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STICK A FORK IN IT: IS JUVENILE JUSTICE DONE?

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INTRODUCTION

After more than a century, the juvenile justice system is in danger of becoming obsolete. The line between adult and minor is becoming more and more indistinct as the modern perception of the accountability of juveniles increases,[1] and the much-debated nature of the juvenile justice system has left it in a twilight zone between punishment and rehabilitation.[2] All of these factors have prompted some to suggest that perhaps the juvenile justice system has outlived its usefulness, that its processes are duplicative, that it is a mere superfluity. Others have suggested that the juvenile justice system is merely in need of refinement. The system therefore stands at the edge, ready either to metamorphosize into another incarnation or plunge headlong into the abyss. This Note will examine the likelihood of each outcome — arguing that the existing juvenile justice system should be bifurcated to take into consideration the very real differences between children and adolescents, much in the same way that the original intent of the juvenile justice system was to consider the differences between adults and juveniles.

Part I outlines the nature and the history of the juvenile justice system, particularly the changing methodology and objectives of the contemporary system. Part I also illustrates the opposing theories which construe the juvenile justice system. First, the juvenile justice system is often seen, and traditionally was intended, as a civil remedy.[3] This civil remedy theory concentrates on the offender as a person in need of direction and care.[4] As a civil remedy, many of the rights that are protected by the Constitution in criminal cases are

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[1] *See* 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) (detailing the changing perceptions of youth and how the twentieth century has a "vastly different conception of childhood from the one that gave birth to the juvenile court").

[2] *See* Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135 (1995) (analyzing the much debated nature of the juvenile justice system in relation to the Violent Crime Control and Law Enforcement Act of 1994).

[3] *See infra* note 19 and accompanying text.

[4] *See infra* note 23 and accompanying text.

inapplicable.[5] Conversely, the juvenile justice system is increasingly considered a punitive criminal remedy.[6] This second theory concentrates on the offense as a crime for which adequate punishment is due.[7] When juvenile justice is viewed as a criminal remedy instead of a civil remedy, many of the civil rights normally available to the juvenile may be limited.[8] By limiting the rights of juveniles under both civil and criminal methodologies simultaneously however, the juvenile justice system functions to give juveniles "the worst of both worlds."[9]

Part II elucidates aspects of the juvenile justice system which have been interpreted and may still be interpreted as violative of the Constitution. It addresses the importance of the Sixth Amendment's guarantee of assistance of counsel,[10] and further explores the double-standard under which juveniles may be deemed competent to waive their right to counsel, yet allowed to disaffirm a contract *for* counsel.[11] Part II also addresses the Eighth Amendment's prohibition on cruel and unusual punishment — specifically the various institutional conditions that function to deny rights to both juvenile offenders and the so-called "status" offenders that are often incarcerated with them.[12] Part II further discusses the Thirteenth Amendment's prohibition on involuntary servitude and the paradox of allowing

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[5] *See infra* note 49 and accompanying text.

[6] *See infra* note 98 and accompanying text.

[7] *See infra* note 98 and accompanying text.

[8] *See infra* note 13.

[9] United States v. Kent, 383 U.S. 541, 556 (1966) (illustrating how the juvenile justice system affords children "neither the protections accorded to adults not the solicitous care and regenerative treatment postulated for children").

[10] *See infra* note 58 and accompanying text.

[11] *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 172 (1993) (noting that "minors are less likely to invoke their rights and more likely to waive them" than are adults accused of the same crimes). Since "approximately 90% of [adult criminal] defendants plead guilty", minors are more likely to suffer injustice through the imprudent waver of counsel. *Id* at 172–73.

[12] *See* Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41, at 58 (1981) (finding that, though the Juvenile Justice and Delinquency Prevention Act explicitly forbids incarceration of status offenders with offenders, a number of states have been able to circumvent such prohibitions).

compulsory labor as a "punishment for a crime" in an ostensibly "non-criminal" proceeding.[13] Additionally, Part II discusses the Fourteenth Amendment's guarantee of Due Process, evaluating how the juvenile justice system determines whether to retain jurisdiction over a juvenile or send that juvenile on to adult criminal proceedings.[14]

Part III outlines some of the remedial measures that have been implemented to cure the juvenile justice system of its ailments, such as the Judicial Justice and Delinquency Prevention Act ("JJDPA") of 1974; the Violent Crime Control and Law Enforcement Act ("VCCLEA") of 1994; the Prisoner Litigation Reform Act ("PLRA") of 1995; and the Omnibus Crime Control Act ("OCCA") of 1997.

Part IV proposes a number of remedies and evaluates the constitutionality of each. One of the proposed changes is a complete abolition of the juvenile justice system and a return to the pre-juvenile justice system regime, under which age was merely a mitigating factor in the sentencing process.[15] This proposal will be evaluated under the Fourteenth Amendment's guarantee of Equal Protection of the Laws, to determine whether juveniles receive the full protection of the laws in adult criminal courts, or whether the adult criminal system creates a stigmatizing effect which precludes the use of age as a mitigating factor.[16] Another proposal would maintain the existing juvenile justice system, but legislatively amending it in order to remedy its shortcomings.[17] The third proposal, and the one advocated by this note, is to create an additional juvenile justice system, which distinguishes children from adolescents, and adolescents from adults. This proposal expressly acknowledges the differences between the individuals within the juvenile justice system. Only this way, by treating children, adolescents, and adults according to their physiological and psychological differences, can the original

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[13] Donald C. Hancock, *The Thirteenth Amendment and the Juvenile Justice System*, 83 J. CRIM. L. & CRIMINOLOGY 614, at 616 (1992) (outlining the arguments against imposing compulsory labor demands on juvenile detainees where the juvenile is not entitled to those processes that ensure Due Process to criminal defendants).

[14] *See infra* note 102 and accompanying text.

[15] *See infra* note 155 and accompanying text.

[16] *See infra* note 162 and accompanying text.

[17] *See infra* note 169 and accompanying text.

objectives of the juvenile justice system be fulfilled.

I. BACKGROUND OF JUVENILE JUSTICE

The juvenile justice system in America was established with the creation of the first juvenile court by the State of Illinois in 1899.[18] Prior to the creation of this court juveniles were tried as adults in a criminal court where, under the common law defense of infancy, the age of the offender was only a mitigating factor in the sentencing of a juvenile.[19] Illinois' motivation for creating the juvenile court was the thought that juveniles were not getting adequate attention in the turn-of-the-century adult criminal courts.[20] As this century begins to turn anew and the juvenile justice system nears its centennial, its objectives and effects are coming under greater scrutiny.[21] The juvenile justice system is threatened with extinction from both ends of the ideological spectrum.[22] It is less and less the rehabilitative program it was intended to be,[23] and has increasingly become the adversarial and punitive process it was meant to leave behind.[24]

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[18] *See* 705 ILL. COMP. STAT. 405/1–2 (West 1998) (amending 1899 Ill. Laws 131, §§ 1, 21).

[19] *See* Robert W. Sweet, *Deinstitutionalization of Status offenders: In Perspective*, 18 PEPP. L. REV. 389, 390 n.5 (1991) (noting that under the commonlaw defense of infancy, children under the age of seven could not be held culpable for their actions, children between the ages of seven and fourteen had a rebuttable presumption of innocence, and children above the age of fourteen were charged as adults).

