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JUVENILE DELINQUENCY: A JUDGE'S VIEW OF OUR PAST, PRESENT, AND FUTURE

EDWARD L. THOMPSON*

I. Introduction

Juvenile crime is quickly becoming a national epidemic. In the last decade alone violent juvenile crime rose 27%.² The statistics in Oklahoma are far worse. From 1983 to 1992, violent crimes committed by Oklahoma's juveniles skyrocketed 262%.³ These crimes committed by juveniles are becoming increasingly brutal and sophisticated, with incidents of rape, robbery, and murder frequently reported.⁴

Oklahoma's juvenile laws are ill-equipped to deter this increase in juvenile crime. A recent murder at a local schoolhouse illustrates this point. A fourteen-year-old student approached a fellow student, drew a gun, and shot him point blank in the head.⁵ Because of Oklahoma's Juvenile Code, this teenager need not fear criminal prosecution or punishment. Even though the juvenile admitted committing the murder, he cannot be convicted of any crime nor suffer any punishment.⁶

Oklahoma's Juvenile Code, at best, allows the judge to assign the juvenile to the Department of Human Services (DHS). Once assigned, Oklahoma's Juvenile Code forbids DHS from even punishing him. Moreover, the judge has no authority to order DHS to incarcerate the juvenile. Instead, the Juvenile Code authorizes his release at

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This is the third in a series of articles by Judge Thompson on juvenile law. The others are *Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts*, 15 AM. INDIAN L. REV. 1 (1990), and *Children in Need of Mental Health Treatment: A Judge's View of Revised Public Law and New Private Law Proceedings*, 26 TULSA L.J. 347 (1991) - Ed.

2. *Violent Crime Surges: Juveniles' Rate Leaps 27% in Decade*, SUNDAY OKLAHOMAN, Aug. 30, 1992, at 1 (stating that the rate of violent juvenile crime rose for all races, social classes, and lifestyles).

3. Juvenile arrests for violent crimes totalled 502 in 1983 and 1317 in 1992. Letter from Hon. Joseph P. Marak, Jr., Associate District Judge, Woodward County, Okla., to the author (Aug. 27, 1993) (discussing juvenile crime statistics).

4. Some crimes are so sophisticated and vicious that we have had to invent new words to describe them such as "carjacking," "drive-by-shooting," and a particularly sadistic crime known as "wilding." Here, a pack of juveniles will hunt down a woman, savagely beat, rob and gang-rape her and then leave her for dead.

5. Mick Hinton, *Crime Bill's OK Pleases Victim's Kin*, DAILY OKLAHOMAN, Mar. 9, 1993, at 1.

6. *J.J.W. v. State*, 842 P.2d 349 (Okla. Crim. App. 1992) (reversing trial court order certifying defendant to stand trial as an adult in the district court's criminal division).

the pleasure of DHS with no criminal record; his record is sealed. The juvenile will soon be back on the street, if he is not there already.

This article addresses the growth in serious, violent crimes by juveniles, and the Oklahoma Juvenile Code's treatment of such crimes: past, present, and future. The development of juvenile rights, and those rights under Oklahoma's juvenile system, will be discussed. Next, this article encourages Oklahoma to move beyond the Juvenile Code's social welfare philosophy to a valid model of justice. This article concludes by recommending some specific changes to the Oklahoma Juvenile Code.

II. Legal History

The United States Supreme Court once described juvenile court as: "a peculiar system for juveniles, unknown to our law."⁷ Ordinarily, persons who committed crimes at common law were tried, convicted, and punished as criminals. However, juvenile court did not exist at common law. Exceptions were thus made for infants and the very young. For example, children under seven were considered incapable of committing crimes because of their inability to form criminal intent.⁸ Likewise, children between seven and fourteen could not be held criminally liable unless the prosecutor proved the requisite *mens rea*. Persons fourteen and older, however, were punished for their crimes.

This common law approach survived well into the nineteenth century. In fact, in 1890, Oklahoma's first territorial legislature adopted the common law approach:

All persons are capable of committing crimes, except those belonging to the following classes: First. Children under age of seven years. Second. Children of the age of seven years, but under the age of fourteen years, in the absence of proof that at the time of committing the act or neglect charged against them, they knew it [sic] wrongfulness.⁹

Even though Oklahoma statutes adopted the common law approach, young criminals were not necessarily imprisoned with older, hardened criminals. Instead, the territorial legislature authorized the court, in its discretion, to place juveniles under sixteen in a reformatory rather than the territorial prison.¹⁰

At the end of the nineteenth century, a juvenile court movement began in the United States.¹¹ The movement rejected the corpus juris and embraced a social welfare philosophy¹² that emphasized rehabilitation rather than punishment of juvenile offenders. "The child — essentially good, as they see it — is to be made 'to

7. *In re Gault*, 387 U.S. 1, 17 (1967).

8. *Id.* at 16.

9. OKLA. TERR. STAT. ch. 2, art. 2, § 2 (1890). Because of the Tenth Circuit's decision in *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972), Oklahoma reverted back to the common law approach for a short time. See *Schaffer v. Green*, 496 P.2d 375 (Okla. Crim. App. 1972).

10. OKLA. TERR. STAT. ch. 25, art. 59, § 19 (1890); see also the Incurable Youth Act, 1895 Okla. Terr. Sess. Laws ch. 28, §§ 1-13 (granting judges the authority to send criminals under age sixteen to a reform school rather than prison).

11. *Gault*, 387 U.S. at 15.

12. *Kent v. United States*, 383 U.S. 541, 554 (1966).

feel that he is the object of [the government's] care and solicitude,' not that he is under arrest or on trial."¹³ To support their position, the social welfare advocates contrived a medical model: "the child is to be 'treated' and 'rehabilitated,' and the procedures, from apprehension through institutionalization, are to be 'clinical' rather than punitive."¹⁴ The goal is to "diagnose" the child's needs, as a doctor analyzes a patient's illness.¹⁵

In determining the disposition to be made of the case the procedure of the physician is closely followed. * * * The judge and the probation officer consider (the case) like a physician and his junior . . . and then they address themselves to the question of how permanently to prevent the recurrence. * * * If the offense is serious and likely to be repeated . . . or if the cause of the difficulty is obscure, he is seen by the judge at frequent intervals, monthly, weekly or sometimes even daily, just as with the patient and the physician in cases of tuberculosis or typhoid.¹⁶

Illinois became the first state to adopt a social welfare approach to juvenile justice by establishing a juvenile court in 1899.¹⁷ Oklahoma Territory followed by establishing a Children's Aid Society in 1905,¹⁸ and in 1909, Oklahoma established its own juvenile court.¹⁹ The juvenile court, then a division of the county court, had jurisdiction over any person under sixteen years of age who committed a crime. Finally, also in 1909, the Oklahoma legislature, expressly adopting the social welfare philosophy, decriminalized all juvenile crimes by legislative decree. Juvenile lawbreakers were no longer criminals, but victims entitled to the state's help. "[A]s far as practicable, any delinquent child shall be treated, not as a criminal, but as misdirected and misguided, and needing aid, encouragement, help and assistance."²⁰

Today, the social welfare philosophy has radically changed legal practice. Criminal acts by juveniles are no longer crimes, but rather, euphemistic "causes of action."²¹ Juveniles caught in the act of crime cannot be jailed, but only momentarily detained. Instead, juveniles demand "services"²² and receive "treatment."²³ Even the petition's

13. *Gault*, 387 U.S. at 15.

14. *Id.* at 15-16.

15. Romae Powell, *Disposition Concepts*, 34 JUV. & FAM. CT. J. 1 (1983).

16. HARVEY H. BAKER, *PROCEDURE OF THE BOSTON JUVENILE COURT* (1910), reprinted in FREDERIC L. FAUST & PAUL J. BRANTINGHAM, *JUVENILE JUSTICE PHILOSOPHY* (1978).

17. 1899 Ill. Laws 131; see also *Gault*, 387 U.S. at 14. While Illinois is credited with enacting the first statewide juvenile code, the work of Denver Juvenile Court Judge Ben Lindsey and Colorado's school law, enacted two months before Illinois code, incorporated essentially the same features. See THOMAS A. JOHNSON, *INTRODUCTION TO THE JUVENILE JUSTICE SYSTEM* (1975).

18. OKLA. GEN. STAT. ch. 11, §§ 687-698 (1908) (citing 1905 Okla. Terr. Sess. Laws 201). The Society aided boys under 16 years of age and girls under 15 years of age.

19. OKLA. COMP. LAWS ch. 13, art. I, §§ 594-604 (1909).

20. *Id.* § 603. Oklahoma's Juvenile Code still clings to this social-welfare philosophy. See 10 OKLA. STAT. § 1129 (1991 & Supp. 1993).

21. 10 OKLA. STAT. § 1102(A)(1) (1991 & Supp. 1993).

22. *Id.*

23. *Id.* § 1115.1.

traditional style is altered from the normal "State versus Defendant" to the *parens patriae* form of, "In the matter of (juvenile's name)."²⁴ The juvenile is not considered an accused, but merely a "child."

There are additional differences in the procedure utilized. Criminal charges are presented merely by filing "petition" rather than by indictment or information.²⁵ The hearing is not considered a trial, but an "adjudicatory hearing."²⁶ Juveniles are thus "adjudicated" rather than convicted of crimes.²⁷ Courts are thus unable to impose judgement and sentence, but only "disposition."²⁸ Most importantly, punishment is forbidden.

III. Juveniles and the Oklahoma Court System

A. Jurisdiction

Juvenile law can be confusing. The precursor requirement of jurisdiction lies at the heart of this confusion. Does jurisdiction lie in district court? If so, which division? What about municipal court? The answers to these questions depend on the accused's age and alleged crime.

Generally, the district court's juvenile division has jurisdiction over those persons under age eighteen who are accused of committing crimes. However, there are four exceptions: traffic offenses, municipal court, certification, and reverse-certification. Traffic offenses are processed through the district and municipal courts' traffic divisions, with violations of certain specified municipal ordinances assigned to the municipal court. Juveniles who commit felonies begin in the juvenile division, but may be transferred to the adult criminal division in a process called certification. Sixteen- and seventeen-year-old youths who commit any of the fifteen specified felonies set out in the statute begin in the adult criminal division, but may be transferred to the juvenile division in a process called reverse-certification.²⁹

B. The Juvenile Division

1. Preliminary Inquiry

Not every juvenile accused of committing a crime ends up in juvenile court. A screening process known as "preliminary inquiry," or "intake," determines whether the filing of a petition is necessary. The purpose of a preliminary inquiry is to divert as many juveniles away from court as possible. A social worker interviews the juvenile and the juvenile's parents, and then makes an initial determination whether the juvenile comes within the purview of the Juvenile Code, whether nonadjudicatory alternatives are available and appropriate, and whether a petition

24. *Id.* § 1103(B).

