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The juvenile "injustice" system: A multi-perspective look at the current state of the American juvenile justice system

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THE JUVENILE "INJUSTICE" SYSTEM:

A multi-perspective look at the current state of the American juvenile justice system

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Abstract

At the tail end of the 19th Century, a new and unique concept of a specialized institution for the treatment of juveniles within the legal system emerged within the fabric of American society. This institution became known as the *Juvenile Justice System*. Today, juvenile justice systems are in place within many countries; and while some developed prior to the birth of the American juvenile justice system, many were developed with the American system as a foundational blueprint. Ironically, given the importance of being a unique concept that influenced several justice institutions world wide, very little instruction pertaining to the American juvenile justice system can be found within undergraduate criminology and criminal justice curriculums. Only slightly more can be found within graduate programs. This irony is increased, too, when one considers that most crime is committed by adolescents; one would think more emphasis would be placed on understanding the juvenile justice system. This paper is an attempt to do just that by taking a look at some of the current literature pertaining to the juvenile justice system through different lenses. First, an etiological perspective is presented over the epochs of juvenile justice. Second, a developmental perspective is presented over how the biological and psychological differences in youths from adults require specialized treatment for juvenile justice. Third, a civil infringement perspective is presented over gender, ethnic, and racial biases intrinsic to the juvenile justice system. Fourth, an ideological perspective is presented over the effectiveness of continuing adjudication within juvenile courts verses transfer to criminal courts. Finally, a personal perspective is presented from a juvenile court judge's career in dealing with troubled youths. The essay concludes with a discussion synthesizing each perspective into one overall view of the juvenile justice system. Throughout the essay, the terms youth, juvenile, and adolescent can be used interchangeably; as well as the terms offender and delinquent.

> Because he was concerned about children, one day his mind was illuminated. He thought, *Something can be done for them.*
>
> - Lillian Smith, *The Journey* (1954, as cited in Gottfredson and Hirschi, 1990/2007, p. 5)

Introduction

Historically, since the inception of the American juvenile court concept in 1899 (Rosenheim, Zimring, Tanenhaus, & Dohrn, 2002), juvenile offenders, aka delinquents, have been adjudicated without the right to trial by jury (see *In re Gault*, 387 U.S. 1 (1967); *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968); *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971); *Findlay v. State*, 235 Kan. 462, 463-64, 681 P.2d 20 (1984)). However, on June 20, 2008, the Kansas Supreme Court filed their opinion (96,197) re: *In the Matter of L.M.* The finding of the court reads, in part:

> Because the Kansas Juvenile Justice Code has become more akin to an adult criminal prosecution, it is held that *juveniles henceforth have a constitutional right to a jury trial* under the Sixth and Fourteenth Amendments [emphasis added].
>
> (http://www.kscourts.org/Cases-and-opinions/Opinions/supct/2008/20080620/96197.htm, ¶1)

Several questions arise from this decision. *Are juvenile offenders acquitted more by jury trial than bench trial? Does allowing trial by jury for juvenile offenders decrease the number of petitions filed? What impact will allowing trial by jury for juvenile offenders have on the already strained resources – both fiscal and logistical – of the judiciary? Are juvenile offenders better served by a jury of six or twelve adults over a judge; i.e. will adult jurors be (more) prejudicial towards a juvenile defendant due to his/her age compared with a judge? Is this*

relatively new social phenomenon – trial by jury for juvenile offenders – localized to Kansas or is it global in nature; i.e. are we entering into a new epoch of juvenile justice?

While important to study, these questions cannot be approached until one has a firm understanding on how the juvenile justice system came to be and evolved over the years. As a law enforcement officer who has spent the last thirteen years serving as a gate keeper to the juvenile justice system – i.e. the arrest/don't arrest decision – I found myself lacking. Real life experience failed to make me knowledgeable of the history and intricacies of the juvenile court – which I contend is not localized to my experience but can be generalized to law enforcement as a whole – nor had my undergraduate studies faired any better, a phenomenon that appears to still be the case throughout criminal justice studies. Review of university catalogs available online of schools in the Kansas Regents System and other well known criminal justice degree granting institutions – i.e. Wichita State University (http://www.wichita.edu/thisis/academics/catalogs.asp), Kansas State University (http://catalog.k-state.edu/index.php), University of Kansas (http://www.catalogs.ku.edu/), Fort Hays State University (http://web.fhsu.edu/universitycatalog/), Washburn University (http://www.washburn.edu/admin/vpaa/catalogs/cat_screen.html), Michigan State University (http://www.reg.msu.edu/Courses/search.asp), Florida State University (http://registrar.fsu.edu/), Sam Houston State University (http://www.shsu.edu/catalog/), and the John Jay College (CUNY) of Criminal Justice (http://www.jjay.cuny.edu/catalogJohnJay/) – for juvenile justice specific courses within an undergraduate criminal justice program showed an average of only one course being offered that was subject matter specific. A few more juvenile justice specific courses were located when a search was extended beyond departments of criminal justice/justice studies to include those of sociology, social work, and law – which is not surprising since criminal justice's eclectic roots are associated with political science, public administration,

sociology, law, business administration, and police science (Dean, 2008). Graduate level courses faired only slightly better. (One exception was found: Prairie View A&M University, Prairie View, Texas offers both a master and doctorate degree in juvenile justice (http://www.pvamu.edu/pages/610.asp)).

This paper attempts to address this lack of understanding of the juvenile justice system – or more correct, *systems*, as the United States has fifty-one separate juvenile justice systems in operation (National Center for Juvenile Justice, 2006); not including US Territories, other than the District of Columbia, and Native American Tribal Courts – through a review of six books on the subject; each book was selected to provide insight into a unique aspect of the juvenile justice system. *A Century of Juvenile Justice* provides a historical overview of the founding and development of the American juvenile justice system, with a brief look at the juvenile justice systems of Europe – primarily the United Kingdom – and Japan. *Youth on Trial* views the American juvenile justice system from a developmental psychology perspective. *Justice for Girls* provides an analysis – through a feminist perspective – of both the American and Canadian juvenile justice system, using each as a lens to examine the other, calling attention to the gender biases intrinsic to the systems. *Our Children, Their Children* examines treatment within the juvenile justice system based on race and ethnicity. *The Changing Borders of Juvenile Justice* takes a critical look at the current trend of transferring juvenile offenders from the juvenile court into the criminal court for adjudication. *Judging Children as Children* examines adjudicating juveniles, primarily in criminal court, from a judge's perspective. Summaries of the main points and theories presented in each book will be provided. (An overview of the criminological, psychological, and sociological theories put forth to explain delinquency may be viewed in Appendix A.) I conclude with a brief discussion that synthesizes each book into one overall

picture of the juvenile justice system and address the original question posited: Are we entering into a new epoch of juvenile justice?

Book Reviews

A Century of Juvenile Justice

Editors Rosenheim, Zimring, Tanenhaus, & Dohrn (2002) arrange the articles into five parts: "Juvenile Justice in Historical Perspective," "Juvenile Justice and Legal Theory," "Juvenile Justice and Social Science," "Juvenile Justice and Child Welfare," and "Juvenile Justice in Comparative Perspective" (pp. v-vi). While this helped facilitate organization, articles in each area were found not to be separate and distinct but overlapping; especially when examining legal theory, social science, and child welfare roles in the development of the American juvenile justice system. My review here will incorporate this overlapping and arrange my discussion to focus on three categorical topics of the juvenile court: History, Legal Theory, and Global Perspective. The social science relationship with the juvenile court will be briefly touched upon; however, I will not elaborate in too much detail during this review, as many of the same concepts presented in *A Century of Juvenile Justice* were presented in the rest of the literature, and for the sake of trying to avoid redundancy, will be discussed under those reviews.

History. The history of the American juvenile justice system from its opening in Chicago on July 3, 1899 (Tanenhaus, 2002) to present day is summed up best by Michael Grossberg (2002), "Americans have been torn between *a fear for children* and *a fear of children*" (p. 3); but the history of the juvenile justice system, the foundation that it was built on, started well before its creation. American legal thought and treatment of juveniles "pre-creation" of the separate

juvenile court system established in 1899 can be looked at as two epochs: the *Colonialism Period* (c. 1776-1820s) and the *Romanticism Period* (c. 1820 – 1860s [Civil War]).

