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Justice for Children: How Do We Get There

Thomas F. Geraghty
Northwestern University School of Law

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JUSTICE FOR CHILDREN: HOW DO WE GET THERE?

THOMAS F. GERAGHTY*

I. INTRODUCTION

A. THE CONTEXT

This article is the response of a lawyer who represents children charged with crimes in juvenile court to those who call for the abolition of the juvenile court[1] and for placing increased criminal responsibility upon delinquent youth.[2] I argue that the

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* Professor of Law, Northwestern University School of Law; Director, Northwestern University Legal Clinic, Children & Family Justice Center. This article is dedicated to the memory of Dr. Derek Miller, former Director of the Adolescent Treatment Program of Northwestern Memorial Hospital, who cared deeply about the children I represented and whom he made whole. I thank Steven Drizin, Diane Geraghty, and Bernardine Dohrn for their helpful comments and Will Rhee for his editorial and research assistance.

[1] *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997); Jonathan Simon, *Law and the Postmodern Mind: Power Without Parents: Juvenile Justice in a Post-Modern Society*, 16 CARDOZO L. REV. 1363 (1995); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977); Martin Guggenheim, *A Call to Abolish the Juvenile Justice System*, CHILDREN'S RTS. REP., June 1978, at 1, 3. Guggenheim has subsequently reversed his position. *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 163 n.1.

[2] During the last 10 years, states have increasingly turned to criminalization as a response to the perception that criminal behavior among juveniles, particularly violent behavior, has increased dramatically. *See* Donna Lyons, *Juvenile Crime and Justice: State Enactments, 1995*, 20 ST. LEGIS. REP. 17 (1995) (50-state survey); Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987); Wendy Kaminer, *Crime and Community*, THE ATLANTIC, May 1994, at 116; Alex Kotlowitz, *Their Crimes Don't Make Them Adults*, N.Y. TIMES, Feb. 13, 1994, § 6 (Magazine), at 40. At the time of the writing of this article, there is a federal bill, the "Violent and Repeat Juvenile Offender Act of 1997," that has already passed the House of Representatives and awaits Senate vote that encourages: (1) incarcerating children with adults; (2) transferring more children to adult

juvenile court and the juvenile justice system (including community-based support programs for children and families) should be retained after being reinvigorated with both financial and human resources.[3] These investments will allow the juvenile courts to perform credibly—even when dealing with the relatively few "serious" or "violent" offenders who now pass through our juvenile justice system.

I make this argument because I see daily the tragic impact of the criminalization of the juvenile court and referral of my clients to criminal court and believe that this trend does not serve victims or society at-large. The acts of a very few children and their access to guns drive the campaign for "get tough" measures which include increased transfer of youth to criminal court and, tragically, the marginalization of juvenile courts.[4] In

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criminal court; and (3) increasing the criminalization of juvenile status offenses (i.e., truancy). The bill, if passed, would link $500 million of federal funding for states to programs that adopt such provisions (not a single dollar of this amount would be used for prevention). S. 10, 105th Congress (Oct. 9, 1997). This legislative movement is reflective of popular perception. *See, e.g.*, Robert B. Acton, *Youth, Family And The Law: Defining Rights And Establishing Recognition: Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform*, 5 J.L. & POL'Y 277 (1996) (examines governors' "initiatives and rhetoric" and finds that governors who speak out on juvenile justice issues overwhelmingly favor measures designed to send a "get tough" message); S.V. Meddis, *Poll: Treat Juveniles the Same as Adult Offenders*, USA TODAY, Oct. 29, 1993, at A1 (73% of adults surveyed agreed that juveniles accused of violent crimes should be treated as adults).

[3] Rather than maintaining the status quo of juvenile courts or abolishing them, some states have completely modified their juvenile court systems. New Mexico and Minnesota provide the two most notable examples of such reforms. At the heart of these reforms are "blended sentencing" provisions which permit juvenile court judges to impose juvenile and adult sentences at the same time. "Blended sentencing" is designed to reduce reliance upon automatic and discretionary transfer, allowing the "transfer" decision to be made *after* a child's experience with juvenile court interventions can be evaluated. The effect of a latent adult sentence provides incentives for the juvenile to respond to services provided by the juvenile court and protects society if the child does not respond to juvenile court interventions. Blended sentencing schemes impose substantial punishment, provide incentives for rehabilitation, and where rehabilitation works, eliminate the economic and social costs of long-term incarceration in adult institutions. *See* PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 55-56 (1996).

[4] When all relevant variables are taken into account, including degree of participation in homicides, in 1992, 1330 juveniles were convicted of murder, 940 were principally responsible for a homicide, 290 were principally responsible for a homicide of a stranger, and 80 were responsible for a homicide and were younger than 14 years-of-age. Eric R. Lotke, *Youth Homicide: Keeping Perspective on How Many Children Kill*, 31 VAL. U. L. REV. 395 (1997). Franklin Zimring referred to the dramatic gun-fueled increase in homicides among 14 to 17-year-olds between 1985-1992 as follows: "The extreme contrast between gun and non-gun homicide trends suggests that there is more change in weapons at work since 1985 than any essential change in the population."

the course of representing the increasingly young children who find themselves in jeopardy of becoming defendants in criminal court,[5] I learn about their experiences and about what has brought them to this tragic point. I do not claim that this perspective is unique or that it should be the only perspective considered in this debate. But it is an important perspective that has heretofore carried relatively little weight.[6]

My perspective is informed by practice in the Juvenile Court of Cook County, and so admittedly some of the lessons I have learned and the conclusions I draw may be parochial. I leave it to the readers with knowledge of other juvenile court systems to judge whether my conclusions resonate with theirs.

I begin with an attempt to contextualize my observations and conclusions by describing a case which places in focus the competing interests and tensions involved in deciding whether children should be tried in juvenile or criminal court. I then

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Franklin Zimring, *Juvenile Violence in Policy Context*, 31 VAL. U. L. REV. 419, 423 (1997). "Get tough" policies often shift the focus away from enlightened and "tough" prevention programs. *See, e.g.*, David M. Kennedy, *Pulling Levers: Chronic Offenders, High Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449 (1997) (describing the Boston Gun Project).

[5] From fiscal years (FY) 1984 to 1987, juveniles under the age of 15 accounted for an average of 22% of the total number of juveniles incarcerated in the Illinois Department of Corrections. By FY 1996, this percentage increased to 28%. ILLINOIS CRIM. JUST. INFO. AUTH., TRENDS AND ISSUES 1997, 173 (1997). The number of juveniles transferred to adult criminal court in Illinois has skyrocketed since 1992. In Illinois outside of Cook County, between 1982 to 1992, juveniles were transferred at an average of 65 a year. In 1995, that number was 233. *Id.* at 174. *Cf. Report Shows Youngest Account for Drop in Juvenile Violent Crime*, U.S. NEWSWIRE, Dec. 12, 1996, at 1, *available in* LEXIS, News Library (Attorney General Janet Reno announced juvenile violent crime arrest rates dropped 4% in 1995, the first drop since 1987).

[6] The proof of this is the trend toward imposing harsher criminal sanctions on youthful offenders and trying more children in criminal court. For example, when I began practicing law in 1970, the only mechanism for transferring children to criminal court was the discretionary transfer hearing. Minors aged 13 to 15 charged with serious offenses were entitled to a discretionary hearing in juvenile court to determine whether they will be tried in criminal court. Since then, Illinois has repeatedly amended its Juvenile Court Act to require that more children—initially those over 15 charged with serious felonies such as murder, armed robbery, and rape—be automatically transferred to juvenile court. Illinois also has had an "automatic transfer" statute since 1982 and a "presumptive transfer" statute since 1995. The "automatic transfer" statute requires that juveniles charged with violent felonies, such as first degree murder, aggravated criminal sexual assault, or armed robbery, are automatically prosecuted in adult court. It was first upheld by the Illinois Supreme Court in *People v. J.S.*, 469 N.E.2d 1090 (Ill. 1984). The "presumptive transfer" statute requires that once probable cause has been established for a serious Class X felony, the burden then shifts to the minor-respondent to rebut the presumption that the child be transferred. 705 ILL. COMP. STAT. 405/5-4(3.3)(a) (West 1997).

describe and address the uncertainties which cause many to question whether juvenile courts have a future. Next, I discuss the reasons for believing that juvenile courts can and should be revitalized to address the concerns of critics and why our adult criminal justice system will not "do justice" to children. Finally, I articulate an admittedly imprecise vision of what juvenile courts of the future might look like, taking into account present failures, successes, and new challenges. I argue that the best ideas for revitalization of the court to meet new challenges are most likely to come from the lawyers who represent children.

B. A CASE

In an effort to make my arguments and my perspective more concrete, let me describe a composite of the increasingly typical case seen in the clinical program at the Northwestern University School of Law and the Juvenile Court of Cook County.[7]

1. The Crime

The neighborhood is gang-controlled. The gang's major source of income comes from the sale of drugs. The gang has a hierarchy. The bottom rung is occupied by the ten to twelve-year-olds, including my client, who do the bidding of older members of the gang. My client's biological family consists of his mother and several siblings. An older gang member, age twenty-one, engages my client to sell drugs. An occupant of a large apartment building, outside of which drugs are being sold, calls the police to report the drug dealing. The drug trade is

[7] The following case is a composite of my experiences in representing children charged with serious crimes in juvenile court. It is a "story." In addition to the conventional analytical tools of common law, statutory, and statistical analysis, feminism and critical race theory have contributed the technique of legal storytelling to legal jurisprudence. Legal storytelling attempts to counterbalance the sometimes misleading cold abstractions of statistics and sweeping generalizations with specific legal anecdotes. *See, e.g.*, Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Other juvenile defense practitioners have told the stories of their clients. *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997) (containing "stories" of child and adult clients to contextualize lawyer-client interactions); Wendy Anton Fitzgerald, *Stories of Child Outlaws: On Child Heroism and Adult Power in Juvenile Justice*, 1996 WIS. L. REV. 495, 500; Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953 (1995).

temporarily disrupted. The older gang member tells one of his younger "employees" to burn the building down. Late one evening, a fire starts in the building. An elderly woman dies of smoke inhalation. Other occupants of the building are injured as they attempt to flee the burning building. The person who complained about the gang's drug selling says that she thinks she sees my client coming out of her building just before the fire started.

2. My Client

My client is thirteen-years-old. He is charged with murder of the elderly woman who died in the fire. The State wants to try him as an adult. He is the smallest person I have ever represented. When he sits up straight at counsel table in juvenile court, his chin rests on the surface of the table. His I.Q. is 54. He reads at a third grade level. His record contains eight prior "station adjustments"[8] and three referrals to juvenile court—all occurring within the last eighteen months. At the time of this incident he was on probation for criminal damage to property. He seems to have little comprehension of what is going on around him in court. When he was placed on probation six months ago, the juvenile court judge who sentenced him ordered the Department of Children and Family Services (DCFS) to find him a residential placement. He was sent home to await placement. No placement was found. The DCFS worker was looking for a placement when my client was arrested for the murder. The only assistance or guidance he received during the four months he spent at home waiting for placement were two counseling sessions.

The client's narrative of his family history and of his alleged involvement in the crime is difficult to obtain and to organize. He lacks the ability to recount these "stories" spontaneously and accurately. Much work needs to be done by his legal team to gather information from him and from the members of his family. Social workers, psychologists, and psychiatrists are enlisted to help develop a family history and to identify educational deficits and emotional and psychiatric needs.

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[8] In Illinois, a "station adjustment" is a documented verbal warning a juvenile receives at a police station without being officially charged for a crime. *See* People v. Clark, 518 N.E.2d 138, 141-42 (Ill. 1987).

The work of the lawyer, social worker, psychologist, and psychiatrist team reveals that our client is heavily gang-involved, primarily as a result of the gang allegiance of his older brother. Our client is failing in school. He attends school infrequently. His mother is a single parent who is unemployed. She is challenged by the task of nurturing and supporting her two sons and three daughters, all under age seventeen.

3. The Courtroom

The courtroom is in the Juvenile Court of Cook County, a building which contains not only the sixteen delinquency courts, but also the sixteen neglect and abuse courts as well. In addition, the building houses the Cook County Juvenile Temporary Detention Center, where children in custody pending trial are held. While waiting trial in the Detention Center, they attend school, some for the first sustained period in their lives. They are also well fed. There are no adults facing criminal charges housed with the children in the Temporary Juvenile Detention Center. The Detention Center is, however, overcrowded with almost a third more children there than it is licensed to accommodate.

In the courtroom during the hearing are my client, my colleagues and law students on the defense team, the judge, the prosecutor, the probation officer, and the victim's family. With the victim's family is a witness advocate from the prosecutor's office. The victim's family occupies the first row of seats. My client's family sits behind the victim's family. My client sits between his lawyers at counsel table.

If you were to approach counsel table from the rear as you enter the courtroom, you would be struck by the comparison in size between his two lawyers, whose bodies are both below and above the table, and my client, who, except for his head, is below the table. My client doodles on a legal pad while the testimony is presented. He is not listening. He nudges his lawyers when he has drawn something of which he is particularly proud.

4. The Evidence

A police officer testifies that my client admitted to him that he acted as a "lookout" while other youngsters went into the building. The police officer cannot recall if my client said anything that supports the prosecution's contention that my client

played a part in the scheme to set the fire. The judge rules that the state has made a showing that a grand jury would probably indict.[9] The state presents a probation officer and a psychiatrist who describe the child's history and mental status. Neither the probation officer nor the psychiatrist recommend transfer to criminal court. We present a psychologist who has diagnosed our client as having a conduct disorder with adolescent onset,[10] the significance of which, our witness contends, is that my client is a good candidate for treatment interventions.

All of the witnesses agree that my client will probably be rehabilitated within the seven years that he would be required to spend in the Juvenile Division of the Department of Corrections if he were to be convicted of murder in the juvenile court. We call the DCFS worker responsible for finding a placement for our client. He testifies that indeed no treatment or services were provided. Closing arguments are given.

