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PROSECUTING JUVENILES IN CRIMINAL COURTS: A LEGAL AND EMPIRICAL ANALYSIS*

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I. PURPOSE

Advocates of a traditional and separate system of juvenile justice have been sharply critical both of judicial decisions handed down during the past two decades that have granted juveniles a broadened set of due process rights and of sweeping legislative modifications in juvenile law that have diminished the discretionary powers of the juvenile court while expanding the powers of prosecutors who wish to pursue cases involving juveniles in criminal rather than juvenile courts. It is argued that this combination of judicial decisions and legislative enactments will dismantle the juvenile justice system and subject juveniles to the risk of harsh treatment by criminal courts that increasingly are committed to retributive rather than rehabilitative goals.[1]

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[1] This is not the appropriate place for us to join the debate now taking place between a growing number of scholars and legislative bodies who favor assigning a significant priority to retributive goals while granting no more than secondary importance to rehabilitative objectives. Two points, however, must be made. First, a rekindling of interest in retributive theories of punishment has had massive effects on the sentencing policies of a large number of states. While rehabilitative and/or such utilitarian goals as

No fewer than two fairly distinct groups, however, have rejected some or all of the arguments advanced by these critics. One group includes what can be thought of as "due process liberals." Never content with the informality of juvenile court proceedings and the consequent inattentiveness to the due process rights of juveniles, those in this group strongly supported judicial decisions that were aimed at expanding the legal rights of juveniles.[2] While not necessarily claiming that the separate juvenile justice system should be abolished altogether, these due process liberals remain firmly convinced that rules of law and procedure governing the operation of juvenile courts should not be substantially different from those found within the adversarial context of criminal courts.

The second group, which can be referred to as "crime control conservatives," attacks those supporting the traditional version of a separate juvenile justice system in a very different manner. At the core of their position is a belief that substantial numbers of juvenile offenders, especially those who are approaching adulthood, who

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deterrence and incapacitation once dominated legislative statements of the purposes of punishment, today we commonly find primacy being assigned to retributive concepts. Typical of this trend is clear language in the Arizona Revised Statutes Annotated which states that the purpose of criminal sentencing is "to impose just and deserved punishment on those whose conduct threatens the public peace." ARIZ. REV. STAT. ANN. §13-101(6) (1978). This "return to retributivism" is not unrelated to the concerns of this Article. The notion that culpable offenders who have harmed others should—indeed must—receive their just deserts has encouraged many to lobby for the prosecution of juveniles in criminal courts. Only then, it is argued, will we have access to sentencing options that are meaningful in terms of retributively-based specifications of desert.

Second, however, it is exceedingly important to recognize that the translation of retributive theories into sentencing policies is both a logical and an empirical impossibility. Retributive theories cannot and do not provide any guidance whatsoever regarding either the specific sentence or the range of sentences that equals the just desert of any offender. *See, e.g.*, N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982); C. THOMAS, CORRECTIONS IN AMERICA (1986); Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, 10 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1 (1984); Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601 (1978). Consequently, any desire to extend the reach of retributive justice to juvenile offenders is inherently doomed to failure. Just as retributive theories provide no guidance of any tangible value regarding what sentence ought be imposed on an adult offender, these theories cannot be relied upon when judicial dispositions are accorded juvenile offenders in either juvenile or criminal courts.

[2] *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975) (holding that double jeopardy protections apply to criminal proceedings subsequent to adjudicatory hearings in juvenile courts); *In re* Winship, 397 U.S. 358 (1970) (holding that standard of proof in delinquency hearings must meet a beyond reasonable doubt standard); *In re* Gault, 387 U.S. 1 (1967) (holding that delinquency hearings must guarantee such due process rights as timely notice, right to counsel, right to confront and cross-examine witnesses, and protection against self-incrimination); Kent v. United States, 383 U.S. 541 (1966) (holding that decision to transfer to adult court is a critical phase of processing at which right to due process attaches).

have significant records of prior delinquency, and/or whose presenting offenses involve serious felonies, are "precocious criminals." They thus advance the belief that such serious juvenile offenders should be removed from the jurisdiction of the juvenile court and prosecuted as adults.[3] This removal, they hypothesize, simultaneously will serve the goal of retributive justice (by guaranteeing that juveniles will receive their "just deserts") and the utilitarian goals of general deterrence, specific deterrence, and incapacitation.[4]

Both of these "pure" positions, of course, encourage us to imagine that our methods of responding to the unlawful conduct of juveniles will reflect a complete adoption of a single model of juvenile justice. Experience in the everyday world of juvenile and criminal justice yields conclusive evidence that we seldom pursue the creation or the application of law in so pristine a fashion. In this analysis, therefore, the authors will move beyond the rhetoric of those who have entered into what appears to be more of a philosophical than a legal debate. The discussion will be divided into several more or less independent sections. The Article will begin with an overview of relevant information regarding the historical origins of granting juveniles some type of special treatment. This portion of our analysis will demonstrate first, that the traditional defense for the informal and often arbitrary procedures of our sepa-

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[3] It should be noted that efforts by crime control conservatives to remove serious juvenile offenders from the jurisdiction of the juvenile court have been matched by even more vigorous efforts by due process liberals who have sought to remove status offenders from the jurisdiction of these courts. In this context, the term "status offender" refers to juveniles who have been charged with offenses for which no adult could be charged (i.e., truancy, being beyond control of parents, etc.). The success of this effort is reflected in the passage of pertinent portions of the Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. No. 93-415, 93d Congress, S. 821, Sept. 7, 1974, § 223(a)(12)) (codified at 42 U.S.C. § 5601, *et. seq.*). The JJDP Act called for, among other things, an end to the incarceration of all status offenders. At least one jurisdiction—the State of Washington—has exceeded this demand by removing all status offenders from the jurisdictional reach of its juvenile courts. *See* A. SCHNEIDER & D. SCHRAM, AN ASSESSMENT OF JUVENILE JUSTICE REFORM IN WASHINGTON STATE (1983). Pressure to move in the direction of full decriminalization of all status offenses and the removal of all status offenders from the jurisdiction of juvenile courts continues to mount. *See, e.g.*, W. WADLINGTON, C. WHITEBREAD & S. DAVIS, CHILDREN IN THE LEGAL SYSTEM 602 (1983); Logan & Rausch, *Why Deinstitutionalization of Status Offenders Is Pointless*, 31 CRIME & DELINQ. 501 (1985).

[4] *See supra* note 1 regarding defects in retributive theories. Regarding utilitarian objectives of punishment, a reasonable assessment of recent empirical evidence provides no more than very modest support for the hypothesis that punishment enhances our ability to prevent either adult crime or juvenile delinquency. *See, e.g.*, DETERRENCE & INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

rate system of juvenile justice which relies upon the presumed *parens patriae* powers of the State is fundamentally flawed in terms of its historical adequacy, and second, that opposition to legal policies which diminish or eliminate altogether the due process rights of juveniles is rooted in a tradition that reaches back at least as far as the beginnings of efforts to create a separate juvenile justice system.

Attention then will shift to how and why the contemporary debate became so heated. Special attention will be given to a combination of judicial decisions that expanded the due process rights of juveniles and to legislative and judicial reactions to those decisions which had the effect of limiting the reach of those expanded due process rights. However, it also will be recognized that recent decisions of the United States Supreme Court raise pointed questions regarding the willingness of the Court to protect the due process ground that arguably was gained during the late 1960's and early 1970's.

Finally, the Article will discuss significant features of Florida's juvenile law and, by drawing on a large body of empirical data derived from the case files of the Dade County (Miami) State Attorney's Office, the manner in which that law is applied in one major metropolitan jurisdiction. The Article will conclude with a discussion of the implications this work may have for the future of juvenile law in Florida and, by extension, significant numbers of other jurisdictions that have made adjustments in their juvenile law similar to those made in Florida.

II. An Historical Overview of the Development of Juvenile Law and the Juvenile Court

A. Early Distinctions Between Juveniles and Adults

It is difficult, if not impossible, to identify precisely the point in legal history at which devising some distinctive means of dealing with juvenile offenders emerged. The earliest legal codes, for example, describe significant numbers of circumstances that could result in juveniles being held liable and confronting very harsh punishments. In the Code of Hammurabi, which appears to be the earliest example of written law, one can find such illustrations as "If a son has struck his father, his hands shall be cut off," and "If the son of a Nersega, or the son of a devotee, to his foster father or his foster mother, has said 'Thou are not my father,' or 'Thou are not my mother,' his tongue shall be cut out."[5] Similarly, Hebrew law, as

[5] The Code of Hammurabi is only partly informative in this regard. Few of its provisions contain language that is of relevance regarding the age of offenders, and the few

reflected in *Exodus, Deuteronomy*, and *Leviticus*, reflects a willingness to deal harshly with juveniles, including those who engaged in conduct for which no adult would have been liable. For example, in *Deuteronomy* it is noted that "[i]f a man has a stubborn and rebellious son who will not obey the voice of his father or the voice of his mother . . . then his father and his mother shall take hold of him and bring him to the elders of his city . . . [and] all the men of the city shall stone him to death with stones."[6]

Notwithstanding this apparent willingness in some ancient bodies of law to deal harshly with juvenile offenders and obvious illustrations of how some of this law directly influenced law in the United States during the Colonial Period,[7] the foundations for legal policies that define juveniles as a special category of persons are more directly linked to developments in English common law, especially the diversification that marked the maturing structure of English courts during the Middle Ages and thereafter. The goal of clarity, though not necessarily of precision, is served by dealing with these two developments as though one reflects a concern with principles of substantive criminal law and the other as though it were more closely linked with judicial administration.

With regard to substantive criminal law, we must note the willingness of English criminal courts to accept infancy or immaturity as a legal excuse.[8] This defense was not available immediately after the Norman Conquest in 1066. The seeds for such a defense, however, do appear to have been sown by that early point in English judicial history via indications of a willingness to excuse the otherwise criminal conduct of, in the language of that period, "lunatics." For example, Rollin Perkins and Ronald Boyce have observed:

> By the time of Henry III (1216-1272) it was not uncommon for the king to grant a pardon as a special act of grace for one who had committed homicide while of unsound mind, and in the reign of Edward I (1272-1307) although there was no change in the theory of guilt as a strict matter of law, such a homicide was regarded as pardonable to the extent that it entitled the defendant to a special verdict saying he committed the crime while mad and this practically insured the issuance of a pardon, which in time came to be granted as a matter of

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that could be relevant are subject to differing translations. *But see* THE OLDEST CODE OF LAWS IN THE WORLD: THE CODE OF LAWS PROMULGATED BY HAMMURABI, KING OF BABYLON, B.C. 2285-2242 (C. Johns trans. 1903).

6 *Deuteronomy* 21:18-21.

7 Numerous examples may be found in the 1641 MASSACHUSETTS BODY OF LIBERTIES.

8 *See, e.g.*, P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW 628 (1982); R. PERKINS & R. BOYCE, CRIMINAL LAW 936, 949 (3d ed. 1982).

course.[9]

Clearly, then, early recognition was given to the possibility that courts could and should excuse the conduct of those who did not appreciate the wrongfulness of their actions. Precisely when such notions began to shape common law standards regarding the culpability of juveniles is not altogether clear. However, it generally is agreed that this development took place by no later than the fourteenth century.[10]

The basic common law standards governing the defense of infancy or immaturity are easily summarized.[11] Children below the age of seven were said to lack any criminal capacity (i.e., *mens rea*). No evidence in support of a contrary position was admissible. There was a conclusive presumption that a child was *doli incapax*. Between the ages of seven and fourteen, however, a rebuttable presumption of incapacity existed. Thus, practically speaking, the nearer a child was to adulthood (i.e., fourteen years of age), the easier it became to introduce convincing evidence that the juvenile offender should be handled as a responsible adult rather than as a child who lacked any criminal capacity. Those who were fourteen years of age or older had no right to raise infancy or immaturity as a defense. They were presumed to be *doli capax* and thus fully responsible for their conduct. Consequently, absent some other means of contending that they lacked criminal capacity (e.g., the insanity defense), they were dealt with as fully responsible adults.[12]

The changing nature of the structure of the early English judicial system is of far greater importance than is the substantive crimi-

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9 R. PERKINS & R. BOYCE, *supra* note 8, at 950.

