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JUVENILE JUSTICE UNDER ATTACK: AN ANALYSIS OF THE CAUSES AND IMPACT OF RECENT REFORMS

Donna M. Bishop, Lonn Lanza-Kaduce, and Charles E. Frazier[*]

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I. INTRODUCTION

The juvenile justice system is currently under attack on two broad fronts. First, legal experts and commentators are providing stinging critiques of the system's failure to protect the liberty and due process interests of juveniles.[1]

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1. Barry C. Feld, *Criminalizing the American Juvenile Court*, *in* 17 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 197 (Michael Tonry ed., 1993) [hereinafter *Criminalizing*]; Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995) [hereinafter *Youth Justice*]; Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) [hereinafter *Re-imagining*];

Second, legislators throughout the country are supporting more and more legislation designed to "get tough" on juvenile crime.[2] In combination, these criticisms and reforms advance the "recriminalization" of juvenile offenders.[3] Juvenile offenders are increasingly subject to adult standards of culpability and punishment. Most of this change in the way we think about and officially respond to juvenile crime has proceeded without a discussion of the empirical effects of imposing adult status on juveniles. The purpose of this article is to introduce that missing element and to consider the wisdom of current policy trends in light of relevant research and theory.

Part II of this article considers challenges to the juvenile justice system and the nature of recent reforms, especially those that attribute adult status to juveniles. The reforms and their historical development are examined in order to appreciate more fully the dynamics of the reform movement. Part III discusses studies that compare the benefits of processing youth as adults in the criminal justice system with traditional juvenile justice processing, concluding that the research does not support the pace and the direction of current reforms. Part IV employs Braithwaite's theoretical framework to interpret these findings and to consider why juveniles may fare better under juvenile as opposed to adult court jurisdictions. Part V concludes that a moratorium on the criminalization of juvenile offenders is needed in order to develop a more informed policy.

Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Barry C. Feld, *Abolish the Juvenile Court: Affirming Personal Responsibility*, 2 JUV. JUST. UPDATE 4 (1996) [hereinafter *Abolish*]; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991) [hereinafter *Transformation*]; Francis Barry McCarthy, *Should Juvenile Delinquency Be Abolished?*, 23 CRIME & DELINQ. 196 (1977); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

2. PATRICIA TORBET ET AL., NATIONAL CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME (1996); Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 472-73 (1987). In more and more states, youths are photographed and finger-printed at arrest, records are no longer confidential, court proceedings are open to the public, and proceedings are increasingly adversarial. TORBET ET AL., *supra* at 34-45. Determinate sentencing has been introduced into juvenile courts, and many courts have the authority to impose sentences that extend well into the adult years. *Id.* at 11-24. Several states have lowered the maximum age of their juvenile courts' original jurisdiction. *Id.* at 3. Methods and criteria for transferring youths to adult court have been expanded. *Id.* at 3-9; Feld, *supra* at 472-73.

3. SIMON I. SINGER, RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM (1996). By "recriminalization," Singer means the deconstruction of the image of delinquents as misguided but innocent children, and then a reconstruction that portrays them as adult-like criminals — fully culpable for their acts. *Id.* at 46-74.

II. THE CHALLENGE TO JUVENILE JUSTICE

Courts have long had the ability to transfer young offenders from juvenile to criminal courts.[4] Transfer provisions were rarely utilized, however, and were nonproblematic as long as the juvenile justice system remained firmly grounded in a *parens patriae* orientation.[5] The task of the traditional juvenile court and its ancillary support services, such as child guidance clinics and juvenile probation departments, was to focus on the whole child — not merely, or even primarily, on his or her offense — to make a diagnosis, and implement an individualized treatment plan.[6] Despite periodic criticism of the juvenile justice system, supporters in the early years of the court's existence remained optimistic about the inherent malleability of youth and the potential for their reform.[7]

However, beginning in the 1960s, a complex set of events and forces converged to threaten the juvenile justice system's philosophical underpinnings as well as its practices.[8] Out of this, a new jurisprudence emerged that justified punishment and at the same time, debunked the beneficent origins and purposes of the juvenile court.[9] Exaggerated accounts of juvenile crime and disenchantment with rehabilitation in general also fed the "get tough" political reforms that have become a new jurisprudence.[10] Perhaps the most critical feature of this jurisprudence has been the expansion of transfer provisions which allow or mandate that growing numbers of juvenile offenders be treated as adults.

A. *A New Jurisprudence for Juvenile Offenders*

Many legal scholars want to reform the juvenile justice system by providing better protection of the liberty and due process interests of juveniles,[11] but they adopt different positions on how this should be

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4. Barbara Flicker, *Prosecuting Juveniles as Adults: A Symptom of a Crisis in the Juvenile Courts, in* MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 351, 351 (John C. Hall et al. eds., 1981); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104-06 (1909); Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 449-51 (1985).

5. *See* Thomas & Bilchik, *supra* note 4, at 450.

6. Feld, *supra* note 2, at 474-78.

7. JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981, at 90 (1988).

8. *See id.* at 200-01.

9. *See id.* at 204-05.

10. *See id.* at 202-03.

11. *See* sources cited *supra* notes 1-2.

accomplished. For example, Ainsworth,[12] McCarthy,[13] Federle,[14] Wizner and Keller,[15] and Feld[16] have advocated elimination of the juvenile justice system altogether. They argue that this would advance the liberty interests of all persons under eighteen years of age.[17] Melton, by contrast, has proposed a new juvenile court that would recognize age-graded sanctioning and procedural protections.[18] More recently, Ainsworth and Feld have proposed unifying the juvenile and criminal justice systems.[19] In her more recent proposal, Ainsworth advocates radically altering the juvenile and adult systems and creating a new unified system that eliminates adult-child distinctions and better protects the liberty interests of both.[20] Feld also proposes unifying the juvenile and adult courts but would provide a "youth discount" at sentencing.[21]

Despite some differences, these legal scholars all commend a new jurisprudence for juvenile offenders.[22] To various degrees, each scholar rejects the basic child-adult distinction and argues that juveniles (past infancy) have the capacity to make adult-like decisions.[23] In turn, each embraces the legitimacy of punishment, and responsibility and accountability, all in the name of protecting the liberty interests of juveniles.[24] This new jurisprudence grows out of, but is different from, the rationales of constitutional rulings in juvenile cases.

The Supreme Court initiated constitutional protections for juvenile offenders by examining the waiver of juveniles to criminal court in *Kent v. United States*.[25] The Supreme Court introduced procedural formality into the judicial waiver process, requiring, inter alia, a hearing, effective assistance of counsel, and a statement of reasons for transfer.[26] The Court recommended criteria to assure that transfer would be applied only to those for whom treatment as a juvenile offender was inappropriate.[27] Subse-

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12. Ainsworth, *Re-imagining, supra* note 1, at 927.
13. McCarthy, *supra* note 1, at 196.
14. Federle, *supra* note 1, at 23.
15. Wizner & Keller, *supra* note 1, at 1120.
16. Feld, *supra* note 2, at 471.
17. *See* sources cited *supra* notes 1-2.
18. Gary B. Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 167-72 (1989).
19. Ainsworth, *Re-imagining, supra* note 1, at 1085; Feld, *Transformation, supra* note 1, at 722-25.
20. Ainsworth, *Youth Justice, supra* note 1, at 944-51.
21. Feld, *Criminalizing, supra* note 1, at 264; Feld, *Transformation, supra* note 1, at 724.
22. *See* sources cited *supra* notes 1-2.
23. *See id.*
24. *See id.*
25. 383 U.S. 541 (1966).
26. *Id.* at 560-62.
27. *Id.* at 560-61.

quently, the National Advisory Committee for Juvenile Justice and Delinquency Prevention issued the influential "Standards for the Administration of Juvenile Justice," which followed the recommendations of the Court in *Kent* and the American Bar Association's Juvenile Justice Standards Project.[28]

