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DISPOSITION IN A DISCRETIONARY REGIME: PUNISHMENT AND REHABILITATION IN THE JUVENILE JUSTICE SYSTEM

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INTRODUCTION

Discretion elicits an ambiguous response in Anglo-American culture. On the one hand, discretion may be identified with qualities of responsiveness, unstrained mercy and flexibility, all testifying to the moral capacity and integrity imputed to the person who wields it. On the other hand, if unbridled, discretion raises the specter of unrestrained authority, abuse of power, and illegitimacy antedating the procedural protections in our Constitution. In no legal sphere are the strains between the possible virtues of discretion and the rational protections of procedure more pronounced than in the realm of juvenile justice. One judge has recently gone so far as to label the system "schizophrenic."[1]

The Supreme Court has never squarely addressed the parameters of discretion in the sentencing (or "disposition") of children found to have committed delinquent acts: that is, acts that would violate the criminal law if committed by an adult.[2] Even as the criminal justice system has moved toward longer and less flexible sentences for adults, the disposition of adjudicated delinquents remains largely discretionary.[3]

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[1] *In re* K.B., 639 A.2d 798, 800 (Pa. Super. Ct. 1994) (Cirillo, J.).

[2] Juvenile courts consider a wide range of problems. Many arise from circumstances unrelated to the child's own behavior (such as custody or foster care arrangements) or do not relate to violations of criminal codes (for example, "status offenses" like missing school or staying out late). Those aspects of juvenile court jurisdiction, and the separate theoretical issues they raise, are beyond the scope of this essay.

[3] ABA JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 36–37 (1995) (courts have "very broad discretion" in ordering disposition for juveniles, and disposition remains the "primary feature that distinguishes the juvenile system from the adult criminal court"). In contrast, when Congress authorized promulgation of federal sentencing guidelines for adults, it

In this essay, I consider the role of discretion and disposition in a modern jurisprudence of juvenile justice. I do so primarily by revisiting the foundation cases of the modern juvenile justice system: *Kent v. United States* and *In re Gault*. Those cases provided the framework for a jurisprudence of juvenile justice that sought to rein in the extraordinary discretion traditionally accorded juvenile courts. Yet they also sought to preserve flexibility, which was valued for its potential to respond to individualized circumstances. In the context of fears about rampant juvenile crime and social breakdown today, many critics of our juvenile justice system have transformed the foundation cases and the regime they inaugurated into symbols of reckless disregard for responsible disposition and public safety. They charge the new regime with seeking myriad extraneous ends—the unbridled rights of children, sociological jurisprudence, therapeutic ideology, and other goals deemed to undervalue responsibility, accountability, and the security of the citizenry. This depiction of juvenile justice ignores the pragmatic balancing that characterized the reasoning in the foundation cases. It also overlooks the primacy of responsible disposition as a normative value and practical concern in the evolution of juvenile jurisprudence. Viewed in their proper context, the other ideals that distinguish juvenile justice—including rehabilitation—actually are conditioned on the use of appropriate sanctions.

I. Discretion Under Fire

From its origins nearly a century ago, the juvenile court rested on a few simple premises: children are different from adults, and their different capacities and status require special treatment under the law, even if they have violated criminal codes. All children were believed to be redeemable.[4] Juvenile court advocates hoped that a specialized forum providing individualized attention would link children to appropriate rehabilitative services needed for their healthy development.[5] The rehabilitative ideal of juvenile courts, their founders proclaimed,

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expressly sought to rein in the "almost unfettered discretion" historically available to federal judges at sentencing, and to replace it with categorical "retributive, educational, deterrent and incapacitative goals." Mistretta v. United States, 488 U.S. 361, 364, 367 (1989) (discussing Sentencing Reform Act of 1984, as amended, 18 U.S.C. §§ 3551–98 (1994) and 28 U.S.C. §§ 991–98 (1988 & Supp. V 1993)).

[4] *See, e.g.*, Anthony M. Platt, The Child Savers: The Invention of Delinquency (2d ed. 1977); Ellen Ryerson, The Best-Laid Plans: America's Juvenile Court Experiment (1978); Steven Schlossman, Love and the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice, 1825–1920 (1977).

[5] ABA Presidential Working Group on the Unmet Legal Needs of Children and Their

was best served by wide judicial discretion. The courts would be so benevolent that the need for procedural protections would disappear. According to this view, juvenile courts translated into action the common law theory of *parens patriae* so that the government, as ultimate parent and guardian of all children, cared for all children who needed protection.[6] An avuncular judge, vested with wide discretion and imparting moral vision, would be able to steer the errant child onto the right path, reinforcing advice with authority to compel participation in rehabilitative programs (including institutionalization) for as long as necessary to accomplish reformation of the child's character.[7]

The unvarnished paternalism of the early juvenile courts ultimately faced challenges on several fronts. For much of the last thirty years, critiques by rights theorists and child advocates have focused on the struggle between unbridled discretion and rational procedure, a clash forecast by Roscoe Pound's earlier observation that "[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts."[8] Beginning in 1966, the Supreme Court attempted to define a balance between the promise of the rehabilitative ideal, which appeared to demand and justify judicial discretion, and the claim for sufficient procedural protections under the Constitution to ensure fundamental fairness. Because juvenile courts promised certain protections for children that were absent from the criminal courts—among them a preference for confidentiality, the sealing of records, and termination of the court's jurisdiction when the child reaches majority—the accused delinquent came to have a significant interest, and sometimes a statutory right, in having his or her case adjudicated in juvenile court.[9]

FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 59 (1993) [hereinafter CHILDREN AT RISK].

[6] *See* Commonwealth v. Fisher, 62 A. 198, 201 (Pa. 1905) (upholding constitutionality of a statute governing the judicial power to commit children under age 16 to institutions as being designed "not for the punishment of offenders, but for the salvation of children"); RYERSON, *supra* note 4, at 63–68; Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 176–78 (1985).

[7] Others have analyzed whether the origins of the juvenile court lie in beneficence or the desire for social control, a question beyond the scope of this article. *See, e.g.*, Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); *supra* note 4 (citing authorities).

[8] Roscoe Pound, *Foreword to the First Edition* of PAULINE YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY at xv (2d ed. 1969) (first edition cited in *In re* Gault, 387 U.S. 1, 18 n.24 (1967)).

[9] *See* Kent v. United States, 383 U.S. 541, 554 (1966); Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict—The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 43 (1976).

Beginning with *Kent* and *Gault*, a series of Supreme Court decisions have gone far toward remedying the glib assumption that the proclaimed good intentions of the juvenile court's founders sufficiently protected children and obviated the need for due process rights. Minors before a juvenile court accused of behavior that can result in confinement now have the constitutional right to the following safeguards: representation by counsel,[10] notice of charges,[11] confrontation and cross-examination of witnesses,[12] protection against self-incrimination,[13] protection from double jeopardy,[14] proof of delinquency charges "beyond a reasonable doubt,"[15] and protection from judicial transfer to criminal court without hearing, without effective assistance of counsel, and without a statement of reasons.[16] The Supreme Court, however, has also held that minors are not entitled to the full panoply of procedural protections available to adults—minors in juvenile courts have no constitutional right to a jury trial,[17] may be detained prior to trial on a far lower standard than would apply to an adult,[18] and may be subjected to far greater judicial discretion in disposition than adults in comparable circumstances.[19]

The juvenile courts that have resulted in most states are hybrids that reflect the series of compromises underlying their unique structure. They exist in a twilight, neither wholly bound by the constitutional norms of criminal procedure nor convincingly "civil" and rehabilitative as envisioned by their founders. The post-*Gault* juvenile court is characterized by unresolved conflicts between the urge to allow judicial discretion where it serves the purposes of rehabilitation and demands for procedural protections; between the rehabilitative goal

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[10] *Gault*, 387 U.S. at 41.

[11] *Id.* at 33.

[12] *Id.* at 57.

[13] *Id.* at 55. Minors may also have a right to creation of a record in proceedings that can result in confinement. *Id.* at 57–58 (not reaching the issue because, in part, it is not clear that the Constitution requires state to provide appellate review but expressly noting that the case illustrates the dire "consequences of failure to provide an appeal, to record the proceedings, or to make findings").

[14] Breed v. Jones, 421 U.S. 519, 541 (1975).

[15] *In re* Winship, 397 U.S. 358, 364 (1970).

