenile delinquents could be rehabilitated, as long as judges possessed the expertise, information, and resources necessary for proper diagnosis and treatment. Despite several decades of experience with rehabilitative penology in the adult and juvenile justice systems, however, criminal recidivism stubbornly refused to wither away. Dozens of studies were undertaken to find out what program, what methodology, what theory might work. The depressing conclusion, by and large, was that nothing worked.¹³²

same criminal law sanctions in both cases. Notwithstanding this caveat, however, the point remains that many on the political right no longer view an offender's age as justifying what they see as the excessively lenient sanctions of juvenile court.

129. Liberal critics have focused on what they see as the illegitimacy of depriving juveniles of rights that all persons ought to enjoy by virtue of their humanity. "The . . . belief in the dignity of man does not have a cut-off point based on age. . . . To fail to treat a minor as a person . . . before the law, is to deny his humanity." H. FOSTER, *A BILL OF RIGHTS FOR CHILDREN* 10 (1974). For the views of other proponents of full rights for juveniles, see H. COHEN, *EQUAL RIGHTS FOR CHILDREN* (1980); R. FARSON, *BIRTHRIGHTS* (1974); and J. HOLT, *ESCAPE FROM CHILDHOOD* (1974); see also L. HOULGATE, *supra* note 124, at 6-8, 95-116 (applying a Hohfeldian analysis to generate a theory of autonomy rights for juveniles).

130. Dichotomies are proper categorizations when a field can be divided in two with membership in each sub-field being mutually exclusive, with no member left out of a sub-field and no overlap between categories. When the two sub-categories are either not mutually exclusive or not exhaustive, the dichotomy is a false one. D. FISCHER, *HISTORIANS' FALLACIES* 9-12 (1970).

131. By positivism in penology, I mean the assumption that external, deterministic factors such as heredity, environment, or social conditions cause criminal behavior, not an evil exercise of free will on the part of the criminal, and that unraveling the causes of crime will tell us what sentencing policies to adopt. S. COHEN, *AGAINST CRIMINOLOGY* 4-7 (1988). See generally N. SHOVER, *supra* note 123, at 35-75, 298-312 (discussing the development of positivistic correctional philosophy and the growing disillusionment of some experts in the field because of a lack of progress in discovering either the causes of criminal behavior or its cure).

132. Among the many studies finding that rehabilitative treatment was ineffective in preventing recidivism are D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975); NATIONAL RESEARCH COUNCIL COMMITTEE ON LAW ENFORCEMENT AND

As a consequence of the general disillusionment with rehabilitative penology, the focus of the criminal justice system turned from assessing the social needs of the offender to assessing the social harm that the offender caused—in short, from rehabilitation to retribution.¹³³ This trend occurred in juvenile justice systems as well,¹³⁴ underscoring the magnitude of change in the social perception of the culpability of young offenders. From a world in which the child by definition was morally incapable of committing a crime, we have now passed to a world in which juveniles are to be held strictly accountable for their crimes. As a result of this shift in juvenile justice philosophy, state juvenile court hearings have come to resemble adult criminal trials.¹³⁵

Consonant with this new philosophy, sentences in the new punitive juvenile court¹³⁶ are designed to hold the youth accountable for the offense committed; any rehabilitative services or programs provided during incarceration are incidental to the punishment meted out. The “just desserts” sentencing model bases the length of incarceration on how much punishment the offense merits, not on how long it might take to reform the offender. In rejecting rehabilitation as the justification for incarcerating the offender, determinate sentencing strikes at the very heart of the *parens patriae* dispositional framework.¹³⁷ The proliferation of

CRIMINAL JUSTICE, THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS (1979); Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 153 (1966); Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974); Robison & Smith, *The Effectiveness of Correctional Programs* 17 CRIME & DELINQ. 67 (1971). See generally N. SHOVER, *supra* note 123, at 274-312 (reviewing the research on correctional effectiveness).

133. The impact of this change on the criminal justice system can only be alluded to here. Two schools of thought emerge among the influential voices on correctional reform. On the one hand, commentators have argued that because rehabilitative treatment is ineffective and unfairly creates great disparity in sentences, sentencing discretion should be limited, with sentences based on the objective seriousness of the offense and the record of the offender. See AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* 145-53 (1971); D. FOGEL, “. . . WE ARE THE LIVING PROOF . . . : THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972); N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENT* (1976). In contrast, other commentators have contended that direct crime prevention best assures community protection and, therefore, that sentences should stress deterrence and incapacitation rather than rehabilitation. See E. VAN DEN HAAG, *supra* note 128, at 248-50; J. WILSON, *THINKING ABOUT CRIME* 162-82 (1975); Boland & Wilson, *Age, Crime and Punishment*, 51 PUB. INTEREST 22, 22 (1978). Ironically, both schools of thought arrive at the same recommendation—determinate sentences proportionate to the offense—via very different political routes.

134. See *infra* notes 136-38 and accompanying text.

135. Supreme Court decisions imposing due process limitations on juvenile court practices have prompted some of the procedural changes in juvenile hearings. See *infra* notes 179-207 and accompanying text. As the details of the Washington model for juvenile court demonstrate, however, the new-style juvenile court proceeding incorporates many procedural formalities that were not constitutionally mandated. See *infra* notes 154-63 and accompanying text.

136. For a discussion of the sweeping changes in juvenile court philosophy and practice during the 1970s and 1980s, see Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U.L. REV. 821, 822-96 (1988); Gardner, *Punitive Juvenile Justice: Some Observations On A Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129, 131-47 (1987); Krisberg, Schwartz, Litsky, & Austin, *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5, 12-28 (1986); Walkover, *supra* note 41, at 523-24.

137. The court, in *In re Felder*, recognized the centrality of indeterminate sentencing to the *parens patriae* juvenile court. *In re Felder*, 93 Misc. 2d 369, 377, 402 N.Y.S.2d 528, 533 (N.Y. Fam. Ct. 1978). The court observed that “[t]he distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing

"just desserts" juvenile sentencing laws in the 1980s¹³⁸ represents telling evidence of the demise of the older juvenile court model.

2. A Model of the New Juvenile Court

In 1977, Washington state enacted a complete overhaul of its juvenile court system.¹³⁹ Washington's Juvenile Justice Act has been called "the most substantial reform of a state juvenile code that has occurred anywhere in the United States."¹⁴⁰ Often cited as the paradigmatic embodiment of the new juvenile court philosophy, the Washington system is widely acknowledged as the model for reforms in juvenile court systems throughout the country.¹⁴¹

Washington's Juvenile Justice Act exemplifies a rejection of both the philosophy and practice of the traditional *parens patriae* juvenile court.¹⁴² According to Representative Mary Kay Becker, the principal sponsor of the bill in the state legislature, the new "just desserts" system enacted by the Juvenile Justice Act represents a move "away from the *parens patriae* doctrine of benevolent coercion, and closer to a more classical emphasis on justice. . . . The presumptive sentencing scheme . . . makes [it] clear that youngsters who are being sen-

ing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution." *Id.* Thus, the *Felder* court held that juveniles subject to a determinate sentence were entitled to trial by jury, whereas those facing an indeterminate sentence had no such right. *Id.* at 377-78, 402 N.Y.S.2d at 533.

138. Some "just desserts" statutes provide determinate sentencing matrices, some require mandatory minimum sentences for many offenses, and some rely on administratively promulgated sentencing guidelines. *See, e.g.,* ARIZ. REV. STAT. ANN. § 8-241 (1989); ARK. STAT. ANN. § 45-436 (Supp. 1975); CAL. WELF. & INST. CODE § 731 (West 1984); COLO. REV. STAT. §§ 19-3-113, 19-3-113.1, 19-3-113.2 (1986); CONN. GEN. STAT. § 46b-140 (Supp. 1980); DEL. CODE ANN. tit. 10, § 937 (Supp. 1990); GA. CODE ANN. §§ 15-11-33, 15-11-37 (1987); ILL. ANN. STAT. ch. 37, paras. 805-35 (Smith-Hurd Supp. 1990); KY. REV. STAT. ANN. §§ 208.194, 208.200 (Michie/Bobbs-Merrill Supp. 1990); MINN. STAT. ANN. §§ 260.015, 260.195 (West 1982); N.J. STAT. ANN. §§ 2A:4A-43, 2A:4A-44 (West 1987 & Supp. 1990); N.Y. FAM. CT. ACT §§ 352.2, 353.5 (McKinney Supp. 1991); N.C. GEN. STAT. §§ 7A-649, 7A-652 (1989); OHIO REV. CODE ANN. §§ 2151.353, 2151.355 (Anderson 1985 & Supp. 1990); TENN. CODE ANN. §§ 37-1-131, 37-1-137 (Supp. 1990); TEX. FAM. CODE ANN. §§ 54.04, 53.045 (Vernon Supp. 1991); WASH. REV. CODE ANN. § 13.40.160 (Supp. 1991). Even in jurisdictions without statutory "just desserts" sentencing, judges appear to be exercising their sentencing discretion by basing juvenile dispositions on "just desserts" principles. *Feld, supra* note 136, at 882-91.

139. Basic Juvenile Court Act, ch. 291, §§ 1-83, 1977 Wash. Laws 1002.

140. Schneider & Schram, *Responses of Professionals to the Washington (State) Law*, in CURRENT ISSUES IN JUVENILE JUSTICE 101, 101 (R. Corrado, M. LeBlanc & J. Trepanier eds. 1983).

141. *See, e.g.,* E. MCGARRELL, JUVENILE CORRECTIONAL REFORM 13 (1988); Castellano, *The Justice Model in the Juvenile Justice System: Washington State's Experience*, 8 LAW & POL'Y 479, 481 (1986); *Feld, supra* note 136, at 852-53, 890; Patrick & Jensen, *Changes in Rights and Procedures in Juvenile Offense Proceedings*, 14 GONZ. L. REV. 313, 313 (1979); Schneider & Schram, *supra* note 140, at 101; Serrill, *Washington's New Juvenile Code*, 6 CORRECTIONS MAG. 36, 37 (1980); Trepanier, *Trends in Juvenile Justice: Washington State*, in CURRENT ISSUES IN JUVENILE JUSTICE 92 (R. Corrado, M. LeBlanc, & J. Trepanier eds. 1983); Walkover, *supra* note 41, at 508.

142. *See* Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289, 305-07 (1979) (describing the motivation of the state legislature in enacting the new system). Becker traced the history of Washington's adoption of *parens patriae* juvenile justice and the gradual public dissatisfaction with a system in which courts based dispositions upon treatment needs rather than proportionate relation to the offenses committed. *Id.* at 293-95. Becker notes that, during the debates on the act, the legislature heard testimony detailing case histories of juveniles whose sentences, based on treatment need, seemed either too low, as in the case of a juvenile given 100 hours of community service and a \$50 fine for murder, or too high, as in the case of first time property misdemeanants sentenced to incarceration. *Id.* at 294-95.

tenced—*i.e.*, deprived of liberty—are being punished rather than ‘treated.’”¹⁴³

The core provisions of Washington’s new system are its determinate sentencing scheme, which sets the length of sentence on the basis of two objective characteristics: the offense, legislatively ranked by level of seriousness, and the prior criminal record of the offender.¹⁴⁴ Judges may deviate from the standard sentences only if mitigating or aggravating factors pertain to the offense; moreover, judges may not base sentencing deviations on their perception of the offender. The law expressly forbids sentencing judges from taking into account information showing that the offender has been abused or neglected.¹⁴⁵ Nor may prosecutors exercise discretion on the basis of such factors. Instead, they must prosecute serious cases regardless of any perceived treatment needs of the child.¹⁴⁶ Even the prosecutorial decision to divert minor offenses from the formal adjudication process cannot be made with reference to social needs of the child in question.¹⁴⁷ In short, the new juvenile justice system has divorced consideration of the social needs of the offender from the issue of imposition or duration of confinement.

The punitive focus of the Juvenile Justice Act was sharpened by Washington’s establishment in 1984 of the Juvenile Disposition Standards Commission to implement the ‘clear policy’ on sentencing called for by the Act.¹⁴⁸ Charged with the responsibility of developing a policy and standards on juvenile sentencing, the Commission produced the *Washington State Juvenile Disposition Standards Philosophy and Guide* in order to “provide direction for the various professionals in the juvenile justice community and help the public understand the reasons and methods behind the juvenile disposition standards.”¹⁴⁹ The

143. *Id.* at 307-08. Becker’s legislative history is consistent with the statutory statement of purpose enunciated as a preface to the Act. According to the Act, the purpose of the juvenile justice system is to:

- (a) Protect the citizenry from criminal behavior;
- (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;
- (c) Make the juvenile accountable for his or her criminal behavior;
- (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;
- (e) Provide due process for juveniles alleged to have committed an offense;
- (f) Provide necessary treatment, supervision and custody for juvenile offenders;
- (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
- (h) Provide for restitution to victims of crime;
- (i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels; and
- (j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdiction limitations of the courts, institutions, and community services.

WASH. REV. CODE § 13.40.050(2) (1977).

