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What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform

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"Reform, reform. Don't talk to me about reform. We are in enough trouble already."[1]

I. INTRODUCTION

As has long been the case, the juvenile justice system is under attack. Faced with rising juvenile crime rates, particularly among violent offenders,[2] and amid the country's increasingly punitive atmosphere, many states have adopted "get tough" measures for juvenile offenders. Legislators in many states have concluded that a major source of our youth crime problem is that too many juvenile criminals are being treated too leniently by the system.[3] As a result of the changes this belief has generated, more young people are being tried as adults[4] and more of the offenders who remain in the juvenile justice system are receiving stricter sentences.[5] This trend shows no signs of dissipating; indeed, with current

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1. This remark has been attributed to the English Lord Macauley. *See* Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4, 4 (1984).

2. According to Federal Bureau of Investigation arrest data, after remaining essentially stable for over a decade, the juvenile violent crime arrest rate soared between 1988 and 1992. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 104-10 (1995) [hereinafter JUVENILE OFFENDERS].

3. *See, e.g.*, Alfred Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 65 (1985).

4. *See infra* text accompanying notes 76-77.

5. As an example of this trend, Illinois recently sent a 12 year old boy to a state juvenile penitentiary. The boy and another youth were convicted of murdering a five year old by dropping him from a 14-story building. The incarcerated youth, who is the nation's youngest inmate at a high-security prison, committed this terrible crime when he was 10 years old. *Boy, 12, to Be Nation's Youngest Prison Inmate*, N.Y. TIMES, Jan. 30, 1996, at A4.

predictions of continuing increases in juvenile crime rates,[6] it can be expected to continue or accelerate.

The juvenile justice system has also frequently been criticized from the left. Some commentators have attacked the philosophical underpinnings of the juvenile courts, arguing that rather than being benevolent in origin, the system principally represents an attempt to control "lower class" youths.[7] Others have directed their attention to the procedural protections in juvenile court and have found them to be inadequate.

Recently, a number of commentators have called for a complete abolition of the juvenile court's delinquency jurisdiction.[8] Although there are some differences in the rationales for their proposals, all of these "progressive" or "due process abolitionists"[9] agree that: 1) the increasingly formal and punitive nature of the juvenile justice system has led to such a convergence with the adult criminal justice system that there remains little justification for a separate juvenile system; and 2) thirty years after *In re Gault*,[10] the due process rights of young people are still not adequately protected in juvenile court, particularly in terms of the absence of jury trials and inadequacies in the representation of counsel. According to this view, young people and society at large would be better

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6. *See, e.g.*, JUVENILE OFFENDERS, *supra* note 2, at 111 (projecting that percentage of population between ages of 10 and 17 will increase 22% between 1992 and 2010). Alfred Blumstein predicts:

> [T]here are many factors currently in place that should make the crime problem become increasingly serious over the coming decade . . . . The effect of the changing demographic composition will increase crime rates as the population in the 15-19 age range (the one with the highest age-specific offending rates) will be growing over at least the next decade.

Alfred Blumstein, *Making Rationality Relevant*, 31 CRIMINOLOGY 1, 12 (1993).

7. *See, e.g.*, ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1218 (1970).

8. *See, e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case For Abolishing The Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 722-25 (1991).

9. I use these terms to differentiate these abolitionists from those who would abolish the juvenile court principally to impose the more overtly punitive (and lengthy) sentences available in adult criminal court. The progressive or due process abolitionists are distinguished by a belief that abolition is actually in the best interests of juveniles accused of crimes. *See infra* part III.A.; *see also* Feld, *supra* note 8, at 724 ("Full procedural parity in criminal courts coupled with mechanisms to expunge records, restore civil rights, and the like can more adequately protect young people than does the current juvenile court.").

10. 387 U.S. 1 (1967).

served by the processing of all criminal charges against juveniles in adult court.

Progressive abolitionists would continue to draw some important distinctions between juvenile and adult offenders. The common law "infancy defense" would be available, perhaps in some expanded form. Certain procedural protections might be heightened for juveniles. And perhaps most importantly, all of these commentators apparently believe that sentence mitigation based on youthfulness is appropriate. That is, although juvenile offenders should be tried as adults, in a system that is principally based on punishment, they should not be punished as severely as adults.[11]

In this Article, I add my voice to those who oppose the abolition of the juvenile justice system. Like other reluctant supporters of the status quo,[12] I do not dispute that the juvenile justice system has manifest flaws and that the punitive inroads that have been made are at odds with the system's unrealized rehabilitative ideal. Rather, my point is that as imperfect as the juvenile justice system is, the adult criminal justice system is likely to be worse for most juveniles charged with criminal misconduct.

Specifically, I believe that the progressive abolitionists have failed to learn the painful lessons from the sentencing reform movement of the past twenty-five years. There are a great many parallels between sentencing reform and the current controversies confronting juvenile justice. Just as the progressive abolitionists are keeping unlikely company with the law and order crowd, so too was sentencing reform the result of strange ideological bedfellows coming together to effect dramatic changes in an obviously troubled segment of the criminal justice system. Despite its early promise and some notable successes, the sentencing reform movement has failed in many important respects. The nature of sentencing reform's failures should serve as a cautionary tale that any progressive abolitionist should consider carefully. It is not a story that those concerned with the welfare of young people should wish to repeat.

In the first part of this Article I will review the traditional sentencing system and its critics, and discuss and critique the various paths that sentencing reform has taken. In the second part, I will summarize the progressive abolitionists' views and argue that, based on the experience of sentencing reform, juveniles would be harmed by the abolition of the juvenile court's delinquency jurisdiction. In addition, I will argue that the "just desserts" philosophy that has influenced both sentencing reform and

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11. *See infra* note 87 and accompanying text.

12. *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163.

recent changes in the juvenile justice system is ill-suited for juvenile offenders. Finally, I will make some observations about the best path for juvenile justice reform based on the implications of my analysis.

II. A BRIEF HISTORY OF RECENT SENTENCING REFORMS

The sentencing reform "movement" which took shape in the 1970s has dramatically altered the sentencing practices of criminal courts around the country. The call to reform the sentencing system resulted from widespread agreement that the existing system had failed. There was less agreement, though, as to the exact shape reform should take. And today, there is sharp disagreement as to whether this reform effort has led to any improvement.

A. Critique of the Traditional System

The sentencing system that existed in 1970 reflected the same historical and philosophical trends that led to the creation of the juvenile justice system. Founded on a rehabilitative ideal, this traditional sentencing system had as its hallmarks broad judicial discretion, indeterminate sentences, and parole release.

Judicial discretion is the first important feature of the traditional sentencing system. In the traditional system, sentencing decisions were almost entirely in the judge's hands. Ordinarily, the only limit was the statutory maximum available for the offense or offenses of conviction. The judge could impose any sentence from probation, or some other nonincarcerative sanction, to the statutory maximum.[13] In making this decision, the judge was free to consider almost any information concerning the offense and the offender.[14] Judicial discretion was heightened by the procedural informality that prevailed at sentencing.[15] And significantly, appellate review of sentences was almost nonexistent.