[16] Kent v. United States, 383 U.S. 541, 553 (1966).

[17] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). Some states provide jury trials in juvenile court. Irene M. Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 170 n.36 (listing 13 states that give minors the right to a jury trial as a matter of state law, and four more that provide a limited right or judicial discretion to grant a jury trial in juvenile court).

[18] Schall v. Martin, 467 U.S. 253, 256 (1984).

[19] *In re* Gault, 387 U.S. 1, 31 n.48 (1967).

and societal demands for retribution; and between idealistic hopes and realistic disappointments.

Dissatisfaction with the juvenile justice system is intensified by perceptions of pervasive juvenile crime,[20] and by the related phenomenon of an unprecedented number of juvenile offenders in confinement.[21] Many citizens doubt that juvenile courts can protect the public or that they impose appropriate sanctions on violent juvenile offenders.[22] These circumstances have encouraged critics of juvenile justice to cast the jurisprudential debate as a narrow one between an ethereal commitment to abstract rights and what they see as their own more grounded concern with punishment: the need to ensure certain punishment, a punishment commensurate with the crime, and a punishment that will protect society from future violations.[23]

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[20] Statistics provide support for the public perception that serious and violent crime by juveniles is rising. *See* Elizabeth F. Emmons et al., *Preventing Juvenile Delinquency: An Ecological, Developmental Approach, in* CHILDREN, FAMILIES AND GOVERNMENT: PREPARING FOR THE TWENTY-FIRST CENTURY (Edward Zigler et al. eds., forthcoming) (citing authorities). The Federal Bureau of Investigation cites an increase of about 60% in arrests of persons under 18 years of age for murder and nonnegligent manslaughter during the 1980's. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT FOR THE UNITED STATES 279 (1991). But a recent analysis of Justice Department data suggests that concerns over mounting juvenile crime are exaggerated by, among other things: the failure to note either the relatively low proportion of juvenile arrests attributable to "serious" crimes (5% for juveniles compared with 15% for adults); failure to understand that the most violent crimes of murder and rape combined represent less than one half of one percent of juvenile arrests; and the tendency of youngsters to commit crimes in groups, so that statistics reflect the number of individual children arrested, not the smaller number of crimes they committed. MICHAEL A. JONES & BARRY KRISBERG, NATIONAL COUNCIL ON CRIME & DELINQUENCY, IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY 23 (1994). Further, a small proportion of juvenile offenders is responsible for the bulk of all serious and violent juvenile crime. Department of Justice and Delinquency Prevention, Final Comprehensive Plan for Fiscal Year 1994 and Notification of Availability of the Fiscal Year 1994 Competitive Discretionary Assistance Program and Application Kit, 59 Fed. Reg. 35,980–36,002 (1994); Robert Wright, *The Biology of Violence*, THE NEW YORKER, Mar. 13, 1995, at 70 (79% of repeat violent offenses are committed by 7% of youth).

[21] The number of confined juveniles reached a record high of 690,000 in 1990, the last year for which figures are available. CHILDREN AT RISK, *supra* note 5, at 60. The Office of Juvenile Justice and Delinquency Prevention continues to rely on data collected in June 1990. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILES TAKEN INTO CUSTODY: FISCAL YEAR 1992 (1995).

[22] A Gallup Organization poll conducted on behalf of Cable News Network and *USA Today* in September 1994 found that 72% of adults surveyed believed that the juvenile justice system was "not very successful" or "not successful at all" in controlling juvenile crime; fully 68% of all persons surveyed thought that juveniles who commit violent crimes should be "treated the same as adults." Roper Center for Public Opinion Research 1995, *available in* Westlaw, POLL database.

[23] *E.g.*, *In re* K.B., 639 A.2d 798, 806 (Pa. Super. Ct. 1994) ("If these young miscreants want all the adult rights, perhaps we should give them all the adult punishments concomitant with them."); Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 397 (1991).

These concerns cut across ideological, jurisprudential, and political lines. The renewed emphasis on the responsibilities that accompany rights illustrates the new flavor of the debate.[24] Speaker Gingrich pushes "personal responsibility" as the panacea for social ills.[25] But President Clinton also refers to a "New Covenant" in which personal responsibility alone allows one to take advantage of proffered opportunity.[26] And the Reverend Jesse Jackson reiterates to the poor: "[y]ou are not responsible for being down . . . you are responsible for standing up."[27] From the perspective of individual responsibility, the discretion accorded juvenile court judges can as easily be abused by solicitous respect for the delinquent and promises of treatment as by long sentences untamed by standards. The dominant critique of juvenile courts has shifted from its earlier focus on the rights of juveniles to a discussion based on quite different premises.

Popular fear of juvenile crime and dissatisfaction with juvenile courts are expressed most dramatically in legislation in every state that allows prosecution as adults of minors accused of serious or violent offenses.[28] Such statutes allow the removal to criminal court of expanding categories of minors charged with acts that would constitute serious crimes if committed by adults.[29] Today, only three states and the District

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[24] *E.g.*, MARY ANN GLENDON, RIGHTS TALK, THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[25] Representative Newt Gingrich, A Vision for America, Address to GOPAC (Nov. 14, 1994) (GOPAC is a political action committee supporting Rep. Gingrich).

[26] *Clinton Touts Government as "Partner,"* WASH. POST, Jan. 18, 1995, at A6; *see also* President Bill Clinton, Remarks to the 86th Annual Holy Convocation of the Church of God in Christ, Memphis, Tenn. (Nov. 13, 1993) (unpublished transcript, on file with the author) (government cannot fight crime alone, "we have to reach deep inside to the values, the spirit, the soul").

[27] *Quoted in* Naomi Wolf, *Women, Money and Power*, L.A. TIMES, Feb. 6, 1994, at 4.

[28] Enabling statutes have long provided for transfer of chronic, mature, or violent juvenile offenders to adult criminal court. According to the federal Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), serious juvenile offenders are those adjudicated delinquent for committing any felony offense. John J. Wilson & James C. Howell, *Serious and Violent Juvenile Crime: A Comprehensive Strategy*, 45 JUV. & FAM. CT. J. No. 2 1994, at 3, 13 n.1. "Violent juvenile offenders" are serious juvenile offenders adjudicated delinquent for homicide, rape or other sexual felony offenses, mayhem, kidnapping, robbery or aggravated assault. *Id.* The ability to transfer minors accused of such serious offenses to criminal court may be viewed as a "safety valve" that protects the very existence of the juvenile court by defusing passions surrounding high profile cases. Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 62–63 (1992).

[29] Methods of transferring a juvenile to the criminal court fall into three primary categories: (i) judicial discretion exercised by the juvenile court after a hearing consistent with *Kent* ("waiver"); (ii) prosecutorial discretion to file in either court; and (iii) mandated transfer for enumerated offenses (vesting discretion in the prosecutor in determining the terms of indictment) and/or prior adjudication for specified delinquent acts. *See* Utah v. Mohi, 901 P.2d 991, 1002–04 (Utah 1995) (overturning act giving prosecutor unguided discretion to file charges in

of Columbia expressly bar criminal prosecution of minors aged fifteen or younger.[30] In what may be viewed as an excess of zeal, forty-one states now allow or *require* transfer of children fourteen years old or younger to criminal court under certain conditions.[31] In Indiana, for example,

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either criminal or juvenile court as violating State Constitution). Only a prior hearing comports with the recommendation in the Juvenile Justice Standards that trials of all persons under age 18 should commence in juvenile court. STANDARDS RELATING TO TRANSFER BETWEEN COURTS § 1.1(A)–(B) (1980).

[30] DEL. CODE ANN. tit. 10, § 1010 (1995); HAW. REV. STAT. § 571-22 (1994); NEV. REV. STAT. § 62.080 (1995). The underlying approach of transferring certain juveniles to criminal court is not new. Martin L. Forst & Martha-Elin Bloomquest, *Cracking Down on Juveniles: Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 338 (1991); Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 653 (1994) (noting that Pennsylvania excluded accused murderers from juvenile court jurisdiction as early as 1933). Respected juvenile justice experts, however, including the drafters of the IJA/ABA Juvenile Justice Standards, recommend that no child should be tried in an adult court for a crime committed before the age of 15. STANDARDS RELATING TO TRANSFER BETWEEN COURTS § 1.1(A)–(B) (1980).