Colonialism period treatment of juveniles was based on the Elizabethan Poor Law of 1601, which colonists had brought with them and adopted, with few changes, from England (Grossberg, 2002). Central was the doctrine of *parens patriae*: the idea that the governing body is responsible, like a parent, for the welfare of all dependants; especially the young. (Parens patriae is a key doctrine throughout the entire history of juvenile justice; what is unique to each epoch is the political, social, and legal milieus of parens patriae.) Children were perceived as property and poverty and ills were considered as a natural and unchanging part of life (Grossberg, 2002); thus, intervention by the state, based on parens patriae, rarely occurred except to address the needs of those youth who were orphaned. Orphans were auctioned off and became bonded apprentices in the home of a craftsman. The craftsman was expected to provide food and shelter to the youth while teaching his trade. Often, the bonded child was considered an extended family member (Grossberg, 2002). Parens patriae was perceived to apply only to the welfare realm; it did not extend into the criminal realm. Juveniles were governed by the same rules and proceedings as adults and were often housed in jails and prisons along side adult criminals. Racial discrimination persisted among the colonialism period – a problem that still plagues the juvenile justice system today, e.g. "[b]lack youth are seven times more likely to go to jail than their white counterparts who commit an identical crime" (Simmons, 2002, p. x); but this will be discussed in further detail under the review of *Our Children, Their Children.* Discrimination during colonialism was due to the legalization of slavery.

> Slave children had the fewest protections against mistreatment of any American youngsters, and slave owners provided minimal level of welfare in terms of food, shelter, and clothing. And, as Andrew Billingsley and Jeanne Giovannoni have argued [in *Children of the Storm: Black Children and American Child Welfare*, 1972], slavery had a powerful impact on the development of American child welfare: “The very existence of slavery meant that child welfare institutions could develop in this country without concern for the majority of Black children.” At the same time, limited assistance to white children “could be rationalized by the notion that they were treated better than Black slaves.” (Grossberg, 2002, p. 7)

Romanticism period, aka antebellum American, treatment of juveniles was also based off of parens patriae; however, the concept had evolved: Children were no longer viewed as property, but as individuals that had distinct interests and were morally pure; that poverty and ills were not natural; that one could create his own fate. Judges, politicians, and the “who’s who” of society started to view dealings with juveniles from “the best interest of the child” (Grossberg, 2002, p.8) and not the best interest of the “property owner’s”, aka guardian’s, perspective. This new perspective led to the deterioration of the bonded apprentice orphan being considered part of the family to being considered a servant.

> The effects of these changes were profound. The parental responsibilities of the master and filial obligations of the apprentice withered as the relationship came to be considered primarily one of employer and employee. Equally important, preexisting class biases in apprenticeship law and practice emerged as a chasm opened between voluntary and involuntary apprenticeship. Private, voluntary indentures narrowed to a method of

> vocational training for young men seeking to be professionals, such as lawyers, or skilled artisans, such as blacksmiths. Involuntary indentures remained a primary form of poor-law relief for children of all ages and sexes…. Poor-law indentures, especially blacks, far too often resembled involuntary servitude. (Grossberg, 2002, pp. 11-12)

Despite the ill-effects imposed on orphaned juveniles, the shift in perspective did benefit juveniles. Parens patriae evolved to include a more interventionist approach by the government, however, juvenile problems were not considered public matter, but rather a private matter – that is community and governmental intervention became necessary only when parents failed; with the goal of helping parents and keeping the juvenile with them and not removed from their care. This concept became known as the *Family Ideal* – "a set of ideological commitments that defied family privacy, made conjugal and parental rights sacrosanct, and promoted family preservation" (Grossberg, 2002, p. 8).

The Romanticism Period perspective of the Family Ideal, guided by "in the best interest of the child" philosophy led to a growing concern within society: That the ills affecting children, especially of poor families, would undermined the family and in turn, undermine society (Grossberg, 2002; Lerman, 2002; Tanenhaus, 2002). Leaders of the day turned to a new institution, the public schools, as the cure for social ills (Grossberg, 2002). Through mandatory attendance, they hoped to Americanize immigrant children and extend the period of childhood, giving juveniles the chance to develop their individualism by providing education and removing them from working within the factories (Grossberg, 2002; Dohrn, 2002). For juvenile delinquents and children of failed families, Houses of Refuge were established to remove them from being housed with adults and placed into an environment where they could receive

schooling (Grossberg, 2002). Unfortunately, time showed that these Houses were failing to provide the education and actually exacerbated social ills; all of which combined, along with a movement of philanthropy, to move juvenile justice into a new era: The Reform Period (Lerman, 2002; Grossberg, 2002; Tanenhaus, 2002).

The Reform Period (c. 1860s-1980s) consists of the creation and development of the juvenile court under a rehabilitation philosophy composed of two parts: (1) a diversionary emphasis to remove juveniles from a exposure to the criminal court world of adults and (2) an interventionist emphasis to expose juveniles to the current benefit of recently established child-welfare programs (Zimring, 2002). Instrumental in its establishment was philanthropist and "mother of the juvenile court" Lucy Flower – president of the Chicago Women's Club – and child-welfare expert Julia Lathrop – who later became the first Chief of the United States Children's Bureau (Simmons, 2002; Tanenhaus, 2002). These women believed all children could be reformed to become productive citizens within society; however, the current treatment of juveniles within the legal system – i.e. detained and imprisoned with adults, and tried under the same standards as adults – hindered this process. Envisioned was a separate children's court system where "hearings would be closed to spectators and the press, a juvenile's record would remain confidential, and no private lawyers or juries would be part of the legal process" (Tanenhaus, 2002, p. 43); in essence, the court was to become a place of sanctuary for juveniles that needed the intervention of the caring state during "the storms of adolescence" (p. 43). What they received, though, was short of their vision. The Chicago Juvenile Court, in Cook County, Illinois, came to fruition in 1899, with an open hearing, no funding for probation officers – a vital position that served as "the right-arm of the court" (Tanenhaus, 2002, p. 53) by investigating home and school conditions of the juvenile for the judge to make the appropriate

interventionist decision – and no funding for a children's detention home. Lucy Flower and the Chicago Women's Club continued working towards their vision, providing support for the court through fundraisers and grass-root activism; while judges of the original court provided public speeches to raise awareness to the needs of the court and why this social experiment was necessary to child-welfare. By 1925, the juvenile justice system concept spread to all states except two – Maine and Wyoming – and eventually, "the hallmarks of progressive juvenile justice – private hearings, confidential records, the complaint system [which prevented "well-to-do" citizens of society from dragging any youth before the court for actions deemed unbecoming to society], detention homes, and probation officers" – became established (Tanenhaus, 2002, pp. 42 & 45).

As mentioned earlier, the probation officer was seen as key to the success of the juvenile court. The probation officer was an educator to a juvenile's family, a mentor to the juvenile, and a reporter to the court about the family and school environment of the juvenile. Besides overcoming funding for this critical position, political battles had to be quashed. Given the importance of the position, concerns of appointment by patronage arose, pitting the mores of the Irish-Catholics, the majority of the lower-income immigrant families, against the mores of the Protestants, the majority of the reformers. (This too became a point of contention when discussing detention homes, as Irish-Catholics did not want their children being supervised and educated by Protestants.) In 1905, Reformers were able to appease concerns by requiring probation officers come from the Civil Service Commission and not through appointment. "A citizens' committee developed the merit examination for probation officers, which tested spelling, arithmetic, and the applicant's understanding of the job, as well as his or her knowledge of the juvenile court Act. In addition, a series of sample cases forced the applicants to apply

their knowledge to practical situations" (Tanenhaus, 2002, p. 55), which "professionalized the court by hiring only those persons trained in the latest theories of social work" (p. 54).

The Reform Period of juvenile justice embraced the parens patriae concept of the state being the dutiful father to all children and succeeded in opening society's eyes to the plight of children, helped foster the development of scientific research pertaining to the family unit and child development, and did succeed in removing juveniles from associating with adults in both judicial proceedings and incarceration; however, the Reformers might have gone too far in their efforts. More juveniles were being locked up in detention facilities, i.e. having their liberties taken, and for a longer time (Lerman, 2002; Teitelbaum, 2002) while being denied any due process (Edelman, 2002; Tanenhaus, 2002; Zimring, 2002); furthermore, children being detained for welfare reasons were being exposed to a criminogenic environment by being housed in the same detention facilities as delinquents, resulting in an increase in delinquent behavior (Lerman, 2002). The 1967 United States Supreme Court case, *In re Gault*, brought to a national spotlight these limitations of the Reform Period and set in motion changes in jurisprudence that, when combined with the legislative response to an increase in juvenile crime, both in offense type and intensity, transformed the juvenile justice system into its current era: The Punitive Period.