[20] *See* Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, 22 JUNE CHAMPION 10, 12 (1998) (noting that, among other things, "juries were often hesitant to convict juveniles because they feared the negative effect such sentencing and incarceration would have once the juvenile offenders were returned to society.").

[21] *See* Mark Soler, Juvenile Justice in the Next Century: Programs or Politics?, 10-WTR CRIM. JUST. 27, 28 (1996).

[22] *See id.*

[23] *See* Aron & Hurley, *supra* note 20, at 10 (noting the shifting emphasis from "protecting and reforming children to 'protecting' society from young people prematurely deemed incapable of rehabilitation").

[24] *See* Susan K. Knipps, *What is a "Fair" Response to Juvenile Crime?*, 20 FORDHAM URB. L. J. 455, at 456 (1993) (noting that the juvenile justice system "has practically gone full circle in one hundred years: from prosecution of juveniles in the adult courts, to adjudication in a separate non-criminal system, and then back to

The traditional rationale for rendering juveniles wards of the state was the doctrine of *parens patriae*, literally "parents of the country."[25] In addition to the custodial powers that it may exercise over property, the doctrine of *parens patriae* allows the government to become the custodian of a child, and to assume the child-rearing duties normally assumed by the child's parents.[26] By acting as the *de jure* parents of a juvenile, the government becomes entitled to the same discretion exercised by the natural parents, specifically those activities relating to raising and disciplining the child.[27] This patriarchal view of the juvenile justice system has, in turn, supported the notion that the system is a non-adversarial one — a system where the normal protections of the adversarial criminal system are unnecessary.[28] However, as the system tends to become more punitive than rehabilitative, this non-adversarial façade serves to disenfranchise many of the individuals that are subject to the juvenile justice system.

A. Classification of Juveniles Subject to the Juvenile Justice System

It is often overlooked that the scope of individuals subject to the juvenile justice system is not limited to offenders; i.e., those juveniles that have committed or have been accused of committing a crime.[29] Both non-offenders and so-called "status" offenders fall

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prosecution of some juveniles in the adult system").

[25] BLACK'S LAW DICTIONARY 1114 (6th ed. 1991) (defining *parens patriae* as "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.").

[26] *See* Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L. J. 999, 1008–09 (1991) (noting that the doctrine of parens patriae in the juvenile justice system was generally understood to grant the state the power "to assume responsibility over neglected and abandoned children").

[27] *See* Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, at 927 (1995) (noting that the early advocates of the juvenile justice system "claimed that...the juvenile justice system would be able to rehabilitate young lawbreakers and derail their incipient criminal careers").

[28] *See id.*

[29] *See* Chung, *supra* note 26, at 1005.

under the jurisdiction of the juvenile justice system.[30] One of the principal problems with the system is that its classifications make too little distinction among the individuals it exercises control over. Presently no consideration is given to any psychological or developmental differences between juveniles of different ages, rather they are only classified by what means they have come into the system.

1. Non-Offenders

Non-offenders are those individuals who have come into the juvenile justice system through the independent actions of third parties, usually parents or guardians.[31] These cases often include juveniles that have been neglected or abused.[32] This group is the traditional rationale for *parens patriae* jurisdiction in that they come to be in the custody of the state because of the way that they have been treated.[33] However as the system moves increasingly toward a punitive nature, this rationale for jurisdiction over this group is gradually compromised.

2. "Status" Offenders

The second group of juveniles subject to the jurisdiction of the juvenile justice system are the status offenders.[34] Status offenders are those juveniles who have committed an act of noncriminal misbehavior, "which is considered unacceptable solely because of their age."[35] The activities in which status offenders have engaged would not subject them to punishment if an adult committed the same acts.[36] Status offenders are those juveniles who have been deemed delinquent based on a nebulous pronunciation of their status as

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[30] *See id.*

[31] *See* Costello & Worthington, *supra* note 12, at 42.

[32] *See id.*

[33] *See supra* note 26.

[34] *See* Costello & Worthington, *supra* note 12, at 42 (defining and illustrating the current usage of the term "status offender").

[35] *See id.*

[36] *See id.*

"incorrigible," "wayward," or "habitually disobedient."[37] These vague characterizations open the door for a tremendous amount of judicial discretion.[38] The brief moments status offenders spend before the judge seem particularly inadequate for determining whether a child is in actuality "incorrigible."

3. Offenders

Offenders are those juveniles who have committed some criminal act; unlike status offenders, they have committed acts that would result in criminal prosecution if committed by an adult. This group of juveniles often raises fewer concerns regarding their treatment because they are considered as culpable as their adult counterparts. However, even among this group, little distinction is made for psychological and physiological differences, particularly between relatively young and relatively older offenders. The result is that a very young offender and a relatively older offender may be housed together. This situation may ultimately jeopardize the well being of the younger offender in the same way that the well being of a juvenile is jeopardized when housed with adults.[39]

4. Classification Problems

One of the difficulties associated with the present classification regime is that it treats many juveniles as fungible. For instance, it is possible that a non-offender victim of sexual abuse could, by attempting to run away from a state facility, be labeled as a status offender. This unfortunate result is only exacerbated by cases such as *Marterella v. Kelly*,[40] which chronicled numerous abuses of the juvenile justice system, yet still held that status offenders could

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[37] *See In re* Gault, 387 U.S. 1, 9 n.6 (1967) (citing the Arizona Juvenile Code provision under which Gerald Gault had been adjudicated "delinquent").

[38] *See infra* note 135 and accompanying text.

[39] *See* Jeffery Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PLI/CRIM 395, 398 (1999) (noting that "adolescents sentenced and incarcerated as adults are more likely to be physically and sexually assaulted").

[40] 349 F. Supp. 575 (S.D.N.Y. 1972), *supplemented by* 359 F. Supp. 478 (S.D.N.Y. 1973).

legally be housed alongside offenders.[41] Now labeled a status offender, the victim of sexual abuse could ultimately be legally placed in the same cell as a juvenile sex offender.[42]

The case of status offenders particularly is complicated by the vagueness of phrases such as "wayward," "truant," or "incorrigible," which suggest that status offenders may have been deprived of procedural due process. If concrete definitions cannot be formulated, juveniles may have no notice as to what acts could subject them to punishment as status offenders. Furthermore, the Supreme Court has ruled that punishment based on status is unconstitutional.[43] It is hard to reconcile that holding with the anomalous result that a status offender (who has not committed any criminal act) can be incarcerated, while an adult who commits the same act can not.[44]

Another problem with classification solely on the basis of actions is that it ignores physical and developmental differences between juveniles of different ages. As such the juvenile justice system itself ignores the differences between older and younger juveniles in the same way that the preceding system ignored the differences between adults and juveniles.

B. The Objectives of Juvenile Justice

Historically, the aim of the juvenile justice system, as an entity separate from the adult criminal system, has been purportedly rehabilitative;[45] the doctrine of *parens patriae*, the basis of the juvenile justice system, calls for intervention on behalf of juveniles before they become hardened, recidivist, adult criminals.[46] The system is designed, ostensibly, to provide a civil remedy: there are no

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[41] *See id.* at 575 (holding that it is not unconstitutional to mix status offenders and delinquents in the same facilities).