144. *Id.* § 13.40.150(3)(h)-(i).

145. *Id.* § 13.40.150(4)(e).

146. *Id.* § 13.40.070(3).

147. *Id.* § 13.40.070(7).

148. *Id.* §§ 13.40.010(2)(j); 13.40.027(l).

149. WASHINGTON STATE JUVENILE DISPOSITION STANDARDS COMMISSION, WASHINGTON

Commission Guide adopted a youth justice model with three major components: justice and accountability; community safety; and youth development.¹⁵⁰ The Commission Guide emphasized that proportional punishment of offenders both furthers justice¹⁵¹ and promotes community safety.¹⁵² While acknowledging that providing treatment services during incarceration might be desirable, the Commission Guide cautioned that social services must be only incidental to sanctions, and never the actual rationale for the sentence.¹⁵³

Disposition is not the only aspect of juvenile court to undergo a transformation. Washington replaced the intimate, informal proceeding in which the judge might "put his arm around his shoulder and draw the lad to him"¹⁵⁴ with procedures that, with one exception,¹⁵⁵ precisely mirror those of the adult criminal trial. The juvenile, like an adult, is charged by prosecutorial information, and must enter a plea of guilty or not guilty.¹⁵⁶ The arraignment hearing is explicitly governed by the same court rules pertaining to adult defendants.¹⁵⁷ Like an adult accused, the juvenile has the right to be represented by counsel¹⁵⁸ and to the services of investigators and expert witnesses necessary to a defense.¹⁵⁹ The juvenile is entitled to the same notice of charges, discovery of prosecution evidence, opportunity to be heard, and confrontation of adverse witnesses as an adult enjoys.¹⁶⁰ Severance and joinder likewise are governed by the same rules that apply in adult criminal cases.¹⁶¹ Admissibility of evidence is governed by the same constitutional standards,¹⁶² and the normal rules of evidence apply

STATE JUVENILE DISPOSITION STANDARDS PHILOSOPHY AND GUIDE 3 (1984) [hereinafter COMMISSION GUIDE].

150. *Id.* at 9.

151. "[T]he community should obtain justice by the fair and prompt imposition of sanctions upon youthful offenders. . . . The more serious the youth's offense, the greater the sanction the youth should receive." *Id.*

152. "The safety of the community is addressed when sentences and sanctions are based upon the youth's offense history." *Id.* at 12.

153. The Commission Guide stated that:

Punishment, under the guise of rehabilitation, is unjust and will be perceived as such by the youth. A sentence that is geared to the treatment needs of the youth undercuts the significance of the crime committed. The need for treatment services should not influence the severity of the youth's sentence or sanctions.

Id. at 15.

154. Mack, *supra* note 93, at 120.

155. The exception is that jury trials are not available to Washington's juveniles. WASH. REV. CODE ANN. § 13.04.021 (Supp. 1991); *State v. Schaaf*, 109 Wash. 2d 1, 16-17, 743 P.2d 240, 247 (1987).

156. WASH. REV. CODE ANN. § 13.40.130(1) (Supp. 1991).

157. WASH. JUV. CT. R. 7.6; WASH. CRIM. CT. R. 4.1, 4.2.

158. WASH. REV. CODE ANN. § 13.40.140(2) (Supp. 1991).

159. *Id.* § 13.40.140(3); WASH. JUV. CT. R. 9.3; WASH. CRIM. CT. R. 3.1(f).

160. WASH. REV. CODE ANN. § 13.40.140(7) (Supp. 1991).

161. WASH. JUV. CT. R. 7.9, 7.10; WASH. CRIM. CT. R. 4.3, 4.4.

162. WASH. REV. CODE ANN. § 13.40.140(8) (Supp. 1991). The statute provides:

A juvenile shall be accorded the *same* privilege against self-incrimination as an adult. An extrajudicial statement which would be constitutionally inadmissible in a criminal proceeding may not be received in evidence at an adjudicatory hearing over objection. Evidence illegally seized or obtained may not be received in evidence over objection at an adjudicatory hearing to prove the allegations against the juvenile if the evidence would be inadmissible in an adult criminal proceeding. An extrajudicial admission or confession made by the

with full rigor.¹⁶³ In essence, except for the lack of trial by jury, the juvenile court fact finding in Washington is, by statute and court rule, procedurally identical to that in an adult criminal trial.

As the Washington juvenile justice model shows, the juvenile court of the late twentieth century bears little procedural resemblance to the Progressive vision of juvenile court. No matter how procedurally congruent the juvenile and adult court hearings become, however, juvenile court dispositions unavoidably differ from adult dispositions in one key regard: the potential length of incarceration is limited by the juvenile court's inevitable loss of jurisdiction over offenders when they reach the age of majority.¹⁶⁴ Because sentences proportionate to offenses therefore may not be available to the juvenile court judge, the trend towards a just desserts model of juvenile court has sharpened the perception that juvenile court sanctions are inappropriate for many youthful offenders.

B. *Bypassing Juvenile Court Jurisdiction*

When a judge perceives that the maximum length of confinement available in the juvenile system is too short to be an appropriate sanction in a particular case, a mechanism¹⁶⁵ long has existed to transfer jurisdiction from juvenile court to the adult criminal justice system.¹⁶⁶ Traditionally, the *parens patriae* juvenile court judge could waive juvenile jurisdiction over an offender if the judge determined that the youth was not amenable to the rehabilitative treatment of the juvenile correctional system.¹⁶⁷ In making the waiver decision, the juvenile court judge focussed solely on the individual characteristics of the youth. The

juvenile out of court is insufficient to support a finding that the juvenile committed the acts alleged in the information unless evidence of a corpus delicti is first independently established in the same manner as required in an adult criminal proceeding.

Id. A 1981 amendment added the emphasized portions to the provision. Act of Apr. 25, 1981, ch. 299, § 11(8), 1981 Wash. Laws 1337, 1351.

163. WASH. JUV. CT. R. 7.11(b).

164. The age of an offender at which the court loses the power to enforce its sanctions is not necessarily the same as the age at which the court loses jurisdiction to try an offender. Again, the Washington model is illustrative. Washington's juvenile court cannot try offenders once they reach their eighteenth birthday, even if the offender committed the alleged activity while still legally a juvenile. WASH. REV. CODE ANN. § 13.40.300(1) (Supp. 1991); *State v. Calderon*, 102 Wash. 2d 348, 351-52, 684 P.2d 1293, 1296 (1984). Nevertheless, provided that the juvenile court has not yet lost jurisdiction automatically, the court may order continued incarceration in the juvenile system until the juvenile turns 21. WASH. REV. CODE ANN. § 13.40.300(1)(a) (Supp. 1991). Although many states have analogous provisions, no state has adopted an extended jurisdiction mechanism to allow unlimited continuation of juvenile sanctions.

165. The name given to this mechanism differs from state to state. In California, the procedure is a "fitness hearing," determining whether the accused is fit for juvenile court sanctions, CAL. WELF. & INST. CODE § 707 (West Supp. 1991); Massachusetts conducts a "transfer hearing." MASS. ANN. LAWS ch. 119, § 61 (Law. Co-op. Supp. 1990). In Washington, the statute awkwardly refers to a hearing to decide if the juvenile court will decline to exercise its jurisdiction as a "decline hearing." WASH. REV. CODE ANN. § 13.40.110 (Supp. 1991). The most commonly used term is "waiver," as the juvenile court "waives" its ordinary jurisdiction over the youth. This Article will use the waiver nomenclature to refer to the procedures for prosecuting a juvenile as an adult.

166. Zimring, *Notes Toward a Jurisprudence of Waiver*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 193, 201 (1981) (maintaining that the need for longer sentences is the moving force behind waiving juvenile court jurisdiction).

167. See S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM §§ 4.1-.4 (2d ed. 1980).

criminal act itself was relevant only insofar as the nature of the offense committed might indirectly shed light on the likelihood that the child who had done such an act could be reformed.¹⁶⁸

The shift from a rehabilitative to a just desserts sentencing philosophy, however, has greatly transformed the waiver process. This shift in focus was presaged in the Supreme Court's 1966 decision *Kent v. United States*.¹⁶⁹ That decision required an adversary hearing before a juvenile could be transferred to adult court for federal prosecution, and ordered the judge to articulate the specific basis for the waiver decision.¹⁷⁰ The Court listed several appropriate factors that the judge must consider in making the waiver decision, including "[t]he seriousness of the alleged offense to the community and whether the protection of the community requires waiver[,] . . . [w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner[,] . . . [and] whether the alleged offense was against persons or against property."¹⁷¹ In addition, the judge could also take into account the more traditional considerations, such as:

The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living[,] . . . [t]he record and previous history of the juvenile[,] . . . and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court.¹⁷²

Despite the *Kent* Court's recognition that a judge must look at the offense itself in making the waiver decision, the *Kent* opinion still used the nature and seriousness of the offense as predictors of future dangerousness to be factored into the determination of whether the offender could successfully be rehabilitated. In the Court's discussion of the issue, one finds no intimation that a juvenile who commits certain offenses consequently *deserves* a specific punishment, only that juvenile correctional treatment might well be fruitless under those circumstances.

In contrast, under the just desserts model, the discretionary waiver procedures,¹⁷³ which once centered on an assessment of whether an offender could be

168. *Id.*

169. 383 U.S. 541 (1966).

170. *Id.* at 557, 561.

171. *Id.* at 566-67.

172. *Id.* at 567.

173. There are two classes of discretionary waiver procedures: judicial waiver and prosecutorial waiver. Except for New York and Nebraska, all states and the District of Columbia provide for a judicial determination of whether a court should waive juvenile jurisdiction. *See* ALA. CODE § 12-15-34 (1990); ALASKA STAT. § 47.10.060 (1990); ARIZ. REV. STAT. ANN. § 8-202(C) (1989); ARK. STAT. ANN. § 9-27-318 (1987); CAL. WELF. & INST. CODE § 707(a)(b) (Deering 1991); COLO. REV. STAT. § 19-1-104 (1990); CONN. GEN. STAT. §§ 46b-126, 46b-127 (1989); DEL. CODE ANN. tit. 10, §§ 921, 938 (1990); D.C. CODE ANN. § 16-2307(a) (1990); FLA. STAT. ANN. § 39.02 (West 1989); GA. CODE ANN. § 15-11-39 (1987); HAW. REV. STAT. § 571-22 (1990); IDAHO CODE § 16-1806 (1990); ILL. ANN. STAT. ch. 37, para. 805-4 (Smith-Hurd 1990); IND. CODE ANN. § 31-6-2-4 (Burns 1990); IOWA CODE § 232.45 (1989); KAN. STAT. ANN. § 38-1636 (1989); KY. REV. STAT. ANN. § 208.170 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 13:1571.1 (West 1983); ME. REV. STAT. ANN. tit. 15, § 3101 (1989); MD. CTS. & JUD. PROC. CODE ANN. § 3-817 (1990); MASS. ANN. LAWS ch. 119, § 61 (Law. Co-op. 1986); MICH. COMP. LAWS § 712A.4 (1990); MINN. STAT. § 260.125 (1991); MISS. CODE ANN. § 43-21-151 (1990); MO. REV. STAT. § 211.071 (1989); MONT.

salvaged, now direct the judge to focus on how the community can be made safe. Although the individualized waiver determinations made by juvenile court judges invariably are inconsistent due to the varying philosophical bents of the individual judges and to the subjective nature of weighing the factors in any particular case,¹⁷⁴ judges nonetheless appear to be responding to the new philosophy by emphasizing the nature of the offense over the characteristics of the offender even in their discretionary waiver decisions.¹⁷⁵

On the political front, state legislatures have acted to limit judicial discretion in the waiver decision in two ways. Since 1970, half of the states have amended their judicial waiver statutes to restrict waiver to certain types of offenses or presumptively to require trial as an adult for specific enumerated offenses.¹⁷⁶ A considerable and growing number of states have gone even further, passing laws that automatically try juvenile offenders accused of certain crimes, or with specified prior records, as adults.¹⁷⁷

CODE ANN. § 41-5-206 (1989); NEV. REV. STAT. § 62.080 (1985); N.H. REV. STAT. ANN. § 169-B:24 (1989); N.J. REV. STAT. § 2A:4A-26 (1990); N.M. STAT. ANN. §§ 32-1-29, 32-1-30 (1989); N.C. GEN. STAT. § 7A-608 (1989); N.D. CENT. CODE § 27-20-34 (1989); OHIO REV. CODE ANN. § 2151.26 (Anderson 1990); OKLA. STAT. ANN. tit. 10, § 1112 (West 1989); OR. REV. STAT. § 419.533 (1989); 42 PA. CONS. STAT. § 6355 (Purdon 1989); R.I. GEN. LAWS § 14-1-7 (1990); S.C. CODE ANN. § 20-7-430 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. § 26-11-4 (1990); TENN. CODE ANN. § 37-1-134 (1990); TEX. FAM. CODE ANN. § 54.02 (Vernon 1989); UTAH CODE ANN. § 78-3a-25 (1990); VT. STAT. ANN. tit. 33, §§ 632, 635 (1989); VA. CODE ANN. § 16.1-269 (1990); WASH. REV. CODE § 13.40.110 (1990); W. VA. CODE § 49-5-10 (1990); WIS. STAT. § 48.18 (1987-88); WYO. STAT. § 14-6-237 (1986).

