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FOREWORD

The Enduring Difference of Youth

David Yellen[*]

This year marks the centennial of the juvenile court. From its start in Chicago in 1899, the idea of a separate court to deal with the problems of young people swept the country. Today, as is well known, the juvenile court is an institution under attack. Both the political right and left have challenged the validity of the juvenile court. The court has been reformed and transformed, and its philosophy and jurisdiction have been whittled away. The nation's juvenile justice systems, however, have proven to be surprisingly resilient, and still, the institution stands. Despite at least two decades of calls for the system's abolition,[1] every state in the country still has a separate court to deal with a high-percentage of young people charged with criminal conduct.

What should we make of this durability? Some observers argue that the juvenile justice system endures because of its chameleon-like quality. The history of juvenile justice can be seen as a cycle,[2] "with laws becoming more punitive when the public and politicians are concerned that juvenile crime is increasing, and becoming more paternalistic and treatment-oriented when juvenile crime seems less of a threat."[3] According to several commentators,

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1. *See, e.g.*, Martin Guggenheim, *A Call to Abolish the Juvenile Justice System*, CHILDREN'S RTS. REP., June 1978, at 1, 3; Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1120-26 (1977). Both Guggenheim and Wizner have subsequently changed their views and no longer support abolition. *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 163-64 n.1 (reporting from a conversation with Martin Guggenheim); Stephen Wizner, *On Youth Crime and the Juvenile Court*, 36 B.C. L. REV. 1025, 1035 (1995). Barry Feld has been the most persistent advocate of abolition. *See, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 70 (1997). For an opposing view, see, for example, David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 577-80; Rosenberg, *supra*, at 163.

2. *See* THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 3 (1992).

3. Jonathan Simon, *On Their Own: Delinquency Without Society*, 47 U. KAN. L. REV. 1001, 1002 (1999).

> [i]t makes no difference which direction the public and political winds might be blowing; the juvenile court can bend without breaking. On the one hand, if youths are under attack or neglected, the juvenile court can take center stage as a bastion of social protection. It can assume a humanitarian face, compassionately shielding youths from all sources of harm. . . . On the other hand, if (mainly adult) society is under attack, then the juvenile court can once again take center stage, this time as a bastion of social control. It can present a tough face, forcefully shielding society from youthful sources of harm. The court can give more attention to the more serious offenses and mete out harsher and, ostensibly, more appropriate dispositions.[4]

In the recent era of rising violent crime rates, the juvenile court has survived by becoming more overtly punitive. More young people than ever are being transferred to adult courts, and more punitive sentences are being imposed on those youths who remain in the juvenile court. The juvenile court's original model of informality and rehabilitation is probably less evident than at any time since the court's founding. Based on this observation, the juvenile court is only able to continue because it has become increasingly indistinguishable from the adult court.

This trend may be a useful model of bureaucratic survival,[5] but it is not a complete explanation for the juvenile court's survival. It is legislators, not those operating within the juvenile justice system, who ultimately hold the court's fate in their hands. They have chosen not to heed the call of the abolitionists, whose position must surely hold some appeal. Therefore, without trying to deny the increased punitiveness of the juvenile justice system, we must look further.

In my view, the juvenile court continues to exist because its core rationale—that the intellectual and psychological differences between children and adults warrant more lenient and supportive treatment of juvenile offenders—still resonates with society. Scholarly debate continues about just how different the young are from adults, and about when those differences dissipate,[6] but everyday experience reiterates the truth of several ideas to most citizens. First, the moral reasoning and cognitive abilities of children are not as developed as those of adults.

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4. Ira M. Schwartz et al., *Nine Lives and Then Some: Why the Juvenile Court Does Not Roll Over and Die*, 33 WAKE FOREST L. REV. 533, 551 (1998).

5. *See* Simon I. Singer, *Criminal and Teen Courts as Loosely Coupled Systems of Juvenile Justice*, 33 WAKE FOREST L. REV. 509, 517 (1998) (asserting that the current juvenile justice system reflects "bureaucratic structures in which treatment and punishment objectives coexist").