The Punitive Period (c. 1970s-present) came about after society started to view the juvenile court established under the Reformers as being (1) too secretive, (2) too coddling towards delinquents, thus the increase in violent juvenile crime, and (3) too liberal in judicial procedure; that is too free in ignoring legal protections guaranteed by the Constitution and afforded to defendants in the criminal court. I will not elaborate any further here, as violation of legal protections will be developed during the review of *Youth on Trial* and the response to the

perception of coddling and increase in violent juvenile crime will be developed during the review of *The Changing Borders of Juvenile Justice*. What is important to remember about the Punitive Period is that it is characterized by an emphasis in seeking punishment towards delinquents rather than rehabilitation; put another way, children were no longer seen as innocent, but as possessing the qualities necessary to be held accountable for their actions (Scott, 2002), viz. parens patriae has taken a back seat to "get tough on crime" legislation.

Legal Theory. Legal theory can be looked at from different perspectives. From a purely legal perspective, juveniles are treated as a dichotomy: they are either considered children, thus subject to paternalistic policies, or they are considered adults, thus fully accountable under the law (Scott, 2002), i.e. they are viewed temporally. From a scientific perspective, juveniles are treated as being multi-layered; thus, many factors combine to influence and create a juvenile's true age: biology, psychology, geographic location, economic status, access to social networks, etc. (Testa & Furstenberg, 2002; Laub, 2002; Scott, 2002), thus juveniles are viewed developmentally. It is this dual age designator that introduces problems into law and into juvenile court. Generally speaking, there are no serious problems for the legal system when relating to age for young children or adults over twenty-five – for it is excepted that young children are dependent on others for support and have not developed the ability to take responsibility for their actions, with the opposite being true for adults – but the legal system runs into problems when dealing with adolescence – "a transitional developmental stage between childhood and adulthood" (Scott, 2002, p. 139).

> During the twentieth century, legal policy makers have tended to ignore adolescence and to classify and describe adolescents as either children or adults, shifting the boundary of

> childhood depending on the policy goal issue. To describe the policy approach crudely, American law embodies an informal legal presumption that adolescents are children, subject to a fair number of exceptions. This generally works quite well, although it has resulted in what might be called the politicization of childhood on controversial issues… *It has not worked well in juvenile justice policy, where the simplistic categorization of young offenders as either children or adults has undermined our ability to achieve viable, effective, and humane juvenile justice policy* [emphasis added]. In this sphere, good policy cannot ignore the empirical reality of adolescence as a developmental stage. (Scott, 2002, pp. 139-140)

America's current ad hoc approach to age limits has its place, for definite age limits are necessary for efficiency in a bureaucratic system of government and laws; however, this needs to only apply to civil and administrative matters. By applying this approach when dealing with juvenile delinquents, America's basic founding principles are undermined and justice for youths is not served; rather, we end up with a juvenile "injustice" system. This is my opinion, and is consistent with Scott's message. This account of the juvenile justice system will be developed further during the review of *Youth on Trial*, *The Changing Borders of Juvenile Justice*, and *Judging Children as Children* below; after which, I feel you will also come to see that using a dichotomous age approach in dealing with juveniles is one of the underlying problems eroding the juvenile justice system.

Global Perspective. My discussion so far of the juvenile justice system may have given some readers the idea that the phrase pertains to only the courts. This is not so. *Juvenile justice system* pertains to the organization and process of juvenile justice and "refers to the police, the

juvenile courts, their intake and probation staffs, the attorneys…, juvenile detention centers, juvenile correction facilities, and social agencies that take children in placement on order of the juvenile court" (Rosenheim, 2002, p. 343). It is this multi-institution design approach that has become watched, studied, and sometimes implemented by other countries (Rosenheim, 2002; Morita, 2002; Doek, 2002). As such, *A Century of Juvenile Justice* devoted chapters to examining how other countries address the process of juvenile justice. This becomes valuable in that similar juvenile justice system designs can be compared to see how our system is fairing and different system designs can be evaluated to see if our system should incorporate new ideas.

Previously noted was the fact that America's treatment of juveniles was established utilizing the Elizabethan Poor Law, so it is natural to examine the United Kingdom and see if our two systems developed along the same path. The answer is no. While both the US and the UK started out with a strong emphasis in the apprenticeship as a means to turn poor youth into productive citizens, the two paths diverged in the 1870s. While the US was focusing on the *Family Ideal*, the UK established a policy that heredity did not matter, that environment was what counted and removed poor juveniles – whether orphaned or not – and emigrated them to colonies of the Kingdom, primarily Australia and Canada (Eekelaar, 2002). This practice continued into the 1960s. Today, the two systems still diverge. The US places an emphasis on utilizing social institutions, such as prisons or treatment facilities, to modify the behavior of the juvenile delinquent; whereas the UK has turned to a philosophy that holds the parents accountable for monitoring and correcting their delinquent child, as noted in a 1998 report from the Home Office:

> [S]ome parents need support and direction in fulfilling their responsibilities and in helping to prevent a child or a young person from turning to crime. To help provide that support and direction, the Crime and Disorder Act 1998 gives courts new powers to impose a parenting order where a child or young person has been convicted of an offense…. The order will include a requirement that parents attend counseling and guidance sessions where they will receive help in dealing with their children […]. The court may also impose a requirement to exercise control over a child's behaviour where firmer direction to the parents is judged to be necessary and appropriate. (as cited in Eekelaar, 2002, p. 408)

While spawning from the same foundation, the US and UK have developed different approaches to juvenile justice; but what about the US and the rest of Europe? Jaap E. Doek's (2002) examination of countries in Scandinavia and Western Europe came to the conclusion: "As to dealing with juvenile offenders, an immediate, limited, and clearly pedagogical approach is considered appropriate in all the countries surveyed" (p. 515). Here, one can see that America is for the most part on par with the European philosophy in the treatment of juveniles. Furthermore, Doek (2002) found that (1) politicians are increasingly calling for lower minimum ages for criminal responsibility and dealing more punitively with juvenile offenders; (2) the legal code the countries operate under – the European Commission on Human Rights – incorporates most of the same legal due process rights the US Supreme Court has ruled need to be implemented in juvenile hearings; and (3) juveniles from ethnic communities are over represented. Finally, the Council of Europe has called for practitioners within the juvenile court system, from police officers to judges, receive specialized training in child development and communicating with youths (Doek, 2002), mirroring the same cry heard in the US.

Youth on Trial

> At the dawn of the twentieth century, state legislatures in the United States embarked on a social experiment of sweeping proportion. States began to develop no less than a totally new and separate system of courts, laws, and correctional programs designed specifically for persons whose age placed them in a category called "juvenile." (Grisso & Schwartz, 2000/2003, p. 1)

These words begin *Youth on Trial*, a collection of essays composed by legal and developmental scholars to examine what it truly means to be categorized juvenile and highlights the limitations of this "social experiment" that we call the juvenile justice system – especially the problems associated with the current trend of adjudicating juveniles as if they were adults. I begin my review by presenting the major developmental stages between childhood and adulthood, commonly known as adolescence. I then turn to the role mental disorders play in delinquency. Next, I look at what is required of a juvenile within the legal system; that is, what capacities are necessary to participate as a defendant in an adversarial system of justice. I conclude with a discussion over factors pertinent to the adjudication of juveniles: culpability and maturity.

Developmental Factors. The juvenile justice system is composed of not only the courtroom adjudication of juveniles, but of many other institutions that combined to form the overall entity. These institutions range from police and intake workers, to prosecutors and probation officers, to correction officers and social service providers. This system design allows for many diversion points along the path of juvenile justice that ultimately determines the fate of the juvenile. It is imperative, then, that all individuals working with juveniles become aware of

basic developmental factors, especially when trying to answer the three fundamental questions pertaining to juvenile offenders and the law: "Is the juvenile sufficiently competent to participate in the adjudicative process? Is the juvenile sufficiently mature to be reasonably viewed as culpable for his or her behavior? Is the juvenile sufficiently malleable to be considered amenable to treatment?" (Steinberg & Schwartz, 2000/2003, p. 19).