The *Kent* decision was quickly followed by *In re Gault*, in which the Court scrutinized both juvenile court procedures and correctional practices.[29] The treatment offered by the juvenile justice system had been the quid pro quo for procedural informality. In *Gault*, the Court observed that what was called "treatment" often involved deprivation of liberty for several years in conditions that resembled those of adult correctional facilities.[30] It concluded that such a result could only be justified following a hearing that comports with due process.[31] Consequently, the Court mandated safeguards to reduce the risk of erroneous adjudications of delinquency.[32]

In 1970, the Court underscored its concern with unfair and error-prone court procedures in *In re Winship*.[33] The Court explicitly adopted "proof beyond a reasonable doubt" as the evidentiary standard to be used in juvenile court.[34] The standard was given constitutional grounding in the due process clauses.[35]

These constitutional rulings recognized the due process interests of juveniles, but they did not equate juveniles with adults. The new jurisprudence advocated by recent critics of the juvenile justice system transforms the basic rationale of the Supreme Court's *Kent-Gault-Winship* trilogy. Whereas the Court insisted on basic due process protections when

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28. NATIONAL ADVISORY COMM. FOR JUV. JUST. & DELINQ. PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 262-63 (1980). Standard 3:116 of the National Advisory Committee recommends transfer only where:

> There is probable cause to believe that the act alleged . . . is of a heinous or aggravated nature, or that the juvenile has committed repeated serious delinquency offenses; and . . . [t]here is clear and convincing evidence that the juvenile is not amenable to treatment . . . because of the seriousness of the alleged conduct, the juvenile's record of prior adjudicated offenses, and the inefficacy of each of the dispositions available to the . . . court.

Id. at 262; *see also* INSTITUTE OF JUDICIAL ADMIN. — AMERICAN BAR ASS'N JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, Standard 2.2 (1980) (recommending similar probable cause guidelines).

29. 387 U.S. 1, 20-26 (1967). The Court's extension of procedural rights to juveniles represents a further manifestation of its general orientation to limit the coercive powers of the state. The "due process revolution" of the Warren Era is most widely recognized in the criminal law context. Thomas & Bilchik, *supra* note 4, at 453.

30. *Gault*, 387 U.S. at 27.

31. *Id.* at 27-28.

32. *Id.* at 33-58.

33. 397 U.S. 358 (1970).

34. *Id.* at 368.

35. *Id.* at 367-68.

punishment compromised the treatment ideal, these critics, in effect, now advocate punishment and the compromise of treatment because of the due process ideal.

Dicta in the *Gault* and *Winship* decisions acknowledged that juvenile justice dispositions are punitive in effect, despite the "treatment" rhetoric.[36] The effort to protect liberty interests because of punitive features of "treatment," however, inadvertently undercut the treatment rationale of juvenile justice. By the time the court restated its endorsement of the rehabilitative ideal in *McKeiver v. Pennsylvania*,[37] the departure from a treatment orientation had already begun. As Feld[38] has cogently observed, by shifting the focus of the juvenile court's fact-finding from the needs of the "whole child" to proof of the commission of criminal acts,[39] the Court decisions unintentionally shifted the focus from diagnosis and rehabilitation to culpability and punishment. Although the Court's stated intent was to alter only the adjudicatory stage of the juvenile justice process,[40] it unwittingly laid the jurisprudential foundation for an unprecedented and explicit focus on punishment as a rationale for juvenile sentencing. The eventual effect of these decisions was to narrow the gap between juvenile and criminal court dispositions and correctional goals.

Once the discourse of punishment had been introduced into court opinions, reforms and practices based on punishment were given legitimacy. The shift away from child-focused to offense-based dispositions dramatically increased the proportion of children for whom lengthy punishment became appropriate.[41] Age limits on the jurisdiction of the juvenile court, however,

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36. *Id.* at 365-66; *Gault*, 387 U.S. at 27.

37. 403 U.S. 528 (1971).

> The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. . . . We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young.

Id. at 547.

38. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 821 (1988); *see also* Feld, *supra* note 2, at 486-87; Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 507 (1984).

39. *McKeiver*, 403 U.S. at 543-44 & n.5.

40. *Id.* at 550.

41. One way in which the juvenile system has tried to respond is through increasing the maximum age of jurisdiction for sanctions. TORBET ET AL., *supra* note 2, at 15. This is an effort to keep juveniles in a separate system but to satisfy offense-based "just deserts" criteria. *Id.*

came to be seen by some as an obstacle to appropriate punishment.[42] Transfer provisions were an available and practical vehicle through which lengthier sentences could be achieved.[43]

The new jurisprudence was also facilitated by revisionist histories. In 1966, an influential work by Platt[44] challenged the purposes and motives of the Progressive reformers, under whose auspices the juvenile justice system had been created.[45] Sinister motives were attached to the Progressives in ways that challenged the juvenile court.[46] Its treatment orientation was cast as a "cover" for extending social control over the children of the poor and especially, the children of immigrants.[47] Platt's critique denied the legitimacy of the juvenile justice system.[48] In effect, this line of attack provided a second ideological justification to turn to the adult criminal justice system when dealing with young offenders.

B. *"Doing Something" About Juvenile Crime*

Legislators seem conspicuously unpersuaded by scholarly commentaries. They are influenced more by perceptions of rising juvenile crime rates, especially for violent crime.[49] There is no doubt that highly publicized media accounts of violent juvenile crime have played into public fears and frustration and have contributed to politically charged calls for action to insure public safety.[50]

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42. *See* Feld, *supra* note 2, at 485-87.

43. *See id.* at 486-87.

44. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 176-81 (1969); *see also* Barry C. Feld, *Progressivism and the Control of Youth: The Emergence of the Juvenile Justice System, in* LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW 173, 180 (James H. Inverarity et al. eds., 1983).

45. Traditional historical accounts maintained that the Progressives were motivated by a humanitarian spirit. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 206-07 (1980). Armed with a faith in science and an enlightened belief in the possibility of reform, they attempted to combat crime, poverty, disease, and other social ills wrought by nineteenth century urbanization and industrialization by instituting a host of legal and social reforms. *Id.* at 206. Along with the establishment of the juvenile court, they were responsible for child labor laws, compulsory school attendance laws, and child welfare laws. *Id.*; *see* Feld, *Criminalizing, supra* note 1, at 202. For further discussion, see *supra* note 22 and accompanying text.

46. *See* PLATT, *supra* note 44, at 176-77.

47. *See id.* at 67-74.

48. *See id.* at 172-75.

49. *See* SINGER, *supra* note 3, at 5-23.

50. Mary Fairchild has commented, "Legislators get their information from news reports and their constituents and only rarely from justice practitioners and members of the research community." Mary Fairchild, "Changing State and Local Legislation," Presentation at the OJJDP National Conference on Juvenile Justice at the Crossroads (Baltimore, Dec. 1996) (on file with author); *see* SINGER, *supra* note 3, at 46-74; Melissa H. Barlow et al., *Economic Conditions and Ideologies of Crime in the Media: A Content Analysis of Crime News*, 41

Talk about juvenile crime in terms of a juvenile crime rate "explosion" is hyperbole. In fact, after increasing in the 1960s, rates of juvenile arrests leveled off and decreased in the mid-1970s, and then increased modestly in the late 1980s and early 1990s.[51] Recent increases, though not as large as those of a generation ago, have occurred disproportionately in crimes of violence, especially among minority youth.[52]

Disproportionate attention given both to increases in juvenile violence and to alarmist portrayals of a new breed of juvenile offender has fueled public fears and stepped up demands for juvenile justice reform.[53] Because juvenile post-disposition jurisdiction terminates in most states at age eighteen or twenty-one, juvenile sanctions are perceived as inappropriately lenient for violent crimes, especially in light of the new jurisprudence, which emphasizes

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CRIME & DELINQ. 3, 16 (1995). The media has contributed to impressions of juvenile crime waves in other time periods as well. Mark Fishman, *Crime Wave As Ideology*, 25 SOC. PROBS. 531, 532-33 (1978).