My colleagues and I leave the courtroom convinced that our client has understood little about the nature and purpose of the proceedings that he has just witnessed. He understands even less about the momentous decision that the juvenile court judge is about to make about his future. His lack of comprehension persists despite our repeated efforts to explain to him the significance of the transfer hearing.

Why begin this article with an example from the real world of community, courts, and practice? Because the example

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[9] The Illinois Juvenile Court Act's discretionary transfer statute, applicable to children under the age of 15 charged with serious felonies, requires the juvenile court judge to consider eight factors when deciding whether a child should be tried as an adult: (1) whether there is sufficient evidence on which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority; (7) whether the minor possessed a deadly weapon when committing the alleged offense; and (8) whether the alleged offense is a felony offense under Section 5 of the Cannabis Control Act, P.A. 89-362, § 5, committed while in a school. 705 ILL. COMP. STAT. 405/5-4(3)(b)(i-viii) (West 1997).

[10] Psychiatrists and psychologists make the distinction between a conduct disorder with childhood onset (before age 10) and adolescent onset (post age 10). *See* IV AMERICAN PSYCHIATRIC ASS'N DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 85-90 (1994). Early onset conduct disorder is deemed difficult to treat. Adolescent conduct disorder is less difficult to treat. *Id. See generally* ALAN E. KAZDIN, CONDUCT DISORDERS IN CHILDHOOD AND ADOLESCENCE (2d ed. 1995).

places in perspective the dilemmas involved in charting the course of the future of justice for children. Without taking into account such examples, we are unlikely to fashion solutions which respond to realities. What is the level of the moral responsibility of my client? To what extent should we take into account factors such as the capacity of his family to nurture him, his subservience to older gang members, and his low intellectual functioning? Can the juvenile justice system "rehabilitate" my client so that, assuming he is now "dangerous," he will no longer be so when released? What kind of justice system holds the most promise for supporting my client's development as an adolescent while at the same time protecting society?

C. THE PROBLEMS

As a practitioner in juvenile court, and as one who follows the public perception of juvenile courts in the media,[11] I know that the future of juvenile courts is in jeopardy now just as it was only a few years after it was created, and just as it has been throughout its history. Reasons for the uncertainties regarding the future of juvenile courts the are same as those which gave our ancestors pause shortly after the court was founded: (1) lack of consensus about the definition and viability of the juvenile court's mission;[12] (2) concerns about the capabilities of those working within the juvenile justice system to produce results;[13] (3) under-funding and/or inefficient use of funds by juvenile courts and associated agencies;[14] and (4) lack of confidence in the effectiveness of interventions designed to turn children away from delinquent conduct.[15]

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[11] *See, e.g.*, Fox Butterfield, *With Juvenile Courts in Chaos, Critics Propose Their Demise*, N.Y. TIMES, July 21, 1997, at A1.

[12] A recent publication, David A. Price & Craig Boersema, The Juvenile Court at 100: Challenges and Opportunities (Findings from a National Survey) (Aug. 20, 1997) (unpublished manuscript, on file with author), noted that only 43% of juvenile courts had mission statements, 27% reported that they had vision statements, and 28% said that they had policy statements.

[13] Interestingly, Price and Boersma found that their respondents (judges, court administrators, prosecutors, defense counsel, probation and court services administrators) thought that people were at the same time the greatest strength and second greatest weakness of juvenile courts. Judges were rated as the juvenile courts' greatest strength. *Id.* at 5-7.

[14] Respondents to the study conducted by Price and Boersma indicated that the single greatest weakness of the juvenile court was funding. *Id.* at 7.

[15] Butterfield, *supra* note 11, at A1.

These concerns have paralyzed juvenile courts. This paralysis has taken the form of demoralization, adherence to old models out of defensiveness, and consequent failure to articulate new visions. Moreover, although there are positive responses to each of the four criticisms of the juvenile system set forth above, those answers have not received the same degree of attention that the criticisms have received. A positive, rather than a defensive, approach to reinvigorating juvenile courts may hold the key.

1. Mission

The controversial aspect of the juvenile court's mission[16] in today's political and social context is the extent to which juve-

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[16] Pending juvenile justice legislation in Illinois (as of the date of this article, it awaits the Governor's signature) makes clear that treatment and rehabilitation should no longer be the first objectives of juvenile justice policy. Illinois' existing Juvenile Court Act provides that its purpose is:

> [t]o secure for each minor subject hereto such care and guidance, preferably in his or her own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him or her from the custody of his or her parents only when his or her welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his or her own family, to secure for him or her custody, care and discipline as nearly as possible equivalent to that which should be given by his or her parents, and in cases where it should and can properly be done to place the minor in a family by legal adoption or otherwise.

705 ILL. COMP. STAT. § 405/1-2 (West 1997). The proposed Act provides:

> (1) It is the intent of the General Assembly to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system that will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively. To effectuate this intent, the General Assembly declares the following to be important purposes of this Article:
>
> (a) To protect citizens from juvenile crime.
>
> (b) To hold each juvenile offender directly accountable for his or her acts.
>
> (c) To provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to rehabilitate and to prevent further delinquent behavior through the development of competency in the juvenile offender. As used in this Section, "competency" means the development of educational, vocational, social, emotional and basic life skills which enable a minor to mature into a productive member of society.
>
> To provide due process, as required by the Constitution of the United States and the State of Illinois, through which each juvenile offender and all other interested parties are assured fair hearings at which legal rights are recognized and enforced.

1997 S.B. 363 (SN), 90th Gen. Assembly (Ill. 1998).

nile courts should attempt to adjudicate and dispose of cases involving youth who commit serious crimes. What kind of juvenile crime and what kinds of children can juvenile courts effectively manage? A narrow vision of a juvenile court's role is that it exists to address the problems of non-serious offenders; indeed, this was probably the objective of the original juvenile court.[17] The narrow vision, need not of course be narrow. By focusing on relatively less serious offenders, the court may be able to offer more services to youth at risk to prevent them from becoming serious offenders.

A more expansive vision would have juvenile courts adjudicating, prescribing interventions, and/or incarcerating both non-serious and serious juvenile offenders. Some argue that the juvenile court will not survive if it takes on the challenge and the "heat" of attempting to deal with older children who commit serious crimes. This is so because there is a widely held public perception that in these cases there is great risk that "treatment" will not work and because the punitive sanctions available to juvenile courts are simply not severe enough to satisfy societal norms of punishment.[18] Given the risk that juvenile courts will "fail" when dealing with the "serious" or "violent" offender, it would be better, some juvenile court preservationists argue, not to subject juvenile courts to this risk of public condemnation.[19]

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[17] As Gittens observes:

> It was really not the intention of the founders of the court to deal with children who had committed very serious crimes; rather they were concerned about the broad range of children held in adult jails for deeds that were more a result of poverty, cultural misunderstandings, or childish misjudgment than of criminal intent.

JOAN GITTENS, POOR RELATIONS, THE CHILDREN OF THE STATE OF ILLINOIS, 1818-1990, 109 (1994). *See also* David S. Tannenhaus, Policing The Child: Juvenile Justice In Chicago, 1870-1925, 111 (1997) (unpublished Ph.D. dissertation, Univ. of Chicago) (on file with author) ("in 1882 the Home of Corrections held 1 eight-year-old, 5 nine-year-olds, 14 ten-year-olds, 25 eleven-year-olds, 47 twelve-year-olds, 68 thirteen-year-olds, and 103 fourteen-year-olds") (citation omitted).

[18] *See* TORBET ET AL., *supra* note 3.

[19] For an excellent case study of one state's attempt to resolve this dilemma, see Susan A. Burns, *Is Ohio Juvenile Justice Still Serving Its Purpose?* 29 AKRON L. REV. 335 (1996).

> [S]ome [Ohio] court officials recognize that the system accomplishes its goals with those offenders it was designed to serve. If the juvenile system continues to allow these repeat violent offenders to stay within its confines, it is only depleting its time, energy, and resources, and neglecting those it was designed to serve, the first-time non-violent child that made a mistake.

Id. at 368.

Both the less expansive vision and the most expansive vision fail to take into account a number of creative solutions that permit both rehabilitation and lengthy incarceration if treatment fails or is impossible.[20] These solutions would permit us to retain the "best of both worlds" by maintaining incentives for rehabilitation, yet ensuring as best as possible the protection of the public.[21] The experience of those states which have experi-

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[20] *See, e.g.*, Barry Feld, *Violent Youth Crime and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 U. MINN. L. REV. 965 (1995); Mary W. Utton, *From Diversity to Unanimity, the Case of the New Mexico Children's Code*, 8 PERSP. 6 (1994).

[21] The U.S. Supreme Court made the famous comment that the juvenile court may offer children the "worst of both worlds" in *Kent v. United States*, 383 U.S. 541, 555-56 (1966):

> There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern 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.

Indeed, the historical performance of the Cook County Juvenile Court has been proof of the Supreme Court's observation in *Kent*. Despite the high aspirations of the founders of the juvenile court movement and the dedication of many who have worked there, the Juvenile Court of Cook County has, during its history, repeatedly failed to meet expectations. Only 13 years after its founding, the juvenile court was criticized in a report. *See* CITIZENS' INVESTIGATING COMM., ILL., REPORT OF A COMMITTEE APPOINTED UNDER RESOLUTION OF THE BOARD OF COMMISSIONERS OF COOK COUNTY 1 (1912) [hereinafter CITIZENS INVESTIGATING COMM.]. This report criticized the administration of the Cook County Juvenile Court for its ties to the "political machine" and "for the mistreatment of children committed to the Industrial School," *id.* at 3, for political appointment of probation officers, *id.* at 30-42, and for the poor operation of its Detention Home, *id.* at 42-43. The 1912 Report also noted with respect to the operation of the juvenile court that a "crowded calendar means delay in hearing cases" but that an increase in juvenile court judges from one to three was not the answer: "the Committee feels that the peculiar duties of the juvenile court judge demand a degree of specialization which would be more difficult to secure with three judges than with one." *Id.* at 29.

In 1963, the Juvenile Court of Cook County was again the subject of a Citizens' Committee Report, as well as a report by the National Council on Crime and Delinquency. GITTENS, *supra* note 17, at 146. The Citizens' Committee Report noted that although the Cook County Juvenile Court was the first in the world to be established, it had fallen behind those in other metropolitan areas: "Knowledgeable persons have watched other metropolitan centers take advantage of new learning to improve their juvenile courts in various ways. In Illinois, where statutory expression was given in 1899 to a new philosophy of judicial help for the youthful offender, our juvenile courts have received little attention." REPORT OF THE CITIZENS' COMMITTEE ON THE JUVENILE COURT 11 (1963).

A report making similar findings about the Cook County Juvenile Court was issued by the Chicago Bar Association in 1989. REPORT OF THE CHICAGO BAR ASSOCIATION ON THE JUVENILE COURT OF COOK COUNTY 1 (1989). In 1993, the Illinois Supreme Court Special Commission on the Administration of Justice issued a report that cited high

mented with various combinations of juvenile and adult sanctions and programs should be evaluated.

2. People

A mission statement is important. But from this practitioner's perspective, people are the key. It is the work and decision-making of the people who interact with children who determine the quality of fact finding, the thorough exploration of dispositional alternatives, and the performance of treatment and correctional agencies. This will be true in any system that we design, although good people can be burdened to such an extent that even the most highly motivated throw up their hands or become demoralized. Unless the juvenile courts can identify and train good people and support their work in ways which provide them with incentives to continue, juvenile justice systems will not realize their potential.

I am not a personnel specialist. I have not studied the hiring, promotion, and termination practices of juvenile courts. I have not studied organizational behavior. But I have been going to the Juvenile Court of Cook County once or twice a week for the last twenty-eight years. Based on this experience, I concede it would be difficult to remain a highly motivated full-time employee in that system, given the crushing caseloads. I have been able to continue to maintain my enthusiasm for the representation of children in juvenile court in part because I am not there every day.

Under more favorable circumstances, the potential for attracting good people to juvenile court is limitless because the mission of juvenile courts promises the ability to intervene meaningfully in the lives of troubled children. Those of us who

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caseloads and inadequate resources as causes for concern in the Cook County Juvenile Court. REPORT OF THE ILLINOIS SUPREME COURT SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE 2 (1993). Each of these reports was prompted by the recognition that the Juvenile Court of Cook County was in crisis. Indeed, the most qualified judges sought to avoid assignment to juvenile court.

Beginning in 1995, with the election of a new Chief Judge of the Circuit Court, Donald P. O'Connell, Cook County has again initiated a campaign to improve its Juvenile Court. This campaign has been sustained under the leadership of Judge Nancy S. Salyers, presiding judge of the Child Protection Division, and Judge William J. Hibbler, presiding judge of the Juvenile Justice Division. Qualified judges now seek assignment to juvenile court. The leadership of the juvenile court is now active in local and national initiatives to improve juvenile justice and child protection.

teach law students know that they clamor for the opportunity to work with young clients and for careers in juvenile court.[22] Many would sacrifice prestigious law firm jobs and high salaries for this opportunity. I am sure that the same holds true for young social workers, psychologists, and psychiatrists. Why then do juvenile courts consistently fail to take advantage of the talents of people who would like to devote their lives to serving children?

The answer is simple. The work of the lawyers and judges in our juvenile court and in most large urban courts is simply unmanageable. It is impossible to do one's job thoroughly. The numbers simply do not permit sufficient attention to individual cases. Moreover, there are few dispositional alternatives which adequately meet the needs of the children who come before the court. This is demoralizing to those who care about their work. As a consequence, positions are hard to fill with highly skilled people; many highly motivated people leave out of frustration.

