The Evolving Policymaking Process of the Juvenile Justice System

And The Rational of Abolition

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Abstract

The purpose of this paper is twofold. First, it is intended to provide a historical context in which to understand the origins and the subsequent development of the juvenile justice system. The juvenile justice system has evolved amidst a changing social and legal landscape, and the system's high-minded ideals have oftentimes struggled to remain practical and even relevant in the face of new political and judicial decisions regarding the proper role and scope of a juvenile justice system. Second, this paper submits the idea that the effectiveness of juvenile justice, and the ideals upon which such a notion was founded, could best be realized via integration with the adult criminal justice system. It will argue that the adult court has already demonstrated an ability to provide flexible and creative solutions in dealing with juvenile offenders. The juvenile justice system has been subjected to a high level of scrutiny and almost uninterrupted tweaking since its inception in 1899; perhaps its gradual abolition has really been a century in the making.

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Introduction

An examination of today's juvenile justice system typically brings up a dichotomous mix of inspiring ideology and disheartening reality. The juvenile justice system emerged as a byproduct of a significant change in cultural ideas that accompanied the modernization and industrialization of more than a century ago: namely, that children were innocent, dependent, and vulnerable. Progressive era reformers advanced this new imagery of childhood, which would dramatically alter a young person's supposed moral responsibility in committing delinquent acts. When a child did commit a crime, he or she was also seen as being a morally malleable entity, capable of benefiting from a compassionate system which would be committed to a youth's growth and development. As admirable and benevolent as this paradigm shift was, however, history quickly reveals a record of the juvenile court system's failings to live up to its rehabilitative ideal.

Indeed, it is even debatable as to how "compassionate" the system ever was. When discussing the motivations for establishing a separate justice system for young people, two vastly different explanations emerge. One explanation points to a society with a burgeoning social conscience and rising awareness regarding the "inequities of a system of retributive criminal justice" (Tenney, 1969). This point of view contends that the United States, particularly in urban areas, was quickly developing a social conscious that was outpacing the existing institutions. As such, new institutions had to be created and new strategies had to be developed in order to head off "debilitating frustration and despair" (Tenney, 1969). 'New institutions' manifested themselves in the form of a juvenile justice system that was formulated around the rehabilitative ideal. The Industrial Revolution had fed the trend of urbanization, and while the Industrial Revolution was the

impetus for unprecedented economic growth in the United States, it also produced "onerous working conditions, poverty, vice, and crime as well" (Tenney, 1969). It became the life's work of many progressive-era reformers to correct these new social ills; journalists, activists, and politicians were all part of a coalition to transform this troubling new social landscape.

For as benign as the first explanation is, however, there exists an equally notable assertion that explains the advent of the juvenile justice system in terms of middle-class anxiety and social control. In his Pulitzer Prize-winning work *The Age of Reform: From Bryan to F.D.R.*, author Richard Hofstadter argues that a large portion of the Progressive leadership were progressives

> "not because of economic deprivations but primarily because they were victims of a upheaval in status that took place in the United States during the closing decades of the nineteenth and the early years of the twentieth century. Progressivism, in short, was to a very considerable txtent led by men who suffered from the events of their time not through a shrinkage of their means but through the changed pattern in the distribution of deference and power." (Hofstadter, 1955)

Hofstadter is referencing a position which maintains that many progressive-era reformers feared that social unrest could destroy their authority. Beginning with the Industrial Revolution, those in positions of economic power began to fear that the urban masses would destroy the world they had built. Out of this atmosphere came demands that new action be taken to preserve social order (Krisberg & Austin, 1993). One such action, as Hofstadter and others argue, was to institute a system of juvenile justice by which the state would be enabled to extend the long arm of the law into the homes of these "urban masses" and exercise control over their children. Doing so was seen as an effective way of combating a decline in both deference and power that had traditionally been allotted to the middle and upper-classes (Scott, 1959). And Chicago, more so than almost any other

American city, had experienced a great amount of economic and social upheaval resulting from the Industrial Revolution.

A final theory offers a way to synthesize and even reconcile the social conscious vs. social control argument. It also offers a means of accounting for the diffusion of a juvenile justice system beyond the city of Chicago and the state of Illinois (after all, much of the rest of the nation adopted a version of the juvenile justice system in short order, and many of these states and cities were not as dramatically effected by the Industrial Revolution and economic explosion). John Sutton offers such a synthesis by writing that

> The new court [in Illinois] was an institutional compromise which drew on legal norms to provide a buffer of legitimacy within which discretionary social control activities...could be continued. Outside Illinois, the juvenile court did not spread as an instrumental response to social disorganization, social movement power, or juvenile crime but as a symbol of commitment to inoffensive Progressivism and to a vague array of child welfare objectives. (Sutton, 1985).

Between these several attempts to account for the birth of a national system of juvenile justice, perhaps at least one conclusion can be drawn: that is, that the advent of a juvenile justice system as a benign system which oversaw a radical transformation in the treatment of children is not a foregone description and rationalization of its early existence. The motivations may seem muddled and even contradictory. It was a system born without a cohesive directive, and today this lack of a well-articulated mandate is reflected in a want of both vision and purpose. The Progressive Era and the personalities who drove it have assumed an almost mythical quality over the past century, and perhaps the current juvenile justice system suffers expectations that are both overblown and misinformed. Expectations aside, however, the juvenile justice system still does not hold up to any reasonable standards of either justice or efficiency. For whatever the

motivations of the founders, they have bequeathed a system that now struggles, perhaps more so than ever, to justify its existence.