10 *See, e.g.*, R. CALDWELL & J. BLACK, JUVENILE DELINQUENCY 186, 200 (1971); A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); Caldwell, *The Juvenile Court: Its Development and Some Major Problems*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 493 (1961); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

11 *See* S. FOX, THE LAW OF JUVENILE COURTS IN A NUTSHELL 21, 35 (1977); R. PERKINS & R. BOYCE, *supra* note 8, at 936. *See also* Godfrey v. State, 31 Ala. 323 (1858); Dove v. State, 37 Ark. 261 (1881); Angelo v. People, 96 Ill. 209 (1880); Willet v. State, 76 Ky. (13 Bush) 230 (1877).

12 This, of course, is something of an overstatement in the sense that colonial and post-colonial period sentencing practices appear to have shielded most juveniles from especially harsh dispositions and included such "creative sentencing alternatives" as lengthy apprenticeships in lieu of strict reliance upon more traditional penal sanctions. *See, e.g.*, P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 8, at 629. On the other hand, it also is true that at least 287 juveniles were executed between 1642 and the present—12 of these executions involving children below the age of fourteen. Strieb, *The American Experience with Capital Punishment*, 36 OKLA. L. REV. 613, 619 (1983). A perplexing aspect of these execution statistics is that 66.90 percent (N=192) of them took place after a separate system of juvenile justice had begun to take form in the United States (i.e., they are post-1899 executions).

nal law to anyone who wishes to understand the foundations of the juvenile justice system that was to emerge in the United States during the nineteenth century. It is also a topic that is difficult to deal with in a summary fashion.[13] Nevertheless, those with interests in the history of law will recall that distinctions between what we now think of as legislative, executive, and judicial functions were far from clear during the period immediately following the Norman Conquest in 1066. Though some judicial powers continued to be exercised by, for example, the shire court and the hundred court, many, if not most, of these powers were vested in the King and his closest advisors (the *Curia Regis*). Furthermore, until at least the time of Henry II (1154-1189), distinctions between civil and criminal wrongs were anything but precise.

However, as the monarchy began to consolidate its political power, at least partly via the contention that criminal offenses were wrongs committed against the State as well as wrongs committed against individuals, the development of an increasingly specialized system of courts became both a necessary way of resolving disputes and an important means of expanding the power of the State. Thus, powers initially vested only in the King and the *Curia Regis* gradually began to attach to several specialized courts: the Court of Exchequer of Pleas, largely an innovation designed to guarantee that payments of taxes and various fees would be made on a timely basis; the Court of Common Pleas, primarily a court within which civil disputes were handled; the Court of King's Bench, which served both as a criminal court and an appellate court that reviewed cases originating in the Court of Common Pleas; and the Court of Chancery, which in some ways may be thought of as a special court that sought remedies for cases that could not be resolved in an equitable manner by other types of courts, especially the Court of Common Pleas.[14]

Certainly the most important of these courts, given the purposes of this discussion, were the chancery courts. While the origins of these courts in the role of the chancellor as the most powerful of the King's advisors may be found soon after the Norman Conquest, it generally is said that a separate chancery court did not exist until

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[13] *But see* H. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); J. GOEBEL, FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW (Univ. of Pa. Paperback ed. 1976); F. KEMPIN, HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW (1973) [hereinafter cited as F. KEMPIN, HISTORICAL INTRODUCTION]; F. KEMPIN, LEGAL HISTORY: LAW AND SOCIAL CHANGE (1963) [hereinafter cited as F. KEMPIN, LEGAL HISTORY].

[14] *See, e.g.*, F. KEMPIN, HISTORICAL INTRODUCTION, *supra* note 13, at 22; F. KEMPIN, LEGAL HISTORY, *supra* note 13, at 1; C.G. POST, AN INTRODUCTION TO THE LAW 18 (1963).

1474.[15] Historical concerns aside, there are two important linkages between the early chancery courts and the structure of more modern juvenile courts.

First, it was within these chancery courts that we find the clearest initial assertions of the *parens patriae* powers and responsibilities of the State (i.e., the idea that the State has the right and perhaps the responsibility to intervene on behalf of those of its citizens who, by virtue of youthfulness or other evidence of an inability to care for themselves, require that the State act as a surrogate parent).[16] Although it will later become obvious that a vastly different meaning subsequently was attributed to the term, this *parens patriae* power was to provide the cornerstone for far later reform efforts in the United States.

Second, and quite significantly, the early chancery courts lacked the formality and rigidity of other English courts.[17] They were relatively informal in their operation and, equally important, endowed with the power to create new and unusual legal remedies rather than simply applying older law to new cases. At the same time, however, it should be understood that the issues coming before these courts concerned "property, guardianship, and the arrangement of people, property, and power in relation to the monarchy."[18] Moreover, the chancery courts neither had nor sought jurisdiction over criminal cases involving either juvenile or adult offenders. In some ways, therefore, it is ironic that so many continue to see the powers and procedures of the early chancery courts as providing a firm foundation for the creation of contemporary juvenile law.[19]

B. CHANGING PATTERNS OF REACTIONS TO JUVENILE OFFENDERS: THE AMERICAN EXPERIENCE AND EXPERIMENT

At least in part because of the impact of British common law on

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15 F. KEMPIN, LEGAL HISTORY, *supra* note 13, at 19.

16 *Id.* It should be noted that the present use of this *parens patriae* power reaches well beyond situations involving children charged with criminal or delinquenct acts and into situations involving, for example, parental refusals to provide medical treatment for their children, child abuse, child labor laws, and compulsory education laws. For a recent consideration of these and related issues, see CHILDREN, MENTAL HEALTH, AND THE LAW (N. Reppucci, L. Weithorn, E. Mulvey & J. Monahan eds. 1984).

17 *See* J. CAREY & P. MCANANY, INTRODUCTION TO JUVENILE DELINQUENCY: YOUTH AND THE LAW 54, 59 (1984).

18 Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, in JUVENILE JUSTICE AND PHILOSOPHY 58, 60 (F. Faust & P. Brantingham eds. 1979). *See also* Cogan, *Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. REV. 147 (1970); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971).

19 *See, e.g.*, THE CHILDREN OF ISHMAEL: CRITICAL PERSPECTIVES ON JUVENILE JUSTICE 14, 18 (B. Krisberg & J. Austin eds. 1978).

the legal system developed in America during the Colonial Period, some of the earliest American legal documents explicitly recognize the age of those alleged to have violated the law. Reflecting both this fact and the linkage between some colonial law to language found in the Old Testament, for example, one of the provisions in the 1641 Massachusetts Body of Liberties contains the following:

> If any child, or children, *above sixteen years of age, and of sufficient understanding*, shall curse or smite their natural father or mother, he or they shall be put to death, unless it can be sufficiently testified that the Parents have been very unchristianly negligent in the education of such children: so provoked them by extreme and cruel correction, that they have been forced thereunto, to preserve themselves from death or maiming.[20]

Realistically, however, the roots of the reform movement are associated most directly with the establishment of houses of refuge in Massachusetts, New York, and Pennsylvania between 1824 and 1828.[21] While there is considerable evidence of earlier exploratory efforts aimed at fashioning special methods of handling juveniles, particularly in Europe, the houses of refuge appear to have been the first public facilities established exclusively for juveniles[22]—though it should be understood that those committed to this and similar institutions by early courts were most commonly children who today would be placed in a "status offender" (i.e., beyond control of parents, vagrant, runaways, etc.) rather than a delinquent category.[23]

Suffice it to say that the initial innovation represented by the houses of refuge was not universally appreciated, largely because

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[20] MASSACHUSETTS BODY OF LIBERTIES, *quoted in* B. Krisberg & J. Austin, *supra* note 19, at 12 (emphasis added).

[21] H. BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA (1927); J. HAWES, CHILDREN IN URBAN SOCIETY (1971); B. KRISBERG & J. AUSTIN, *supra* note 19; R. MENNELL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE STATES, 1825-1940 (1973); R. PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857 (1969); A. PLATT, *supra* note 10; D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971); S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920 (1977); Sutton, *Social Structure, Institutions, and the Legal Status of Children in the United States*, 88 AM. J. SOC. 915 (1983); Sutton, *Stubborn Children: Law and the Socialization of Deviance in the Puritan Colonies*, 15 FAM. L. Q. 31 (1981).

[22] It is claimed that the New York City House of Refuge was the first public facility that was designed specifically for those we would now refer to as either delinquents or dependent/neglected children. For more thorough reviews of these and earlier developments see T. ERIKSSON, THE REFORMERS: AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS (1976); B. MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS (1977); A. PLATT, *supra* note 10; Fox, *supra* note 10; Teitelbaum & Harris, *Some Historical Perspectives on Governmental Regulation of Children and Parents*, in L. TEITELBAUM & A. GOUGH, BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 1 (1977).

[23] Teitelbaum & Harris, *supra* note 22, at 1.

courts which committed children to these institutions often did so in a way that reflected little regard for due process rights. Constitutional challenges were thus quick to materialize. Perhaps the earliest illustration of this criticism is provided by *Ex parte* Crouse.[24] Based on a complaint by her mother which alleged that Mary Ann Crouse was an incorrigible child, Mary Ann was detained in the Philadelphia House of Refuge. Contending that his daughter should not have been committed to the House of Refuge without a prior exercise of her right to a trial by jury, her father challenged the constitutional basis of Mary Ann's commitment. However, raising the *parens patriae* power of the State as a legitimation for its holding, the Pennsylvania Supreme Court observed: "The infant has been snatched from a course which must have ended in confirmed depravity; and, not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it."[25] Similarly, in Farnham v. Pierce,[26] the Massachusetts Supreme Court defended the deprivation of due process rights by holding that a challenged statute

> is not a penal statute, and the commitment to the public officers is not in the nature of punishment. It is a provision by the Commonwealth, as *parens patriae*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost. . . . It does not punish the infant by confinement, nor deprive him of his liberty; it only recognizes and regulates, as in providing for guardianship and apprenticeship, the parental custody which is an incident of infancy.[27]

The roots of a separate juvenile justice system, with their origins in the English chancery courts, thus found fertile soil in the United States long before the considerably later creation of separate juvenile courts. Indeed, there are numerous indications that something akin to a separate court system emerged in some jurisdictions before the well-known Illinois legislation of 1899.[28] For example, Massachusetts designed special probation provisions for juvenile of-

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[24] 4 Whart. 9 (Pa. 1838). As additional examples of judicial willingness to assert a variety of *parens patriae* power that appears to have had no foundation beyond the novel claim asserted by the Pennsylvania Supreme Court in *Crouse*, see *Ex parte* Sharpe, 16 Idaho 120, 96 P. 563 (1908); *In re* Ferrier's Petition, 103 Ill. 367 (1882); County of McClean v. Humphreys, 104 Ill. 378 (1882); Roth v. House of Refuge, 31 Md. 329 (1869); Farnham v. Pierce, 141 Mass. 203, 6 N.E. 830 (1886); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); Milwaukee Industrial School v. Supervisors, 40 Wis. 328 (1876).

[25] *Crouse*, 4 Whart. at 11-12.

[26] 141 Mass. 203, 6 N.E. 830 (1886).

[27] *Id.* at 204, 6 N.E. at 831.