For a discussion of the role of the media in law formation, see Richard C. Hollinger & Lonn Lanza-Kaduce, *The Process of Criminalization: The Case of Computer Crime Laws*, 26 CRIMINOLOGY 101, 105-07 (1988). They argue that the media convey a sense of frequency about a phenomenon, and that the amount of media attention is more important for legal change than is the objective frequency of the problem behavior. *Id.* at 106. The media also can stress themes that convey a sense of normative threat that invites legislative responses. *Id.* at 107. Inasmuch as utility is a cultural value, reformers advance deterrent rationales. In so doing, they also obtain favorable publicity for themselves. That public perception helped to create a political imperative to "do something," namely to "get tough" on juvenile crime.

51. LARRY J. SIEGEL & JOSEPH J. SENNA, JUVENILE DELINQUENCY: THEORY, PRACTICE, AND LAW 34 (4th ed. 1991) (citing BUREAU OF JUSTICE STAT., REPORT TO THE NATION ON CRIME AND JUSTICE (1989)); FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 1995 (1996).

52. James C. Howell et al., *Trends in Juvenile Crimes and Youth Violence*, *in* A SOURCEBOOK: SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 1-2 (James C. Howell et al. eds., 1995) [hereinafter A SOURCEBOOK]. To be sure, there was an increase in violent arrests among juveniles, but the increase in adult arrests for these same offenses was much greater. *Id.* at 2. Media attention to these crime statistics, in particular, has overstated the actual increases in juvenile homicide and violence by placing disproportionate emphasis on percentage increases computed on small bases. Note how calculations of percentage increases can overdramatize. Between 1980 and 1992, the juvenile homicide arrest rate increased from 6.4 per 100,000 to 11.7 per 100,000, an increase of 5.3 homicides per 100,000 juveniles. When translated to percentages, however, this represents an increase of 82.8%.

53. *See* WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 25-26 (1996). They argue:

> America is now home to thickening ranks of juvenile "super-predators" — radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.

Id. at 27; *see also* JAMES ALAN FOX, U.S. DEP'T OF JUSTICE, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 1-5 (1996).

offense-based sentencing.[54]

The trend toward attributing culpability to juvenile offenders and punishing them has met little resistance, in part because rehabilitation has lost credibility. Misgivings about the adequacy of the juvenile justice system were reinforced by researchers who, in the 1960s,[55] began to question the viability of the rehabilitative ideal on which the system was founded. In 1974, the highly publicized "Martinson Report" provided an appraisal of correctional treatment strategies and outcomes and concluded that "nothing works."[56] Martinson and his colleagues suggested that it was futile to attempt to rehabilitate offenders and recommended that the objectives of deterrence and incapacitation be adopted instead.[57] Martinson later recanted his conclusions.[58] Subsequently, numerous reports were published showing demonstrable reductions in recidivism attributable to various treatment programs.[59] These supporting reports notwithstanding, defenders of rehabilitation have become ever more scarce.[60]

The perception among politicians is that electoral success is linked to

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54. *See* Feld, *supra* note 2, at 471.

55. H. Ted Rubin, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 53 (2d ed. 1985).

56. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22-54 (1974); *see also* DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 439 (1975); William E. Wright & Michael C. Dixon, *Community Prevention and Treatment of Juvenile Delinquency: A Review of Evaluation Studies*, 14 J. RES. IN CRIME & DELINQ. 35 (1977).

Legal change has been linked to the activities of reformers. In juvenile and criminal law developments, these reformers are often "experts." John Hagan, *The Legislation of Crime and Delinquency: A Review of Theory, Method, and Research*, 14 L. & SOC'Y REV. 603, 603-05 (1980); Hollinger & Lanza-Kaduce, *supra* note 50, at 101.

57. *See* Martinson, *supra* note 56, at 22-54.

58. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979).

59. TED PALMER, THE RE-EMERGENCE OF CORRECTIONAL INTERVENTIONS (1992); Mark W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytic Inquiry into the Variability of Effects*, *in* META-ANALYSIS FOR EXPLANATION: A CASEBOOK 83 (Thomas D. Cook ed., 1992); D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369 (1990); Carol J. Garrett, *Effects of Residential Treatment on Adjudicated Delinquents: A Meta-Analysis*, 22 J. RES. IN CRIME & DELINQ. 287 (1985); Paul Gendrea & Robert R. Ross, *Revivification of Rehabilitation: Evidence from the 1980's*, 4 JUST. Q. 349, 395 (1987); Edward P. Mulvey et al., *The Prevention and Treatment of Juvenile Delinquency: A Review of the Research*, 13 CLINICAL PSYCHOL. REV. 133, 158-59 (1993); Ted Palmer, *Programmatic and Nonprogrammatic Aspects of Successful Intervention: New Directions for Research*, 41 CRIME & DELINQ. 100 (1995).

60. FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION (1982); BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE (1993); IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD (1989).

support for repressive crime control strategies.[61] The politics of reform have become the politics of punishment. To "do something," politicians advocate punishment and support reforms that center on punishment.[62]

C. *The Recent Reforms*

Political and legislative efforts to reform juvenile justice have been impressive, and their intent cannot be mistaken. Unlike the legal scholars' focus on due process and liberty interest rationales for juvenile reform, the political and legislative agenda purports to be a utilitarian response to concerns about public safety. The utility of the reforms is taken entirely on faith. Accurate, reliable outcome data and empirical research have rarely been included in the reform discussion.

The central features of the legislative reform agenda are developed below. They include the following: (1) many state juvenile codes now explicitly endorse the aims of punishment, accountability, and protection of public safety,[63] (2) many juvenile courts operate under offense-based philosophies, as indicated by determinate sentencing schemes, extended jurisdiction statutes, and mandatory minimum sentences,[64] and (3) reforms have made it easier to transfer juvenile offenders to criminal courts.[65]

The intent of the reform agenda is evident from the statement-of-purpose clauses in state juvenile codes.[66] As of 1991, thirty-nine states incorporated statements of juvenile justice philosophy into their codes.[67] Nearly two-thirds of the thirty-nine endorsed punishment in some way.[68] Over one-third of the thirty-nine recognized punishment as the sole objective of the juvenile system.[69] Just three years earlier, less than a quarter of statutory purpose clauses had recognized punishment as a goal of the juvenile system.[70]

Similarly, the intent of the legislators is apparent from the shift from

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61. Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice, in* 16 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 99, 101 (Michael Tonry ed., 1992).

62. *See id.*

63. *See* TORBET ET AL., *supra* note 2, at 11-24.

64. *See id.*

65. *See id.* at 3-9.

66. Statement-of-purpose clauses use language such as "holding offenders accountable for criminal behavior," "provide effective deterrents," "punish consistent with the seriousness of the crime," and "protection of the public from criminal activity." HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 72 (1995).

67. *Id.* at 71 (citing LINDA SZYMANSKI, JUVENILE CODE PURPOSE CLAUSES (Nat'l Ctr. for Juvenile Justice 1991)).

68. *Id.*

69. *Id.*

70. Feld, *Criminalizing*, *supra* note 1, at 245-46.

indeterminate sanctions, which are consistent with treatment needs, to determinate and offense-based sanctions. In 1980, the Institute of Judicial Administration of the American Bar Association endorsed sentencing proportionate to the offense and injury.[71] Feld has reviewed the extent to which offense-based sanctions have altered juvenile courts across the country.[72] The most extreme example of offense-based sanctioning today is found in the Texas juvenile code, which permits the juvenile court to impose sentences of up to forty years for specified felonies.[73] Other states have chosen to punish beyond the usual age limits of the juvenile court more generally. Eleven states and the District of Columbia have recently extended the maximum age of the juvenile court's continuing jurisdiction over youths committed to juvenile institutions to age twenty-one, or in some cases, to age twenty-five.[74] Mandatory minimum sentences also bear witness to the new importance of offense-based sanctions. Since 1992, fifteen states and the District of Columbia have enacted or modified statutes providing for mandatory minimum sentences for juvenile offenders.[75]

The magnitude of the shift to a punishment emphasis is seen in the staggering pace and the impact of reforms that address who is removed from the juvenile system. Between 1992 and 1995 alone, forty states adopted or modified laws making it easier to prosecute juveniles in criminal courts.[76] This was accomplished by lowering the maximum age of juvenile court jurisdiction and by transferring juveniles into criminal court. Thirteen states have now lowered the maximum age of juvenile jurisdiction to fifteen or sixteen years of age.[77] Estimates for 1991 indicate that 176,000 youths were brought into adult court by these lower age jurisdictions.[78]

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71. INSTITUTE OF JUDICIAL ADMIN. — AMERICAN BAR ASS'N, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS, Standard 5.2 (1980). Determinate sentencing, which represented a criminal justice reform of the 1970s, was extended to the juvenile justice system more recently. Feld, *Criminalizing*, *supra* note 1, at 246-50.