[42] *See* Chung, *supra* note 26, at 1000 (illustrating how, through sequential adjudications, "a victim of parental neglect was as likely to be transferred [to a maximum security building] as a convicted delinquent").

[43] *See* O'Connor v. Donaldson, 442 U.S. 563 (1975) (ruling that a nondangerous person cannot be confined because of their status as mentally ill).

[44] *See id.*

[45] *See infra* note 97.

[46] *See supra* note 27.

convictions, and findings of guilt are termed "adjudications."[47] There is no "sentencing," but a "disposition."[48] The non-criminal nature of juvenile proceedings, along with the doctrine of *parens patriae*, has been cited to justify why many of the constitutional rights that are extended to adults in criminal prosecutions have been denied to juveniles who commit similar offenses.[49] The rationale is that juveniles are not actually being deprived of life, liberty, or property, but are merely being placed in the custody of a more fit guardian — the state.[50]

This tautology has allowed a number of state governments to circumvent the traditional constitutional protections to which adults are entitled — such as bail, trial by a fair and impartial jury, notice of the charges of which one is accused, the assistance of counsel, freedom from involuntary servitude, the equal protection of the law, and procedural due process.[51] Though there has been a gradual affirmation that such juveniles are entitled to *some* of the protections afforded under the Constitution,[52] the disparity between the rehabilitative and the punitive nature of the juvenile justice system has allowed some courts to find that many of the constitutional protections that adults take for granted are inapplicable to juveniles.[53] Again, the

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[47] *See* Honorable Ronald D. Spon, *Juvenile Justice: A Work "In Progress"*, 10 REGENT U. L. REV. 29, n.13 (1998). "The term 'disposition' is customarily used in juvenile court parlance in place of the word 'sentencing,' as delinquency cases are generally technically deemed as 'civil' in nature, as opposed to 'criminal'." This is true even though 'delinquency' by definition, necessarily involves a violation of a criminal statute, law or ordinance." *Id.*

[48] *See id.*

[49] *See* Ainsworth, *supra* note 27, at 935 (illustrating how the "juvenile court shrugged off due process concerns as irrelevant to the primary mission of the court, which was...the crafting of dispositions to address the social needs of the offending youth").

[50] *See id.*

[51] *See infra* notes 58–111 and accompanying text.

[52] *See In re* Gault, 387 U.S. 1 (1967) (affirming the Constitutional right of juveniles to notice, assistance of counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination); Kent v. United States, 383 U.S. 541, 565 (1966) (requiring a hearing before a juvenile could be waived into adult criminal court, where a "full investigation" of every element of the crime was statutorily required); *In re* Winship, 397 U.S. 358 (1970) (holding that due processes required proof of guilt beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519 (1975) (prohibiting transferring a juvenile to an adult criminal court after a adjudicatory hearing on the same charge).

[53] *See generally* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971)

rationale is that, under a custodial system, there is no need of *constitutional* protections, since the *government* is protecting the juvenile; therefore such constitutional protections would be duplicative.[54] This is tantamount to a claim that there is no need of any constitutionally protected freedoms, since the government will protect those freedoms that are deemed important by the government. Such a position is not only untenable, but it is arguably the precise threat of governmental intrusion that the Constitution protects against: the determination and limitation of rights under the implausible guise of "protection."

Though the historical characterization of the juvenile justice system was rehabilitative, increasingly the trend is to characterize the juvenile justice system as punitive.[55] This trend offers support to the modern notion that the juvenile justice system is a superfluity: if the adult penal system works equally well for both adults and children (and the juvenile justice system is merely duplicative of the work done by the adult criminal system), then the juvenile justice system is unnecessary. This reasoning is flawed because it assumes that the adult criminal procedure will adequately protect the juveniles who come under its jurisdiction.[56] The adult criminal process is replete with occasions where a juvenile is treated less fairly than an adult in the same situation.[57]

(denying juveniles the right to a jury trial in adjudicatory hearings); New Jersey v. T.L.O., 469 U.S. 325, 347 (1985) (holding that neither a warrant nor probable cause was required in cases of searches of students by school officials if the searches are "reasonable").

[54] *See* Ainsworth *supra* note 27.

[55] *See* Elsea, *supra* note 2, at 136 (illustrating that, regardless of the original intention of the juvenile justice system, "[s]ociety is beginning to view children as less innocent and more capable of distinguishing right from wrong").

[56] *See* Aron & Hurley, *supra* note 20, at 10 (indicating that the trend is from rehabilitation to punishment and "protecting society from young people prematurely deemed incapable of rehabilitation").

[57] *See* Elsea, *supra* note 2, at 142 (showing that an average juvenile's stay in detention is ten months longer than adults, that "adults are often released before serving their maximum time [whereas] juveniles are not" and that they serve "50% longer sentences for the same homicide convictions as their adult counterparts").

II. CONSTITUTIONAL ISSUES

A. Sixth Amendment and the Right to Counsel

The Sixth Amendment guarantees the criminal defendant the right to counsel and the right to a jury trial.[58] The juvenile justice system, however, has been allowed to do away with these rights.[59] First, the juvenile justice system precludes trial by jury.[60] The reasoning for this denial has been similar to the reasoning that precludes the right to a jury in civil cases:[61] because juvenile proceedings are not "criminal," they are not protected under the Sixth Amendment, which only guarantees the right to a jury trial "[i]n all criminal prosecutions."[62] Many of the protections that are mandatory in the adult criminal system are considered unnecessary in the juvenile justice system, because it is argued that, as in civil proceedings, less is at stake in juvenile proceedings than in criminal proceedings.[63] The history of courts being more protective of criminal proceedings — which generally implicate the loss of life and liberty — and being less protective of civil proceedings — which generally only implicate the loss of property — is undeniable.[64] By reasoning that juveniles are not actually being deprived of life and liberty as the basis for denying

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[58] *See* U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury... to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." *Id.*

[59] *See supra* notes 46–50.

[60] *See* McKeiver, 403 U.S. at 545 (pointing out that "[d]espite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement").

[61] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (illustrating the general principle that the courts will be more solicitous of those proceedings which threaten life and liberty than property).

[62] U.S. CONST. amend. VI. (ensuring that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

[63] *Cf.* Breed v. Jones, 421 U.S. 519, 528 (1971) (acknowledging the inherent seriousness involved in juvenile and subsequent criminal proceedings which might subject a juvenile to double jeopardy).

[64] *See Duncan*, 391 U.S. at 151 (outlining the "history of trial by jury in criminal cases").

them the protections of the criminal system, the juvenile justice system further ignores the fact that many juveniles stand to lose as much in the way of liberty as an adult who is convicted in the adult system.[65]

Second, the juvenile justice system allows juveniles to waive their right to counsel — a right that was protected under *In re Gault*.[66] The result is that a juvenile, in exercising this right, may actually appear before a judge without the benefit of counsel.[67] Most jurisdictions will uphold the waiver of counsel if the waiver was "knowing and voluntary", whereas only a very few states presume that the juvenile is incapable of waiving this right.[68] This right to waive counsel is especially paradoxical where it is widely acknowledged that proceeding pro se is unwise, even for experienced litigators,[69] much less for inexperienced juveniles.