[28] Illinois Juvenile Court Act, § 1, 1899, Ill. Laws 131 (repealed 1965).

fenders by 1869, and in 1870, Massachusetts provided separate hearings for juveniles in Suffolk County.[29] Similarly, by 1877, New York law required that juvenile and adult offenders be separated from one another in its courts and penal institutions and, in 1892, New York law called for separate trials for children below the age of eighteen.[30] Thus, a lengthy and often complicated history predated the establishment of juvenile courts in the State of Illinois in 1899.[31]

By way of a brief overview of the period between 1899 and the mid-1960's, however, two points warrant particular emphasis. First, juvenile courts did not develop in any highly specific fashion after 1899.[32] Some courts were separated entirely from other courts of limited or of general jurisdiction. Some of them were granted exclusive jurisdiction over all matters—dependency, neglect, and delinquency—involving persons below some age defined by statutory law. More often, juvenile courts and criminal courts had concurrent jurisdiction over significant numbers of juveniles who were alleged to have engaged in unlawful conduct. Whether as a matter of technical legal definitions regarding jurisdiction or as a matter of prevailing legal practice, however, the vast majority of delinquency cases in the United States quickly came to fall within the reach of juvenile rather than criminal courts.[33] Moreover, the jurisdictional reach of these courts soon became a power of the juvenile court that it effectively sought to retain. It most commonly did so by asserting its right to determine whether juvenile cases should or should not be moved to the jurisdiction of criminal courts (i.e., transfer of jurisdiction after a waiver hearing held within the juvenile court). Indeed, "to waive" a case became the legal equivalent to admitting that the rehabilitative efforts and potential of the juvenile justice system were impotent. Thus, the burden of proof placed on those who sought a transfer of jurisdiction became substantial. They had to provide convincing evidence that the child was not amenable to treatment as a juvenile and that he or she would constitute a danger-

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29 P. TAPPAN, CRIME, JUSTICE AND CORRECTION 388 (1960).

30 *Id.*

31 *See supra* note 28.

32 *See* H. RUBIN, THE COURTS: FULCRUM OF THE JUSTICE SYSTEM 79 (1983).

33 This trend is well-illustrated by the changes in relevant New Jersey statutes reviewed by P. Low, J. JEFFRIES & R. BONNIE, *supra* note 8, at 647. Statutes passed in 1903 and 1912 limited the powers of its juvenile courts by excluding murder and manslaughter from the jurisdiction of these courts. This limitation was removed in 1929, and in 1935 legislation passed which described "a person under the age of 16 [as being deemed] incapable of commiting a crime." *Id.* For a frequently discussed ramification of this expansion of the jurisdictional powers of New Jersey's juvenile courts, see State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954).

ous threat to the community were his or her case to be disposed of within the juvenile justice system.[34]

Second, as the juvenile justice system developed in the United States, its advocates claimed a special exception from the constitutional restraints that applied to criminal courts. On the one hand, they consistently legitimized their intervention into the lives of juveniles with repeated references to the *parens patriae* powers and responsibilities of the State (conveniently ignoring, of course, that in the English origins of such powers and responsibilities they had little if anything to do with behavior that was in violation of the provisions of criminal law).[35] On the other hand, they were swift to join those who, during the last quarter of the nineteenth century, argued that criminal behavior did not reflect a conscious choice made by a rational actor and that, instead, it was an overt reflection of some force or forces over which individuals had little or no control.[36] Crime, most particularly crimes committed by juveniles, came to be seen as something very closely akin to the way we view disease.[37] Disease, of course, is to be treated rather than punished. Moreover, the treatment of disease is said to require individualized diagnosis, flexibility in the development of an appropriate treatment plan, and, sometimes, periods of isolation or quarantine that bear little or no relationship to the legal seriousness of, in effect, symptoms. The fact that pitifully little criminological evidence or theory supports such a "medicalization of delinquency" or the ability of the juvenile justice system effectively to provide for a "cure" for delinquency was and often continues to be ignored by those who confidently as-

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[34] *See, e.g.*, Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167 (1981); Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978).

[35] Early cases are replete with language that suggests that juveniles lack due process rights when they encounter the State in its capacity as *parens patriae*. The end, early courts commonly contended, justifies the deprivation of virtually all constitutional rights that juveniles might assert in other contexts. Consider, for example, especially clear language in Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905) that drew favorable comment in the frequently cited case of *Ex parte* Sharpe, 16 Idaho 120, 96 P. 563 (1908):

> "To save a child from becoming a criminal . . . the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state *without any process at all* . . . . When the child gets there, and the court, with the power to save it, determines on its salvation, and not its punishment, *it is immaterial how it got there.*"

Id. at 127-28, 96 P. at 564 (quoting *Fisher*, 213 Pa. at 53, 62 A. at 200) (emphasis added).

[36] *See, e.g.*, G. NETTLER, EXPLAINING CRIME (3d ed. 1984); THEORETICAL CRIMINOLOGY (T. Bernard 2d ed. 1979) (G. Vold 1st ed. 1958); C. THOMAS & J. HEPBURN, CRIME, CRIMINAL LAW, AND CRIMINOLOGY (1983).

[37] For a general overview of this and related issues, see P. CONRAD & J. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS (1980).

sert the reasonableness of a very separate and a very different system of juvenile justice.[38]

III. Contemporary Developments in Relevant Juvenile Law

During the period immediately following the establishment of the first juvenile courts in Illinois in 1899, the considerable popularity of the proposals advanced by those who urged the State to exercise its *parens patriae* powers to legitimize the creation of a separate juvenile justice system had massive effects on the administration of justice in the United States.[39] By 1912, for example, juvenile courts had been established in no fewer than twenty-two states. By 1925, juvenile courts existed in all but two states: Maine and Wyoming. The reform movement proved to be completely successful by 1945. By that time every jurisdiction in the nation, including that of the federal government, had created some type of juvenile court.[40] Much the same can be said of the success of this reform movement in other countries. For example, within no more than a quarter of a century after the passage of the initial legislation in Illinois, virtually all European jurisdictions had made major changes in their methods of dealing with juveniles who were alleged to have violated the provisions of criminal law.[41]

Largely because advocates of a system of more or less independent juvenile courts contended that such courts should enjoy very broad discretionary powers and that they should not be charac-

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[38] G. Kassebaum, D. Ward & D. Wilner, Prison Treatment and Parole Survival: An Empirical Assessment (1971); P. Lerman, Community Treatment and Social Control (1975); D. Lipton, R. Martinson & J. Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (1975); Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. Crim. L., Criminology & Police Sci. 153 (1966); Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in Justice for the Child: The Juvenile Court in Transition 22 (M. Rosenheim ed. 1962); Riedel & Thornberry, *The Effectiveness of Correctional Programs: An Assessment of the Field*, in B. Krisberg & J. Austin, *supra* note 19, at 418; Robison & Smith, *The Effectiveness of Correctional Programs*, 17 Crime & Delinq. 67 (1971).

[39] *See, e.g.*, J. Carey & P. McAnany, Introduction to Juvenile Delinquency: Youth and the Law 255, 285 (1984); H. Lou, Juvenile Courts in the United States (1927); C. Simonsen & M. Gordon, Juvenile Justice in America 170, 200 (1982); P. Tappan, Crime, Justice, and Correction 387, 401 (1960); Chute, *The Juvenile Court in Retrospect*, Fed. Probation, Sept. 1949, at 3.

[40] *See* Krisberg & Austin, *History of the Control and Prevention of Juvenile Delinquency in America*, in B. Krisberg & J. Austin, *supra* note 19, at 7; Rubin, *The Juvenile Courts*, in H. Rubin, The Courts: Fulcrum of the Justice System 79 (1983); Teitelbaum & Harris, *supra* note 22.

[41] Relevant laws were enacted soon after the Illinois initiative in, for example, Great Britain (1908), France (1912), Belgium (1912), Hungary (1913), Spain (1918), and Germany (1923). *See* United States Children's Bureau, Juvenile Court Laws in Foreign Countries, Pub. No. 328 (1951).

terized by the commitment of criminal courts to formalities designed in part to protect the due process rights of defendants,[42] juvenile courts always have found themselves under attack by liberal critics whose core concern has been with the constitutionality of juvenile court procedures, policies, and broad dispositional powers.[43] Critical and clear language, for example, appears in *In re* Coyle: "Juvenile court procedure has not been so far socialized and individual rights so far diminished that a child may be taken from its parents and placed in a state institution simply because some court might think that to be in the best interests of the state."[44] Indeed, such sharp attacks on what was to become the guiding philosophy of juvenile courts were in evidence even before the Illinois legislation of 1899.[45]

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[42] B. KRISBERG & J. AUSTIN, *supra* note 19; A. PLATT, *supra* note 10; Fox, *supra* note 10; Lemert, *The Juvenile Court—Quest and Realities*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, JUVENILE DELINQUENCY AND YOUTH CRIME 91 (1967); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Mack, *The Juvenile Court as a Legal Institution*, in PREVENTIVE TREATMENT OF NEGLECTED CHILDREN 293 (H. Hart ed. 1910).

[43] *See, e.g.*, NATIONAL JUVENILE LAW CENTER, INC., LEGISLATIVE RESOURCE MANUAL FOR IMPLEMENTATION OF THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (1979); Fox, *supra* note 10; Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967). Notwithstanding criticism of the policies and procedures adopted within the juvenile court system, it is important to recognize that between 1899, when the initial Illinois juvenile court legislation was enacted, and 1966, when the decision of the United States Supreme Court in Kent v. United States, 383 U.S. 541, was issued, not a single directly relevant juvenile delinquency case was formally decided by the Court. *But see* Gallegos v. Colorado, 370 U.S. 49 (1962) (holding that due process clause prohibits use of improperly obtained confession of juvenile tried in criminal court); Haley v. Ohio, 332 U.S. 596 (1948) (holding that due process clause prohibits use of coerced confession of juvenile tried in criminal court); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (holding invalid state law requiring pledge of allegiance by public school children).

Thus, the development of our juvenile justice system between no later than 1899 and 1966 is most unusual in two regards. First, the authors are aware of no major innovation in either the criminal or the juvenile justice system that transformed the structure and function of courts so swiftly as did the rush to follow the general model created in Illinois. Second, it is almost impossible to imagine that so major an adjustment in the structure of the judicial system and in the routine application of legal policy persisted for so long a period of time with no more than a handful of denials of requests for writs of certiorari. Even a few years before *Kent*, however, the United States Supreme Court appears to have supported its continuing "hands off doctrine" by accepting the simple contention advanced by the Pickett Supreme Court that "[s]ince juvenile courts are not criminal courts, the constitutional rights granted to persons accused of crimes are not applicable to the children brought before them." *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955).

[44] *In re* Coyle, 122 Ind. App. 217, 219, 101 N.E.2d 192, 193 (1951).

[45] An early and important example of this is provided by *Ex parte* Crouse, 4 Whart. 9 (Pa. 1838). *See also Ex parte* Sharpe, 16 Idaho 120, 96 P. 563 (1908); People v. Turner, 55 Ill. 280 (1870); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905). Increasingly, however, the courts came to push such challenges aside by referring to the *parens patriae* power of the State and by declaring that juvenile and criminal courts are qualita-

These attacks notwithstanding, challenges to the expanding powers of juvenile courts proved to be futile throughout most of this century. During the "due process revolution" of the 1960's and early 1970's, however, the United States Supreme Court, in such celebrated cases as Kent v. United States,[46] In re Gault,[47] In re Winship,[48] and Breed v. Jones,[49] determined that the simple status of being a juvenile could not be equated with a total lack of access to fundamental constitutional rights. This brief burst of judicial activism drew mixed reviews from those with special interests in juvenile law and the role of juvenile courts. Many expressed concerns that the Court was moving in a direction that would have the effect of eliminating most if not all distinctions between juvenile and adult courts and, consequently, that the objective of the juvenile justice system would become the pursuit of retributive justice within a fully adversary system.