3. Funding

Our juvenile court judges are paid reasonable salaries. So are our public defenders, public guardians, and state's attorneys. This is not to say that they do not deserve more. There is great demand for these jobs as there is for the positions of probation officer, deputy sheriff, and court clerk. Cook County has recently devoted substantial funds for renovation and new building at our juvenile court complex. However, the fact remains that the Circuit Court of Cook County would not tolerate the levels of caseload per judge in its "complex case" civil division as seen in the Cook County Juvenile Court.[23] No private law office would saddle its lawyers with 400-500 cases each as is common in our Cook County Public Defender's office. The choices seem clear: reduce intake through utilization of effective screening protocols and community-based diversion pro-

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[22] *See* Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Opportunity*, 31 U. MICH. J.L. REFORM 1 (1997).

[23] Statistics generated by the Clerk of the Circuit Court indicate that during the month of December, 1997 there were a total of 23,267 active petitions pending in the Juvenile Justice Division of the Juvenile court of Cook County. Report 9-F, In The Circuit Court of Cook County, County Department, Juvenile Division (Dec. 1997) (on file with author). There are 16 judges assigned to that division. Each of those courtrooms has three prosecutors and three public defenders assigned to it. This means an average of roughly 1450 cases per judge and an average of close to 500 cases per lawyer.

grams, or increase the number of personnel required competently to address the needs of the children and families who appear in juvenile court.

Does lack of funding drive the difficulty in obtaining social and treatment services for my clients? In some cases yes, in some cases no. Often, the reasons for the "unavailability" of services are lack of knowledge about their availability and the difficulty of securing funding for them. Indeed, the tasks of knowing about available services and how to fund them are important but neglected sub-specialties which should be better developed within juvenile courts. In addition, our juvenile court has no power to order state or private agencies to fund services or placements. It can only commit children to state agencies (the Department of Children and Family Services or the Department of Corrections). The agency then has the discretion to decide how to place and treat the child; the juvenile court has no authority to see to it that the agency performs its assignment. Moreover, once a child is committed to a state agency, lack of funding may constrain the agency's decision to provide needed services.[24]

4. Effectiveness of Interventions

The old saying that "nothing works" has been pretty well discredited. Those of us who represent children in juvenile court, the vast majority of whom are poor, know that an individual or a program that forges a relationship with a child has a good chance of succeeding. Indeed, families with financial resources who have access to effective services often experience successful treatment outcomes. The problem for most poor children is finding the appropriate program and figuring out how to pay for it. In Illinois, unfortunately, few such programs for poor children exist. This means that failure of juvenile

[24] Funding for juvenile delinquency prevention and intervention programs is a low priority for most state legislatures. In Illinois, for example, funding for such programs has remained at the same levels for decades, while funding for new prison construction had dramatically increased. Emily Wilkerson, *Governor Signs Bond Authority: $610 Million Will Go Toward Construction at Prisons, Universities,* PEORIA STAR J., Feb. 21, 1997, at B7. Moreover, the Illinois Department of Children & Family Services (DCFS), Illinois' child welfare agency with the largest budget, recently succeeded in lobbying for legislation that essentially eliminates DCFS responsibility for funding services for delinquent teens. *See In re* A.A., No. 81711, 81800, 1998 Ill. LEXIS, at 3 (Ill. Jan. 23, 1998) (interpreting 705 ILL. COMP. STAT. 405/2-10. 2-17 (West 1997)).

court intervention is caused not by programs that do not work, but by the unavailability of or failure to identify programs that do work. A multitude of programs designed to reduce recidivism among young offenders have been shown to be successful.[25] Moreover, new approaches to interventions designed to change the behaviors of children charged with crimes, such as the "balanced and restorative justice" model[26] are receiving substantial attention from legislators and juvenile court personnel.

Recent initiatives to improve juvenile courts hold promise that we can develop a juvenile justice system that will effectively and humanely balance the needs of children and the protection of the public.[27] Initiatives such as these spark new excitement,

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[25] *See* James C. Howell, The Nonsense of Abolishing the Juvenile Court 7 (1997) (unpublished manuscript, on file with author):

> Distorted, misleading, and erroneous information about juvenile violence and program effectiveness has endangered the future of the juvenile court. This is most unfortunate because recent studies demonstrate convincingly that juvenile court programs are highly effective. In fact, juvenile court treatment programs are more effective than punishment and incarceration in juvenile training schools and adult prisons. Surprisingly, juvenile court programs appear to be more effective with more serious offenders than with less serious offenders—just the opposite to the myth. The juvenile court is effective even with the hardest cases, particularly when intervention occurs early in chronic offender careers.

This excellent paper contains a useful list of research findings regarding successes of various forms of interventions. *See also* PETER GREENWOOD ET AL., DIVERTING CHILDREN FROM A LIFE OF CRIME: MEASURING COSTS & BENEFITS (1996); DELBERT ELLIOTT ET AL., MULTIPLE PROBLEM YOUTH: DELINQUENCY, SUBSTANCE USE, AND MENTAL HEALTH PROBLEMS (1989); *infra* note 43 and accompanying text.

[26] *See, e.g.*, Gordon Bazemore, *What's New About the Balanced Approach,* 48 JUV. & FAM. CT. J. 1 (1997).

[27] The revitalization of the Cook County Juvenile Court is an example of this trend. Collaboration between court administrators, judges, state's attorneys, public defenders, public guardians, service providers, and universities have the potential to reinvigorate juvenile courts. In Chicago, for example, substantial funding from local and national foundations has contributed to a sense of importance and excitement about improving the performance of our juvenile court. Northwestern University's Children and Family Justice Center has been a participant in this effort. The improvement of the Juvenile Court of Cook County has been a collaborative effort between the leadership of the Circuit Court of Cook County and a multitude of institutions and agencies interested in the welfare of children who view the Juvenile Court of Cook County as a vital community resource. The leadership of the Circuit Court of Cook County and of the Juvenile Court of Cook County has adopted reform of the Juvenile Court as a priority. This reform involves assigning highly qualified and motivated judges to Juvenile Court, improving the facilities of the juvenile court, developing new computer systems to monitor the work of the Juvenile Court and its associated agencies, developing more knowledge about screening mechanisms which identify appropriate cases for adjudication—thereby reducing caseloads, and assessing the quality and utilization of social, psychological, and psychiatric assessments and services. *See* Children and Family Just. Center, Report of the Northwestern University

commitment, and sense of professionalism among all who work in juvenile courts and hold the potential to attract needed talent to this vital institution.[28]

II. RESPONSE TO THE PROBLEMS: THE PRACTITIONER'S PERSPECTIVE

I recognize that the ideas of those who practice in juvenile court are not the only perspectives to be valued in this debate; input from a variety of perspectives is essential to determining the best possible way to address the problems of delinquent youth and protection of the public. The future of juvenile courts uniquely depends on a multitude of interests and influences. Judges, lawyers, social workers, psychologists, court administrators, child welfare agencies, state departments of child welfare and corrections all have considerable influence in the debate. Perhaps most important are the state legislators who are responsible for writing juvenile justice legislation and thus have the ultimate power to shape the future of juvenile courts. There has been little discussion about how constructive dialogues can be initiated between those who study juvenile court, those who work in them, and the legislators who shape and implement juvenile justice policy.[29] For our juvenile justice system

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Children & Family Justice Center (1997) (unpublished manuscript, on file with author).

[28] The Juvenile Defender Leadership Summit sponsored by the American Bar Association Juvenile Justice Center, the Juvenile Law Center, and the Youth Law Center that was held on October 24-26, 1997 at the Northwestern University School of Law provided an example of this new excitement, commitment, and professionalism among lawyers who represent children in juvenile court. The Summit's "statement of need" emphasized the need for reinvigoration of the juvenile defense bar:

> The overall purpose . . . is to bring together a diverse group of leading juvenile defenders in order to explore new ways to invigorate, support, and inspire the juvenile defense bar at large. Juvenile public defenders in offices around the country have no medium through which to collaborate with defenders in other jurisdictions. For that reason, most juvenile defenders do not have access to innovative ideas, alternative resources, training methods, shared brief banks, and solutions to systemic problems. Counterparts to juvenile defenders (i.e., adult defenders, juvenile prosecutors, judges, corrections officers, etc.) currently enjoy the kind of collaborative network that sustains interactive communication between members of their profession. Juvenile defenders must find ways to improve their ability to represent and obtain services for their youthful clients and enhance professional development.

Overview of the Juvenile Defender Leadership Summit (Oct. 24-26, 1997) (on file with author).

[29] A recent example of this phenomenon in Illinois is the process which may lead to the enactment of a new Illinois Juvenile Court Act. The bill was drafted by a coalition of prosecutors. Although the prosecutors did seek input from others, they ob-

to succeed, there must be a constructive collaboration between practitioners, scholars, court administrators, and legislators.

Many of those who argue for a reinvigorated juvenile court are or have been involved in the representation of children. Their views about the question of whether juvenile courts should be abolished or reinvigorated are based upon their assessments of the alternative—the abandonment of children to a criminal justice system that has no special focus on the unique problems associated with the adjudication, support, and treatment of children,[30] and to a system that has proven ineffective in curbing recidivism. The fact that involvement in the representation of children in juvenile court—even with all of the juvenile court's shortcomings—leads most children's advocates to the conclusion that the future of the juvenile court lies in preservation and improvement of the court rather than in its abolition is a telling commentary on the merits of this debate. [31]

Another reason for this preference among lawyers who represent children is that they know the facts and circumstances that led their clients to face prosecution. Almost always, those facts and circumstances are stories of low economic status, fam-

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tained and maintained control of the content of the bill and lobbied aggressively for its passage. A description of a more inclusive and constructive approach to drafting juvenile justice legislation is described by Professor Feld. *See* Feld, *supra* note 21; *see also* Burns, *supra* note 19. The process which led to the enactment of the New Mexico juvenile justice bill was a collaboration between the various constituencies concerned about juvenile justice issues. Interview with Prof. Barbara Bergman, Univ. of New Mexico School of Law, in Chicago, Ill. (Sept. 25, 1997).

[30] *See generally* Smith, *supra* note 7; Fitzgerald, *supra* note 7; Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court,* 30 HARV. C.R.-C.L. L. REV. 507 (1995); Francine T. Sherman, *Thoughts on a Contextual View of Juvenile Justice Reform Drawn from Narratives of Youth,* 68 TEMP. L. REV. 1837 (1995); Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise,* 68 TEMP. L. REV. 1791 (1995); Rosenberg, *supra* note 1.

[31] *See, e.g.,* Smith, *supra* note 7 (Smith is Deputy Director and Clinical Instructor at the Criminal Justice Institute, Harvard Law School); Victor L. Streib, *The Efficacy of Harsh Punishments for Teenage Violence,* 31 VAL. U. L. REV. 427 (1997) (author was both a prosecutor and defense lawyer). As Streib observes:

> My turning away from the punishment approach came in part as a result of working with victims' families. Several times over the years, I have found myself listening to the stories of parents whose child has been murdered as they struggled to deal with such unfathomable grief. Each time, I have been chagrined and embarrassed to witness the criminal justice system, usually in the person of a local prosecutor, promising to serve the needs of this victim's family by wreaking horrible punishments on the person who killed their family member.

Id. at 429. *See also* David A. Harris, *The Criminal Defense Lawyer In the Juvenile Justice System,* 26 U. TOL. L. REV. 751 (1995); Rosenberg, *supra* note 1.

ily dysfunction, lack of emotional support, educational deficits, mental health problems, peer pressure, and, in the most serious cases, the availability of a lethal weapon.[32] Lawyers who represent children must obtain detailed and confidential social histories from their clients, as well as information surrounding the commission of a crime, which may not be shared with other professionals. Because of the confidentiality inherent in the lawyer-client relationship,[33] lawyers for children may know these facts and circumstances as well as, if not better than, anyone else in the juvenile justice system.[34]

These lawyers also know the dire and unproductive consequences that ensue when children are transferred to criminal court. Children who are incarcerated in juvenile and then adult institutions for long periods of time lose contact with family members and their communities. They become more gang-involved than they were before entering the correctional system and have higher rates of recidivism.[35] The educational opportunities within adult correctional systems are poor relative to

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[32] There have been innumerable studies and articles written concerning the individual and environmental causes of delinquency. For an excellent annotated bibliography of these materials, see Jean J. Davis et al., *Bibliography of Selected Juvenile Justice Resources*, 5 J.L. & POL'Y 385 (1996). *See generally* VIOLENCE & YOUTH: PSYCHOLOGY'S RESPONSE, SUMMARY (1993); ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 3 (1993); ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993); JOYCE OATES, FOXFIRE: CONFESSIONS OF A GIRL GANG (1993); JAMES GARBARINO, NO PLACE TO BE A CHILD, GROWING UP IN A WAR ZONE (1991); MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990); ELLIOTT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE (1985); Franklin E. Zimring, *Kids, Groups, and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867 (1981).

[33] *See* MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.6 (1983).

[34] Admittedly, lawyers for children in crowded juvenile systems sometimes know their clients least well of all of the professionals who work with these children. Often, in such settings, lawyers meet with their clients only on the days when their clients appear in court and thus are not able to establish optimum lawyer-client relationships. However, even in juvenile court systems in which lawyers carry unconscionable caseloads, they are still in a unique position to assess their clients' alleged criminal activity, their clients' backgrounds, and the constructiveness of the sanctions and treatment experienced by their clients.