Here, developmental factors are referring to physical, intellectual, emotional, and social development of an individual during adolescence. "Adolescence," defined, "is an extended period beginning with the onset of puberty (ten or eleven years of age) and ending with independence and entry into adulthood (eighteen to twenty-four years of age)" (Kazdin, 2000/2003, p. 33). Why consider only developmental factors of adolescents? This is for purely practical reasons. Crimes committed by young children might get sensationalized in the media, but they are so statistically rare that they have no considerable effect on revising current laws and practices (Steinberg & Schwartz, 2000/2003). Likewise, most adults have lost malleability; that is they are set in their ways and unlikely to change. Furthermore, adolescence is a period in human development that is crucial for four interrelated reasons. (1) It is a transitional period with significant and quickly occurring changes in the physical, intellectual, emotional, and social capabilities of an individual. (2) Experiences from different social units – family, school, peers, etc. – have tremendous influence on development. (3) It is a period when beliefs become firmly established. (4) It is a period of "tremendous variability, both within and between individuals," e.g. an adolescent might look like an adult physically, yet be emotionally immature (Steinberg & Schwartz, 2000/2003, pp. 23-24). Thus, intervention during the adolescent years is the only true time period when policy makers can develop laws and practices that will have true impact on future crime and public safety. Let us look briefly, then, at each of these developmental factors.

Physical developmental factors during adolescence deal primarily with the onset of secondary sex characteristics within an individual. Boys start taking on the appearance of men, and girls start taking on the appearance of women. This process is known as puberty. It is the outward affect, i.e. the physical appearance, of puberty that has been linked to both delinquency and injustice. The notion that "raging hormones" of adolescents, an inward affect of puberty, leads to delinquency is false. Physical appearance contributes to delinquency in two ways. First, early maturers have the appearance to associate with older peer groups and engage in their activities without the intellectual development or social skills necessary to avoid engaging in criminal behavior. Second, adults tend to view physically mature adolescents in a non sequitur manner. Physically mature adolescents are seen as psychologically mature, too. This disadvantages a juvenile during adjudication, as the adult physical appearance suggests to juries, judges, and attorneys that the juvenile has "a higher capacity for responsible decision making than is warranted." This phenomenon is likely to affect African-American juveniles more so than other juveniles, as African-American juveniles tend to reach puberty sooner than other races (Steinberg & Schwartz, 2000/2003, pp. 24-25).

Intellectual developmental factors look at an adolescent's ability to think and reason. Science generally agrees that by age seventeen, an adolescent's ability is comparable to adults; however, this does not give carte blanche to policy makers to treat all juveniles 17 and older to the same standards as adults. Three factors must also be considered. First, some of these adolescents, and certainly those at the younger end of the spectrum, will tend to have more child-like processes. Second, even if the processes are comparable, adolescents tend to have fewer experiences to draw on; put another way, the juvenile's ability might be comparable to the best statistical software package available, yet without the proper data type and of sufficient size,

valid results cannot be produced. Third, judgment between adolescents and adults may differ. Adolescents tend to be less future-oriented, take more risks, and are more impulsive – all characteristics that create differences in judgment (Steinberg & Schwartz, 2000/2003, pp. 25-26).

Emotional developmental factors center on the ability of an adolescent to internalize – to reflect on and explain his/her motivations – and of an adolescent’s self-esteem. Adolescents are trying to establish an identity and demonstrate their independence; that is they are trying to transition from the world of a child and into the world of an adult. Delinquency, then, can come about in an attempt to prove to themselves and others their independence; it can also come about because the adolescent lacks the resources necessary to support their new status (Steinberg & Schwartz, 2000/2003, pp. 26-27).

Social developmental factors in adolescents focus on peer groups. “Adolescents are, for the most part, pack animals, and their activities – whether harmless or worrisome – are typically pursued in group settings.” Understanding how a juvenile offender interacts with his/her peer group can help provide understanding as to why the juvenile engaged in the criminal activity. Susceptibility to peer pressure is high for adolescents and how the adolescent appears to his/her peer group often out weighs the consequence for the offense; in his/her mind. Susceptibility to peer pressure peeks around 12-15 years of age. Susceptibility to peer pressure is also shown in that most crimes by juveniles are committed in groups; for this reason, when examining a criminal act where a juvenile is suspected, the investigating individual (officer, judge, attorney, etc.) should also ask about or look for the involvement of one or more additional juveniles (Steinberg & Schwartz, 2000/2003, pp. 27-28).

Mental Disorder. In a 1998 comparative study conducted at a Cook County, IL juvenile detention facility, Teplin, Abram, and McClelland found that 79.7 percent of delinquent youths had at least one mental disorder; which indicates mental disorder among delinquents is about four times higher than normal community samples (Kazdin, 2000/2003). This might possibly be a conservative estimate too, as comorbidity – being diagnosed with more than one disorder – was not examined. What is relevant to the juvenile justice system from this study is that it suggests a potential diminished capacity in culpability of an adolescent being involved in a crime; as a mental disorder affects intellectual development. Further, it suggests that if the juvenile justice system wants to remain functioning in a rehabilitative capacity to help juveniles reintegrate into society as productive citizens, the system must provide psychiatric and psychological treatment to juvenile offenders brought into it. Finally, it shows that the majority of delinquents tend to have a mental disorder and that policy makers might be better off in funding treatment for these disorders as a proactive means of crime control and reduction within society over the reactive method of the juvenile justice system.

"Mental disorders refer to patterns of behavior that are associated with distress, impairment, or significantly increased risk of suffering, death, pain, disability, or an important loss of freedom" (Kazdin, 2000/2003, p. 34). The *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition (DSM-IV) groups mental disorders that arise in adolescence into ten categories; which can be further grouped into four general categories: Externalizing Disorders (e.g. conduct disorder (CD) or attention-deficit/hyperactivity disorder (ADHD)), Internalizing Disorders (e.g. posttraumatic stress disorder (PTSD)), Substance-Related Disorders (e.g. alcohol abuse or illicit drug use), and Learning and Mental Abilities (e.g. metal retardation) (Kazdin,

2000/2003). One or more of these disorders may contribute to delinquency. Alan E. Kazdin's (2000/2003) review of the literature showed:

- Mental disorders decrease inhibitions to engaging in at-risk behaviors; which is already a hallmark of adolescence. (pp. 45 & 49)
- Substance abuse places an adolescent at risk for school failure [and school failure has been linked to delinquency]. (p. 46)
- Depressed adolescents may select more hostile problem-solving strategies to interpersonal problems. (p. 51)

Certainly, this list is not all-inclusive regarding how mental disorder can affect delinquency; in fact, "the precise role of mental disorders in the decision making of delinquent youths is insufficiently studied to permit firm conclusions. Even so, in many instances the core symptoms of disorders would be very likely to impair decision making" (Kazdin, 2000/2003, pp. 49-51); which becomes very relevant for the just treatment of adolescents.

Legal Capacities. With the adjudication of juveniles becoming more punitive regardless of where processed – criminal or juvenile court – concern over the legal capacities of juveniles must take center stage. This concern must move beyond rhetoric and find its way into practice; for historically, concern over the legal capacities of juvenile offenders has always found its way into the dialogue of the juvenile court system, yet was superficially acknowledged as the rehabilitative mission trumped the punitive mission; but, this too was rhetoric and not reality. The United States Supreme Court (USSC) noted in *Kent v. United States* that "the child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care

and regenerative treatment postulated for children" (383 US 541, 556 (1996)). So, what are the protections pertaining to due process, specifically legal capacity for juveniles? Legal capacity for juveniles revolves around protection during two stages of the adjudication process: (1) Waving of Miranda rights – the "warning" safe guard notices developed in *Miranda v. Arizona* – and (2) Having the ability to participate in the trial process (Grisso & Schwartz, 2000/2003).

The USSC has never ruled Miranda protections apply to juveniles; however, Miranda protections were indirectly extended by *In re Gault* to juveniles through a determination that juveniles also have a legal protection against self-incrimination, not just adults (Feld, 2000/2003, p. 129, endnote 17). Thus, determining the legal capacity of a juvenile in the waiver of Miranda rights becomes pivotal, since "[o]nce a child admits to criminal involvement, the other procedural rights *Gault* made available at trial retain little practical significance for determining guilt or innocence" (Feld, 2000/2003, p. 108). But how is this done?