The "doom and gloom" predictions of those who supported the retention of what they took to be a traditional juvenile court system did not prove to be accurate, at least to the extent that those predictions involved concerns about the probable direction in which the United States Supreme Court would move. In *Winship*,[50] for example, Chief Justice Burger contended that "[w]hat the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive . . . the repeated assaults from this court."[51] Similarly, as the Court rejected the notion that juveniles had a federal constitutional right to a trial by jury in McKeiver v. Pennsylvania,[52] Justice Blackmun suggested that "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it."[53] Those favoring the retention of a system of juvenile courts—

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tively different entities. *See, e.g., In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955).

46 383 U.S. 541 (1966).

47 387 U.S. 1 (1967)

48 397 U.S. 358 (1970).

49 421 U.S. 519 (1975) (holding that fifth and fourteenth amendment protections against double jeopardy apply to subsequent criminal proceedings after adjudicatory hearings in juvenile courts). *But see* Swisher v. Brady, 438 U.S. 204 (1978).

50 397 U.S. 358, 376 (Burger, C.J., dissenting).

51 *Id.* (Burger, C.J., dissenting).

52 403 U.S. 528 (1971) (holding that due process rights of juveniles charged with unlawful conduct do not include right to trial by jury).

53 *Id.* at 551.

even courts that were required to relinquish some portion of their discretionary powers as a consequence of the *Kent-Gault-Winship* trilogy—then breathed a sigh of relief.[54]

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[54] Proponents of providing a distinctively different set of constitutional rights to juveniles—which is to say a reduced access to due process protections—appear to have found some new friends judging from recent and somewhat tortured opinions of the United States Supreme Court. Several significant examples are obvious. In Schall v. Martin, 104 S. Ct. 2403 (1984), for instance, the Court overturned a holding of the Court of Appeals for the Second Circuit, 689 F.2d 365 (2d Cir. 1982), regarding a provision of the New York Family Court Act, § 320.5(3)(b), that provided for the pre-trial detention of juveniles if it was the opinion of the juvenile court that such juveniles would present a risk to themselves or others were they not detained. The Court of Appeals had determined that the statute was unconstitutional, largely because (1) "the detention period serves as punishment imposed without proof of guilt established according to the constitutional standard," 689 F.2d at 374, and (2) because "the vast majority of juveniles detained . . . either have their petitions dismissed before an adjudication of delinquency or are released after adjudication," 689 F.2d at 369. The Supreme Court majority, in an opinion delivered by Justice Rehnquist, ignored altogether the inability to predict dangerousness of either juveniles or adults in a suitably reliable and valid fashion. The majority reasoned in part that the maximum detention period of seventeen days was not so great and, in any event, not inconsistent with the *parens patriae* powers of the State.

The case of Parham v. J.R., 442 U.S. 584 (1979), provides a still more troublesome case in point. It involved a class-action suit based on 42 U.S.C. § 1983 in which voluntary commitment procedures of juveniles pursuant to GA. CODE §§ 88-503.1, 88-503.2, had been challenged. While agreeing that juveniles have a protected liberty interest in such settings, the Court, in an opinion by Chief Justice Burger, found no need for either a formal or quasi-formal hearing prior to the commitment of juveniles as a means of guaranteeing their due process rights. By implication, then, the earlier holdings in such celebrated cases as *Kent, Gault,* and *Winship* may be ignored altogether so long as the State seeks to commit juveniles to hospitals rather than to training schools.

Consider also Fare v. Michael C., 442 U.S. 707 (1979). After being taken into custody by police in Van Nuys, California, sixteen year-old Michael C. responded to standard *Miranda* warnings by requesting the presence of his probation officer. The request was refused and, with no attorney or parent present, the police obtained incriminating statements. The California Supreme Court subsequently determined that, for *Miranda* purposes and in cases involving juveniles, the request of Michael C. was the equivalent to a request for counsel. *In re* Michael C., 21 Cal.3d 471, 579 P.2d 7 (1978), *rev'd*, 442 U.S. 707 (1979). Despite strong dissent from Justices Marshall, Brennan and Stevens, the Court held that Michael C.'s request for his probation officer was not an invocation of fifth amendment protections against self-incrimination and that admissions made by him should not have been suppressed. Fare v. Michael C., 442 U.S. 707 (1979).

As a final and recent illustration of the apparent retrenchment of the Court in the area of due process rights of juveniles, consider New Jersey v. T.L.O., 105 S. Ct. 733 (1985). There the Court granted certiorari to determine the applicability of the exclusionary rule to searches of public school students conducted by school officials. Recognizing that searches and seizures must be reasonable and that public school students enjoy a protected privacy interest while they are on school property, the Court held that school officials need not seek a warrant before searching students and, moreover, that the searches they do conduct need not stem from considerations of probable cause to believe that any rule or law has been violated by the persons they search. Only a vaguely defined "reasonableness test" need be met to support such searches and to avoid entirely any fourth amendment entanglements.

These and related cases make it abundantly clear that any who hypothesized something approaching a complete set of due process rights to juveniles in the wake of such

It quickly became apparent, however, that this sigh of relief stemmed from understandings that were as poorly grounded as earlier predictions that the Court was going to strike at the very heart of the philosophy upon which the juvenile courts had been constructed. Specifically, what the Supreme Court now appears to have been indicating was a growing hesitancy to further dismantle the juvenile court system by setting forth judicially promulgated guidelines that would blur or eliminate the distinction between juvenile and criminal courts. Recall, however, that this manifestation of judicial restraint appeared at a point in recent history during which the "crime in the streets" issue was becoming a dominant public and political concern. One dimension of this concern, widely believed to have been a reflection of the post-World War II "baby boomers" reaching the age at which disproportionate involvement in crime and delinquency always has been common (i.e., roughly those between the ages of fifteen and twenty-five), included a rapid growth in the numbers of juveniles who were alleged to have engaged in serious violations of law.[55] A related dimension included a rapidly growing reservation about the rehabilitative potential of either the juvenile or the criminal justice system.[56]

The legislative response was as quick as it was popular. A "get tough on crime" plank became an almost obligatory ingredient in the promises made by politicians at all levels of government. Support for individualized treatment of offenders and a commitment to the so-called "rehabilitative ideal" quickly gave way to retribution, "just deserts," long mandatory sentences for a variety of criminal offenses, the abolition of parole within the adult system, and, at the extreme, a major reversal in both public and legislative definitions of the appropriateness of capital punishment.[57] More significantly, for our purposes here, jurisdiction after jurisdiction made sweeping

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decisions as *Gault* were unappreciative of how definitions attached to the Bill of Rights and the fourteenth amendment due process and equal protection clause can change as swiftly as does the composition of the Court.

55 Evidence of growth in the rate as well as the sheer number of juvenile offenses is abundant. For example, the estimated number of arrests of persons under eighteen years of age in 1960 was 485,007. By 1975, this rose to 1,184,105, or a percentage increase of 144.1. During the same time period, arrests of persons eighteen years of age or older rose from 2,969,209 to 3,353,285, or a far more modest percentage increase of 12.9. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 182 (1976).

56 *See supra* note 38.

57 Perhaps the most frequently cited reference is E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION (1975). For a less superficial and politically conservative treatment of many of the same issues, see JUSTICE AS FAIRNESS: PERSPECTIVES ON THE JUSTICE MODEL (D. Fogel & J. Hudson eds. 1981); SENTENCING (H. Gross & A. von Hirsch eds. 1981).

modifications in the provisions of juvenile law.[58]

In ways that will be considered more thoroughly elsewhere in this analysis, legislative bodies at both the state and federal levels moved to redefine previous definitions of (1) the age below which jurisdiction over those alleged to have violated the provisions of law would be disposed of by juvenile rather than criminal courts and (2) the circumstances under which prosecutors rather than juvenile court judges would have the non-reviewable discretionary power to determine the court before which juveniles would be required to appear. An extreme illustration of this major transition is provided by a now-amended provision of Wyoming law.[59] The relevant portion stated, "All complaints alleging misconduct of a minor other than violation of a municipal ordinance, WYO. STAT. §12-6-101 or a misdemeanor violation of the Uniform Act Regulating Traffic on Highways, must be referred to the county and prosecuting attorney *who shall determine the appropriate action to be taken and the appropriate court in which to prosecute the action.*"[60]

To be sure, legislative actions designed to do what the United States Supreme Court had either refused to do or did not wish to do have not gone unchallenged. In particular, many have advanced the view that the expansion of prosecutorial powers to a point at which prosecutors, without benefit of any judicial hearing and on the authority of little more than broad legislative guidelines, is flatly contradictory to the holding of the Supreme Court in Kent v. United States.[61] Repeatedly, however, the appellate courts held that there is no constitutional defect in those provisions of juvenile law that

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58 For a relatively recent review of some related materials, see D. HAMPARIAN, YOUTH IN ADULT COURTS (1982).

59 For a critical discussion, see Brinkerhoff, *Prosecution as a Juvenile or an Adult? Is the Discretion Vested in the District Attorney by Section 14-6-203(c) of the Wyoming Statutes Unconstitutional and Violative of the Proper Role of a Prosecutor?*, 19 LAND & WATER L. REV. 187 (1983).

60 WYO. STAT. § 14-6-203(c) (1978) (emphasis added) (current version at WYO. STAT. §14-6-203(c) (Supp. 1985)).

61 383 U.S. 541 (1966). There are numerous illustrations of this position, but an especially sound example is provided by Circuit Judge Wright's strong dissent in United States v. Bland, 472 F.2d 1329, 1338 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). He hotly opposed statutory adjustments that removed the need for a traditional waiver hearing prior to any transfer of juvenile defendants to the jurisdiction of criminal courts. *See* 16 D.C. CODE ANN. § 16-2301(3)(A)(Supp. V 1972) (current version at D.C. CODE ANN. 16-2301(b)(A) (1981)). In particular, Judge Wright complains that the relevant portion of the amended D.C. CODE "was written into the Act in order to countermand the Supreme Court's decision in *Kent* as well as this court's rulings in *Watkins* [referring to Watkins v. United States, 343 F.2d 278 (D.C. Cir. 1964)] and *Black* [referring to Black v. United States, 355 F.2d 104 (D.C. Cir. 1965)]." *Bland*, 472 F.2d at 1341 (Wright, J., dissenting). He later concludes that "I would therefore hold that Congress may not abrogate a child's constitutional right to a hearing, representation by counsel and a

grant prosecutors powers that would be viewed as improper were they to be exercised by juvenile court judges.[62]

This position was made especially clear, for example, in Cox v. United States.[63] The defendant, a juvenile, had been convicted of armed bank robbery by a United States District Court. Contending that he had a right to a hearing designed to determine whether the District Court should have tried him as a juvenile rather than as an adult, Cox appealed. Delivering the majority opinion for the Fourth Circuit Court of Appeals, in which the Court denied that any right to such a hearing existed, Chief Judge Haynsworth contrasted the role of juvenile court judges and prosecutors in the following fashion:

> When the question is one of waiver of jurisdiction of a juvenile court and it is to be decided by a judge of the juvenile court, it is clear that the juvenile is entitled to a hearing on the question of waiver and the assistance of counsel in that hearing.
>
> This is entirely consistent with our tradition that the decisions of judges in judicial proceedings affecting substantial rights of persons charged with criminal violations shall be reached only after an opportunity is afforded for a full and fair hearing with the benefit of counsel.
>
> We have no such tradition with respect to prosecutorial decisions to seek an indictment, or not to seek one, to make or not to make a charge, or to charge a greater offense or a lesser one. Such decisions have a substantial impact on the outcome of subsequent proceedings. Indeed, they may foreclose such proceedings, but they are left for determination by the prosecutor without a hearing and without extension of any of the other due process protections to the person whose exposure and degree of exposure to prosecution the prosecutor determines.[64]

In effect, then, in *Cox* and other cases, appellate courts seem inclined to hold that the decision-maker rather than the decision is what is at issue when it is determined that charges of unlawful conduct involving juveniles are to be pursued before criminal rather than juvenile courts. When the determination is made by a juvenile court judge within the context of a traditional waiver hearing, then the guidelines articulated in *Kent* are likely to be granted constitutional stature.[65] If, however, a legislative body has granted discre-

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statement of reasons before he is charged and tried as an adult." *Id.* at 1350 (Wright, J., dissenting).