[35] A 1996 study concluded, after reviewing 50 juvenile transfer cases that recidivism rates are higher among juveniles transferred to adult criminal court than among those who remain under juvenile jurisdiction. The study suggests that there is a trade-off between the short-term public safety benefit of juvenile transfer to adult criminal court and the long-term effects of increased recidivism. James C. Howell, *Juvenile Transfers to the Criminal Justice System: State-of-the-Art*, 18 J.L. & POL'Y 58-60 (1996).

those in juvenile correctional institutions.[36] Children who face adult sentences experience additional tragedy. In many cases, they will be institutionalized for longer periods of time.[37] In most states, while younger "adult sentenced" juveniles will be kept in juvenile facilities for some period of time, most of them will be transferred to adult institutions at age sixteen or seventeen to complete their sentences.[38] There they will be raped,[39]

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[36] For studies of deteriorating educational services in juvenile detention facilities, see OSA D. COFFEY & MAIA G. GEMIGNANI, EFFECTIVE PRACTICES IN JUVENILE CORRECTIONAL EDUCATION: A STUDY OF THE LITERATURE AND RESEARCH, 1980-1992 (1994); D. PARENT ET AL., CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONAL FACILITIES (1994).

As the American Bar Association's Juvenile Justice Standards state in § 10.6 ("Education") of Part X: Standards for Juvenile Detention Facilities: "All accused juveniles held in interim detention should be afforded access to the educational institution they normally attend, or to equivalent tutorial or other programs adequate to their needs, including an educational program for 'exceptional children.'" INSTITUTE OF JUD. ADMIN.-AM. BAR ASS'N JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 141 (Robert E. Shepherd, Jr. ed., 1996) [hereinafter JUVENILE JUSTICE STANDARDS]. *See also* C. FRAZIER, DEEP END JUVENILE JUSTICE PLACEMENTS OR TRANSFER TO ADULT COURT BY DIRECT FILE? (1991) (a report prepared by the Florida Legislative Comm'n on Juv. Just.); J. Fagan, *Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in* SOURCEBOOK ON SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 238-74 (J.C. Howell et al. eds., 1995).

[37] *See* J. FAGAN, URSA INSTITUTE: SEPARATING THE MEN FROM THE BOYS: THE CRIMINALIZATION OF YOUTH VIOLENCE THROUGH JUDICIAL WAIVER 55 (1987) (concluding that in a study of Boston, Newark, Detroit, and Phoenix, youths transferred to criminal court received considerably longer sentences than youths in juvenile court); P.W. GREENWOOD ET AL., FACTORS AFFECTING OFFENSE SEVERITY FOR YOUNG OFFENDERS (1984) (comparing juvenile court dispositions of juveniles with young adult robbery and burglary sentences in Las Vegas, Seattle, and Los Angeles from 1971-1973, and concluding that juveniles with extensive prior records received longer sentences than adults); P.W. GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA: A REPORT TO THE LEGISLATURE (1983) (comparing juvenile court dispositions of juveniles with young adult robbery and burglary sentences in three large California jurisdictions from 1971-1973, and concluding that criminal court sentences were longer than juvenile court sentences except when juveniles had prior record).

[38] In Illinois, for example, juveniles tried as adults are committed to the Juvenile Division of the Department of Corrections until they turn 17. Although the Juvenile Division may keep a juvenile found guilty as an adult until age 21, most "adult sentenced" juveniles are transferred to the adult division of the Department of Corrections when they turn 17 or 18. These transfers are made in part because of overcrowding within the juvenile division of the Department of Corrections. The Juvenile Division of the Illinois Department of Corrections (IDOC) is 170% over capacity. The adult division of the IDOC is 163% over capacity. Report of Proceedings at 46, *In re* W.S. & J.W., 96JD 14650, 97JD3753, & 97JD3751 (Cir. Ct. Cook County, Juvenile Div. Aug. 19, 1997) (testimony of Michael Furrie, Administrator, IDOC) (on file with author). Such testimony is routinely presented by the prosecution in Cook County Juvenile Court transfer hearings to address the question of whether there are

forced to swear life-long allegiance to gangs to survive,[40] and dehumanized.[41] The long-term consequences of incarcerating young offenders for lengthy periods of time under these conditions are clear—the release into society of an increasing number of dysfunctional middle-aged men and women and the expenditure of vast sums to protect the public from them.[42]

Given the vulnerabilities of our clients, the horrors of what children face in adult institutions, and our admittedly imperfect record in designing juvenile justice, prevention, and treatment systems, how should we choose between the many competing models of justice for young offenders? One way of resolving the issue is to try to reason our way to a solution based upon the application of logic to decide what principles of responsibility should apply to young people who commit crimes. Another way

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"facilities particularly available to the juvenile court for the treatment of the minor." 725 ILL. COMP. STAT. 405/4-5(3)(b)(v) (West 1997).

[39] *See* DALE PARENT ET AL., KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: TRANSFERRING SERIOUS JUVENILE OFFENDERS 2 (1997) (lists "risk of being raped or assaulted by older inmates" as the first key legislative issue); *see also* NATIONAL INST. OF CORRECTIONS, OFFENDERS UNDER 18 IN STATE ADULT CORRECTIONAL SYSTEMS: A NATIONAL PICTURE (1995).

[40] *See generally* BUREAU OF JUST. ASSISTANCE INST. FOR L. & JUST., URBAN STREET GANG ENFORCEMENT (1997); JAMES C. HOWELL, YOUTH GANGS IN THE UNITED STATES: AN OVERVIEW (1997).

[41] *See generally* ROGER A. HANSON & HENRY W. DALEY, CHANGING THE CONDITIONS OF PRISONS AND JAILS (1997) (a survey of 42 U.S.C. § 1983 lawsuits by prisoners against prison officials nationwide); FRANKLIN E. ZIMRING & GORDON HAWKINS, LETHAL VIOLENCE AND THE OVERREACH OF AMERICAN IMPRISONMENT (1996); H. TOCH, LIVING IN PRISON: THE ECOLOGY OF SURVIVAL (1977).

[42] *Accord* Guttman, *supra* note 30, at 509:

> Unless society intends to lock up every child who enters the justice system for the rest of his or her life, it must acknowledged that these children will ultimately reenter society. Society's treatment of these children during their incarceration will affect who they are when they return to their communities.

This point was reaffirmed convincingly by Professor Stephen Shulhoffer, who describes the human and economic waste of "broad, automatically punitive responses" to juvenile crime:

> Give a twenty-six-year-old robber a ten year sentence, and he returns to the street at age thirty-six, well past his prime for predatory offending. But sentence a fourteen-year-old to ten years in prison for a purse snatching and you are almost guaranteeing that he will spend his formative years in an environment with no affection, no positive role models, and no useful education other than an intensive immersion in the ways of crime and brutality. . . An enterprise that is destined to produce these sorts of results does not seem to bear possible use of scarce resources.

Stephen J. Shulhoffer, *Youth Crime and What Not To Do About It*, 31 VAL. U. L. REV. 435, 443-44 (1997).

of approaching the problem is to examine the question of whether we can make reasoned distinctions between those we treat as juveniles and those we try in criminal court. We could also ask whether juvenile courts, because of their low status and the absence of the procedural protection of the jury trial, can be trusted to dispense justice to children. We should also consider the question of whether effective rehabilitative services can ever be delivered on the massive scale needed to make real inroads.[43] Finally, we must ask, as do Professors Scott and Grisso,

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[43] For a comprehensive directory of treatment services around the nation that work, see IMOGENE MONTGOMERY ET AL., WHAT WORKS: PROMISING INTERVENTIONS IN JUVENILE JUSTICE (1994). The foreword of this Department of Justice, Office of Juvenile Justice program directory, asserts that juvenile rehabilitative programs work and always have worked:

> In the 1970s, the message issued by the research community concerning the use of prevention and treatment programs for juveniles was that "nothing works." This unfortunate and, as it turned out, erroneous conclusion, together with increasing serious juvenile delinquency, fueled confinement of larger numbers of juveniles throughout the 1980s. Juveniles were increasingly turned over to the criminal courts. These trends continue to this day.
>
> Now we find that treatment programs for juveniles do work—and were working all the while. This report . . . describes a variety of successful prevention and treatment programs in the juvenile justice system. Compiled by the National Center for Juvenile Justice, it represents the results of a nationwide survey of 3,000 juvenile justice professionals, including juvenile and family court judges, court administrators, probation officers, and line staff. The respondents nominated over 1,100 programs they deemed effective in their jurisdiction. After careful review, 425 programs merited designation as promising interventions.

Id. at iii.

Perhaps the most comprehensive study of juvenile treatment programs to date made a similar conclusion in 1992:

> It is no longer constructive for researchers, practitioners, and policy-makers to argue about whether delinquency treatment and related rehabilitative approaches work. As a generality, treatment clearly works. We must get on with the business of developing and identifying the treatment models that will be most effective and providing them to the juveniles they will benefit.

M. W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytic Inquiry into the Variability of Effects, in* META-ANALYSIS FOR EXPLANATION 126 (T.D. Cook et al. eds., 1996).

High quality services for children who need intensive and sophisticated interventions are hard to come by. In Illinois, for example, community-based interventions and intensive, structured residential programs for children at risk are difficult to access. Thus for children requiring on-going attention and/or treatment, the alternative is often placement in very expensive out-of-state facilities, or commitment to the juvenile division of the Department of Corrections. The scarcity of in-state resources is the result of the expense of maintaining them, lack of economic incentives to create them, and the view that children who offend do not deserve state-of-the-art interventions. *See* Holland & Myleniec, *supra* note 30, at 1833. There is also the concern that money spent on these resources will not prevent recidivism. However, when compared to the cost of lengthy incarcerations, which increased referrals to criminal

whether the potential for constructive treatment-based outcomes required by the psychological needs of children are more possible in juvenile court than in criminal court.[44]

There are additional questions to ask in deciding the future of justice for children. Perhaps the most important questions are: (1) what kind of system of justice for children is most likely to be flexible and child-centered while at the same time taking into account the needs and interests of the public? and (2) what kind of system of justice for children will continue to motivate our society to continue to search, with flexibility in light of experience, for new answers to the question of how best to adjudicate and treat young people accused of crimes?

III. AREAS OF AGREEMENT: ABOLITIONISTS AND PRESERVATIONISTS CONCUR

Identification of areas of consensus regarding a debated issue sometimes has the effect of demonstrating that the "disputants" agree on more issues than they debate. Refining the debate to the actual disputed points focuses the discussion and makes it more productive. In the debate over the future of justice for children, there are three points that are not in controversy: (1) children are fundamentally different in their cognitive and moral decision-making capabilities than adults; (2) the ju-

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court will inevitably cause, investment in state-of-the-art programs for youthful offenders makes economic and social sense: economic because most youth can be treated given appropriate services, and social because rehabilitative programs directed toward youth have a good chance of preventing recidivism. *See, e.g.*, Melissa M. Moon et al., *Reclaiming Ohio: A Politically Viable Alternative to Treating Youthful Offenders*, 43 CRIME & DELINQ. 438 (1997) (describing a system which provides counties with financial incentives to keep youthful offenders out of state-run juvenile correctional facilities); Laurence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long-Term*, 43 CRIME & DELINQ. 548, 558-59 (1997) (finding that in Florida, "[t]ransfer was more likely to aggravate recidivism than to stem it").

[44] Scott & Grisso argue convincingly that a court which focuses on the interests of children is more likely to have interdisciplinary connections with a variety of helping professions. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 181-89 (1997). A justice system with a child-centered focus fosters closer analysis of the causes of behavior and the potential for constructive interventions. When a lawyer develops a strategy for representing a child client, that strategy will always involve an assessment of the child's world with the objective of designing appropriate interventions should there be a finding of delinquency. The flexibility of the juvenile justice system permits this inquiry to take place. The rigidity of the adult system prevents this inquiry from taking place.

venile justice system has failed to satisfy expectations for providing procedural protection and successful interventions; and (3) the juvenile justice system cannot survive solely by relying upon the historical justifications for its founding. The point that is in controversy is Professor Feld's conclusion that juvenile courts should be abolished as a consequence of points 1 and 2.[45] However, a close examination of the points of agreement, I argue, makes abolition of the juvenile court unnecessary and undesirable.

The developmental and "moral decision-making" differences between children and adults support the proposition that we should distinguish between the sanctions we impose upon children and those we impose upon adults. The fact that juvenile courts have failed to live up to expectations requires that we reconceptualize and re-tool the court rather than abolish it. The lack of procedural protections which are of concern to Professor Feld[46] can be solved by providing child-sensitive jury trials in juvenile court.

A. CHILDREN ARE FUNDAMENTALLY DIFFERENT THAN ADULTS

The reality that children are fundamentally different than adults in their ability to make moral judgments and more amenable to treatment than adults has always been at the heart of the juvenile court movement. These differences are not disputed by any of the authors in this Symposium. Indeed, the developmental differences between children and adults are acknowledged and underscored by many authors[47] and by psychologists and psychiatrists.[48]

Neither Professor Feld nor Professor Morse dispute these basic propositions about the relative capacity of children and adults to make reasoned judgments.[49] Of course, the extent of

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[45] *See* Feld, *supra* note 1.

[46] *Id.*

[47] There are many studies that assert this rather intuitive proposition. *See, e.g.*, L. Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. ADOLESCENCE 265 (1989).

[48] *See, e.g.*, Elizabeth Caffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-making*, 68 TEMP. L. REV. 1763, 1787 (1995) (criticizes the assumptions of the informed consent model that adolescents and adults are cognitively similar).

[49] *See* Feld, *supra* note 1, at 104-14; Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 49 (1997).

the "fundamental difference" between children and adults depends on the age, sophistication, and personality development of the child at issue.[50] A "just" system, therefore, would be a system which combines fair adjudication, punishment in proportion to the child's responsibility, and dispositions that recognize rehabilitation, consistent with a "responsibility" message, and the need to protect the public.[51] Professors Feld and Morse would not dissent from this proposition either. A "just" system, especially one that addresses the problems of young people, must be flexible but consistent in its response to individual children, to the nature of the societal problems presented to it, and to the evolving lessons of child and adolescent development. Morse's position that children should have imposed on them more responsibility for their actions[52] and Feld's argument that more consistency can be achieved in the adult court setting with a "youth discount" mitigating the harshness of adult sentences,[53] are not incompatible with these propositions.