It is also paradoxical that, although juveniles are presumed to not be competent to enter into contracts, they are presumed competent to waive their right to counsel.[70] They cannot drink, nor vote, nor even drive, but they have the "right" to dispense with some of their most precious constitutional protections, protections that they likely know little or nothing about.[71] Under common law, minors were able to disaffirm contracts they entered into.[72] Once a right to counsel has

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[65] *See* Ainsworth, *supra* note 27, at 944 (noting that "sentences of juvenile confinement frequently exceed the sentences meted out in municipal court").

[66] 387 U.S. 1 (1967) (affirming the applicability of a number of rights guaranteed to criminal defendants to juvenile court proceedings).

[67] *See* Robert E. Shepard, Jr., *Juveniles' Waiver of the Right to Counsel*, 13-SPG CRIM. JUST. 38, at 39 (detailing the various approaches that law has taken to juvenile waiver of counsel).

[68] *See id.*

[69] *See* People v. Riccardi, 50 Cal. App. 427, 451 (1920) (holding that it is not prejudicial misconduct for the judge to state that "a lawyer who acts as his own attorney has a fool for a client").

[70] *See* CBS, Inc. v. Tucker, 412 F. Supp 1222 (S.D.N.Y. 1976) (affirming the right of a minor to disaffirm contracts entered into as a minor). Common law long presumed that minors were not competent to enter into contracts. *Id.*

[71] *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, at 172 (1993) (noting that "minors are less likely to invoke their rights and more likely to waive them [than adults]").

[72] *See* Dominic J Ricotta, *Eighth Amendment — The Death Penalty for*

been waived however, any earlier constitutional violations are no longer considered reversible error.[73] If the common law is any guide, a juvenile should be able to disaffirm a waiver of counsel.[74] This would, of course, likely give rise to a number of occasions where the right to counsel had been waived, and then such waiver disaffirmed.[75] In order to prevent repetition of adjudicative proceedings, it is more logical to deny juveniles the "right" to waive counsel.[76] Characterizing the ability to nullify one's own constitutional protections as a "right" belies the older myopia that the juvenile justice system is a nonadversarial system, and that a juvenile does not need counsel because the *judge* is his counsel.[77] Given the practicalities of the juvenile justice system, this position is almost laughable: presently, even those public defenders that are not imprudently waived away by the juvenile spend only minimal time with each client.[78] It is unreasonable to expect that a judge, whose "sensibilities are blunted from the hundreds, if not thousands, of cases that she hears every year," will be able to effectively counsel each child, much less have each child's individual interests in mind.[79]

B. Eighth Amendment and Cruel & Unusual Punishment

A variety of conditions inherent in the juvenile justice system have been held cruel and unusual punishment within the meaning of the Eighth Amendment.[80] The often endemic brutality and physical

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[73] *See id.* at 172 (citing the "series of Supreme Court decisions establish[ing] that if a defendant pleads guilty, almost all antecedent constitutional violations are waived").

[74] *See id.*

[75] *See* Ainsworth, *supra* note 1, at 1126 (citing "recent empirical studies revealing that a shockingly high proportion of juveniles still are tried without lawyers").

[76] *See id.* at 173.

[77] *See infra* note 148 and accompanying text.

[78] *See* Soler, *supra* note 21, at 30 (noting the "crushing caseloads" and lack of training and resources of juvenile defenders).

[79] *See* Ainsworth, *supra* note 27, at 942.

[80] Morales v. Turman, 383 F. Supp. 53 (E.D.Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976); *rev'd*, 430 U.S. 322 (1977) (finding numerous violations of the

abuse of juveniles committed by an institution's staff, and also by other juveniles with the tacit approval by the staff, has been ruled cruel and unusual punishment.[81] This is particularly problematic where some of the juveniles potentially subject to such conditions are merely status offenders who have been incarcerated with juvenile offenders.[82] Additionally, insufficient staffing of facilities has been considered cruel and unusual punishment in situations where it serves to deny juveniles medical and psychiatric care.[83] Overcrowding, though it has not yet been ruled cruel and unusual per se, can similarly curtail the ability of the juvenile justice system to adequately provide for a juvenile — therefore overcrowding can deny a juvenile requisite care.[84]

C. Thirteenth Amendment and Involuntary Servitude

The Thirteenth Amendment, enacted after the Civil War, is largely accepted to be applicable in the context of slavery in which it was written.[85] However, it may also be implicated when juveniles are forced into compulsory labor.[86] One of the arguments in favor of the constitutionality of compulsory labor, such as work detail, is that it serves a rehabilitative purpose.[87] Under this reasoning, compulsory

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prohibition against cruel and unusual punishment present in several juvenile institutions).

[81] *See id.* at 73 (illustrating some of the "various forms of physical abuse, applied by the staff or other boys with the encouragement of the staff," to which juveniles held in protective custody might be subjected).

[82] *See id.* (showing that some of the juveniles in the juvenile institutions, and therefore potentially subject to cruel and unusual punishment "consisted of such 'status' offenses as truancy, incorrigibility, or running away from home").

[83] *See id.* at 105 (finding that juveniles are entitled to medical and psychiatric care that meets "minimally acceptable professional standards").

[84] *See* Soler, *supra* note 21, at 28 (explaining how "overcrowding has a serious impact on the security in the institutions, the provision of health and mental health care and other basic services, the availability of education and other programming, the level of institutional conflict and violence, and the danger of suicides").

[85] *See* Hancock, *supra* note 13, at 615 (noting that it also limits compelled labor as a punishment for a crime).

[86] *See id.* (noting that a number of states "subject delinquents to compulsory labor expressly for the purpose of punishment, not rehabilitation" in violation of the Thirteenth Amendment's requirement of Due Process).

[87] *See id.* at 628.

labor has been found to be constitutional, but only where it can be shown that the required work is indeed rehabilitative.[88] "Educational" or "vocational" programs must also be shown to actually be rehabilitative in order to qualify as an exception to the Thirteenth Amendment's prohibition of involuntary servitude.[89]

A number of institutions have classified labor performed by the juveniles as "voluntary."[90] This "voluntary" labor was coerced by threatening the imposition of some other form of punishment in lieu of the voluntary labor, and is considered violative of the Thirteenth Amendment.[91] Several forms of coercion, such as the threat of solitary confinement for failure to comply with some compelled labor, have been held to be unconstitutional.[92]

Proponents of compelled labor often argue that it is part of the punishment of adjudicated juveniles that they perform such labor, and that the state is exempt from the Thirteenth Amendment's strictures when it is acting in a *parens patriae* capacity.[93] This rationale fails first because the Thirteenth Amendment allows involuntary servitude only "as a punishment for crime whereof the party shall have been duly convicted."[94] However, it is well established that the juvenile justice system is not criminal in nature, and that such juveniles have not been convicted of any "crime."[95] Worse still, this *parens patriae* reasoning is undercut "[a]s juvenile justice adopts the punitive nature of the criminal justice system . . . the government may act less as a surrogate parent and more as an adversary."[96]

Similarly, because the juvenile justice system is a distinct

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[88] *See id.* at 636.