72. Feld, *supra* note 38, at 832-96; Feld, *supra* note 2, at 483-503. As of 1988, one-third of the states used offense-based criteria to regulate decisions on juvenile institutional commitment and release. Feld, *supra* note 38, at 889-91.

73. 1995 Tex. Gen. Laws ch. 262, § 38(d)(3) (codified as amended at TEX. FAM. CODE ANN. § 54.04(d)(3) (West 1998)). For further discussion of Texas reforms, see Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 594-95 (1996).

74. TORRET ET AL., *supra* note 2, at 15. Extended jurisdiction statutes permit the juvenile court to retain jurisdiction over youths committed to state institutions beyond the age of the juvenile court's original jurisdiction, which typically terminates at age 18. *Id.*

75. *Id.* at 14-15.

76. *Id.* at 3.

77. *Id.* at 3-5; SZYMANSKI, *supra* note 67, at 2.

78. HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A FOCUS ON VIOLENCE 28 (1995).

Transfer statutes have been revised as well. Thirty-six states and the District of Columbia have legislatively excluded various offenses from juvenile court jurisdiction.[79] In the last few years, legislatures in thirty-two of these states have modified their statutes to lower the age limit for juvenile court jurisdiction, or increase the range of offenses to which exclusion from the juvenile system applies, or both.[80] As Feld has observed, "The almost irreversible legislative tendency . . . is for lists of excluded offenses to expand."[81]

Trends reveal steady and significant increases in the use of judicial waiver in recent years.[82] In judicial waiver, the juvenile court relinquishes jurisdiction over a case after a hearing focused on a youth's amenability to treatment. In 1995, 13,600 youths nationwide were judicially waived to criminal court, nearly double the number of youths waived in 1988.[83] This increase is all the more striking considering that a majority of states have recently supplemented judicial waiver with other, less cumbersome and exacting, methods for moving young offenders to criminal court.[84]

Another method of transfer is prosecutorial waiver, or "direct file," under which prosecutors are granted the discretionary authority to file in either juvenile or criminal court.[85] Unlike judicial waiver or legislative exclusion statutes, direct file statutes generally provide few guidelines or criteria for the exercise of prosecutorial discretion.[86] Usually prosecutorial direct file decisions are not subject to judicial review.[87] As of 1982, eight states permitted prosecutorial waiver.[88] By 1995, eleven states did, and five had recently modified their statutes to expand the range of offense and age classifications to which they applied.[89] The latitude of these statutes is

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79. TORBET ET AL., *supra* note 2, at 4.

80. *Id.* Other changes also provide evidence of a new punishment orientation. Many states have altered confidentiality standards. As of 1995, 39 states permit the release of juveniles' names and photographs to the media under various conditions. *Id.* at 5. Other changes include opening of juvenile court proceedings to the public, making juvenile court records available to the public, expanding the fingerprinting and photographing of juvenile suspects by law enforcement, and prohibiting sealing or expunging of juvenile records. *Id.* at 45.

81. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1122 (1995).

82. MELISSA SICKMUND, OJJDP UPDATE ON STATISTICS: HOW JUVENILES GET TO CRIMINAL COURT 1 (1994). Currently, about two percent of petitioned delinquency cases are waived to criminal court. *Id.*

83. *Id.*

84. TORBET ET AL., *supra* note 2, at 3-9.

85. *Id.* at 3, 7-8.

86. *Id.* at 7.

87. *Id.*

88. *Id.* at 4.

89. *Id.*; Feld, *Abolish*, *supra* note 1, at 4.

illustrated by Florida's 1995 law.[90] Under this law, prosecutors have discretion to file an information in the criminal court (1) on any child age sixteen or seventeen charged with any felony;[91] (2) on any child age sixteen or seventeen charged with any misdemeanor if the youth has previously been adjudicated or had adjudication withheld for two prior offenses, one of which involved a felony;[92] and (3) on any youth age fourteen or fifteen charged with one of several enumerated felonies.[93] Florida law mandates direct files in two instances: when youths age sixteen or seventeen are charged with a second violent crime against a person,[94] and when youths of any age have three prior residential commitments and are charged with any subsequent offense.[95]

III. THE RESEARCH RECORD ON TREATING JUVENILES AS ADULTS

Transfer is one of the few areas that offers an empirical record that can be used to assess the utility of many of the recent reforms. The key utilitarian research question is how adult processing affects the recidivism of juveniles. Before we can make sense of the recidivism studies, however, we need to address a preliminary issue. Recidivism studies can shed light on the relative utility, or disutility, of adult versus juvenile processing only if the researchers successfully identify similar offenders in both systems. If juveniles who are treated as adults are systematically different from all other juveniles (if they are truly the worst of the worse), it will not be possible to make valid comparisons. Without equivalent comparison groups in the adult and juvenile systems, we cannot attribute differences in recidivism to differences in processing.[96]

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90. FLA. STAT. § 39.0587, *renumbered as* § 39.052(3) (1995), *repealed by* 1997 Fla. Laws ch. 97-238, § 116. Chapter 97-238 was codifed as Chapter 985 of the Florida Statutes, which included similar provisions as the former statute for judicial waiver, direct filing, and sentencing. FLA. STAT. §§ 985.226, .227, .233 (1997) (covering judicial waiver, direct filing, and sentencing, respectively).

91. FLA. STAT. § 39.052(3)(a)(5)(b)(I) (1995).

92. *Id.*

93. *Id.* § 39.052(3)(a)(5)(a)(I)-(XIV).

94. *Id.* § 39.052(3)(a)(5)(b)(II).

95. *Id.* § 39.052(3)(a)(5)(c).

96. Some studies have examined recidivism for reasons other than assessing the relative efficacy of juvenile versus adult processing. Carole Wolff Barnes & Randal S. Franz, *Questionably Adult: Determinants and Effects on the Juvenile Waiver Decision*, 6 JUST. Q. 117 (1989); Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996); Cary Rudman et al., *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 75 (1986). They have not established the equivalency between the transferred youth and those retained in the juvenile system. *See id.* For example, Podkopacz and Feld report that youths who were certified to adult court by judges have higher recidivism than others who received reference motions but were not certified. Podkopacz & Feld, *supra* at 490. No control other

Two different strategies have been used to identify equivalent comparison groups. One is to conduct a cross-jurisdictional analysis where one jurisdiction routinely brings juveniles into the adult system and another matched jurisdiction routinely retains the same type of offenders in the juvenile system.[97] The other strategy is to conduct a within-jurisdiction analysis where each individual who is transferred is carefully matched with someone retained in the juvenile system.[98] This latter approach requires that the population of transferred youth overlaps that of nontransferred juveniles so that precise matches can be found.[99] Prior research indicates that, at least in some jurisdictions, the populations are overlapping.[100]

A. *Fagan's Cross-Jurisdictional Study*

The fact that some jurisdictions have legislatively excluded particular offenses from juvenile jurisdiction, which other jurisdictions handle routinely as juvenile cases, provides an opportunity to pursue a cross-jurisdictional analysis. Jeffrey Fagan conducted such research by comparing the recidivism rates of fifteen- and sixteen-year-old robbery and burglary offenders processed in two counties in southeastern New York with those handled in two contiguous counties in northern New Jersey during 1981-1982.[101] Under New York law, these cases originated in the criminal courts under a

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than prosecutorial selection was used. *See id.* Analyses of the effects of criminal versus juvenile justice processing require research designs that insure greater equivalence of the groups under comparison.