B. THE JUVENILE JUSTICE SYSTEM HAS FAILED TO SATISFY EXPECTATIONS

Another fact that is not disputed is that juvenile courts and their associated agencies have historically fallen short. Juvenile courts have failed to adequately protect the procedural rights of the children who appear in juvenile court. Associated agencies have failed to provide sufficient state-of-the-art interventions. The first set of criticisms is justified: juvenile courts (and, indeed, criminal courts) have failed to adhere to the highest ideals of due process. The second set of criticisms, while justified, should not compel the conclusion that juvenile courts be abolished. Juvenile courts should not shoulder the blame for inadequate or unsuccessful interventions on behalf of children.

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[50] There are numerous studies that conclude that such factors as these affect a juvenile's criminal sophistication. *See generally* JAMES C. HOWELL, JUVENILE JUSTICE AND YOUTH VIOLENCE 133 (1997).

[51] The moral and developmental differences between children and adults cannot rest as the only justification for separate juvenile courts. Children's courts must also justify their existence by treating children effectively and by demonstrating sensitivity to the need to protect the public. Although no court can in fact protect the public, the political pressure to move away from a rehabilitative model of the juvenile court will persist if it appears that the juvenile courts are not meeting the goals of fair adjudication, adequate punishment and incapacitation, and effective treatment.

[52] *See* Morse, *supra* note 49, at 17-61.

[53] *See* Feld, *supra* note 1, at 96-97.

1. Failure to Adhere to Due Process

Although the *parens patriae* and rehabilitative ideals of the court have long enjoyed considerable appeal, the implementation of those ideals has been problematic. The *parens patriae* philosophy led to the abuses of judicial and administrative power that *Gault*[54] sought to curtail. The Supreme Court's decision in *Gault* did not eradicate those abuses.[55] Lack of resources and power allocated to defense counsel for children, as well as continuing reluctance on the part of judges to fully implement due process protections, leave many children in our juvenile courts in the pre-*Gault* "worst of both worlds."

Overburdened defense counsel cannot make effective assistance of counsel a reality. The provision of lawyers who are hamstrung by too many cases is not a meaningful implementation of the Sixth Amendment.[56] The right to a procedurally "regular" hearing is also impossible when a judge has too many cases on his call. The priority becomes disposition of cases (with heavy reference on plea bargaining), rather than upon full and fair adjudication of facts. The right to confront witnesses is also compromised to the extent of being relatively meaningless when too many cases clog the system. The full exercise of rights is restricted by lawyer and judicial practices which encourage children to forego their procedural rights in order to secure promised (and often undelivered) benefits of supportive interventions.

2. Failure to Solve the Problem of Crime Committed by Children

Many of the critics of juvenile courts argue that the jurisdiction of juvenile courts should be limited and that juvenile courts should be abolished because they have not been effective in preventing crime committed by children. However, the role of a court is not to curb crime. The role of a court is to find facts fairly and to impose sentences which take into account a myriad of factors, including the seriousness of the offense, the culpability of the child, the defendant's potential for rehabilitation, and protection of the public.

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[54] *In re* Gault, 387 U.S. 1 (1967).

[55] *See, e.g.*, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS, REPORT OF THE AM. BAR ASS'N JUV. JUST. CENTER (Patricia Puritz ed., 1995) [hereinafter A CALL FOR JUSTICE].

[56] U.S. CONST. amend. VI.

The unfairness to children and to the concept of the juvenile court (admittedly a lesser consideration) of expecting that juvenile courts can, by themselves, curb crime is underscored by the fact that many of our largest juvenile courts have always been under funded and understaffed. An example of this phenomenon is, again, the Juvenile Court of Cook County, where judges in the delinquency division of the court have 1,500-2,000 cases on their calendars. Public defenders' caseloads can be as high as 400 cases at any one time.[57] The three to four state's attorneys assigned to each of these courtrooms are responsible for prosecuting all of the cases assigned to the judge. Under these circumstances, we cannot expect any court to meet expectations. However, transferring the problems of this over-loaded system to the adult criminal courts (which are themselves stretched beyond capacity) cannot be the answer.

C. THE JUVENILE JUSTICE SYSTEM CANNOT SURVIVE BY RELYING SOLELY UPON THE HISTORICAL JUSTIFICATIONS FOR ITS FOUNDING

The original motivations for the founding of the juvenile courts, by themselves, support continuation of "business as usual" in our juvenile courts; advocates of retaining and strengthening juvenile courts cannot rely upon the noble urge to "save children." First, there is considerable doubt that the founders of juvenile courts ever intended to include within its jurisdiction all children who break the law. In fact, during the early history of the juvenile court, many children were tried as adults.[58] This history underscores the question of whether the juvenile court was ever meant to address the problems with the small population of "serious" or "violent" offenders we see today in our juvenile and in our criminal courts. The youngsters whom the founders of the juvenile court sought to help were, for the most part, charged with minor offenses.[59] The new (real and perceived) challenges faced by juvenile courts—increased

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[57] In 1995, in Cook County, "in some delinquency courtrooms, attorneys handled more than 450 cases per year . . . lawyers may have 15 cases set for trial on one day, or 40 to 50 cases on calendar for a day." A CALL TO JUSTICE, *supra* note 55, at 25.

[58] In the first juvenile court in Illinois there was concurrent jurisdiction over serious crimes between criminal and juvenile jurisdictions. On June 4, 1907, the Illinois Juvenile Court Act was amended to allow for discretionary transfer to adult court. *See* 1907 ILL. LAWS §9, 70-72. *See generally* Tanenhaus, *supra* note 17.

[59] *See* CITIZENS' INVESTIGATING COMM., *supra* note 21, at 9.

caseloads,[60] a population with more access to lethal weapons,[61] more public attention focused on the work of juvenile courts as a consequence of the notoriety of some delinquent behavior,[62] the need to strengthen families and schools,[63] the involvement of young children in a drug trade dominated by adults,[64] and peer pressure displacing family systems—all raise questions about the efficacy of a juvenile court model which was created in a different era. However, the fact that we face new challenges—e.g., changes in family systems—simply means that juvenile courts must adapt to a changing reality for children and families. This is exactly what the founders of the juvenile court attempted with the creation of the court and its associated social service providers.

The fact that we face the challenge of making juvenile courts and associated social service and correctional systems responsive to the needs of today's children and society does not require that juvenile courts be abolished. It means, rather, that

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[60] In 1995, an American Bar Association study concluded that the high caseloads of juvenile courts was the single most important barrier to effective representation of juveniles. A CALL FOR JUSTICE, *supra* note 55, at 8 (1995). *See also supra* note 23 and accompanying text.

[61] UNIFORM CRIME REPORTING PROGRAM, FEDERAL BUREAU OF INVESTIGATION, AGE-SPECIFIC RATES & RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES, 1965-1992 (1993) (from 1965-1992, violent crime among juveniles increased from an average of 65.1 offenses to 197.6 offenses per 100,000 juveniles). Although these rates are still unacceptably high, this trend may have leveled off. *See* Lotke, *supra* note 4, at 401 ("data for 1995 suggest that arrests of juveniles for homicide and other violent crimes have started to decline"); B. KRISBERG ET AL., JUVENILES TAKEN INTO CUSTODY RESEARCH PROGRAM: FY 1995 ANNUAL REPORT (1996).

[62] The case of 11-year-old Robert Sandifer ignited nationwide concern. He allegedly killed a 14-year-old girl and then was himself killed, allegedly by fellow gang members. Nancy R. Gibbs, *The Short, Violent Life of Robert "Yummy" Sandifer, So Young to Kill, So Young to Die*, TIME, Sept. 9, 1994, at 54. President Clinton echoed popular sentiment over Sandifer in his weekly radio address:

> Too many of [our children] are growing up in fear. All too many are growing up without the values of mainstream society. . . . By now, nearly all of us know the story of Robert Sandifer, known as "Yummy" to his friends. . . . Robert Sandifer's grandmother despaired at his funeral because, she said, "I couldn't reach you." We must keep doing everything we can to reach those children. And we must help them respect the law to keep them safe. Next week I'll sign into law the historic crime bill that will be a tough but smart tool . . . [to] punish hardened young criminals with stronger penalties.

William J. Clinton, Audio Tape of Presidential Radio Address (Sept. 10, 1994).

[63] Howell, *supra* note 25, at 134.

[64] A 1989 study of Kansas City and Seattle concluded that most gang drug trafficking in both cities was conducted either by retired, older members or much younger, aspiring "wannabe" juveniles. *Id.* at 116.

we are facing new challenges and that we must formulate the most enlightened and efficient way of responding to them. A response to Professor Morse's concerns about the extent to which more responsibility should be imposed upon children is to develop courts, social service, and correctional systems designed to promote acceptance of responsibility and reinforce positive behaviors.[65] New approaches to court administration, programming for youth, and psycho-social interventions suggest that our juvenile courts can be reinvigorated to meet new challenges.

V. NO AGREEMENT: PROFESSOR FELD'S PROPOSAL TO ABOLISH THE JUVENILE COURT

I make two arguments which support retaining and strengthening juvenile courts rather than abolishing them. The first is that criminal courts will never adapt themselves to the distinct challenges of doing justice to children. The second argument is that procedural protections (including the right to jury trial) could be provided in "re-tooled" juvenile courts without destroying the distinctive mission of juvenile courts. First, I turn to the reasons for not relying upon criminal courts to process all criminal cases involving children.

A. THE OPERATION OF CRIMINAL COURTS, ESPECIALLY THOSE IN URBAN AREAS, FALLS SHORT

Criminal courts in large urban areas are overburdened. There are too many cases, too few lawyers representing too many defendants, and too few resources to support probation and correctional services. Indeed, many argue that our criminal justice system (courts and correctional systems) are in a state of crisis, despite the best intentions of the many and dedicated lawyers, judges, and correctional workers who populate the system. Overburdened courts and correctional agencies are simply not prepared to absorb the number and character of the cases which, if juvenile courts were abolished, would flood criminal systems. This would be true even if all juvenile court resources were shifted to criminal courts, because the crisis within our criminal courts will likely not permit sufficient focus on resources to be directed to the problems of children.

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[65] *See, e.g.*, Bazemore, *supra* note 27.

B. CHILDREN WILL BE SECOND CLASS CITIZENS IN CRIMINAL COURT

We know that given the history of the separate juvenile court, and the history of child welfare systems generally, that children would be second class citizens in a unified criminal court.[66] We know this from the history of juvenile courts themselves: juvenile courts have always been the neglected stepchildren of court systems.[67] This is because the children in juvenile court have no social or economic power. The status of the special needs of children within a criminal court system would be even lower.

In a unified system, there would be no hope that a sophisticated children's court, with judges, defenders, and prosecutors who specialize in the adjudication and disposition of offenses committed by children, would develop. There is substantial evidence that these specialties will develop in the near future in separate juvenile courts.[68] Although this argument would be more powerful if juvenile courts had performed better and had even more promise, we should not make matters worse for children and for society by subjecting children to a criminal justice system that has no incentives to take their special needs into account.

In juvenile courts, children's advocates "lobby" for better court administration, better judges, and better services. Some of this lobbying is performed by lawyers in the context of the representation of individual clients. Good probation and social

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[66] *See, e.g.*, ELLEN RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978); ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977).

[67] Price & Boersema, *supra* note 12, at 2 (finding that "the greatest future needs of the juvenile court have implications for resource utilization and funding").

[68] The proliferation of law school clinical programs devoted to the representation of children may provide the juvenile justice system with highly motivated, knowledgeable, and competent lawyers in the near future. Such programs exist at many law schools including Loyola University (Chicago), University of Chicago, Georgetown University Law Center, New York University School of Law, Northwestern University School of Law, Vanderbilt University School of Law, Yale Law School, University of Miami School of Law, University of Florida School of Law, University of Texas School of Law, and the University of Michigan School of Law. *See* AMERICAN BAR ASS'N, SECTION OF LITIGATION TASK FORCE ON CHILDREN, DIRECTORY OF CHILDREN'S LAW PROGRAMS (1996). For an eloquent description of the benefits to juvenile courts, to the profession, and to law schools of such programs, see Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1 (1997).

service providers lobby for better resources with which to serve the children for whom they are responsible. The potential for improvement of court and social services through collaboration between legal and social service providers is enormous.[69]

Needless to say, this "lobbying" on behalf of the interests of children is not always as effective as it could be. However, children tried in criminal court would have less effective special voices advocating for their interests, thus making their plight worse than it is now. The very existence of juvenile courts keeps alive a special focus on the causes, prevention, and cures for delinquent behavior. The interests of children and the special focus on causes, prevention, and cures in a unified criminal system would necessarily become subsidiary to the goal of the new unified criminal court—that goal being the efficient trial of cases and sentencing of all defendants.

C. CHILDREN WILL BE SUBJECTED TO THE INFLUENCE OF ADULTS CHARGED WITH CRIMES TRIED IN CRIMINAL COURT

One goal of maintaining separate juvenile court systems is the separation of children from adult criminal defendants. There are common sense reasons for this. Children should be protected from older and stronger adults who might assault and injure them. Children are easily pressured into criminal behavior by adults.[70] One answer to this objection to abolition of juvenile courts is that a unified juvenile/criminal justice system could function without mixing children with adults. Separate detention facilities could be maintained. Within criminal court systems, separate courtrooms and divisions could be established to handle cases involving children. Will such attempts at physical separation be successful? Although strict age guidelines could be used for purposes of placement in detention, will it be desirable even to have older and younger people charged with

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[69] *See supra* note 27 and accompanying text.

[70] Many lawyers who represent children have seen the powerful influences that adult co-defendants or gang leaders can have on young people. There is an increasing number of children who find themselves charged with crimes because they have been recruited into criminal organizations and have been required by their elders to support the criminal activities of the organizations. The case study described at the beginning of this article is just one such example. Another example is the life and death of an 11-year-old killed in Chicago allegedly because he "knew too much" about gang activities. *See* Gibbs, *supra* note 62, at 54.

crimes mixing together in the hallways and courtrooms of criminal courts?