Several states provide concurrent jurisdiction for some or all offenses in both juvenile and criminal court, allowing prosecutors to exercise their discretion in filing charging documents in either court system. See ARK. STAT. ANN. § 41-617 (1977 & Supp. 1983) (concurrent jurisdiction over all criminal violations); NEB. REV. STAT. § 43-247 (1989) (same); WYO. STAT. § 14-6-203(c) (1986) (same); cf. COLO. REV. STAT. § 19-1-104 (Supp. 1990) (concurrent jurisdiction only over specific listed offenses); FLA. STAT. ANN. §§ 39.02 (West 1989) (same); GA. CODE ANN. § 15-11-5 (1990) (same); UTAH CODE ANN. § 78-3a-25(6) (1990) (same).

174. See Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 491-94 (1987).

175. The judicial disquiet over having to make forward-looking predictions of amenability to treatment and preferences for substituting an apparently objective assessment of the seriousness of offense also reflect the perception among many correctional professionals that prediction of future dangerousness is, at best, problematic. See N. MORRIS, *supra* note 133, at 66-76; Morris & Miller, *Predictions of Dangerousness*, 6 CRIME & JUSTICE 1 (1985).

176. The specifics of these statutory provisions vary considerably from state to state. For a detailed discussion of the differing statutory schemes, see Feld, *supra* note 174, at 504-11.

177. Many states have statutes providing for automatic transfer to the adult criminal justice system based upon the offense charged. See, e.g., ARK. STAT. ANN. § 41-617 (1977); COLO. REV. STAT. § 19-1-104(4)(b) (1973); CONN. GEN. STAT. § 46b-127 (1986); DEL. CODE ANN. tit. 10, § 921 (Supp. 1990); D.C. CODE ANN. § 16-2301(3) (1981); FLA. STAT. ANN. §§ 39.02, 39.04 (West 1988); IDAHO CODE § 16-1806A (Supp. 1990); ILL. ANN. STAT. ch. 37, para. 805-4 (Smith-Hurd 1990); IND. CODE ANN. § 31-6-2-1(d) (Burns 1987); KAN. STAT. ANN. § 38-1602(b)(3) (1986); LA. REV. STAT. ANN. § 13:1570(A)(5) (West 1983); MD. CTS. & JUD. PROC. CODE ANN. § 3-804(d) (1989); MISS. CODE ANN. § 43-21-105 (Supp. 1988); NEV. REV. STAT. § 62.040 (1985); N.Y. PENAL LAW § 30.00(2) (McKinney 1987); OHIO REV. CODE ANN. § 2151.26 (Anderson 1990); OKLA. STAT. ANN. tit. 10, § 1104.2 (West Supp. 1991); 42 PA. CONS. STAT. ANN. § 6302 (Purdon Supp. 1990); R.I. GEN. LAWS § 14-1-7.1 (Supp. 1990); UTAH CODE ANN. § 78-3a-25(6) (Supp. 1990); VT. STAT. ANN. tit. 33, §§ 632, 635a (1981).

In referring to these laws as automatic waiver statutes, I do not mean to imply that there is no discretion involved in their operation. In choosing what offense to charge, prosecutors control whether automatic waiver rules will apply to an accused. That choice obviously entails the exercise of prosecutorial discretion. Once the prosecutor has opted to charge a juvenile with an offense covered by such a statute, however, there is no judicial discretion to retain jurisdiction.

Automatic waiver statutes represent a total repudiation of the philosophy of the *parens patriae* juvenile court, which stemmed from the belief that juveniles were so different in nature from adults as to justify a separate justice system for them.¹⁷⁸ Whereas the traditional juvenile court saw "child" and "adult" as mutually exclusive and essentially dichotomous age-based categories, waiver of juveniles into the adult criminal justice system appears rational only when this categorization has blurred. Discretionary waiver rests on the assumption that, although most juveniles differ enough from adults so that they ought not be held accountable for their law violations, some persons who are chronologically juveniles share enough adult attributes to be treated as adults and punished for their crimes. In contrast, automatic waiver statutes break down the child-adult dichotomy completely, assuming that nothing inherent in the nature of children generally or in the individual juvenile in particular prevents holding the juvenile offender criminally responsible for breaking the law. Because the nature of the offense rather than the nature of the offender triggers adult jurisdiction under automatic waiver statutes, the proliferation of these laws is another indication of the impact on the law of the refiguration of childhood and adolescence.

C. *The Supreme Court and the Juvenile Offender*

Examining United States Supreme Court decisions that deal with the juvenile justice system serves two valuable functions. First, because Supreme Court justices are themselves culturally and historically situated actors, tracing the Court's developing juvenile jurisprudence provides tangible evidence of the general social refiguration of childhood. But the Court's opinions are not merely products of larger social processes; these decisions also actively produce social reality. Supreme Court pronouncements have direct, real-world consequences,¹⁷⁹ reshaping institutions or permitting institutions to resist change, according to the Court's decree. Second, and more broadly, the Supreme Court's impact on society transcends the direct consequences of its decisions. The language used in Supreme Court opinions constitutes a powerful rhetorical resource, reconstructing the framework within which public debate is conducted.¹⁸⁰ That being the case, Supreme Court opinions can be seen as both cultural context and content, as artifact and architect of legal reality.

1. The Procedural Challenge to the *Parens Patriae* Juvenile Court

Beginning in the mid-1960s, the Supreme Court undertook a systematic re-examination of the procedural manifestations of the *parens patriae* juvenile

178. See *supra* notes 68-89 and accompanying text.

179. See Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601-10 (1986) (observing that legal decisions have coercive, concrete impact).

180. For example, when the Supreme Court frames the abortion debate as an issue of privacy, *Roe v. Wade*, 410 U.S. 113, 154 (1973); when it looks at racial segregation as a question of enforced racial inferiority, *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954); when it characterizes affirmative action programs as reverse discrimination, *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 496 (1989), the Court provides a new vocabulary that reshapes subsequent debate, and that legal discourse, which is highly critical of the Court, cannot be ignored.

court. The opening salvo of the juvenile court's "constitutional domestication"¹⁸¹ was fired in the 1967 decision *In re Gault*.¹⁸² That case arose when a neighbor called the police to complain that fifteen-year-old Gerald Gault had made a lewd telephone call to her.¹⁸³ The police arrested Gault and held him in custody overnight. The following day, he appeared in court without a lawyer to answer an allegation specifying only that he was "a delinquent minor . . . in need of the protection of this Honorable Court."¹⁸⁴ No witnesses were sworn and no transcript was made of the proceedings. In fact, the neighbor whose complaint triggered Gault's arrest did not appear in court at all.¹⁸⁵ Instead, the Arizona juvenile court judge questioned Gault about the telephone call.¹⁸⁶ As a result of incriminating admissions that Gault made during this questioning, the judge ordered Gault committed to a state juvenile facility until his twenty-first birthday, unless earlier paroled.¹⁸⁷ Had Gault been an adult, however, the maximum possible sentence would have been a two month jail sentence and a fifty dollar fine.¹⁸⁸

In his habeas corpus petition, Gault claimed that the Arizona juvenile court hearing violated his constitutional rights to notice of the charges, to counsel, to confront and cross-examine witnesses against him, to a transcript and to appellate review, and also that the hearing deprived him of his privilege against self-incrimination.¹⁸⁹ The United States Supreme Court agreed, finding that much of the procedural informality of juvenile court failed to provide due process of law.¹⁹⁰

In reaching this conclusion, the Court looked beyond the articulated *parens patriae* philosophy of the juvenile court and critically examined its implementation in practice.¹⁹¹ Despite "the highest motives and most enlightened impulses" of the founders of the juvenile justice system, the Court concluded that the reality of juvenile court had failed to live up to its promise.¹⁹² Informal procedures and unfettered discretion resulted in arbitrariness, not in the "careful, compassionate [and] individualized treatment" imagined by the proponents of juvenile court.¹⁹³

Although the *Gault* majority expressed skepticism about much of the asserted rationale for a separate juvenile court, the Court still apparently accepted the belief that children and adults are sufficiently different in nature to justify a

181. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 236.

182. 387 U.S. 1 (1967).

183. *Id.* at 4.

184. *Id.* at 5.

185. *Id.*

186. *Id.* at 6.

187. *Id.* at 7-8.

188. *Id.* at 8-9.

189. *Id.* at 9-10.

190. *Id.* at 13-14, 30-31.

191. *Id.* at 14-22, 28-30.

192. *Id.* at 17-18.

193. *Id.* at 18-19.

separate court system. Although the majority acknowledged the brute reality of juvenile incarceration despite whatever euphemistic labels its institutions might bear,¹⁹⁴ the Court nevertheless declined to hold that juvenile delinquency adjudications are the equivalent of criminal prosecutions.¹⁹⁵ As a result, the *Gault* holding was grounded in the due process clause, rather than the more specific sixth amendment guarantees.¹⁹⁶ If the Court was prepared to say that "the condition of being a boy does not justify a kangaroo court,"¹⁹⁷ it was not ready to say that being tried as a boy made no difference to the scope of his constitutional rights.

The consequences of regulating juvenile court procedure through the due process clause rather than through the sixth amendment became obvious four years after *Gault* in *McKeiver v. Pennsylvania*.¹⁹⁸ In *McKeiver*, the Court held that juveniles are not constitutionally entitled to trial by jury in delinquency hearings.¹⁹⁹ The plurality opinion²⁰⁰ reaffirmed that the juvenile delinquency adjudication had "not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment."²⁰¹ Thus the Court framed the issue as whether "fundamental fairness" required jury trials under the due process clause.²⁰² In answering this question, the Court interpreted "fundamental fairness" as mandating only those procedural safeguards that enhanced accurate fact-finding.²⁰³

As the *McKeiver* plurality recognized, jury trial²⁰⁴ is the procedural right

194. *Id.* at 27.

195. The Court said only that delinquency proceedings are "comparable in seriousness to a felony prosecution," not that they are equivalent to adult prosecutions. *Id.* at 36.

196. The sixth amendment explicitly mandates many of the rights that the Court denied *Gault*. It applies "[i]n all criminal prosecutions," giving the defendant "the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

197. *Gault*, 387 U.S. at 28.

198. 403 U.S. 528 (1971) (plurality opinion).

199. *Id.* at 545.

200. Justice Blackmun authored the plurality opinion, in which Justices Burger, Stewart and White joined. Justice White wrote a separate concurrence consistent with Blackmun's opinion, and Justice Harlan concurred specially, stating that if he thought the sixth amendment were binding on the states, he would have found juveniles entitled to a jury trial under it. *Id.* at 557 (Harlan, J., concurring). Justice Brennan concurred as to the Pennsylvania cases and dissented as to the North Carolina cases, asserting that the purposes of jury trial are satisfied as long as the trial is public as in Pennsylvania. *Id.* at 553-57 (Brennan, J., concurring in part, dissenting in part). Justice Douglas, with whom Black and Marshall joined dissenting, would have found both states' systems violative of the sixth and fourteenth amendments. *Id.* at 561 (Douglas, J., dissenting).

201. *Id.* at 541.

202. *Id.*

203. *Id.* at 543. This analysis departs from the earlier discussion of fundamental fairness in *Gault*, in which the Court held that procedural due process vindicates interests in preventing governmental oppression as well as interests in promoting accurate fact-finding. *In re Gault*, 387 U.S. 1, 47 (1967); see also *Duncan v. Louisiana*, 391 U.S. 145, 151-58 (1968) (jury trials provide protection against biased judges, over-zealous prosecutors, and other forms of government oppression). *Gault*'s application of the privilege against self-incrimination to juveniles through the due process clause cannot be squared with *McKeiver*'s equation of due process with accurate fact-finding; the problem with *Gault*'s interrogation had nothing to do with its factual reliability, but rather with governmental overreaching.