[31] As of August 31, 1995, state codes authorize or require transfer as follows: ALA. CODE § 12-15-34 (1994) (age 14) (act which would constitute a crime if committed by an adult); ALASKA STAT. § 47.10.060 (1990) (no minimum age) (minor is delinquent and not amenable to treatment); ARIZ. R. JUV. P. 12-14 (no minimum age) (public offense) (rebuttable presumption of nonamenability if juvenile is 16 and committed murder, aggravated assault with deadly weapon, sexual assault with deadly weapon, or committed class 1, 2, 3, or 4 felony and has four prior delinquent findings at least one of which is considered "serious"); ARK. CODE ANN. § 9-27-318 (Michie 1993) (age 14) (capital murder, murder in the first degree, murder in the second degree, kidnapping in the first degree, aggravated robbery, rape, battery in the first degree, possession of a hand gun on school property, or aggravated assault committed with a deadly weapon); CALIF. WELF. & INST. CODE § 707 (West 1995) (age 14) (a detailed enumeration including murder, arson, violent sex crimes, drug felonies, violent felonies, and fire-arms related felonies); COLO. REV. STAT. ANN. § 19-2-806 (West 1994) (age 14) (felony); CONN. GEN. STAT. § 46b-127 (1995) (age 14) (murder, a single felony constituting a "serious juvenile offense," or various combinations of offenses); FLA. STAT. ch. 39.022 (1994) (no minimum age, capital offense) (age 14, violation of Florida law); GA. CODE ANN. § 15-11-39 (1994) (age 13, capital offense, age 15, other offenses); IDAHO CODE § 16-1806, 1806A (1994) (age 14) (mandatory for violent crimes and drug offenses near schools, permissive for other offenses that would be a crime if committed by an adult); 705 ILCS 405/5-4 (West Supp. 1995) (age 13) (act that constitutes a crime under the laws of State); IND. CODE § 31-6-2-4 (1994) (age 10, murder, age 14, heinous or repetitive offense); IOWA CODE § 232.45 (1994) (age 14) (public offense); KAN. STAT. ANN. § 38-1636 (1993) (age 14) (felony); KY. REV. STAT. ANN. § 635.020 (Baldwin 1994) (age 14) (capital offense, Class A or B felony or felony with a firearm); ME. REV. STAT. ANN. tit. 15, § 3101 (West 1993) (no minimum age) (murder or Class A, B, or C crime); MD. CODE ANN., CTS. & JUD. PROC. § 3-817 (1995) (under age 15) (capital offense); MASS. GEN. L. ch. 119, § 61 (1994) (age 14) (felony involving threat or infliction of serious bodily harm or felony committed by child previously committed to department of youth services); MINN. STAT. § 260.125 (1994) (age 14) (mandatory for first degree murder, discretionary for other felonies); MISS. CODE ANN. § 43-23-31 (1993) (age 13) (felony); MO. REV. STAT. § 211.071 (1994) (age 14) (felony); MONT. CODE ANN. § 41-5-206 (1994) (age 12) (sexual intercourse without consent, deliberate homicide, mitigated deliberate homicide, or attempted deliberate or mitigated homicide); NEB. REV. STAT. § 43-276 (1994) (under 16) (felonies, misdemeanors or violations of city or village ordinances which are not traffic offenses); N.H. REV. STAT. ANN. § 169-B:24 (1994) (no minimum age) (felony); N.J. REV. STAT. § 2A:4A-26

children as young as ten years old who are charged with murder or manslaughter "shall" be waived to criminal court.[32] Twelve states do not set any minimum age for criminal prosecution.[33] At least one of those states—Oklahoma—expressly allows children tried as adults to "be incarcerated with the adult population" upon conviction regardless of their age.[34]

The parameters of legislative and jurisprudential choices are constrained by the erroneous assumption that we are confronted by stark, mutually exclusive choices: rehabilitation *or* punishment, therapy *or* retribution, rights *or* responsibilities.[35] This assumption is both prem-

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(1994) (age 14) (a detailed enumeration including criminal homicide, first degree robbery, aggravated sexual assault, aggravated assault, kidnapping, aggravated arson, repeat offender, car theft, or selling drugs in school zone); N.M. STAT. ANN. § 32A-2-20 (Michie 1995) (no minimum age) (adult crime); N.Y. CRIM. PROC. LAW § 180.75 (McKinney 1993) (criminal court has original jurisdiction over age 13, murder, and age 14, first degree kidnapping, first degree assault, first degree manslaughter, first degree rape, first degree sodomy, aggravated sexual assault, first degree burglary, first or second degree robbery, first or second degree arson, attempted second degree murder, or attempted first degree kidnapping); N.C. GEN. STAT. § 7A-608 (Supp. 1994) (age 13) (felony); N.D. CENT. CODE § 27-20-34 (Supp. 1995) (age 14) (act or threat of serious bodily harm); OKLA. STAT. tit. 10, § 1112 (1994) (no minimum age) (felony); 42 PA. CONS. STAT. §§ 6302, 6355 (1994) (all murder trials in criminal court, age 14 for all other offenses); R.I. GEN. LAWS § 14-1-7 (1993) (no minimum age) (felony); S.C. CODE ANN. § 20-7-430 (Law. Co-op. Supp. 1994) (no minimum age, murder or sexual assault; age 14, Class A, B, C or D felony or felony punishable by a maximum of 15 years); S.D. CODIFIED LAWS ANN. § 26-11-4 (Supp. 1995) (no minimum age) (felony); TENN. CODE ANN. § 37-1-134 (Supp. 1994) (under 16) (first or second degree murder, rape, aggravated robbery, kidnapping); UTAH CODE ANN. § 78-3a-25 (Supp. 1995) (age 14) (felony); VT. STAT. ANN. tit. 33, § 5506 (1991) (age 10) (arson causing death, assault and robbery with a dangerous weapon, assault and robbery causing bodily injury, aggravated assault, murder, manslaughter, kidnapping, maiming, sexual assault, aggravated sexual assault, burglary of sleeping apartments); VA. CODE ANN. § 16.1-269.1 (Michie Supp. 1995) (age 14) (felony); W. VA. CODE § 49-5-10 (Supp. 1995) (age 14) (treason, murder, robbery with a deadly weapon, kidnapping, first degree arson, first degree sexual assault, or any felony provided the child had two prior findings of delinquency for acts which would be felonies if committed by an adult, or a prior delinquent finding for an offense which would be a violent felony if committed by an adult); WIS. STAT. ANN. § 48.18 (West Supp. 1994) (age 14) (enumerated felonies); WYO. STAT. § 14-6-237 (Supp. 1995) (no minimum age) (delinquent act).

[32] IND. CODE § 31-6-2-4 (1994).

[33] Alaska, Florida, Maine, Maryland, Nebraska, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota and Wyoming. *See supra* note 31. West Virginia set no minimum age until 1995. *See id.*

[34] OKLA. STAT. tit. 10, § 1112(C).

[35] Recently, some juvenile justice experts have tried to break down the barriers between the retributive and rehabilitative models of juvenile justice (which they erroneously attribute to internal contradictions in the juvenile justice system) by promoting a "balanced" approach. Under this model, treatment is combined with an emphasis on accountability and protecting the public. They challenge the over-reliance on institutionalization of juvenile offenders, which they attribute to the lack of adequate community-based programs. Instead, they urge adoption of techniques that help the offender to understand the effect of crime on its victims, and meaningful restitution programs through which the offender can repay both the victim and the community. *See, e.g.*, WILLIAM H. BARTON ET AL., A BLUEPRINT FOR YOUTH CORRECTIONS (1991) (research conducted for the Center for the Study of Youth Policy, University of Michigan School of Social

ised on and has contributed to a peculiarly restrictive reading of the current juvenile justice regime and the seminal cases which gave birth to it. It has too often appeared as if *Kent* and *Gault* mindlessly focused on abstract rights at the expense of public safety obtained through meaningful disposition designed to punish and deter. Yet when we turn to the details of those cases, it becomes apparent that *Kent* and *Gault* clearly focused on disposition. The Justices sought to balance proportional retribution with treatment as they laid out their vision of a modern juvenile jurisprudence.