How will the new court that Professor Feld envisions determine which children should remain separated from adult criminal defendants? Will age be the determining factor? Will judges be required to determine the degree of the child's sophistication before requiring separation from adults? The opportunities for domination and influence of the younger by the older multiply in a criminal court system responsible for trying both children and adults.

If juvenile courts were abolished, there would probably be some "unified" criminal courts that would employ careful and enforceable measures designed to prevent children and adults from coming into contact with each other. In these criminal courts, "special" courts and/or systems would be developed to process cases involving children. In criminal court systems in which cases of children were separated from those of adults, new, but less autonomous juvenile courts might develop within the structures of adult criminal courts. But these new, less autonomous, juvenile courts, located in adult criminal courts, would inevitably have fewer specialized resources for children. They would be subsidiaries of adult criminal courts, far more likely to be a "poor relations" than independent, autonomous institutions. Inevitably, the influence of practices, themes, and attitudes which play out in adult court—a high level of adversariness; a sense of despair and hopelessness regarding the causes of crime and the potential of prevention and rehabilitation-based programs; a lack of attention to individualized needs; and harsh determinate sentencing[71]—would all be present in the divisions of the criminal courts which, under Professor Feld's proposal, would process children.

The existence of separate juvenile courts is a powerful and enduring symbol of the fact that children are in most cases less morally responsible for commission of crime than adults. Without a separate court this basic difference will be lost on our justice system. Moreover, the impact of our juvenile and criminal

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[71] *See* Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169 (1995); David Yellen, *What Juvenile Court Abolitionists Can Learn From the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 578 (arguing that as imperfect as the juvenile justice system is, the adult criminal justice system is likely to be worse for juveniles).

justice systems are felt disproportionately by African-American and Hispanic youth and by children with low socio-economic status. Thus the population most in need of social services will be deprived of them.[72] Youth most at risk will receive even less attention than they receive now.[73]

D. JURY TRIALS CONDUCTED IN CRIMINAL COURTS WILL BE INCOMPREHENSIBLE AND INTIMIDATING TO CHILDREN

Under Professor Feld's proposal, jury trials would be guaranteed to juveniles as a consequence of being tried in criminal court.[74] Will the availability of a jury trial in a criminal court benefit juvenile defendants? This is a subject about which there is much disagreement. Before reaching that question, however, it should be noted that whether juveniles are afforded jury trials or not need not depend on whether they are tried in adult or in juvenile court. Juvenile courts could continue to function as separate entities and provide jury trials; there is no inconsistency between the goals of a rehabilitation, balanced punishment, and the availability of jury trials.[75]

There is no reason that legislators must chose between a purely punitive, adversarial system and one whose only priority is rehabilitation. It is possible to combine all elements of a de-

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[72] For example, a 1994 study of National Youth Survey data found that by the time subjects reached age 20, African-Americans were five-times more likely to be arrested for a serious violent offense than their Caucasian counterparts. The study suggested that because young African-Americans have fewer economic opportunities, they are more likely to become "more deeply embedded in and dependent upon the gangs and the illicit economy that flourish in their neighborhoods." D.S. Elliott, *Serious Violent Offenders: Onset, Developmental Course, and Termination*, 32 CRIMINOLOGY 19 (1994); Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 36 (1995).

[73] Cook County provides another example. Children automatically transferred to criminal court for possessing guns or weapons in or about public housing or schools normally receive adult probationary sentences. The ratio of children to probation officers in the Cook County Juvenile Court is approximately 25:1. The ratio in the Cook County Criminal Court is much higher. Interview with William Sifferman, Deputy Director, Juvenile Probation, Juvenile Court of Cook County, in Chicago, Ill. (Jan. 28, 1998).

[74] Feld, *supra* note 1, at 87-89.

[75] The Supreme Court's holding in *McKiever* that states are not required to provide jury trials in juvenile court is based upon the mistaken notion that jury trials will inject more adversariness into the juvenile system than is already present. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). The holding relied on an incorrect assertion that juvenile correctional institutions were not punitive. That belief is outdated now, especially in light of the increasingly punitive nature of the new juvenile justice legislation. *See supra* note 16 and accompanying text.

sirable justice system into one court that would provide all due process protections available to adults, including jury trials, as well as specialized and flexible rehabilitative and correctional dispositions. We can address Professor Feld's concerns about the arbitrariness of juvenile court judges by making jury trials more available in juvenile court and by placing the most highly qualified public defenders, prosecutors, and judges in juvenile court.[76]

Providing jury trials to children in juvenile court need not transform juvenile courts into adult criminal courts. First, the exercise of the right would probably be infrequent. Second, juvenile courts could adopt practices and procedures that would adapt jury trials to the capacities and needs of children, something that would probably not happen in adult criminal courts.

Moving children to adult court to afford them the right to a jury trial would subject them to a judicial/legal culture even more incomprehensible to them than the judicial/legal culture that exists in juvenile courts.[77] The degree of the child's inability to comprehend the adult system will inevitably result in challenges to youngsters' fitness to stand trial based upon developmental considerations, an issue which juvenile courts can sometimes avoid.[78] According to Grisso, children do not grasp "abstract legal concepts" such as "rights" generally understood by adults. Moreover, children's understanding of the trial process is poorer than that of adults. Children often have difficulty "separating defense attorney functions from court authority." Finally, "pre-adolescents are significantly less capable of imagining risky consequences of decisions."[79]

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[76] States should make the right to jury trial in juvenile court co-extensive with the right to jury trial in adult criminal proceedings where, if incarceration exceeds six months, a jury trial is required if demanded. *See* Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

[77] *See* Rosenberg, *supra* note 1, at 174 n.66 ("I cannot believe that the proverbial visitor from Mars, if planted down in the juvenile courts and the criminal courts, and asked to determine which would be better in terms of protecting children, would not conclude that the juvenile courts are far superior").

[78] *See* Thomas Grisso, *Juvenile Competency to Stand Trial, Questions in an Era of Punitive Reform*, CRIM. JUST., Fall 1997, at 4-11.

[79] *Id.* at 11.

E. JURY TRIALS HELD IN JUVENILE COURT NEED NOT BE FRIGHTENING AND INCOMPREHENSIBLE

My experience of trying cases in juvenile court when compared to trying cases in adult criminal court is that the adult court proceeding is more "formal" and less "flexible." What do the terms "formal" and "flexible" mean in this context? "Formal" means "rigid," "severe," "solemn," "intimidating." "Flexible" means "pliant," "sensitive," "understanding." In adult court jury trials all of the actors participate in a system that is characterized by formality, not flexibility. In a "flexible" system, jury trials of children would be characterized by the ability of the juvenile court judge to take into consideration the child's history, needs, and interests at every stage of the proceeding.

Although jury trials are increasingly being used in juvenile court,[80] there is little discussion in the literature about how jury trials involving children should be conducted differently from those in which defendants are tried. However, there is considerable discussion about how jury trials can be made more responsive to the needs of children who testify as witnesses and victims.[81] We need to think creatively about this problem, but are unlikely to do so if children are subjected to jury trials in a system designed for adults. In that system, we are likely to assume (mistakenly and tragically) that one jury trial procedure fits all.

Those of us who have represented children in adult court jury trials (i.e., cases in which children have been transferred

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[80] Fourteen states today have afforded juveniles the right to a jury trial. Joseph B. Sanborn, Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile*, 76 JUDICATURE 230, 233 (1993). *See, e.g.*, COLO. REV. STAT. ANN. § 19-2-501 (West Supp. 1995); KAN. STAT. ANN. § 38-1656 (1986) (jury trial at court's discretion); MASS. GEN. LAWS. ANN. ch. 119, § 55A (West 1993); MICH. COMP. LAWS ANN. § 712A.17(2) (West 1993); MONT. CODE ANN. § 41-5-521(1) (1995); N.M. STAT. ANN. § 32A-2-16(A) (Michie 1995) (prior to this legislation, the New Mexico Supreme Court ruled in *Peyton v. Nord*, 437 P.2d 716 (N.M. 1968), that juveniles have the right to jury); OKLA. STAT. ANN. tit. 10, § 1110 (West 1987); TEX. FAM. CODE ANN. § 54.03(c) (West Supp. 1995); W. VA. CODE ANN. § 49-5-6 (1992); WIS. STAT. ANN. § 48.31(2) (West 1987); WYO. STAT. ANN. § 14-6-223(c) (Michie 1994); R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (holding that child acquires right to jury under state constitution).

[81] Several jury studies have concluded that adult juries find children's testimony less credible than adults' because of skepticism over the children's ability to accurately observe and recall events. *See, e.g.*, Michael R. Leippe et al., *Discernibility or Discrimination?: Understanding Jurors' Reactions to Accurate and Inaccurate Child and Adult Eyewitness, in* CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 169 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

from juvenile court) know that our clients have little comprehension of the process.[82] They are wooden in their responses to juries. They are paralyzed. How can we expect children to react to juries other than in terror and panic? And what effect does their state of mind and their demeanor have upon the juries who judge them?[83]

Jury trials that are not modified to take into account the special needs of children will also impair the ability of children to tell their stories. Anyone who has defended a child in criminal court knows that putting a child on the stand in that setting is often unwise.[84] Children who are defendants in adult criminal proceedings rarely make good witnesses. And their testimony is often made even less credible by the aggressiveness of cross-examinations that are likely to occur in the criminal court setting. A child cross-examined by a skilled adversary is unlikely to survive the battle of credibility.

Admittedly, cross-examinations of children in juvenile court can be just as aggressive, mean spirited, and abusive as cross-examinations of children in criminal court; prosecutors and defense lawyers in juvenile court are often as aggressive as their adult court counterparts. However, in a properly supervised, staffed, and animated juvenile court, this kind of conduct could be kept to a minimum—utilized only where necessary to underscore gross and willful failure to adhere to the oath. A properly trained, sensitive, and fair-minded juvenile court judge should never permit a prosecutor or a defense lawyer to take advantage of a child witness's fear or openness to suggestion.

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[82] Admittedly, my evidence to support the assessment of a child client's reactions to a criminal court jury trial is anecdotal. And, admittedly, many of the adults I have represented have demonstrated the same reactions to juries.

[83] I have not been able to find any studies which have discussed the impact of child defendants upon the jury decision-making process. This is a point that seems to be overlooked by those who argue that juveniles should be given the right to a jury trial. *See, e.g.*, Susan Brooks, *Juvenile Injustice: The Bar on Jury Trials for Juveniles in the District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875 (1994); Feld, *supra* note 1. I do not mean, however, to suggest that jury trials should not be made available in the juvenile court. To the contrary, they should be made available but adapted to the capacities of children. *Cf.* Peter Margulies, *The Lawyer as Lawgiver: Child Clients' Competence in Context*, 64 FORDHAM L. REV. 1473 (1996) (discussing children's competency in the context of representation by attorneys).

[84] For techniques to consider in preparing the client if the client indeed does take the stand, see Karen J. Saywitz & Lynn Snyder, *Improving Children's Testimony with Preparation*, *in* CHILD VICTIMS, CHILD WITNESSES, *supra* note 83, at 117.

We cannot begin to imagine the reactions that children must have to the race and class differences between them and the criminal court juries. A "flexible" system would allow a judge to take creative measures to make the proceeding less terrifying for the child. These measures could include special explanations to the child, and selecting and de-selecting jurors based upon behaviors which might demonstrate hostility toward or dislike of children.

How might the jury trial process be more suitable for children in a juvenile court than it would be in an adult criminal court? Ideas worth taking into consideration include less formal courtrooms, restructured jury selection processes, re-written jury instructions, and a less adversarial-than-normal interaction between all of the actors in the courtroom.

F. THE LEGAL CULTURE OF CRIMINAL COURTS WILL DAMAGE CHILDREN

The adult criminal court's law practice culture would also do great damage to children, where the culture of law practice is characterized by combativeness. Prosecutors in adult court are likely to bring to the courtroom a harder edge to jury trials in adult court than in jury trials in juvenile court because prosecutors in adult court are judged by their superiors on their success in obtaining convictions.[85] The phenomenon of a "harder edge" includes a greater degree of aggressiveness, of inflexibility, and retributivist motivation. Those of us who practice in adult court know that as adversarial as some juvenile proceedings are, the degree of adversariness in criminal court often far exceeds the contentiousness found juvenile court. In juvenile courts, it is at least more likely that prosecutors are committed to the mission of protecting the public *and* fashioning balanced dispositions which serve the best interests of children. Moreover, judges in juvenile courts may be more vigilant in protecting juveniles from the retributionist leanings of prosecutors.[86]

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[85] Professor Rosenberg's description of adult criminal courts is apt: "for the most part, the typical criminal court in urban areas is a harsh, tough, mean institution cranking out pleas. It is not place for an adult defendant to be, much less a child. . . . Let's face it. As bad as the juvenile courts are the criminal courts are worse." Rosenberg, *supra* note 1, at 174.

[86] The American Bar Association Juvenile Justice Standards Relating to Prosecution state in Rule 1.4 that "[j]uvenile prosecutors should take an active role in their com-

The behavior of the lawyers who represent children in criminal court will also be more contentious. The very environment of the criminal courtroom will generate and make necessary this attitude on the part of lawyers who represent children. If the prosecutor in the adult court views the child as an adult, the defense lawyer must respond in kind. This means submitting to the unfortunate reality that a jury trial involving a child defendant is no different than one involving an adult defendant.

How will the level of conflict inherent in adult court jury trials be different from the level of such conflict in juvenile court jury trials? What consequences will likely flow from heightened adversariness and formality? Because of the number of children's cases that have been transferred to adult court in recent years, there are an increasing number of lawyers who have extensive experience in representing young children in adult court in jury trial settings. Before moving all children charged with crimes to adult court, we should learn from the experience of those who try cases in juvenile and criminal courts.