[89] *See id.*

[90] *See* Hancock, *supra* note 13, at 626.

[91] *See id.* at 614 (arguing that imposed involuntary servitude is violative of the Thirteenth Amendment because the juvenile justice system is neither "criminal" nor subject to the due processes of the criminal court).

[92] *See* Morales v. Turman, 430 U.S. 322 (1977) (limiting compulsory labor at juvenile detention centers).

[93] *See* Hancock, *supra* note 13, at 618 (noting that "[a]t common law, courts have exempted parents — and anyone acting as parents — from the prohibition of involuntary servitude as it applies to children in their custody").

[94] U.S. CONST. amend. XIII.

[95] *See* Rosenberg, *supra* note 73.

[96] Hancock, *supra* note 13, at 618.

entity apart from the adult criminal system, it is professedly rehabilitative and not punitive.[97] How then can the imposition of involuntary servitude on juveniles properly be termed a "punishment" under the Thirteenth Amendment?[98]

Furthermore, the Thirteenth Amendment further requires that the punishment be for a crime for which one had been "duly convicted". However, because waiver into the adult criminal system often procedurally denies the juvenile the right to an individual hearing, there may be insufficient due process to qualify any punishment as an exception to the Thirteenth Amendment, even when the juvenile has been duly convicted as an adult.[99]

Additionally, considering that a number of status offenders would be subject to the same treatment as adjudicated offenders in the name of "discipline,"[100] the argument that compulsory labor is a punishment for a crime, and therefore comes under the exception to the Thirteenth Amendment, is untenable.[101]

D. Fourteenth Amendment and Due Process

The Due Process clause of the Fourteenth Amendment is implicated at every stage in the juvenile justice system. The right to procedural due process is implicated in the denial of the right to a jury trial; the denial of bail where there had been no finding of a "serious risk" that the juvenile would commit a crime before trial;[102] the waiver of the right to counsel by a juvenile (who would be considered incompetent to make such a determination in other circumstances);[103] and the waiver into the adult criminal system by the prosecutor or legislature.[104] Such waivers by the prosecutor ("prosecutorial

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[97] *See* Aron & Hurley, *supra* note 20, at 12 (stating that the juvenile justice system "inaugurated the goal of rehabilitating and reintegrating juvenile offenders into mainstream society").

[98] *See id.* at 631 (noting that juveniles are not convicted of committing crimes, but are determined to be delinquent for some offense).

[99] *See infra* note 111 and accompanying text.

[100] *See* Hancock, *supra* note 13, at 643.

[101] *See id.*

[102] Schall v. Martin, 467 U.S. 253, at 278 (1984).

[103] *See supra* notes 70–71 and accompanying text.

[104] *See* Aron & Hurley, *supra* note 20, at 63 (outlining the procedural

waivers") amount to a violation of due process because they vest in the prosecutor the ability to file "concurrent jurisdiction" in both adult criminal and juvenile courts,[105] and allow the prosecutor total discretion to decide in which court to proceed.[106] This vests in the juvenile's adversary the power to treat the juvenile as an adult, without giving the juvenile the opportunity to demonstrate otherwise.[107] In a similar manner, legislative waivers are thought to violate procedural due process because, by mandating which offenses must be tried in adult criminal court, waivers effected by legislature do not provide for individual hearings to determine whether the juvenile should be tried as an adult.[108] Some scholars suggest that the best alternative between the two has been the judicial waiver advocated in *United States v. Kent*,[109] even though *Kent* struck down a judicial waiver on the basis that the juvenile did not have a hearing, that the juvenile had been denied the assistance of counsel, and that the judge had not provided any basis for his decision.[110] Pointing out that both prosecutorial and legislative waivers deny juveniles counsel and individual hearings, *Kent* suggests that the only acceptable waiver of a juvenile into the adult criminal court would be by way of a judicial waiver after a hearing that has sufficient procedural safeguards.[111]

III. ATTEMPTED REMEDIES

Based on the legislation of the past few decades, federal intervention and preemption of state law appears to be the best method of implementing a uniform juvenile justice system.[112]

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differences between prosecutorial, legislative, and judicial waiver mechanisms).

[105] *See id.*

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] 383 U.S. 541 (1966).

[110] *See id.* at 546.

[111] *See* Aron & Hurley, *supra* note 20, at 62 (noting that "[t]he main difference [that distinguishes judicial waiver] is that it is approached and utilized on a case-by-case basis").

[112] *See infra* notes120–149 and accompanying text.

However, because federal preemption of state laws is limited to the financial incentive authorized to Congress by the Spending Power, the usefulness of such legislation is limited.[113] The influence of the Juvenile Justice and Delinquency Prevention Act ("JJDPA") of 1974 has been limited to withholding federal funds from states that do not meet its guidelines.[114] The Violent Crime Control and Law Enforcement Act ("VCCLEA") of 1994 served primarily to facilitate the prosecution of juveniles in adult criminal proceedings.[115] By allowing easier transfer into the adult criminal system, the VCCLEA potentially violates the Fourteenth Amendment's guarantee of Due Process.[116] The Prisoner Litigation Reform Act ("PLRA") of 1995 limits the right of all prisoners, juveniles and adults alike, to effect change in their environment.[117] Though not specifically directed at juveniles, the PLRA significantly decreases the likelihood that injuries done to juveniles will be adequately redressed.[118] Similarly, by automatically waiving juveniles into the adult criminal system for certain types of crimes, the Omnibus Crime Control Act of 1997 is potentially violative of due process in that it does not provide hearings to investigate the specific circumstances of individual juveniles before transferring them to adult criminal court.[119]

A. Juvenile Justice and Delinquency Prevention Act

In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act (JJDPA).[120] The JJDPA limits what the

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[113] *See* Costello & Worthington, *supra* note 12, at 58 (noting how "[m]any states have ingeniously taken advantage of the loopholes left by the language of both the [Juvenile Justice and Delinquency] Act and the [Office of Juvenile Justice and Delinquency Prevention]").

[114] *See infra* note 120 and accompanying text.

[115] *See infra* note 131 and accompanying text.

[116] *See generally supra* note 108 and accompanying text.

[117] *See infra* note 139 and accompanying text.

[118] *See infra* note 144 and accompanying text.

[119] *See infra* note 149 and accompanying text.

[120] Juvenile Justice and Delinquency Prevention Act, 42 U.S.C.A. §§ 5601–5777 (1974) [hereinafter, JJDPA]. The JJDPA is limited in that it can only enforce its provisions to the extent that the States are unwilling to forego federal funding; if a state were to decide that its juvenile justice system did not need federal funding, the provisions of the JJDPA would be unenforceable. *See* Chung, *supra* note 26, at 1015.

states can do in their sovereign territories by making federal funding dependent on compliance — a regulatory scheme implicitly authorized to Congress via the spending power.[121] However, because the JJDPA only preempts state sovereignty to the extent that the states require federal funding, noncompliance with the terms of the JJDPA will only result in the forfeiture of federal funds.[122] Furthermore the JJDPA allows a number of exceptions for minor, *de minimus* noncompliance.[123] Moreover, the JJDPA also allows a three-year grace period in which to remedy even serious violations.[124] Although the JJDPA has had some effect on the amount of non-offenders that are presently being housed with offenders,[125] the JJDPA still allows the unacceptable mixing of offenders and non-offenders where such mixing is considered "minor" or where a state decides that federal funding is unnecessary.[126] Thus, the relatively loose strictures of the JJDPA allow constitutional violations to continue for long periods of time.[127]

B. The Violent Crime Control and Law Enforcement Act of 1994

With the increasing perception that juveniles and adults were being inadequately punished for the commission of violent crimes, Congress passed the Violent Crime Control and Law Enforcement Act ("VCCLEA").[128] Two provisions specifically provided for legislative

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[121] *See* U.S. CONST. art. I, § 8.