204. Commentators have suggested that *McKeiver* reflects the Burger Court's general hostility

most inimical to the traditional juvenile court model.²⁰⁵ With a trial by jury, the juvenile delinquency adjudication would so closely resemble a criminal trial as to make a separate juvenile justice system superfluous.²⁰⁶ If a state chose to maintain a separate (if concededly unequal) justice system for the young, the Court was unwilling to make that choice constitutionally invalid.²⁰⁷

2. The Breakdown of the Child-Adult Dichotomy in Supreme Court Jurisprudence

As an institution, juvenile court depends for its legitimacy upon the belief that the young inherently differ from adults in their capacity to make responsible choices, thus making it wrong to hold them legally accountable for breaking the law.²⁰⁸ One might expect courts subscribing to this ideology to reason analogously that juveniles lack the inherent capacity to be held legally accountable for the purported waiver of their constitutional rights. Yet the United States Supreme Court rejected this argument in *Fare v. Michael C.*,²⁰⁹ holding that no special bright-line age-based rules are constitutionally required to assess the validity of a juvenile's waiver of the privilege against self-incrimination.²¹⁰

In *Fare v. Michael C.*, a sixteen-year-old juvenile who had been implicated in a homicide was in police custody. As is constitutionally required prior to custodial police interrogation, he was read his *Miranda* rights.²¹¹ Instead of requesting an attorney, Michael C. asked that his probation officer be present during questioning. After that request was denied, Michael C. agreed to speak with the

toward juries and its disinclination to expand their use. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 412-14 (1972) (allowing non-unanimous verdict in criminal prosecution); *Walkover*, *supra* note 41, at 522 n.77 (citing *Williams v. Florida*, 399 U.S. 78, 103 (1970)) (allowing six person jury to hear criminal case). But see *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (five person jury unconstitutional); see also *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344-45 (1990) (expanding the seventh amendment jury trial right in civil cases); *Lytle v. Household Mfg.*, 110 S. Ct. 1331, 1335, 1337 (1990) (same); *Granfinanciera v. Nordberg*, 109 S. Ct. 2782, 2795-2802 (1989) (same). Although under Chief Justices Burger and Rehnquist the Court has not shown unrestrained enthusiasm for jury adjudication, the Court's current stance is better described as ambivalent rather than hostile. In any event, the language of the various opinions in *McKeiver* evinces a greater concern over the significance of the juvenile status of the petitioner than over the value of juries per se.

205. *McKeiver*, 403 U.S. at 545-50.

206. *Id.* at 550-51.

207. Justice White's concurring opinion makes explicit what is implicit in the plurality opinion: juries need not be used as long as a juvenile system is reasonably based upon the *parens patriae* model, even if it is imperfectly realized. *McKeiver*, 403 U.S. at 551-53 (White, J., concurring). Justice White set forth the philosophical underpinning of juvenile court and contrasted it with that underlying the criminal law. Whereas criminal law is based on the assumption that individuals act from free will and consequently may be held responsible, juvenile court is predicated on the belief that juveniles do not choose misconduct freely, but act because of environmental pressures beyond their control. *Id.* at 551-52 (White, J., concurring). Given a juvenile system with that jurisprudential basis, Justice White found no due process violation in denying jury trials. But, he warned, "[The states] are also free, if they extend criminal court safeguards to juvenile court adjudication, frankly to embrace condemnation, punishment, and deterrence as permissible and desirable attributes of the juvenile justice system." *Id.* at 553 (White, J., concurring).

208. See *supra* notes 68-89 and accompanying text.

209. 442 U.S. 707 (1979).

210. *Id.* at 725.

211. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 473-74 (1966).

police, and during that interrogation made statements incriminating him in the homicide.²¹² On appeal, Michael C. argued, and the California Supreme Court agreed, that interrogation of a juvenile must cease whenever the juvenile asks for "an adult who is obligated to protect his interests."²¹³ The California high court accepted Michael C.'s contention that being a juvenile in and of itself automatically justifies a different bright-line rule to define when the privilege against self-incrimination is invoked.²¹⁴

The United States Supreme Court reversed the California high court, holding that juveniles are not entitled to a special rule that automatically would constitute an invocation of the privilege against self-incrimination.²¹⁵ The Court further rejected any suggestion that a juvenile's purported waiver of his rights should be judged by a different standard than an adult's waiver would be.²¹⁶ Although the trial judge could consider the age and experience of the suspect in judging whether a waiver was knowing, voluntary, and intelligent,²¹⁷ the Court concluded that the same "totality of the circumstances" balancing test is appropriate in evaluating waiver of *Miranda* rights, whether by adults or juveniles. The Court opted for a case-by-case evaluation of juvenile waiver of rights, with the trial judge free to consider how much weight, if any, to accord to an individual juvenile's immaturity. The holding in *Michael C.* represents a repudiation of the view that adult and child are members of binary, dichotomous categories whose inherently differing cognitive capacities justify separate waiver rules.²¹⁸

The issue of whether the law ought to recognize the adult-child dichotomy also arises with the question of the constitutionality of the death penalty for juveniles. Whether a bright line should be drawn prohibiting executions of juveniles below a certain age is a question that divided the Supreme Court in *Thompson v. Oklahoma*²¹⁹ and again a year later in *Stanford v. Kentucky*.²²⁰

212. *Fare*, 442 U.S. at 710-11.

213. *Id.* at 729-30 (Marshall, J., dissenting).

214. The *Miranda* bright-line rule provides that a suspect's request for an attorney is per se an invocation of the privilege against self-incrimination, and that custodial interrogation must end until the suspect has the assistance of counsel. *Miranda*, 384 U.S. at 467-68, 473-74. Michael C. asked the Court to apply a different bright-line rule for juveniles, urging the Court to find a per se invocation of the fifth amendment upon a juvenile's request for either an attorney or other person legally obliged to protect the juvenile's interests. *Fare*, 442 U.S. at 729-30 (Marshall, J., dissenting).

215. *Fare*, 442 U.S. at 724.

216. In adopting for juveniles the same "totality of the circumstances" balancing test used to determine the validity of an adult's supposed waiver, the Court asserted:

This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.

Id. at 725.

217. *Id.*

218. Justice Powell, dissenting in *Michael C.*, preferred this view, citing with approval older Supreme Court cases that did treat juveniles and adults as dichotomous categories in judging the adequacy of fifth amendment waiver. *Id.* at 732-34 (Powell, J. dissenting); see, e.g., *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (noting that a juvenile "cannot be compared with an adult in full possession of his senses"); *Haley v. Ohio* 332 U.S. 596, 599 (1948) (plurality opinion) (declaring that juveniles are not to be "judged by the more exacting standards of maturity").

219. 487 U.S. 815 (1988) (plurality opinion). Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, wrote the *Thompson* plurality opinion. *Id.* at 817. Justice O'Connor con-

Both cases were plurality decisions, with Justice O'Connor providing the swing vote in each case.²²¹ The *Thompson* plurality adopted a bright-line rule that the Constitution forbids executing persons under the age of sixteen at the time of the commission of their crimes.²²² In *Stanford*, the *Thompson* dissenters assembled a plurality of the Court to reject extending the *Thompson* holding to those under eighteen.²²³

Writing for the plurality in *Thompson*, Justice Stevens asserted that a bright-line rule prohibiting executions of those under sixteen is necessary given the nature of adolescents.²²⁴ Citing psychological evidence, he insisted that youths are inherently less culpable than adults due to their special impulsiveness and susceptibility to peer pressure.²²⁵ He noted the prevalence in our legal system of age-based laws reserving certain rights and duties for those over a certain age.²²⁶ These laws "reflect . . . this basic assumption that our society makes about children as a class; we assume that they do not yet act as adults do."²²⁷

Justice O'Connor, however, expressed reluctance to draw a line on the basis of the invariant nature of adolescents. In her view, even though some juveniles under sixteen are sufficiently impulsive and immature to make imposition of the death penalty unacceptable, not all people under sixteen share those characteristics.²²⁸ She based her concurrence instead on a finding that a national consensus exists against executing those under sixteen.²²⁹

The dissenters in *Thompson*, Justices Scalia, Rehnquist, and White, rejected the proposition that persons under sixteen necessarily exhibit attributes that make capital punishment disproportionate to their culpability.²³⁰ In the opinion of the dissenters, many juvenile offenders are "indistinguishable, except for their age, from their adult criminal counterparts."²³¹ Instead of drawing a line below which no juvenile could be executed,²³² the dissent would have allowed juries to

concur with the plurality, and Justices Scalia, White, and Rehnquist dissented. Justice Kennedy took no part in the decision of the case. *Id.*

220. 109 S. Ct. 2969 (1989) (plurality opinion). Justice Scalia authored the opinion, joined by Justices Rehnquist, White, and Kennedy. *Id.* at 2972. Justice O'Connor again concurred with the plurality, while Justices Brennan, Marshall, Stevens, and Blackmun dissented. *Id.*

221. *Stanford*, 109 S. Ct. at 2980 (O'Connor, J., concurring in part and concurring in the judgment); *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring).

222. *Thompson*, 487 U.S. at 838.

223. *Stanford*, 109 S. Ct. at 2980 (Justice O'Connor concurred with Justices Scalia, Rehnquist, White, and Kennedy to form the plurality).

224. *Thompson*, 487 U.S. at 833-38.

225. *Id.*

226. *Id.* at 823-24, 839-48. Varying bright-line, age-based rules prohibit minors from voting, serving on juries, marrying without parental consent, purchasing alcohol or cigarettes, driving without parental consent, purchasing pornography, and gambling without parental consent. *Id.*

227. *Id.* at 825 n.23.

228. *Id.* at 853 (O'Connor, J., concurring).

229. *Id.* at 849-59 (O'Connor, J., concurring).

230. *Id.* at 864 (Scalia, J., dissenting).

231. *Id.* at 865 (Scalia, J., dissenting) (quoting *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 551 (1983)).

232. The dissent did intimate that there might be some age under which execution could not be countenanced, referring back to its earlier historical discussion of BLACKSTONE'S COMMENTARIES,

make case-by-case decisions.²³³

The opinions in *Stanford v. Kentucky*²³⁴ are mirror images of those in *Thompson*, with the *Thompson* plurality, now in dissent, arguing for a bright-line rule prohibiting execution of those under eighteen,²³⁵ and the former *Thompson* dissenters, now writing for the Court, declining to mandate such a rule.²³⁶ Given Justice O'Connor's continued refusal to draw a line based on the intrinsic nature of youths²³⁷ and the addition of Justice Kennedy to the Court, who voted with the *Stanford* plurality, it is now clear that the majority of the Supreme Court has rejected the notion that chronological age ought to divide those eligible for the death penalty from those who are not.²³⁸ In the context of capital punishment, just as in the context of juvenile waiver of rights, the current Supreme Court again has repudiated a bright-line dichotomy between child and adult.

VI. ABOLISHING THE SEPARATE AND UNEQUAL JUVENILE COURT

Having an autonomous juvenile justice system with its own distinctive procedures made sense in a world that viewed the categories of "child" and "adult" as inherently antithetical in their essential attributes. Once the imagined nature of childhood changed and the child-adult dichotomy blurred, however,²³⁹ the ideological justification for a separate juvenile jurisprudence evaporated. With its philosophical underpinnings no longer consonant with the current social construction of childhood, the juvenile court now lacks a rationale for its continued existence other than sheer institutional inertia. All things being equal, inertia might not be an insupportable basis for maintaining the juvenile court. After all, dismantling the system would entail at least some political and economic costs. Indeed, overcoming the vested interests of such an entrenched institution could take a heroic political effort of will. Yet all things are not equal. Perpetuating an anachronistic juvenile court exacts its own costs, both ideological and practical. These costs compel me to conclude that the juvenile court ought to be abolished.

A. *Ideological Costs of an Autonomous Juvenile Court*

To the extent that today's juvenile court preserves its legacy of greater pro-

which set seven as the minimum age for capital punishment. *Id.* at 859, 870-71 (Scalia, J., dissenting).

233. *Id.* The dissent noted that the jury exercised "particularized judgment" in sentencing Thompson to death. *Id.* at 863 (Scalia, J., dissenting).

234. 109 S. Ct. 2969 (1989).

235. *Id.* at 2987-94 (Brennan, J., dissenting).

236. *Id.* at 2979-80.

237. In *Stanford*, Justice O'Connor rested her concurrence on her finding that no national consensus forbids executing those between 16 and 18. *Id.* at 2980-82 (O'Connor, J., concurring).

238. The *Thompson* holding, which prohibited capital punishment for those under 16, must be considered tenuous authority in light of the limited basis of Justice O'Connor's concurrence in that case. See *supra* notes 228-29 and accompanying text. Presumably if the national mood shifted to favor execution of those under 16, Justice O'Connor would find their execution constitutional.

239. See *supra* notes 117-30 and accompanying text.

cedural informality than the adult criminal court,²⁴⁰ the procedural contrast between the two systems is the most salient feature of the juvenile justice system. This contrast may be more of a liability to the juvenile court than traditionally has been assumed, however. When juvenile court practice diverges from that observed in other courts, juvenile court seems less like a court at all. As Martha Minow observed, "[d]ue process notions are familiar to every child in this culture."²⁴¹ Raised on a steady television diet of fictional courtroom drama²⁴² and local news coverage of notorious criminal trials, American young people have an image of what a court proceeding should look like.²⁴³ The perfunctory bench trial typical of the juvenile court is not what they imagine a trial to be.²⁴⁴

The gulf between the archetypal trial and its actualized caricature has significance for juveniles beyond the obvious conceptual dissonance it engenders. Like any other litigants, juvenile defendants invest the legal system with legitimacy only insofar as they see it to be a just system. That perception of justice is affected not merely by the litigants' degree of satisfaction with the outcome of the case, or its distributive justice, but also by their belief in its prescriptive fairness, or its procedural justice.²⁴⁵

Extensive sociological research²⁴⁶ has explored the somewhat counter-intu-

240. Certainly one remaining instance of procedural contrast is the consistent lack of trial by jury in the juvenile court. Most states do not legally entitle juveniles to jury trial. See *infra* notes 258-61. Even in those jurisdictions that allow juvenile jury trials, they are apparently uncommon. For supporting empirical data, see *infra* note 262. There is also considerable evidence that, even when statutes prescribe identical procedures to those of the adult system, lawyers in juvenile court frequently fail to observe them. See *infra* notes 285-302 and accompanying text.