Other research controls for offense among different age groups so that juveniles are compared with young adults to capture the differences between the systems. For example, Greenwood examined court dispositions of persons aged 16 to 21 charged with armed robbery and residential burglary in three California jurisdictions. PETER W. GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA: A REPORT TO THE LEGISLATURE 36 (1983). The obvious nonequivalency in this type of design is age, which may be a critical factor in recidivism. *See id.*

97. *See infra* notes 101-21 and accompanying text.

98. *See infra* notes 122-62 and accompanying text.

99. *See infra* notes 122-62 and accompanying text.

100. For example, in Florida in 1984, 23% of transfers were first-time offenders and 34% had only one or two prior offenses. Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 296 (1991). Moreover, 22% of transfers were misdemeanants or drug offenders, and only 20% were charged with personal felonies. *Id.* at 295. In 1990, Florida's population of transfers was compared on offense and offense history with all juveniles committed to "deep end" juvenile justice placements. CHARLES E. FRAZIER, DEEP END JUVENILE JUSTICE PLACEMENTS OR TRANSFER TO ADULT COURT BY DIRECT FILE: A REPORT TO THE FLORIDA COMMISSION ON JUVENILE JUSTICE 11-79 (1991). The groups were not significantly different in most instances. *See id.* The "deep end" juvenile cases, however, were more serious than their transferred counterparts. *Id.*

101. Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in* A SOURCEBOOK, *supra* note 52, at 238, 245-60.

legislative exclusion statute, while in New Jersey, they were processed in juvenile court.[102] The counties were matched on social structural characteristics and key crime indicators to insure equivalence across sites on factors that independently influence rates of offending.[103] Two hundred cases were drawn from each county, using a multistage cluster sampling design to reduce selection bias.[104] Recidivism was measured through 1989.[105] Several alternative measures of recidivism were constructed: prevalence of rearrest, prevalence of reincarceration, frequency of rearrest adjusted for time at risk, and average time to rearrest.[106]

Fagan found a consistent pattern of higher recidivism for robbery offenders processed in adult court compared with those processed in juvenile court.[107] As to prevalence of rearrests, seventy-six percent of robbery offenders in criminal court were subsequently rearrested; sixty-seven percent of those treated as juveniles were rearrested.[108] Significant differences were also found in the prevalence of reincarceration: fifty-six percent of robbers from the criminal court group were subsequently incarcerated versus forty-one percent of those in the juvenile court group.[109] Among those who reoffended, robbers prosecuted in criminal court also had a higher frequency of rearrest adjusted for time-at-risk (2.85 offenses) than those prosecuted in juvenile court (1.67 offenses).[110] The average time to rearrest also differed. After release, the robbery offenders processed in adult court were rearrested on average nearly 100 days sooner than were their counterparts processed in juvenile court (456 versus 553 days).[111] There were no significant differences for burglary offenders between juvenile and criminal court cases.[112]

Among robbery offenders, both sanction type and court type had an impact on prevalence of rearrest.[113] Criminal sentences, whether probation or incarceration, produced higher recidivism than did juvenile dispositions.[114] Ninety-one percent of those incarcerated in adult facilities were subsequently rearrested compared to seventy-three percent of those incarcerated in juvenile facilities.[115] Eighty-one percent of those sentenced

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102. *Id.* at 247.
103. *Id.* at 246.
104. *Id.* at 247.
105. *Id.*
106. *Id.*
107. *Id.* at 249-50 & tbl.8.4.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 250-51 & tbl.8.5.
114. *Id.*
115. *Id.*

to adult probation were subsequently rearrested compared to sixty-four percent of those sentenced to juvenile probation.[116]

Time-to-failure analyses showed similar results.[117] Robbery offenders sentenced to juvenile facilities took eight months longer to reoffend than those sentenced to adult facilities (631 days versus 392 days).[118] Again, there were no significant differences for burglary offenders.[119]

Finally, Fagan examined the effects of both court type and sentence length in a hazard model that simultaneously estimated rearrest prevalence and time-to-failure.[120] These analyses revealed that increasing the term of confinement had an insignificant effect on recidivism, while the comparative advantage of juvenile over criminal court processing was both significant and substantial.[121]

B. *The Florida Studies*

Within-jurisdiction research findings from Florida echo the results reported by Fagan.[122] To overcome the problem of selection bias, we used a matching procedure to compare cases transferred to criminal court with equivalent cases retained in the juvenile justice system.[123] Florida transfers the vast majority of cases to the criminal courts through prosecutorial direct file under statutory provisions that are extremely broad.[124] As a result, there are many cases retained in the juvenile system that closely resemble those transferred to the criminal courts.[125]

We identified all youths who were transferred to criminal court in the state during 1987.[126] Matches could not be generated for youths charged with capital and life felonies, as these cases were excluded from juvenile court jurisdiction.[127] For the remaining transferred youths, we sampled the nontransfer population using the state's automated offender tracking system.[128] We matched each transferred youth with a nontransferred youth

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116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 250-52 & tbl.8.6.
121. *Id.*
122. Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 171 (1996); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism over the Long Term*, 43 CRIME & DELINQ. 548, 551-57 (1996).
123. Bishop et al., *supra* note 122, at 171-72.
124. *See id.* at 171-73.
125. *See id.* at 173.
126. *Id.* at 175-76.
127. *Id.* at 176.
128. *Id.*

on the most serious offense for which the youth was charged, the number of charges, the number of prior referrals to the juvenile justice system, the most serious prior offense, age, gender, and race.[129]

We used several outcome measures to tap different dimensions of recidivism. These included the prevalence and frequency of rearrest, severity of rearrest charges, and time-to-failure, adjusting for time at risk.[130] In the first study, the follow-up period was less than two years,[131] and in the second study the follow-up was extended to a maximum of seven years.[132]

1. The Short-Term Analyses

In the first of our Florida studies, recidivism of 2738 matched pairs was analyzed through December 31, 1988.[133] We found that transfers were more likely to reoffend than their matches, to have higher rates of prevalence as a group, to average more subsequent rearrests, to reoffend more quickly, and to be rearrested for felonies as opposed to misdemeanors.[134]

Looking at each set of matched pairs over the short term, we found that the probability of rearrest was significantly higher for transferred youths than for their matches who were retained in the juvenile system.[135] In 627 pairs, the transfer was rearrested but the match was not, and in 347 pairs, the nontransfer match was rearrested but the transfer was not.[136] We repeated these analyses for each of seven classes of offense, ordered by level of severity.[137] For six of the seven comparisons, the probability of rearrest was significantly higher for offenders prosecuted in criminal court.[138] Even for the seventh offense class, "minor misdemeanors," more transfers were rearrested, but the difference was not statistically significant.[139] Prevalence rates for the respective groups were also computed. Thirty percent of those transferred to criminal court were rearrested during the initial follow-up compared with nineteen percent of those retained in the juvenile system.[140]

Among those rearrested, the average number of subsequent arrests,

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129. *Id.* at 176-77.
130. *Id.* at 177-78.
131. *Id.* at 177.
132. Winner et al., *supra* note 122, at 550.
133. Bishop et al., *supra* note 122, at 177.
134. *Id.* at 183.
135. *Id.* at 182.
136. *Id.* at 180 tbl.1.
137. *Id.* at 179-80 & tbl.1.
138. *Id.*
139. *Id.*
140. *Id.* at 182.

adjusted for time at risk, was higher for the transfer group.[141] The average number among the transfer group was 1.9 per person-year of exposure.[142] The average for the group retained in the juvenile system was 1.7 per person-year of exposure.[143] Among those who reoffended, the time-to-failure was much shorter for the transfers.[144] The time after release to the first rearrest averaged 135 days in the transfer group versus 227 days in the group processed in the juvenile justice system.[145]

Finally, we examined differences in the severity of rearrest offenses across the two groups. Ninety-three percent of the transferred youths who reoffended were arrested on felony charges.[146] Eighty-five percent of the nontransferred matches were rearrested for felonies.[147] The difference, although not large, was statistically significant.[148]