[122] *See* Chung, *supra* note 26, at 1017 (explaining how a "state that fails to adhere to the Act's requirements may lose its federal funding unless the state can commit to achieving full compliance within a three-year period").

[123] *See* Sweet, *supra* note 19, at 408 (noting that such violations will be determined *de minimus* on a case-by-case basis).

[124] *See* Chung, *supra* note 26, at 1015.

[125] *See* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correction Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 702 n.150 (1998) (noting that the numbers of status offenders and non-offenders that are being housed in secure facilities has dropped in recent years).

[126] *See* Soler, *supra* note 21, at 29 (indicating that "several jurisdictions are considering noncompliance with the federal Juvenile Justice and Delinquency Prevention Act, thus forfeiting significant federal funds, in order to make widespread use of adult jails to incarcerate children and to engage in other actions the Act would not permit").

[127] *See* Chung, *supra* note 26.

[128] *See* Soler, *supra* note 21, at 28 (noting that "[t]he public feels ever more

waiver of juveniles into the adult criminal system: Title XIV "Youth Violence"[129] and Title XV "Criminal Street Gangs."[130] Title XIV "Youth Violence" operates to transfer juveniles to the adult criminal system because of the violence of the offense.[131] Juveniles accused of violent offenses such as murder, robbery, and rape could be waived into adult criminal proceedings.[132] Title XV "Criminal Street Gangs" similarly transfers juveniles involved in criminal street gangs to adult criminal proceedings — depending on their role in the gang.[133] A leadership role or other influence over other persons would "weigh in favor of a waiver of a transfer to adult status".[134] Under both of these provisions waiver is not automatic.[135] A court must apply a number of balancing factors, including: "the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; [and] the availability of programs designed to treat the juvenile's behavioral problems".[136] Though these guidelines only list *what* factors shall be weighed and not *how* to weigh those factors, they are superior to both a strict legislative or prosecutorial waiver — neither of which has any guidelines.[137]

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threatened by juvenile crime, despite the fact that most types of juvenile crime are at or below levels of 20 years ago").

[129] 18 U.S.C. § 5032 (1994).

[130] 18 U.S.C. § 521 (1994).

[131] 18 U.S.C. § 5032 (prosecution as adults of certain juveniles for crimes of violence).

[132] 42 U.S.C. § 3751(b)(23) (1994) (bindover system for certain violent juveniles).

[133] 18 U.S.C. § 5032 (adult prosecution of serious juvenile offenders).

[134] *See id.*

[135] *See* Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, 22-JUNE CHAMPION 10, 62 (1998) (detailing the processes required in order to effect a transfer of a juvenile to the adult criminal court under Titles XIV and XV of the VCCLEA).

[136] 18 U.S.C.A. § 5032 (West 1998). "Evidence of the following factors shall be considered . . . in assessing whether a transfer [to an adult criminal court] would be in the interest of justice." *Id.*

[137] *See* Aron & Hurley, *supra* note 20, at 62 (noting that judicial waiver "will provide for a less arbitrary, non-partisan, non-adversarial balancing of mutual interests of

C. Prison Litigation Reform Act of 1995

Following much public denouncement of "frivolous prisoner litigation," Congress passed the Prison Litigation Reform Act ("PLRA")[138] which restricted the rights of prisoners to bring suit against the institutions that detain them.[139] This limitation — though not specifically targeted toward juveniles — was later extended to include juveniles in *Alexander v. Boyd*,[140] which held that the plain meaning of the statute's language was meant to include juvenile detention centers.[141] The PLRA also limits the right to attorney's fees: it places upon prisoners or juveniles the burden to prove eligibility for attorneys fees; that said fees were incurred in proving an actual violation of the prisoners rights; and that the fees were proportional to the ordered relief.[142] By placing the burden of proof on the litigant in these situations, the PLRA attempted to cure the juvenile justice system of some of its failings.[143] Paradoxically, by greatly circumscribing the methods which prisoners and juveniles can protect their rights, and reducing the avenues for genuinely aggrieved juveniles to pursue reform, it also silences many legitimate complaints that would serve to better the juvenile justice system.[144]

D. Omnibus Crime Control Act of 1997

The Omnibus Crime Control Act ("OCCA") was an attempt to "reform juvenile law so that the paramount concerns of the juvenile justice system are providing for the safety of the public and holding juvenile wrongdoers accountable for their actions."[145] Section 1112 of Title 18 amends the provisions set out in the Violent Crime Control

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the juvenile offender and society."

[138] 18 U.S.C. §3626 (1996).

[139] *See* Dale, *supra* note 125, at 704.

[140] 113 F. 3d 1373 (4th Cir. 1997), *cert denied* 522 U.S. 1090 (1998).

[141] *See* Dale, *supra* note 125, at 705.

[142] *See id.* at 706.

[143] *See id.*

[144] *See id.*

[145] Omnibus Crime Control Act of 1997, Title XI–Violent and Repeat offenders, 105th Cong., 1st Sess., 185 (codified at 18 U.S.C. § 5032 (1997)).

and Law Enforcement Act ("VCCLEA") of 1994 in Section 5032[146] by allowing for the prosecutorial discretion of whether to bring criminal charges against a juvenile 14 years of age or older.[147] This "prosecutorial waiver" is problematic for the reasons mentioned earlier, in that it vests in the prosecutor (the archetypal adversary of the juvenile and adult alike) the same power formerly reserved for the juvenile judges, who are — ostensibly, at least — impartial.[148] Lack of adequate statutory guidance similar to the language of the VCCLEA, and the lack of the opportunity for the juvenile to have a hearing on his or her particular case prior to being sent to adult criminal court, are among the major flaws with this attempt to revamp the juvenile justice system.[149]

IV. PROPOSED REMEDIES

A. Abolition of the Juvenile Justice System

A number of legal theorists, noting the demise of both the juvenile justice system and the culture that created it, have suggested the abolition of the juvenile justice system altogether.[150] This is the position taken by a number of liberal thinkers, who maintain that the current juvenile justice system serves only to deprive juveniles of their

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[146] *See* Aron & Hurley, *supra* note 20, at 63 (criticizing the Omnibus Crime Control Act's prosecutorial waiver as "[t]he most controversial of the three transfer mechanisms").

[147] *See* 18 U.S.C. § 5032 (1997).

[148] *See* Aron & Hurley, *supra* note 20, at 63 (illustrating how "the prosecutorial waiver mechanism . . . fails to protect the best interest of juveniles, when prosecutors are not required to consider those interests" and can avoid the burden of proving that the juvenile offender should be tried as an adult).