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13. Various jurisdictions had at times enacted mandatory minimum penalties, which for the most part required one or two year minimum sentences. For background on federal mandatory minimum penalties, see Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200-08 (1993).

14. Such "real offense sentencing" has long been approved by the courts. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79 (1986); Williams v. New York, 337 U.S. 241 (1949). A number of recent commentators have criticized at least some aspects of this practice. *See, e.g.*, Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993); David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993).

15. For example, the rules of evidence are generally inapplicable at sentencing. *See* FED. R. EVID. 1101(d)(3).

While judges clearly exercised broad powers in such a system, discretion was widely distributed. Sentences imposed were indeterminate. That is, an offender sentenced to a term of imprisonment was initially informed only as to the maximum possible duration of the term to be served. The actual time to be served was usually determined by a parole board. Typically, an inmate would become eligible for parole after serving one-third of the maximum sentence and could be released any time from then until service of the maximum sentence. The parole board would, in theory, make an individualized assessment of the offender's needs and progress and order the offender's release only when the offender had been rehabilitated.

The reality of this system, of course, always diverged greatly from its aspirations. The prison environment can hardly be said to foster rehabilitation, even for those inmates who are committed to reforming themselves. The "science" of parole release proved incapable of predicting with any great accuracy which inmates were ready to become law-abiding citizens. Nonetheless, the system sketched above had been largely unchanged for many years.[16] Sentencing was rehabilitative in philosophy, largely punitive in practice. The differences between this system and the juvenile justice system were really in degree, not kind.[17]

The traditional sentencing system came under increasing attack in the late 1960s and early 1970s.[18] There were both conservative and liberal critiques of existing sentencing practices. To conservatives, rehabilitation was a failed ideal. After a century of reform-based penology, crime rates were high and recidivism widespread. To these critics, judicial discretion and parole were the source of much mischief. Too many liberal judges were free to impose lenient sentences, and social work-oriented parole boards released offenders too soon.[19] Liberals, too, began to doubt the

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16. Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169 (1995).

17. Sentencing in juvenile courts was particularly rehabilitative in theory:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.

Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

18. For background on the sentencing reform movement, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

19. *See, e.g.*, Jonathan D. Casper, *Determinant Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 236-37 (stating that conservatives felt that "parole boards seemed often to release prisoners who continued to pose a danger to society" and judges were "reluctant to send 'marginal defendants' to prison").

effectiveness of rehabilitation,[20] and were troubled as well by the notion of offenders being incarcerated "for their own good." Liberals also found judicial discretion to be problematic because it led to sentencing disparity (similar cases receiving quite different sentences), including racial and class discrimination. In addition, some liberals came to see the system as basically "lawless," with no guiding principles for judges to follow, rampant procedural unfairness, and an absence of meaningful appellate review.[21]

Conservatives and liberals agreed that the sentencing system was deeply flawed. Although there were important differences in how they diagnosed the problems, leading liberals and conservatives formed an alliance aimed at reforming the sentencing system.[22] They agreed on several fundamental points. First, both sides agreed that unwarranted sentencing disparity was an unnecessary evil. Policymakers shared the perception that like-situated offenders often received significantly different sentences.[23] This was seen as an obvious consequence of judicial and parole discretion. Second, both sides targeted uncertainty in sentencing, another consequence of indeterminate sentencing and parole release, agreeing that it should be replaced with "truth in sentencing," under which the term imposed would actually be served, minus a modest amount of time off for good behavior.[24]

Third, there was agreement on the broad outlines of a philosophical shift in the aims of sentencing. Both sides agreed that rehabilitation

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20. *See* DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF CORRECTIONAL TREATMENT STUDIES (1975); Robert Martinson, *What Works: Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22; *see also* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 201-02 (1995) (arguing that these studies have been improperly read as concluding that "nothing works"). Robert Martinson later changed his views. *See* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

21. *See* Stith & Koh, *supra* note 18, at 227.

22. *Id.* at 230-34. There were early dissenting voices, particularly from the left. *Id.* at 228, 234.

23. Several studies seemed to support this conclusion. *See, e.g.*, ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1973). *But see* I PANEL ON SENTENCE RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 19-20 (Alfred Blumstein et al. eds., 1983) ("There is little doubt that substantial unexplained variation in sentences does exist. Some of this variation, however, may only give the appearance of disparity when cases seem alike to an outside observer but differ materially in the case attributes observed by the judges.").

24. *See* Stith & Koh, *supra* note 18, at 227 (noting that reformers felt that "indeterminacy bred anxiety among prisoners because of uncertainty in their release dates").

should be deemphasized, although for different reasons.[25] Although some commentators urged general deterrence as the guiding rationale of sentencing,[26] more attention was focused on a modernized version of retribution, or just desserts.[27] Although there are many different approaches to just desserts, at its most basic level it means basing sentencing decisions more on the circumstances of the offense, and perhaps the offender's criminal record, and less on the individual characteristics of the offender. Conservatives favored this approach because it was more manifestly punitive. Liberals, or at least some of them, believed that offense-based sentencing would be fairer, and less subject to bias.

So much for philosophy. The sentencing reform movement had to develop mechanisms to replace or supplement the prevailing methods of sentencing offenders. Reforms have proceeded in two distinct directions. Some legislatures have, in light of their unhappiness with the traditional sentencing system, enacted mandatory penalty schemes.[28] Under these regimes, specific or minimum penalties are prescribed by statute for violations of various laws. There may be mandatory penalties covering a wide range of offenses, as in California, or a more specific group of offenses, as in the federal system, where mandatory minimums apply basically to narcotics and weapons offenses.

Under mandatory statutes, judicial discretion is severely curtailed. As has become clear, though, discretion itself continues to flourish, basically in the hands of the prosecutors.[29] In mandatory sentencing regimes, prosecutors exercise unprecedented authority to shape sentences. I shall not dwell here on mandatory minimums, except to note that there is near unanimity among commentators, judges, and even the United States Sentencing Commission that mandatory minimums are failures, imposing unduly harsh sentences in many cases and inviting evasion and

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25. As noted above, conservatives felt that rehabilitation did not work, and that punishment was the proper focus of sentencing. Liberals shared many of these doubts about the efficacy of rehabilitation, but were also very concerned that rehabilitation was used as a rationale to exert excessive coercive influence over the lives of offenders. *See supra* notes 18-21 and accompanying text.

26. *See, e.g.*, RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF LAW 364-67 (1973); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

27. The most influential proponent of just desserts has been Andrew von Hirsch. *See, e.g.*, ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT (1976).

28. Perhaps the most notorious of these statutes was New York's Rockefeller drug law. *See* Schulhofer, *supra* note 13, at 207-08.

29. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY MINIMUM REPORT]; Schulhofer, *supra* note 13, at 217-20.

manipulation.[30] Nonetheless, legislators continue to be attracted to this quick fix, as the popularity of "three strikes" laws demonstrates. Any jurisdiction with such a mandatory sentencing scheme would, by abolishing the juvenile court's delinquency jurisdiction, expose juvenile offenders to needless and destructive suffering.