2. The Long-Term Analyses

In the second study, we examined the same cases from 1987 but extended the follow-up through November 15, 1994.[149] The findings from the short-term analyses were replicated for the most part. Results of the time-to-failure analyses paralleled the short-term findings.[150] Among those who were rearrested, the subsequent offense occurred more quickly for the transfers than for those retained in the juvenile system.[151] Among those charged in 1987 with felony offenses, the respective survival functions of transfers and nontransfers did not intersect until approximately 3.5 years after release.[152] For those charged in 1987 with misdemeanors, the survival function for those retained in the juvenile system never intersected with that for the transfer group.[153]

We also calculated the average number of subsequent arrests overall and for each of the seven classes of offenses ordered by seriousness.[154] Across all comparisons, the average number of rearrests was higher for those who had been transferred to criminal court than for those retained in the juvenile

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 182-83.
148. *Id.* at 183.
149. Winner et al., *supra* note 122, at 550.
150. *Id.* at 555-56.
151. *Id.* at 555.
152. *Id.* at 555, 557 & fig.1.
153. *Id.* at 555, 559 & fig.3.
154. *Id.* at 556, 560 & tbl.4.

system.[155] Unlike the short-term findings, the long-term bivariate analysis of the matched pairs indicated no difference between transfers and nontransfers in the individual probability of a rearrest during the extended follow-up period.[156] The difference observed in the short-term analysis disappeared. When we reanalyzed the long-term data by offense class, we learned the reason for the disappearance. For those who had been charged with felony property offenses in 1987, the transfers were less likely to be rearrested over the long term than were their matches who had been retained in juvenile court.[157] Because a relatively large proportion of cases involved property felonies, this offense class offset other significant differences. For five offense classes, which included drug felonies and lesser felonies as well as three classes of misdemeanors, transfers were more likely to be rearrested than their nontransferred matches.[158] No significant difference in the probability of rearrest was found for personal felonies in the bivariate analysis.[159]

We then conducted a multivariate analysis of the probability of rearrest. Rearrest was regressed simultaneously on the criminal/juvenile status of the case and a series of prediction variables, such as seriousness of offense, prior record, and number of charges, which operationalized each of the matching criteria.[160] This analysis permitted us to isolate the effects of transfer while controlling for other variables, and to determine whether transfer status interacted with offense type. We found that property felons had an overall increased risk of rearrest, but this tendency was counteracted when they were transferred to criminal court.[161] For all other offense classes, however, the effect of transfer increased the likelihood of recidivism over the long term.[162]

C. *The Best Evidence*

Fagan's research and the Florida studies point to the conclusion that transfer is more likely to aggravate recidivism than to prevent it.[163] The

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155. *Id.*

156. *Id.* at 551-52 & tbl.1.

157. *Id.* at 552-54 & tbl.1. Fagan found burglars (included in our property felony class) to be different from robbers (included in our personal felony class). Fagan, *supra* note 101, at 247-51. Recall that Fagan, however, did not find that adult court reduced recidivism among burglars. *See supra* notes 107-21 and accompanying text.

158. Winner et al., *supra* note 122, at 552 & tbl.1.

159. *Id.*

160. *Id.* at 552-55 & tbl.2.

161. *Id.* at 553-54.

162. *Id.* at 553.

163. Given that the current transfer reform effort has been instituted to enhance the specific deterrent/incapacitative effects of what are perceived to be ineffectual juvenile sanctions and to provide a greater measure of public safety than that afforded by the juvenile courts, then

net effect of transfer is to increase the likelihood, the rate, and the severity of reoffending and to decrease the time to rearrest. The recidivism results compel us to consider why the juvenile and adult systems would produce different outcomes. If the comparison groups were equivalent,[164] then the systems must be different.[165]

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surely it must be judged a failure. We do not address general deterrence here, but we note that others have found little general deterrent effect. Jensen and Metsger conducted a time series analysis of two five-year periods preceding and following changes in Idaho's 1981 legislative waiver statute and found no evidence that the rate of violent juvenile crime was affected. *See* Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 99-102 (1994). This is consistent with results from a similar analysis done by Singer and McDowell in New York. *See* Simon I. Singer & David McDowell, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521 (1988); *see also* SINGER, *supra* note 3.

The recent legislative reforms may primarily have symbolic value rather than utility. They may assuage a public that clamors for "get tough" policies in a time of growing fear and frustration. But the empirical record shows that it has little or no substantive value. *See supra* notes 101-158 and accompanying test. As Rosenberg warned about abolitionist reforms, we may be making a bad situation worse. Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 165-84.

164. The different strategies of the Fagan and Florida studies reflect the complexity of obtaining adequate matches. Fagan controlled for degree of offense by narrowing the range of offenses he studied. Fagan, *supra* note 101, at 247. We matched across a wider variety of offenses. Bishop et al., *supra* note 122, at 175-77. Fagan matched jurisdictions on a variety of structural variables like crime rates and socio-economic factors. Fagan, *supra* note 101, at 246. We did not control for these. Bishop et al., *supra* note 122, at 175-77. On the other hand, we matched individuals on prior records, and Fagan did not. *Id.*; Fagan, *supra* note 101, at 247. Both Fagan and we had to make important assumptions in calculating the time at risk. Bishop et al., *supra* note 122, at 177-78; Fagan *supra* note 101, at 247.

Although the Fagan and Florida studies had complementary strengths, they leave some room for doubt about equivalency. The matching issues are currently being examined by research funded by OJJDP. For example, in Florida we are examining the local records in four judicial circuits to obtain more complete information about offense and offender characteristics for a population of transfers and their computer-generated matches. The circuit-level matches will control for socio-demographic and economic structural variables. The local records data will provide more precise information about weapons and injuries, prior records, and processing decisions, including prehearing release, legal representation, plea bargaining, restitution, recoupment, etc. In other words, we will learn whether or how much transfers are systematically different from their computer-generated matches who are retained in the juvenile system.

165. The arguments of many legal commentaries seem to assume that the juvenile system already issues punitive (*i.e.*, criminal-like) sanctions, so it focuses on the different (and inferior) procedural safeguards in the juvenile system. The "get-tough" political agenda largely ignores the procedural issues and instead criticizes traditional juvenile dispositions for being even more weak and ineffectual than adult sanctions. The irony is that criticisms of juvenile justice and findings from recidivism studies seem to accept the position that the juvenile justice system is different from the adult system. The differences are largely presumed. They have not been subjected to theoretical or systematic empirical investigation, especially in terms of how they may affect recidivism.

IV. THE RESEARCH FINDINGS IN SOCIAL AND THEORETICAL CONTEXTS

Three decades of change in the juvenile justice system make it difficult to assert that any characteristic of the juvenile justice system is unique or that the system itself is supported by some clear, unifying rationale.[166] Indeed, differences in juvenile and criminal justice have long been more a matter of degree than kind.[167] Despite recent points of convergence, however, several differences remain. In contrast to the criminal justice system, the juvenile system is more attentive to the offender and the offender's social circumstances.[168] The juvenile court also incarcerates less often.[169] In practice, the dispositions of the juvenile court depend more on community-based programs, small rather than large institutions, and sanctions that keep youth separate from more sophisticated criminal role models.[170]

In earlier works, we suggested that several different theories could be applied to make sense of the recidivism findings, depending upon which aspect of a very complex set of relationships one considers most important.[171] Here we invoke Braithwaite's theory of reintegrative shaming.[172] We select this theory because it is a general theory of crime and social control, and because it helps make sense of how differences in the adult and juvenile systems might produce different recidivism results.[173] In addition, Braithwaite incorporates and synthesizes central features of social learning theory,[174] labeling theory,[175] social control theory,[176] opportunity

166. JEROME G. MILLER, LAST ONE OVER THE WALL (1991); Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Response to Youth Crime*, 41 CRIME & DELINQ. 296 (1995).

167. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

168. *See* Francis T. Cullen et al., *Is Child Saving Dead? Attitudes Toward Juvenile Rehabilitation in Illinois*, *in* THE NEW JUVENILE JUSTICE 231 (Martin L. Forst ed., 1995).