Currently, the courts have ruled that the "totality of the circumstances" test used for adults also applies to juveniles when deciding if a waiver was valid. To be considered valid, under the totality of the circumstances, a waiver must be voluntary as well as knowing and intelligent. Voluntariness pertains primarily to police conduct; that is, was it coerced. Knowing and Intelligent pertains to having comprehension of the right that is being relinquished; comprehension, however, has been interpreted "to mean only an understanding and awareness of the *Miranda* rights themselves, that is, a right not to speak and to have counsel present, rather than an appreciation of the ramifications and legal consequences of a waiver" (Feld, 2000/2003, p. 111).

Applying an adult standard of Miranda waiver to adolescents is non sequitur. Empirical studies have shown that most adolescents do not understand Miranda rights well enough to waive them in a knowing and intelligent manner. One such study, conducted by Thomas Grisso, found "[a]s a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension" (as cited by Feld, 2000/2003, p. 114). Additional studies found that "the level of comprehension exhibited by youths sixteen and older, although comparable to that of adults, left much to be desired" (Feld, 2000/2003, p. 114; see also Buss, 2000/2003). Furthermore, voluntariness comes under question, for what might not be coercion for an adult may be for an adolescent. Being an adolescent, for all the developmental reasons discussed above, renders one vulnerable to interrogation tactics; and, adolescents – especially those from poorer and ethic minority backgrounds – usually harbor feelings that they will be punished by law enforcement personnel for exercising their legal rights (Feld, 2000/2003; Buss, 2000/2003). "Thus, [the court's] requirement that youths invoke *Miranda* rights forthrightly and with adultlike [*sic*] precision runs contrary to the normal and predictable social reactions and verbal styles of most delinquents subjected to custodial interrogation" (Feld, 2000/2003, p. 115).

Some jurisdictions have developed policies, or have ruled that if a parent is present, the waiver becomes knowing and intelligent. While commendable on the surface, this procedure is also inherently flawed. Parents often do not understand the legal ramifications of waiver, nor are they in a state-of-mind to look at what is in the best interest of their child – normally this is because parents are either in shock or anger over the situation their child found himself/herself in. Furthermore, the decision to waive one's rights is a personal decision; one that cannot be

made by anyone except the juvenile. Often, juveniles will waive their rights to alleviate the tension between parent and them; since it is what the parent wants done (Feld, 2000/2003).

To truly protect the legal capacity of juveniles as it pertains to the Miranda waiver and their right against self-incrimination, legislatures need to enact a *per se* requirement that juveniles will consult with an attorney prior to any waiver being given. Legislation of this type recognizes the special needs of juveniles and provides the juvenile access to the one individual whom has the specialized skills and training necessary to assist them in the adversarial process: the attorney (Feld, 2000/2003).

I turn now to the second stage of legal capacity – the ability to participate in the trial process, aka *adjudicative competence*. American law operates under the premise that if adjudicative competence is lacking, than a trial cannot proceed. Adjudicative competence refers to *competence to assist council* and *decisional competence* (Bonnie & Grisso, 2000/2003; Grisso, 2000/2003). Under competence to assist council, a defendant must have a capacity for *understanding* the charges and the basic adversarial process, *appreciation* of the position he/she is in, and *reasoning* skills that permit the defendant to relate pertinent information to counsel concerning the facts of the case" (Bonnie & Grisso, 2000/2003, p. 76). Under decisional competence, a defendant must have a capacity to *understand* relevant information pertaining to the decision at hand, *appreciate* one's position as a defendant in relation to the decision at hand, the ability to *reason* through all available courses of action, and *choose* among the options (Bonnie & Grisso, 2000/2003; Grisso, 2000/2003). Empirical studies limited to just the legal setting tend to support determining adjudicative competence in juveniles is equivalent to determining adjudicative competence in adults – in fact, the defense of infancy, i.e. lack of

maturity, has rarely been allowed into use within the American legal system to establish incompetency (Bonnie & Grisso, 2000/2003) – however, these studies tend to be lacking, as they only focus on the cognitive abilities of the juvenile and do not incorporate psychosocial or clinical factors (Woolard & Reppucci, 2000/2003). When these developmental factors – as discussed above – are considered, a new perspective regarding adolescents' adjudicative competency comes to light. Thomas Grisso (2000/2003) explains:

> [F]or youths who are under fourteen years old, the balance of evidence… suggests that as a group they are at greater risk than most adults for deficits in abilities associated with adjudicative competence. Significant differences between this age group and older adolescents or adults have been found in most types of abilities reviewed thus far. Youths of that age who have defendant abilities similar to those of adults represent a significant exception to the norm.
>
> In contrast, among adolescents who are fourteen to sixteen years old, age itself tends to be a poor indicator of abilities associated with the defendant role. By about fourteen to fifteen years of age, some youths appear to have developed legally relevant cognitive abilities that approximate those of older adolescents. Many other youths at those ages, however, continue to develop more slowly and will achieve their adult capacities at a later age, nearer to the late teens. This developmental delay is seen especially in delinquent populations, which have a greater proportion of adolescents with intellectual deficits, learning disabilities, emotional disorders, and reduced educational and cultural opportunities…. If future studies affirm those reviewed here, arguments could be made

> for a legal presumption of incompetence to stand trial for youths younger than fourteen, when they face proceedings that may lead to criminal adjudications […]. (pp. 163-164)

C*ulpability and Maturity*. Culpability refers to blameworthiness (Cauffman & Steinberg, 2000/2003) – Should the juvenile even be held accountable for his/her actions? Maturity refers not to temporal age, but to developmental age – see discussion above. Culpability and maturity are the etiological factors surrounding debate over juvenile justice. One side views adolescents completely culpable for their actions; the other side views adolescents as lacking maturity to be held accountable. However, these two concepts are not an either-or; they are mutually related. Culpability and maturity work together to facilitate the long standing Anglo American legal tradition of proportionality – that a defendant's punishment, to be just, is in relation to their moral involvement (Zimring, 2000/2003). Proportionality, in turn, is related to another legal concept of negate versus mitigate. Negate refers to the actions of the defendant being excused, i.e. they had no culpability, based on underlying conditions. Mitigate refers to the actions of the defendant being culpable but not to the full degree established by law, based on underlying conditions. Proportionality, holistically speaking, is not a concept to "go soft on juvenile crime," but necessary for justice to occur within society.

When determining culpability, "the issue is not solely whether adolescents make bad decisions; the issue is also whether adolescents make decisions badly" (Cauffman & Steinberg, 2000/2003, pp. 327-328), viz. proportionality. When looking at underlying conditions, few tend to negate culpability; however, especially when applied to juveniles, many may mitigate culpability; i.e. provided diminished responsibility. Mental illness and immaturity (Zimring, 2000/2003) are commonly cited as grounds for diminished responsibility in juveniles; however,

other underlying conditions may create diminished responsibility, too. These include: environmental setting (Fagan, 2000/2003; Graham & Halliday, 2000/2003; Zimring, 2000/2003), peer groups (Scott, 2000/2003; Zimring, 2000/2003), poor parenting (Graham & Halliday, 2000/2003), poverty (Graham & Halliday, 2000/2003), perception of "fairness" of the legal system (Fagan, 2000/2003), impulsiveness (Scott, 2000/2003; Zimring, 2000/2003), and any of the developmental factors discussed above. Empirical research on adolescence pertaining to these underlying factors shows proportionality clearly must be considered in any adjudication of a juvenile. Two reasons support this. The first is explained by Franklin E. Zimring (2000/2003).