25. *Id.* § 1103.

26. *Id.* § 1101(8); *see also id.* § 1111(A).

27. *Id.* § 1114(B).

28. 10 OKLA. STAT. § 1115 (1991); 10 OKLA. STAT. § 1116 (1991 & Supp. 1993).

29. 10 OKLA. STAT. § 1101(1), (2) (1991 & Supp. 1993). *See also infra* notes 206-25 and accompanying text.

should be filed.³⁰ Given the Juvenile Code's philosophy, a juvenile's first crime is almost certain to be diverted from court. Instead, an informal adjustment will probably occur, such as deferred prosecution or counseling.³¹ However, if an informal adjustment is not practicable, a petition is filed.

2. The Petition

At one time in Oklahoma, any reputable person could file a juvenile delinquency petition.³² By judicial construction, the county attorney was placed in charge of prosecuting the case as *dominus litis* (master of the suit).³³ However, in 1968, the Oklahoma legislature amended the Juvenile Code to expressly limit the role of private individuals.³⁴ A private individual was therefore permitted to file a petition only by leave of court with the county attorney (now district attorney) retaining the duty to prepare and prosecute the case. Judges were then required to make a judicial inquiry to determine if action was warranted.³⁵ In 1977, the legislature eliminated the private individual's right to file a petition altogether.³⁶ Today, the district attorney prepares and prosecutes all delinquency petitions.³⁷

Once a petition is filed, the juvenile has the right to know the specifics of the charge. This right was recognized in the landmark case of *In re Gault*.³⁸ In *Gault*, the United States Supreme Court held that an accused juvenile and his parents have the right to notice of the charges. Due process thus requires that the juvenile and his parents "be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation."³⁹ The right to notice of the charges has been a part of Oklahoma's Juvenile Code since 1909,⁴⁰ and Oklahoma law has always guaranteed parties time to prepare for hearings.⁴¹

30. 10 OKLA. STAT. § 1101(10) (1991 & Supp. 1993).

31. *Id.* § 1103(A).

32. OKLA. COMP. LAWS ch. 13, art. I, § 596 (1909) (codified at 10 OKLA. STAT. § 1103 (1991 & Supp. 1993)); 10 OKLA. STAT. § 105 (1961).

33. *Ex parte Lewis*, 188 P.2d 367, 380 (Okla. Crim. App. 1947).

34. 1968 Okla. Sess. Laws ch. 282, § 103.

35. 10 OKLA. STAT. § 1109(E) (1991 & Supp. 1993).

36. 1977 Okla. Sess. Laws ch. 259, § 3 (codified at 10 OKLA. STAT. § 1103(B) (1991 & Supp. 1993)); *see also* *Davis v. Davis*, 708 P.2d 1102, 1107 n.23 (Okla. 1985) (describing the related area of deprived child proceedings).

37. 10 OKLA. STAT. § 1109(E) (1991 & Supp. 1993).

38. 387 U.S. 1 (1967).

39. *Id.* at 33.

40. OKLA. COMP. LAWS ch. 13, art. I, § 596 (1909). Before Oklahoma's adoption of a Juvenile Code in 1909, juveniles were processed through the criminal justice system, and were entitled to written notice either by grand jury indictment or prosecutor's information.

41. *Id.* § 597 (parties provided with a minimum of twenty-four hours notice). Today, the time granted to prepare for hearings has been doubled. *See* 10 OKLA. STAT. § 1105 (1991 & Supp. 1993).

Today, the juvenile and his or her parents have the right to written notice in the petition of: (1) the specific crime charged; (2) the alleged facts supporting the charge stated with particularity; (3) the list of witnesses the government intends to call; (4) the relief requested by the government; (5) the juvenile's

3. Amendments to the Petition and Subsequent Pleadings

After the juvenile petition is filed, the government cannot amend it, except with the court's permission.⁴² However, if the court grants an amendment, the parties are entitled to additional time for preparation to insure a full and fair hearing.⁴³ Because juvenile actions are special statutory proceedings,⁴⁴ no pleadings, including an answer, are required after the petition.⁴⁵ Moreover, summary judgment does not apply,⁴⁶ and no motion or pleading can be used to delay the adjudicatory hearing.⁴⁷ However, if the proof at the adjudicatory hearing does not change the substance of the alleged act, then the petition is deemed to have been amended to conform to the proof.⁴⁸ Finally, the court cannot change the adjudicatory category alleged in the prosecutor's petition.⁴⁹ For example, the court cannot change the nature of the case from a juvenile delinquency proceeding into one to determine whether the juvenile is "deprived"⁵⁰ or "in need of supervision."⁵¹

4. Summons

After the prosecutor files the petition, a summons is issued.⁵² In Oklahoma, juveniles and their parents have had the right to an issuance of summons since the adoption of the Juvenile Code in 1909.⁵³ The summons should briefly recite the nature of the juvenile delinquency proceeding, reference the attached petition, and require the person or persons having custody of the juvenile to accompany the juvenile to the specified proceeding. It should also state the relief requested and the right of the juvenile, parents, and other interested parties to be represented by a lawyer.⁵⁴ The summons is then served on the person having actual custody of the juvenile.⁵⁵ If the juvenile is twelve or older, a copy must also be served on the

name, age and residence; (6) the names and residences of the juvenile's parents; (7) the name and residence of the juvenile's legal guardian, if any; (8) the name and residence of the person or persons having custody or control over the juvenile; and (9) if no parent or guardian can be found, then the name and residence of the nearest known relative. *Id.* § 1103(B). A copy of the juvenile delinquency petition must be attached to, and delivered with, the summons. *Id.* § 1103.

42. 10 OKLA. STAT. § 1103.1(B) (1991).

43. *Id.*

44. *In re Christina T.*, 590 P.2d 189, 193 (Okla. 1979); *see also* 12 OKLA. STAT. § 2001 (1991) including the committee comment to § 2001.

45. 10 OKLA. STAT. § 1103.1(A) (1991); *see also In re Christina T.*, 590 P.2d at 192.

46. 10 OKLA. STAT. § 1103.1(A) (1991); *see also In re Christina T.*, 590 P.2d at 192.

47. 10 OKLA. STAT. § 1103.1(A) (1991).

48. *Id.* § 1103.1(B).

49. *Id.*

50. *See* 10 OKLA. STAT. § 1101(4) (1991 & Supp. 1993) (defining "deprived child").

51. *See also id.* § 1101(3) (defining a "child in need of supervision").

52. *Id.* § 1104(A).

53. OKLA. COMP. LAWS ch. 13, art. I, § 597 (1909).

54. 10 OKLA. STAT. § 1104(A) (1991 & Supp. 1993).

55. *Id.*

juvenile, with a separate copy served on a custodial parent, guardian, or next friend.⁵⁶

5. Arrest Warrant

The district attorney can submit an application to a magistrate for a warrant for the juvenile's arrest. The application must state facts sufficient to demonstrate probable cause to believe that the juvenile committed a crime.⁵⁷ In addition, all requirements for the issuance of an arrest warrant for an adult offender,⁵⁸ including the identification of the crime charged, must be satisfied.⁵⁹ The magistrate then determines whether probable cause exists and whether to issue the arrest warrant.⁶⁰

6. Pretrial Detention or Release

Even if a juvenile is arrested, it is unlikely that he or she will ever be jailed. Amendments to the Juvenile Code, growing primarily out of the federal lawsuit known as *Terry D.*,⁶¹ have made it all but impossible to jail a juvenile.⁶² In lieu of jail, a juvenile can be placed in secure juvenile detention. However, even that seldom happens.

Under *Terry D.* and Oklahoma's current Juvenile Code, the accused juvenile has the right to what is known as the "least restrictive alternative," or a presumption of releasability. This usually means that the juvenile is released to his or her parents in the hope that the juvenile will return to court at a specified date and time.⁶³ However, if the prosecutor wants to try and detain the juvenile, then he or she is taken immediately before a magistrate for a detention hearing. At the detention hearing, the prosecution must prove that probable cause exists to detain the juvenile.⁶⁴ Even if the prosecutor proves the juvenile probably committed the crime and that the juvenile should be detained, the juvenile still has the statutory right to be released on bail.⁶⁵

56. *Id.*

57. *Id.* § 1107(A)(2).

58. *Id.* § 1104(E).

59. *Id.*; see also 10 OKLA. STAT. § 1106 (1991) (stating that a warrant may be issued against the parent, guardian, or the juvenile himself).

60. 10 OKLA. STAT. § 1107(A)(2) (1991 & Supp. 1993). It is possible to arrest a juvenile without a warrant. If a juvenile is caught committing a crime, the juvenile can be arrested by a police officer or court employee. *Id.* § 1107(A)(1). The district attorney must then file the juvenile delinquency petition within five days; otherwise the juvenile must be released to his or her parents. *Id.* § 1104.1(A). See *infra* text accompanying notes 61-69.

61. *Terry D. v. Rader*, 93 F.R.D. 576 (W.D. Okla. 1982).

62. See 1993 Okla. Sess. Laws ch. 342, § 6 (codified at 10 OKLA. STAT. § 1107.1 (D)-(E) (Supp. 1993); 1993 Okla. Sess. Laws ch. 205, § 2 (adding a new subsection, § 1107.1(d)(4), for enforcing detention orders from other states).

63. 10 OKLA. STAT. § 1107(B) (1991 & Supp. 1993).

64. *Id.*; see also *id.* § 1107.1. Even then, the juvenile can only be detained if it is necessary to assure the juvenile's appearance in court or for the protection of the juvenile or the public. *Id.* § 1107.1(A).

65. *Id.* § 1107(B). The United States Constitution does not guarantee juveniles the right to bail. In *Schall v. Martin*, 467 U.S. 253, 281 (1984), the Supreme Court held that pretrial detention of juveniles

If the juvenile fails to make bail, he or she will still likely be prematurely released as the magistrates order for detention lasts no more than thirty days, and can only be extended for an additional thirty days if good cause is shown.⁶⁶ Nevertheless, after ninety days, the juvenile must be released from detention even if he or she cannot make bail and even if probable cause exists.⁶⁷

The Juvenile Code further prohibits the magistrate from placing a juvenile in secure detention unless the prosecutor can prove limited and specific extraordinary circumstances.⁶⁸ Even then, a secure detention order lasts for no more than ten days, with extensions granted only if the prosecutor files an additional application. A secure detention hearing is again conducted, with the juvenile having the right to be present and to have an attorney at the hearing. Again, the burden is placed on the prosecutor to prove extraordinary circumstances, and only then is the magistrate authorized to extend the secure detention order; but the juvenile may be detained for no more than an additional ten days. Eventually, unless the district attorney files yet another application starting the process all over again, or at the end of ninety days, the Juvenile Code requires that the juvenile be released from secure detention.