62 *See, e.g.*, Woodard v. Wainwright, 556 F.2d 781 (5th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978); Russell v. Parratt, 543 F.2d 1214 (8th Cir. 1976); Cox v. United States, 473 F.2d 334 (4th Cir.), *cert. denied*, 414 U.S. 869 (1973); United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); Vega v. Bell, 47 N.Y.2d 543, 393 N.E.2d 450, 47 N.Y.S.2d 543 (1979).

63 473 F.2d 334 (4th Cir.), *cert. denied*, 414 U.S. 869 (1973).

64 *Id.* at 335-36.

65 *See, e.g.*, Geboy v. Gray, 471 F.2d 575 (7th Cir. 1973) (holding that juveniles enjoy

tionary powers regarding such decisions to prosecutors rather than to members of the judiciary, even when such legislative enactments contain very few guidelines regarding the exercise of prosecutorial discretion, then the appellate courts, in deference to a combination of the separation of powers doctrine and an historical hesitancy to subject prosecutorial discretion to more than minimal constitutional constraints, seem likely to concur with the *Cox* court view that selecting a criminal court rather than a juvenile court "is a prosecutorial decision beyond the reach of the due process rights of counsel and a hearing."[66]

The question, quite obviously, is whether the substantial changes we are witnessing presently in our bodies of juvenile law mark the demise of the entire juvenile justice system and a consequent elevation in the harshness of the dispositions that will be accorded juveniles who find themselves confronted with the risk of adult instead of juvenile dispositions. The initial answer might appear to be clear. Nicholas Kittrie, for example, has predicted, "The juvenile court in the United States is in a state of decline. If current trends continue, the separate system of justice for children which now exists may come to an end in the 1980's."[67]

Should this and similar predictions prove to be correct, the growing legislative commitment to retribution as the primary goal of sentencing in adult courts, as is reflected by the State of Florida's straight-forward observations that "[t]he primary purpose of sentencing is to punish the offender" and that "[r]ehabilitation and other traditional considerations continue to be desired goals of the

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both timely appointment of counsel prior to and right to effective assistance of counsel during transfer hearings); Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970) (holding that juvenile defendants have right to counsel during hearings in juvenile court regarding motions to transfer jurisdiction to criminal courts).

66 *Cox*, 473 F.2d at 335. This, of course, reflects the far broader willingness of the appellate courts to defer, for example, to the separation of powers doctrine as a means of avoiding judicial review of the exercise of prosecutorial discretion. To be sure, the United States Supreme Court consistently has held that abuses of prosecutorial discretion are reviewable given fourteenth amendment protections. In Bordenkircher v. Hayes, 434 U.S. 357 (1978), for example, Justice Stewart observed, "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Id.* at 365. There are even celebrated cases that illustrate the reviewability of prosecutorial charging decisions. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). Judicial restraint in this area, however, is well-established. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545 (1979); Gerstein v. Pugh, 420 U.S. 103 (1975); Beck v. Washington, 369 U.S. 541 (1962).

67 N. KITTRIE, THE RIGHT TO BE DIFFERENT 107 (1971).

criminal justice system but must assume a subordinate role,"[68] could indeed result in harsh, punitive responses to juvenile offenders.

It is equally obvious, however, that how emerging trends in juvenile law will impact on the fate of juveniles has yet to be established. To begin with, it would be foolish to attack recent modifications in law and in practice as being destructive of a system whose merit was appreciated by all concerned. Recall, for example, that real defects in previous juvenile law and procedure prompted Justice Fortas to conclude, "While there can be no doubt of the original laudable purpose of juvenile courts . . . [t]here is evidence . . . that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[69] Similarly, in delivering the majority opinion of the Court in *Gault*,[70] Justice Fortas observed that

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts." [citation omitted]. The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment.[71]

Thus, there are ample reasons for advocates of a traditional juvenile court system to refrain from thinking of earlier periods of history as "the good old days."

Furthermore, many of the changes that we are witnessing today are a good deal more complex than some have depicted them to be. Although it is true that many statutory adjustments have eroded the discretionary and the jurisdictional powers of juvenile courts, they have not necessarily done so in a manner that automatically deprives all juveniles who appear before criminal courts of many of the benefits they are said to have enjoyed previously. Thus, what appears to be essential is that we develop a fuller appreciation for the specific nature of recent adjustments in the provisions and purposes of juvenile law and that we be especially attentive to the manner in which that body of law is applied in the everyday life of our judicial system.

Fostering such an awareness will be the primary objective of the remaining portions of this analysis. Specifically, in the following

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68 The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988—Sentencing Guidelines), 451 So. 2d 824, 825 (Fla. 1984) (per curiam).

69 *Kent*, 383 U.S. at 555-56.

70 387 U.S. at 18.

71 *Id.*

section, we will examine relevant provisions of Florida law, especially those provisions of law which deal with criminal versus juvenile court jurisdiction over juveniles who are alleged to have engaged in unlawful conduct (as opposed to cases involving dependency and neglect issues).[72] Because many of the present provisions of Florida law have much in common with the post-*Kent* statutes of many non-Florida jurisdictions,[73] this portion of our analysis should be of general interest. Attention will then turn to a presentation of empirical data regarding the manner in which these features of Florida law are being translated into legal practice in one major metropolitan jurisdiction (Dade County, Florida—the county within which Miami is located).

IV. Contemporary Provisions of Florida Law

Juvenile law in the State of Florida has changed substantially during the past decade. As has been true in many other jurisdictions in the United States, these changes have tended to increase the discretionary powers of prosecutors while decreasing the jurisdictional powers of the juvenile court as the age of children alleged to have engaged in unlawful conduct moves them closer to adulthood. Thus, after noting one somewhat unusual feature of Florida law that stems from the Florida Constitution, we will divide our overview of relevant provisions of Florida's juvenile law into three segments: (1) treatment of children below the age of fourteen, (2) treatment of children who are fourteen or fifteen, and (3) treatment of children who are sixteen or seventeen.[74]

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[72] Florida law attempts to draw a clear distinction between two categories of juveniles over whom its juvenile courts are given jurisdiction. Of particular importance is the fact that Florida law defines as dependent rather than as delinquent those juveniles who run away from home, who are habitually truant, or who are believed to be beyond control of their parents. *See* Fla. Stat. Ann. [hereinafter referred to as FSA] §§39.01(8)-(9)(West Supp. 1985). This non-delinquent categorization of so-called "status offenders" reflects a national trend that was stimulated by a federal initiative, the Juvenile Justice and Delinquency Prevention Act of 1974. *See supra* note 3. Interestingly, however, the JJDP Act does not define the term "status offender." Instead, the Office of Juvenile Justice and Delinquency Prevention defined "status offender" by regulation as follows: "A juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult." 28 C.F.R. §31.304 (h)(1985).

[73] *See, e.g.*, Ark. Stat. Ann. §45-420 (1975 & Supp. 1984); Ind. Code Ann. §31-6-2-4(e) (Burns 1984); Neb. Rev. Stat. §43-276 (1981); Utah Code Ann. §78-3a-25 (1978).

[74] A juvenile, for the purposes of Florida law, is "any married or unmarried person who is charged *with a violation of law occuring prior to the time that person reached the age of 18 years.*" FSA §39.01(7) (West Supp. 1985) (emphasis added). However, once there has been a finding of delinquency, juveniles may be subject to the jurisdiction of the court until they reach the age of 19. *See* FSA §§39.11(2)(c), 39.111(4)(b) (West Supp. 1985).

A. THE CONSTITUTIONAL GUARANTEE OF FULL DUE PROCESS RIGHTS

Advocates of granting full due process rights to juveniles have never been entirely successful when they have argued their position before the United States Supreme Court. Although such landmark decisions as *Kent, Gault,* and *Winship* illustrate significant movement in that direction, the decisions of the Court in *McKeiver* and elsewhere made it clear that there were limits to the willingness of the Court to accord full due process rights to juveniles.

It is obvious, of course, that the United States Supreme Court intended to specify only those rights that the individual states could not abridge. There has never been any intention on the part of the Court to inhibit individual jurisdictions from expanding the rights of either juveniles or adults. Such an expansion is provided for in Florida's Constitution. The relevant portion of that document contains the following language:

> When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult.[75]

Statutory reflections of this constitutional provision clearly indicate that a child of any age may assert his or her right to a trial by jury in a criminal rather than a juvenile court:

> The court shall transfer and certify the case for trial as if the child were an adult if the child is alleged to have committed a violation of law and, prior to the commencement of an adjudicatory hearing, the child, joined by a parent or, in the absence of a parent, by his guardian or guardian ad litem, demands in writing to be tried as an adult.[76]

The obvious effect of these constitutional and statutory provisions is that any juvenile charged with unlawful conduct has initial control over the forum in which his or her case will be heard. Our greater concern here, however, is with the relative powers of the

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This dispositional power does not attach to cases resulting in findings of dependency. In those cases, supervision may not persist beyond a child's eighteenth birthday. FSA § 39.41(1)(a) (West Supp. 1985).

75 FLA. STAT. ANN. CONST. art. I, § 15(b) (West 1970).

76 FSA §39.02(5)(b) (West Supp. 1985). In addition, the relevant portion of Florida's procedural law, Florida Rules of Juvenile Procedure [hereinafter cited as FLA. R. JUV. P.], Rule 8.150(a), reads as follows:

> On demand for waiver of jurisdiction, the court shall enter a written order setting forth the demand, waiving jurisdiction, and certifying the case for trial as if the child were an adult. The demand shall be made, as required by law, in writing or orally, prior to the commencement of an adjudicatory hearing.

FLA. R. JUV. P. 8.150(a).

juvenile court and of prosecutors. It is to that concern that we now shift our attention.

B. OFFENDERS BELOW THE AGE OF FOURTEEN

Florida has not explicitly adopted common law standards regarding the age at which juvenile offenders have the capacity intentfully to violate the law—indeed, it would be possible for a child of any age to be required to appear before a juvenile court based on allegations of unlawful conduct. Juvenile courts have exclusive jurisdiction over virtually all cases involving children below the age of fourteen. Only two significant exceptions to this general rule warrant comment. First, of course, children below the age of fourteen can assert their constitutional right to a trial by jury in an adult court. Second, Florida law requires that:

> [a] child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the [juvenile] court . . . unless and until an indictment on such charge is returned, by the grand jury. When an indictment is returned the petition for delinquency, if any, shall be dismissed. The child shall be tried and handled in every respect as if he were an adult. . . .[77]

Because this provision does not require that the prosecutor seek a grand jury indictment in such cases involving juveniles below the age of fourteen, and also because other provisions of Florida law prohibit prosecutors from seeking a traditional waiver hearing in the juvenile court in cases involving those below the age of fourteen,[78] the likelihood that young children will be required to appear before a criminal court is exceedingly small.

C. OFFENDERS BETWEEN THE AGES OF FOURTEEN AND SIXTEEN

As the ages of juvenile defendants increase, Florida law expands the discretionary powers of prosecutors while simultaneously diminishing those of the juvenile court. This shift begins to become apparent in cases involving juveniles who are fourteen or fifteen years of age. In addition to the fact that such juveniles can assert their right to a trial by jury in an adult court and the fact that prosecutors may seek a grand jury indictment in cases involving offenses punishable by death or life imprisonment, additional transfer mechanisms materialize. First, prosecutors have the discretionary power

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77 FSA §39.02(5)(c)(1).