[149] *See id.*

[150] *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, at 725 (1991) (stating that "rejecting the juvenile court's premise that young people are inherently irresponsible can begin a process to reexamining childhood that extends to every institution that touches their lives"). Feld suggests that by treating juvenile offenders as their adult counterparts, the constitutional violations of the juvenile justice system can be remedied. *See id.* at 720.

constitutional rights.[151] These scholars suggest that, because the juvenile justice system tends to treat the juveniles as second-class citizens anyway, the offending juveniles are taking opportunities away from non-offenders and status offenders.[152] According to these scholars, it is wiser to get rid of the juvenile justice system completely, and remand criminals to the criminal courts, regardless of age.[153] The argument is that the youth of the offender will either excuse his wrongdoing or act as a mitigating factor in the sentencing phase.[154] Our legal system might then return nostalgically to the days before the creation of the juvenile justice system.[155] This idealism ignores the fact that it is not at all conclusive that age *will* be a mitigating factor, since it seems that the creation of the juvenile justice system a century ago was spurred by the feeling that, regardless of theoretical reasoning, age was *not* being considered as a mitigating factor in criminal proceedings in practice.[156]

Surprisingly, many of the country's conservative thinkers are also of the opinion that the juvenile justice system should be abandoned.[157] Conservatives suggest that the role of any criminal process is retributive or punitive, and that because rehabilitative efforts in the juvenile justice system have failed, the juvenile justice system is particularly ineffective.[158] By considering the juvenile

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[151] *See id.*

[152] *See* Ainsworth, *supra* note 27, at 927 (noting that "[t]he unhappy truth is that we as a society do not particularly value young people").

[153] *See id.* at 930 (arguing that her real object is "the abolition of 'adult court', with all the assumptions entailed by its necessary contrast with juvenile court").

[154] *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, at 116 (1997) (advocating a "youth discount" that reduces the maximum penalty by a certain percentage per year younger than eighteen).

[155] *See* Feld, *supra* note 150, at 724 (reminiscing that "[y]outhfulness . . . has long been recognized as a mitigating, even if not an excusing, condition at sentencing").

[156] *See* Ainsworth, *supra* note 27, at 947 (pointing out that "[o]nce waived into the criminal courts, the juvenile is transformed into an "adult," with all that the designation entails").

[157] *See* Spon, *supra* note 47, at 34 (concluding that "the administration of 'true' justice requires that laws and court decisions be in accord with God's nature and character, as revealed in the created order and in the holy scriptures").

[158] *See* Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, POL'Y REV., Fall 1985, at 65.

justice system as a failed punitive process, conservatives join liberals in the proposal to do away with the present juvenile justice system.[159]

This strange consensus — that the juvenile justice system should be eradicated — would be the legislative equivalent of a judicial concurrence in judgement: the ends are agreed upon, but the reasoning is vastly different. Conservatives hope that the abolition of the juvenile justice system will better punish those people that are deserving of punishment, whereas liberals hope to put an end to the undeserved punishments that result from the unconstitutional practices of the present juvenile justice system.[160] The resulting concurrence appears to be that somehow the eradication of the juvenile justice system will simultaneously punish more and punish less.

One of the many problems with this conclusion is the likelihood that the abolition of the juvenile justice system will serve only to punish more. Contrary to the suggestions of juvenile court abolitionist Professor Barry Feld, who maintains that "providing an explicit 'youth discount' to reduce adult sentences can ensure an intermediate level of just punishment,"[161] it seems likely that many officials will probably treat every criminal alike, regardless of age. The danger lies in the sentiment that, once the juvenile has been treated as an adult, any leniency based on the notion that the juvenile is *not* an adult will be incongruous — many opponents of juvenile court abolition point out that the treatment of a juvenile as a juvenile, after having been nominally designated an adult, is unlikely.[162] Even an explicit "youth discount" like the one proposed by Professor Feld[163] is likely to be ineffective where the parameters of such a discount can fluctuate within sentencing guidelines; after all it is hard to reconcile giving any offender a "discount", as if they were getting

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[159] *See* Soler, *supra* note 21, at 27 (illustrating how "[p]ublic officials point to isolated crimes as justification for broad-scale 'get tough' attitudes").

[160] *See* Sweet, *supra* note 19, at 397 (illustrating "legal moralists" and "constitutionalists" from Anthony Platt's book *The Child Savers: The Invention of Delinquency*).

[161] Feld, *supra* note 150, at 724.

[162] *See* Rosenberg, *supra* 11, at 175 (asserting that "[b]ringing children within the criminal jurisdiction is an assertion by the state that minors do *not* receive specialized treatment") (emphasis added).

[163] *See* Feld, *supra* note 154.

their sentence on sale from K-Mart. It remains unclear whether "youthfulness" will be wholly within the discretion of the judge or on some form of sliding scale — some ratio of gravity of the offense compared to the age of the perpetrator.[164] Both methods seem impracticable. Leaving the "discount" to the discretion of the judge, even if she is bound by balancing factors,[165] would still leave her a tremendous amount of latitude in sentencing. On the other hand, a predetermined sliding scale that discounts the maximum sentence per year younger than eighteen presents the problem that a juvenile who gets a youth-discounted-maximum sentence might be sentenced to the same number of years as an adult who gets a less-than-maximum sentence, negating the effect of the youth discount. The problem with this scheme is that it fails to address the *rebuttable* presumption of inculpability — a juvenile that is atypically culpable for his crime would get the same youth-discount as a juvenile who is inculpable.[166]

B. Statutory Overhaul

One alternative to abandoning the juvenile justice system is complex: in order to retain the present juvenile justice system, and still cure it of its shortcomings, extensive statutory overhaul would be required. The difficulties associated with amending the juvenile statutes and their successive amendments are likely to be prohibitive. Furthermore, statutory amendments are often time consuming and inefficient, not to mention perpetual.[167] The Juvenile Justice and Delinquency Prevention Act ("JJDPA"), the Violent Crime Control and Law Enforcement Act ("VCCLEA"), the Prisoner Litigation Reform Act ("PLRA"), and the Omnibus Crime Control Act ("OCCA") are just some of the many articles of legislation that are pressed through Congress to address the notion that the current

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[164] *See id.*

[165] *See supra* note 136 and accompanying text.

[166] *See* Rosenberg, *supra* note 11, at 178 (exploring the presumptions of culpability between children and adults).

[167] *See* Feld, *supra* note 150, at 723 (observing the twenty years of ineffectual constitutional and legislative reform and the juvenile justice system's ability to "deflect, ignore, or absorb ameliorative tinkering with minimal institutional change").

juvenile justice system simply does not work.[168] Each time a deficiency is observed in the juvenile justice system, a new barrage of legislation is likely to follow.[169]

C. Multiple Juvenile Courts

Another alternative to abolishing the juvenile courts or trying to restructure a system that has become unwieldy is to create a new juvenile court system to coexist simultaneously with the existing juvenile justice system.[170] For example, this new system could group offenders by age, and classify them in three tiers: as children, adolescents, or adults. The express recognition of the time between childhood and adulthood, adolescence, would allow a more realistic transition to adulthood — thus avoiding what Professor Ainsworth calls "the adult/child binary opposition."[171]

Like the present juvenile justice system, a three-tiered system would give a presumption of inculpability to children, but would presume partial culpability for adolescents, although not the total culpability presumed of adults. In the tier for children, the rehabilitative aspect would be paramount because of a presumption of inculpability.[172] From this tier — should the presumption of inculpability be rebutted — the juvenile could be waived into the tier for adolescents. In the tier for adolescents, the emphasis would tend more toward punishment, because adolescents would be presumed partially culpable.[173] Only from this second tier could a juvenile be waived into the adult criminal system; and only by way of a judicial

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[168] *See id.*

[169] *See supra* notes 14520–14949 and accompanying text for a discussion of propsed Juvenile Justice Legislation and the circumstances leading up to such legislation.