169. Fagan, *supra* note 101, at 248 & tbl.8.2; Podkopacz & Feld, *supra* note 96, at 454. It is important to note that sentences actually served by youths transferred to criminal court are sometimes no longer than sentences that could have been imposed had their cases been retained in the juvenile system. Fritch, Caeti, and Hemmens show that, at least in Texas between 1981 and 1993, actual time served in prison by transferred youths was not more than juveniles could have received in the juvenile courts. Eric J. Fritch et al., *Spare the Needle But Not the Punishment: The Incarceration of Waived Youth in Texas Prisons*, 42 CRIME & DELINQ. 593, 598-600 (1996).

170. *See* Feld, *supra* note 2, at 474-78.

171. Bishop et al., *supra* note 122, at 171; Winner et al., *supra* note 122, at 548.

172. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

173. *See id.* at 1.

174. *See, e.g.*, RONALD L. AKERS, DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH (1985); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE (1985).

175. *See, e.g.*, HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963); EDWIN M. LEMERT, HUMAN DEVIANCE, SOCIAL PROBLEMS AND SOCIAL CONTROL (1967); EDWIN M. SCHUR, RADICAL NON-INTERVENTION: RETHINKING THE DELINQUENCY PROGRAM (1973).

theory,[177] and subcultural theory.[178] Finally, Braithwaite is not necessarily opposed to either punishment or due process protections.[179]

In general terms, Braithwaite argues that shaming that is reintegrative and forgiving works better to prevent or deter crime than shaming that is stigmatizing and condemnatory.[180] Shaming is reintegrative if it communicates that the person being punished is still considered to be part of the group.[181] Thus, the disapproval, even moral outrage in serious offense situations, must be directed at the criminal act rather than the actor. In contrast, shaming that stigmatizes operates to sever the offender from the group.[182] Its message is exclusionary and unforgiving.

Formal shaming by the state is generally less reintegrative and therefore, less effective than informal shaming, that is, the disapproval of friends, family, and other members of one's immediate community.[183] Social control works better if it is connected to interdependent networks between offenders and conventional others, especially those with whom the offender has close personal ties.[184] Braithwaite identifies the community, rather than the justice system, as the primary agent of effective crime control.[185]

Networks of interdependency are the keys for making formal official sanctions work.[186] For example, Braithwaite argues that specific deterrence works best when the official sanction produces in offenders fear of being shamed in the eyes of their intimates.[187] Intimates may include family, friends, and other close personal associates. Deterrent effects will be greater still when offenders are re-embraced by intimates to whom they are strongly attached.[188] For Braithwaite, reintegrative shaming, including punishment (even harsh punishment), provides chances for the offender to express repentance and for conventional groups to punish the transgression and to forgive the offender.[189] Under such circumstances the offender can be reintegrated into conventional society.

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176. *See, e.g.*, TRAVIS HIRSCHI, CAUSES OF DELINQUENCY (1969).
177. *See, e.g.*, ROBERT MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1968).
178. *See, e.g.*, ALBERT KIRCIDEL COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG (1955); DAVID MATZA, DELINQUENCY AND DRIFT (1990); Walter B. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5 (1958).
179. *See* BRAITHWAITE, *supra* note 172, at 150-57.
180. *See id.* at 54-55.
181. *See id.* at 152-61.
182. *Id.* at 101.
183. *See id.* at 87.
184. *See id.* at 89-97.
185. *Id.* at 8.
186. *See id.* at 89-97.
187. *See id.* at 177-82.
188. *See id.* at 152-77.
189. *See id.* at 162-65.

Braithwaite is not opposed to public shaming, condemnation, or even stiff punishment.[190] His theory allows that all are sometimes necessary and can have beneficial effects if they are reintegrative rather than stigmatizing in tone and quality.[191] Properly applied, shaming should put pressure not just on juvenile offenders but on parents, teachers, and the community to reinforce the moral outrage that is felt about criminal acts.[192] At the same time, however, shaming should provide ways to reclaim the offender as a part of the group.[193] If forgiveness and reintegration are accomplished, the bonds between the offender and the community are strengthened.[194]

Braithwaite's theory provides a theoretical framework for understanding the findings of the recidivism studies reported above, which indicate that criminal processing of juvenile offenders may make things worse. One does not have to accept current or past juvenile justice practices as being optimal to learn from Braithwaite.[195] For present purposes, his major contribution is to provide a framework for thinking about ways in which the juvenile justice system may be more reintegrative, that is, less stigmatizing[196] and disintegrative, than the criminal justice system. The two systems differ in many respects.

First, compared with the adult system, the juvenile justice system generates expectancies in both juveniles and officials about the potential for change. However awkwardly, the juvenile justice system communicates a message that young people can change and that dispositions they receive are designed to facilitate change. The underlying message of habilitation and rehabilitation is a positive, forward-looking one which anticipates integration. In contrast, the dominant message of today's offense-based criminal justice system is negative and backward-looking. It is preoccupied with punishment and desert to the neglect of the consequences these have for the offender. In

190. *See id.* at 150-51.

191. *See id.*

192. Braithwaite does not hold the community solely or even primarily responsible for crime by its youth. *Id.* at 5-12. When a member of a family, neighborhood, or a community violates the law, however, the group shares some responsibility and deserves some shame itself. *Id.* at 12. For Braithwaite, this community stake in shame provides an impetus for reintegrative social control. *Id.* at 8. He notes that a shamed community or family will transmit the shame in the most reintegrative and, therefore, most effective way. *Id.* at 184-86. The more immediate institutions (family, school, church) and intimate groups are better able to dispense disapproval/shame without rejecting the offender. *Id.*

193. *See id.* at 84-89.

194. *See id.* at 29, 84-89.

195. In fact, Braithwaite's framework provides insight into how the juvenile justice system could be made both more effective through reintegrative shaming. Others also discuss ways to improve juvenile justice in a manner that is consistent with Braithwaite. Simon I. Singer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377 (1991).

196. Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, *in* THE NEW JUVENILE JUSTICE, *supra* note 168, at 103.

so doing, it eschews reclamation as a goal. In other words, the criminal justice system stops at stigmatizing shaming.

Second, compared with the juvenile court, the criminal court is more likely to incarcerate offenders.[197] Sanctions that move an offender away from home and community disrupt family, school, and other networks and attachments. These disruptions directly contribute to recidivism.[198] In addition, inmate groups to which offenders are exposed in institutions become more attractive because ties to the conventional community are broken. Inmate groups provide subcultural support for crime.[199]

Third, compared with the adult correctional system, the juvenile system tends to rely on smaller facilities that are built on community models, for example, halfway houses, group homes, wilderness camps, Upward Bound, and VisionQuest.[200] Although traditional "reform schools" are large-scale institutions that have impacts like their criminal counterparts,[201] the clear trend in the last twenty years has been to shut down these institutions and replace them with small residential facilities.[202] No comparable movement has occurred in criminal corrections. To the contrary, adult institutions have grown in number and size.[203] According to Braithwaite, formal, large-scale penal institutions implemented outside the community, like those characteristic of the criminal justice system, are less effective, in part, because they are detached from informal social control networks.[204] Another difference between juvenile and adult correctional institutions is the relative emphasis accorded to custody and population management. Concerns about custody and control inevitably become primary in large institutions like those

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197. *See* SINGER, *supra* note 3, at 133-44.

198. Positive ties to the family, the school, and the workplace alter criminal career trajectories. *See* ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993).

199. DONALD CLEMMER, THE PRISON COMMUNITY (1958); JOHN IRWIN, THE FELON (1987); GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF MAXIMUM SECURITY PRISON (1958); Gresham M. Sykes & Sheldon L. Messinger, *The Inmate Social System, in* THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON 6 (Richard A. Cloward et al. eds., 1960).

200. *See* F. LEE BAILEY & HENRY B. ROTHBLATT, HANDLING JUVENILE DELINQUENCY CASES 217-27 (1982).

201. BARRY C. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977); Charles W. Thomas et al., *The Impact of Confinement on Juveniles*, 14 YOUTH & SOC'Y 301 (1983).