II. THE LEGACY OF *KENT* AND *GAULT*

For critics of all stripes, disposition underlies the controversy over juvenile justice. On the one hand, those who draw from a rights model criticize the juvenile justice system for failing to give minors who face adjudication for delinquency the full panoply of constitutional rights due to adults. Their criticism derives both from a principled devotion to rights and from their perception that juvenile courts often strip young people of liberty under the guise of rehabilitation.[36]

On the other hand, opponents of leniency decry the failure of the juvenile justice system to stem a rising tide of youth crime and violence.[37] They have attacked the juvenile court for what they see as its fixation on procedural protections for the young. One judge sums the problem up as "Gaultmania," which he defines as "the unnecessary overuse of formalized criminal procedures, lawyers and judges" in juvenile court.[38] As a result, he charges, such courts are "filled with lawyers, and bewildered little waifs . . . standing with blank faces listening to a robed figure reciting an incomprehensible litany of constitu-

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Work); GORDON BAZEMORE & MARK S. UMBREIT, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, BALANCED AND RESTORATIVE JUSTICE, PROGRAM SUMMARY (1994); Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME & DELINQ. 296, 298 (1995) ("[T]he punitive model and the traditional treatment model are not the only options for the juvenile court."); Dennis Maloney et al., *The Balanced Approach to Juvenile Probation*, 39 JUV. & FAM. CT. J. No. 3 1988, 1, 5–11; *see also infra* note 113.

[36] *E.g.*, McKeiver v. Pennsylvania, 403 U.S. 529, 557–72 (1971) (Douglas, J., dissenting) (juveniles facing incarceration—in this instance up to 5 or 10 years in confinement—have a constitutional right to a jury trial); Janet E. Ainsworth, *Youth Justice in a Unified Court: A Response to the Critics of Juvenile Court Abolition*, *ante*; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

[37] *E.g.*, Springer, *supra* note 23, at 403; *see also* WILLIAM W. TREANOR & ADRIENNE E. VOLENIK, THE NEW RIGHT'S JUVENILE CRIME AND JUSTICE AGENDA FOR THE STATES: A LEGISLATOR'S BRIEFING BOOK 14–30 (1987) (describing and criticizing the heavily retributive "just deserts" model juvenile code developed by the Rose Institute and the American Legislative Exchange Council in 1987 under a grant from the O[JDP).

[38] Springer, *supra* note 23, at 405 & n.36.

tional rights."[39] The "little waifs" appearing in juvenile courts, he insists, are nearly always guilty of the offense attributed to them.[40] In the ensuing "panic" over rights, this social order theorist argues, "criminals are treated like children" and are not held accountable for their actions.[41] By depicting the choices in such polar terms, proponents of both schools of thought belittle the complexity of the vision in the foundation cases.

As I shall demonstrate, sensibility about equitable disposition was central to the reasoning of the seminal cases that set forth the jurisprudential basis of the modern juvenile court. *Kent*, *In re Gault* and their progeny collectively pieced together the peculiar regime that defines modern juvenile justice. Despite the pivotal significance of *Kent* and *Gault*, commentators and courts alike have generally ignored the facts that led to the procedural holdings in those cases. By doing so, they have overlooked how important disposition was to the balancing process that determined what procedures were due to minors charged with delinquent acts. The following analysis of the foundation cases highlights the Court's consistent concern with the unrestrained discretion that too frequently characterized the disposition of juveniles in the old regime.

In both *Kent* and *Gault*, the Court concluded that the disposition by the trial court violated the ephemeral yet basic concept often described as "fundamental fairness."[42] Fundamental fairness, in the juvenile context, emerges as a blend of the appropriate level of retributive justice—dispensed to punish a triggering act and to deter similar acts in the future by the same actor or by others—and the discretion to mete out individualized justice in the form of rehabilitation.[43]

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[39] *Id.* at 405 n.36.

[40] *Id.* at 414 ("[T]he fact that almost all juveniles who are brought before the court on delinquency charges have in truth committed the crime charged is a fact that we should not be required to ignore."). This is also true, of course, of most adults charged with crimes who are or plead guilty. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 530, 546 (Kathleen Maguire & Ann L. Pastore eds., 1994) (88.5% of persons sentenced in federal court entered a plea of guilty, while only one percent of those indicted on felony charges were acquitted after trial).

[41] Springer, *supra* note 23, at 405–08.

[42] The presenting issue, of course, was the process that led to the disposition. *In re* Gault, 387 U.S. 1, 19 (1967) (failure to observe "fundamental requirements of due process" has resulted in "arbitrariness" and "unfairness to individuals"); Kent v. United States, 383 U.S. 541, 553 (1966) ("substantial degree of discretion" accorded juvenile court "does not confer . . . a license for arbitrary procedure"); *see also Gault*, 387 U.S. at 72 (Harlan, J., concurring in part, dissenting in part) ("fundamental fairness" requires only notice, access to counsel and a written record or its equivalent).

[43] *See* Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, B.Y.U. L.

Kent involved a minor transferred from juvenile to criminal court for the apparent, albeit unspoken, purpose of subjecting him to a longer period of confinement.[44] The juvenile court judge apparently worried about how to frame an appropriate disposition from the moment sixteen-year-old Morris Kent appeared in 1961 charged with committing several robberies and rapes.[45] Morris had been in and out of the juvenile justice system since the age of fourteen and remained on probation in his mother's custody as a result of prior housebreakings and an attempted purse snatching. The juvenile court assumed that limited juvenile facilities and Morris's aging out of the court's jurisdiction rendered juvenile justice unable to accomplish rehabilitation. Here we have the kind of case that seizes the public imagination: pretrial evaluations indicated that Morris suffered from schizophrenia, could not receive adequate treatment in juvenile facilities, and might pose a risk to society if released at age twenty-one. The juvenile court apparently concluded that the only way to achieve jurisdiction over Morris beyond age twenty-one was to waive juvenile jurisdiction and transfer him for criminal proceedings. It did so, the Supreme Court held, "without hearings, without effective assistance of counsel, without a statement of reasons"—thereby depriving Morris of due process.[46] While awaiting trial in criminal court, Morris spent nearly one year in prison without benefit of any psychiatric treatment.[47] The criminal court sentenced Morris to thirty-to-ninety years following his conviction on housebreaking and robbery charges.[48] The jury found Morris not guilty by reason of insanity on the rape counts, resulting in his commitment *sine die* to a psychiatric hospital.[49]

In a majority opinion by Justice Fortas, the Supreme Court vacated and remanded for a de novo hearing on the waiver consistent with

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REV. 351, 353–67 (1991) (citing, among others, ROBERTO UNGER, KNOWLEDGE AND POLITICS 88–91 (1975) on the comparison of regimes of "legal" and "substantive" justice). The creative dispositions that maximize the positive attributes of juvenile court discretion may be thought of as a kind of individualized distributive justice. Through disposition, such thinking runs, collective resources are redistributed to the children whose failures demonstrate their special neediness. *See* Springer, *supra* note 23, at 408–09 (juvenile courts administer "distributive" justice composed of "care, guidance, control and discipline," as well as retributive justice).

[44] 383 U.S. at 543. The question of which procedures should govern such transfers is even more significant today than it was when *Kent* was decided. State and federal legislators have expanded the categories of minors who may be transferred to criminal court for trial. *See supra* notes 28–34 and accompanying text.

[45] Kent v. United States, 401 F.2d 408, 409 (D.C. Cir. 1968).

[46] *Kent*, 383 U.S. at 554.

[47] *Kent*, 401 F.2d at 411–12.

[48] *Kent*, 383 U.S. at 550.

[49] *Id.* at 550, 565 n.33.

"procedural regularity."[50] The Court held that the federal statute that created the District of Columbia's juvenile court jurisdiction created a right for an accused juvenile to have the advantage of juvenile court proceedings.[51]

In *Kent*, the Supreme Court measured the child's interest in appearing before a juvenile court as the potential "difference between five years' confinement and a death sentence."[52] The Court suggested an inherent rationality in distinguishing between minors and adults by limiting the sentence to which children could be exposed. The Court surely never meant that the flexibility inherent in juvenile disposition should (or could) result in a death sentence which could not be imposed on an adult in similar circumstances.[53] The unspoken assumption of Justice Fortas's opinion, therefore, was that the underlying rehabilitative premises of the juvenile court system must cause any sentencing disparities between the two systems of justice to redound to the benefit of the offender sentenced by a juvenile court.[54]

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[50] *Id.* at 542, 553, 565. *Kent* was the first in a series of opinions by Justice Fortas that emphasized the constitutional rights of children in a number of contexts. In addition to the opinions in *Kent* and *Gault*, discussed here, Justice Fortas wrote the frequently cited opinion stating that children do not "shed their constitutional rights . . . at the schoolhouse gate." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (holding that the First Amendment protects nondisruptive student speech in schools). Laura Kalman discusses *Tinker* as a statement of Justice Fortas's views on the First Amendment and political dissent, but does not relate his opinion in *Tinker* to her observation that he sought to "enfranchis[e] outsiders"—including alcoholics, criminals and children. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 250, 286 (1990).