This circular procedure can lead to bizarre results. For example, in September 1992, a fifteen-year-old boy broke into the home of his ninety-year-old neighbor. The juvenile burglarized the home, then beat and stabbed the elderly occupant to death. The police soon caught the juvenile and placed him in secure detention. However, this detention presented no problem for him as he simply waited out the ninety days, at which time, by order of the Oklahoma court of Criminal Appeals, he was released. Seminole County District Attorney Bill Peterson declared the release to be "unbelievable." Peterson then had the unpleasant duty of telling the victim's family that the juvenile had been set free. "I told them, 'I'm going to ruin your Christmas.' They were kind of numb when I told them. Their mouths fell open. They were dumbfounded."⁶⁹

is constitutional if due process standards are met. Of course, states can grant juveniles greater protections than those afforded by the United States Constitution. Oklahoma has done just this by granting juveniles the right to bail since the original enactment of the Juvenile Code in 1909. OKLA. COMP. LAWS ch. 13, art. I, § 602 (1909). Today, an accused juvenile has the same right to be released on bail as an adult. 10 OKLA. STAT. § 1107(B) and (C) (1991 & Supp. 1993).

66. 10 OKLA. STAT. 1107.1(A)(1)(a) (1991 & Supp. 1993).

67. *Id.* § 1107.1(A)(1)(b).

68. *Id.* § 1107.1(B) and (C).

69. *Youth Freed of Charge*, LAWTON CONST., Dec. 25, 1992, at 12A. The Court of Criminal Appeals eventually ruled that Mitchell should stand trial as an adult. Stacy D. Johnson, *Teen Faces Murder Trial As Adult After Ruling*, SATURDAY OKLAHOMAN & TIMES, Apr. 17, 1993, at 12. See also *State v. R.W.M.*, 64 OKLA. B.J. 1299 (1993), which appears to be the Mitchell case. A Seminole County jury later convicted Mitchell of first-degree murder and first-degree burglary. The jury recommended Mitchell serve life in prison without parole for killing McGeehee and assessed the maximum 20-year sentence for the burglary. *Jury Recommends Life Term for Teen*, DAILY OKLAHOMAN, Sept. 24, 1993, at 8. The judge followed the jury's recommendation. *Teen Sentenced to Life Term*, DAILY OKLAHOMAN, Nov. 2, 1993, at 5.

7. *The Adjudicatory Hearing*

The adjudicatory hearing must be conducted according to the rules of evidence.⁷⁰ This is one of the better provisions of the Juvenile Code, ensuring that an adjudication of delinquency is based on reliable evidence. However, the rules of evidence do not apply to every stage of juvenile proceedings. For example, the rules do not apply to the issuance of an arrest warrant, search warrant, as well as to bail hearings, juvenile emergency show-cause hearings⁷¹ or dispositional hearings.⁷²

a) The Right to a Secret Hearing

Generally, the juvenile has the right to a secret hearing.⁷³ This right derives from the Juvenile Code's social welfare philosophy which maintains that the juvenile should not have his or her crimes exposed to public view because it might hamper "rehabilitation." But once again, such an approach is too narrow. The public and press are being barred from vital governmental action — the determination of whether a citizen has committed a crime. Moreover, an open trial is important to the preservation of the integrity of the judicial system. The juvenile hearing must be open so that the public can ensure that all proceedings are fair and regular.

Another problem with secret hearings is that the juvenile can hide past criminal activity from future prey. For example, if the juvenile is convicted of a violent or sexually related crime, then at eighteen the juvenile can gain employment at a day care center, a children's nursery, or any other place where the character of the applicant is an important consideration, since the crime is not a matter of public record. Parents and child care providers should not be denied the vital information necessary to protect innocent children. A better approach is to open all records and hearings to the public unless the record or specific evidence needs to be closed. Such closure should only be allowed upon a court order in which the judge must explain, in writing, the reasons for closure.

Unfortunately, Oklahoma's current Juvenile Code takes an opposite approach. Hearings are closed unless specifically ordered by the judge to be conducted in public.⁷⁴ Only persons having a "direct interest" in the case are admitted.⁷⁵ Given the secrecy surrounding juvenile proceedings, it once appeared that even the juvenile's victims might be excluded. However, with the emergence of the victim's rights movement, the 1993 legislature added a provision to the Juvenile Code requiring that the victim or a relative be notified of all court hearings and be considered a person having a "direct interest" in the case.⁷⁶ Unfortunately, the legislature failed to identify who is responsible for giving the notice. However, the

70. 10 OKLA. STAT. § 1111(A) (1991 & Supp. 1993).

71. 12 OKLA. STAT. § 2103(B)(2) (1991).

72. 10 OKLA. STAT. § 1115(a) (1991).

73. 10 OKLA. STAT. § 1111(A)(1) (1991 & Supp. 1993).

74. *Id.* Second and subsequent offenses are public. *Id.* § 1111(A)(2).

75. *Id.* But see *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 317 (1977) (stating that if the press is admitted into a delinquency hearing, the court cannot enjoin publication).

76. 10 OKLA. STAT. § 1111(A)(1) (1991 & Supp. 1993).

district attorney should be required to provide the notice as he or she is required by law to prepare and prosecute delinquency cases.⁷⁷

b) Right to a Separate Trial

The juvenile has the right to have his or her case heard separately from the trial of adults.⁷⁸ From the juvenile's point of view, this is a significant advantage because it means the juvenile will not stand trial with adult accomplices or adult co-conspirators. For example, assume two gang members, ages eighteen and fifteen, stalk, rape, torture, and then stab a young girl to death. The eighteen-year-old, considered an adult in Oklahoma, will be tried in the district court's criminal division. If convicted of first degree murder, he will face life imprisonment, life without parole, or possibly the death penalty. However, the fifteen-year-old will be tried separately in the juvenile division, where he can plead that he is "just a child." In all probability he will never face an adult trial, will neither be convicted of any crime nor punished, and will soon be back on the street. This scenario holds true even if he is the more vicious and violent murderer. While this is a great bargain from the juvenile's point of view, it does not serve justice.

Another problem extending from this aspect of the Juvenile Code is that it focuses narrowly on the welfare of the criminal while ignoring the crime victim. For example, had the young girl somehow survived, the Code's mandate of separate trials means the young girl will have to relive the horror over and over again. She will be forced through a criminal preliminary hearing, possibly a certification hearing, plus two separate trials. While multiple trials may work to be a strategic advantage for the juvenile, allowing the defense to drag the victim back to court over and over again exacts an impermissibly high price on the juvenile.

c) The State Bears the Burden of Proof

In the 1970 case of *In re Winship*,⁷⁹ the United States Supreme Court held that the United States Constitution places the burden of proof in juvenile proceedings on the state.⁸⁰ Oklahoma's Juvenile Code, however, has always placed the burden of proof on the state in such a situation.⁸¹

While it is clear that the state bears the burden of proof in a juvenile proceeding, the Oklahoma Juvenile Code has never defined what standard of proof is required for a delinquency adjudication.⁸² This uncertainty was clarified when the United States Supreme Court decided the issue as a matter of constitutional law. In *In re*

77. *Id.* § 1109(E).

78. This right was added to Oklahoma's Juvenile Code by 1968 Okla. Sess. Laws ch. 282, § 111. For the latest version of a juvenile's right to a separate trial, see 10 OKLA. STAT. § 1111(A) (1991 & Supp. 1993).

79. 397 U.S. 358 (1970).

80. *Id.* at 368.

81. 10 OKLA. STAT. § 1109(E) (1991 & Supp. 1993).

82. 10 OKLA. STAT. § 1114(B) (Supp. 1994) (providing that if "the court finds that the allegations of a petition alleging a child to be delinquent . . . are supported by the evidence, the court shall sustain the petition," but not specifying the standard of proof).

Winship,⁸³ the Court held that accused delinquents, like adults, are entitled to a presumption of innocence.⁸⁴ The juvenile thus has the right to demand that the government prove its case beyond a reasonable doubt. "Beyond a reasonable doubt" is the highest possible standard of proof which is ordinarily not used in other types of juvenile proceedings. For example, in a deprived child proceeding, the government need only prove its case by a preponderance of the evidence.⁸⁵ And in a children's mental health case, the government must prove its case by clear and convincing evidence.⁸⁶

Consequently, if the government fails to prove delinquency beyond a reasonable doubt, the judge must dismiss the petition. The juvenile is discharged from all detention or restriction, with the juvenile's parents also discharged from any restriction or temporary order.⁸⁷ However, if the government proves its case, the judge sustains the petition, adjudicates the juvenile "delinquent,"⁸⁸ and adjudges the juvenile a ward of the court.⁸⁹

8. Disposition

If a juvenile delinquent is found guilty of a crime, even a vicious or violent crime such as rape, armed robbery, or murder, he or she cannot be jailed. The Code abandons the concept of punishment, instead demanding that an individual service and treatment plan be filed with the court within thirty days after the juvenile is adjudged delinquent.⁹⁰ The plan should identify the specific services to be provided to the delinquent,⁹¹ the delinquent's parents, and/or other family members.⁹² Under the Code, the State becomes the servant of the delinquent and his family. The Code therefore assumes that delinquents should remain in their own homes — the same environment that may have spawned their criminal behavior. Any suggestion that

83. 397 U.S. 358 (1970).

84. *Id.* at 368.

85. Edward L. Thompson, *Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts*, 15 AM. INDIAN L. REV. 1 (1990). Of course, termination of parental rights under the Indian Child Welfare Act requires proof beyond a reasonable doubt. *In re J.W.*, 742 P.2d 1171, 1175 (Okla. Ct. App. 1987).

86. Edward L. Thompson, *Children in Need of Mental Health Treatment: A Judge's View of Revised Public Law and New Private Law Proceedings*, 26 TULSA L.J. 347 (1991).

87. 10 OKLA. STAT. § 1113 (1991).