Today, the public is all too familiar with the shortcomings of the juvenile justice system. A *Time* magazine article once referred to one city's juvenile courthouse as being filled with "halls of anguish." Sensational media coverage of juvenile crime, such as the spree of school shootings that seemed to endanger suburban schoolchildren in the mid-to-late 1990s, serves to turn a harsh spotlight on the effectiveness of a separate court system for young offenders. According to a *NBC News- Wall Street Journal* poll, two-thirds of Americans think juveniles under age 13 who commit murder should be tried as adults (Associated Press, 1998). Indeed, in recent years both the general public as well as lawmakers have begun to question the wisdom of retaining a separate and independent juvenile justice system.

What may be less obvious is that the states have gradually begun to chip away at the distinction between a juvenile and an adult offender, and that this trend has hugely important implications. No state retains an inviolable, legal distinction between the status of "juvenile" and "adult," and the age threshold for trial in adult courts seems to fall every time a new incident of juvenile violence captures the nation's attention (Butts & Harrell, 1998). Youth who violate the law are no longer guaranteed special treatment because of their age, and the day may come when a crime is a crime, regardless of the offender's age (Butts & Harrell, 1998). Even if states abolish the practice of sending young offenders to a separate court, however, children and adolescents will continue to be cognitively, emotionally, and socially different from adults (Butts & Harrell, 1998).

Before advocating the dismantling of the current juvenile justice system, it is important to understand a few of the particulars that characterize the system itself. This will help to understand why the adult criminal justice system is not currently equipped to handle an influx of new cases involving young people, and why specialized means for dealing with juvenile offenders need to be incorporated into the adult system. The current juvenile justice system allows for important distinctions to be made between the various young people who come under the court's jurisdiction—distinctions that the adult criminal justice system, at present, is not able to account for. Most importantly, the juvenile courts allow for a distinction to be made between juvenile status offenders and juvenile delinquent offenders. Essentially, a juvenile status offense is a crime which cannot be committed by adults (U.S.S.G. §4A1.2(c)(2)). For example, a juvenile may not run away from home, skip school, or be caught smoking or drinking alcohol—all acts which are not illegal if committed by someone over a particular age. Furthermore, the juvenile court system was established to deal with cases involving children who did not commit a crime at all; many courts are authorized to hear cases involving the termination of parental rights, abuse and neglect, adoption, child support, and the appointment of guardians.

Although policymakers have been tweaking the system almost since the time of its inception, it is obvious that the juvenile court is still not living up to its promises. Considering the high level of public discontent, elected officials appear amenable to considering more significant adjustments to the system—or doing away with it altogether. Satisfactory answers, however, are not likely to be found in radical proposals to simply abolish the juvenile court and process all young offenders in regular court

(Butts & Harell, 1998). This paper argues that we need a new system of youth justice, and that policymakers need to have more options at their disposal that reach beyond total abolition or total integration with the adult system. After a historical overview of the circumstances and developments that have yielded the present system, this paper looks at the possible directions that a new youth court system might take, with a particular emphasis on incorporating specialized mechanisms for dealing with juvenile offenders, under the auspices of one single court system. Even under a unified justice system, punishment does not have to be the primary mandate.

Historical Background

The Progressive Era

The foundation of a separate court system for juvenile offenders is typically associated with Progressive Era reforms and the familiar personalities of Jane Addams and John Dewey—celebrated champions of both children's rights and human rights. The Progressive Era in American history is typically characterized by a belief in the obligation to intervene in economic and social affairs, and in the ability of civic activism to serve as a catalyst for improving conditions of life in a new urban-industrial society, and especially in improving conditions for children. In addition to the establishment of separate courts for juvenile offenders, though, child labor laws and compulsory school attendance laws can also be seen as reflecting a new child-centric approach that characterized the Progressive Era (Wiebe, 1967). Illinois, in 1899, was the first state to establish a "children's court," which would be the predecessor and blueprint for the successive juvenile court systems that would eventually be established by all fifty states.

The stated goals of these early courts practically overflowed with benevolence and sympathy for "misguided" youth. Indeed, this new type of court was influenced on one hand by the growing notion that childhood was a uniquely distinct period of time in a person's life, and that children were fundamentally different from adults—not just physically different, but emotionally, socially, and developmentally distinct, as well. This was a new, more modern concept of childhood, where children were seen as dependent beings who were in need of extended preparation for life (Hawes & Hiner, 1985). With this new view on the role of childhood in one's life came the idea that young people who violated the law should not be bound to the same strictures of justice as their adult counterparts. An offender's age was thought to correspond with his or her likelihood of being successfully rehabilitated.

This shift in thinking concerning the nature of childhood influenced popular perceptions about juvenile crime and its causes. Formerly, both popular and learned opinion held that crime and deviance were products of "free-will" choices that people made; it followed that if one actively and consciously chose to commit a crime, then that person should suffer the consequences of such poor character and decision-making. Positive criminology, on the other hand, asserted that crime was determined rather than chosen. This shift meant a reduction in the focus on an actor's moral responsibility for crime, and therefore allowed for the focus to shift to the possibilities for reforming offenders, rather than punishing them (Feld, 1992). It is this idea of rehabilitation which was a founding principle of the children's courts, and which continues to serve as a primary justification for the continued existence of a separate juvenile court today.