6. *Compare* Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 61 (1998) ("[M]id- to late-adolescent serious offenders as a class should not be distinguished from their adult counterparts."), *with* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 174 (1998) ("[T]he predispositions and behavioral characteristics that are associated with the developmental stage of adolescence support a policy of reduced culpability for this category of offenders.").

Second, children have less empathy for others and a less complete appreciation for the consequences of their actions. Finally, teenagers, though more like adults in their intellectual and moral capabilities, are naturally, even if temporarily, inclined toward antisocial behavior, are particularly susceptible to peer pressure, and perceive risk differently from adults.[7] These developmental differences tend to lessen a youth's culpability, and therefore call for more lenient treatment.

Abundant evidence exists that policymakers, even as they express displeasure with aspects of the juvenile justice system, have not rejected the concept that "children are different." For example, legislation was recently enacted in Arkansas, the scene of a 1998 shooting spree by two boys, ages eleven and thirteen, in which five people were killed.[8] Because of the horrific nature of the crime, there was widespread outrage at the state's inability to try these youths as adults.[9] After the case was decided, the legislature took up proposed changes to the rules governing a juvenile's waiver to adult status.[10] If there was ever a time and place for the juvenile justice system to take a pounding, this would seem like the likely point. It was widely expected that the Arkansas Legislature would adopt dramatic and far-reaching changes in the waiver provisions.[11] Instead, the legislation passed, and while it expands the opportunity to try young teenagers as adults for the most serious crimes, it includes a number of moderate provisions supported by child advocates.[12] This illustrates that the instinct to moderate punishment for young offenders remains, even when strained by horrific events.

Similarly, the recent experimentation with "sentence blending"[13] reveals an unwillingness to abandon all serious juvenile offenders to the harsh world of the adult criminal court. In sentence blending, pioneered by Minnesota, both a juvenile sentence and an adult sentence are announced.[14] If the offender satisfies the terms of the juvenile sentence, the adult sentence is vacated.[15] A violation of the juvenile sentence,

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7. These traits are also found in a number of adults, particularly among adult offenders. However, the strong association of these traits with adolescence argues for a separate approach to juvenile offenders as a group.

8. *See* David Firestone, *Arkansas Tempers a Law on Violence by Children*, N.Y. TIMES, Apr. 11, 1999, § 1, at 20, *available in* LEXIS, News Library, Nyt File.

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See, e.g.*, PATRICIA TORBERT ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 11-14 (1996).

14. *See id.* at 12.

15. *See id.*

however, leads to the offender serving the harsher adult sentence.[16] The Arkansas legislation noted above contains a variation of sentence blending.[17] Sentence blending, by offering a last chance to serious youth offenders, holds out hope for the possibility of redemption. This last chance is not currently offered to many serious adult offenders, including, most notably, nonviolent drug offenders.

Even the recent hype concerning a coming wave of juvenile "super-predators"[18] can be viewed in a light consistent with this hypothesis. Violence by juveniles, especially gun violence, is certainly a major problem. Yet the extreme imagery suggested by the super-predators language, supported by little more than a coming demographic change that will increase the percentage of young people in society,[19] seems extreme and even hysterical. Why do we fear violent juveniles so much? Perhaps it is because we recognize that juveniles, more than adults, are capable of behaving irrationally, without full foresight of the potential consequences. The kind of senseless, random acts of violence that are most terrifying are easier to imagine at the hands of an immature, out-of-control teenager. Thus, we especially worry about youths gone astray for the same reason that we establish a separate juvenile justice system: we recognize that the young are developmentally different.[20] This ambivalence about youth is perhaps at the heart of the paradoxes of the current juvenile court.

The Essays and Comments in this Special Issue contribute to the debate about the future of the juvenile court. After reviewing the origins of the juvenile justice system, nationally and in Kansas, Attorney General Carla Stovall discusses recent crime trends and reforms in Kansas.[21] These reforms seem to reflect an effort to combine toughness in the face of higher juvenile crime rates with a continued recognition that children are different. Kansas, like many states, often vacillates between these

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16. *See More States Starting to Test Dual Sentencing for Youths*, OMAHA WORLD-HERALD, Feb. 15, 1998, at 16A, *available in* 1998 WL 5495844.

17. *See* Firestone, *supra* note 8, at 20.