88. Rule 8.2 of the Rules for the District Court of Oklahoma, found at 12 OKLA. STAT. ch. 2, app. (1991), requires that the order adjudicating the juvenile delinquent contain the following findings of fact and findings of compliance: (1) the delinquent's correct, full legal name; (2) the delinquent's date of birth; (3) compliance with the Federal Indian Child Welfare Act of 1978 (The requirement of compliance with the Federal ICWA is curious, because the Act itself expressly excludes delinquency proceedings, see 25 U.S.C. § 1903(1)(iv) (1988) ("Such term or terms shall not include placement based upon an act which, if committed by an adult, would be deemed a crime . . .")); and (4) compliance with the Uniform Child Custody Jurisdiction Act (UCCJA). Although Rule 8.2 still cites the UCCJA as "10 O.S. 1601 et seq.," it was recodified in 1990 and now is found at 43 OKLA. STAT. §§ 501-527 (1991).

89. 10 OKLA. STAT. § 1114(B) (1991 & Supp. 1993).

90. *Id.* § 1115.1(A).

91. *Id.* § 1115.1(A)(2)(a).

92. *Id.* § 1115.1(A)(2)(b).

a delinquent should be removed from his or her home must be explained in writing.⁹³

The court then holds a dispositional hearing⁹⁴ designed to determine what to do with the juvenile criminal. The dispositional hearing is heard by a judge rather than a jury, and strict rules of evidence do not apply. Instead, all evidence helpful in reaching a disposition which will best serve the interest of the juvenile criminal and the public is admissible. Such evidence includes oral and written reports.⁹⁵ Of course, the judge must advise parties and counsel of the factual contents and conclusions of all reports, affording a fair opportunity to controvert them.⁹⁶

a) Disposition Orders

The Code limits the court in the types of dispositional orders it can issue.⁹⁷ As previously discussed, the court cannot sentence a delinquent to jail, even for atrocious crimes, as the Code and its underlying philosophy decriminalizes all juvenile behavior. In fact, the court's first option is simply to send the delinquent home on "probation."⁹⁸ The hope is "rehabilitation"; that the delinquent will stop committing crimes once he or she gets services and treatment.

The second option is to place the delinquent with a private institution or agency.⁹⁹ However, a private institution or agency may not be willing to accept the delinquent. Moreover, as with own-home placement, there is no practical way to prevent the delinquent, if he or she desires, from committing more crimes.

Third, the court may order the delinquent to receive counseling or other community-based services.¹⁰⁰ Again, because the delinquent is not in a secure facility, the judge is reduced to hoping that the delinquent will commit no further crimes.

Fourth, the court may commit the delinquent to the custody of the DHS.¹⁰¹ However, at that point, the DHS decides where to place the delinquent and for how long. As a practical matter, the DHS will probably not place the delinquent in a secure institution, primarily because of a 1978 lawsuit filed against the state of Oklahoma for the mishandling of juveniles. The lawsuit, now known as *Terry D.*,¹⁰² resulted in a 1984 consent decree¹⁰³ and federal monitoring over Oklahoma, which still continues. The practical effect was deinstitutionalization, as Oklahoma

93. *Id.* § 1115.1(A)(3).

94. 10 OKLA. STAT. § 1115 (1991); *see also* 10 OKLA. STAT. § 1101(9) (1991 & Supp. 1993) (defining dispositional hearing as "a hearing to determine the order of disposition which shall be made with respect to a child adjudged to be a ward of the court").

95. 10 OKLA. STAT. § 1115(a) (1991).

96. *Id.* § 1115(b).

97. All disposition orders must be reviewed by the court every six months. 10 OKLA. STAT. § 1116.1 (1991 & Supp. 1992).

98. *Id.* § 1116(A)(1).

99. *Id.* § 1116(A)(2).

100. *Id.* § 1116(A)(3).

101. *Id.* § 1116(A)(4).

102. *Terry D. v. Rader*, 93 F.R.D. 576 (W.D. Okla. 1982).

103. *Id.* (consent decree filed May 31, 1984).

soon closed virtually all its secure juvenile institutions. Today, the DHS has only 201 secure placement beds,¹⁰⁴ many of which are only for temporary placement of 30, 60, or 90 days. Moreover, because these few secure placements are usually full, the DHS must usually place delinquents in nonsecure settings, hoping that they will commit no additional crimes.

Fifth, if the juvenile is placed outside the home, the court may make the juvenile's parents and household members subject to a treatment or placement plan if they contributed to the juvenile's delinquency.¹⁰⁵

Sixth, the court may order the delinquent to pay a victim's compensation assessment, perform community service, or pay a fine. The court has further authority to revoke the delinquent's driver's license, sanction detention in the delinquent's own home, with DHS, or a juvenile bureau, impose weekend detention, tracking, or house arrest with electronic monitoring, or impose sanctions for violating probation.¹⁰⁶ The delinquent, his parents, or both, may also be ordered to reimburse the court fund. If the parent willfully fails to pay, the parent may be held in contempt of court.¹⁰⁷

Seventh, the court may dismiss the case for good cause shown.¹⁰⁸

b) The "Reasonable Efforts" Requirement

Every dispositional order removing a delinquent from his or her home must contain a court finding that "reasonable efforts have been made to provide for the return of the child to the child's own home, or that efforts to reunite the family are not feasible, and reasonable efforts are being made to secure an alternate placement."¹⁰⁹

C. Additional Guaranteed Rights

1. The Right To Remain Silent

The juvenile's right to remain silent is protected by both the United States Constitution and state law. The United States Supreme Court extended the constitutional privilege against self-incrimination to juvenile delinquency proceedings in *In re Gault*,¹¹⁰ stating "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."¹¹¹ Oklahoma's Juvenile Code provides that the juvenile "may remain silent

104. Central Oklahoma Juvenile Center has 38 beds. L.E. Rader Center has 163 beds (Diagnostic Center, 15; New Start, 32; R.T.P., 60; and I.J.P., 56). Telephone interview with Dan Broughton, Programs Administrator, Office of Juvenile Justice, Okla. Dep't of Human Servs. (Aug. 30, 1993); Okla. Dep't of Human Servs., Annual Report for FY '93 (1993) (on file with the *Oklahoma Law Review*).

105. 10 OKLA. STAT. § 1116(A)(5) (1991 & Supp. 1993).

106. *Id.*; see also *id.* § 1116(A)(6)(a)-(g).

107. *Id.* § 1116(E). Parents can also be held liable for the care and maintenance of their child. 10 OKLA. STAT. § 1121 (1991).

108. 10 OKLA. STAT. § 1116(A)(7) (1991 & Supp. 1993).

109. *Id.* § 1116(A)(8).

110. 387 U.S. 1 (1967).

111. *Id.* at 55.

as a matter of right in delinquency hearings . . . and before he is interrogated he shall be so advised."¹¹²

Oklahoma's response to *Gault* was not simply to incorporate this constitutional privilege, but to shift the balance to the side of the juvenile against law enforcement. This partiality is evidenced by the restrictions placed on the questioning of children by law enforcement officers.¹¹³ A juvenile cannot be questioned unless his or her parents, guardian, legal custodian, or lawyer is present. Moreover, before questioning begins, both the juvenile and the juvenile's parents, guardian, or custodian must be "fully advised of the constitutional and legal rights" of the juvenile, including the right to be represented by a lawyer at every stage of the proceedings, and the right to a court-appointed lawyer if the juvenile is an indigent.¹¹⁴ Unfortunately, the legislature gave no further explanation of what it meant by "constitutional and legal rights" before questioning. However, it probably refers to the familiar *Miranda*¹¹⁵ warnings routinely administered by police to criminal suspects before custodial questioning. These restrictions on the questioning of juveniles extend not only to police, but also to DHS personnel, court employees, and investigative agencies.¹¹⁶

The right to remain silent is especially important in juvenile delinquency proceedings and should be retained. Because adolescence can be a time of great instability, a juvenile, under stress, may falsely acknowledge guilt. Moreover, a juvenile may succumb to the fear or panic associated with a delinquency proceeding. Therefore, without appropriate safeguards, the juvenile's admissions or confessions may not be trustworthy.¹¹⁷

Finally, there are limits to how far our government can go. The Constitution and Juvenile Code thus prevent the government, "whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."¹¹⁸ Great care must be taken to assure that any statement made by an accused juvenile is voluntary, not only in the sense that it is not forced, coerced,

112. 10 OKLA. STAT. § 1111(B) (1991 & Supp. 1993).

113. 1968 Okla. Sess. Laws ch. 282, § 109 (codified at 10 OKLA. STAT. § 1109(A) (1991 & Supp. 1993)).

114. 10 OKLA. STAT. § 1109(A) (1991 & Supp. 1993).

115. *Miranda v. Arizona*, 384 U.S. 436 (1966).

116. 10 OKLA. STAT. § 1109(A) (1991 & Supp. 1993). One consequence of failing to follow the restrictions on questioning is that any information gained is not admissible. The "fruit of the poisonous tree" doctrine may also be applicable, rendering any evidence later obtained as a result of the tainted statement inadmissible. *Id.*; see also *R.S. v. State*, No. J-89-1329 (Okla. Crim. App. June 8, 1991); *K.J.M. v. State*, 811 P.2d 103 (Okla. Crim. App. 1991); *Young v. State*, 807 P.2d 276 (Okla. Crim. App. 1991); *Williams v. State*, 807 P.2d 271 (Okla. Crim. App. 1991); *R.W.D. v. State*, No. J-90-0078 (Okla. Crim. App. Jan. 8, 1991); *State v. S.J.A.*, No. J-90-343 (Okla. Crim. App. Aug. 7, 1990); *Harris v. State*, 777 P.2d 1359 (Okla. Crim. App. 1989).

117. *Haley v. Ohio*, 332 U.S. 596 (1948) (reversing conviction in adult criminal court of 15-year-old boy for murder); *In re Gault*, 387 U.S. 1, 45 (1967) (extending privilege to juvenile delinquency proceedings).

118. *Gault*, 387 U.S. at 47.

or suggested, but also that it is "not the product of ignorance of rights or of adolescent fantasy, fright or despair."¹¹⁹

2. Right to a Lawyer

As mentioned previously,¹²⁰ a juvenile must be informed of his or her right to an attorney before that juvenile can be questioned. This right to an attorney also extends to all aspects of a juvenile proceeding. The juvenile's right to an attorney was explained in *In re Gault*,¹²¹ where the United States Supreme Court held that the accused juvenile, as well as his or her parents, must be notified of the juvenile's right to be represented by an attorney. Moreover, if the juvenile is an indigent, he or she has the right to a court-appointed attorney.¹²² The Court declared that this right to representation, which springs from the Fourteenth Amendment's Due Process Clause, mandates that there be "the guiding hand of counsel at every step in the proceedings."¹²³ The Court thus demonstrated its belief that a lawyer can help the juvenile cope with the problems of law by skillfully inquiring into the facts, insisting on regular proceedings, determining whether the accused has a defense, and preparing and submitting the juvenile's case.¹²⁴ It should be noted that the juvenile's right to a lawyer is also specifically guaranteed by Oklahoma law.¹²⁵ In fact, the Juvenile Code expressly forbids parents from attempting to "waive" the juvenile's right to a lawyer.¹²⁶

3. Right to a Jury Trial

In *McKeiver v. Pennsylvania*,¹²⁷ the United States Supreme Court held that the Due Process Clause does not grant juveniles the right to trial by jury at the adjudicatory phase of a juvenile delinquency proceeding.¹²⁸ However, states are free to grant their citizens greater protection than that afforded under the United States Constitution. In fact, in the words of Oklahoma's Court of Criminal Appeals, this state is one of the few states which provides "greater safeguards for the rights of juveniles than are required by the United States Constitution."¹²⁹

Oklahoma has been granting juveniles the right to trial by jury since 1909.¹³⁰ Significantly, Oklahoma considers the juvenile's right to trial by jury so important that, for a time, the right was even added to the Oklahoma Constitution.¹³¹ Today,

119. *Id.* at 55.