The more promising approach to implementing sentencing reform involved sentencing guidelines. Spurred by the thoughtful, if "rhetorically excessive,"[31] commentary of then-United States District Judge Marvin Frankel,[32] many reformers coalesced around the idea of having an expert, independent administrative agency of judges, lawyers, criminal justice officials and scholars, known as a sentencing commission, study sentencing and develop a set of guiding principles. These principles would be reduced to a set of rules, or guidelines, which judges would be required to follow in ordinary cases. There would be room for judges to "depart" from the guidelines in atypical cases. Parole would be abolished to ensure honesty in sentencing. With a body of rules to govern sentences, meaningful appellate review would for the first time be available, leading to the development of a "common law of sentencing." Judge Frankel hoped that the sentencing commission's expertise and insulation from political considerations would lead to crucial improvements in sentencing.

In 1980, Minnesota became the first state to implement sentencing guidelines on Judge Frankel's model,[33] followed by Pennsylvania in 1982 and Washington in 1984.[34] In 1984 Congress passed the landmark Sentencing Reform Act.[35] The United States Sentencing Commission, established by the Sentencing Reform Act, promulgated its original guidelines in 1987, although the guidelines did not take full effect until 1989 when the Supreme Court upheld their constitutionality.[36] As of

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30. *See, e.g.*, MANDATORY MINIMUM REPORT, *supra* note 29, at 26-34 (criticizing the proliferation of mandatory minimum penalties and noting the tension between such penalties and sentencing guidelines).

31. Stith & Koh, *supra* note 18, at 228.

32. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

33. For an examination of the development of Minnesota's guidelines, see DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988).

34. *See* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173 (1995).

35. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, and 28 U.S.C. §§ 991-998 (1994)). For a detailed diseussion of the legislative history of the Sentencing Reform Act of 1984, see Stith & Koh, *supra* note 18.

36. *See* Mistretta v. United States, 488 U.S. 361 (1989).

November 1994, seventeen states and the federal system had sentencing guidelines in effect and five more states had sentencing commissions at work.[37]

Sentencing guidelines differ in some important ways. The federal sentencing guidelines[38] are extremely complex,[39] severely restrict the ability of judges to take account of individual offender characteristics,[40] often require sentences to be based in part on alleged offenses of which the defendant was not convicted,[41] and barely consider nonimprisonment sentences.[42] As a result, the federal guidelines have been widely criticized.[43] The various state guidelines, although they differ on such issues as whether the guidelines are binding or advisory, the ease with which judges may depart from the guidelines, the extent to which they regulate non-prison sentences, and whether parole has been abolished, are generally simpler and more flexible than the federal model and have been much more readily accepted.[44]

B. The Mixed Record of Sentencing Reform

Because the sentencing reform movement has resulted in many distinct approaches, with each jurisdiction charting its own course, no single assessment of success or failure is possible. In fact, a jurisdiction's sentencing changes may represent both success and failure, as different parts of a reform package have gone in different directions. Still, some overall observations can be made after approximately twenty years of sentencing reform. Sentencing reform's records are mixed, with some notable successes, some unrealized hopes, and some abject failures.

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37. Frase, *supra* note 34, at 173-74.

38. U.S. SENTENCING COMM'N, SENTENCING COMMISSION GUIDELINES AND MANUAL (1995) [hereinafter U.S.S.G.].

39. *See, e.g.*, Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 301 (1992).

40. *See, e.g.*, Daniel J. Freed & Marc Miller, *Handcuffing the Sentencing Judge: Are Offender Characteristics Becoming Irrelevant? Are Congressionally Mandated Sentences Displacing Judicial Discretion?*, 2 FED. SENTENCING REP. 189 (1990).

41. *See* Yellen, *supra* note 14.

42. For background on the development of the federal guidelines, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

43. *See. e.g.*, FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Gerald W. Heaney, *The Reality of Sentencing Guidelines: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991).

44. *See* Frase, *supra* note 34.

The current focus on the offense committed, dictated by the ascendant just desserts philosophy, has proven to be too narrow. All guideline systems restrict to some degree the ability of judges to shape sentences based on the offender's individual circumstances[45] and mandatory minimum statutes completely reject any such individualization. These restrictions have been motivated in part by philosophy and in part by the practicalities of drafting sentencing guidelines. To some, it is important that "the punishment should fit the crime" and to others there is a desire to avoid rewarding those characteristics, like education, employment history, family responsibilities and the like, that may tend to disproportionately reward more affluent, middle class offenders. The practical side is that in drafting guidelines that result in a numerical score, with the sentencing range to be derived from a grid,[46] it is hard to include factors that cannot be quantified. Personal characteristics may have varying importance to different judges, and even where judges agree that a factor is worthy of consideration, it may be hard to define and quantify.

These limitations on the consideration of individual characteristics of the offender have proven to be too restrictive, at least in those jurisdictions that do not liberally permit departures from their sentencing guidelines. Ignoring the personal history and needs of an offender runs counter to the sound instincts of judges, and when they consider the matter carefully, the public. This is because exclusive focus on just desserts violates another important, competing principle of punishment, parsimony.[47] That is, unnecessary punishment and suffering should be avoided. For example, consider a single parent convicted of a nonviolent drug offense. Just desserts would call for the same punishment to be imposed on this offender as any other. However, if the offender is not considered to be dangerous, and the crime not so severe that a nonincarcerative sentence would offend the public's sense of justice, while at the same time, imprisoning the defendant would lead to the breakup of a family and placement of innocent children in foster care, why should the judge not be able to consider these factors?

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45. The federal sentencing guidelines most severely restrict consideration of offender characteristics by not including them in guidelines calculations and deeming as "not ordinarily relevant" to a judge's decision whether to depart from the guidelines such factors as age, education and vocational skills, mental and emotional conditions, physical condition, employment record, and family ties and responsibilities. U.S.S.G. §§ 5H1.1-5H1.6. Some commentators state that these policies are inconsistent with the Sentencing Commission's statutory mandate. *See, e.g.*, Freed, *supra* note 43, at 1715-18.

46. *See* Miller, *supra* note 39.

47. *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 59-62 (1974).

This principle of parsimony can also be expressed as a preference for the least restrictive appropriate alternative. Viewing punishment as the imposition of necessary pain on an offender, this view holds that the amount of such pain imposed should be the least required to accomplish legitimate and important sentencing purposes. Therefore, if a short term of imprisonment instead of a long term, or a non-prison sentence instead of incarceration, can satisfy the purposes of sentencing, the lesser sentence should be imposed. This principle has been included in both the American Bar Association's Criminal Justice Standards and the American Law Institute's *Model Penal Code*.[48]

Current sentencing policies in many jurisdictions reject the least restrictive alternative approach. Judges throughout the country complain that some sentencing guidelines and virtually all mandatory minimum statutes force them to impose unjust sentences because the judges are precluded from considering the unique circumstances of offenders.[49] Unfettered judicial discretion is indeed problematic, but at least for progressives, handcuffing the judges has come at too great a cost. As Michael Tonry has cogently argued,[50] the left's concern with fairness, which led them to support restricting judges' ability to mitigate punishment based on the offender's life circumstances, was misguided. Liberals feared that discretionary power to mitigate sentences would leave judges free to unduly favor middle class offenders. However, even if judges would be so inclined, the fact is that there are so few middle class criminal defendants in the system as to make this criticism meaningless. Those who have suffered from sentencing reform's restrictions on considering individual characteristics have been those poor defendants, often members of minority groups, who have made some strides toward overcoming the invidious conditions in which they live.[51] Thus, one of the lessons of sentencing reform is that liberals, while concerned with fairness, signed on to a policy change that has had precisely the opposite effect from what was intended.