G. PLEA BARGAINING IN ADULT COURT WILL BE UNFAIR TO CHILDREN

Many of the children I represent in criminal court do not understand the consequences of the decision to go to trial or to accept a negotiated plea bargain. This is particularly true when children are asked to make the choice between pleading guilty and accepting a lengthy prison sentence, and going to trial. They have little ability to gauge the probability of a conviction and cannot comprehend the impact of a short or lengthy sentence upon their lives.

In criminal courts where defendants are penalized at sentencing for asserting the right to trial by jury, young people may receive longer sentences just because they have asked for a jury trial.[87] Such a result seems unfair in adult proceedings and

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munity in preventing delinquency and protecting the rights of juveniles." JUVENILE JUSTICE STANDARDS, *supra* note 36, at 263.

[87] Although imposing a penalty for exercising the right to jury trial is impermissible, it is permissible to impose a tax for refusing a plea offer. *See* Borderkircher v. Hayes, 434 U.S. 357 (1978); Corbitt v. New Jersey, 439 U.S. 212 (1978). In reality, the penalty for rejecting a plea offer is often difficult to distinguish from a penalty imposed because a defendant demands a jury.

doubly so in proceedings involving children. But the phenomenon of punishment for assertion of the right to a jury trial will inevitably occur in jury trials in adult criminal court involving children. In a properly supervised juvenile court, this form of retribution could be held to a minimum. Juveniles should not be expected to comprehend the informal rule of law that holds that a criminal defendant can be expected to pay a "tax" for assertion of his jury trial right. While we might tolerate such an informal "tax" for adults, we cannot tolerate it for children who have no comprehension of the risks and benefits of the "tax."

H. SENTENCES IN ADULT COURT WILL BE TOO HARSH AND THE FOCUS ON THE DEVELOPMENT OF YOUTH-ORIENTED CORRECTIONAL SYSTEMS WILL BE ABANDONED

Children will face harsher penalties in adult court than in juvenile court. The solution of a "youth discount"[88] may impose some flexibility and rationality upon sentencing decisions. However, in light of the complaints about the inflexibility of the federal sentencing guidelines,[89] and other mandatory sentencing schemes, we should think long and hard before imposing a similarly rigid system upon children who arguably could benefit from well-informed flexibility in sentencing. The perceived, and some times real, need to provide long-term incarceration for the small minority of children who must be institutionalized could be satisfied by the "blended sentencing" schemes.[90] Under these provisions, children receive both a juvenile and an adult sentence in juvenile court. Based upon their responsiveness to programming within the juvenile system, they are evaluated to determine whether they will be released after their juvenile sentence or whether they should serve out an adult sentence. This decision is made based upon the experience with the child of the juvenile correctional system over a lengthy period of time. It is thus a better informed decision regarding prognosis for treatment and protection of the public than the automatic and ill-informed decision that is made in the context of adult protection initiated by an automatic transfer. We should question whether we have solved the problem of too

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[88] *See* Feld, *supra* note 1, at 70, 115-31.

[89] *See supra* note 73 and accompanying text.

[90] *See supra* note 3 and accompanying text.

much judicial discretion in the juvenile system by utilizing a "youth discount" which would not take into consideration the individual characteristics of the children newly subject to the adult jurisdiction.[91] The fact that there are inevitably some irrational distinctions made between sentences children receive in juvenile court should not compel us to move to a system in which inflexible decision making is mandated.

I. ADULT COURT JUDGES, PROSECUTORS, AND DEFENDERS WILL NOT BE CHILD SPECIALISTS

Other objections to trying children in adult court may be even more substantial. Personnel in adult court—judges, prosecutors, defense lawyers, probation officers, custodial workers—are unlikely to receive the training necessary to sensitize them to the special needs of children.[92] There is no reason to think that in a criminal system more resources would be devoted to juvenile than to adult probation services. There is every reason to believe that just the opposite will occur. In many jurisdictions, probation officers assigned to juvenile cases have lighter caseloads and are more highly motivated to secure rehabilitative services than their counterparts in adult court.[93] Again, it is unlikely that in a criminal court setting specialized and effective approaches to developing and supporting the competencies of children and families will develop. Indeed, quite the opposite may occur. Placing children in adult court will make them indistinguishable from adults and may lead to the stifling of initiatives and learning.

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[91] *See supra* note 44 and accompanying text.

[92] For a discussion of the potentials and complexities of the inter-disciplinary culture of juvenile courts, see Frank P. Cervone & Linda Mauro, *Ethics, Cultures, and Professions in the Representation of Children*, 64 FORDHAM L. REV. 1975, 1987 (1996):

> [L]egal interests of children are intertwined with their social and psychological interest. How to resolve which interest is more important at a particular point in time is unclear. What is clear is that child advocacy takes place in the context of relationships—that is, between the client and the professionals and between the professionals themselves. Professionals need to respect each other and work together to arrive at meaningful decisions.

[93] The Cook County Probation Department demonstrates that this is true in Chicago. JUVENILE DIVISION, COOK COUNTY PROBATION DEP'T, ANNUAL REPORT OF THE JUVENILE DIVISION OF THE COOK COUNTY PROBATION DEPARTMENT (1997) (on file with author).

VI. HOW CAN WE REINVIGORATE JUVENILE COURTS?

Legislators will make decisions about the future of juvenile justice. Legislators are free to construct systems for providing justice for children which contain the best of the ideas from scholars such as Morse, Feld, Scott and Grisso and from other experts, including judges, lawyers, social workers, doctors, and correctional officials. However, recent trends suggest that legislators rely more on public opinion than information as their guide. There is also substantial evidence that legislators use "get tough" messages to win re-election. In fact, recent juvenile justice legislation has been enacted in Illinois in response to particularly notorious cases, instead of on the actual data regarding crime trends and the newest learning about successful interactions.[94] Unfortunately, there is little that lawyers who represent children can do to influence this unfortunate political process. It should be noted, however, that Professor Feld's involvement in Minnesota's juvenile justice reform provides a model for positive interactions between the world of academics and the world of politics.

Putting the political process aside and turning to the merits, what would be the nature of a constructive compromise? How can we satisfy the need for more appropriate sentencing, recognition of consequences, the need for more procedural protection, and the need to develop and to utilize new ways of supporting and rehabilitating children? The answer, and admittedly a very general one, is that juvenile courts must preserve individualized decision-making with respect to the culpability and developmental needs of children, while insisting on appropriate imposition of responsibility. Post-disposition, we must develop ways of moving away from institutionalized "treatment" of children to community-based programs designed to support

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[94] *See, e.g.*, Johnathan Eig, *Under Age: Frustrated Public Ready to Prosecute Children as Adults*, DALLAS MORNING NEWS, Nov. 6, 1994, at 1J (concerning the two prepubescent boys who murdered five-year-old Eric Morse); Gibbs, *supra* note 62 (concerning the case of 11-year-old Yummy Sandifer); John Kifner, *Three Teen-Agers Held in Killings of Two in Brooklyn and Queens*, N.Y. TIMES, July 2, 1994, at A21 (three 15-year-olds murdered two people); Lynette Holloway, *Four Youths Arrested in Killing of Bicyclist in Park*, N.Y. TIMES, June 5, 1993, at A23 (two 14-year-olds and two 16-year-olds arrested for shooting a drama teacher to steal his bicycle); Elizabeth Neuffer, *Detention v. Incarceration: Rise in Murders Renews Call to Classify Youths as Adults*, BOSTON GLOBE, Nov. 23, 1990, at A1 (rape by five juveniles and three adults).

children and families and to build self-esteem and competencies.[95]

The juvenile court must be transformed in a way that permits and indeed requires children to be treated as *our* autonomous and individual children, and which provides for the public safety. This requires changes in the ways that juvenile courts adjudicate and dispose of cases. It requires a reorganization of services for children so that the interests of children—not those of institutions or agencies—prevail.

A. WE MUST LEARN FROM HISTORY THE PROBLEMS THAT HAVE BROUGHT THE JUVENILE COURT TO ITS WEAKENED AND DIMINISHED AUTHORITY, AND THESE PROBLEMS MUST BE RECOGNIZED AND ADDRESSED

Any attempt to bring together those who argue that the juvenile court should be abolished and those who believe that it should be invigorated and preserved must address the concerns of those who seek the juvenile court's abolition. For example, Professor Feld argues that the juvenile court is still the "worst of both worlds;" it punishes without procedural protections, and it offers no treatment in exchange for forfeiture of rights.[96]

Many juvenile courts, perhaps most, are subject to this criticism. But is the answer to this criticism to abolish the court? Professor Feld's proposal has a rational basis, especially in light of the fact that the juvenile court still hasn't got it right after almost 100 years of existence. The proposal is flawed, however, because it fails to take into account ideas which could make an essentially good idea—a highly functioning special court for children—a reality.

1. There Has Never Been a Dedicated, Concerted Effort to Create and Support Excellent Juvenile Courts

The historical evidence demonstrates that even from the beginning, we have failed both to create and to sustain excellent juvenile courts. Only one judge presided over the first juvenile court. That judge had few resources;[97] there was a well-founded

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[95] *See* Holland & Myleniec, *supra* note 30, at 1835.

[96] Feld, *supra* note 1, at 92, 97.

[97] *See* Tanenhaus, *supra* note 17, at 140 ("The [1899] Juvenile Court Act did not . . . provide Judge Tuthill [the presiding Judge of the Cook County Juvenile Court] with the resources to put this new philosophy of governance into practice because all the funding provisions had been cut from the legislation"). Lucy Flowers, one of the

worry even then that paying probation officers with government funds would result in a patronage-driven system.[98] Indeed it is remarkable how soon after the founding of the juvenile court the same shortcomings that concern us today surfaced. The one judge assigned to the court had too many cases, so a mechanism for "screening" cases was established.[99] Judge Mack, the second presiding judge of the juvenile court, was transferred from the juvenile court because he became angered at the practice of congregate care institutions of releasing, without notice to him, children he had committed.[100] In response to that practice, he placed more children on probation so that he could personally supervise them.[101] He was transferred to criminal court as a result of the political outcry that resulted.[102] He was the first juvenile court judge to express frustration with child care agencies. The tactic that he employed to address the problem—less reliance on institutionalization—earned him the equivalent of the modern day label "soft on crime."

The due process revolution after *Gault* marked the beginning of the second imperfect experiment. Juvenile courts became populated by lawyers and judges in order to staff the adversarial system mandated by the commands of due process. Not all of these lawyers and judges sought assignments to juvenile courts. In Chicago, for example, between 1968 and roughly 1994, although there were many dedicated judges and lawyers who sought careers in juvenile court, most lawyers and judges assigned to the court did not want to be there. In Chicago, juvenile court judges and lawyers who worked in the juvenile court were also programmed for failure by a cynical political machine that viewed the court system as a patronage haven.[103]

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court's founders, obtained private funds to pay the salaries of probation officers and to run a detention home. *Id.* at 140, 153-54.

[98] *Id.* at 157.

[99] *Id.* at 177.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] In the late 1980s, the federal Operation Greylord investigation resulted in the conviction of 31 Chicago lawyers and eight Cook County judges who routinely offered and accepted bribes to fix cases ranging from traffic citations to death sentences during a 20-year period. The chairman of the 43-member Special Committee on the Administration of Justice established in 1984 to oversee the Cook County Circuit Court, attorney Jerold Solovy, commented that:

Chicago's history is particularly embarrassing when it comes to the administration and staffing of its court system.[104] The undermining of the juvenile court that occurred in Chicago, particularly after the *Gault* due process revolution, may not be typical of what went on in juvenile courts around the country. In jurisdictions with smaller court systems and less political influence, juvenile courts only had to struggle with the lack of resources and inability to obtain meaningful services for children.

2. In Many Juvenile Courts the Quality of Adjudication is Poor

a. There is not enough attention paid to accurate fact-finding during adjudicatory hearings.

The adjudicatory phase of a delinquency proceeding is not taken seriously enough; there is not enough attention paid to accurate fact-finding. There are a number of reasons for this. Children are discouraged by the judge, by the prosecutors and by defense lawyers from taking their cases to trial. The ethic in juvenile courts is still that confession (or admission) is good for the soul, although it is difficult to know whether the best interests of the children or heavy caseloads lie at the heart of the juvenile court's failure to be careful about the facts. High caseloads pressure children, prosecutors, defense lawyers and judges to gloss over relevant facts, to ignore possible defenses, and to avoid the kind of attention to detail that makes for accurate determinations of fact.

b. There is too much reliance on plea bargaining in juvenile courts

There is too much reliance on plea bargaining without adequate consultation with the client and without adequate super-

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the corruption exposed by the Greylord investigation was comprised of more than isolated, individual acts of greed. The corruption was organized and systematic. . . . The failure of so many to speak out about the endemic corruption . . . occurred (1) because of misplaced societal values that call keeping mum "loyalty" or "being a good boy" and (2) because lawyers have forgotten and have not had the courage to fulfill their ethical obligations.

David O. Weber, *Still in Good Standing: The Crisis in Attorney Discipline,* 73 A.B.A. J. 58, 60 (1987).

[104] *Id.*

vision by judges. When a child is told to choose between going to trial and risking incarceration, versus pleading guilty to a lesser charge in return for probation, the deal is almost impossible to resist. Unless handled properly, a child's response to such an offer after plea bargaining may not be voluntary.

Reliance on plea bargaining is a necessary evil in our overcrowded courts. Indeed, the practice is often salutary. It injects much needed flexibility and responsiveness into the system. The plea bargaining process often provides the only opportunity for reasoned discussion between all of the decision-makers—judge, prosecutor, defense lawyer, probation officer—about all of the facts. However, in juvenile court, plea bargaining can have a particularly destructive impact. Children may be naturally good negotiators, but they are not sophisticated enough to understand the various forces that bring the judge, the prosecutor, and the defense lawyer to the bargaining table. Is the negotiation taking place to save the system and the adults' time and money, or is the being held to advance the child's interests? Is the child brought into the process and made to understand how the negotiation is meant to further *his* or *her* interests? How are the alternatives that negotiation produces explained to child clients? Is pressure applied to encourage children to plead guilty?