[170] *See* Feld, *supra* note 150, at 725 (realizing that "[c]hildren, especially by adolescence, are more competent than the law acknowledges").

[171] *See* Ainsworth, *supra* note 27, at 945 (detailing how such opposition is taken to mean that "child" is the opposite of "adult", when that is not actually the case). Professor Ainsworth points out that the system's flaw is its failure to adequately assess people as they are, and instead forcing them into too narrow categories. *See id.*

[172] *See supra* note 166.

[173] *See* Feld, *supra* note 150, at 724 (noting that "[y]ouths older than fourteen are mature enough to be responsible for their behavior, but immature enough as to not deserve punishment commensurate with adults").

hearing consonant with the guidelines articulated in the Violent Crime Control and Law Enforcement Act of 1994.[174] Finally, in the tier for adults, as now, the emphasis would tend toward the punitive.[175]

In such a system, the existing classifications of juveniles would be incorporated to ensure that each tier was populated according to whether the child or adolescent was a non-offender, status offender, or offender instead of simply by age. By incorporating the classifications presently used, a three-tier system acknowledges not only the differences between children, adolescents, and adults but that those differences are the reason that they are housed separately.[176]

Furthermore, in the three-tiered system juveniles could not be indiscriminately transferred between tiers. Each transfer would have a number of procedural safeguards, including the requirement of an individualized hearing that would govern the removal from one tier to the next. Furthermore, a transfer could only be made to the next successive tier. This sequential transfer mechanism would put the sole transfer power in the hands of the judiciary in accordance with *Kent*, and ensures procedural due process by preventing legislators and prosecutors from removing the juvenile to adult criminal court based on the crime.

Such a system would necessarily require that the individual tiers would be specially focused on a finite set of criteria, thereby ensuring greater facility with the problems that each different tier would encounter.[177] Specialization has been the trend in a number of markets, and it has been suggested that the juvenile justice system could also benefit from a more specialized approach to the needs of juveniles.[178] By addressing the needs of the juveniles in the juvenile

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[174] *See supra* note 136.

[175] *See supra* note 166.

[176] *See* Fagan, *supra* note 39 (illustrating that "compared to adolescents placed in juvenile corrections programs, adolescents sentenced and incarcerated as adults are much more likely to be physically and sexually assaulted. Research has consistently shown that such victimization as children and adolescents often lead to higher rates of crime").

[177] *See* Soler, *supra* note 21, at 31 (suggesting the creation of a model court "true to the original spirit and intent of the juvenile court").

[178] *See id.*

justice system with greater attention to the needs of an individual group, a multiple-tier juvenile system would more effectively deal with the realities of what is now largely a punitive process masquerading as rehabilitation.[179]

CONCLUSION

The juvenile justice system has changed considerably over the past hundred years, from an instrument of rehabilitation designed to protect children from society, to an instrument of punishment designed to protect society from children. The arguments of those who would do away with the juvenile justice system are indeed compelling. Conservatives are correct in maintaining that many juveniles go unpunished for those acts that they have committed. Liberals are correct in their assertion that many juveniles are left without the constitutional protections that the criminal system would offer. However, its seems that the decision whether or not to retain a separate system for juveniles is a choice between the lesser of two evils. No longer is the question "Which approach is better?" The appropriate question has become "Which approach is least terrible?"

Abolishing the juvenile justice system has the benefits of a simplified system where each individual, whether an adult or a juvenile, would be treated similarly. The laws applicable to one would be applicable to the other. The age of the offender would duly be taken into account and the offender's culpability reduced in proportion with age. This abolitionist approach has a number of drawbacks, the most important of which is its failure to recognize that juveniles are not yet adults. While it is well understood that adolescents are no longer children, it is hard to maintain the position that they are as accountable as adults. The proliferation of juvenile justice system laws suggests that modern society perceives juveniles as fully informed and fully accountable; modern society's perception, however, may be factually wrong. How can adolescents be completely liable for those ethical lessons that are not yet learned?

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[179] *See* Dale, *supra* note 125, at 678 (labeling the juvenile justice system as "theoretically rehabilitative in nature, but in fact is terribly punitive").

Presuming adolescents to be as completely culpable as adults supposes that people learn little or no ethical lessons after the age of twelve; or that all the important lessons *should* be learned by twelve, and that everything else is mere moral fastidiousness.

However, maintaining a juvenile justice system entirely separate from the criminal process, is equally problematic. It presumes that adolescents haven't learned *any* lessons since they were children. It suggests that we can expect no more of juveniles than we can of children. As the juvenile court abolitionists fail to grasp an important point, that adolescents are simply not adults, the juvenile court preservationists fail to grasp an equally important point: adolescents are no longer children. In this respect the juvenile court preservationists fail to address the fact that many people believe that the juvenile justice system treats criminals like kids, instead of kids like criminals: confronted with headlines from Jonesboro and Columbine, we are more acutely aware than were our great-grandparents that adolescents are most definitely not children.

The changing view of society may indeed be that we perceive adolescents as being morally culpable for their crimes, and wrong or not, it will always influence the legislature. The truth is that a hundred years of experimentation with juvenile justice cannot continue on the same principles that it began on. Society needs a new experiment, one that is neither our present juvenile justice system, nor the older system that predates it. Society needs a system that makes an express recognition of the intangible but very definite difference between adults and adolescents, and between adolescents and children. Such a system would be better tailored to the unique contours of each group, rather than the general outline of them all.

The creation of a new juvenile justice system, with a three-tiered approach to juveniles and adults appears to be an ideal solution to the problem. It will not suffer from the myopia that children, adults, and adolescents are identical — nor will it assume that everyone who is not an adult is necessarily a child. It will be created specially to address modern values, rather than resorting back to either one of two failed methodologies.

The present juvenile justice system is not done; it is merely in a cocoon from which something new shall emerge. It will need to have more well-defined procedures both for intake and waiver into the

adult criminal system. It will need to more adequately address in what circumstances it is predominantly punitive and in what circumstances it is predominantly rehabilitative. It will need to take a more realistic view of what it means to be and adult, or an adolescent, or a child.

The defects which cripple the juvenile justice system remain — we are aware that juveniles are not children; that they are in some way responsible for their actions. However, the theories that sparked the creation of the juvenile justice system also remain — we are still aware that juveniles are not adults, that they deserve and require more rehabilitative treatment. Combining both into a new, three-tiered juvenile justice system would at last rid us of the worst of both worlds.

Claude Noriega