Several other features of the early juvenile justice system also reinforced the distinct nature of the Court. Most importantly, the Court's jurisdiction reached far beyond youth who had committed a crime. The Court's mandate encompassed youths suffering from abuse, dependency, or neglect, as well as those charged with criminal offenses and non-criminal disobedience (Feld, 1992). Progressives invoked the legal doctrine of *parens patriae* to legitimize such wide-reaching intervention. *Parens patriae*, or the state as parent, refers to the power of the state to usurp the rights of the natural parent or legal guardian, and to act as the parent of any child whom the court deems as in need of protection. Indeed, as early as 1838, the Pennsylvania state supreme court was holding that the right of parental control, while a natural right, was not necessarily an inalienable right. In its decision in the case *Ex parte Crouse*, the state supreme court articulated its rationale for keeping children in the state's custody, despite parental objections:

> The object of the charity is reformation, by training the inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?...The infant has been snatched from a course which must have ended in confirmed depravity; and, not only is the restraint of her person lawful, but it would have been an act of extreme cruelty to release her from it.

When designing the juvenile justice system, the doctrine of *parens patriae* came at the expense of due process for juveniles. Because the goal of the new court was to rehabilitate offenders using the most flexible process possible for hearing and sentencing cases, due process was omitted to increase the informality and agility of proceedings. The juvenile court was also not envisioned as an adversarial court—another reason for omitting due process protections to young people.

A series of legislative actions have brought the juvenile court together with various social service agencies, with the idea that together they will form a competent parenting team. This alliance, however, tends to be an uneasy one. By their nature, courts seek to hold individuals accountable for their actions, while social service agencies seek to modify those same actions and provide support (Cavanaugh-Stauts, 2000). This dichotomous relationship mirrors the sort of catch-22 in which the juvenile justice system frequently finds itself. At times, it can seem as though the juvenile justice system has been charged with mutually exclusive aims: first, to rehabilitate delinquent youth with the hope that they can become successful and contributing members of society, but secondly, to ensure the safety of the general public. The first aim requires the support of and interaction with the general public, while the second necessitates that law-breaking youth be securely sequestered from the populace at large, in the name of public safety. Historically, then, the Juvenile Justice System has been tasked with being a little bit of everything to everybody. It serves as one part benevolent parent, one part authoritarian arbiter; it serves as a giver of second and third chances, but also as a final terminator of any opportunity for rehabilitation.

Operating under such a variety of directives, it should come as little surprise that the Court has a mixed record when it comes to its history of successfully rehabilitating delinquent youths. From its inception, the Juvenile Justice System has not maintained the best record of using its jurisdiction for benign and therapeutic purposes. Several, more recent, developments have expanded the Court's propensity for dispensing punitive justice, but the Court itself has a long history of straying from its founding principles. Part of this trend stems from the fact that juvenile courts appeared to be endowed with

seemingly unlimited discretion. Although caseloads varied among jurisdictions, the volume of cases in the urban areas soon overwhelmed existing court resources, and judges became unable to give the close personal attention to each case advocated by the reformers. As little as ten minutes was devoted to each case as court calendars became increasingly crowded (Krisberg & Austin, 1993). Although the juvenile courts were established around the principle that youth delinquency could and should be dealt with on a case-by-case basis, such huge caseloads often meant that the quality of probationary supervision deteriorated and dispositions were hastily and indifferently meted out. More than a century later, an overwhelmingly voluminous caseload continues to saddle the effectiveness of the juvenile justice system.

Although juvenile courts were founded in the spirit of the popular Progressive movement of the time, from its inception the juvenile court system has had a number of vocal opponents. The criticisms of one hundred years ago oftentimes mirror those that are raised today. Generally, the early opponents of the juvenile justice system opposed what they saw as an almost immediate betrayal of the ideals which the system was supposedly founded upon. Hearings that lasted as little as ten minutes could hardly be expected to provide an earnest examination of a child's specific circumstances and yield a thoughtful evaluation as to what would be in anyone's "best interests." Early on, too, opponents recognized the procedural problems that would come to dominate the discussion over the court's effectiveness. A defining feature of juvenile courts was that the "concept of justice was altered from adjudication of guilt to diagnosis of a condition" (Albanese, 1992). In wanting to exercise its power to "save" children, the court found that it was not in a youth's best interest to be subjected to a trial by jury. After all, if the

court was established for the purpose of salvation, and not punishment, then there was really no place for a body of one's peers to determine innocence or guilt. No effort of prosecution was being made—only an effort to look at the best interests of the child, as a parent would (Albanese, 1992). As it became increasingly evident that the court *was* actually in the business of meting out punitive justice, and that youths were frequently being mistreated under the state's custody, the lack of legal council and basic due process protections for juveniles began to stand out as an egregious violation of the purported aim to serve a child's "best interests."

Juvenile Justice in the '60s and '70s: Revisiting Gault and Winship

These long-stewing issues came to head in the late 1960s and early 1970s, in the form of cases argued before the Supreme Court. The Supreme Court's decisions would significantly modify the original intent of the first juvenile court and the doctrine of *parens patriae*, as it was being invoked at the time. The way in which juveniles are handled in the present juvenile justice system would also be established.

In re Gault

The case of *In re Gault*, decided in 1967, would establish the right of juveniles to receive the full protection of the Constitution. Prior to the *Gault* decision, it was fundamentally assumed that there was no need for constitutional protection since the juvenile courts operated under the premise of *parens patriae*; as such, the state entrusted judges with the authority to rule in the best interest of the child (Houston and Barton, 2005). Whereas the court system that deals with adult offenders is adversarial in nature, involving an accuser pitted against the accused, it was again the supposedly benign nature

of the juvenile system which justified the absence of the procedural protections guaranteed to adults.