241. Minow, *Are Rights Right for Children?*, 1987 AM. B. FOUND. RES. J. 203, 212 (1987) (citing J. KAGAN, *THE NATURE OF THE CHILD* (1984); R. KEGAN, *THE EVOLVING SELF* (1982)).

242. One can scarcely doubt that media images of trials and lawyers have a powerful influence on the way in which the public conceives of its legal system. See Friedman, *Law, Lawyers and Popular Culture*, 98 YALE L.J. 1579, 1598-1606 (1989); Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185, 197-204 (1987). For assessment of the impact of one television program on the popular imagination of the legal order, see Gillers, *Taking LA Law More Seriously*, 98 YALE L.J. 1607 (1989). See also Rosen, *Ethical Soap: LA Law and the Privileging of Character*, 43 U. MIAMI L. REV. 1229, 1230-31 (1989) (interpreting L.A. Law's account of legal ethics).

243. W. CAVENAUGH, *JUVENILE COURTS, THE CHILD AND THE LAW* 2 (1959); Paulsen, *supra* note 181, at 242.

244. Paulsen, *supra* note 181, at 242; Studt, *The Client's Image of the Juvenile Court*, in *PURSuing JUSTICE FOR THE CHILD*, *supra* note 2, at 200.

245. The term "procedural justice" was used first by Thibaut, Walker, LaTour, and Houlden. Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974).

246. Whether the adjudicatory forum is civil, criminal, or administrative, the sociological studies consistently demonstrate the effect of procedural justice perceptions on overall litigant satisfaction with the process—an effect independent of whether or not the substantive outcome was favorable. See, e.g., E. LIND & T. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61-92 (1988); J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Casper, Tyler & Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 483 (1988); O'Barr & Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137, 159 (1988); Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedure*, 22 LAW & SOC'Y REV. 103, 103 (1988). See also Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 543 (1978) (comparing process for resolving scientific controversies with legal dispute resolution, and positing a general theory of procedural justice encompassing competing values of truth and justice.); Walker, Lind & Thibaut, *The Relation between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (1979) (a more theoretical analysis of procedural justice).

The results of this research have been remarkably consistent, finding that procedural justice matters in a variety of contexts, even in cultures generally considered far less procedurally oriented

itive notion that how one is treated in court may be at least as important as the ultimate verdict in shaping one's opinion about whether a system is just. According to these studies, the key factors contributing to a sense of procedural justice are consistency in the process, control of the process by the litigant, respectful treatment of the litigant, and ethicality of the fact-finder.²⁴⁷ Consistency in the process means both that the system always follows prescribed rules and that everyone is treated equally within the system. Process control is the litigant's ability to determine which issues will be contested and upon what basis the contest will proceed. Respectful treatment of the litigant connotes more than just courteous interchange; it also includes investing the litigant with the full complement of rights possessed by other actors in the system. Ethicality of the fact-finder entails a sense that the judge is honest, non-biased, forthright and non-arbitrary in adjudication.²⁴⁸

Even in its current "constitutionally domesticated" version, juvenile court procedural practice cuts against these core notions of procedural justice. Treating juveniles differently from adults—by denying them jury trials, for example—violates the consistency norm of equal treatment for all and reminds the young that they do not have all of the rights assigned to full-fledged members of the society. Similarly, the paternalistic tendencies that juvenile court engenders in its functionaries undermines the norm of litigant process control. From judges to probation officers to defense counsel, juvenile court professionals all too frequently assume that juvenile accuseds are incapable of exercising sound judgment in making the decisions that affect their cases.²⁴⁹ Confidence in the ethicality of the fact-finder is undercut by the dual roles of the juvenile court judge as finder of fact and sentencing authority. Particularly for the repeat offender, the judge's knowledge of the accused's background and previous criminal record creates the unseemly appearance that guilt has been pre-judged. In the sentencing role, expressions by the judge of paternalistic concern for the juvenile accused coupled with stern judicial sanctioning likewise is inconsistent with the normative model of adjudicatorial behavior.²⁵⁰ All of these divergences from procedural justice norms strongly suggest that, in the eyes of juvenile respondents,²⁵¹ the legitimacy of juvenile court is suspect.²⁵²

than our own. See E. LIND & T. TYLER, *supra*, at 135-45 (1988) (citing studies performed on Americans, Germans, and Hong Kong Chinese).

247. E. LIND & T. TYLER, *supra* note 246, at 93-127, 131-32.

248. *Id.* at 93-127.

249. For a fuller discussion of the tension between defense attorneys' perceived roles as advocate and as guardian for their juvenile clients, see *infra* notes 311-15 and accompanying text.

250. See Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 19-21 (citing psychological literature which shows that the mixed messages of the juvenile system, alternating between offers of help and chastisement, causes adolescents to feel frustration, cynicism and contempt for the system).

251. Although most of the procedural justice research examined the responses of adults, those studies that looked at children's attitudes toward procedural justice factors have reached the conclusion that even relatively young children exhibit responses resembling those seen in adults. See, e.g., Gold, Darly, Hilton & Zanna, *Children's Perception of Procedural Justice*, 55 CHILD DEV. 1752, 1758 (1984). These researchers found that first- and fifth-grade children considered procedurally irregular punishment of the guilty to be unfair. The children's responses approximated "a sensible, mature pattern of judgment about procedural justice." *Id.* See also Fry & Corfield, *Children's Judg-*

As a consequence of this loss of legitimacy of the juvenile court, the process of legal socialization for a large segment of our youth has broken down. Legal socialization, or the inculcation of a society's approved norms and values regarding the law, has been described as a primary mechanism of social control.²⁵³ The legal system, along with the schools, has been considered the most important institution involved in legal socialization.²⁵⁴ In a legal culture as deeply permeated by due process concepts as ours,²⁵⁵ strict observance of procedural rights in and of itself contributes to an inculcation of the values of the social and political order.²⁵⁶ If juveniles perceive their exposure to the legal system as unjust, however, the legal socialization process fails.²⁵⁷ Ironically, conserving the current legal order may be possible only at the expense of abolishing the present dual system of adult and juvenile criminal jurisdiction.

B. Practical Consequences of Abolishing the Juvenile Court

1. Jury Trial Availability

The most striking difference between juvenile court adjudications and those in criminal court is the lack of jury trial for juveniles. In the majority of states²⁵⁸ and in the federal system,²⁵⁹ juveniles are denied jury trial unless they

ments of Authority Figures with Respect to Outcome and Procedural Fairness, 143 J. GENETIC PSYCHOLOGY 241, 243, 248 (1983) (fourth- and fifth-grade children exhibited procedural justice attitudes consistent with those of adults). See generally R. Coles, *THE POLITICAL LIFE OF CHILDREN* 21-52 (1986) (children develop relatively sophisticated political concepts at an early age).

252. The procedural justice literature tends to support the Supreme Court's assertion in *In re Gault* that procedural formality will enhance the legitimacy of the juvenile court adjudicatory process. *In re Gault*, 387 U.S. 1, 26 (1967). The Court may have underestimated the juvenile court's inertial capacity to appear to accommodate constitutional procedural mandates without changing its day-to-day routine. For citation to empirical studies describing institutional resistance to change ordered by Supreme Court decision, see Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1322 n.274 (1989).

253. Tapp & Kohlberg, *Developing Senses of Law and Legal Justice*, in *LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY* 89 (J. Tapp & F. Levine eds. 1977) (articulation of appropriate legal norms gives juveniles a model to which they can conform their behavior using the term "legal socialization" to describe this process).

254. *Id.* at 104.

255. A recent sociological study that questioned adults on whether the courts ought to accord children aged five, nine, thirteen and seventeen certain rights and privileges strikingly demonstrated the primacy of this belief in due process. Although there was substantial disagreement on the propriety of children's rights of expression and behavior, a large majority of the respondents believed that children of all ages should have full due process rights, including the right to jury trial. Helgeson, Goodman, Shaver & Lipton, *Attitudes Concerning the Rights of Children and Adults*, 10 *CHILDREN'S LEGAL RTS. J.* 4 (Winter 1989).

256. See Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 *HARV. WOMEN'S L.J.* 1, 22 (1986) (seeing procedural formality as a mechanism for learning "norms of a liberal order that metes out justice through the interplay of rights and restraints on government power"). Professor Minow is ambivalent, however, about the desirability of liberal rights rhetoric, noting that it ignores issues of children's need for relationships of mutual obligation and care. *Id.* at 14-18.

257. Tapp & Kohlberg, *supra* note 253, at 104.

258. For case law affirming the denial of jury trial, see *Raines v. State*, 294 Ala. 360, 365, 317 So. 2d 559, 562-63 (1975); *Elkins v. State*, 7 Ark. App. 166, 168, 646 S.W.2d 15, 17 (1983); *In re T.M.*, 742 P.2d 905, 909-10 (Colo. 1987) (upholding denial of jury trial for certain misdemeanors when no incarceration imposed); *In re J.T., Jr.*, 290 A.2d 821, 822 (D.C. App. 1972), *cert. denied*, 409 U.S. 986 (1972); *In re V.D.*, 245 So. 2d 273, 280 (Fla. Dist. Ct. App. 1971), *cert. denied*, 249 So. 2d 688

are bound over upon a prosecution request to be tried as adults. Three states give the juvenile judge discretion to allow trial by jury,²⁶⁰ and thirteen states guarantee juvenile jury trials by case law or statute.²⁶¹ Even in those states where juveniles may opt for a trial by jury, such trials are apparently extremely uncommon.²⁶² The juvenile court ethos exerts powerful institutional and ideological constraints on the accused's exercise of the right to jury trial.²⁶³ The result, whether by legal code or local custom, is that juveniles seldom see jury resolution of the charges against them.²⁶⁴

(1971); *Robinson v. State*, 227 Ga. 140, 142-43, 179 S.E.2d 248, 250 (1971); *In re Fucini*, 44 Ill. 2d 305, 308, 255 N.E.2d 380, 382 (1970); *Bible v. State*, 253 Ind. 373, 380, 254 N.E.2d 319, 328 (1970); *In re Johnson*, 257 N.W.2d 47, 51 (Iowa 1977); *Dryden v. Commonwealth*, 435 S.W.2d 457, 461 (Ky. 1968); *In re Dino*, 359 So. 2d 586, 597-98 (La. 1978); *State v. L.D.*, 320 A.2d 885, 888 (Maine 1974); *In re Johnson*, 254 Md. 517, 531, 255 A.2d 419, 426-27 (1969); *In re Welfare of K.A.A.*, 397 N.W.2d 4, 5 (Minn. 1987), *rev'd on other grounds*, 410 N.W.2d 836 (Minn. 1987); *Hopkins v. Youth Court of Issaquena County*, 227 So. 2d 282, 285 (Miss. 1969); *O.H. v. French*, 504 S.W.2d 269, 274 (Mo. 1973); *In re New Jersey ex rel J.W.*, 57 N.J. 144, 146, 270 A.2d 273, 274 (1970); *In re R.Y.*, 189 N.W.2d 644, 653 (N.D. 1971); *In re Agler*, 19 Ohio St. 2d 70, 80, 249 N.E.2d 808, 813 (1969); *State v. Turner*, 253 Or. 235, 244, 453 P.2d 910, 914 (1969); *In re McCloud*, 110 R.I. 431, 435, 293 A.2d 512, 515 (1972); *State v. Schaaf*, 109 Wash. 2d 1, 16, 743 P.2d 240, 250 (1987); *see also* *McKeiver v. Pennsylvania*, 403 U.S. 528, 532 (1971) (holding that trial by jury in adjudicative stage of state juvenile court delinquency proceeding is not constitutionally required); *cf. In re Javier A.*, 159 Cal. App. 3d 913, 974-75, 206 Cal. Rptr. 386, 430 (1984) (appellate court urging California Supreme Court to grant review and hold that juveniles are entitled to jury trial); *De Backer v. Brainard*, 183 Neb. 461, 470-71, 161 N.W.2d 508, 513 (1968) (Nebraska Supreme Court voted four to three that a statute denying juvenile jury trials is unconstitutional, but because of Nebraska rule requiring five-judge majority to hold a statute unconstitutional, court upheld denial of jury trial).

259. *United States v. Salcido-Medina*, 483 F.2d 162, 164 (9th Cir. 1973), *cert. denied*, 414 U.S. 1070 (1973); *United States v. Doe*, 627 F.2d 181, 183 (9th Cir. 1980).