[51] *Kent*, 383 U.S. at 553–54. Justice Stewart, joined by Justices Black, Harlan and White, dissented on the narrow ground that the statute at issue related only to the District of Columbia. *Id.* at 568 (Stewart, J., dissenting) For that reason, the dissenters argued, the opinion of the Court of Appeals for the District of Columbia should be left undisturbed. *Id.* (Stewart, J., dissenting). The majority explained that Kent's right to a hearing in juvenile court stemmed from the jurisdictional "statute read in the context of constitutional principles relating to due process." *Id.* at 557.

[52] *Id.* at 557.

[53] *Id.* at 556–57; *see also* United States v. Bland, 472 F.2d 1329, 1339–40 (D.C. Cir. 1972) (Wright, J., dissenting).

[54] Ironically, juveniles do not always benefit from the distinction. The goal of rehabilitation has sometimes served as a rationale for allowing courts to impose longer sentences on minors than on similarly situated adults. *See, e.g.*, 18 U.S.C. §§ 5035, 5039 (1994) (juvenile delinquency act). This statute was discussed in Brief For Petitioner at 24–25, United States v. R.L.C., 503 U.S. 291 (1992) (No. 90–1577) ("[I]t would not be inequitable or unconstitutional for a juvenile to be committed for a longer period of confinement than an adult convicted of the same offense" because commitment of juveniles is designed to "rehabilitate, not punish, errant youths, and the government provides juveniles with special treatment toward that goal.") (citing authorities for evaluating age-based distinction under a rational basis test). The Supreme Court of Wyoming, for example, ruled in the *Matter of ALJ* that a juvenile court could: (i) sentence a minor to a period of probation three times longer than that applicable to a similarly situated adult and longer than the maximum prison term for the underlying offense; (ii) order that the minor be

The theoretical significance of *Kent*, however, cannot be fully mined by analysts who stop at Justice Fortas's opinion. On remand, the district court approved the original 1961 waiver of juvenile court jurisdiction over Morris Kent, but the Court of Appeals for the District of Columbia reversed.[55] The rich, yet rarely cited, opinion for the Court of Appeals by Chief Judge David L. Bazelon elaborated on some of the themes explored by Justice Fortas, with a particular emphasis on framing an appropriate disposition.[56] Chief Judge Bazelon expressly concluded: "[i]t seems clear that the chief reason for waiver was that the juvenile court could retain jurisdiction over Kent for only five years and that he was unlikely to recover within this period."[57] Chief Judge Bazelon criticized the "paradoxical result" of the lower court's approach to waiver: "the sicker a juvenile is, the less care he receives from the juvenile court."[58] Instead, he explained, a child would invariably be subjected to the "strains and stresses" of criminal prosecution because no one can guarantee he will recover by age twenty-one.[59] The Court of Appeals rejected the trial court's approach, which it characterized

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subjected to intrusive searches (including urinalysis and residential checks) during the probationary period without any showing of the "reasonable suspicion" required to search an adult probationer; and (iii) revoke the minor's driving privileges. 836 P.2d 307, 311–13 (Wyo. 1992). ALJ was charged with pointing an unloaded weapon at acquaintances during a party. *Id.* at 309. Under the criminal code, an adult charged with the same act (a misdemeanor) was subject to a maximum probation of one year. *Id.* at 313. ALJ received five days of confinement and "triple" probation of three years; violation of probation would expose ALJ to incarceration in the boys' training school for a period as long as seven months into his majority. *Id.* at 323 (Urbigkit, C.J., dissenting in part).

[55] 401 F.2d 408, 409, 412 (D.C. Cir. 1968). The district court determined that on remand the 1961 waiver was "appropriate and proper," presumably in light of determinative factors set forth in a policy memorandum issued by the District's Juvenile Court judge, that was appended to the opinion of the Supreme Court in *Kent*. *Id.* at 409; *see Kent*, 383 U.S. at 565–68 (factors to be weighed in deciding whether to transfer a juvenile to criminal court—later labeled the "*Kent* factors"—include the seriousness of the offense, level of violence and premeditation, whether personal injury resulted, whether evidence exists supporting an indictment, presence of adult co-defendants, the juvenile's "sophistication and maturity," the juvenile's record in the justice system, and prospects for rehabilitation through facilities "currently available to the juvenile court").

[56] A search of the major law reviews included in standardized services indicates that not a single commentator has discussed Chief Judge Bazelon's opinion in *Kent*. Chief Judge Bazelon, however, considered it important enough to devote a chapter of one of his book to excerpts from his opinions in *Kent* before it reached the Supreme Court and after remand. DAVID L. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND THE CRIMINAL LAW 129–36 (1988). Only one article even notes the existence of the opinion. McCarthy, *supra* note 30, at 653 n.125 (noting that after remand the Court of Appeals "concluded that Kent should have been civilly committed").

[57] *Kent*, 401 F.2d at 412.

[58] *Id.*

[59] *Id.*

as taking an unnecessarily restrictive view of the procedures available to preserve public safety:

> [T]his harsh result might be justified if there is no other way to protect society. But it is clear that society can be protected without departing from civilized standards for the prompt and adequate care of disturbed children. The juvenile court can institute civil commitment proceedings against the youngster. If commitment ensues, he will be confined and treated until he is no longer dangerous due to mental illness. If not, the juvenile court will be free to follow its usual procedures.[60]

Chief Judge Bazelon also noted that if civil commitment to a psychiatric facility resulted in release before age twenty-one, Morris would have remained under the jurisdiction of the juvenile court and the juvenile court could have reinstated charges, presumably with a renewed opportunity to waive Morris into criminal court.[61] The Court of Appeals vacated the initial waiver and the criminal conviction, but advised the government that it could still institute civil commitment proceedings against Morris[62]—who by then was twenty-three years old.[63]

Chief Judge Bazelon explained that the legitimacy of the juvenile justice system depended on its ability to protect the safety of the public. "*Parens patriae*," he emphasized, "requires that the juvenile court do what is best for the child's care and rehabilitation *so long as this disposition provides adequate protection for society.*"[64] He concluded that it was possible—and essential—to achieve both goals for Morris Kent within the framework of juvenile court.[65] Chief Judge Bazelon, widely and justifiably regarded as a leading liberal judge, took a solicitous interest both in the young and in mental illness.[66] He never, however, lost sight of the conditional terms of the rehabilitative ideal. Rehabili-

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[60] *Id.* (footnote omitted). To be sure, the civil commitment process for persons accused of crimes raises its own civil liberties issues. *See, e.g.*, David W. Burgett, *Substantive Due Process Limits on the Duration of Civil Commitment for the Treatment of Mental Illness*, 16 HARV. C.R.-C.L. L. REV. 205 (1981); Grant H. Morris, *The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment*, 60 TUL. L. REV. 927 (1986). But Morris Kent would undoubtedly have preferred an indeterminate psychiatric commitment to a criminal sentence of up to 90 years.

[61] *See Kent*, 401 F.2d at 410.

[62] *Id.* at 412.

[63] *Id.* at 413 n.1 (Burger, J., dissenting).

[64] *Id.* at 411 (second emphasis added).

[65] *Id.* at 412.