The facts of *Gault* revolve around a fifteen-year-old boy, Gerald Francis Gault, who was taken into custody by local police after a neighbor had filed a complaint with the local authorities, alleging that the boy and a friend had been making threatening and obscene phone calls to her at her home. Young Gault did have a previous juvenile record—earlier, he had been in the company of another young teen who had been found guilty of snatching a woman's wallet from her purse. Solely on the basis of this rather brief record, the juvenile court held that he was a delinquent and ordered him committed to the state industrial school until the age of twenty-one. Under the juvenile code at this time, Gerald Gault was not entitled to particular constitutional rights; namely, the right to be informed of the charges, the right to counsel, the right to confront and cross-examine witnesses, and protection against self-incrimination. It is especially import ant to note that, had Gault been over the age of 18 and committed the same offense, he would have either faced a fine of between $5.00 and $50.00 or a maximum of two months jail time.

Gerald Gault's parents had to petition his release to the Arizona Supreme Court, because the younger Gault himself had no such right of appeal. When the case made its way to the United States Supreme Court, the Court held in an 8-1 decision that, indeed, Gerald Gault's commitment to Arizona's state industrial school " was a clear violation of his 14th Amendment due process rights, since he had been denied the rights to legal council, had not been formally notified of the charges against him, had not been informed of his right against self-incrimination (remain silent), had no opportunity to confront accusers and had been given no right to appeal his sentence to a higher court (U.S.S.C.,

1967). Supreme Court Justice Potter Stewart, however, wrote a dissenting opinion, where he maintained that the purpose of the juvenile court was correction, not punishment, and therefore the constitutional procedural safeguards for criminal trials do not actually apply to juvenile cases. In articulating his rational for voting contrary to the opinion of the other eight justices, Justice Stewart was holding fast to the historical and idealistic notion of a benign juvenile justice system which should continue to be entrusted with its paternalistic authorization to serve "in the best interest" of the child. What the Gault case represented, however, was just how far the actual juvenile justice system had strayed from its original intentions. In practice, the system was failing in its mission to serve this 'best interest.' The system could not live up to this purpose, so the Constitution would have to protect juveniles because the juvenile justice system was not.

In re Winship

The *Winship* case would come to affirm the rights of juveniles with regards to the role of the burden of proof in obtaining a conviction. As with the *Gault* case, *Winship* would wrestle with whether or not juvenile offenders were entitled to the full protections of the Constitution. Again, it had been fundamentally assumed that the answer was 'no'; if the juvenile court really isn't an adversarial system which hands out punishment, then the question of Constitutional protections is practically moot. The facts and events of *In re Winship*, however, would again demonstrate that the punishment ethic was very much at work in the juvenile justice system.

The facts of *In re Winship* center around a twelve-year-old boy from New York (Winship), who was taken into custody for allegedly stealing $112 from a woman's pocketbook. In the juvenile court hearing, the judge actually acknowledged that the

proof against Winship wasn't entire conclusive—meaning that it didn't constitute proof beyond a reasonable doubt. 'Proof beyond a reasonable doubt' is the standard for securing a conviction in a criminal matter, but at this time juvenile hearings were considered civil matters. As such, a conviction in a civil matter only required that "a preponderance of the evidence" be obtained—hence a higher burden of proof is not necessary. Had Winship been an adult accused of stealing $112 dollars, however, it would have been necessary to demonstrate proof beyond a reasonable doubt. Winship was found guilty of the offense under the "preponderance of the evidence" standard, though, and placed in a training school for boys for an initial period of eighteen months, subject to annual extensions until he reached the age of majority at eighteen years of age (Albanese, 1993). Because Winship was only twelve at the time, he effectively received a six-year sentence.

When heard before the Supreme Court, the case presented the question of whether or not "proof beyond a reasonable doubt was essential to the fair treatment of a juvenile charged with an act that would be a crime if committed by an adult" (Albanese, 1993). The Court agreed with Winship's claim that such proof was essential. The Court's decision held that when a juvenile is charged with an act that would be considered if committed by an adult, then every element of the offense must be proved beyond a reasonable doubt.

Like the *Gault* case, though, the Court's decision was not unanimous. Of particular importance is the way in which the purpose and philosophy of the juvenile justice system was debated between the Supreme Court justices in delivering their various opinions. With the *Winship* decision, it was clear that the juvenile justice system

was being evaluated from both a practical and a philosophical standpoint. In a concurring opinion, Justice John Marshall Harlan II wrote that he hoped the higher burden of proof would not eclipse the rehabilitative mission of the court. He wrote that he hoped the procedural constraints would not "(1) interfere with the worthy goal of rehabilitating the juvenile, or (2) burden the juvenile courts with a procedural requirement that will make juvenile adjudications significantly more time consuming, or rigid" (397 U.S. 358, 1970). Justices Warren Burger and Potter Stewart dissented to the decision, arguing that they felt as though the rehabilitative ideal had been effectively done away with, in favor of treating juvenile offenders in the same manner as adult criminals. They wrote that they hoped the decision of *In re Winship* would not "spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and traumas of exposing youthful offenders to a traditional criminal court" (397 U.S. 358, 1970). What the justices failed to confront was the question of which was more harmful: to expose juvenile offenders to the adult system of criminal courts, or to leave young offenders effectively exposed to what was becoming the full thrust of the law in juvenile matters, and without the Constitutional protections of their adult counterparts.