Moreover, in many cases, changes that have restricted judicial sentencing authority have not succeeded in eliminating unwarranted disparity and the abusive or unwise exercise of discretion. It is widely recognized that adopting determinate, offense-based sentencing shifts discretion to prosecutors. This discretion is subject to little legal scrutiny

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48. *See* TONRY, *supra* note 20, at 193.

49. *See, e.g.*, Alan Abrahamson, *U.S. Judge to Quit; Cites Sentencing Guidelines*, L.A. TIMES, Sept. 27, 1990, at A3; Jack B. Weinstein, *Perspectives: No More Drug Cases*, N.Y. L.J., Apr. 15, 1993, at 2 (federal district judge explaining his decision not to handle any more sentencings in drug cases due to severe sentences required).

50. TONRY, *supra* note 20, at 167-70.

51. *Id.* at 160, 164-70.

and can be used to manipulate sentencing guidelines and enhance the prosecutor's power in plea bargaining.[52] In federal drug cases, where the quantity involved is the major determinant of the sentence, even undercover law enforcement officers have significant power to enhance a sentence by suggesting a larger quantity of drugs.[53] And while unwarranted disparity—similar defendants receiving different sentences—may have been reduced, unwarranted *uniformity* has been dramatically increased, so that many defendants who present fundamentally different cases receive the same sentence.[54]

A just desserts approach need not be inflexible, nor must it result in severe restrictions on the consideration of offender characteristics. Just desserts is intended to link sentences to an offender's culpability. Current sentencing policies, though, take a decidedly narrow view of culpability, focussing almost exclusively on the offense committed[55] and the offender's criminal record. A more complete view of culpability would take into account at least some of the circumstances of the offender's life.[56] Mandatory minimums prohibit this, and virtually no sentencing guideline system includes much consideration of offender characteristics, although systems do, to varying degrees, allow judges to depart on this basis.

Unfortunately, the picture gets worse. Sentences have become increasingly harsh over the life of the sentencing reform movement.[57] Sentencing guidelines do not require any increase in imprisonment. To the contrary, as Minnesota's early experience with its guidelines shows,

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52. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

53. *See* Heaney, *supra* note 43, at 195-97; Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulation Before Arrest*, 1993 WIS. L. REV. 187, 205-14.

54. *See* Alschuler, *supra* note 43; Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

55. Perversely, systems like the federal sentencing guidelines and the federal mandatory minimums often base the sentence on factors, such as the quantity of drugs or money involved in an offense, that may not even be related to the offender's culpability. *See* Yellen, *supra* note 14, at 451-53.

56. *See* TONRY, *supra* note 20, at 157-58.

57. Tonry notes:

> Between 1980 and 1994, while crime rates were either falling . . . or little changed . . . the number of inmates in American prisons and jails tripled. According to the 1993 Panel on the Understanding and Control of Violence of the National Academy of Sciences, the average time served per violent crime also tripled between 1975 and 1989.

Id. at 166.

guidelines can be a useful tool for managing the limited prison space available and ensuring that it is used for the most serious or dangerous offenders.[58] However, liberals in the sentencing reform movement badly misjudged the dangers of increasing the political profile of the criminal justice system. Once legislatures began to pay attention to sentencing, it was only a matter of time until they began to meddle, and increase sentences. Again, the federal system may be the worst example. Sentencing guidelines and mandatory minimum penalties are fundamentally at odds. Yet even as the U.S. Sentencing Commission worked on the first set of federal sentencing guidelines, Congress began its election year tradition of passing "tough on crime" legislation, including mandatory minimum penalties. This trend continues today with the wave of "three strikes" laws sweeping the nation.[59]

This increased sentence severity has disproportionately fallen on racial and ethnic minorities. Current sentencing policies, particularly the so-called "War on Drugs" with its associated mandatory minimum penalties, has had a devastating impact on black Americans.[60] At a time when the rate of black participation in serious crime has not increased,[61] the number and percentage of blacks being imprisoned has soared. As Michael Tonry summarizes:

> Since 1980, the number of blacks in prison has tripled. Between 1979 and 1992 the percentage of blacks among those admitted to state and federal prisons grew from 39 to 54 percent. Incarceration rates for blacks in 1991 (1,895 per 100,000) were nearly seven times higher than those for whites (293 per 100,000). Widely publicized studies in 1990 showed that 23 percent of black males aged 20 to 29 in the United States were under criminal justice system control. . . . Studies by the National Center on Institutions and Alternatives showed that in 1991 in Washington D.C. and Baltimore, 42 and 56

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58. *See, e.g.*, Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. J. 1, 36-38 (1993).

59. *See, e.g.*, Jerome Skolnick, *Wild Pitch: "Three Strikes, You're Out" and Other Bad Calls on Crime*, AM. PROSPECT, Spring 1994, at 30.

60. For an analysis of race and the "War on Drugs", see TONRY, *supra* note 20, at 81-123.

61. According to Federal Bureau of Investigation statistics, blacks make up a significantly higher porcentage of those arrested for serious crimes than their proportionate share of the population: approximately 44% of arrestees for violent crimes compared with 12-13% of the population are black. However, these percentages have remained essentially stable since 1976. *See id.* at 63-65.

> percent, respectively, of black males aged 18 to 35 were under justice system control.[62]

There have been some successes in sentencing reform. Most state guideline systems have been well received and have made at least modest improvements on unwarranted disparity.[63] Presumptive guidelines have effectively restrained unduly harsh sentences, at least where no mandatory minimums apply. Very few sentences have been upward departures, that is, more severe than those called for by the applicable guidelines.[64] Effective sentencing commissions have at times been able to insulate their work from political pressures. Prison overcrowding has been less of a problem for jurisdictions with effective commissions, too. Imprisonment has been directed more towards violent offenders in many guidelines regimes, with greater use of intermediate sanctions for other offenders.[65]

In recent years, however, even many of these successful efforts at reform have been eroded by increasingly harsh sentencing policies enacted by legislatures.[66] In the end, then, sentencing reform has been rather one-sided. Sentences are more severe, judges' ability to individualize sentences has been diminished, and prosecutors' power has been enhanced. Sentencing policymaking has become increasingly politicized, with predictable results. Efforts to allocate public money to address the societal factors that contribute to crime are derided as misguided or "pork-barrel" spending.[67] Conservatives have achieved most of their reform aims, while the liberals who joined them in the spirit of reform should be sorely disappointed.