[66] Abner Mikva, *The Real Judge Bazelon*, 82 GEO. L.J. 1, 2–3 (1993); *see also* Martha Minow, *Questioning Our Policies: Judge David L. Bazelon's Legacy for Mental Health Law*, 82 GEO. L.J. 7 (1993).

tation—a gift of the state—was possible only after meeting the security needs of society. Because Chief Judge Bazelon was convinced that the juvenile court could assure that Morris would remain confined for "treatment for as long as the public safety requires," he concluded that the condition precedent for retaining juvenile court jurisdiction had been satisfied.[67] The solution crafted in *Kent* resembles the statutory provisions for extended jurisdiction of juvenile courts recently enacted in several states that allow juveniles to be detained beyond the age of majority based on an adjudication by a juvenile court where necessary to protect the public.[68]

Although on its face, *Kent* concerns only procedural rights, when properly understood, it illuminates the central conflicts that surround juvenile justice. Considered together as a thematic statement, the opinions of Justice Fortas and Chief Judge Bazelon underscore that no artificial division exists between rehabilitation and punishment, therapy and retribution, or rights and responsibilities. According to the vision in these opinions, Morris Kent could exercise his right to appear before a juvenile court which could find an appropriate way to provide him with treatment and still protect the public until Morris was able to meet his responsibilities to society. Chief Judge Bazelon's opinion makes clear that the procedural questions decided by the Supreme Court do not even arise unless the juvenile court lacks the ability to structure a proportionate response: only if the juvenile court cannot protect all of the individual and societal interests involved would a boy like Morris have the occasion to assert his right to procedures designed to ensure that he did not lose his right to a hearing in juvenile court without due process protections.

Protection of society was hardly at issue in *In re Gault*, the seminal case that addressed the widespread procedural shortcomings of the

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[67] *Kent*, 401 F.2d at 412. Future Supreme Court Chief Justice Burger, sitting on the panel with Chief Judge Bazelon, disagreed. *Id.* at 413 (Burger, J., dissenting). He emphasized that Morris's entire juvenile record, including his "entire social and psychiatric file" revealed that the supposed "'child'" before the court was "a dangerous person who has committed numerous grave crimes of violence." *Id.* at 413 & n.1 (Burger, J., dissenting). Therefore, he feared that Morris might be released by a doctor if confined under the terms of a civil commitment, and argued that greater protection for society was warranted. *Id.* at 414 (Burger, J., dissenting).

[68] *See, e.g.*, CAL. WELF. & INST. CODE § 607(b) (West Supp. 1995) (allowing extension of jurisdiction to age 25); MINN. STAT. ANN. § 260.126 (West 1995) (where minors over age 14 are accused of felony offenses, and certain conditions are met, upon adjudication of delinquency the court may impose both a juvenile and an adult sentence, but the adult sentence shall be stayed until and unless the juvenile violates the terms of the adjudication or commits a new offense, at which time the offender is entitled to a summary revocation hearing); TEX. FAM. CODE ANN. § 54.04(d)(3) (West 1992) (allowing extension of jurisdiction for up to 40 years for enumerated serious and violent offenses); *see also* Martin, *supra* note 28, at 60–61, 84–87.

juvenile justice system.[69] *Gault* can be viewed as the mirror image of *Kent*: trial courts in each instance imposed what the Justices viewed as unreasonable penalties on minors, one by retaining juvenile jurisdiction, the other by waiving it. The fundamental issue of disposition was central to both cases. In *Gault*, the juvenile court committed fifteen-year-old Gerald Gault to the State Industrial School until the age of majority for the childhood prank of making an indecent telephone call to a woman neighbor.[70] If Gerald had been over eighteen, and had committed the same offense, the maximum penalty a criminal court could have imposed was a fine of between five and fifty dollars or imprisonment for not more than two months—and Gerald would have received a full array of procedural guarantees.[71] Instead, young Gerald faced six years of confinement in an "industrial school," which the majority concluded amounted to incarceration "no matter how euphemistic the title."[72] The perception that Gerald received unacceptably harsh punishment in juvenile court—far beyond what could be meted out to an adult—framed Justice Fortas's analysis for the majority.[73] In light of the significant deprivation of liberty Gerald faced in juvenile court, the Court in *Gault* held that even in that unique forum he was entitled to numerous due process rights.[74]

Legal scholars interested in juvenile disposition have largely confined themselves to *Gault*'s procedural holdings, ignoring the focus on

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[69] 387 U.S. 1 (1966).

[70] *Id.* at 3, 7–8.

[71] *Id.* at 29.

[72] *Id.* at 27.

[73] Six members of the Court agreed with all of the holdings in *Gault*, but only five Justices signed the entire majority opinion. Justice Black concurred, but wrote separately to express his belief that "the guarantees of all the provisions of the Bill of Rights" apply to all persons, whether "infant or adult, [who] can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years." *Id.* at 59, 61 (Black, J., concurring). Justice White joined all but Part V of the majority opinion, which held that the constitutional privileges of confrontation, self-incrimination and cross-examination apply to children; he believed the Court should not have reached those questions on the scant record available to it. *Id.* at 64 (White, J., concurring) (expressly agreeing that the privilege against compelled self-incrimination applies at the adjudicatory stage of juvenile proceedings). Justice Harlan agreed with much of the reasoning in the majority opinion, but disagreed with the procedural balance struck by the majority. *Id.* at 65–78 (Harlan, J., concurring in part, dissenting in part) He would have imposed only three procedural requirements on juvenile courts: timely notice of the charges; "unequivocal and timely notice" of a right to counsel accompanied by provision of counsel to indigents; and creation of a record adequate to permit appellate review. *Id.* at 72 (Harlan, J., concurring in part, dissenting in part). Only Justice Stewart dissented. *Id.* at 78–81 (Stewart, J., dissenting) (juvenile proceedings are not adversarial and, in any event, the questions presented did not arise on this record since Gerald's parents knew of "their right" to counsel and other protections at issue).

[74] *Gault*, 387 U.S. at 57.

disposition within the Court's reasoning. They have thereby underestimated the significance of the disproportionate sentence Gerald received to the procedural "revolution" wrought in *Gault*.[75] For instance, one leading commentator omits Gerald's actual disposition from a list of factors that contributed to the Court's decision in *Gault*.[76] He argues that the Court crafted a narrow decision, "without considering . . . [the] dispositional practices of the juvenile justice system."[77] Similarly, historians, trying to place judicial writings in context, discuss *Gault* without attention to Gerald's incarceration.[78] But Justice Black, concurring in *Gault*, put it plainly, underscoring his concern that children who are "*subject to heavier punishments*, could, *because they are children*, be denied . . . constitutional safeguards."[79]

The thirty-page "preface" to Justice Fortas's opinion, a classic essay about the dreams and disappointments of the juvenile court, is something more than *obiter dicta*: it comprises the lens through which the Justices evaluated Gerald's fate. They concluded that "[t]he absence of

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[75] Kent v. United States, 401 F.2d 408, 409 (D.C. Cir. 1968). The list of commentators on *Gault* is voluminous. *See, e.g.*, SAMUEL M. DAVIS, RIGHTS OF JUVENILES, THE JUVENILE JUSTICE SYSTEM 1–4, 6–42 (2d ed. 1994) (not mentioning disposition and concluding that "procedural arbitrariness" made the *Gault* decision inevitable, but noting that the Court recognized the risk that adjudicated delinquents would enter adult penal institutions); Fox, *supra* note 7, at 1235–36 (analyzing *Gault* as procedural reform that naively overlooks the social control impulses of nineteenth-century reformers, without mentioning Gerald's disposition); Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1393, 1401 (1995) (observing that Gerald received a six-year sentence, but not discussing its importance to the Court's reasoning, and discussing *Gault* as a case about "procedural shift"). Lee Teitelbaum cites Gerald's commitment for an unnamed misdemeanor as example of dissociation between behavior and disposition in the untamed juvenile court, but does not relate that dissociation to the result in *Gault*. Teitelbaum, *supra* note 43, at 363 & n.36. An important exception is Robert Schwartz, who brought his provocative unpublished analysis to my attention shortly before this article went to press. He observed that the disproportionate penalty imposed on Gerald compared to similarly situated adults "caught the Court's attention, and led it to revisit the fairness of juvenile court proceedings." Robert G. Schwartz, Another Perspective: The Nation and Other States, Address to the Association for Children of New Jersey 15–16 (Nov. 21, 1994) (transcript on file with author) (speculating that in *Gault* the Justices sought to ensure that intervention matched the individual child and the offense).

[76] Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 826–27 (1988) (arguing for abolition of the juvenile court on the ground, among others, that in its current incarnation it too closely resembles criminal court, but fails to grant the full panoply of rights, and has failed to resolve inherent tensions between punishment and treatment).

[77] *Id.* Feld elsewhere notes Gerald's sentence in passing, but does not comment on it in his extensive discussion of the case. BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 18 (1993).