260. The three states giving the judge authority to allow juvenile jury trials are: Alabama, *Ex parte State ex rel. Simpson*, 288 Ala. 535, 537, 263 So. 2d 137, 138 (1972); Kansas, KAN. STAT. ANN. § 38-1656 (1986); *Findlay v. State*, 235 Kan. 462, 466, 681 P.2d 20, 24 (1984); and South Dakota, S.D. CODIFIED LAWS ANN. § 26-8-31 (1984).

261. States providing juvenile jury trials include: Alaska, *RLR v. State*, 487 P.2d 27, 32 (Alaska 1971), ALASKA STAT. § 47.10.070 (1990); Colorado, COLO. REV. STAT. § 19-2-501 (Supp. 1990); Massachusetts, *Commonwealth v. Thomas*, 359 Mass. 386, 387, 269 N.E. 2d 277, 278 (1971), MASS. ANN. LAWS. ch. 119, § 55A (Law. Co-op. Supp. 1990); Michigan, MICH. COMP. LAWS § 712A.17 (1987); Montana, MONT. CODE ANN. § 41-5-521(7) (1989); New Mexico, *Peyton v. Nord*, 78 N.M. 717, 724, 437 P.2d 716, 723 (1968); Oklahoma, OKLA. STAT. ANN. tit. 10, § 1110 (West 1987); Tennessee, *State v. Johnson*, 574 S.W.2d 739, 744 (1978), *Arwood v. State*, 62 Tenn. App. 453, 457, 463 S.W.2d 943, 945-46 (1970); Texas, TEX. FAM. CODE ANN. tit. 3, § 54.03(c) (Vernon 1986); West Virginia, W. VA. CODE § 49-5-6 (1986); Wisconsin, WIS. STAT. ANN. § 48.31(2) (West 1987); and Wyoming, WYO. STAT. § 14-6-223(c) (1986).

262. Statistics compiled in a 1978 study showed that the percentage of juvenile adjudications taking advantage of the right to jury trial ranged from a low of .36% in Alaska to a high of 3.2% in Denver. Note, *The Right to a Jury Under the Juvenile Justice Act of 1977*, 14 GONZ. L. REV. 401, 418 n.125 (1979).

263. Despite the procedural due process protections the Supreme Court put in place, the ghost of *parens patriae* philosophy still hovers over the juvenile court, undercutting the full exercise of those constitutional rights. The same constraints militate against defense lawyers providing the degree of zealous adversary representation expected in adult prosecutions. *See infra* notes 285-315 and accompanying text.

264. Law review commentators are virtually unanimous in condemning the juvenile court for its failure to provide jury trials. *See, e.g.,* Feld, *supra* note 136, at 903-07; Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 213 (1989); Handler, *supra* note 250, at 7; Kalven, *The Supreme Court - 1970 Term*, 85 HARV. L. REV. 3, 118 (1971) (criticizing *McKeiver*); Katz, *Juveniles Committed to Penal Institutions - Do They Have a Right to Jury Trial?*, 13 J. FAM. L. 675, 711-12 (1974); Ketcham, *McKeiver v. Pennsylvania: The Last Word in Juvenile Court Adjudication?*, 57 CORNELL L. REV. 561, 563-68 (1972); McLaughlin & Whisenand, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings*, 46 BROOKLYN L.

Being deprived of a jury trial hurts juveniles in a number of ways. Juries traditionally have been treasured²⁶⁵ as a protection against biased judges²⁶⁶ and overzealous prosecutors,²⁶⁷ because the jury has no access to background information about the accused which might cause them to prejudge the case. Moreover, because the jury embodies community values,²⁶⁸ it functions as the symbolic conscience of the community.²⁶⁹

Further, it is one of the less well-kept secrets of our criminal justice system that juries acquit more frequently than do judges. In their germinal comparison of judge and jury fact-finding, Professors Kalven and Zeisel empirically demonstrated²⁷⁰ what every trial lawyer knows: a defendant ordinarily stands a far better chance with a jury trial than with a bench trial.²⁷¹ A recent California

REV. 1, 2-3 (1979); Note, *A Recommendation for Juvenile Jury Trials in Minnesota*, 10 WM. MITCHELL L. REV. 587, 600-18 (1984); Note, *Jury Trials for Juveniles: Rhetoric and Reality*, 8 PAC. L.J. 811, 815-19 (1977); Note, *McKeiver v. Pennsylvania: A Retreat in Juvenile Justice*, 38 BROOKLYN L. REV. 650, 678-92 (1972); Note, *The Right to a Jury Trial Under the Juvenile Justice Act of 1977*, 14 GONZ. L. REV. 401, 415-19 (1979). Notwithstanding the barrage of academic criticism and the transformation of the juvenile court from its *parens patriae* origins to a just desserts retributive model, there is no sign that the new juvenile court has any inclination to accommodate jury trials. See, e.g., State v. Schaaf, 109 Wash. 2d 1, 16-17, 743 P.2d 240, 247 (1987).

265. In *Duncan v. Louisiana*, the Supreme Court articulated the historical rationale for jury trials. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). As the Court observed:

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Id. at 156.

266. There exists a long-standing fear that judges as a group might partake of some monolithic bias that would distort their fact-finding ability. See, e.g., Norton, *What a Jury Is*, 16 VA. L. REV. 261, 265 (1930) (noting the 'professional bias' of judges, and championing the jury to counterbalance the biases of a judiciary "should our bench, either federal or state, ever become 'packed' through the exertions of any school of thought"). Norton's worry seems uncannily prescient in an age of the ideological litmus test as a prerequisite to judicial appointment.

267. Juries can temper excessive prosecutorial charges by returning guilty verdicts on lesser included offenses of the original charge, for example, by reducing arson to reckless burning, or robbery to theft. Because a criminal defendant always can ask for a jury trial, prosecutors are encouraged to make realistic charging assessments to avoid jury trials held solely to whittle down the charge. It was my experience in several years in a public defender office that when prosecutors charged adults and juveniles as a result of one criminal episode, not infrequently the prosecutors charged the juveniles with more serious offenses than the adults. The juveniles could not appeal to a jury to reduce the charges to ones that more reasonably fit the level of perceived blameworthiness. On the other hand, the prosecutors knew that a jury would be unlikely to convict the adults of a seemingly overcharged offense, even if all of the elements of the greater offense technically were present.

268. Justice William O. Douglas phrased it this way: "A jury reflects the attitudes and morals of the community from which it is drawn. [I]t . . . takes the sharp edges off the law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges cannot do." W. DOUGLAS, WE, THE JUDGES 389 (1957); see also Kadish & Kadish, *The Institutionalization of Conflict: Jury Acquittals*, 27 J. SOC. ISSUES 199 (1971) (ideological and institutional role of jury nullification).

269. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

270. Kalven and Zeisel used a database of 3576 cases to study how often the jury's verdict differed from that which the judge would have pronounced. They found that the jury convicted in 64.2% of the cases, acquitted in 30.3%, and failed to reach a verdict in 5.5% of them. Judges, on the other hand, convicted 83.3% of the defendants, and acquitted the remaining 16.7%. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 55-81 (1966). Adding together the statistics for acquittals and hung juries, juries failed to convict more than twice as often as did judges.

271. *Id.*

study comparing juvenile to adult court convictions confirms Kalven and Zeisel's findings; on comparable offenses it is easier to get a conviction in juvenile court than in the adult criminal justice system.²⁷²

Why do judges convict more often than juries? One explanation is that the nature of judicial decision making is intrinsically different from the process of fact-finding for juries. Judges try hundreds, even thousands of cases every year, while jurors hear only a few during their service. Over and over again, the juvenile court judge hears testimony from the same police and probation officers, inevitably forming a settled opinion on their credibility. Worse yet, the judge may well have heard earlier charges against the accused, and thus may come to hold a fixed view on the juvenile's credibility and character. In any event, the judge hears pre-trial motions to suppress evidence; even if the motions are granted, the judge will have heard the damning information.

Another explanation for the discrepancy in conviction rates between judges and juries is that sitting in high caseload courts such as the typical juvenile court, judges invariably begin to slip into a routine that may make them less meticulous in considering the evidence. Judges grow "weary of fact-finding whereas jurors find it novel and nothing escapes their attention."²⁷³ Not only may judges consider the facts more casually than would jurors, but they also may apply less stringent concepts of reasonable doubt and presumption of innocence.²⁷⁴

Moreover, as a general proposition, fact-finding by a single person necessarily differs from that by a group because the sole fact-finder does not have to discuss²⁷⁵ the law and the evidence with others before reaching a verdict. The back-and-forth, give-and-take of a discussion can cause the fact-finders to recon-

272. P. GREENWOOD, A. LIPSON, A. ABRAHAMSE & F. ZIMRING, *YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA* 30-31 (1983) (after controlling for seriousness of offense, juveniles are convicted of a higher proportion of charged crimes than adults).

273. Norton, *supra* note 266, at 266.

274. One thoughtful Washington State judge discussed this problem in reluctantly ruling that juveniles had no right to jury trial:

The longer I have been on the bench, the more value I have placed on the jury. I have often said, particularly when an adult felon through his counsel or her counsel announces that they would like to waive a jury, I have—it has become routine for me to tell them that it's my perception that the longer I am on the bench, at least, the more uncertain I am that I am truly upholding the concept of presumption of innocence. I cannot be sure that that is true for anyone else, but I believe that it simply becomes easier for a human being to say another human being citizen is guilty, if you've seen a jury do it a number of times and if you have done it yourself. I fear that the standard that I think I hold for myself—it becomes eroded. I try to avoid that, but I tell you, I sometimes agonize about it, so I have come to believe, I've said and I've written about it a couple of times, that the jury is an even more important institution than I apprehended a few years ago.

Report of Proceedings, Court's Ruling on Respondent's Motion for Jury Trial, *State of Washington v. Loney*, King Co. Sup. Ct. No. 85-8-04998-7, at 12-13 (Dec. 13, 1985), *aff'd. sub nom* *State v. Schaaf*, 109 Wash. 2d 1, 743 P.2d 240 (1987) (reconsideration denied).

275. Semiotic theory holds that, as a conversation develops, the meaning of the words used by each speaker undergoes subtle changes as speakers adopt each other's vocabulary and incorporate these earlier references into their own statements. See R. KEVELSON, *THE LAW AS A SYSTEM OF SIGNS* 59-78 (1988). "In interpersonal dialogue the interaction between speakers is actually an exchange between social systems. . . . In conversation the values of verbal message-signs appear to shift between systems and also to shift dimensionally as the cumulative meaning of repeated referent signs becomes more voluminous, that is, denser." *Id.* at 76.

sider their opinions in light of the arguments and observations of others.²⁷⁶ Being forced to articulate the basis for an opinion forces the fact-finder to spell out the logical connections between the evidence and conclusions, "giv[ing] contours to items previously apprehended in a fleeting and unclear manner."²⁷⁷

Not only is the judicial decision making process different from that of juries, but the personal characteristics of judges differ from those of most jurors. In terms of economic status, social class, race, and gender, it is an understatement to say that judges as a group do not reflect the composition of the community at large.²⁷⁸ That jury pools include men and women, blacks and whites,²⁷⁹ adds valued dimension to jury fact-finding that judges cannot share.

Additionally, the litigants in a jury trial may probe the jurors for hidden biases through searching voir dire examination, inquiring about juror attitudes, beliefs, and experiences that may affect the way in which they would hear the case.²⁸⁰ In a bench trial, no analogous opportunity exists to explore the judge's background. Without voir dire scrutiny to detect the possibility of judicial bias, one must assume that judges are persons of superhuman powers of self-reflection, able to attend to their conscious and unconscious mental processes and set aside any biases they might reveal.

The value of the availability of jury trials for juveniles goes beyond curing the problems of biased judges or disadvantageous fact-finding, however. A jury trial requires the trial judge to articulate in detail the law to be applied in the case through the mechanism of jury instructions. Any error of law in the instructions is reviewable by an appellate court. If no jury instructions exist to make explicit the trial judge's understanding of the law, the reviewing court has no way of knowing whether the juvenile court judge misunderstood or misap-

276. See Norton, *supra* note 266, at 266 (explaining the value of discussion). Requiring the judge to set forth findings of fact and conclusions of law does not function in the same way as intra-jury discussion because the judge already has committed herself to a verdict. Articulating the basis for the verdict is at best an attempt to reconstruct the judge's thought processes in arriving at the verdict and at worst a post hoc rationalization. It cannot be the fluid exchange of potential positions that jury deliberations entail.

277. P. BERGER & T. LUCKMANN, *supra* note 11, at 153; see also *id.* at 152-55.

278. For a survey of current information on judicial demographics, see Slotnick, *Review Essay on Judicial Recruitment and Selection*, 13 JUST. SYS. J. 109 (1988).