III. SENTENCING REFORM'S LESSONS FOR JUVENILE JUSTICE ABOLITIONISTS

The path of recent sentencing reforms is important to the juvenile justice system for two principal reasons. First, I will argue that sentencing reform's failures represent public policy patterns and themes that are likely to be repeated should the juvenile justice system be

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62. *Id.* at 4.

63. *See* Frase, *supra* note 58, at 3 (Minnesota guidelines "have achieved most of their major intended goals, and remain a model of rationality and effective sentencing").

64. *See* TONRY, *supra* note 20, at 172 tbl. 6-1.

65. *See, e.g.*, Debra L. Dailey, *Minnesota's Guidelines—Past and Proposed Changes*, OVERCROWDED TIMES, Dec. 1995, at 1.

66. *See id.* at 7-8 (describing Minnesota Legislature's adoption of measures of increasing severity).

67. *See, e.g., Congress Calls It Quits: Final Hours*, N.Y. TIMES, Oct. 9, 1994, at 1 (Senator Dole refers to proposed funds for crime prevention as "big pig").

abolished. And second, understanding the current state of sentencing in adult criminal courts is essential to assessing the likely disposition of young offenders should the abolitionist proposals be accepted. In this section I will first sketch the progressive argument in favor of juvenile court abolition. I will then apply the lessons of sentencing reform to these proposals. Finally, I will make some suggestions for a more sensible path of reform, in light of our experience with sentencing reform.

A. Progressive Arguments for Abolishing the Juvenile Justice System

Liberal doubts about the efficacy of the juvenile justice system are not new.[68] However, recent events have led more commentators to look favorably upon the abolition of the juvenile court's delinquency jurisdiction. Each of these commentators points to changes in the nation's juvenile justice systems that have led to significant convergence with the adult criminal system as evidence that the juvenile system may have outlived its usefulness. Some of the reform ideas leading to this convergence came from cases advocating rights for juveniles, such as the Supreme Court cases of *In re Gault*,[69] *In re Winship*,[70] and *Breed v. Jones*,[71] which "criminalized" the juvenile justice system's processes to a significant extent,[72] as well as the trend towards diminishing juvenile courts' authority over "status offenders."[73]

Other changes in the juvenile justice system that have led to a reevaluation of the system's usefulness have resulted from law and order

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68. For some earlier proposals to abolish the juvenile court's delinquency jurisdiction, see, for example, Martin Guggenheim, *A Call to Abolish the Juvenile Justice System*, CHILDREN'S RTS. REP., June 1978, at 1, 3; Francis B. McCarthy, *Delinquency Dispositions Under The Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093 (1977); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977). Professor Guggenheim has subsequently changed his mind. *See* Rosenberg, *supra* note 12, at 164 n.1 (reporting telephone interview).

69. 387 U.S. 1 (1967) (holding that juveniles are constitutionally entitled to notice of charges, to assistance of counsel, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to a transcript and appellate review).

70. 397 U.S. 358 (1970) (holding that delinquency must be established by proof beyond a reasonable doubt).

71. 421 U.S. 519 (1975) (holding that Double Jeopardy Clause of Fifth Amendment applies to juvenile court delinquency proceedings).

72. On the other hand, invoking the benevolent intentions of the juvenile justice system, the Supreme Court has held that the right to a jury trial, McKeiver v. Pennsylvania, 403 U.S. 528 (1971), and to bail, Schall v. Martin, 467 U.S. 253 (1984), are not constitutionally required.

73. *See, e.g.*, Feld, *supra* note 8, at 696-700.

concerns.[74] A number of states have revised the purpose section of their juvenile codes to include punishment and community protection.[75] More juveniles than ever are being waived into adult criminal courts[76] and waiver decisions are being increasingly based on the seriousness of the offense rather than consideration of the "best interests" of the offender.[77] The philosophy of just desserts has become more influential in the sentencing of juvenile offenders,[78] as determinate sentences are becoming increasingly common and mandatory minimum terms of confinement based on the offense committed have appeared.[79]

On a more philosophical level, Janet Ainsworth has argued that the development of a separate juvenile justice system was the product of a particular phase in the history of society's view of childhood and adolescence.[80] According to Ainsworth, unlike earlier times, when children were essentially treated as little adults, by the late Nineteenth Century, a conception of childhood as a distinctly different stage of life had developed. Further, adolescence came to be seen as a sub-class of childhood. The juvenile court was innately bound up with this conception of development. Today, she argues, this child-adult dichotomy has blurred, and with this change "the ideological justification for a separate juvenile jurisprudence evaporated."[81]

Finally, progressive abolitionists are troubled by the continuing lack of due process for the accused in juvenile court, in particular the absence of jury trials and the fact that the right to counsel is not fully honored.[82]

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74. *See* Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System"*, 22 PEPP. L. REV. 907 (1995) (stating that self-interested opposition of those who run the juvenile justice system has stymied needed punitive reforms).

75. *See* Feld, *supra* note 8, at 709-10; *see also* JUVENILE OFFENDERS, *supra* note 2, at 71-72.

76. *See* Francis Barry McCarthy, *The Serious Offender And Juvenile Court Reform: The Case For Prosecutorial Waiver Of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 649-51 (1994).

77. *See* Feld, *supra* note 8, at 701-08.

78. *See* Barry C. Feld, *The Juvenile Court Meets The Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 832-38 (1988).

79. *See id.* at 851-79; Feld, *supra* note 8, at 711-13; Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 485-86 (1995); Brian R. Suffredini, *Juvenile Gunslingers: A Place for Punitive Philosophy in Rehabilitative Juvenile Justice*, 35 B.C. L. REV. 885, 920-21 (1994) (supporting mandatory penalties for juvenile gun offenders).

80. Ainsworth, *supra* note 8, at 1096-101.

81. *Id.* at 1118.

82. Feld, *supra* note 8, at 718-22.

If denying juveniles jury trials, as most states do, was ever defensible, that justification evaporates as the juvenile justice system becomes more manifestly punitive. Although the rate at which juveniles are represented by counsel has increased significantly since *Gault*, large numbers of juveniles still appear in court without lawyers, usually as the result of a waiver that the juvenile may not fully comprehend.[83] When lawyers do appear, they are too often overworked or poorly trained, have inadequate resources available, and do not advocate zealously for the juvenile.[84] As a result of these problems, abolitionists contend that juveniles would greatly benefit from the enhanced procedural protections in adult criminal court.

Progressive abolitionists would not expose juvenile offenders to the full weight of the criminal justice system. Some proposals focus on the need for heightened procedural protections, such as preservation of the right to counsel for juveniles.[85] The common law infancy defense has been urged as an important component of the criminal justice system's treatment of juveniles.[86] And perhaps most importantly, all of these commentators urge and assume that the adult criminal courts would offer some form of sentencing mitigation to many if not all juvenile offenders.[87]

B. Why the Abolitionists Are Wrong

The juvenile justice system is indeed in a state of disrepair. Procedural protections are inadequate, treatment is illusory, and the current trend towards increasingly punitive approaches is shortsighted, even in the face of rising levels of violence by juveniles. As bad as

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83. *Id.* at 720-22.