> With regard to the punishment of the immature, the same inverse-importance principle applies. If no offender under eighteen was eligible for punishment because the [legal] system diverted all below that age out at the capacity stage, the role of diminished responsibility would be much less important than if a [legal] system found minimum capacity at age twelve or thirteen. The younger the age at which we deemed kids eligible for some punishment, the more important would be the role of principles of mitigation of punishment based on immaturity.
>
> The implications of any such inverse relationship between excuse and mitigation for immaturity are substantial in the United States at this moment in our history. Every trend in recent legislation in this country seems calculated to increase the importance of doctrines of mitigation on account of immaturity as an influence on sentencing. Mandatory and discretionary waiver of adolescent offenders to criminal courts, lowering of the minimum ages for eligibility for transfer from juvenile to criminal court, and increasing the severity and penal context of sanctions administered within the juvenile

> courts all have the tendency to put additional pressure on doctrines of mitigation to avoid injustice in the punishment of young offenders. The collective impact of all three trends is to place unprecedented importance on the ability of American criminal and juvenile courts to generate coherent doctrines of diminished responsibility on account of immaturity for the huge and diverse assortment of young offenders who are now regarded to be eligible for some punishment. Every new reduction in the threshold of penal capacity makes the role of diminished-capacity doctrine more important in maintaining a system of penal proportionality. (p. 275)

The second reason proportionality must be considered in any adjudication of a juvenile offender is that by focusing only on the harm caused by the juvenile and punitive retribution towards him/her, one fails to account for the long term social costs (Crippen, 2000/2003; Scott, 2000/2003). Focusing solely on punishment greatly hinders the juvenile's ability to become a productive member of society that is capable of supporting himself/herself through legal means; society will shoulder the responsibility for the juvenile's care. In fact, most juveniles who are sentenced to adult prisons end-up recidivating upon release to society, whereas juveniles sentenced to juvenile court sanctions – either detention or some form of alternative-to-incarceration (ATI) program – are less likely to; also, the financial costs of an ATI program is cheaper then the cost to incarcerate a juvenile.

Justice for Girls

Jane B. Sprott and Anthony N. Doob (2009) use available data to support their argument that the recent popular media and political portrayal of girls in both the United States and Canada from the 1990s on are erroneous exaggerations – that the unquestioned fact that "'[e]veryone

knew' that 'crimes by girls' were increasing in number and becoming more brutal" was just not statistically valid (p. 6); however, this was overlooked since "[i]n reporting crime and criminal-justice events and trends…detailed facts are not as headline grabbing as are unsubstantiated assertions about these facts" (p. 10). Sociologists and criminologists used flawed theory – the *liberation theory* – and not sound statistical analysis to account for the data changes pertaining to girls in the juvenile justice system or the rare, but sensationalized, violent criminal incident that occasionally involved a girl. Sprott and Doob further assert that the juvenile justice system of both countries are gendered biased, and have been since their inceptions, but by adopting the changes made to the structure of the Canadian juvenile justice system in 2002 helped significantly reduce this bias; and that if the United States system would adopt the same philosophy, it too could reduce gender bias in the juvenile justice system.

I will limit my review here not to the data – i.e. the numbers – but to the assertions made and the supporting arguments. I begin by explaining the liberation theory, as applied to juvenile delinquency, and why it does not seem to be applicable, in toto. Next, I will provide an overview of the developmental histories of the Canadian and United States juvenile justice systems; as a basic understanding is necessary to fully comprehend why gender bias occurs. Finally, I'll discuss gender bias in the juvenile justice system and the supporting arguments given.

Liberation Theory. In general, this theory claims that by "liberating" girls from traditional suppressive gender roles, they are free and almost socially required to take on the roles of boys; thus the increase in juvenile delinquency. James Garbarino (as cited by Sprott & Doob, 2009) used the liberation theory in 2006 to assert:

> Girls in general are evidencing a new assertiveness and physicality that go far beyond criminal assault…. We should welcome the New American Girl's unfettered assertiveness and physicality…. But I believe that the increasing violence among troubled girls and the generally elevated levels of aggression in girls are unintended consequences of the general increase in normal girls getting physical and becoming more assertive. All this, the good news of liberation and the bad news of increased aggression, is the New American Girl. (p. 9)

Historically, the liberation theory has been applied by sociologists and criminologists to explain female crime long before the media and political rhetoric of the late twentieth and early twenty-first centuries. L. Pike (as cited by Sprott & Doob, 2009, p. 11) asserted in 1876 that "every step made by a [girl] towards her independence is a step towards that precipice at the bottom of which lies prison"; and Freda Adler (as cited by Sprott & Doob, 2009) wrote in 1975:

> [T]he emancipation of women appears to be having a twofold influence on female juvenile crimes. Girls are involved in more drinking, stealing, gang activity, and fighting – behavior in keeping with their adoption of male roles. We also find increases in the total number of female roles and the testing of uncertain alternative roles coincide with the turmoil of adolescence creating criminogenic risk factors which are bound to create this increase. These considerations help explain the fact that between 1960 and 1972 national arrest rates for major crimes show a jump for boys of 82 percent – for girls, 306 percent. (p. 13)

Sprott and Doob claim liberation theory was, and is still being, inappropriately applied to explain the increase of girls in the juvenile courts. First, mathematical principles were ignored;

specifically, when statistically dealing with small numbers, a few numbers of events can cause massive rate changes and small numbers tend to be unstable – e.g. "[i]f a crime rate for boys increases from 10 to 14 per one thousand boys, we might describe that change as a 40 percent increase. If, at the same time, the rate for girls increased from 4 to 6 per one thousand girls, we might describe that increase as a 50 percent increase. Was the increase of 2 really larger than the increase of 4.... are girls really becoming more like boys" (p. 14)? Second, the theory fails to account for mothers being removed (liberated) from the household, too. The fact that more girls are left unsupervised is a potential variable in increased arrest rates – both for boys and girls – and not just girls adopting traditional male gender roles and attitudes. (This too plays on the developmental needs of the adolescent, as discussed above under *Youth on Trial*. The girl – or boy – must look for needs in the "gang" family of the street for emotional support with the cost of criminal activity, even if not desired, to be accepted.) Finally, the theory ignores the fact that most juvenile crime is committed by boys and that when committed by girls, statistically, the type of offense is minor or status in nature; with violent crime by girls being an anomaly.

I agree with Sprott and Doob that the liberation theory is being applied incorrectly to account for the increase of girls in the juvenile court, but not for the same reasons. It is incorrectly applied, as it is being utilized as an all inclusive reasoning for why rates of arrest, charging, and adjudication of girls has increased in the juvenile justice system. Liberation does appear to play a role in the increase, as girls are now afforded the opportunities as boys, and has changed the familial structure; thus allowing for youths to grow-up far more unsupervised than before , creating opportunities to be placed in situations to engage in criminal activity at a higher rate than before. However, liberation theory fails to account for other variables beyond "girls becoming boys." For example, did the percentage of crimes committed by girls really increase

due to being liberated or did it increase because law enforcement officers stopped excluding girls as possible suspects in crime?

Canadian v. United States Juvenile Justice Systems. The developmental histories of both the Canadian and the United States juvenile justice systems are fairly similar up to the 1960s-70s; the two diverge at this point. For starters, both were formed around the same time: Canada's court at Toronto, Ontario in 1894 and the US's court at Chicago, Illinois in 1899 (Sprott & Doob, 2009). Both courts were created out of the Reform rhetoric of the period, each with proponents in different camps-of-thought. The first being, what Franklin Zimring (as cited in Sprott & Doob, 2009, p. 51) has termed, the "diversionary" approach; the second being the "interventionist" approach. Diversionists were individuals concerned with removing children from the harms accorded them from exposure to the world of the adult court. Interventionists were individuals concerned with removing children from the harms of "bad" parenting and poor community life. Additionally, division between those who favored due process for youth and those who felt it was unnecessary, due to the civil rehabilitation mission of the courts, also existed – found among members of both camps. Both courts started out with criminal and social welfare missions. Finally, rates of adjudication of delinquency for violent crimes are fairly consistent in pattern between the two systems: Decrease in the rate for boys across time with a stable rate for girls, until from around 1985-2004. (The only exception to this trend is that in the US, the rates pertaining to simple assaults for both boys and girls were increasing throughout the period, but the trend held true when aggregated with all Index categories.) Starting in the late 80s, rates for both genders started to increase in the US, while decreasing in Canada (Sprott & Doob, 2009). To understand this phenomenon, one must look at each system closer; primarily, their differences.

In the US, the juvenile justice system operates under state legislatures, with federal "guidelines" that are often tied to funding, grounded in both criminal and non-criminal laws. When established, the US juvenile court allowed open hearings, public records, and had no funding allocated for its unique mission; despite the Reform rhetoric calling for the opposite. Eventually, these issues were rectified. Additionally, the juvenile court system became an "all-encompassing" institution for many jurisdictions to address all facets pertaining to familial and welfare issues as they pertained to youths; which was not always perceived in favorable light. Discord between the two camps-of-thought lead some to believe that the juvenile court was spread too thin.