279. The Supreme Court has reversed criminal convictions in cases in which the jury venire systematically excluded certain discrete groups. See *Smith v. Texas*, 311 U.S. 128, 130-31 (1940) (jury venire excluding blacks was not a panel representative of the community); *Ballard v. United States*, 329 U.S. 187, 194 (1946) (exclusion of women causes "a flavor, a distinct quality [to be] lost"). For this reason, courts have constitutionally forbidden prosecutors from exercising peremptory challenges to jurors on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

280. For commentary extolling the importance of voir dire in securing a fair trial, see Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 558-63 (1975); Bush, *The Case for Expansive Voir Dire*, 2 LAW & PSYCHOLOGY 9, 15-20 (1978); Karcher, *The Importance of Voir Dire*, 15 PRACTICAL LAW. 59, 59-60 (1969). The proliferation of voir dire handbooks for practitioners is a measure of the estimation that voir dire holds in the minds of trial lawyers. See, e.g., NATIONAL JURY PROJECT, *JURYWORK: SYSTEMATIC TECHNIQUES* (2d. ed. 1984); L. BLUE & J. SAGINAW, *CALLAGHAN'S TRIAL PRACTICE SERIES: JURY SELECTION - STRATEGY AND SCIENCE* (1986); A. GINGER, *JURY SELECTION IN CRIMINAL AND CIVIL TRIALS* (1985); V. STARR & M. McCORMICK, *JURY SELECTION, AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS* (1985); Fahringer, *In the Valley of the Blind: A Primer of Jury Selection in a Criminal Case*, 43 LAW & CONTEMP. PROBS. 116 (1980).

plied the law to the juvenile's detriment. As a result, juveniles denied a jury trial lose out twice. They are more likely to be convicted in the first place,²⁸¹ and are unlikely to be able to prove an error of law which would allow them to prevail on appeal.

Denying juveniles jury trials has symbolic costs as well, undermining the perceived legitimacy²⁸² of the judicial process in the eyes of the juvenile.²⁸³ Given the centrality of the jury trial in the popular cultural vision of the legal system, it is not surprising young people share the general public's high regard for the jury trial, ranking it highly among their constitutional rights.²⁸⁴ Thus, the right to jury trial is important both symbolically and substantively. If abolishing the juvenile court is the only practical means of securing jury trials for juveniles charged with criminal offenses, then abolition would be well worth it for that benefit alone.

2. Achieving Effective Assistance of Counsel

In the literature on the contemporary juvenile court, a harsh indictment of the legal counsel available to juveniles is a repeated refrain.²⁸⁵ Notwithstanding that more than twenty years ago the Supreme Court constitutionally guaranteed legal counsel to juveniles charged with crimes,²⁸⁶ the most recent empirical studies reveal that a shockingly high proportion of juveniles still are tried with-

281. See *supra* notes 271-72 and accompanying text.

282. See *supra* notes 255-57 and accompanying text (discussing procedural justice).

283. Professor Kalven observed that, "an important function of the jury is its capacity to enhance the youthful offender's perception of the juvenile process [J]ury trial is essential to the appearance of fairness, impartiality and orderliness to the juvenile and the general public." Kalven, *The Supreme Court - 1970 Term*, 85 HARV. L. REV. 3, 118 (1971).

284. In a recent sociological study, eighth graders were told to imagine that Americans could only retain some of their constitutional rights, and then asked to rank which basic rights they most valued. The right to jury trial was judged more valuable than any other right associated with the criminal trial process. The right to privacy was rated most highly, chosen by 84.3% of the respondents, followed by freedom of speech (82.4%), the prohibition against cruel and unusual punishment (72%), freedom of religion (55%), the right to trial by jury (49%), the privilege against self-incrimination (38%), the right to counsel (23.5%), freedom of assembly (23.5%), freedom of the press (22%), and the right to bear arms (16%). Sibley, *Child's Play: The Origins of Hegemony, Acquiescence and Obligation in Adolescents' Studies of Law 7* (1989) (unpublished paper presented at annual meeting of Law and Society Association at Madison, Wisconsin, 1989).

285. Commentators unanimously have blasted the caliber of advocacy on behalf of juveniles accused of criminal offenses. For a representative sample of this chorus of protest, see M. BORTNER, *INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE* 136-39 (1982); M. FINKELSTEIN, A. WEISS, S. COHEN & S. FISHER, *PROSECUTION IN THE JUVENILE COURT: GUIDELINES FOR THE FUTURE* 40-42, 51-62 (1973) (describing Boston Juvenile Court); B. FLICKER, *PROVIDING COUNSEL FOR ACCUSED JUVENILES* 2 (1983); J. KNITZER & M. SOBIE, *LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 8-9* (1984); E. LEMERT, *SOCIAL ACTION AND LEGAL CHANGE: REVOLUTION WITHIN THE JUVENILE COURT* 178 (1970); A. PLATT, *supra* note 5, at 163-75; Clarke & Koch, *Juvenile Court: Therapy or Crime Control and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 297-300 (1980); Davidson & Saul, *Youth Advocacy in the Juvenile Court: A Clash of Paradigms*, in *LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES* 29, 40-41 (G. Melton ed. 1982); Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 548-49 (1971); Feld, *supra* note 252, at 1207-08; Ferster, Courtless & Sneathen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 398-99 (1971); Fox, *supra* note 85, at 1236-37; Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1168-81 (1968).

286. *In re Gault*, 387 U.S. 1, 41 (1967).

out lawyers.²⁸⁷ As it turns out, those juveniles may be the lucky ones; over and over again, studies have shown that juveniles with lawyers fare worse in juvenile court than those proceeding without counsel, being more likely to be incarcerated and jailed for longer periods than if represented *pro se*.²⁸⁸

These statistics reveal only the correlation between legal representation and more severe dispositions, and not why this disadvantage exists. One possibility is that lawyers hurt their clients through sheer incompetence and inadequacy in their advocacy.²⁸⁹ Another is that lawyers in juvenile court may deliberately solicit harsher penalties, believing that such dispositions are in their clients' best interests in the long run.²⁹⁰ Still another explanation is that juvenile court judges may display conscious or unconscious antagonism toward the idea of attorneys in juvenile court, and take out their hostility on the represented clients.²⁹¹ Or it may be that the juvenile court judge has prejudged the case and predetermined the likely sentence before the proceedings began, and to save the system time and money, encourages waiver of counsel in those cases where the probable sanction is comparatively light. What is clear, however, is that all of these factors find factual support in current studies of the juvenile court.

As is demonstrated in two in-depth examinations of juvenile court procedures,²⁹² trials in juvenile court²⁹³ are frequently "only marginally contested,"²⁹⁴ marked by "lackadaisical defense efforts."²⁹⁵ Defense counsel

287. For a survey of statistical studies on the percentage of juvenile offenders represented by counsel, see Feld, *supra* note 252, at 1199-1200. Professor Feld's own extensive empirical work on this question indicates that there are gross fluctuations from state to state, and from county to county within a state, in the proportion of juveniles who receive legal representation. The situation in Minnesota is, however, representative; overall, Professor Feld estimates that fewer than half of Minnesota's accused juvenile offenders have lawyers. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 *CRIME & DELINQ.* 393, 400-02 (1988) [hereinafter Feld, *A Cross-State Comparison*].

288. Even when comparing offenders accused of similar crimes, and controlling for prior record, the sociological research has demonstrated that, all things being equal, lawyers appear to hurt, not help, their clients appearing in juvenile court. See M. BORTNER, *supra* note 285, at 139-40; L. STAPLETON & V. TEITELBAUM, *IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS* 64-65 (1972); Clarke & Koch, *supra* note 285, at 304-06; Duffee & Siegel, *supra* note 285, at 548-53; Feld, *A Cross-State Comparison*, *supra* note 287, at 393; Hayeslip, *The Impact of Defense Attorney Presence on Juvenile Court Dispositions*, 30 *JUV. & FAM. CT. J.* 9, 12 (1979). For a detailed regression analysis controlling for disparities in seriousness of offense, prior criminal history, and detention status, see Feld, *supra* note 252, at 1239, 1250, 1260, 1306-12.

289. See *infra* notes 292-302 and accompanying text.

290. See *infra* note 312 and accompanying text.

291. See *infra* note 308 and accompanying text.

292. M. FINKELSTEIN, A. WEISS S. COHEN & S. FISHER, *PROSECUTION IN THE JUVENILE COURT: GUIDELINES FOR THE FUTURE* 51-62 (1973) [hereinafter *PROSECUTION IN THE JUVENILE COURT*] (a federally funded examination of the Boston Juvenile Court); J. KNITZER & M. SOBIE, *LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATIVES OF CHILDREN* (1984) [hereinafter *LAW GUARDIANS IN NEW YORK STATE*] (a study of New York's juvenile courts commissioned by the state's bar association). These two studies provide specific localized confirmation of charges generally leveled at the juvenile justice system. See *supra* note 285.

293. I would caution that the description of juvenile court given here is not invariably and universally applicable. Many able and aggressive advocates practice in juvenile court; certain public defender offices pride themselves on their zealous juvenile representation. By the same token, not all adult defendants receive vigorous and proficient assistance of counsel. Looking at these systems in the aggregate, however, the discrepancy between the quality of counsel generally available in juvenile court and that afforded adults has been too often observed to go unremarked.

294. *PROSECUTION IN THE JUVENILE COURT*, *supra* note 292, at 51.

generally make few objections,²⁹⁶ and seldom move to exclude evidence on constitutional grounds.²⁹⁷ Defense witnesses rarely are called,²⁹⁸ and the cross-examination of prosecution witnesses is "frequently perfunctory and reveals no design or rationale on the part of the defense attorney."²⁹⁹ Closing arguments are sketchy when they are made at all.³⁰⁰ Watching these trials, one gets the overall impression that defense counsel prepare minimally or not at all.³⁰¹ The New York State Bar Association study estimated that in forty-five percent of all juvenile trials, counsel was "seriously inadequate"; in only five percent could the performance of defense counsel be considered "effective representation."³⁰²

One explanation for the abysmal performance of defense counsel is that lawyers in juvenile court are all too frequently both inexperienced and overworked. Particularly in jurisdictions where juveniles have no right to jury trial, public defender offices often assign their greenest attorneys to juvenile court to season them.³⁰³ Supervision from senior attorneys is not always what might be desired,³⁰⁴ and caseloads in these high volume³⁰⁵ courts are crushing. Moreover, in a forum without jury trials, there is a tendency for lawyers to cut corners in these cases of comparatively low public visibility, a tendency often tacitly encouraged by judges anxious to process cases as expeditiously as possible. Under these circumstances, it is no wonder that juvenile bench trials are seldom models of zealous defense advocacy.³⁰⁶

In addition, defense lawyers who routinely practice in juvenile court face tremendous institutional pressures to cooperate in maintaining a smoothly functioning court system.³⁰⁷ The defense lawyer who is seen as obstreperous in her

295. *Id.* at 41.

296. *Id.* at 52, LAW GUARDIANS IN NEW YORK STATE, *supra* note 292, at 8.

297. PROSECUTION IN THE JUVENILE COURT, *supra* note 292, at 52.

298. *Id.* at 51.

299. *Id.*

300. In the Boston Juvenile Court, summations by the defense were "the exception rather than the rule." *Id.* at 52.

301. LAW GUARDIANS IN NEW YORK STATE, *supra* note 292, at 8-9.

302. *Id.* at 8-9.

303. Feld, *supra* note 252, at 1331. Barbara Flicker notes, "[I]n some defender offices, assignment to 'kiddie court' is the bottom rung of the ladder, to be passed as quickly as possible on the way up to more visible and prestigious criminal court assignments." B. FLICKER, *supra* note 285, at 2; see also Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 431 (noting low priority given to juvenile court work by many defenders).

304. Feld, *supra* note 252, at 1331.

305. Two organizations that have commissioned studies on delivery of legal services to indigent defendants have recommended maximum caseloads of 200 juvenile cases per attorney per year. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR NEGOTIATING AND AWARDING INDIGENT LEGAL DEFENSE CONTRACTS, Guideline III-5 (1983 Draft); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON COURT STANDARDS 13.12 (1973). Few if any public defenders, however, can limit themselves to the recommended caseload. In a telephone survey of urban public defender offices across the country, I found no office whose juvenile court caseload met the 200-case guideline. Actual caseload per attorney in 1989 ranged from a low of 250 to a staggering high of 550 cases. The situation may be even more desperate in rural areas; one rural Washington county assigned 912 juvenile cases to one lawyer. 4 WASH. CRIM. DEF. No. 3 at 8 (August 1990).