Juvenile Justice in the 1980s and 1990s: Youth Crime and the "Get Tough" Movement

The most recent development in the history of the juvenile justice system came with the "Get Tough" movement that characterized much of juvenile justice policy in the 1980s and '90s. While this movement also influenced the criminal justice system at large, its effects were particularly staggering for the juvenile population. Indeed, this era in juvenile justice has probably been the most conservative since before the time of the

inception of the juvenile court system in the late nineteenth century. Here, deterrence and especially punishment have been emphasized as the new goals of the juvenile court. The movement really got underway in 1976, when over half the states made it easier to transfer youths to adult courts, and other states stiffened penalties for juvenile offenders via mandatory minimum sentencing guidelines (Krisberg & Austin, 1993). From 1979-1984, the number of juveniles sent to adult prisons rose by 48% (Krisberg & Austin, 1993). Individual states seemed to think that if young offenders were now entitled to receive the same Constitutional protections as adults, then they were also liable to be subjected to the very same institutions and sentencing procedures as the adult criminal population.

The genesis for this reform came from several places. First, there was the allegation that the juvenile justice system was being too lenient with dangerous offenders. During this time period, the media latched onto several high-profile cases which seemed to reveal an epidemic of felonious youth running awry throughout the United States. Indeed, the raw numbers seemed to corroborate the sense that youth violence was spiraling out of control. From the mid-1980s through the mid-1990s, homicides by juveniles tripled, juvenile arrests for aggravated assault went up 78 percent, law enforcement officials identified 14% of violent crimes in America as having been committed by a juvenile, and juvenile arrests for robbery went up 63 percent (Fox, 1996). Such raw numbers, however, can be deceiving. Between 1997 and 1998, Americans were terrified at what seemed to be an epidemic of schoolyard killings, including the Columbine High School massacre. While such stories were both highly disturbing and highly sensational, they obscured the fact that school killings had actually gone down

45% since 1992. Furthermore, the previous escalation in juvenile violence turned out to be very highly concentrated. For example, one-third of the juvenile homicides that took place in 1995 occurred in just ten counties in the United States, according to the Bureau of Justice Statistics. Eighty-four percent of the nation's counties had no juvenile homicides whatsoever (Lotke & Schiradeli, 1996). The bottom line seems to be that policymakers were put in a tough position: raw data certainly seemed to indicate the likelihood of a vast moral vacuum amongst juveniles. This could have fueled the rush to abandon all methods of fighting juvenile crime save one—prosecution in adult courts and incarceration in adult prisons (Elikann, 1999).

Such data would have certainly informed public opinion regarding youth in general. In 1997, one poll noted that 61% of adult Americans thought that the lack of values among young people was a serious problem (Associated Press, 1997). There emerged a real fear that young people "were so lacking in remorse, conscience, and feeling that they've become a dangerous and lethal menace" (Elikann, 1999). Taken together, this negative public attitude towards youth can mean that there is little public resistance or outcry when juveniles are transferred into the adult criminal justice system, or when a 14-year-old first-time offender is locked up next to a 34-year-old hardened criminal.

Perhaps most importantly as far as the future of the juvenile justice system is concerned, the most strident advocates of the "get tough" movement have called for the complete abolition of a separate court for young offenders. This voice argues that the juvenile courts are unwilling to protect juvenile rights, unable to protect juvenile rights, or a combination of both (Elrod & Ryder, 1999). Although this particular movement in

juvenile justice policy appeared to lose momentum by the beginning of the twenty-first century, it has left the system in something of a lurch. "Getting tough" ended up resulting in a greatly increased incarceration rate for young people, overwhelming existing facilities and service providers but doing little to address the problem of juvenile delinquency. It has left the juvenile justice system itself in something of an identity crisis, struggling to reassert its relevance in the twenty-first century.

Over the course of about a century, the ideology of the juvenile justice system has changed, and policy has adapted to shifting views on the nature and causes of juvenile delinquency, and as to how such children in need should be dealt with. From the time that children began to be treated differently than adult offenders in 1899, to the introduction of Constitutional due process to the juvenile justice system in the 1960s and 1970s, and to the era of the early 1990s when the juvenile justice system was characterized by uncertain goals and programs (relying heavily on punishment and deterrence), children have been confronted with a system that has been inconsistent at best, and blatantly detrimental at worst. Today, the system is striving to give attention to strategy that focuses on reducing the threat of juvenile crime and expanding options for handling juvenile offenders. Emphasis is being placed on "what works", and an effort is made to utilize the restorative justice model, which involves balancing the needs of the victim, the community, and the juvenile (Siegel & Senna, 2000).

Step 1 in Court Reform: What are we up against?

In instituting any type of meaningful reform, then, what are the basic deficiencies in the present setup of the juvenile justice system that need to be addressed? In brief,

four basic inadequacies can be identified (although many, many more could certainly be recognized). Essentially, the current system is plagued by past reform initiatives that proved to be anticlimactic; a paucity of funding; a lack of uniformity that yields confusion, frustration, and disparate outcomes; and the possibility that inherent contradictions within the juvenile justice system itself have destined the court for failure.

One complaint seems to be that we continue to experience more of the same. Barry Feld, author of numerous works on the juvenile justice system, noted almost seventeen years ago that "after more than two decades of constitutional and legislative reform, juvenile courts continue to deflect, co-opt, ignore, or absorb ameliorative tinkering with minimal institutional change" (Feld, 1991). More than three decades after *In re Gault* was decided by the Supreme Court, University of Chicago law professor Emily Buss concluded that the decision amounted to little more than a "botched rescue" that "foreclosed any thoughtful consideration of the changes required to make the juvenile justice system fair to children" (Buss, 2003). She goes on to add that the direct product of *Gault* is a "set of rights ill-tailored to serve either the aims of the juvenile justice system or the interests of the children who hold those rights." Both Feld and Buss are driving at two notions in particular: one, that the juvenile justice system is stubbornly resistant to change and two, that the reform measures that have thus far been implemented have not been successful in pushing the system in a direction which would ensure efficiency and fairness to the children involved.