78 FSA §39.02(2)(a) contains the following relevant language: "[T]he state attorney may file a motion requesting the court to transfer the child for criminal prosecution if the child was 14 or more years of age at the alleged time of commission of the violation of law for which he is charged." *See also* FLA. R. JUV. P. 8.150(b).

to request that a waiver hearing be held within the juvenile court. Consistent with the standards articulated by the United States Supreme Court in *Kent*, any decision on the part of the juvenile court to waive its jurisdiction must be documented in writing and must reflect a consideration of numerous criteria set forth in Florida law.[79] Second, if any child was fourteen years of age or older at the time of the alleged violation of law and he or she

> "has been previously adjudicated delinquent for a violent crime against a person, to wit: murder, sexual battery, armed or strong-armed robbery, aggravated battery, or aggravated assault, and is currently charged with a second or subsequent such offense, the state attorney *shall* file a motion requesting the court to transfer the child for criminal prosecution. . . ."[80]

In effect, then, juvenile courts in Florida have been granted exclusive jurisdiction over juveniles who are below the age of sixteen, and this jurisdiction may not be challenged unless the challenge is made (1) by the juvenile, (2) via a prosecutorial decision to seek a grand jury indictment in a narrowly defined set of cases, or (3) as a consequence of a well-supported motion for a waiver of jurisdiction that may and sometimes must be filed by a prosecutor. While such standards modestly increase the probability that juveniles will appear before criminal courts, the probability is not great. Moreover, the burden that must be assumed by the prosecution is high. Stated somewhat differently, the erosion of the traditional powers of the juvenile court is not substantial prior to the time attention focuses on those who are sixteen or seventeen years of age.

D. OFFENDERS BETWEEN THE AGES OF SIXTEEN AND EIGHTEEN

It is quite easy to argue that Florida law, for most practical purposes, has so structured the provisions of its juvenile law that those who reach the age of sixteen have become adults in spite of statutory language that defines eighteen as the beginning of adulthood. Naturally, a transfer of jurisdiction over this category of juveniles may be accomplished by any of the means we have identified previously (i.e., "demand motions" made by the juvenile, grand jury indictments for some types of offenses, and waiver hearings held within the juvenile court). In addition, however, there is one narrow

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[79] FSA §39.02(2)(c)(1-8). This set of criteria directs the attention of the court to the seriousness of the alleged offense, the prosecutive merit of the case, the sophistication and maturity of the child, the prior offense record of the child, any indications of responsiveness to prior rehabilitative efforts, and the ability of the dispositional alternatives available to the juvenile court effectively to protect the public.

[80] FSA §39.09(2)(a) (emphasis added).

and one very broad means of accomplishing a transfer. Both stem from the filing of a bill of information.

Regarding the narrow area of interest, the provision of Florida law referred to previously that requires the filing of a motion for waiver of jurisdiction in cases involving those fourteen or fifteen year-olds who are charged with serious crimes and who have previously been adjudicated delinquent on similar charges, also requires the filing of a bill of information if the child is sixteen or seventeen.[81] When an information is filed, there is no hearing within the juvenile or any other court with regard to the selection of an appropriate court. More importantly, however, another provision of Florida law provides a very broad means of accomplishing transfer and reads as follows: "With respect to any child who at the time of the commission of the alleged offense was 16 or 17 years of age, [the state attorney may] file an information when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed."[82]

This broad discretionary power can be and is exercised without any hearing on the merits of the rationale relied upon by the prosecutor. Regarding those charged with felony offenses, there is no challenge whatsoever to this aspect of prosecutorial discretion. If, however, a bill of information is filed when the charged offense is classified as a misdemeanor or, presumably at least, "a violation of a local penal ordinance,"[83] then "[u]pon motion of a child . . . the case shall be transferred for adjudicatory proceedings as a child . . . if it is shown by the child that he had not previously been found to have committed two delinquent acts, one of which involved an offense classified under Florida law as a felony."[84]

E. THE IMPACT OF ALTERATIONS OF FLORIDA JUVENILE LAW

This information shows that prosecutors in Florida now enjoy considerable discretionary powers, powers that were once vested in juvenile courts both in Florida and many if not all other jurisdictions. This is most obviously the case with regard to juveniles who are sixteen years of age or older. Given the historical mandate requiring that prosecutors emphasize retributive punishment rather than rehabilitation, it could thus appear that the "get tough on crime" movement in Florida has been quite successful.

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81 *Id.*

82 FSA §39.04(2)(e)(4) (West Supp. 1985).

83 FSA §39.01(33).

84 FSA §39.04(2)(e)(4). *See also* Note, *Prosecutorial Waiver of Juveniles into Adult Criminal Court: The Ends of Justice . . . Or the End of Justice?* State v. Cain, 5 NOVA L. J. 487 (1981).

Before moving forward, it is critically important to emphasize how deceptive appearances can be. More specifically, additional provisions of Florida's juvenile law have created what many would consider to be an ironic distribution of dispositional powers. While the tradition of a separate system of juvenile courts places much emphasis on the alleged ability of juvenile courts to exercise more flexible dispositional powers than one finds in adult courts, the reverse is now true in Florida. With the single exception of juveniles indicted for crimes punishable by death or life imprisonment who are subsequently convicted of such offenses,[85] the criminal court can pursue any one of three basic options. The first of these permits the court to select from all of the dispositions that could have been relied upon had the case been disposed of by a juvenile court.[86] Indeed, "suitability or nonsuitability for adult sanctions shall be determined by the court before any other determination or disposition."[87] This determination requires the consideration of standards similar to those set forth in *Kent*.[88] Second, the criminal court may select an intermediate strategy by invoking the Florida Youthful Offender Act,[89] the stated purpose of which "is to improve the chances of correction and successful return to the community of youthful offenders sentenced to imprisonment by preventing their association with older and more experienced criminals during the terms of their confinement."[90] Indeed, other provisions of the Youthful Offender Act make it possible for the criminal court to sentence a juvenile, for Florida's Department of Corrections to determine that the child is better suited for commitment to juvenile programs operated by the Department of Health and Rehabilitative Services, for the child to then be administratively transferred into such a program, and even for the child to later be re-transferred to the control of the Department of Corrections.[91] Finally, the criminal court can exercise its traditional power by sentencing under the provisions of criminal law.[92]

Florida, in short, has created an unusual and complex set of legal provisions in its body of juvenile law. While effectively pre-

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85 FSA §39.02(5)(c)(3) requires that "[i]f the child is found to have committed the offense punishable by death or by life imprisonment, the child *shall* be sentenced as an adult." FSA § 39.02(5)(c)(3)(West Supp. 1985) (emphasis added).

86 *See* FSA §39.111, especially 39.111(6).

87 FSA §39.111(6)(c).

88 383 U.S. 541 (1966).

89 FSA §958.04(1)(a) (West 1985).

90 FSA §958.021 (West 1985).

91 FSA §959.116(1) (West 1985).

92 FSA §39.111(6)(c).

cluding a transfer of jurisdiction of cases involving children below the age of fourteen, and while also subjecting most efforts to transfer jurisdiction involving children who are fourteen or fifteen to judicial scrutiny within the juvenile court, it has greatly expanded the discretionary powers of prosecutors who confront juveniles who are sixteen or older. In addition, in the vast majority of all cases involving juveniles who appear before criminal courts, Florida law has evolved in such a way as to grant its criminal court judges considerably broader dispositional powers than any juvenile court judge has ever enjoyed. This paradoxical redistribution of power virtually defies explanation, but the reality of the situation is quite obvious.

V. The Application of Juvenile Law in Florida Courts

By and large, of course, statutory law and rules of procedure create possibilities rather than realities in the everyday life of our legal system. Provisions of law have little meaning unless and until one fully understands and appreciates how that body of law shapes the processing of actual cases as they move—or fail to move—through our juvenile and criminal justice systems.

The need for such quantitative information is great, for the number of cases coming to the attention of responsible officials in Florida is enormous. In one recent three-year period, for example, 221,028 separate cases involving allegations of delinquency came to the attention of Florida's juvenile court intake officials.[93] The vast majority of these cases remained within the jurisdiction of juvenile courts (97.43 percent of the 221,028 delinquency cases coming to the attention of intake officials from 1979 through 1981 did so).[94] However, if one considers raw numbers rather than percentages, it is also true that significant numbers of juveniles in Florida are now finding that their cases are being disposed of in the criminal rather than the juvenile justice system as a consequence of waiver hearings held within juvenile courts (2,056 waivers of jurisdiction were granted by juvenile courts during 1979-1981) or because prosecu-

[93] Our figures are derived from data collected by the Florida Department of Health and Rehabilitative Services (DHRS). These data provide the basis for the DHRS Client Information System, which is a computerized data base maintained by DHRS on all delinquency, dependency, and neglect cases that come to the attention of those responsible for Florida's juvenile justice system. The total of 221,028 delinquency cases has the following yearly subtotals: 1979, 69,917 cases; 1980, 86,858 cases; and 1981, 64,253 cases.

[94] Waivers of jurisdiction granted by juvenile courts in Florida for the three-year period were as follows: 1979, 581 cases; 1980, 782 cases; and 1981, 693 cases. Similar figures for "direct file" cases for these years were: 1979, 658 cases; 1980, 1,259 cases; and 1981, 1,614 cases.

tors have exercised their right to file bills of information (3,631 such discretionary decisions were made during 1979-1981).[95]

Most unfortunately, no systematic empirical assessment of the application of Florida's juvenile law exists at the present time. Those favoring, as well as those opposing, recent adjustments in juvenile law are thus left in a position that permits them to do no more than speculate or make unacceptably crude projections from limited personal experience and/or equally limited sets of statistical estimates. Perhaps the most significant contribution of this Article, therefore, is to be found in the empirical analysis of the characteristics of all cases that came to the attention of those in the Felony Division of the Dade County State Attorney's Office in 1981.[96] Indeed, it is especially appropriate that the focus of attention be on this single jurisdiction. Prosecutors in Dade County have been more willing to pursue juvenile cases before criminal courts than have those in any other jurisdiction in Florida. In 1981, for example, the statewide overview data we were able to obtain from the Florida Department of Health and Rehabilitative Services indicates that jurisdiction over a total of 693 juvenile cases was transferred to criminal courts after waiver hearings held in juvenile courts and that 1,614 cases involved transfers of jurisdiction based on the "direct file" initiatives of prosecutors. Our data, derived from all case files involving juvenile defendants processed by Felony Division prosecutors in Dade County, show that jurisdiction over 844 Dade County juveniles moved away from the juvenile court (253 involving waiver hearing cases, 549 involving "direct file" cases, 33 caused by grand jury indictments, and 13 cases where this data element was

95 It is significant to note that adjustments in Florida law during the early 1980's substantially elevated the total number of cases moved into the criminal courts via "direct files" and that this set of adjustments did not materially influence that number of cases involving judicial waivers of jurisdiction granted by the juvenile courts. It is also significant to recognize that modifications made in the provisions of Florida's juvenile law reflect something of a compromise between prosecutorial and legislative preferences. Specifically, the statutory adjustments that went into effect on July 1, 1981 reflect an unwillingness of the legislature to reduce the age of presumptive juvenile court jurisdiction from eighteen to sixteen, but a legislative willingness to grant prosecutors broad discretionary powers over cases involving juveniles who had reached the age of sixteen or seventeen.

96 All data reported in our analysis were coded by the staff of the Dade County State Attorney's Office. These materials then were prepared for computerized processing by the senior author and other staff members of the University of Florida's Center for Studies in Criminology and Law. It should be noted that our focus is on cases filed rather than on individuals throughout this analysis. Because a case file was prepared by Dade County prosecutors on each case that came to their attention, and because the same defendant may have come to their attention more than a single time during 1981, the total number of juvenile defendants is less than the total number of cases.

missing in the records reviewed) during 1981. Thus, this single metropolitan jurisdiction accounted for 36.51 percent of all of the "waiver" cases and 34.01 percent of all of the "direct file" cases processed in the entire State during 1981.

Our analysis of the Dade County data will be divided into two parts. The first part will review briefly the manner in which prosecutorial discretion over juvenile cases is structured in Dade County. Having thus described this quite important feature of case processing, the second part will move to a review of the empirical data.