84. A recent American Bar Association study catalogues and analyzes the current system of legal representation for juveniles. *See* PATRICIA PURITZ ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (1996).

85. *See, e.g.*, Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1112 (1995) (questioning whether juveniles can voluntarily and intelligently waive counsel, particularly without consulting with counsel).

86. *See, e.g.*, Feld, *supra* note 78, at 912. For a discussion of the dimensions of the infancy defense, see Rosenberg, *supra* note 12, at 176.

87. Feld states:

> Relative to adults, juveniles are less able to form moral judgments, less capable of controlling their impulses, and less aware of the consequences of their acts. Juveniles are less responsible, hence less blameworthy, than adults; their diminished responsibility means that they 'deserve' a lesser punishment than an adult who eommits the same crime.

See, e.g., Feld, *supra* note 78, at 899-900.

things are, though, they would be worse if the juvenile justice system were abolished and all juvenile offenders were handled by the adult criminal courts. Both philosophically and practically, it is wrong to equate most juvenile and adult offenders. The abolitionists err by comparing the juvenile justice system as it actually is with an idealized vision of the adult criminal justice system.[88] In reality, the trends that have made the juvenile justice system increasingly punitive are even more evident in the adult system. Given the adult system's assembly-line justice and historic rates of imprisonment, it is hard to believe that juvenile offenders would be better served there than in juvenile court.

First, let us consider one of the progressive abolitionists' strongest arguments, that in adult criminal court juveniles accused of crimes would receive more procedural fairness.[89] Probably the two main components of this argument are jury trials and the assistance of counsel. It is true that most juvenile court systems do not provide for jury trials, and where they do, that right is infrequently exercised.[90] In adult criminal court, jury trials would be freely available to defendants. It is important to remember, though, that approximately ninety percent of criminal convictions are obtained as a result of guilty pleas, not jury verdicts.[91] It seems unlikely that juvenile trial rates in adult criminal court would be substantially different. Most juveniles, then, would continue not to have jury trials. Even if we assume that juries would acquit juveniles more often than juvenile court judges do,[92] this benefit would be experienced by precious few juveniles.

The provision of counsel in juvenile court is indeed deeply troubling.[93] Nonetheless, it is again important to reflect on the reality of adult criminal court. Many indigent defendants are represented by overworked public defenders or appointed counsel of variable abilities. I am prepared to accept that the assistance of counsel would be improved in adult court, but the extent of that improvement is certainly unclear. Further, any such improvement must be balanced against the harm that is likely to beset juveniles in terms of the sentences they would receive in adult criminal court. It is to that disturbing subject that I next turn.

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88. *See* Rosenberg, *supra* note 12, at 173.

89. For an argument that the abolitionists overstate the differences in procedural protections in the two systems, see *id.* at 166-73.

90. *See* Ainsworth, *supra* note 8, at 1121-26.

91. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 486 (1995) [hereinafter 1994 SOURCEBOOK].

92. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 55-81 (1966) (stating that juries fail to convict almost twice as often as do judges).

93. *See, e.g.*, Ainsworth, *supra* note 8, at 1126-30; Feld, *supra* note 8, at 720-22 (summarizing studies demonstrating juveniles' low rates of representation by counsel).

Abolitionists argue that juveniles in adult criminal court should and would receive significant sentence mitigation, thus reducing the impact of being in adult criminal court.[94] If this were so, and if incarcerated juveniles were kept completely separate from adult offenders, the argument against abolition would be substantially undercut. An essential feature of the juvenile justice system, perhaps more salient today given the system's supposed rehabilitative orientation, is that juveniles who commit serious offenses are not punished as severely as their adult counterparts.[95] Any proposal to abolish the juvenile justice system must grapple with the issue of sentence mitigation.

In my view, meaningful sentence mitigation for juveniles in adult criminal court is unlikely to be implemented or maintained. One of the powerful lessons of the past decade is how politicized crime has become and how reluctant legislators are to advocate any position than can be labeled as "soft on crime." Consider, for example, Congress' fixation on crime control measures, even though the federal role in prosecuting crime, particularly violent crime, is minimal.[96] It is hard to see how and why in such an environment sentence mitigation for juveniles would be implemented in legislation abolishing the juvenile court.

In pragmatic terms, the existence of a separate juvenile justice system may operate as a partial brake on legislators' punitive instincts. Legislators and the public today take as the norm the idea that there is a separate juvenile justice system. Debate for the most part focuses on how sternly to treat offenders in the juvenile justice system, and which offenders are serious enough to warrant transfer to adult criminal courts. When juvenile's sentences are increased by statute, there is at least some momentum to select a midpoint between traditional juvenile sentencing practices and adult sentences. Without a juvenile justice system, the terms of the debate would shift subtly. The issue would no longer be which juveniles should be treated more harshly than the accepted, if criticized, baseline, but rather whether all or most juveniles should receive leniency from the prevailing (adult) rates of punishment. For this debate to long be resolved in favor of leniency for juveniles would require more legislative self-restraint than exists today.

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94. *See, e.g.*, Ainsworth, *supra* note 8, at 1130-32.

95. *See infra* text accompanying note 107.

96. During fiscal year 1994, approximately 50,000 individuals were convicted and sentenced for all offenses in federal courts. 1994 SOURCEBOOK, *supra* note 91, tbls. 5.28-5.29. By contrast, in 1992 there were almost 900,000 state court felony convictions. *Id.* tbl. 5.46. Offenses involving violence or weapons accounted for over 20% of the state felony convictions, but just over 10% of federal convictions. *Id.* tbls. 5.28-5.29, 5.46.

Individual judges may believe that youth should be a mitigating factor,[97] but the prevailing sentencing philosophy, as implemented in sentencing guidelines and mandatory minimum statutes, is at odds with mitigation for juveniles. As discussed above, the thrust of recent sentencing reforms has been in the direction of just desserts, or offense-based sentencing. All guideline systems and mandatory minimum statutes restrict or prohibit consideration of individual offender characteristics.[98] The federal sentencing guidelines provide that age "(including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range"[99] and most courts have refused to allow deviation from this principle.[100]

Abolitionists apparently believe that sentencing commissions or legislators would buck this trend and carve out an exception for youth. Unfortunately, little reason exists for such optimism. If abolitionists believe that sentence mitigation for young offenders is appropriate, the most judicious course would seem to be to try to hold the line on the punitive philosophy's inroads into the juvenile system and to continue working to improve the juvenile system. If this seems naive and idealistic, I would argue that it is less so than hoping for a mature, balanced, fair approach in adult criminal courts.

Even if a criminal justice system incorporating a newly abolished juvenile justice system did initially offer reduced sentences to many juveniles, I fear that this policy would not endure. With the highly

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97. Several studies support this notion. *See, e.g.*, PETER GREENWOOD ET AL., FACTORS AFFECTING SENTENCING SEVERITY FOR YOUNG ADULT OFFENDERS 13-14 (1984); Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 501 (1987).