202. ROBERT B. COATES ET AL., DIVERSITY IN A YOUTH CORRECTIONAL SYSTEM (1982); BARRY KRISBERG, UNLOCKING JUVENILE CORRECTIONS (1991); KRISBERG & AUSTIN, *supra* note 60; Robert B. Coates, *The Future of Corrections in Juvenile Justice, in* JUVENILE JUSTICE: POLICIES, PROGRAMS AND SERVICES 281 (Albert R. Roberts ed., 1989).

203. *See* BRAITHWAITE, *supra* note 172, at 116.

204. *See id.* at 179-80.

characteristic of the adult system.[205] Regimentation of behavior, separation of inmates, and rigid authority structures become central organizing principles. All of these may serve custodial purposes, but they also constitute obstacles to reintegration. "The regimen and realities of the society of captives have little or nothing in common with life in the wider society."[206] Now that juvenile corrections has moved toward small community-based residential programs, it offers more potential for reintegrative shaming.

Fourth, while programming in juvenile corrections leaves much to be desired, the juvenile system offers more community-oriented and community-based programs than does the adult system.[207] Even within juvenile institutions, the programming emphasis is on skills that are directly applicable to life in the community, for example, academic and vocational education, communication and interpersonal skills, behavioral management, and job-seeking and job retention skills.[208] A growing body of research indicates that recidivism is lower for community-based programs.[209]

Fifth, proponents of the labeling and societal reaction perspectives have long warned about the negative consequences of formal sanctions for young offenders.[210] The stigma attached to a criminal conviction potentially makes it all the more difficult for young offenders to restore positive images of self and to integrate into the law-abiding community.[211] "While being branded 'delinquent' by a punitive juvenile system is surely stigmatic, it may well carry fewer negative connotations, both in the minds of offenders and to the community at large, than flow from being convicted a 'criminal' by the adult court."[212] The effects that flow from the stigmatizing label may be the greatest obstacle to reintegration, and these are greatest for criminal

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205. FREDA ADLER ET AL., CRIMINAL JUSTICE: THE CORE 311 (1996); *see also* DAVID STREET ET AL., ORGANIZATION FOR TREATMENT: A COMPARATIVE STUDY OF INSTITUTIONS FOR DELINQUENTS (1966). "A very strong concern for security marks the U.S. prison today. Maximum security prisons are dedicated solely to that purpose. Medium security prisons have a somewhat more relaxed attitude but still emphasize security. Only minimum security prisons subordinate security to institutional programs." ADLER ET AL., *supra* at 311.

206. CULLEN & GILBERT, *supra* note 60, at 114.

207. *See supra* note 200 and accompanying text.

208. Research has shown that juveniles sentenced and incarcerated as adults are less likely to receive basic education and job training services than those committed to training schools. Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 39 JUV. & FAM. CT. J. 1 (1989).

209. KRISBERG & AUSTIN, *supra* note 60; BARRY KRISBERG ET AL., THE IMPACT OF JUVENILE COURT SANCTIONS (1988); Lipsey, *supra* note 59, at 83; Andrews et al., *supra* note 59, at 369. *But see* ROBERT B. COATES ET AL., DIVERSITY IN A YOUTH CORRECTIONAL SYSTEM (1978); DENISE C. GOTTFREDSON & WILLIAM H. BARTON, DEINSTITUTIONALIZATION OF JUVENILE OFFENDERS (1992).

210. *See* Gardner, *supra* note 196, at 103.

211. *See id.*

212. *Id.* at 112.

offenders, as was recognized in *Kent*.[213] Stigma disrupts the ties that may play a central role in correcting and redirecting the offender's future behavior.

Research supports the proposition that changes in criminal propensity are related to changes in personal relationships (for example, a stable marriage), social circumstances, and employment.[214] Job marketability is especially adversely affected by a criminal conviction. Often occupational licenses require the absence of a criminal record, automatically barring adult convicts from those fields.[215] Many states block convicted felons from holding public office, and many more prohibit ex-cons from public jobs.[216] Even where legal impediments do not exist, social ones do. Employers are reluctant to hire applicants with criminal records.[217]

Finally, Braithwaite incorporates Matza's concern with how juveniles, adrift from conventional society, adopt attitudes that foster delinquency.[218] "The subculture of delinquency is . . . a memory file that collects injustices."[219] Matza argues that a sense of injustice develops among delinquents when they perceive unfairness in how they are processed.[220] To the extent that offenders perceive formal processing as unjust, they become less integrated into the community.[221] Subsequent delinquency has been linked to Matza's formulation of a sense of injustice.[222] Others also have documented how perceptions of procedural unfairness contribute to crime.[223] Singer reports that transferred juveniles have a sense of injustice.[224] He states: "They viewed their sentences not just as a product of their offenses; they questioned the motives and competencies of criminal justice officials. They compared themselves not with adult offenders but with other juveniles."[225]

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213. Kent v. United States, 393 U.S. 541 (1967). The *Kent* opinion reviews ways in which the criminal processing is different in terms of sanction, confidentiality, civil "death," and job prospects. *See id.* at 554-57.

214. SAMPSON & LAUB, *supra* note 198; NEAL SHOVER, AGING CRIMINALS (1985).

215. GEORGE G. KILLINGER ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 147-55, 309-13 (1976).

216. Velmer S. Burton et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION, Sept. 1987, at 54-57.

217. Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 136 (1962).

218. *See* BRAITHWAITE, *supra* note 172, at 23-25.

219. MATZA, *supra* note 178, at 102 (footnote omitted).

220. *See id.* at 101-04.

221. *See id.* at 181-92.

222. Lonn Lanza-Kaduce & Marcia Radosevich, *Negative Reaction to Processing and Substance Use Among Young Incarcerated Males*, 8 DEVIANT BEHAV. 137 (1987).

223. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

224. SINGER, *supra* note 3, at 176-77.

225. *Id.* at 176.

V. CONCLUSIONS

We have tried to contribute to the debate on juvenile justice reform in three ways. First, we reviewed the forces and rationales that initiated and sustain the criminalization of juveniles. Second, we interjected empirical research on recidivism into the discussion. Third, we have shown how a general theory integrates the recidivism findings and other evidence to suggest implications for practice and justice and to provide insight into policy.

Our analysis suggests that the forces of reform need to incorporate empirical research. The empirical record is, in fact, inconsistent with both the direction and pace of the juvenile justice reform movement. The best available evidence indicates that the rush to impose adult status on juveniles is neither reducing juvenile crime nor enhancing public safety. Thus, we recommend a moratorium on the criminalization of juvenile offenders so that a more informed policy can emerge. Specifically, we call for (1) more reasoned and systematic analyses of crime data, especially crimes of violence, (2) research on the effectiveness of alternative strategies of crime control as they apply to juveniles, and (3) effective dissemination of the information.

An informed policy will require active involvement by more scholars in the public policy arena.[226] Academic researchers and legal scholars can affect the opinions and actions of legislators, as well as public opinion, if they are relatively united, if they succeed in defining issues clearly and specifically, and if they maintain credibility by closely relating their recommendations to research findings.[227] According to Jerome Skolnick, "[o]ur task as criminologists, is to bring evidence and reasoned discussion to the debate over crime control, to inform the public about . . . 'alternatives and payoffs,' and to move the discussion from 'raw opinion' to 'responsible public judgment.' "[228]

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226. Some scholars and commentators have already pointed the way. KRISBERG & AUSTIN, *supra* note 60; SCHWARTZ, *supra* note 60; SINGER, *supra* note 3; Rosenberg, *supra* note 163; Rubin, *supra* note 55.

227. For discussions of the role of experts in policy development and implementation, *see* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988); EDWARD O. LAUMAN & DAVID KNOKE, THE ORGANIZATIONAL STATE (1987); Paul Burstein, *Policy Domains: Organization, Culture, and Policy Outcomes*, 17 ANN. REV. SOC. 327 (1991).

228. Jerome H. Skolnick, *What Not to Do About Crime — The American Society of Criminology 1994 Presidential Address*, 33 CRIMINOLOGY 1, 12 (1995).