No discussion of the current woes of the juvenile justice system is complete without lamenting the bare-bones budget on which most juvenile courts around the country operate. The problems associated with inadequate funding manifest themselves

in most aspects of juvenile court proceedings. Courts can be understaffed and lack adequate and up-to-date systems for records keeping. Inadequate and inappropriate physical space presents another challenge. Judge David Mitchell, formerly of the Baltimore, Maryland juvenile court system, lobbied his city to erect a new courthouse that would provide a "humane and empathetic" atmosphere for children (Mitchell, 1996). Employees of the system and its adjuncts are underpaid, and caseworkers are overwhelmed. In some areas, it can take between six to nine months before a case is heard before a judge, based largely on a system that grants extended delays which aggravate the preexisting backlog of cases. This only serves to frustrate the mission of the juvenile court because, in order for delinquent behavior to be effectively corrected, the juvenile must be able to experience a link between his behavior and the punishment that he receives.

The juvenile justice system also lacks any sense of overriding uniformity. Perhaps this is permissible on a national level; after all, the term "juvenile justice *system*" may be something of a misnomer. The term is correct insofar as it applies to the individual fifty states—juvenile court systems *are* largely beholden to state and local authority, as opposed to federal. As such, fifty separate juvenile justice systems will inevitably yield a disparity of outcomes. Granted, this is a problem which is not unique to juvenile justice. Within states, however, treatment of children within the juvenile justice system can seem almost laughable arbitrary. An evaluation of the juvenile court in Phoenix, Arizona revealed that for the crime of burglary, one youth was sentenced to serve a one-year term in a state juvenile facility, another was fined $400, another was placed on probation, and yet the case of another was transferred to the adult criminal

court system (O'Hare, 2005). Achieving a sense of uniformity in sentencing outcomes becomes even more imperative when one considers that justice doesn't appear to be blind—poor and minority youth are frequently the recipients of the harshest penalties. While this disparity in outcomes also characterizes the adult justice system, at the juvenile level it does highlight just how far the system has strayed from any rehabilitative ideal.

Finally, the juvenile justice system seems to be burdened by its inherent contradictions. Was the court simply bound to be ineffective because of its original design? Again, Barry Feld raises concerns about the overall usefulness of the court's traditional design, arguing that "the fundamental shortcoming of the juvenile court's welfare idea reflects a failure of conception and not simply a century-long failure of implementation" (Feld, 1999). He goes on to maintain that, while the juvenile court creators envisioned a social service agency that functioned in a judicial setting, combining social welfare and penal social control functions in one agency ensures that juvenile courts do both badly. Should providing for child welfare be a social responsibility as opposed to a judicial one? After all, states typically don't bring juveniles to court because they need social services—it is because they committed a crime. This dissatisfaction with the organizational structure of the juvenile justice system is important largely because abolitionists frequently cite this grievance when arguing for the complete dismantling of the system and an integration with the adult criminal justice system.

Towards a "Middle Road" in Juvenile Justice Reform

Two things seem apparent in this debate. The first is that the juvenile justice system cannot continue to operate in its present state and organization. The second is that reformers seem to be grouped into two distinct camps: those in favor of restoring the rehabilitative ideal and restoring strict autonomy within the present juvenile justice system, and those who advocate a complete merger with the adult criminal justice system, with a focus on punishment. In the midst of this debate, though, it is important to keep in mind one thing that all sides seem to agree upon. Although the rehabilitative versus punitive advocates will clash, both groups are still in agreement as to the fundamental principles of developmental psychology upon which the juvenile court was founded. Most reformers, of whatever persuasion, will still agree that juveniles, "because of their developmental differences, are less responsible for their actions than adults and should be punished differently from adults who commit the same criminal acts" (Geraghty & Drizin, 1997). It is the opinion of many that even the adult justice system can incorporate ways to accommodate these "differences." It may be suggested, as many have already done, that the juvenile justice system is ineffective due in part to the fact that it may have been ill-conceived and misguided. If we accept the idea that the juvenile justice system was founded out of benevolence and a genuine concern for child welfare, then we may still applaud and admire these noble principles, for surely they point to a very highly evolved social conscience within society at that time. Still, however, the fact remains that the court's execution has fallen far short of its ideal. Here, we may propose that a new justice *process* be designed for young offenders within the existing criminal courts system. It may be equally naïve and idealistic to assume that the judges and prosecutors of the current adult justice system will desire to handle very young offenders

differently. But while there exists a consensus regarding the emotional and social differences that separate adolescents and adults, it is reasonable to hope that a single justice system can make adequate accommodation.

How, then, should such an integration take place? Jeffrey Butts and Adele Harrell of the *Crime Policy Report* suggest that "the work to design a new youth justice system should start before states actually begin to abolish the legal concept of delinquency" (Butts & Harrell, 1998). They suggest that we consider what would be the best court process for adjudicating and sentencing young offenders. As the situation currently stands, the adult court system is not prepared to deal with an influx of young people. It should be clarified that a type of juvenile court could and probably would still exist even if cases involving law violations were removed. Doing away with the delinquency jurisdiction of the juvenile court does not mean that a juvenile court could no longer hear cases involving abused and neglected children, truants, or divorce and custody disputes. They would simply no longer handle criminal law violations by minors (Butts & Harrell, 1998).