18. *See* John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23, 26; *see also* Fox Butterfield, *Experts on Crime Warn of a "Ticking Time Bomb,"* N.Y. TIMES, Jan. 6, 1996, § 1, at A6, *available in* LEXIS, News Library, Nyt File (discussing Professor DiIulio's research on a potential crime wave).

19. *See* Butterfield, *supra* note 18, at A6.

20. Fortunately, the hype surrounding an anticipated crush of juvenile predators has begun to abate. The wind has been taken out of the sails of these fear-mongers due to declining crime rates and because of more thoughtful scholarship demonstrating that many factors other than the percentage of young people in society influence future violent crime rates. *See* Franklin E. Zimring, *The Youth Violence Epidemic: Myth Or Reality?*, 33 WAKE FOREST L. REV. 727, 728 (1998).

21. Carla J. Stovall, *Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed*, 47 U. KAN. L. REV. 1021, 1029-30, 1032-34 (1999).

positions in an incoherent manner. But given the likely alternative in today's political climate—inflicting on juveniles the same extreme sentences often meted out in adult criminal courts—this approach has something to commend it.

In a thought-provoking Essay, Professor Jonathan Simon examines several "post-social" responses to juvenile crime.[22] These responses, including anti-graffiti ordinances, the imposition of criminal liability on parents who fail to control their children, and student drug testing, are characterized in his view by a commitment "to the idea that crime can be prevented by effective collective action that targets society as a whole and places primary responsibility on state actors."[23] This new "group logic" approach has been developing even as individual punitiveness has increased in the juvenile justice system.[24] Although Professor Simon is critical of many aspects of these new approaches, he finds some positive potential in them as well. Implicit in both his criticism and optimism is a commitment to developing new strategies of dealing with youth crime that forthrightly and progressively take account of the impressionable nature and potential for growth of young people.

The Comment by Cathleen Hull takes on the troubling issue of capital punishment for juvenile murderers.[25] The author makes an intriguing argument that principles of international law render the juvenile death penalty invalid.[26] Although this argument is unlikely to prevail in United States courts, it again illustrates a "juveniles are different" belief. Most countries that allow the death penalty prohibit it for youthful offenders.[27] In contrast, the United States Supreme Court has ruled that the Constitution prohibits executing offenders who committed their crimes before age sixteen.[28] Only about half of the states that have explicitly addressed the issue prohibit the death penalty for offenders below eighteen years of age.[29]

Finally, the Comment by Trey Meyer examines custodial interrogation of juveniles.[30] Specifically, the Comment criticizes the adoption of a per se rule in Kansas excluding confessions by juveniles fourteen years of age or younger, unless the juvenile has consulted with a parent, guardian, or

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22. Simon, *supra* note 3, at 1004-05.

23. *Id.* at 1005.

24. *See id.* at 1006.

25. *See* Cathleen E. Hull, Comment, *"Enlightened by a Humane Justice": An International Law Argument Against the Juvenile Death Penalty*, 47 U. KAN. L. REV. 1079 (1999).

26. *See id.* at 1106-07.

27. *See id.* at 1094-95.

28. *See* United States v. Thompson, 487 U.S. 815, 838 (1988).

29. *See* Hull, *supra* note 25, at 1079.

30. *See* Trey Meyer, Comment, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 U. KAN. L. REV. 1035 (1999).

attorney.[31] Most states and the United States Supreme Court have adopted a totality of the circumstances approach under which the age of the defendant is only one factor in determining whether a waiver of the right to remain silent is valid.[32] Again, the question is not whether age is relevant, but instead how to best take into account the special factors associated with youth.

In the end, virtually everyone agrees that, in general, there are differences between juvenile and adult offenders that warrant leniency for youths. Even those who would abolish the juvenile court would propose instituting a "sentence discount" based on the youth of the offender in adult criminal court.[33] The challenge facing us all is to find mechanisms that meet society's legitimate safety and security needs, while at the same time allowing and promoting the successful development of troubled youths. The juvenile court, with all its flaws and mixed messages, remains our best hope.

31. *See id.* at 1065-77.
32. *See id.* at 1051.
33. *See* Feld, *supra* note 1, at 113-23.