120. *See supra* note 114.

121. 387 U.S. 1 (1967).

122. *Id.* at 41.

123. *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45 (1932)).

124. *Id.*

125. 10 OKLA. STAT. § 1109(A) and (B) (1991 & Supp. 1993); *see also* 10 OKLA. STAT. § 24 (1991).

126. 10 OKLA. STAT. § 1109(B) (1991 & Supp. 1993). Moreover, although not required by federal law, the juvenile has a right to a guardian ad litem under the Juvenile Code. *Id.* § 1109(C).

127. 403 U.S. 528 (1971).

128. *Id.* at 551.

129. *Alford v. Carter*, 504 P.2d 436, 439 (Okla. Crim. App. 1972).

130. OKLA. COMP. LAWS ch. 13, art. I, § 595 (1909).

131. The juvenile's right to a jury trial was added to Oklahoma's Constitution by State Question No.

the right to a jury trial at an adjudicatory hearing to determine whether the juvenile is delinquent still survives in the Juvenile Code.¹³² However, it applies only to the adjudicatory phase, and not to disposition, which is heard by the court.

4. *Right to a Transcript*

In *In re Gault*,¹³³ the United States Supreme Court expressly declined to address the issue of whether the Due Process clause requires that a transcript of the delinquency proceedings be provided to the juvenile. However, even if a transcript is not constitutionally required, Oklahoma law provides that stenographic notes or a transcript shall be kept.¹³⁴ This is a sound provision as a record of the proceedings protects everyone, while facilitating meaningful appellate review.

Nevertheless, a problem remains. The Juvenile Code provides that the transcript is secret and should not be open to public inspection without court order.¹³⁵ This law should be changed. The public has a right to know what its government is doing. To strike a better balance between the juvenile's right to privacy and the public's right to know, the law should provide that all hearings and transcripts are open to public inspection, except where the court, for good cause shown, closes a specific part of a hearing or portion of a transcript. Even then, the judge should be required to explain, in writing, the reasons for closure.¹³⁶

5. *Right to Credible Testimony*

The United States Constitution and the Oklahoma Juvenile Code also guarantee the juvenile that all testimony at the adjudicatory hearing will be sworn under oath.¹³⁷ Again, this increases the reliability of the adjudication. The United States Constitution and the Oklahoma Juvenile Code also guarantee the juvenile the right to confront his or her accusers.¹³⁸ Finally, the United States Constitution and the Oklahoma Juvenile Code guarantee the juvenile the right to cross-examine his accusers.¹³⁹ The right to cross-examine is perhaps the most important tool in the search for truth.

6. *Delinquents Retain Their Civil Rights*

Under Oklahoma's Juvenile Code, even delinquents convicted of serious crimes retain their civil rights. Convictions for crimes committed under the Juvenile Code do not count against the juvenile for purposes of "employment, civil rights, or any

459, Legislative Referendum No. 172, adopted at election held September 17, 1968, effective Jan. 13, 1969. The right was deleted from Oklahoma's Constitution by State Question No. 623, Legislative Referendum No. 277, adopted at election held on Aug. 28, 1990.

132. 10 OKLA. STAT. § 1110 (1991 & Supp. 1993). The jury consists of six persons.

133. 387 U.S. 1, 58 (1967).

134. 10 OKLA. STAT. § 1111(A)(1) (1991 & Supp. 1993).

135. *Id.*

136. See *supra* notes 73-77 and accompanying text.

137. *Gault*, 387 U.S. at 57; 10 OKLA. STAT. § 1111(C) (1991 & Supp. 1993).

138. *Gault*, 387 U.S. at 42; 10 OKLA. STAT. § 1111(C) (1991 & Supp. 1993).

139. *Gault*, 387 U.S. at 57; 10 OKLA. STAT. § 1111(C) (1991 & Supp. 1993).

statute, regulation, license, questionnaire, application, or any other public or private purposes.¹⁴⁰ Once again, under the social welfare theory, juveniles who kill, rape, and maim are not criminals but simply misguided youths. Under such a philosophy, it is not helpful to their rehabilitation to be labeled as criminals, or even for the public to know of their crimes. Unfortunately such a naive philosophy gives predators just the chance they need to attack new victims.¹⁴¹

D. The Municipal Court Exception

In the wake of an unmanageable increase of juvenile felony cases, the Oklahoma legislature, in 1989, created the municipal court exception.¹⁴² During this period of increasing crime, juvenile division judges, prosecutors, and public defenders were swamped with juvenile felony cases, leaving little time and resources to address misdemeanors. The legislature therefore authorized the governing bodies of municipalities to enter into agreements with the district court, allowing the municipal court to assume jurisdiction over juveniles who commit the crimes of vandalism, shoplifting, or public intoxication.¹⁴³ While juveniles convicted in a municipal court can be required to pay a fine, perform community service work, receive counseling, or complete other community based services, the legislature still forbids municipalities from imposing jail time as punishment. The legislature still, however, requires that juveniles' crimes be hidden from public view.¹⁴⁴

Over the years, the legislature has added numerous additional misdemeanors to those overseen in the municipal courts. There are now twelve: vandalism, shoplifting, trespassing, assault, battery, assault and battery, truancy, curfews, possession of 3.2 beer, possession of alcoholic beverages, disorderly conduct, and public intoxication.¹⁴⁵

E. The Traffic Exception

The legislature created a traffic exception to juvenile jurisdiction in 1968.¹⁴⁶ Under this exception, routine violations are processed through the district and municipal

140. 10 OKLA. STAT. § 1125.4 (1991 & Supp. 1993).

141. For example, assume that a juvenile has been detained for raping and sodomizing young children. Assume further that, under the Juvenile Code, the juvenile is adjudicated delinquent. When the juvenile turns eighteen, he or she seeks employment where there is easy access to children: as a day-care worker, maintenance crew of a children's hospital or public school, etc. The employer is very careful, and specifically asks whether the applicant is a convicted child molester. The applicant responded with a smile, knowing that the Juvenile Code says none of his actions are crimes and that all his juvenile records are sealed. He will be on the job tomorrow, waiting for the children. *Id.*

142. 1989 Okla. Sess. Laws ch. 269, § 1.

143. *Id.*

144. *Id.*

145. 10 OKLA. STAT. § 1102(E) (1991 & Supp. 1993).

146. 1968 Okla. Sess. Laws ch. 252, §§ 101, 112. The most recent version is 1993 Okla. Sess. Laws ch. 342, § 1 (codified at 10 OKLA. STAT. §§ 1101(2)(a) (1991 & Supp. 1993)) and 1993 Okla. Sess. Laws ch. 342, § 7 (codified at 10 OKLA. STAT. § 1112(A) (1991 & Supp. 1993)). See also Shirley A. Cox, *Juvenile Law: Jurisdiction of Juveniles in Driving Under the Influence Cases*, 33 OKLA. L. REV. 399 (1980).

courts' criminal divisions. Only juveniles who habitually violate traffic laws are subject to juvenile division jurisdiction.¹⁴⁷

The theory behind the traffic exception is straightforward: the Juvenile Code's social welfare philosophy simply does not apply to a minor traffic offense.¹⁴⁸ Because traffic violations are generally noncriminal in nature, the stigma of criminality does not attach to a traffic ticket;¹⁴⁹ such violations are merely *malum prohibitum* rather than *malum in se*.¹⁵⁰ Branding an errant driver delinquent and subjecting him or her to the same range of disposition as one who committed a very serious crime makes no sense.¹⁵¹

While the traffic exception usually works well, there are some trouble areas that should be noted. For instance, what about the juvenile who drives recklessly, drives drunk, or commits vehicular negligent homicide? Unfortunately, the legislature has never defined what crimes are included in the traffic exception, so it has been up to the Oklahoma Court of Criminal Appeals to sort out which crimes fall under this exception.

In *Mook v. City of Tulsa*,¹⁵² the court held that reckless driving falls within the traffic exception.¹⁵³ Mook, age sixteen, was charged in Tulsa Municipal Court with violating the city ordinance against reckless driving. The jury convicted the juvenile and fixed his punishment at sixty days in jail and a twenty-five-dollar fine. The Oklahoma Court of Criminal Appeals upheld the conviction and fine, but vacated Mook's incarceration.¹⁵⁴ The court held that even though the municipal court had jurisdiction to convict and fine Mook, it could not sentence a juvenile to jail without a certification proceeding.¹⁵⁵

The court ruled the same way in *Franshier v. City of Oklahoma City*.¹⁵⁶ Franshier, age seventeen, was charged in Oklahoma City Municipal Court with driving under the influence of alcohol. The penalty for drunk driving under the city ordinance is a fine, imprisonment, or both. However, the municipal judge, relying on *Mook*, instructed the jury that the only punishment for a juvenile was a fine. Upon conviction, Franshier was fined. The Oklahoma Court of Criminal Appeals affirmed, stating: "[T]he juvenile act compels the conclusion that no child be sentenced to incarceration in a criminal action in the absence of certification proceedings."¹⁵⁷

The conclusion drawn from these cases is that reckless driving, DUI, and DUI's lesser included offenses are all traffic in nature. The juvenile will thus be tried as an

147. 10 OKLA. STAT. § 1101(2) (1991 & Supp. 1993). But compare *State v. Gray*, 803 P.2d 718, 720 (Okla. Crim. App. 1990) (erroneously referring to the traffic exception as the exercise of concurrent jurisdiction).

148. *D.M.T. v. Edmiston*, 560 P.2d 976, 977 (Okla. Crim. App. 1977).

149. *Id.*

150. *Id.*

151. *Id.*

152. 565 P.2d 1065 (Okla. Crim. App. 1977).

153. *Id.* at 1067.

154. *Id.* at 1068.