As Butts and Harrell succinctly point out, the debate between juvenile court preservationists and abolitionists could be characterized as a fight between the "naïve" and the "reckless." In trying to achieve a middle ground in the past, Simon Singer points out that politicians have tried to "criminalize" the juvenile court (Singer, 1996). It seems that very few have suggested or even realized the possibility that the "adult" criminal justice system could actually be adequately accommodating to underage offenders, and that several such accommodations are already functioning at present. For example,

"Abolition of the delinquency jurisdiction would not require that all young offenders be sent to adult prison. Many states already operate separate correctional facilities for young adults (under age 21, under 23, etc.). The decision to handle all young offenders in the criminal court would not prevent such

correctional specialization. States would still be free to separate offenders by age when incarcerating or otherwise supervising convicted offenders, and the Federal government would still be free to require such separation as a condition of financial support for state corrections agencies." (Butts & Harrell, 1998)

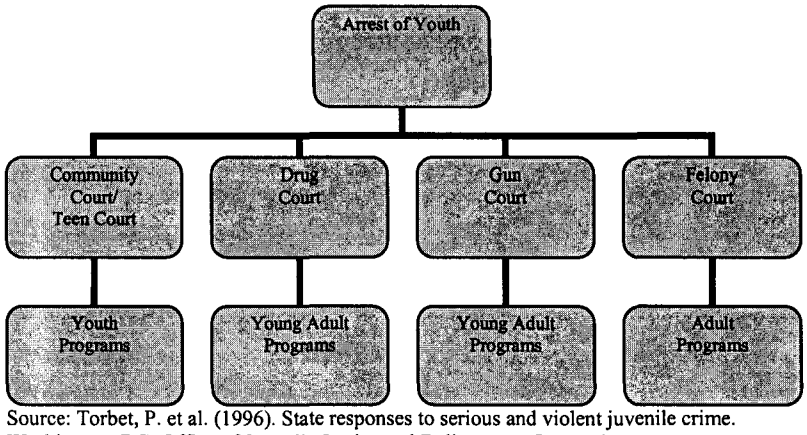
We can see that it probably is not rational to assume that a fourteen-year-old will be incarcerated alongside a hardened and lifelong criminal if the juvenile and adult justice systems undergo some sort of a merger. An even larger issue, though, concerns what would happen to the vast array of agencies and services that currently exist to serve delinquent youth. Several extraordinarily bright and hardworking professionals have dedicated their careers to working with juvenile offenders and their social, emotional, and educational needs. The systems of juvenile probation and juvenile corrections could continue to exist, along with these other services, regardless as to whether the offending juveniles are subject to the juvenile court's delinquency jurisdiction. Essentially, the youth offender programs that operate now could continue to operate; the only difference would be that client referrals would come from the adult criminal justice system.

Perhaps the most valuable ideal from the foundation of the juvenile justice system that should be retained is the idea of flexibility in dealing with delinquent youth. Here, the idea of flexible sentencing does not have to be mutually exclusive with an adult justice system that has jurisdiction over cases involving law-breaking youth. It is hardly a foregone conclusion that hearing juvenile cases in adult court will mean that an 11-year-old vandal and a 17-year-old murderer will now be treated under the same processes. If we look closely, we can see plenty of instances where the courts have demonstrated an ability to move beyond "one-size-fits-all" processes.

Alternative court models that exist under the banner of the adult criminal justice system may provide a sensible answer for dealing with youth crime. Examples of such "alternative courts" include drug courts, gun courts, community-based courts, and more.

These more specialized courts are designed to work with offenders regardless of age, but because they are relatively decentralized and those referred to them have committed a particular type of crime, such courts may offer the flexibility and creativity in dealing with offenders that is so valued within the current juvenile justice system. Drug courts, spearheaded by initiatives in Miami, Florida, have proven to be models of both effectiveness and flexibility. According to the U.S. Department of Justice, "judges, prosecutors, defenders, and drug treatment specialists work as a team to ensure offender outcomes, and drug courts offer legal incentives such as deferred prosecution for drug defendants willing to participate in treatment programs."

In addition to an alternative like the very specific drug court, several other alternative court models exist that include a wide variety of offenses under their umbrellas. Teen courts, community courts, and alternative dispute resolution are all methods for providing an element of individualization to youths who find themselves in the criminal justice system. Teen courts, particularly en vogue over the past decade, provide a "voluntary, non-judicial alternative for youths charged with minor law violations. Rather than going before a judge in a traditional court, young people referred to teen courts have their fate decided by other young people" (Godwin & Steinhart, 1996). While the effectiveness of such courts has been called into question, teen courts are important in that they highlight the ability of the justice system to formulate alternative models of justice that are particularly tailored to young people. Perfection in corrections and criminal justice is likely to always be fleeting, but innovation should always be prized. A new model for organizing youth offenders within the adult justice system might look as follows:



Source: Torbet, P. et al. (1996). State responses to serious and violent juvenile crime. Washington, DC: Office of Juvenile Justice and Delinquency Prevention.

This reorganization does offer a response to a few of the barriers to reform that have been previously cited. Barry Feld, a long-time critic of the current makeup of the juvenile justice system, has often criticized the juvenile court for undergoing seemingly endless "tinkering" while failing to undergo even "minimal institutional change." Indeed, Feld has criticized the juvenile court on the grounds that it has been turned into "a scaled-down, second-class, criminal court" (Feld, 1993). Those who agree with Feld would find the maintenance of a separate juvenile justice system to be indefensible. From these court alternatives, whose use in cases involving juvenile is strongly advocated by Jeffrey Butts and Adele Harrell, hopefully a new and more diverse system of juvenile justice could eventually be constructed. This new construction might also satisfy Feld and those who believe that the juvenile justice system has suffered for more than a century from a general failure of conception.