[78] *See, e.g.*, PLATT, *supra* note 4, at 161–63 (no reference to disposition); RYERSON, *supra* note 4, at 149–51 (noting in passing that Gerald's parents failed to achieve his release from the industrial school to which he had been committed).

[79] *In re* Gault, 387 U.S. 1, 61 (1967) (Black, J., concurring) (emphasis added).

procedural rules based upon constitutional principles has not always produced fair, efficient and effective procedures."[80] "Departures from established principles of due process," Justice Fortas emphasized, "have frequently resulted not in enlightened procedure, but in arbitrariness."[81] Justice Fortas proceeded from an awareness of the constraints on judicial authority, apparent at least since Chief Justice Marshall explained the limits of judicial discretion: discretionary choices are left, "not to [a court's] inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[82] When arbitrariness results from abuse of discretion, Justice Fortas made clear, society loses collectively along with the individual whose rights are compromised. "Due process of law," he explained, "is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which . . . delimits the powers which the state may exercise."[83]

Justice Fortas repeatedly noted the divergence of reality and rhetoric in the juvenile court system.[84] His majority opinion "confront[ed] the reality" of the cavalier treatment Gerald received in juvenile court.[85] The Justices were fully cognizant of the decision's symbolic importance. Discretion bled over into arbitrariness, the Court held, when, under the guise of special protection, Gerald was taken into custody without any notice to his parents, was charged in writing only with needing protection of the court, and had a hearing at which the complainant did not appear, not a single witness was sworn, and nothing was recorded in any way.[86] Even after sentencing Gerald, the trial judge was unable to specify what section of the code he found Gerald had violated to render him delinquent.[87] The judge later testified that he was uncertain whether Gerald's behavior constituted disturbing the peace or habitual immoral behavior.[88] Ultimately, the Supreme Court criticized the trial judge for treating Gerald's case as if it were simply "any charge of violation of a penal statute" and for failing to use his discretion to explore whether Gerald's apparently stable household—

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[80] *Id.* at 18.

[81] *Id.* at 18–19.

[82] United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.).

[83] *Gault*, 387 U.S. at 20.

[84] *Id.* at 30 (quoting STANTON WHEELER & FRED COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL 18, 21–22, 24 (1966)).

[85] *Id.* at 27.

[86] *Id.* at 5.

[87] *Id.* at 8 n.5.

[88] *Gault*, 387 U.S. at 8 n.5.

consisting of two working parents and an older brother—could provide suitable supervision for rehabilitation.[89]

Rumor, innuendo, and unfounded charges all helped to determine Gerald's sentence.[90] Justice Fortas painted a picture of discretion run riot by detailing how the juvenile court judge considered a prior vague "referral" about the theft of a baseball glove a factor relevant to Gerald's disposition.[91] The referral, the Court underscored, led to "'no hearing,' and 'no accusation' . . . 'because of lack of material foundation.'"[92] Yet it contributed to Gerald's incarceration.[93]

While it appeared to condemn such capriciousness masquerading as exercise of discretion, the majority expressly reserved opinion on the question of the "post-adjudication disposition" of juveniles which it deemed "unique to the juvenile process."[94] By inference the Court did not reach the role of discretion in disposition.[95] In dicta, the majority voiced several preliminary concerns about disposition, which the Court has not yet considered directly. For example, Justice Fortas observed that the strengths and risks of the juvenile system were magnified at the disposition stage, where the "opportunity" for "individualized treatment plans" was ripest, but where the opportunity was accompanied by the "danger" inherent in the "court's coercive powers."[96]

Justice Fortas also used *Gault* as an occasion to ask whether the juvenile justice system lived up to its promise to rehabilitate young offenders, citing research on the "'bankruptcy of dispositional resources'" within the juvenile justice system.[97] He wondered whether, to the extent that reduced procedural protections are justified as a legitimate ex-

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[89] *Id.* at 28–29.

[90] *Id.* at 9.

[91] *Id.*

[92] *Id.*

[93] *Gault*, 387 U.S. at 9.

[94] *Id.* at 31 n.48.

[95] *Id.* at 13, 27, 31 n.48.

[96] *Id.* at 39 n.65 (counsel is needed at disposition to ensure that the juvenile court exercises its discretion with "adequate knowledge of the circumstances"). Then, as now, inadequate resources undermined the juvenile justice system. Judges with severely overcrowded dockets cannot be expected to render thoughtful, individualized justice. *See id.* at 66 n.2 (Harlan, J., concurring in part, dissenting in part) (noting "many of the critics have asserted that the deficiencies of juvenile courts have stemmed chiefly from the inadequacy of the personnel and resources available to those courts" and citing Monrad G. Paulsen, Kent v. United States*: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 191–92); CHILDREN AT RISK, *supra* note 5, at 53 (judges hearing delinquency cases in Chicago make as many as 1700 decisions a month); Mark I. Soler, *Re-Imagining the Juvenile Court*, *in* CHILD, PARENT, AND STATE 596, 601 (S. Randall Humm et al. eds., 1994) (discussing the "pervasive inadequacy" of services and programs for children and the potential of juvenile courts in coordinating services).

[97] *Gault*, 387 U.S. at 22 n.30. Chief Judge Bazelon voiced a similar concern in Haziel v. United

change for "special consideration and treatment[,] . . . there is reason to doubt that juveniles always receive the benefits of such a quid pro quo."[98] As a direct corollary, Justice Fortas noted with approval several lower court decisions indicating that "appropriate treatment is essential to the validity of juvenile custody" in light of diminished procedural protections.[99] Unfortunately, Justice Fortas never had a further opportunity to develop the vision of juvenile justice implicit in these observations.

In the post-*Gault* era, however, several lower court judges have pursued Justice Fortas's insight. They have held that the denial of the full panoply of procedures available to adults—such as jury trials—based on the juvenile court's rehabilitative goals for minors might entitle confined adjudicated delinquents to placement in facilities that offer a prospect of rehabilitation. Some judges, noting that juveniles adjudicated delinquent have not been convicted of a crime, have relied on the Supreme Court's holding in the context of mental illness that, absent a criminal conviction, a reasonable relationship must exist between the purpose for which an individual is deprived of liberty and the treatment accorded that individual.[100] Applying that rationale to juveniles, some post-*Gault* courts have held that conditions at state training schools must be reasonably related to the statutory purpose of confinement, which they held to be treatment and rehabilitation according to legislative statements of purpose.[101] Recently, a district court in South Carolina held that the state's policy of incarcerating

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States, 404 F.2d 1275, 1280 (D.C. Cir. 1968) (we "cannot ignore the mockery of a benevolent statute unbacked by adequate facilities").

[98] *Gault*, 387 U.S. at 22 n.30.

[99] *Id.* at 23 n.30 (citing Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); Kautter v. Reid, 183 F. Supp. 352 (D.D.C. 1960); White v. Reid, 125 F. Supp. 647 (D.D.C. 1954)).

[100] Alexander S. v. Boyd, 876 F. Supp. 773, 796 (D.S.C. 1995) (citing cases relying on Jackson v. Indiana, 406 U.S. 715 (1972)). The *Alexander S.* court also relied on O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (a state "cannot constitutionally confine without more a nondangerous individual" but must offer such individuals treatment if that is the purpose of their confinement), but too swiftly declined to rely on an express "quid pro quo" argument because it unnecessarily emphasized Chief Justice Burger's concurrence in *O'Connor*, 422 U.S. at 584–89 (specifically rejecting a quid pro quo analysis where he doubted that treatment constituted the sole reason for petitioner mental patient's confinement). *Alexander S.*, 876 F. Supp. at 796 n.43.