Plea bargaining also fosters cynicism. The child who is not guilty and who pleads to something that he did not do under the threat of a harsh or penalty will not leave court impressed with the integrity of the system. The child who is offered a better deal than he should be offered feels that he has beaten the system. We should worry about these same phenomena when evaluating plea bargaining in the context of our adult criminal justice system. However, the deficits of plea bargaining seem even more pronounced when we involve children in it unless we are especially sensitive to how the bargaining is conducted and how the child is brought into the process.

c. The quality of judging, lawyering, and social work in juvenile courts must be improved

The quality of judging, lawyering, and social work in juvenile courts is too low.[105] The most pervasive cause of the low quality of juvenile court personnel is that many of the people who work in juvenile court do not want to be there. Advocates for children, be they prosecutors or defense lawyers, repeatedly have their efforts undermined by inefficient, ill-informed, or downright hostile judges. Judges who want to make a difference find themselves hamstrung by lawyers and child welfare personnel who are not as knowledgeable or as committed as they should be.

3. There is Little Centralized Knowledge in Juvenile Courts Concerning the Availability and Payment Options for Post-Dispositional Services

If there are good programs for children who need post-dispositional services, there is little centralized knowledge regarding their existence and/or how to pay for them. In Cook County, Illinois, for example, there are only a few people in juvenile court who are knowledgeable about programming for delinquent youth and what resources exist to fund such programs. However, the information is not routinely distributed to judges, to prosecutors, or to public defenders.

Once good post-dispositional programs are identified, the process for getting children into those programs is Byzantine. Funding sources for each program are different. The number of different kinds of orders that must be obtained, the various personnel who must be contacted, and the myriad of local, state, and federal regulations that must be taken into account during a search for services means that effective representation of a child at this stage of the proceedings requires specialization in the law of placement. Few legal services organizations have recognized this fact, and few lawyers have the resources to cope effectively with the placement bureaucracy.

If a child is in the system, the juvenile court usually has no control over the quality of the program to which the child is assigned. This is often where the *parens patriae* model breaks down. After disposition, the parent (the court) often has no supervisory control over the services that are provided for the

[105] A CALL FOR JUSTICE, *supra* note 55, at 27 ("in some courts, attorneys are subtly reminded by the court, the prosecutor, and other court personnel that zealous advocacy is considered inappropriate and counter productive").

child. In Illinois, for example, the separation of powers doctrine has been interpreted to mean that a juvenile court judge has no power to monitor the State Department of Corrections' treatment of a ward of the court.[106] It is remarkable that a juvenile court can hold a parent responsible for the treatment of her children but cannot hold a state agency to whom a child is committed by the court as parent to the same standard. There are, of course, good reasons for being wary about judicial intervention in correctional and treatment programs. Judges could make nuisances of themselves. However, juvenile treatment and correctional facilities are unlikely to perform well without the oversight of an independent ombudsman. The children in their care are, after all, powerless.

VII. A PARTIAL SOLUTION: THE PRACTITIONER'S CHILD-CENTERED FOCUS

Without focusing on how proposals to alter existing systems would affect individuals, the debate about the future of juvenile justice ignores a necessary "child centered" focus. This "child centered" focus should animate the conduct of all who work in juvenile courts: prosecutors, defense lawyers, judges, and probation officers.[107] It is a focus shared by many who work in juvenile court.

Information about the quality of the interaction between children and families and the juvenile justice system cannot be gleaned from statistics alone. By "quality of the interaction," I mean an assessment of the value and efficacy of the intervention to the child and to society. This subjective information comes from familiarity with the experience of representing a client, the experience of prosecuting a child, and from the experience of investigating the social histories of children. This "experienced based" assessment of the "quality of the interaction" is clinical, not theoretical, and offers valuable perspectives to those who grapple with the moral underpinnings of existing juvenile justice systems or whose aim is to create a procedurally and conceptually more consistent approach to juvenile justice.

Is there consensus among reflective lawyers who work in juvenile courts about the efficacy of existing juvenile justice sys-

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[106] *See* People v. J.S., 469 N.E.2d 1090, 1095 (Ill. 1984).

[107] *See* JUVENILE JUSTICE STANDARDS, *supra* note 36, at 1.

tems as compared to the adult criminal justice system? I believe there is. Most lawyers who represent children subject to transfer procedures fight hard to keep their clients out of adult court. Why? The fight is not just to evade the state's effort to seek punishment and responsibility. The fight is not just over who will win or who will lose a case. Though the duty to represent a client zealously dictates that we follow the directives of our clients and attempt to minimize the adverse impacts of state intervention, we are also motivated in our representation of children by a more emotional response to our clients. We get to know our clients.[108]

Through the process of getting to know our clients, we begin to understand the complexity of the forces which have brought our clients to the juvenile court (or to adult criminal court if they are transferred there). We learn that the forces which produced a violent act are a combination of external and internal factors. More often than not, the external forces (e.g., poverty, child abuse, substance abuse) are factors that our clients did not create and for which they are in no way responsible.

Lawyers who represent children also learn that in the vast majority of cases, sustained treatment interventions stand a very good chance of achieving positive results. The problem is always how to find these services, how to identify the providers who are truly skillful, and how to pay for the services. These interventions include the involvement of skilled social workers, specialized educational services, and more structured, residential treatment programs in special schools or psychiatric hospitals.[109]

The social workers and doctors who consult with us on our cases tell us that they could design programs for our clients that would probably reduce the likelihood of re-offending. They also tell us that such programs are not available unless our cli-

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[108] I recognize that many lawyers who represent clients in juvenile court may not get to know their clients very well. *See supra* note 34 and accompanying text. Impediments to knowing clients include high caseloads and cultural differences between lawyers and clients. Systems must be developed in defender offices to surmount this problem. This means fewer cases per lawyer and a greater degree of assistance from those with the skills to understand children.

[109] I take seriously the observations of Holland and Myleniec regarding the overuse of the concept of "treatment" and the failures of large systems to support the development of children in crisis. Holland & Myleniac, *supra* note 30, at 1793.

ents are able to pay for them. None of our young clients and very few of their families can afford to pay. Of course, if our own children were similarly at risk, such resources would be found for them.

Reliance on so-called "state of the art" programming may not be the most important or powerful potential of the juvenile court. Hope for the juvenile court may have less to do with the belief that thoughtful, well organized and well-intentioned programs can work and more to do with the juvenile court's underlying philosophy of hope. The ethic of the juvenile court is to support children through adolescence as they mature out of patterns of impulsive behavior. Sending children to adult court destroys this ethic of hope and patience.

These observations underscore two important points. First, many of the decisions that we are now making about the future of juvenile justice are being made because we recognize that the high quality individualized services that we would find for our own children if they were at risk cannot be made available utilizing current state-funded service delivery systems. Second, legislators are unwilling to fund programs that could work.

I do not mean to suggest that the proposals offered by Professors Feld and Morse rest on the proposition that service delivery systems within the juvenile justice system are incompetently organized or that they have given up on convincing legislators to provide funding for state-of-the-art treatment programs for troubled youth. However, if we had in place programs that were thoughtful, efficient, and effective, the rationales for abolishing the juvenile court would be far less powerful to the public and to the legislators who must inevitably chart the future course of juvenile justice policy.

VIII. SOLVING THE PROBLEMS OF JUVENILE COURTS: ESTABLISHING REALISTIC EXPECTATIONS, MEETING REALISTIC EXPECTATIONS

A. ESTABLISHING REALISTIC EXPECTATIONS

The juvenile court is in jeopardy not because it has failed, but because it has been unable, in a relatively short period of time, to respond to new realities of children. However, the expectation that a court should have immediate solutions to increased violence among youth is simply wrong-headed. We do

not expect courts to solve social problems. We do expect courts to be fair, efficient, and just.

Juvenile courts should no more be expected to solve the problem of juvenile crime than the criminal courts are expected to solve the problem of adult crime. This may mean that juvenile courts could play a role in reducing crime rates, but that role will probably be relatively insignificant. What juvenile courts will do with effective interventions is to keep the rate of recidivism relatively low when compared to the performance of criminal court-corrections systems. There is substantial evidence to support the proposition that juvenile courts and associated treatment and correctional systems have proved themselves to be more effective at preventing recidivism than have adult court and penal systems.[110] This reality must be taken into account when deciding how many young people should be deprived of the services which the juvenile justice system is relatively good at delivering.

B. MEETING REALISTIC EXPECTATIONS

What should juvenile courts be expected to accomplish in order to satisfy those who are skeptical about their continuing utility?

1. Juvenile Courts Should Provide Fair, Impartial, and Informed Adjudications and Dispositions of Cases

First, juvenile courts should have as their hallmark the fair, impartial, and informed adjudication and disposition of cases. This means that juvenile court judges must hold the state to the requirement of proof beyond a reasonable doubt, that excessive plea bargaining in order to deal with case backlogs should be eliminated, and that judges and lawyers in juvenile court be specially trained to recognize the educational, social, and treatment needs of children and families in crisis. It is no longer enough, and it probably never was enough, that judges have a sincere desire to help children. Thus, judges must be generalists in the sense that they know how a case should be tried and specialists in their knowledge of juvenile law and procedure, child development, and treatment strategies.

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[110] *See supra* notes 35, 43 and accompanying text.

2. Lawyers in Juvenile Courts Must Be Both Generalists and Specialists

We also need generalists and specialists in the corps of lawyers who prosecute and defend juvenile delinquency cases; generalists in the sense that they have a broad range of lawyering skills and specialists in dealing with children, families, and treatment providers. That corps of highly qualified generalists and specialists has never existed in juvenile court; it is as though we have been trying to run a children's hospital without a staff of pediatricians. For the most part, those who prosecute and defend juvenile cases do so only for a short period of time and move on. Juvenile court is a training ground for them, nothing more. Juvenile courts cannot possibly succeed without a level of professionalism and experience that we would require for any important endeavor. We have never been serious about organizing, funding, and staffing juvenile courts.

3. Treatment and Rehabilitation Services Must Function Properly

Moving beyond the court, probation services, residential programs, and correctional programs must function properly if the juvenile court is to succeed. In most jurisdictions, these services are far from state-of-the-art. The failures of these institutions undermine the court's work and its public image. The failures of treatment/rehabilitation services rarely come back to haunt those who are providing the services. They often come back to haunt the juvenile court judge who took the risk of sending a child for treatment rather than long-term incarceration and incapacitation. No treatment/correctional system can guarantee success. However, increased focus on improving the quality of interventions will make juvenile courts viable.

An effective strategy for preserving and strengthening juvenile courts can only be built upon investing in the people who serve children in juvenile courts and in public and private child service organizations. The best interests of children and the protection of the public will ultimately not be achieved by resting decision-making regarding the future of juvenile justice on the wholesale reorganization of existing systems or upon rethinking the question of the extent to which children should be held to be as responsible as adults.

The key question is how to deliver legal and social services to children fairly, efficiently, and effectively. This is, indeed a "systems" problem. Systems problems are relatively easy to

solve. Just change the system. But the more important problem is how to motivate the people who work within the system to turn out the best possible product. This problem will exist if children are treated as fully responsible adults, it will exist if the juvenile court is abolished, and it will exist if we seek to save the juvenile court by understanding more deeply the delinquent behaviors of children and adolescents.

IX. CONCLUSION

This article began with a case study describing the interaction between a young person charged with serious crimes, his lawyers, and the juvenile court. The case study was meant to set the stage for the discussion that followed about the realities of juvenile crime statistics and the capabilities and role of juvenile courts. Since writing the introduction to this article, an even more distressing crime was allegedly committed by an even younger child in Chicago. The newest case involves a twelve-year-old who allegedly shot and killed two teenagers, allegedly in an effort to prove his worthiness to older gang members. Interestingly, the reaction of the press to this incident focused on causes and prevention rather than amending legislation to make it possible to try this child as an adult. The *Chicago Sun-Times* referred to this incident as "Everyone's Problem."[111] The *Chicago Tribune* described in detail the social and educational history of the troubled child charged with the crime.[112] Again, rather than calling for this child to be tried as an adult, at this writing, public opinion seems to be calling for an effort to understand what produced this tragedy and how to prevent such tragedies from occurring in the future.

Perhaps the reason for the measured and constructive reaction to this latest awful event is the extreme youth of the child involved and the uncontested fact that he acted seeking approval from or following the instructions of older gang members. Perhaps the reaction is the result of the fact that the reporters who covered the story did much the same kind of investigation that

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[111] Editorial, *Everyone's Problem*, CHI. SUN-TIMES, Feb. 5, 1998, at 29:

> Certainly, there are no easy answers here. And there is no one person or problem to blame. But that does not mean that juvenile violence and the proliferation of gangs are problems that cannot be stopped. At the risk of oversimplifying, we note that everyone has a role to play in this drama.

[112] *A Life on a Collision Course*, CHI. TRIB., Feb. 5, 1998, at A1. The subtitle of this article is *Young Murder Suspect Fell to Gang's Lure.*

good lawyers would do on behalf of this child: they went into the community, and interviewed family and friends of the child and of the victims, interviewed the child's school teachers and neighbors. What came out of this investigation was the story of a child's life. It turned out to be a story of a broken home, a child lost to gang culture despite the efforts of his family and school teachers, and access to a snub-nosed .38 caliber gun. The story of this child's life, like the story of the young man whose progress through the juvenile court began this article, is the product of all if its parts. Unless we focus our efforts on understanding these stories, in a setting supportive of understanding, we are unlikely to provide justice for children.