98. Some jurisdictions have been particularly vigilant in trying to stamp out individualized sentencing. On several occasions when a court has departed from the federal sentencing guidelines based on an offender's unusual circumstances, the U.S. Sentencing Commission has promulgated an amendment precluding future courts from so departing. For example, in one case the sentencing court reduced a guideline sentence based on the defendant's "potential for victimization" in prison because of his "diminutive size, immature appearance and bisexual orientation," a decision that was upheld by the Seeond Circuit. United States v. Lara, 905 F.2d 599, 601 (2d Cir. 1990). Subsequently, the Sentencing Commission amended § 5H1.4 of the guidelines to state that "[p]hysical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." *See* U.S.S.G. app. C., amend. 386.

99. U.S.S.G. § 5H1.1.

100. *See, e.g.*, United States v. O'Brien, 950 F.2d 969, 971 (5th Cir. 1991), *cert. denied*, 506 U.S. 819 (1992) (suggesting that there can be no departures from the guidelines based on age). *But see* United States v. Smith, 909 F.2d 1164, 1169 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991) (upholding downward departure based on defendant's youth).

politicized nature of criminal justice policymaking today, anecdotal evidence or highly publicized individual cases can lead to rapid, poorly considered changes in policy. In a world without a juvenile justice system, every time a particularly horrendous crime is committed by a juvenile, particularly if the juvenile has previously been the beneficiary of a sentence reduction based on age, the legislature would be under enormous pressure to "tighten up" the "loopholes" that benefit youthful offenders. It should be noted here that the recent surge in incarceration rates has occurred at a time when serious crime rates have been relatively stable, or even declining.[101] If the dire predictions of a coming juvenile crime wave due to an increasing percentage of young people in the population[102] turn out to be even partly correct, the legislative urge to crack down on juveniles may be irresistible.

Without any significant sentence mitigation, the lives of countless youthful offenders would be decimated by adult criminal sentences. Imprisonment is at historic levels. Mandatory minimum sentences mechanistically send offenders to prison for terms far longer than justified by any reasonable theory of punishment. We should pause here for a moment and consider drug sentencing policy. The "War on Drugs," which reverberates loudly in current law, has exacted a huge price from relatively low level offenders. Many juveniles are involved with drugs at some time in their adolescence. It would be disastrous if many teenagers, who may otherwise be law abiding and who, in any event, are likely to cease their involvement in crime as they mature, were to receive the draconian mandatory minimum sentences so commonly handed out today.

The cost of applying current sentencing policies to juveniles would be disproportionately born by minority youths and communities. As noted previously,[103] sentencing policies of the past decade have led to an explosion in the incarceration of African-Americans. The same pattern holds true for juveniles.[104] Policymakers have not been sensitive to the disproportional racial impact of these sentencing policies.[105] Thus,

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101. *See* TONRY, *supra* note 20, tbls. 1-1, 1-2.

102. *See* Fox Butterfield, *Experts on Crime Warn of a "Ticking Time Bomb"*, N.Y. TIMES, Jan. 6, 1996, at 6 (reporting that Council on Crime in America study predicts that demographic trends will lead to significant increase in crime in coming years).

103. *See supra* notes 60-62 and accompanying text.

104. TONRY, *supra* note 20, at 60.

105. For example, it has been effectively demonstrated that federal law's vastly different treatment of crack and powder cocaine has an enormous disparate impact on blacks. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995). Nonetheless, when the United States Sentencing Commission proposed changing the law to reduce that disparity, Congress and the President quickly rejected that proposal. *See* David Yellen, *Reforming Cocaine*

removing all juvenile offenders from juvenile court would likely expose an increasingly larger percentage of minority youths to unduly severe sentences.[106]

It would be wrong to sentence all juvenile offenders like adults (albeit for somewhat shorter terms), even if some form of sentence mitigation were to survive the abolition of the juvenile justice system. As discussed above, sentencing reform's shift to a just desserts, offense-based approach has been too restrictive. It has led to sentences that are too harsh, and it reflects an exceedingly narrow view of culpability. These shortcomings are even more profound when youthful offenders are considered. The offense committed is but one measure of a youth's culpability. In assessing a young person's responsibility for criminal behavior, it is counterintuitive to refuse to consider the youth's age, maturity, and life circumstances. Imagine two teenage boys who have been caught stealing a car. One is a gang member who neither attends school nor works. The other has maintained a reasonably solid school record, but has recently experienced some personal or family trauma. Although "equity" may call for identical sentences, is it really in society's best interest to impose the same sanction on these two offenders? Judges should be able to mitigate punishment for youthful offenders who demonstrate some promise or seem less than fully responsible for their actions. Such judgments will always be subjective and subject to second guessing, but the illusory equality of just desserts seems particularly misplaced in juvenile sentencing decisions.

There is another practical reason for imposing shorter, more individualized sentences on youthful offenders. Rightly or wrongly, we are currently incapacitating a large number of young adult offenders for the remainder of their crime prone years (and then some, in many cases). Most young offenders, even if they serve substantial prison terms, will still be released during those crime prone years. It is surely a recipe for disaster to take a young offender, imprison him for an extended period in a criminogenic environment, then release him, with few if any job or life skills, while he is still young enough to be a menace to society. An extra few years of imprisonment for a juvenile may come at a substantial cost to society.

In sum, while I respect the progressive abolitionists' motives, I doubt that their remedy is practical or desirable. The juvenile justice system, with all of its flaws, looks better as one closely examines the adult

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Sentencing: The New Commission Speaks, 8 FED. SENTENCING REP. 54 (1995).

106. Juvenile court sentencing practices also yield racial disparities. *See* Feld, *supra* note 8, at 713-15. However, the situation in the criminal courts, with their increasing racial disparities and lengthening sentences, is a more significant problem.

criminal justice system, particularly current approaches to sentencing adult offenders. There seems to be little chance that the sentencing practices discussed here will be ameliorated in the near future. Under these circumstances it seems to be in the best interests of juvenile offenders and society to retain the juvenile court's delinquency jurisdiction.

Before proceeding to the next section, the so-called "punishment gap" should be considered. Several studies have reported that while adult sentences imposed on youths convicted of violent offenses are much more severe than sentences imposed in juvenile court for similar offenses, for property offenders, the situation is reversed. That is, young recidivist property offenders who are waived to adult court are actually treated more leniently than similarly situated youths whose cases are retained by the juvenile court.[107] A number of factors may account for this seemingly anomalous treatment of property offenders. Judges in adult criminal court consider youth to be a mitigating factor.[108] In addition, youths making their first appearance in criminal court may be treated as first offenders, while in juvenile court their entire record is considered. Finally, to sentencing judges, even repeat juvenile property offenders compare favorably to the many serious and violent offenders in adult court.