155. *Id.* at 1067.

156. 620 P.2d 1347 (Okla. Crim. App. 1980).

157. *Id.* at 1349.

adult in the district court's criminal division or municipal court, and if found guilty, the judgment and sentence is an adult criminal conviction, rather than a juvenile adjudication. However, the juvenile still cannot face jail time as a penalty.¹⁵⁸

The Oklahoma Court of Criminal Appeals has also decided whether vehicular negligent homicide falls within the traffic exception.¹⁵⁹ In *D.M.T. v. Edmiston*,¹⁶⁰ the court held that negligent homicide is not a traffic violation, and thus the district court's criminal division has no jurisdiction.¹⁶¹ A juvenile accused of committing negligent homicide can therefore only be processed through the juvenile division.

This ruling creates a serious problem as the Juvenile Code forbids juvenile division judges from jailing criminals — even those who kill. Further, because the statutory punishment for negligent homicide is not more than one year in the county jail,¹⁶² the crime is not a felony. Therefore, the judge can neither certify the juvenile as an adult, nor transfer the case to the district court's criminal division. In other words, a juvenile can drive with reckless disregard for the safety of others, crash into another car and kill the driver, but he or she cannot spend a single day in jail or be convicted of any crime.

Unfortunately, this is not just a legal theory, but a tragic fact. For example, on June 12, 1993, a seventeen-year-old was driving at 75 mph in a 45 mph zone. The teenager sped through an Edmond intersection and smashed into the broadside of a car, killing the driver. Prior to the accident, the teenager had already received ten traffic citations.¹⁶³ Moreover, during the pendency of his juvenile case for negligent homicide,¹⁶⁴ he was cited four more times for traffic violations.¹⁶⁵ The teenager eventually admitted his delinquency, and the juvenile court judge ordered him not to drive. Nevertheless, the delinquent violated the court's order by driving the next day.¹⁶⁶ The law should be changed. Juveniles should not be permitted to kill with impunity.

F. Certification

1. Overview

Certification is the process by which a juvenile charged with a crime can be ordered to stand trial as an adult.¹⁶⁷ If the juvenile is certified, the case is transferred from

158. *State v. Gray*, 803 P.2d 718, 721 (Okla. Crim. App. 1990). Of course, if the juvenile continues to drive drunk after he or she becomes an adult, his or her prior drunk driving convictions incurred while a juvenile can be used to enhance punishment. A repeat offender faces felony prosecution and up to five years imprisonment.

159. 47 OKLA. STAT. § 11-903 (1991) (Motor Vehicles Code).

160. 560 P.2d 976 (Okla. Crim. App. 1977).

161. *Id.* at 978.

162. 47 OKLA. STAT. § 11-903(b) (1991).

163. Penny Owen, *Edmond Teen Faces Contempt of Court Trial*, SATURDAY OKLAHOMAN & TIMES, Oct. 30, 1993, at 12.

164. *In re C.S.D.*, No. JF-93-1311 (Dist. Ct. Okla. County, Okla.).

165. Owen, *supra* note 163, at 12.

166. *Id.*

167. 10 OKLA. STAT. § 1112(B) (1991 & Supp. 1993).

the district court's juvenile division to the criminal division. If convicted, the juvenile is adjudged a criminal and is sentenced and punished as an adult. The Juvenile Code has contained a certification provision since the Code's first adoption in 1909.¹⁶⁸ Certification was supposed to serve as the Juvenile Code's safety valve, however, changes over the years have perverted the safety valve into the juvenile's license to kill.

The Code's original certification provision was simple and straightforward: "The court may, however, in its discretion cause such child to be proceeded against in accordance with the laws that may be in force governing the commission of crime."¹⁶⁹ However, in 1966, the United State Supreme Court decision of *Kent v. United States*¹⁷⁰ imposed the basic due process requirements on state certification proceedings. These include: the right to a hearing; the right to a lawyer; the right of the juvenile's lawyer to have access to the juvenile's social records and probation and other similar reports; and the right to a statement of reasons for the court's decision.¹⁷¹

The application of these due process requirements to the Code's certification proceedings presented no major problems; however, the Court unfortunately mentioned in passing eight guidelines promulgated by the judge of the District of Columbia's juvenile court on November 30, 1959.¹⁷² These guidelines, which were later rescinded, identified eight factors that the D.C. juvenile court once considered in deciding whether to certify a juvenile as an adult.¹⁷³ The guidelines provided, in relevant part:

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against person or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

168. OKLA. COMP. LAWS ch. 13, art. I, § 601 (1909).

169. *Id.*

170. 383 U.S. 541 (1966).

171. *Id.* at 554.

172. *Id.* at 546 n.4.

173. The *Kent* Court attached the D.C. Policy Memorandum, No. 7, to its opinion as an appendix. *Id.* at 565-67.

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the Juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to the Court, or prior commitments of juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.¹⁷⁴

It is crucial to recognize that these guidelines are *not* the holding of *Kent*. The U.S. Supreme Court did not impose these guidelines on the states. Unfortunately, however, the Oklahoma Court of Criminal Appeals, in *Sherfield v. State*,¹⁷⁵ misread *Kent* to impose the guidelines on Oklahoma. And once again, in *S.H. v. State*,¹⁷⁶ the Oklahoma Court of Criminal Appeals claimed the guidelines "were mandated by the United States Supreme Court case of *Kent*."¹⁷⁷

The Oklahoma Court of Criminal Appeals did not recognize its error until *State ex rel. Coats v. Rakestraw*,¹⁷⁸ where the court finally conceded that *Kent* did not mandate the District of Columbia guidelines: "Our statement in *S.H. v. State* relied on by respondent, to wit: 'The guidelines set out in *Sherfield, supra*, were mandated by the United States Supreme Court in the case of *Kent v. United States*,' was dictum not supported by *Kent*, and we expressly overrule it."¹⁷⁹ Dictum or not, the Oklahoma court of Criminal Appeals apparently forgot what it said in *Rakestraw*, because, in its 1984 decision in *K.C.H. v. State*,¹⁸⁰ the Court once again claimed that the District of Columbia guidelines were mandated by *Kent*.¹⁸¹

The Oklahoma legislature also had difficulty with *Kent*, as was exemplified by the fact that the same year that the Oklahoma Court of Criminal Appeals decided *Sherfield*, the legislature amended the Juvenile Code to add the guidelines.¹⁸² An

174. *Id.* at 565.

175. 511 P.2d 598 (Okla. Crim. App. 1973).

176. 555 P.2d 1050 (Okla. Crim. App. 1976).

177. *Id.* at 1052.

178. 610 P.2d 256 (Okla. Crim. App. 1980).

179. *Id.* at 258 n.1 (citations omitted) (quoting *Sherfield v. State*, 511 P.2d 598, 600 (1973)).

180. 674 P.2d 551 (Okla. Crim. App. 1984).

181. *Id.* at 552.

182. 1973 Okla. Sess. Laws ch. 227, § 1.

amendment passed in 1977 compacted the original eight guidelines into five,¹⁸³ and added a new sixth guideline addressing offenses occurring during escape.¹⁸⁴

The certification process that was so simple in 1909 is today rather complex. Section 1112 of the Juvenile Code, which now controls the certification process, has several important provisions.¹⁸⁵ First, no juvenile can be certified unless the crime he or she commits is a felony.¹⁸⁶ The felony requirement sounds reasonable enough, but it excludes serious criminal behavior. For example, it permits juveniles who commit vehicular homicide to escape all criminal punishment.¹⁸⁷ Therefore, as vehicular homicide is not a felony, juveniles cannot be certified to stand trial as adults. Consequently, these juveniles who kill will never face criminal liability.

The next problem with certification is the cryptic language used by the legislature to describe under which circumstances certification proceedings must be held. The statute reads: "Except as otherwise provided by law, if a child is charged with delinquency as the result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney, shall conduct [certification proceedings.]"¹⁸⁸ This language can be read in at least two ways: (1) certification proceedings must be held whenever a juvenile is charged with a felony; or (2) certification proceedings are never held unless specifically demanded by the district attorney or the judge. It appears that the accepted practice in Oklahoma is the latter, which can place the judge in an untenable position. Assume a fifteen-year-old is charged with breaking into a woman's home and beating her to death, but the district attorney does not file for certification. If the court initiates certification proceedings "on its own motion" as authorized by statute, then the judge is likely to be criticized for trying to be both prosecutor and judge. The judge might also be attacked by a claim of prejudging the case for even considering certification. A judge must also address the practical problem of how to hold an effective certification hearing if none of the parties favor certification. For instance, will the judge be placed in the unseemly position of subpoenaing the *court's*, rather than a party's witnesses? Will the court be required to interrogate witnesses?

*Bruner v. Myers*¹⁸⁹ is the only reported case in which a trial judge, on his own motion, certified a juvenile to stand trial as an adult. In this case, the juvenile filed an original proceeding in the Oklahoma Court of Criminal Appeals for a writ of prohibition. Although the Court of Criminal Appeals acknowledged the judge's statutory right to hold certification proceedings on its own motion, it granted the

183. 1977 Okla. Sess. Laws ch. 79, § 2; see also *State ex rel. Burns v. Steely*, 600 P.2d 367, 370 n.7 (Okla. Crim. App. 1979).

184. 1979 Okla. Sess. Laws ch. 257, § 4.

185. 10 OKLA. STAT. § 1112 (1991 & Supp. 1993).

186. *Id.* § 1112(B).

187. See *supra* notes 159-66 and accompanying text discussing that vehicular homicide does not fall within the "traffic exception" to the juvenile code.

188. See *supra* notes 159-66.

189. 532 P.2d 458 (Okla. Crim. App. 1975).

writ anyway. The *Myer* court instead held that because the trial judge did not give the parties sufficient notice, the certification proceeding was improper.¹⁹⁰

2. The Certification Process

Assuming that the juvenile is charged with a felony, and that certification proceedings are properly brought by the district attorney or judge, the certification process consists of two hearings: (1) the prosecutive merit hearing, and (2) the amenability of rehabilitation hearing.

a) The Prosecutive Merit Hearing

The purpose of the prosecutive merit hearing is to determine the sufficiency of the evidence against the juvenile, and is held by a judge sitting without a jury. While the prosecutor bears the burden of proof, at this early stage of the proceedings, the standard of proof necessary to satisfy the statutory requirement of prosecutive merit is relatively low.¹⁹¹ The prosecutor must only prove a "reasonable likelihood" that the juvenile committed the crime¹⁹² which is "something less than the 'probable cause' standard applied at a criminal preliminary examination."¹⁹³

If the prosecutor fails to prove prosecutive merit, the juvenile cannot be certified. However, if the judge finds prosecutive merit, the case is continued to allow for an investigation and a further hearing in order to determine the juvenile's amenability to rehabilitation in the juvenile system.¹⁹⁴

b) The Amenability to Rehabilitation Hearing

In order to understand an amenability hearing, one must return to the Juvenile Code's social welfare philosophy. This philosophy assumes that even prosecutive merit juveniles have the right to rehabilitative treatment in the juvenile system. The burden to prove otherwise is on the State; a negative burden which is almost impossible to overcome.¹⁹⁵

Under Oklahoma's Juvenile Code, certifying a juvenile to stand trial as an adult thus "contemplates the exceptional case in which the child is not amenable to treatment under the juvenile facilities and programs available to the court."¹⁹⁶ However, a finding that the juvenile is unfit for rehabilitation "is a discretionary decision to be made by the judge, but the decision must be based on substantial evidence against the juvenile's claim to the benefit of juvenile treatment."¹⁹⁷

190. *Id.* at 462.