306. Fox, *supra* note 85, at 1236-37.

307. The process of cooptation, or being rendered unthreatening to a system by assimilating oneself to its values and practices, has long been a problem for defense attorneys in juvenile court.

advocacy will be reminded subtly, or overtly if necessary,³⁰⁸ that excessive zeal in representing her juvenile clients is inappropriate and counter-productive. If she ignores these signals to temper her advocacy, the appointed defense lawyer is vulnerable to direct attacks, such as having her fees slashed or being excluded from the panel of lawyers from which the court makes indigent appointments.³⁰⁹ Seldom are such crude measures necessary, however. For most defense lawyers, withstanding the psychological debilitation attendant upon being the sustained focus of judicial and prosecutorial disapproval is hopeless.³¹⁰

Perhaps the most pervasive and insidious reason for less than zealous defense advocacy is the ambiguity felt by many juvenile court lawyers concerning their proper role.³¹¹ The legacy of decades of paternalistic *parens patriae* ideology is still evident in the attitudes of many defense lawyers, who cannot help thinking of themselves as charged, at least in part, with a responsibility to act in their clients' long term best interests rather than scrupulously to safeguard their legal rights.³¹² Despite the clear ethical mandate to represent juveniles on the same terms and with the same zeal as they would adults,³¹³ many defenders nevertheless find themselves deeply torn between their professional obligation to press their clients' legitimate legal claims and their paternalistic inclination to

See M. BORTNER, *supra* note 285, at 136-39; B. FLICKER, *supra* note 285, at 2A; A. PLATT, *supra* note 5, at 163-75; Feld, *supra* note 252, at 1207-08; *see also* Clarke & Koch, *supra* note 285, at 297-300 (1980) (providing statistical support for ineffectiveness of juvenile counsel). Cooptation of defense counsel is not a phenomenon peculiar to juvenile court; it exists to some degree among defense lawyers in all criminal justice systems. *See generally* Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 18-24 (Issue 2 1967) (institutional pressures encourage defense counsel to place the interests of the court system above the interests of the client, resulting in counsel adopting a conciliatory rather than adversarial stance in representing the client).

308. M. BORTNER, *supra* note 285, at 137.

309. B. FLICKER, *supra* note 285, at 4.

310. *See* Feld, *supra* note 252, at 1207-08.

311. *See generally* Ferster, Courtless & Snethen, *supra* note 285, at 398-401 (discussing various roles counsel assumes when representing juvenile clients and systemic influences on these roles).

312. A survey of defenders in New York State showed that 85% of those lawyers considered their role to be that of a guardian *ad litem*. LAW GUARDIANS IN NEW YORK STATE, *supra* note 292, at 8-9. In a typical example of this attitude, one unnamed public defender described his customary practice in this way:

Ordinarily I stipulate that the probation officer's report is acceptable in the jurisdictional hearing. Otherwise he would have to bring in witnesses. In many such cases, perhaps most, the evidence would not support the judgment, but I hate to see a young kid get the idea that he can get away with something. One 15 year old boy who broke into a bar and took a case of beer told me in an interview that his problem was that he got caught. I became indignant and asked him if he wasn't too young to drink. The boy said, "No, only too young to buy." I decided he needed to be jolted—maybe with a stay in detention—so I encouraged him to admit his guilt in court. No *corpus delicti* needed to be established. If it had been an adult case, I would have taken the position that the D.A. could not prove his case, because the beer was never found and not even reported until a month after it disappeared.

E. LEMERT, *supra* note 285, at 178 (quoting an unnamed public defender).

313. The American Bar Association stipulates that the lawyer with a juvenile client must represent that client's legal interests, and that it is up to the client to decide what those interests are, after consultation with the lawyer. INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.1(a), (b) (1980). The lawyer has the same obligation as to an adult client to keep his juvenile client informed of the progress of his case, and the same requirement to keep his client's confidences and secrets inviolate. *Id.* §§ 3.3, 3.5.

help the court address their clients' often desperate social needs.³¹⁴ Even lawyers who have not internalized this role conflict may face external pressure from judges and probation officers to conform to a guardian-like role.³¹⁵

In all of these ways, the institution of the autonomous and distinct juvenile court inherently discourages effective assistance of counsel for juvenile defendants. As long as a separate juvenile court system exists, separate advocacy models appear to be the inevitable result. Although rooting out paternalistic attitudes toward children cannot be accomplished by fiat, abolishing the juvenile court would go a long way toward ensuring that juveniles charged with crimes get the same caliber of legal counsel, operating under the same standards of zealous advocacy, as adult defendants receive.

3. Dispositional Needs of Juveniles

One objection to the abolition of the separate juvenile justice system is that juvenile court sentencing practices shield young people from the draconian sentences meted out to adult offenders. This objection, however, both overstates the protections of the juvenile system and underestimates the degree to which the ordinary criminal justice system could and undoubtedly would adapt to the extension of their jurisdiction over minors.

First, the recent trend extending the scope of judicial and statutory waiver procedures³¹⁶ already has deprived many young offenders of supposedly palliative juvenile court sentences.³¹⁷ Even for those juveniles remaining within the juvenile court system, however, it may be anachronistic to think of their sentences as radically less severe than those they might receive as adults. For example, one study of juvenile sentences indicates that, compared with earlier

314. See M. BORTNER, *supra* note 285, at 138-39; see also PROSECUTION IN THE JUVENILE COURT, *supra* note 292, at 41 (quoting an unnamed Massachusetts defender, "By the time [the client] gets to court he doesn't need a lawyer, his problems are so deep. I can help him beat his case, but if the kid is really in trouble, that doesn't help him.").

315. See *Beating the Rap in the Juvenile Court*, 31 JUV. & FAM. CT. J. 19 (1980) (decrying defense counsel who are more intent on winning the client's case than saving the client from a life of future crime); see also Welch, *Delinquency Proceedings-Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653, 681-82 (1966) ("Above all, the attorney in a delinquency hearing should discard any personal interest in winning cases. . . . [R]eal 'victory' is realized when a delinquent child has been rehabilitated. The real 'defeat' lies in obstructing the legitimate operation of the rehabilitation mechanism.").

My own experience as a student attorney in Boston Juvenile Court in the late 1970s is illustrative. In one case, I was representing a teenager accused of possessing drugs that had been seized in an arguably unlawful search. After I presented my motion to suppress, the judge asked me point-blank if I really wanted to bring this motion in light of my client's obvious and untreated drug dependency. He offered to call a recess so I could consult with my supervising attorney, who to his credit encouraged me to press the issue. In granting the motion and dismissing the case, the judge commented on what he saw as my misguided zeal in vindicating my client's constitutional rights at the expense of his true best interests in being forced into a drug treatment program. In his parting shot to me, the judge predicted that if I continued to practice in Boston Juvenile Court, I would ultimately wind up agreeing with him. My recurring fear is that he could have been right about that.

316. For a further discussion of this trend, see *supra* notes 165-78 and accompanying text.

317. This includes, most recently, not exempting juveniles over the age of 15 from the death penalty if they are transferred to adult court. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2980 (1989); see *supra* notes 234-38 and accompanying text.

times, in recent years the juvenile court is incarcerating more offenders³¹⁸ and their sentences are longer,³¹⁹ even though the juvenile arrest rate has been declining since 1975.³²⁰ The gap between juvenile and adult sentencing practices thus appears to be narrowing.

Nor must adult sentences necessarily ignore the fact of youth as a mitigating sentencing factor. In those jurisdictions that still maintain indeterminate adult sentences, parole boards and judges alike could consider the age of the offender in setting the appropriate sentence. For states with determinate sentencing grids, an express mitigation factor for youth could be accommodated within the ordinary sentencing matrices. There are neither theoretical nor practical bars to the use of age to mitigate the harshness of average adult sentences.³²¹ Furthermore, available historical evidence suggests that judges considered youth as a mitigating factor in the past before the advent of the juvenile court.³²² Recent sociological data suggests that judges currently give lighter sentences to younger adults in the criminal justice system.³²³ There is no reason to suppose that what has been termed this "punishment gap"³²⁴ between younger and older offenders will not continue to exist when the juvenile court has been dismantled.

Nor is there any need for a special adjudicatory system to justify incarcerating young offenders separately from older criminals,³²⁵ any more than we must have a separate women's court or be forced to imprison females in male penal facilities. Preserving a separate juvenile court system tends to obscure from the public the extent to which juvenile sentencing already fails to protect juveniles from exploitation in adult facilities. The grim truth is that, even under a separate juvenile justice regime, all too many juveniles currently are incarcerated in adult penal institutions.³²⁶

318. Krisberg, Schwartz, Litsky & Austin, *The Watershed of Juvenile Justice Reform*, 32 CRIME AND DELINQ. 5, 22-26 (1986).

319. *Id.* at 12-16, 22-26.

320. *Id.* at 11.

321. In the not-so-distant past, the federal criminal justice system maintained an alternative sentencing scheme for young adult offenders in the Youth Corrections Act, 18 U.S.C. § 5005-06, 5010-26 (1982), repealed by Sentencing Reform Act of 1984, Pub. L. 98-473, § 218(a)(8), 98 Stat. 1837, 2027 (1984).

322. Historian Anthony Platt suggests that, prior to the juvenile court, young people were not often charged with crimes. Even when charged, they frequently were acquitted by juries instructed on the matter of the criminal responsibility of the young, and almost never executed. In tracking down some of the widely-cited examples of child executions in the nineteenth century, he discovered a number to be apocryphal, and most of the rest to be cases involving child slaves. He concludes that the child-saving literature exaggerated the extent to which young people were previously subjected to severe penalties. A. PLATT, *supra* note 5, at 193-212.

323. Several studies have shown that both juveniles waived into adult court and young adults normally subject to adult criminal jurisdiction receive lighter sentences than somewhat older adults with similar offenses and records. Feld, *supra* note 173, at 500-01; P. GREENWOOD, A. ABRAHAMSE, & F. ZIMRING, FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS 13-14 (1984).

324. Feld, *supra* note 174, at 501.

325. Historically, many states have set aside certain adult prison facilities for younger adult offenders. This precedent suggests that states would likely continue as a general policy to house teenaged offenders apart from older convicts.

326. Most states statutorily require certain juveniles to serve their juvenile sentences in adult

Worse yet, the current dichotomous juvenile and adult system often forces the use of adult prisons to incarcerate juveniles waived into the adult system. While there may be sound reasons for holding certain young teenagers criminally responsible and trying them as adults, their subsequent incarceration is a prison administrator's nightmare. In the prison world, these youngest inmates face a horror of unimaginable violence and victimization. If we abolish the separate juvenile court, we detach the question of what place of incarceration would be appropriate from the question of criminal accountability. Serious young offenders could be given sentences proportionate to the gravity of their crimes without necessarily requiring that they serve the first part of the sentence alongside older convicts. In reconstructing childhood as a developmental continuum in which the development of different capacities may proceed at different rates, we are comfortable today concluding that a particular fifteen-year-old may have sufficient cognitive and moral maturity to justify holding him fully responsible for his criminal conduct, while at the same realizing that he may not be physically and psychologically competent to hold his own in the world of an adult prison. Abolishing the juvenile court is thus compatible with our contemporary sentencing and correctional ideology, and consistent with the current social construction of childhood.

VII. CONCLUSION

This Article is a case study applying social constructivist theory in a critical examination of a legal institution—in this case, juvenile court. This theory asserts that the collective social process of constructing systems of shared significance makes it possible for the individual to ascribe meaning to the actions both of the self and others. Therefore, this Article outlines the historical and cultural construction of childhood and adolescence in our society, and explores the consequences of that interpretive construct for the legal order in its treatment of law violations by the young. The turn of the century invention of adolescence and its assimilation to childhood made an autonomous juvenile justice system imaginable and, indeed, indispensable within its social context. Because our interpretive construct of childhood and adolescence has changed, and we no longer view young people as essentially and uniformly different from adults, we can no longer justify maintaining a procedurally and practically inferior justice system for juveniles; hence the call for its abolition.

The reader may question why a normative claim need be made to abolish the juvenile court, assuming that the current refiguration of the life cycle must inevitably lead to change in our legal institutions to make the legal order consis-

prisons. To illustrate, the state of Washington permits the administrative transfer of juveniles if they "present a continuing and serious threat to the safety of others." WASH. REV. CODE § 13.40.280 (Supp. 1991). Those juveniles who receive adult sentences to be served consecutively to their juvenile sentences also may be mandatorily transferred to adult prisons to serve their juvenile terms. *Id.* § 13.40.285. In addition to this kind of statutory transfer, many juveniles are held in adult prisons and jails without legal authorization. For a discussion of this situation and the litigation it has spawned, see Soler, *Litigation on Behalf of Children in Adult Jails*, 34 CRIME AND DELINQ. 190, 190-205 (1988).

tent with our social context. Here I wish to emphasize that the legal order is not merely a passive reflection of the social context in which it is embedded, but rather is in addition a dynamic part of that context. As has been noted, juvenile court would not have been created absent the Progressive Era's attitudes and beliefs about the nature of young people. But it is equally true that in its ideological articulation of purpose and in its practice, the Progressive juvenile court itself helped to change our shared social understanding of what it meant to be a child.

Social constructivism does not imply a deterministic clockwork universe in which "superstructural" aspects such as legal institutions respond to overarching social processes. On the contrary, constructivism insists that it is through the intentional actions of human actors that society collectively creates and recreates our world. In short, the fact that our social order is culturally and historically contingent does not make it immune from criticism or proof against consciously effectuated change. Not only can we examine and understand our shared interpretive constructs, but also we have the power and indeed the moral obligation to judge our constructs and to change them if we find them unsatisfactory. In this study, I have suggested that a separate juvenile court system is no longer consonant with our current cultural and historical context. I have further argued that this institution exacts insupportable social costs. As intentional actors in the legal order, we ought to choose to dismantle it.