A. STRUCTURING THE EXCERCISE OF PROSECUTORIAL DISCRETION

A well-established fact of life within our justice system is that virtually all state and federal statutes grant substantial discretionary powers to prosecutors. Especially in large metropolitan jurisdictions, the goals of efficiency and effectiveness as well as a desire to protect fully the due process rights of defendants commonly mandates that broad discretionary powers flowing from statutory provisions be excercised within a context established by administratively promulgated guidelines. Such mechanisms for structuring the exercise of prosecutorial discretion are in place in Dade County and may be found in the Dade County State Attorney's Juvenile Division Policy Manual.[97] The relevant portions of the manual are those regarding the filing of a motion for waiver, the filing of a bill of information, and the presentation of cases to a grand jury.[98]

The standard guidelines dealing with a motion for waiver may be summarized concisely. The guidelines indicate that such a motion should be filed if (1) the alleged offender was fourteen or fifteen years of age, had at least one prior adjudication for a serious felony offense, and a present charge involving a serious felony offense or (2) the alleged offender was fourteen or fifteen years of age, had no prior offense record, and was charged with a serious felony involving conduct that was clearly and intentionally contemptuous of the life of another.[99]

The guidelines also require attentiveness to a set of aggravating and mitigating factors. These factors include prior responsiveness to treatment efforts within the juvenile system, the extent to which the juvenile might have acted under strong and immediate provocation, the length of time that had elapsed between any prior offense

97 Dade County State Attorney's Juvenile Division Policy Manual (1984).
98 *Id.* at §§ IV & V.
99 *Id.*

and the present charge, the intent to inflict or actual infliction of serious injury to a victim, and the value of property taken or destroyed.[100] A balancing of such mitigating and aggravating factors as well as an application of the guidelines regarding age, offense record, and seriousness of the presenting offense, therefore, shape prosecutorial determinations regarding motions for waiver in Dade County.

Decisions to file bills of information are subjected to similar administrative guidelines. The Juvenile Division Policy Manual, as of August 28, 1980, required that consideration be given to four basic factors: (1) age, (2) current offense, (3) prior record, and (4) prior treatment efforts within the juvenile system.[101] With the statutory amendments that became effective on July 1, 1981—amendments that expanded the scope of prosecutorial discretion in juvenile cases—these guidelines were refined considerably. Specifically, the guidelines call for prosecutors to file a bill of information on all sixteen or seventeen year-old defendants when (1) the juveniles were first offenders who were charged with serious felonies (i.e., a life felony, a first degree felony, a second degree felony against persons, a burglary of an occupied dwelling, other types of burglary if a given juvenile had been arrested for a series of burglaries committed within a brief period of time, or more than one felonious crime of violence arising out of separate transactions) or (2) the juveniles had prior felony adjudications and were charged with any felony (unless a significant period of time had elapsed between such prior adjudications and the present charges and the present charges were not particularly serious).[102] Finally, the guidelines call for the grand jury process to be invoked only with regard to especially serious offenses and, of course, when permitted by the statutory provisions we have discussed previously.

On balance, then, substantial efforts have been made in Dade County to create administrative policies that, while preserving the discretionary powers that prosecutors have been granted in Florida as well as in all other jurisdictions, meaningfully structure the excercise of prosecutorial discretion. Such administrative guidelines increase the likelihood that particular types of serious offenders will fall within the jurisdiction of criminal rather than juvenile courts, but they clearly do not call for the selection of a criminal court juris-

100 *Id.*
101 *Id.*
102 *Id.*

diction in the broad spectrum of cases that Florida law defines as being eligible for such treatment.

B. EMPIRICAL ANALYSIS OF CASE FLOW DATA

The analysis can now shift to a consideration of actual case file data. The primary purpose will be to address the most frequently expressed concerns of those who feel that recent modifications in Florida's juvenile law are having one of two possible negative effects. First, the authors' conversations with many juvenile justice system officials in Florida indicate that these officials believe that unacceptably large numbers of juvenile cases that are transferred to adult criminal court jurisdiction quickly "fall through the cracks" of that system. One common and understandable belief, for example, is that cases viewed as being especially problematic within the Juvenile Division of the Dade County State Attorney's Office are evaluated very differently by Felony Division prosecutors who routinely deal with substantial numbers of quite serious felony offenses involving adult offenders. Consequently, it is suggested that the Felony Division prosecutors are too inclined to not pursue large numbers of juvenile cases that come to their attention, and therefore, that juveniles who are seriously in need of some type of care or supervision end up receiving neither. This concern also has been advanced by others who have scholarly interests in this area of juvenile law.[103]

The second and quite contrary hypothesis is that processing juveniles in criminal rather than juvenile courts subjects them to exceedingly harsh adult sanctions. This hypothesis is straight-forward and easily understood. When a juvenile is brought before a criminal court, that court has an opportunity to impose the full weight of criminal sanctions on him or her. Recall, however, that relevant provisions of Florida law[104] make the full range of juvenile court dispositions available to criminal court judges in all but a tiny fraction of cases. Moreover, this Article also has shown that the use of age either as a mitigating factor or as a complete defense has a lengthy history in our system of criminal jurisprudence.[105]

Given this Article's earlier review of both Florida's juvenile law

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103 *See, e.g.*, Boland, *Fighting Crime: The Problem of Adolescents*, 71 J. CRIM. L. & CRIMINOLOGY 94 (1980); Boland & Wilson, *Age, Crime, and Punishment*, 51 PUB. INTEREST 22 (1978); Feld, *Delinquent Careers and Criminal Policy*, 21 CRIMINOLOGY 195 (1983); Keiter, *Criminal or Delinquent: A Study of Juveniles Transferred to the Criminal Court*, 19 CRIME & DELINQ. 528 (1973).

104 *See* FSA §39.111.

105 *See supra* note 11.

and the administrative guidelines developed in Dade County to structure the exercise of prosecutorial discretion, there is reason to doubt the validity of both of these hypotheses. Although Florida law certainly permits large numbers of juveniles to be brought before a criminal court—particularly those who are sixteen or seventeen at the time of the commission of alleged offenses—the same body of law grants broad dispositional powers to criminal courts when and if the time comes to impose sentences on juveniles. Thus, the "harshness hypothesis" has no obvious support in Florida law.

Similarly, because of the care that has been taken in the creation of administrative guidelines for prosecutors in the Dade County State Attorney's Office Juvenile Division, there is ample reason to believe that case attrition in the set of cases involving juvenile defendants that is handled by Felony Division prosecutors should not be high. Nevertheless, the above described hypotheses must be evaluated empirically.

To begin such an empirical analysis, it should be noted that a total of 844 cases involving juvenile defendants were processed by Felony Division prosecutors in Dade County during 1981. Of these 844 cases, 65.1 percent (N=549) involved "direct files," 30.0 percent (N=253) involved waivers of jurisdiction granted by juvenile courts, 3.4 percent (N=29) involved grand jury indictments, and data were not available regarding the transfer method employed for the remaining 1.5 percent (N=13) of the cases. The characteristics of this pool of cases warrants some attention before we trace their movement through the criminal justice process.

A clear majority were sixteen or seventeen years of age at the time of the alleged offenses. In addition, virtually all (96.8 percent, N=816) were male, most were non-white (67.8 percent, N=567), and a majority had some record of prior offenses (while 40.6 percent, N=340, had no prior record; 18.9 percent, N=158, had one prior offense; 16.0 percent, N=134, had two prior offenses; and 24.6 percent, N=206, had three or more prior offenses).[106] Furthermore, although a very large number of specific charges were brought against those in the sample, our data show that the typical offender was alleged to have engaged in a felony offense against property (especially burglary or attempted burglary), against person (especially aggravated assault), or against person and/or property depending upon the definition one adopts (e.g., attempted robbery,

106 Data were missing with regard to the facts (one case), race (eight cases), and prior record (seven cases) of some files. Percentages are based on those cases for which complete data were available.

robbery, and armed robbery). This set of characteristics is consistent with the authors' expectations (though note that only a very small fraction of these cases—a total of eighteen cases—involved alleged violations of drug laws as the most serious alleged offense). Moreover, the relative seriousness of this set of offenders is further emphasized by the fact that most (58.8 percent, N=496) had been charged with two or more presenting offenses.[107]

Greater interest attaches to the movement of these cases through the criminal justice system subsequent to their having entered that system via the filing of a bill of information, a motion for waiver, or a grand jury indictment. The first step in this process in Dade County involved a prosecutorial determination either to move forward with the case or to terminate processing. Standard and well-understood factors shape this aspect of discretionary decision-making (e.g., the availability of physical evidence, witnesses, etc.). Our data show that formal charges were filed by Felony Division prosecutors in 84.5 percent (N=713) of the 844 cases and that no further action was taken in the remaining 131 cases (or 15.5 percent of the total pool of available cases).[108]

This low level of case attrition undermines the hypothesis that large numbers of juvenile cases receive no attention by Felony Division prosecutors. However, the possibility certainly exists for those prosecutors to remove cases after an initial decision to charge. As is true in other jurisdictions, the Dade County prosecutors retain the option to *nolle prosequi*. Notwithstanding options, our data once again reveal relatively little pre-trial case attrition. Of the 713 cases that prosecutors decided to pursue, 86.5 percent (N=617) culminated either in a trial or the entry of a plea of guilty. Of the remaining ninety-six cases, a *nolle prosequi* decision terminated the processing of seventy-five. The remaining twenty-one cases either had not been heard when our data were collected or involved defendants for whom warrants had been issued but who had not been apprehended. In any event, the data show that 73.1 percent (N=617) of the initial set of cases (N=844) moved at least as far as a trial or plea entry.

Especially given the seriousness of the offenses charged against

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107 Data on this variable were missing in 31 of the 844 cases.

108 It should be noted that case attrition created by initial prosecutorial screening within the Felony Division was not evenly distributed across all referral type categories. Specifically, of the 29 grand jury indictments, 100 percent were retained for further action. Similarly, the "retention percentage" for cases coming to the Felony Division after a successful motion for waiver was 97.6 (N=247). However, for direct files cases this percentage dropped to 78.0 percent (N=428).

those in the sample, the clear expectation was that those who move to a trial or plea entry stage of processing were very unlikely to find their cases moving out of the system for any reason. The data lend clear support to such an expectation. In 90.4 percent of the cases moving to this point of processing (N=617), there was a finding of guilt. There were several reasons for alternative outcomes. In forty-one cases (6.7 percent of the total), charges were dismissed by the criminal court. In fifteen cases (2.4 percent of the total), the defendant was found not guilty or not guilty by reason of insanity. In three cases (0.5 percent of the total), information on court disposition of cases in the sample was missing from our data. We find no strong predictor in our data of case outcomes not involving a finding of guilt, but the total number of such case outcomes is really too small to permit any sophisticated statistical analysis on this issue.

Having established that the number of cases that come to the attention of Felony Division prosecutors which fail to reach a trial stage is not unusually high and that the vast majority of cases reaching that stage culminate either in a conviction or the entry of a guilty plea, attention must now be given to ultimate case dispositions. Both of the critical hypotheses reviewed earlier warrant consideration at this stage of processing. It is possible that sentences imposed on juvenile defendants by criminal courts are either (1) excessive, thereby supporting the position of those who feel that criminal courts are inclined to deal harshly with juveniles as they pursue the goal of retribution, or (2) lenient, thereby supporting the contrary view that juvenile defendants appearing before criminal courts will receive neither the treatment nor the supervision they require.