191. *K.V.F. v. State*, 805 P.2d 106, 108 (Okla. Crim. App. 1991).

192. *M.L.S. v. State*, 805 P.2d 665, 667 (Okla. Crim. App. 1991).

193. *Id.* (quoting and adopting Judge Lane's separate opinion in *R.J.D. v. State*, 799 P.2d 1122 (Okla. Crim. App. 1990)).

194. 10 OKLA. STAT. § 1112(B) (1991 & Supp. 1993).

195. *In re J.E.S.*, 585 P.2d 382, 383 (Okla. Crim. App. 1978).

196. *T.C. v. State*, 740 P.2d 739, 742 (Okla. Crim. App. 1987) (quoting with approval *J.T.P. v. State*, 544 P.2d 1270, 1275 (Okla. Crim. App. 1975)).

197. *Id.* (quoting with approval *In re E.O.*, 703 P.2d 192 (Okla. Crim. App. 1985)). The Court of

In addition, section 1112(B) identifies six guidelines the judge must consider in determining the prospects for rehabilitation:

Consideration shall be given to:

1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
2. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;
3. The sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living;
4. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions;
5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and
6. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.¹⁹⁸

Even with these guidelines, one would assume that a juvenile committing cruel and atrocious crimes such as armed robbery, rape, or murder would certainly be certified. Such an assumption is wrong. Under Oklahoma's Juvenile Code, "there is no presumption that a child who has committed a very serious act is not receptive to rehabilitative treatment."¹⁹⁹ The Juvenile Code's obsession with social engineering, coupled with its rejection of criminal accountability, persists despite the fact that the trial judge's consideration of the guidelines does not have to be arithmetically proportioned among the six factors.²⁰⁰ Moreover, there is no requirement that each factor has to be clearly decided against the juvenile.²⁰¹ The Oklahoma Court

Criminal Appeals defines substantial evidence as follows:

Substantial evidence is more than a scintilla. It must do more than create a suspicion of the existence of the fact to be established. We must consider the case as a whole and not piecemeal. The lines of proof must be considered together, not separately. Even if each line of proof taken by itself is of insufficient probative force, the conclusion does not necessarily follow that the proof taken as a whole is insufficient. The lines of proof interweave and support each other.

M.L.S. v. State, 805 P.2d 665, 669 (Okla. Crim. App. 1991) (quoting with approval *Corbin v. United States*, 253 P.2d 646, 649 (10th Cir. 1958)).

198. 10 OKLA. STAT. § 1112(B) (1991 & Supp. 1993).

199. *T.C.*, 740 P.2d at 742 (quoting *S.H. v. State*, 581 P.2d 916, 917 (Okla. Crim. App. 1978).

200. *K.C.H. v. State*, 674 P.2d 551, 552 (Okla. Crim. App. 1984).

201. *J.T.P. v. State*, 544 P.2d 1270, 1279 (Okla. Crim. App. 1975).

of Criminal Appeals will therefore vacate certifications even in instances where the juvenile has committed a serious crime.²⁰²

For example, in *T.C. v. State*,²⁰³ a juvenile and his girlfriend broke into a seventy-five-year-old man's house and began to rob him. Upon waking the man, the juveniles began beating him with a board. The juvenile's vicious attack inflicted horrible injuries, including multiple wounds to the man's skull and brain, twelve smashed ribs, a fractured sternum, two broken wrists, a broken ankle, and multiple body lacerations and bruises. These injuries led to the elderly man's death.

The trial judge certified the juvenile to stand trial as an adult, but the Oklahoma Court of Criminal Appeals vacated the certification. In its chilling opinion, the court stated: "The fact that the appellant is accused of brutally beating an elderly man to death does not in and of itself answer the question of whether the appellant is amenable to rehabilitation with the juvenile system."²⁰⁴ Given the prosecutor's nearly impossible burden of proving a negative, certification may mean that a juvenile's first violent crime, even murder, is free.²⁰⁵

G. Reverse Certification

By the 1970s, the public became so disillusioned with the Juvenile Code's social welfare philosophy that it demanded that violent juveniles be held accountable for their crimes. Finally, a bill was introduced in 1978 and the Legislative debate was on. The Honorable Tom R. Cornish, who was at that time a judge on the Oklahoma Court of Criminal Appeals, described the action:

The atmosphere surrounding the adoption of the legislation in 1978 was one in which many thought there was undue coddling of juvenile offenders. Correspondingly, a popular goal was to enact a procedure that would deal swiftly and harshly with the sophisticated juvenile. There was a groundswell of support for lowering the age of accountability from eighteen to sixteen for all juveniles — a proposal for which support is still apparent. There was even debate about dropping the age to fourteen.²⁰⁶

Eventually, a compromise was reached. The juvenile age remained at eighteen, but an exception was carved out for sixteen- and seventeen-year-olds charged with

202. *J.J.W. v. State*, 842 P.2d 349 (Okla. Crim. App. 1992); *M.L.S. v. State*, 805 P.2d 665 (Okla. Crim. App. 1991); *T.C. v. State*, 740 P.2d 739 (Okla. Crim. App. 1987); *In re E.O.*, 703 P.2d 192 (Okla. Crim. App. 1985); *S.H. v. State*, 581 P.2d 916 (Okla. Crim. App. 1978); *In re G.L.W.*, 580 P.2d 998 (Okla. Crim. App. 1978); *C.P. v. State*, 562 P.2d 939 (Okla. Crim. App. 1977); *In re R.M.*, 561 P.2d 572 (Okla. Crim. App. 1977); *In re J.S.*, 556 P.2d 641 (Okla. Crim. App. 1976).

203. 740 P.2d 739 (Okla. Crim. App. 1987); *see also Williams v. State*, 807 P.2d 271 (Okla. Crim. App. 1991).

204. *T.C.*, 740 P.2d at 742.

205. Free, that is, from criminal prosecution and punishment. The juvenile might still have to pass through the juvenile system, but that results in no criminal trial, no conviction, no criminal record, and by definition, no punishment.

206. Tom R. Cornish, *Where Have All the Children Gone? — Reverse Certification*, 35 OKLA. L. REV. 373, 374 (1982).

committing any of eleven specified crimes.²⁰⁷ If a juvenile was charged with one of these "exception" or "index" crimes, he or she would be considered an adult, subject to criminal prosecution, trial, and punishment. The legislature thus placed the burden on the accused to convince the magistrate that he or she should be certified as "child" and remanded to the juvenile division — hence the name "reverse certification."

The original reverse certification law did not last long. The Oklahoma Court of Criminal Appeals immediately struck it down as unconstitutionally vague.²⁰⁸ However, in doing so, a member of the court recognized the seriousness of these types of crimes and their threat to public safety. In his specially concurring opinion, Judge Cornish acknowledged the legislature's intent to protect the public from older juveniles who commit the most violent crimes; to separate older, predatory juveniles from younger, less criminally sophisticated children; and to validate the community's outrage over serious crime and the public's demand for criminal prosecution.²⁰⁹

The 1979 legislature rewrote the reverse certification statutes.²¹⁰ This second version of reverse certification passed constitutional muster when the Oklahoma Court of Criminal Appeals upheld the revision in *State ex rel. Coats v. Rakestraw*.²¹¹ In upholding the statute, the court rejected attacks based on vagueness, equal protection, and due process.²¹² The court further noted the legislature's intent that most sixteen- and seventeen-year-olds charged with any of the enumerated felonies should be tried as adults.²¹³ Although the accused can apply to the juvenile division for "reverse certification" back to the juvenile division, the court approved the legislature's intent that, in most instances, the magistrate should decline to certify the accused as a "child."²¹⁴

207. The original eleven crimes were: (1) murder, (2) kidnapping for purposes of extortion, (3) robbery with a dangerous weapon, (4) rape in the second degree, (5) use of a firearm or other offensive weapon while committing a felony, (6) arson in the first degree, (7) burglary in the first degree, (8) burglary with explosives, (9) shooting with intent to kill, (10) manslaughter, and (11) nonconsensual sodomy. 1978 Okla. Sess. Laws ch. 231, § 1(A).

208. *State ex rel. Coats v. Johnson*, 597 P.2d 328 (Okla. Crim. App. 1979).

209. *Id.* at 331 (Cornish, P.J., specially concurring).

210. 1979 Okla. Sess. Laws ch. 257, §§ 1-9.

211. 610 P.2d 256 (Okla. Crim. App. 1980).

212. *Id.* at 258-60.

213. *Id.* at 258. Over the years, the legislature had added crimes to the reverse certification list. Today, the complete list includes: (1) murder; (2) kidnapping; (3) robbery with a dangerous weapon; (4) rape in the first degree; (5) rape by instrumentation; (6) use of a firearm or other offensive weapon while committing a felony; (7) arson in the first degree; (8) burglary with explosives; (9) burglary in the first or second degree after three or more adjudications for committing either burglary in the first degree or burglary in the second degree; (10) shooting with intent to kill; (11) discharging a firearm, crossbow or other weapon from a vehicle under 21 OKLA. STAT. 652 (B) (i.e., drive-by shooting); (12) witness intimidation; (13) manslaughter in the first degree; (14) nonconsensual sodomy; (15) and manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense a controlled dangerous substance (i.e., drug dealing). 10 OKLA. STAT. § 1104.2(A) (1991 & Supp. 1993).