In advocating for something of a 'middle ground' in juvenile justice reform, juveniles might finally achieve some standard of uniformity in court proceedings. Well before the decisions of *Gault* and *Winship* were handed down, court reformers were

agitating for the adoption of constitutional standards of due process in order to assure fairer judicial treatment for juveniles (Ketcham, 1977). Several commentators on the juvenile court, including Monrad Paulsen, had written about the legal flaws in the use of the *parens patriae* doctrine prior to *Gault* and *Winship*. Indeed, when the Supreme Court eventually mandated certain constitutional protections to juveniles in the *Gault* case of 1967, the Court agreed with Paulson and cited his articles in eight footnotes (Ketcham, 1977). For the landmark decision that *Gault* was, however, the case has also been called a "missed opportunity" (Buss, 2003). In explaining this characterization of the Supreme Court's decision, Emily Buss writes that,

> "in assuming that children's due process rights would, at best, match those of adults, the Court foreclosed any thoughtful consideration of the changes required to make the juvenile justice system fair to children. The direct product of *Gault* is a set of rights ill-tailored to serve either the aims of the juvenile justice system or the interests of the children who hold those rights. More broadly, *Gault*'s error helped establish a pattern of analysis which has stunted the development of children's constitutional rights overall." (Buss, 2003: 39)

Buss goes on to contend that while children need to be ensured of constitutionally protected procedural rights, it would be inappropriate to try and graft the adult version of due process directly onto the situations of juveniles. She argues instead for "procedural adaptations" that would fit the "special context" of a juvenile court.

Empirical and evaluative research seems to corroborate the feeling that *Gault* has failed to deliver on its promises. Barry Feld, one of the most prolific writers on the juvenile justice system, has concluded that, even in the post-*Gault* era, juveniles receive the worst of both worlds. He writes, "Most states do not provide youths with either procedural safeguards equivalent to those of adult criminal defendants or with special procedures that more adequately protect them from their own immaturity" (Feld, 1995). Considering that their appears to be at least one viable way of integrating juvenile justice

into the adult system, is the continued operation of a separate juvenile justice system justifiable?

Conclusion and Observations

Over the course of its century-long history, the juvenile justice system has evolved within an interesting legal and cultural framework. Due process for juvenile offenders appears to have been omitted from the "children's court" by design. To that 'design', however, can be ascribed particular motivations. On the one hand, due process could have been omitted out of a genuine conviction regarding the non-adversarial nature of the juvenile court—an unnecessary hindrance to a system designed for maximum creative and discretionary freedom in rehabilitating delinquent youth. Conversely, it could be argued that a lack of due process in the juvenile justice system was yet another manifestation of the urban middle classes' attempt to exercise and regain control over a new industrial society that they perceived as slipping further and further away from their ability to exert influence. Either explanation, though, still leaves a court without due process by intention. This is one of the primary flaws of design that Barry Feld laments, and is frequently cited when accounting for the ineffectiveness of the juvenile justice system. Perhaps this original lack of due process made it inevitable that, almost since the court's inception in 1899, the higher courts and the Supreme Court would have to consistently move towards rectifying such an omission. Perhaps the juvenile justice system is the proverbial house built upon sand, destined to give way as a result of its own structural weakness.

Culturally, the environment has also shifted since the time of John Dewey, Jane Addams, and the Progressive movement. Today, there are new ideas about the role that government should play in response to crime, conflict, and trouble (Bazemore, 1999). Gordon Bazemore offers a summary of these shifting tides when he writes,

> "Indeed, most baby boomers and older generations can recall a time when adults in their communities took responsibility for looking after and imposing informal controls on neighborhood children other than their own. Moreover, there were numerous informal means of resolving disputes and disturbances peacefully, as well as mechanisms for sanctioning behavior that exceeded tolerance limits without recourse to formal court processes. In effect, community members, with the encouragement and support of schools, neighborhood police, and other institutions, often took care of problems that now end up in juvenile and criminal justice systems." (Bazemore, 1999: 83)

The founders of the juvenile justice system obviously envisioned a role for government in the rehabilitation of wayward youth, but it is worthwhile to wonder if they would have been able to foresee just how many young people would come to pass through the system. Has the sheer number of juveniles in the system compromised court's ability to be flexible, creative, and benign? While it is difficult to determine how the amount of traffic in the juvenile justice system has or has not compromised the court's original vision, it seems certain that the court will not be experiencing a decrease in its docket load any time soon. The public seems to have an expectation that courts, and especially the juvenile court, exist to solve any myriad number of conflicts which may present themselves. It is a shift towards an ever-increasing litigious paradigm that was not nearly as pronounced over a century ago.

Today, neither policy makers nor the general public are too pleased with the current direction of the juvenile justice system. The system rightfully struggles to justify its own existence. An integration into the adult criminal justice system may irretrievably compromise the original vision of the juvenile justice system, but it was a vision that was never capable of being realized under the original design of the children's court. Viable

alternatives for achieving due process and justice for juveniles within an adult system do exist—alternatives that are by no means exclusively punitive and without consideration of the personal circumstances and rehabilitative needs of the juvenile. Reformers should not hesitate to initiate a process of integration with the adult court and gradually do away with the juvenile court's delinquency jurisdiction. "Abolition" does not have to be a dirty, heartless word. Indeed, such a radical reformation of the juvenile justice system may actually be in line with the progressive ideals of the "child savers" who are oftentimes credited with the idea of a children's court. Today's reformers, like those of more than a century ago, still desire to realize the best means of achieving justice and fair treatment for young people.

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