Keeping in mind the fact that those in our sample who were sentenced by criminal courts most commonly had been found guilty of serious felony offenses (e.g., 55.1 percent of felonious crimes against property, primarily burglary; 17.0 percent of attempted or actual robbery, strong-armed robbery, or armed robbery; and 9.5 percent of felonious crimes against persons), the sentencing information captured in our data support neither of these hypotheses.[109] For example, looking solely at the sentence imposed for the most serious offense charged, a clear majority of these juvenile defendants confronted some period of incarceration (66.5 percent of the 558 who were found to be guilty were sentenced to a term of imprisonment; the median length of sentence for those who were incarcer-

[109] Compare our results with, for example, the multi-state sentencing data reported in BUREAU OF JUSTICE STATISTICS, TIME SERVED IN PRISON 3 (1984).

ated was 47.6 months). Almost all of the remaining defendants were placed on probation (32.1 percent of those found guilty; the median length of probation sentence imposed was 24.4 months).

Overall, then, our evaluation of the flow of 844 cases that came to the attention of Felony Division prosecutors in Dade County during 1981 reveals that cases involving juvenile defendants are taken quite seriously by both prosecutors and the criminal courts. Only 26.9 percent failed to reach a trial or plea entry stage of processing. This appears to compare favorably with other legal process studies conducted in other jurisdictions.[110] In the recent and very large Boland examination of case processing, for example, roughly one-half of all felony arrests examined never reached a trial or plea entry stage.[111] We attribute the much lower level of attrition reported here largely to the fact that our cases were "double-screened" (i.e., once by prosecutors in the Juvenile Division and later by prosecutors in the Felony Division). The same comparability appears to exist regarding other phases of processing, such as probability of a finding of guilt and imposition of sentences involving either probation or incarceration.[112]

VI. Conclusions and Implications

Juvenile law in Florida and elsewhere is in the midst of what amounts to a revolutionary period of change. Beginning by no later than the decision of the United States Supreme Court in Kent v. United States[113] in 1966, the appellate courts consistently have held that juveniles must be accorded most—though certainly not all—of the due process rights that are accorded adult defendants. Such guarantees stem from, first, a conviction that due process protections should and must attach to any proceeding that can culminate in deprivations of liberty and, second, that the juvenile justice system has never been able to demonstrate that its claim to the broadly discretionary and informally exercised powers associated with the

110 *See, e.g.*, B. Boland, E. Brady, H. Tyson & J. Bassler, The Prosecution of Felony Arrests 1979 (1983); J. Eisenstein & H. Jacob, Felony Justice: An Organizational Analysis of Criminal Courts (1977); J. Jacoby, The Prosecutor's Charging Decision: A Policy Perspective (1977); K. Williams, Felony Arrests: Their Prosecution and Disposition in New York City's Courts (1977); Forst, *Prosecution and Sentencing*, in Crime and Public Policy 165 (J. Wilson ed. 1983); Zeisel, *The Disposition of Felony Arrests*, 1981 Am. B. Found. Research J. 407.

111 B. Boland, E. Brady, H. Tyson & J. Bassler, *supra* note 110; Forst, *supra* note 110.

112 B. Boland, E. Brady, H. Tyson & J. Bassler, *supra* note 110, especially at 34-49, for it is at that point that Boland *et al.* present detailed statistical data regarding case flow on an offense specific basis.

113 383 U.S. 541.

parens patriae doctrine has resulted in an effective delivery of beneficial treatment.[114] When this period of judicial activism appeared to have run its course, and also as the magnitude of the problems posed by serious crimes committed by juveniles began to attract national attention, legislative initiatives further eroded the powers of juvenile courts by redefining the age at which jurisdiction over juveniles was granted to criminal courts and/or granting prosecutors broad discretionary powers to select the forum within which they would present their charges.

Reactions to these judicial and legislative efforts have been strident. Many advocates of a traditional system of juvenile justice have been especially hostile in their response to both judicial and legislative initiatives. Invoking the concept of *parens patriae* as well as asserting their continuing conviction that the purposes of both justice and proper treatment of juvenile offenders are best served by permitting juvenile court judges to pursue their work in a highly flexible and informal fashion that permits them to remain in the parental role many have come to favor, the predictions these advocates make about the future of the juvenile justice system are bleak and somber.

Such predictions warrant the most careful consideration. Juveniles are precisely what the term implies. They are children. They are not adults. Criminal law has granted full recognition to this fact for hundreds of years.[115] The authors' view, however, is that the choices before the legal system today do not demand that a choice between black and white categories must be made. The fact that juveniles are not adults does not provide a sound constitutional rationale for depriving them of fundamental rights to due process and equal protection of law. Further, according juvenile defendants such rights does not require the adoption of a rigid and inflexible system of justice that undermines the ability of any sentencing authority to take into account both the characteristics of the defendant and the seriousness of the defendant's conduct when the time comes for the selection of an appropriate case disposition.

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114 Regarding due process guarantees, it should be noted that judicial opinions place rather extreme limitations on the contexts within which relatively complete due process protections will be accorded juveniles. Such protections, subsequent to the holdings of the Supreme Court in such landmark decisions as Kent v. United States, *In re* Gault, *In re* Winship, and Breed v. Jones, attach to juvenile defendants after they have been charged with unlawful acts. In other contexts, including those that constitute a clear threat to the liberty interests of juveniles, constitutional protections remain at a minimum level. *See, e.g.*, Schall v. Martin, 104 S. Ct. 2403 (1984); Fare v. Michael C., 442 U.S. 707 (1979); Parham v. J.R., 442 U.S. 584 (1979). Regarding the ineffectiveness of treatment and rehabilitative efforts in both the juvenile and the criminal justice systems, *see supra* note 38.

115 *See supra* note 11 and accompanying text.

Second, were one to argue that the juvenile justice system has earned the right to broader discretionary powers and the consequent diminution of due process rights accorded juvenile defendants, then one would be injecting a different meaning into the term "earned" than seems appropriate. Little or no empirical evidence exists that reveals any correlation whatsoever between the scope of discretionary powers granted those working within the juvenile justice system and the likelihood that the stated objectives of that system will be achieved.[116]

Third, it is clear that legal policies permitting juveniles to fall within the jurisdiction of criminal rather that juvenile courts need not and indeed do not create a context within which dispositional alternatives become limited. Recent modifications in Florida law that grant criminal courts broad dispositional alternatives when they deal with juvenile defendants—considerably broader alternatives than those that are available to any juvenile court judge—clearly prove this point.

Fourth, an unfortunate reality of everyday life in contemporary society is that there is a category of serious juvenile offenders whose amenability to treatment within the juvenile justice system is low and whose threat to the lives and property of others is demonstrably high. The juvenile justice system becomes impotent when it encounters this arguably small portion of the juvenile offender population. Moreover, a strong argument can be made that the mingling of this category of offenders in typical types of juvenile treatment programs may undermine the ability of those programs to deal effectively with more frequently encountered types of delinquents.

Taking all of these factors into account, the reasons to support the vast majority of adjustments that have been made in Florida's juvenile law become substantial. Although both the statewide and the Dade County data that we have presented show that only a small fraction of juveniles who are alleged to have engaged in unlawful conduct will have their cases disposed of by criminal rather than juvenile courts, the adjustments we have described increase rather than decrease the range of options available to those responsible for processing juvenile cases. Further, when juvenile cases are moved into the adult system, two very important things happen: (1) they immediately are granted the full range of rights to due process and equal protection of law (as opposed to the more narrowly defined set of rights accorded them within the juvenile justice system); and

116 *See supra* note 38.

(2) the range of sentencing alternatives from which criminal court sentencing authorities may choose also expands considerably.

Finally, our empirical analysis of juvenile cases disposed of by criminal courts in Dade County during 1981 demonstrates, on the one hand, that they are not defined as trivial matters by Felony Division prosecutors and, on the other hand, that the ultimate dispositions accorded convicted defendants by Dade County criminal courts is neither remarkably harsh nor lenient given the offenses, prior records, and other characteristics of the juvenile defendants.

The implication of all of this is clear. On the level of theory or philosophy, reasonable people can and do differ widely regarding the image they have regarding both the nature of juvenile offenses and the role of juvenile courts. In a better and a more nearly perfect world, perhaps it would be possible to translate the traditional *parens patriae* philosophy upon which the initial juvenile courts were based into sound and effective legal practice. Perhaps, as advocates of an entirely separate and very different juvenile justice system continue to contend, the placement of limits on the powers of the juvenile court is premature and we should wait longer, invest more resources, recruit more sophisticated personnel, and so on.

In reality, however, we must deal reasonably and fairly with what is rather than with what might be. To deal reasonably does not mean and has not meant pretending that juvenile and adult offenders are indistinguishable from one another. It does not mean and has not meant contending that the entire juvenile justice system must be dismantled. It does not mean and has not meant substituting rigidity and punitiveness for flexibility and benevolence. At least in Florida, what one finds is the creation of a three-tier system of justice. The vast majority of juveniles enter and never leave the first tier, which involves a juvenile justice system within which defendants are accorded substantial due process rights. In the third tier we find a more or less traditional criminal justice system, a system that is explicitly committed first to retributive punishment and only second to rehabilitation. But there is also a very non-traditional second tier, and it has been the object of the bulk of our analysis and commentary. There we find a very unusual blending of features of both the traditional juvenile and the traditional criminal justice systems. Explicitly designed for a particular category of the juvenile offender population—a category that is defined still more specifically by formal guidelines developed by the Dade County State Attorney's Office—this intermediate tier has the mandate of at once being attentive to the needs of juvenile defendants and to pub-

lic safety as well as doing so within the context of a fully adversary system of justice.

None of what we have said at any point in our analysis should be interpreted as a reflection of our ignorance of one fundamental problem that could quite easily erode away altogether any potential benefits of adjustments in juvenile law of the type one finds today in Florida. Specifically, the fairness, the integrity, and the utility of the legal provisions we have described depends very heavily—arguably too heavily—on the willingness of prosecutors to create and then to follow meaningful guidelines designed to transform their discretionary powers from reflections of mere individual judgment to reflections of reasoned and mature administrative policy. Whenever, as is the case today in Florida, the law itself invests broad discretionary powers in prosecutors, the potential for the abusive exercise—whether intended or unintended—of those powers also broaden.

Very significantly, moreover, there is a truly awesome difference in our legal system between the potential for abuse of judicial and of prosecutorial powers. Many if not most of the powers vested in the judiciary are exercised in open court and, at least in relative terms, those offended by the exercise of judicial discretion have access to various avenues of appeal. The same is far from true with regard to the exercise of prosecutorial powers. Those powers are exercised in contexts that commonly are shielded from public scrutiny. They equally often reflect the preferences of individual and sometimes inexperienced prosecutors rather than officially promulgated administrative guidelines devised by senior and experienced personnel—and this is most particularly true with regard to the nation's juvenile court prosecutors. Even when guidelines do exist, mechanisms for effectively monitoring compliance with them seldom exist. Finally, appellate attacks on prosecutorial decisions are almost doomed to fail in all but cases involving the most grievous abuses. Thus, whether for better or for worse, the fact is that the most peculiar feature of our juvenile and criminal justice process is that it involves a fairly elaborate set of checks and balances on the conduct and the decisions of all but one set of actors: prosecutors.

We end this analysis, then, by recognizing an irony in recent developments in juvenile law that should create much tension in the minds of all who are concerned with juvenile justice. In *Kent* and in *Gault* and in *Winship* and elsewhere, appellate courts have contended that the due process rights of juveniles deserve and must be accorded respect. While many find it difficult to see such a commitment to due process rights in some recent holdings of the United

States Supreme Court,[117] the fact remains that those appearing before our juvenile courts today enjoy vastly greater protections than did their counterparts of only two decades ago. The Bill of Rights is a document that school children have been required to read since its ratification in 1791. That they had to wait more than a century and a half before they could depend upon its guarantees in their everyday lives stands as an historical fact that is a source of embarrassment to many of us. But would the embarrassment not become intolerable were we to learn in years to come that the Star Chamber of the juvenile court alluded to by Justice Fortas in *Gault*[118] had been displaced by nothing firmer than the even more unbridled discretion of prosecutors?

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117 *See supra* note 54.

118 *See supra* note 71 and accompanying text.