214. *Rakestraw*, 610 P.2d at 258. At footnote 2, the Court listed statutes from sister states that require adult treatment for juveniles of certain age and offense classification, including Louisiana, New York, Pennsylvania, Maryland, Delaware, Florida, and the District of Columbia. *Id.*

Today's reverse certification procedure is as follows. First, the district attorney files an information against the accused in the district court's criminal division,²¹⁵ and the magistrate issues a warrant. The warrant and a certified copy of the information must be served personally on the accused and the custodial parent.²¹⁶ The warrant must state the rights of the accused and the parents: (1) to be present at the preliminary hearing; (2) to have an attorney present; and (3) the right to apply for "reverse certification" as a "child" to the district court's juvenile division.²¹⁷ The accused then files a reverse-certification motion before the start of the criminal preliminary hearing.²¹⁸

The magistrate then conducts the criminal preliminary hearing.²¹⁹ The State first presents its case, followed by the accused's presentation of his or her evidence for reverse certification. The magistrate must rule on the reverse-certification motion before deciding whether to bind the accused over for adult criminal trial. When ruling on the reverse-certification motion, the magistrate must consider four statutory guidelines, listed in order of importance:

1. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
2. Whether the offense was against persons or property, greater weight being given for retaining the accused person with the adult criminal system for offenses against persons, especially if personal injury resulted;
3. The record and past history of the accused person, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and
4. The prospects for adequate protection of the public if the accused person is processed through the juvenile system.²²⁰

Conspicuous by its absence from this list is the notion of amenability to treatment. The Oklahoma Court of Criminal Appeals has held that amenability is not one of the criteria.²²¹ Therefore, its only possible relevance arises in the fourth

215. 10 OKLA. STAT. § 1104.2(B) (1991 & Supp. 1993).

216. *Id.*

217. Failure to give the required notice may result in the accused escaping punishment. *See Gilley v. State*, 64 OKLA. B.J. 665 (Okla. Crim. App. 1993) (remanding for a Hearing on Reverse Certification).

218. 10 OKLA. STAT. § 1104.2(C) (1991 & Supp. 1993). Placing this burden on the accused does not violate the constitutional presumption of innocence. The prosecutor still has the burden of proving every element of the crime charged beyond a reasonable doubt. *Jones v. State*, 654 P.2d 1080, 1082 (Okla. Crim. App. 1992). At the start of the criminal preliminary hearing, the accused's complete juvenile record is made available to both the district attorney and the accused. 10 OKLA. STAT. § 1104.2(C) (1991 & Supp. 1993).

219. 10 OKLA. STAT. § 1104.2(C) (1991 & Supp. 1993). The legislature intended this preliminary hearing to be the preliminary examination required by 22 OKLA. STAT. §§ 251-276 (1991) and OKLA. CONST. art. 2, sec. 17; *see also W.D.C. v. State*, 799 P.2d 142, 144 (Okla. Crim. App. 1990).

220. 10 OKLA. STAT. § 1104.2(C) (1991 & Supp. 1993).

221. *Armer v. State*, 773 P.2d 757, 758 (Okla. Crim. App. 1989).

factor concerning adequate protection of the public.²²² This is a clear rejection of the Juvenile Code's usual social welfare philosophy in favor of the public's right to protection from violent criminals.²²³

The magistrate then enters an order concerning reverse certification, which is final and appealable when entered.²²⁴ If the magistrate grants the reverse-certification motion, the accused is certified as a child and transferred to the district court's juvenile division. The child's criminal record is then hidden from public view.²²⁵

IV. *The Justice Model*

It is time to move beyond the Juvenile Code. Well-meaning social welfare advocates, with their zeal for rehabilitation, have lost their balance. They ignore equally important functions of the law, including public condemnation for the crime, punishing the criminal for the crime, retribution, incapacitation, and deterrence. Their error is due to a lack of understanding of the law. As Professor Wigmore noted more than half a century ago:

[T]he social workers and the psychologists know nothing of crime or wrong. . . .

. . .

And so we say to the devoted social workers and the cold scientists: "Do not think that you have a right to demand that all crimes be handed over to your charge until you have looked a little more deeply into the criminal law and have a better comprehension of the whole of its functions."²²⁶

Oklahoma should therefore adopt a justice model.²²⁷ All juveniles accused of crimes should begin in the adult criminal system, entitled to all of the criminal rights of adults through trial. This phase would be the guilt/innocent determination. If the juvenile is innocent, the case is over. But if the juvenile is guilty, then there would be a sentencing phase. The sentencing judge would have the full range of punishments and rehabilitation available in both the current adult and juvenile systems. Handled in this way, the juvenile's sentence would more closely fit the crime.

This does not mean that every juvenile offender is bound for prison. As no state has the financial resources to lock up every juvenile offender, incarceration must be

222. *Id.* at 758-59; *see also* J.L.S. v. State, 759 P.2d 239, 240 (Okla. Crim. App. 1988).

223. Although the statute does not require the magistrate to detail responses to each guideline, the magistrate should state reasons with sufficient specificity to permit meaningful appellate review. *State ex rel. Coats v. Rakestraw*, 510 P.2d 256, 261 (Okla. Crim. App. 1980).

224. 10 OKLA. STAT. § 1104.2(E) (1991 & Supp. 1993).

225. *Id.* § 1104.2(D).

226. John H. Wigmore, *Juvenile Court Vs. Criminal Court*, 21 ILL. L. REV. 375, 376-77 (1926) (Editorial Notes).

227. The author makes no claim for originating the justice model. The model has been suggested by others, including Justice Marian P. Opala of the Oklahoma Supreme Court. Justice Marian P. Opala, Address at the Oklahoma Joint Judicial Training Conference on Juvenile Justice (Nov. 9, 1992).

considered a precious and limited resource, reserved for predators. Indeed, the full range of options available in the adult system should be considered for juveniles. For example, prosecutors should be able, where appropriate, to consider deferred prosecution. The court, where appropriate, should consider deferred judgment and sentence.

For example, probation is working well in the case of a young girl who shot her abusive father. The girl pled guilty to first-degree manslaughter, and apparently received a deferred judgment and sentence. If she abides by the conditions of her probation, her record will be cleared in 1998.²²⁸

In a similar case that also drew national attention, two young boys plead no contest to a manslaughter charge for shooting their abusive father.²²⁹ Under such circumstances, the Justice Model would include a battered child defense, resembling the battered spouse defense recently adopted by the Oklahoma Court of Criminal Appeals.²³⁰

Overall, the Justice Model would determine guilt or innocence under constitutional standards. At the same time, predators would be incarcerated and non-predators rehabilitated, providing the public with a greater degree of protection.

V. Recommendations for Change

However, if Oklahoma retains the Juvenile Code, the following changes should be made:

(1) All records and court proceedings should be open to the public. Secrecy does not protect children. All secrecy laws, including sections 1102 (E), 1104.2 (D), 1111 (A) (1), 1116.4, 1123.1, 1125.1, and 1125.3 should be repealed. The public has the right to know what its government is doing.

(2) Change the definition of a "child" under section 1101. All persons sixteen and older should be considered adults accountable for their crimes. Those under sixteen should face reverse certification for all crimes.

(3) The presumption of releasability found at section 1107.1 should be deleted. The bail procedure used for adults should be followed.

(4) The legislature must provide sufficient secure detention beds to hold dangerous juveniles for trial.

(5) The mandatory release after 90 days pretrial detention should be deleted. The length of pretrial detention should be based on the facts and circumstances of the individual case.

(6) Section 1109 should be deleted, and replaced with an explicit adoption of the *Miranda* warnings. Those warnings should apply only where there is police

228. Mark A. Hutchison, *Guilty Plea Ends Teen's Ordeal: Probation Given in Father's Death*, DAILY OKLAHOMAN, Feb. 24, 1993, at 1.

229. Mich Hinton & Mark A. Hutchison, *Dutton Boys Adjust, Guardian Says*, SUNDAY OKLAHOMAN, Sept. 19, 1993, § A, at 11.

230. *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992); *see also Davenport v. State*, 806 P.2d 655 (Okla. Crim. App. 1991) (adopting limited use of the child sex abuse accommodation syndrome).

custodial interrogation. Section 1109 unfairly restricts questioning of children and impedes the search for truth.

(7) The statutory right to trial by jury found at section 1110 should be strengthened by once again adding it to the Oklahoma Constitution. No person should be convicted of any crime without the right to demand a jury. The jury provides a wonderful check and balance against all forms of governmental tyranny.

(8) Greater importance should be placed on victim's rights. The Oklahoma legislature's 1993 amendment to section 1111 (A)(1), granting crime victims the right to attend juvenile hearings, is a step in the right direction. Greater priority should be placed on the needs of the victim.

(9) Section 1112 (C) should be amended to eliminate the duplication caused by holding both a prosecutive merit hearing and an adult preliminary hearing. The two hearings should be combined into one.

(10) Preliminary inquiry should be changed. Currently, it sends the message that a juvenile's first crime is free. The law should provide that a juvenile's first crime will be punished.

(11) Section 1111 (A) should be amended to delete the requirement for separate trials. The juvenile should be tried with his or her adult accomplices and co-conspirators.

(12) Section 1116 should be changed to give judges the authority to sentence juvenile criminals to confinement in a locked facility for a specific period of time. Criminal punishment can and should be a part of the juvenile's rehabilitation. Juveniles must know that they will be punished for their crimes. The legislature should also add a provision to transfer the juvenile, when he or she turns eighteen, to the Department of Corrections to complete the sentence.

(13) Section 1129 should be repealed. Legislative priority should be given to public protection, victim compensation, and punishment for crime. Rehabilitation is a worthy goal, but must be considered in the context of the other major goals. Section 1129 should also delete the requirement for "least restrictive alternative." Placement should be based on the facts and circumstances of the individual case.

(14) Section 1135, providing a legislative preference for own-home placement, should be repealed.

(15) Section 1138 should be repealed. The placement goal should be public protection.

(16) Section 1139 should be repealed. DHS should not decide whether a juvenile is placed, or for how long. The court should make these decisions.

(17) If section 1139 is retained, it should be amended to provide that any juvenile who fails to obey a court order can be held in contempt and jailed, even if the juvenile is under age eighteen.

(18) Executive branch authority over juvenile criminals should be transferred from the DHS to the Department of Corrections.

(19) The Department of Corrections' primary objectives should be to protect the public, punish criminals, and, if possible, rehabilitate the criminal.

(20) Probation and parole violators should be arrested and detained in jail (eligible for bail) until their initial court appearance. The initial court appearance should be held the very next judicial day.

(21) The uncertainty and confusion surrounding the *Terry D.* case must be resolved.

(22) The Juvenile Code's Serious and Habitual Juvenile Offender Act, found at 10 Okla. Stat. §§ 1160.1-1160.6, while well intended, is not sufficient. It should be replaced with a justice model.

Although the above changes would not be as beneficial as a justice model, they would cause a significant improvement in Oklahoma's present Juvenile Code.

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