If these studies are accurate,[109] one might argue that abolition of the juvenile justice system would benefit many property offenders currently retained by juvenile courts. It seems fair to conclude that at least some juveniles now incarcerated by juvenile courts for property offenses would receive shorter terms or nonimprisonment sentences in criminal court. Overall, however, nonviolent youthful offenders would suffer. First, those recidivist property offenders now waived to adult court would no longer seem like the least serious offenders if all juvenile crime were handled in the same adult courts. In addition, with no juvenile court confidentiality available, many of these currently waived juveniles would be sentenced as repeat offenders. Perhaps most

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107. *See, e.g.*, JAMES P. HEUSER, U.S. DEP'T OF JUSTICE, JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND "REMANDED" TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY 19-21 (1985); M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53, 56-59 (1986); Marcy Rasmussen Podkopacz & Barry C. Feld, 14 LAW & INEQ. J. 73, 88, 159-65 (1995).

108. *See* sources cited *supra* note 97.

109. Problems with data collection and analysis may raise doubts about the validity of these studies. For a discussion of some of the difficulties in making comparisons of length of sentence in adult and juvenile court, see Podkopacz & Feld, *supra* note 107, at 162-64. In addition, the Podkopacz/Feld study probably reflects the fact that Minnesota's sentencing guidelines for offenders sentenced in adult court deemphasize imprisonment for nonviolent offenders.

importantly, repeal of the juvenile court's delinquency jurisdiction would lead to the imposition of long mandatory terms of imprisonment on many juveniles, pursuant to the nation's drug and "three strikes" laws.

In sum, if there would be some winners under the abolitionists' proposals, there would likely be many more losers. Still, the probable existence of the "punishment gap" does point out that the juvenile court's unbridled discretion and indeterminate sentences does lead to many nonviolent young offenders being incarcerated longer than appropriate. This problem will be one of the issues addressed in the next section.

IV. The Path Toward a Better Future

To say that the juvenile court's delinquency jurisdiction should be retained is not to be satisfied with the conditions in the juvenile justice system. Let me here sketch a few ideas that I believe flow from my previous analysis.

The first, obvious implication of this discussion is that judicial discretion is not an evil that should he stamped out. Individualized sentences for juvenile offenders are the best course for young people and society. Discretion is inherent in any criminal justice system; the question is how to divide up and supervise the exercise of that discretion. Properly constrained, judicial discretion at sentencing has been shown to be superior to excessive prosecutorial or legislative control. Judges will certainly not always make the right decision, but that is hardly an adequate response to the problems caused by overly restricting judicial discretion.

This is not to say that judicial discretion should be unfettered. Early sentencing reformers were right that unbridled judicial discretion leads to disparity, undue leniency or severity, and bias. This pattern is probably more apparent in the traditional juvenile court, with its frequent use of lenient dispositions for serious offenders, and coercive dispositions for minor offenders. Properly structured sentencing guidelines and determinate sentences can be a great aid in balancing individualization and consistency. Guidelines should ensure that secure confinement is reserved for serious and violent offenders; nonviolent offenders should be incarcerated only as a last resort.

The keys to effective juvenile sentencing guidelines are simplicity and flexibility. The Byzantine process of applying the federal sentencing guidelines should be avoided. Departures from the guidelines should not be feared or too strongly discouraged. Judges should be able to inquire into the life history of an offender and make adjustments from the applicable sentence range if appropriate. Judges, because they like to follow rules and because they welcome guidance in performing what many consider to be the most difficult part of their job, will impose most

sentences within the ranges set by reasonable guidelines. Meaningful appellate review can ensure the development of principles to guide the individualization of sentences.

Because properly constrained judicial discretion is so important, juveniles should not be exposed to mandatory minimum penalties. Many defendants who receive mandatory minimums should serve substantial sentences. This crude tool, though, is too rigid, manipulable, excessively punitive and extremely vulnerable to discriminatory enforcement. As has been true in the past, eventually mandatory penalty statutes are likely to be discarded. For juveniles, mandatory minimums are particularly pernicious and should be immediately rejected.

One of the most difficult questions is under what circumstances a youthful offender should be tried as an adult.[110] A detailed examination of waiver is beyond the scope of this Article, but I would offer some brief observations. Traditionally, the waiver decision was entrusted to individual juvenile court judges, the so-called judicial waiver. More recently, other mechanisms, such as legislative or prosecutorial waiver, have also been implemented. Judicial waiver is an exercise in discretion comparable to sentencing in an indeterminate system. The decision to transfer a youth to criminal court is essentially a decision that the youth, if convicted, requires a longer period of incarceration than that available in juvenile court.[111] As such, judicial waiver is open to the same types of criticisms that have been leveled against indeterminate sentencing systems.[112]

However, legislative and prosecutorial waiver suffer from many of the deficiencies of mandatory minimum statutes. They provide an illusion of consistency and a reality of rigidity or troubling prosecutorial discretion. The soundest approach here, as with sentencing in juvenile court, is judicial discretion subject to an appropriate degree of appellate review.[113] Waiver guidelines can be constructed to guide consideration of the appropriate factors such as age, amenability to treatment, and seriousness of the offense. But there should be room for the judge's weighing of individual circumstances. Again, discretion will exist with any waiver system; the question is where that discretion will be located.

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110. For a discussion of the effect of a just desserts philosophy on waiver decisions, see Feld, *supra* note 97, at 487-89; and Feld, *supra* note 8, at 701-08.

111. Feld, *supra* note 97, at 494.

112. *See id.* at 489-94.

113. For a defense of judicial waiver, see Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267 (1991). *But see* McCarthy, *supra* note 76, at 656-71 (supporting prosecutorial waiver).

In creating sentencing guidelines and structuring waiver criteria, we should reject the false binary choice that the juvenile justice system must seek to punish or rehabilitate, but not both.[114] These goals can and should be integrated. No one believes any longer that we do or should incarcerate in order to attempt to rehabilitate an offender. We incarcerate for the obvious reasons: to punish, to incapacitate, and to deter. At least with juveniles, though, we must commit ourselves to doing what we can, with education, counseling and training, to increase the chances that those youths convicted of criminal actions, whether incarcerated or not, will avoid lives of crime.

One of the weaknesses with just desserts theory is its notion that there is a "right" punishment for each offense. Instead, as Norval Morris has argued,[115] the best we can probably do is to say that there is a range of appropriate punishment for an offense: neither so lenient as to invite disrespect for the law, nor so severe as to be unfair. This principle of "limiting retributivism" can serve as a good model for a juvenile court sentencing system. Some offenses are so grave that they require significant periods of incarceration, no matter what we learn about the offender. Many minor offenses should never be the basis for an offender's removal from the community. Within the range of acceptable punishments for each offense, though, there should be room for considered judicial discretion. This approach provides the best opportunity for both protecting society and providing fairness and the opportunity to reform to offenders.

We have strayed far from this principle in sentencing adult offenders. Rather than embracing or surrendering to these trends, as have the progressive abolitionists, we should resist them and work to improve the quality of justice in the juvenile court from within. And we should be trying to convince society to devote more resources to the poor and neglected children who grow up to be the juvenile offenders we fear. Abolishing the juvenile justice system would remove a reminder that young people are different from adults and demand more of our attention. In making decisions about our juvenile justice system today, we should not lose sight of those differences.

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114. *See, e.g.*, Feld, *supra* note 97, at 484.

115. *See* MORRIS, *supra* note 47.