> There were also some concerns about the expansive range of cases brought into the juvenile courts. Many such cases – dependency, neglect, pensions, and adoptions – were seen by some as beyond the scope of juvenile courts, for two reasons. First, it was argued by some that regardless of the rhetoric, juvenile courts did maintain some of the punitive practices from adult criminal courts, and second, those sorts of cases took time and energy away from delinquency cases. (Sprott & Doob, 2009, p. 50)

The breadth of cases and discord continued into the 1960s; at this time, two US Supreme Court cases *Kent v. United States* and *In re Gault* took judicial notice of the "hidden" punitive practices of the juvenile courts and the fact that they were not functioning under the parens patriae doctrine as claimed. These rulings fueled the rhetoric that the juvenile courts should remove status offenses and to increase due process rights for juveniles. In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act (JJDPA) (Sprott & Doob, 2009) in an attempt to bring national standards to the administration of juvenile justice. Congress called

for increased due process rights, but left the status offenses and regulated them to a "deinstitutionalization" approach (p. 63); contrary to the calls of several groups: the National Committee on Criminal Justice Standards and Goals, the Institute of Judicial Administration, and the American Bar Association for their complete removal (p. 64). Thus, even with the enactment of the JJDPA, the US juvenile justice system remained grounded in both a criminal and non-criminal philosophy. Most state legislatures adopted statutes to mirror the JJDPA, as funding was tied to its goals. The deinstitutionalization of status offenders did not last long. In the 1980s, the JJDPA was amended to give judges the power to institutionalize status offenders that did not conform to deinstitutionalized treatment or their orders through the Violation of Court Order (VRO); resulting in increased incarceration of many more status offenders, thus reclassifying them as delinquents. (Many other issues also contributed to the divergence in the 1980s between the two courts – such as an increase in the "get tough on crime" legislation, which will be discussed under *The Changing Borders of Juvenile Justice* (particularly in regards to blended sentencing); and different treatments of youth in regards to the use of drug (the US treats drug use as a criminal problem, Canada as a public health problem) – but Sprott and Doob left their discussion dealing primarily with the civil v. criminal aspects of the divergence, not jurisdictional and ideological.)

In Canada, the juvenile justice system operates under one federal law that is administered by the separate providences. When established, the Canadian juvenile justice system had closed, i.e. non-public, hearings that were held separate from other cases and called for detainment of juveniles "separate from other persons [i.e. adults]" (Sprott & Doob, 2009, p. 74). Additionally, multiple sentencing options were outlined – fine, imprisonment, commitment (for those under 14) to "any home for destitute and neglected children…or… any children's aid society" (pp.74-

75), suspended sentencing – thus giving options to judges in how to dispose of cases. The law also provided provision for "expert" opinion.

> [I]n Ontario the local Children's Aid Society was to be notified of any charge against a boy younger than 12 or a girl younger than 13. Children's Aid could then advise the court on the case, and, instead of having a trial and sentencing the youth, the judge could order Children's Aid to take the child or commit the child to a foster home. (Sprott & Doob, 2009, p. 75)

Thus, the Canadian juvenile court started out with primarily a diversionary approach and maintained this view for much of its early development; reflected in the laws established. In 1908, Parliament enacted the Juvenile Delinquents Act (JDA). The JDA, like the JJDPA in the US, provided a broad definition of delinquent, thus incorporating a magnitude of both criminal and non-criminal behaviors. The JDA specifically outlined that the intent of the legislation was to "focus on rehabilitation and treatment as opposed to punishment" (Sprott & Doob, 2009, p. 75). Criticism was drawn, citing the JDA was too informal; that due process of the law was not being provided to youths, such as legal representation and trial by jury. Furthermore, the JDA focused on welfare of youths, which was traditionally a matter for the providences. The Minister of Justice defended the act, based on its diversionary nature, claiming jury trials would draw public attention; Parliament upheld the JDA.

An amendment to the JDA was proposed in 1924 to broaden the scope of delinquency to include "sexual immorality and any other form of vice" (Sprott & Doob, 2009, p. 77). The rhetoric surrounding this change centered on "any other form of vice" and not sexual immorality. The concern was the wording opened up a slippery slope and gave magistrates too much power

in determining what was criminal, i.e. a vice, especially when looking at minor behavior of boys that could be considered a vice and then adjudicating them as delinquent. The proposal was reworded to read "who is guilty of sexual immorality or any *similar* form of vice" (p. 78, [emphasis original]) and the amendment passed. (While proposed as gender free, the rhetoric here illustrates the innate gender bias of the juvenile justice system; especially since minor transgressions against sexual morality tend to be disproportionately applied to girls who thus become labeled delinquent. This will be discussed in more detail below.)

The JDA was amended once more, in 1929, to emphasize its welfare (diversionary) mission: "Where a child is adjudicated to have committed delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision" (sec. 3(2) of the JDA, as cited by Sprott & Doob, 2009, p. 79). This too generated rhetoric about the lack of due process and the superseding of welfare regulation by the federal government. Some suggested a compromise to allow for due process while still keeping the diversionary interests – "it was suggested that 'gowns are unnecessary and out not to be worn…. He [the judge] should preserve a dignified informality to gain, and maintain, the confidence of the child who comes before him'" (from the *Report of the Royal Commission to Investigate the Penal System of Canada*, as cited by Sprott & Doob, 2009, p. 81). (Interestingly, this 1938 perspective falls very much in line with what is now known about the developmental perspective of youths, as discussed above under *Youth on Trial*, and how the Honorable Michael A. Corriero runs his courtroom, as discussed below under *Judging Children as Children*.)

This rhetoric continued into the 1960s-70s, prompting the Canadian government to take a critical examination of the JDA. One such examination was undertaken by the Canadian Department of Justice, whose committee was not only concerned with the broadness of the delinquency definition in place, but acknowledged the gender biasness of the sexual morality clause. The committee also lent support to the rhetoric of those wanting a return of the juvenile justice system to a more due process, punitive mission, with the welfare decisions left with each individual providence. In a 1965 report outlining 100 recommendations, the committee called for any legislation that dealt with juveniles to be repealed if it was outside the scope of the criminal.

> A statute, especially a quasi-criminal one, should not be any more vague or ambiguous than is absolutely necessary…. We think it sound proposition to assert, therefore, that as a matter of public policy quasi-criminal legislation should not be used to achieve welfare purposes if those purposes can be achieved by non-criminal legislation. To this end we recommend that children be charged only with specific offenses as is the case in proceedings against adults, and that any provisions in the law that are inconsistent with this principle be repealed. (cited in Sprott & Doob, 2009, p. 82)

The committee report led to the drafting and introduction of the Young Offender's Act (YOA) to Parliament in 1970. The YOA called for formal proceedings and specific offenses, removing the broad "delinquency" definition. The bill never passed. The rhetoric did not die, though, and in 1973 the Solicitor General of Canada convened a committee to reassess youth justice. Their findings were presented in 1975 and called for the removal of status offenses from the JDA, as they were unfairly criminalizing youths solely because of their age; for an age range

of criminal liability in youth court jurisdiction of 14-18, with those under 14 being under the jurisdiction of provincial welfare laws; and recognition of the special needs of youths – "young people 'should be considered as persons who, because of their state of dependency and level of development and maturity, have special needs and require aid, encouragement and guidance and, where appropriate, supervision, discipline and control….Young people have basic rights and fundamental freedoms no less than those of adults'" (cited by Sprott & Doob, 2009, p. 86). These findings, combined with a shift of political control from conservatives to liberals, led to the redrafting and passage of the YOA in 1984. The YOA eliminated status offenses, set an age range from 12-18 years, restricted authority to specific federal criminal offenses, and incorporated the majority of due process rights accorded adults to juveniles (Sprott & Doob, 2009).

The YOA of 1984, thus, in theory provided for two approaches to dealing with troubled youths: federal (criminal) adjudication or provincial child welfare laws. However, "child-saving" efforts were still implemented within the criminal jurisdiction through maximum sentencing of delinquents to remove them from poor home environments. Furthermore, an amendment to the YOA in 1986 brought back the punishment for status offense violations, circumventing the purpose for the 1984 changes. This was the passage of the failure to comply with disposition offense (FTC); with most failures to comply being within the realm of status violations and not criminal. FTC incarceration was really just a new way for the juvenile court to regulate social welfare (Sprott & Doob, 2009).