[101] *Alexander S.*, 876 F. Supp. at 781, 796 & n.43 (purpose of incarcerating juveniles under state law is "beneficent" rather than punitive); *accord* Morgan v. Sproat, 432 F. Supp. 1130, 1135 (S.D. Miss. 1977) (same, cited by *Alexander S.*); Pena v. New York State Div. for Youth, 419 F. Supp. 203, 206–07 (S.D.N.Y. 1976) (same, cited by *Alexander S.*); *see also* Martarella v. Kelley, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (nondelinquent minors confined as persons in need of supervision are entitled to receive adequate treatment). *Contra* Santana v. Collazo, 714 F.2d 1172, 1176–77 (1st Cir. 1983) (noting in dicta that juveniles have no constitutional right to rehabilitative treatment in confinement since rehabilitation is not the only legitimate goal of such confinement, but affirming an injunction designed to further a constitutional right to safe conditions in confinement), *cert. denied*, 466 U.S. 974 (1984); Morales v. Turman, 562 F.2d 993, 997–98 (5th

juveniles for the purpose of rehabilitation provided a constitutional claim to rehabilitative treatment as well as to reasonably safe conditions, freedom from unreasonable bodily restraint and "minimally adequate training"[102] in order to provide "a reasonable opportunity to accomplish the purpose of their confinement . . . and to ensure the safety of the community once the juveniles are ultimately released," through programs that, among other things, develop "a positive sense of accomplishment."[103] Such decisions do not stem from a desire to coddle young criminals; they represent a vision of juvenile justice anticipated by Chief Judge Bazelon's advice that courts should strive to respond to the desperate need of delinquent youth to be offered "some reason to hope that they are not the losers that society has labeled them."[104]

III. CONCLUSION

Critics of the juvenile justice system attack it for punishing too lightly or too harshly, for according too much procedure or too little. Based on diametrically opposed yet equally stark models of reality, those critics posit that juvenile courts are confronted with inherently incompatible demands. The tempting simplicity of this view wrongly dominates arguments over the viability of the juvenile court. The

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Cir. 1977) (the Eighth Amendment provides sufficient protection against abusive conditions, and approaches to treatment are open to discretionary interpretation); *but see* Ingraham v. Wright, 430 U.S. 651, 669 n.37 (1971) (expressly reserving the question of whether the cruel and unusual punishment clause of the Eighth Amendment applies to juvenile institutions).

Courts have generally been more reluctant to accept the legal theory of a right to treatment in a variety of contexts since the Supreme Court held that a profoundly retarded adult confined to state facilities only had a right to "minimally adequate or reasonable training." Youngberg v. Romeo, 457 U.S. 307 (1982). For a discussion of the deference frequently accorded treatment plans under *Youngberg*, see MARK SOLER, REPRESENTING THE CHILD CLIENT, ¶ 1.05[3] (1995).

[102] *Alexander S.*, 876 F. Supp. at 795, 798 (ordering the state to develop and implement a plan to reduce severe, unconstitutional overcrowding; provide sufficient numbers of trained staff, including juvenile corrections officers, social workers, and psychologists to "adequately supervise and rehabilitate juveniles"; identify and develop appropriate programs for the estimated 50% of all inmates who require special education; and provide basic medical care).

[103] *Id.* at 790. Surveys suggest that the conditions at issue in *Alexander S.* are far from unique, but rather resemble conditions at juvenile correctional institutions around the country. A recent Justice Department survey of conditions of confinement for juveniles, for example, reveals serious inadequacies in basic care. DALE G. PARENT ET AL., CONDITIONS OF CONFINEMENT: JUVENILE JUSTICE DETENTION AND CORRECTIONS FACILITIES 43–68 (1994). In 1991, nearly half of confined juveniles lived in overcrowded facilities, with an average population reaching 120% of design capacity. *Id.* The study concluded that "substantial and widespread" problems exist in juvenile facilities, "most notably [in] living space, health care, security [including safety from attack within the facility] and control of suicidal behavior." *Id.* at 5. Such conditions are incompatible with rehabilitation and, thus, with the long term goal of protecting the public.

[104] Haziel v. United States, 404 F.2d 1275, 1280 (D.C. Cir. 1968).

debate suffers from a failure to recognize the far more complex view captured in the foundation jurisprudence of the post-*Gault* juvenile justice system.

In arguing that the goals of rehabilitation and punishment are fundamentally in conflict, critics of the juvenile justice system uniformly ignore how central concern about appropriate disposition was to the reasoning of the jurists who fashioned modern juvenile justice. The normative foundation of the post-*Gault* juvenile justice system—responsible disposition, that is, disposition responsible to both the child and society—demands satisfaction of two conditions. First, the jurisprudential vision reflected in the opinions of Justice Fortas and Chief Judge Bazelon emphasized that confinement as a result of juvenile court proceedings—with their reduced procedural protections—is conditioned on providing a minimum threshold of rehabilitation. But the reasoning did not stop there. The second prong of the reasoning makes clear that an adjudicated delinquent's claim to rehabilitation is conditioned, in turn, on the availability and use of appropriate sanctions to protect the public. This dual conditionality of rehabilitation and proportional retribution serves as a prerequisite to the constitutional exercise of judicial discretion in the juvenile court. It defines the parameters of legitimate discretion in that forum. Judges may sometimes, even often, fail to satisfy these dual conditions, but failure to satisfy the conditions in no way vitiates their normative force.

The modern regime of juvenile justice was intended to harmonize many needs—indeed the ability to accommodate diverse goals is a measure of its success. Despite widespread misunderstandings about the proper balance of competing claims, guided discretion does not erect barriers to dispositions that balance rehabilitation with punishment, therapy with retribution, or rights with responsibilities. The pragmatic vision that underlay the foundation cases never contemplated that these categories might be perceived as antithetical or even discordant. On the contrary, the emphasis on disposition called for judges to weigh—and ultimately harmonize—competing claims in crafting concrete decisions.

A vivid testimony to the guidance *Kent* and *Gault* provide for courts considering dispositions is found in a recent District of Columbia case, *Matter of L.J.*[105] Fifteen-year-old L.J., on probation for drug dealing and on pretrial release for alleged assault with intent to kill eleven people at a Masonic Temple, sprayed an automatic weapon into a car in which two men sat.[106] This was not, as the court put it, a case

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[105] 546 A.2d 429, 436–38 (D.C. 1988).

[106] *Id.* at 431, 433.

of "truancy or public urination or shoplifting. . . . The potential for tragedy was fearsome."[107] Under these circumstances, an appellate court upheld a juvenile court judge's refusal to release L.J. from a juvenile facility, despite an assurance by L.J.'s therapists that L.J. had been sufficiently rehabilitated to leave.[108] L.J.'s loss of liberty, the court concluded, sent a powerful message to the youngster and to his friends who remained at liberty in the community.[109] Meanwhile, L.J. received intensive therapeutic interventions in a juvenile facility.[110] The structure provided in detention led to the best performance in L.J.'s life.[111] The court concluded that detention may have saved L.J.'s life: his accomplice was shot to death while L.J. was locked up.[112] L.J.'s ultimate fate underscores the juvenile justice system's potential for penal sanctions recognizable as punishment even when they accompany rehabilitative measures.[113]

None of the safeguards against unconstrained judicial discretion initiated by *Kent* and *Gault* or built into the post-*Gault* regime require or even suggest that "rehabilitation" and appropriate "retribution" are mutually exclusive categories. To the contrary, the very concept of rehabilitation may include a serious message that consequences follow conduct. As the court underscored in L.J.'s case, meaningful rehabilitation may even require precisely that message. When children commit heinous crimes, swift and definite punishment is an essential part of both "justice" and "rehabilitation." Indeed, the crafting of reasonable sanctions has been and remains an essential part of the jurisprudence of modern juvenile justice.

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[107] *Id.* at 433 (Schwelb, J.). Later in the opinion, Judge Schwelb quotes Chief Judge Bazelon's opinion in *Kent* regarding the importance of protecting society. *Id.* at 437.

[108] *Id.* at 431, 433.

[109] *Id.* at 439–40.

[110] *L.J.*, 546 A.2d at 439.

[111] *Id.* at 433–34.

[112] *Id.* at 439.

[113] Social science research supports the notion that the small proportion of juvenile offenders who commit the bulk of serious, violent juvenile crimes must be identified early and receive comprehensive, intense treatment and rehabilitation. The research, and the juvenile justice policies it supports, are summarized in OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, GUIDE FOR IMPLEMENTING THE COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS (1995). At the same time, recent research supports calls for graduated sanctions designated to respond to the offense and the history of the individual that combine treatment and rehabilitation with reasonable sanctions. *Id.* Such graduated sanctions culminate in secure detention for the most violent offenders. *Id.* These latest attempts to formulate a workable protocol for responding to juvenile delinquency are perfectly consistent with the framework sketched out in *Kent* and *Gault* nearly two decades ago. *See supra* notes 42–104 and accompanying text.