The YOA continued in effect until 2002, at which time, Parliament enacted the Youth Criminal Justice Act (YCJA). The YCJA emphasized the shift in ideology of the juvenile court

from its founding, a shift from welfare intervention to punitive sanctions, with the incorporation of "criminal" in its title (Sprott & Doob, 2009). The YCJA stressed measures to keep youth out of court and out of custody; however, when they found themselves in court, the YCJA also stressed proportionality in sentencing for youth, thus limiting incarceration for non-violent offenders. Proportionality was designed to reduce "the intrusiveness of any measure imposed on a youth under the act" (Sprott & Doob, 2009, p. 93).

In summary, the main differences between the Canadian and US juvenile courts is (1) the Canadian mission evolved into criminal jurisdiction only, whereas the US mission maintains both a criminal and welfare jurisdiction; and (2) legislation governing Canadian juvenile justice is relatively minuscule compared to that of the US, which has legislation enacted on both the federal and local levels; and while I believe the US might be better off having one act of federal juvenile justice legislation that is then administered by the states, this will never happen due to the American governmental concept of Federalism. Regardless of these differences between systems, both historically incorporated gender bias. I now conclude my discussion over *Justice for Girls* with a look at gender bias.

Gender Bias. The rhetoric throughout the history of the juvenile court from founding through the late 20th and into the 21st Centuries rarely involved discussions over the treatment of girls. When it did, this normally pertained to the need to seek treatment and rehabilitation for girls, reference their incorrigibility and sexual morality; and often, these discussions were quashed or superficial at best, as girls were viewed as being in need of protection from moral offenses more so than boys. "If most cases of sexual immorality involved a girl *and* a boy, it would appear that for boys an active sexual life did not constitute an area of public concern"

(Sprott & Doob, 2009, p. 132). Furthermore, when girls were brought into discussions, it was to emphasize the interventionist approach to child welfare, primarily through status offenses, and not in regard to due process or protection from penalization. Sprott and Doob's (2009) review of legislative records showed "[b]oth countries… had the tendency to use examples involving girls to create images of how legislative initiatives could provide help or rehabilitation, whereas they used examples of boys when they wanted to create images of how various initiatives could infringe on civil liberties" (p. 95).

Rhetoric aside, analysis of court data and self-report studies support the theory of a gender bias design of the juvenile justice system. Sprott and Dobb (2009) looked at FBI arrest data from 1970-2006 and data from 1985-2004 pertaining to two areas: youth court processing and custodial populations. With regards to arrest data, they found

> that no matter which jurisdictions were reporting in any given year… girls accounted for anywhere from 20 percent to 30 percent of all juvenile arrests. However, it is important to remember that this does not mean that the distribution of offenses that brought girls and boys into the youth justice systems was the same for boys and girls. For example, whereas the offense of running away accounted for anywhere from 4 percent to 7 percent of boys' arrests, this justification for involvement in the youth justice system accounted for 11 percent to 28 percent of girls' arrests. Moreover, when looking at all arrests made for running away, the majority – 53 percent to 59 percent – involved girls. (p.101)

The youth court processing data was broken down into two areas: obstructing justice and disorderly conduct. Since the passage of the VCO provision in the JJDPA, and subsequent adoption by all 51 US juvenile court jurisdictions, the rates of bringing youths into court on

obstruction of justice has steadily risen; with girls consistently being brought into court at lower rates than boys. However, this can be misleading as to the true phenomenon occurring. Sprott and Doob (2009) corrected for proportionality and found that girls are more likely than boys to be both charged and convicted for VCOs; furthermore, girls are likely to receive a sentence that places them into custody. Yet, self-report studies have consistently shown that girls are less likely to violate court orders than boys and that offenses committed by girls tend to be less serious in nature and usually create more of a threat towards themselves than the community.

This same trend holds true when looking at Canada's FTC cases too, up until the enactment of the YCJA, after which, the proportionality of FTC sentencing and custody became relatively equal between girls and boys. Sprott and Dobb (2009) provide two possible explanations for this phenomenon. The first being that the VCO and FTC cases are seen as being quite serious, as the juveniles are failing to show respect for the court, and thus, they must be harshly punished. The second being VCO and FTC cases are "simply just status offenses in disguise, and the high use of custody reflects the desire to intervene and 'help' – a desire most profoundly felt when dealing with girls" (p. 148).

With regards to delinquency conduct, Sprott and Dobb's (2009) findings were very similar to those in regards to obstructing justice; as such, I will not elaborate further, instead, I turn my attention to their findings pertaining to custodial populations.

Sprott and Doob (2009) hypothesized that "[b]ecause girls and women are less likely than boys and men to commit serious offenses, there might be expected to be similar proportions of girls and women in custody. However, if there is more of an interventionist aim with respect to juveniles than adults, girls [or boys] may account for a larger proportion of the custodial

population than do women [or men]" (pp. 100-101). What they found was that an interventionist aim did exist with respect to girls within the US. The rate of incarceration for girls was always higher than the rate of incarceration of women, with the opposite holding true for boys. The rate of boys incarcerated was always less than men; on a per capita basis. The enactment of the JJDPA did help decrease the ratio, but to no great effect.

> Although girls saw decreases, it has to be remembered that women constitute only a small proportion of the (adult) prison population – between about 3 percent and 7 percent of the population, depending on the year and the exact measure one looks at… Girls, on the other hand, constitute between about 15 percent and 21 percent of the youth population that is in custody… In other words, compared to their male counterparts, it would appear that girls are still more likely to be the recipients of the state's harshest punishments (excluding capital punishment) than are women.
>
> We believe that this extra portion for girls (as compared to women) is largely (or at least disproportionately) made up of those convicted of status offenses. Few women are locked up "for their own safety or proper development," but if girls (by the way of obstructing-justice charges, for example) are, then at least some portion of the "extra" imprisonment of girls might be the fingerprint left by the use of custody for status offense. (Sprott & Doob, 2009, p. 126)

Data for Canada paralleled that of the US, indicating an interventionist approach, up until the enactment of the YCJA; at which time, the rates of incarceration for girls took a dramatic decline. As noted earlier, this can be contributed to a change in not allowing the use of FTC findings as a means to return status offenses into the juvenile court. Regardless of which court

system one looks at, gender bias has been and continues to be intrinsic to the system. I leave you with Sprott and Doob's (2009) summary of the situation; as I do not think I could explain it any better.

> [T]he primary justice problem for girls remains what it has always been: minor offenses and status offenses pushing girls into the justice system. The majority of the crimes that girls commit are minor, and it is these minor offenses, such as stealing and minor assaults, along with failing to comply with a disposition in Canada or violating a valid court order in the United States (e.g., not obeying a curfew, running away, or family conflict), that tend to drive crime rates for girls. Indeed, one might argue that family conflict is what actually drives many of the status-type offenses in both Canada and the United States. (p. 162)

Our Children, Their Children

Just as problematic to the juvenile justice system as gender bias is that of racial and ethnic bias. While racial or ethnic bias occurs in almost any country's system, *Our Children, Their Children* (Hawkins & Kempf-Leonard, 2005) limits the majority of the essays to the American juvenile justice system. For the most part, the US is unique, in that we actually compile data designating race, while most other countries do not (Lauritsen, 2005). Second, the US still tends to view race and ethnicity as separate variables, which often skews data (Bishop, 2005) and is logically incorrect; for a person's race is more than biology, it is also intertwined with and expressed by his/her cultural, social, economic, and psychological factors (Krisberg, 2005). Third, racial and ethnic bias that exists in other countries is usually focused on indigenous populations and cultures; whereas the US focuses little on biases toward indigenous

(Native American) populations. Thus, it is almost impossible to do any comparative analysis between the American juvenile justice system and systems of other countries, when looking at racial and ethnic issues.

Analysis within the American juvenile justice system is just as problematic; as research and data collected has historically focused on "Black verses White" distinctions (Bishop 2005; Krisberg, 2005; Lauritsen, 2005) and thus are not generalizable to other race populations. Furthermore, the few studies and data collected that did place emphasis on Native American, Asian American, Pacific Island, and Latino/Latina youths categorized each group generally, making it impossible to determine if there might be a distinction in offending based off of cultural upbringing and not specifically race and/or ethnicity (Lauritsen, 2005). For example, Puerto Rican youths have a different cultural upbringing than Cuban youths, yet both are classified as being Latino/Latina. These statistical problems aside, it is widely held that within the juvenile justice system, the question of study is not *if* racial and ethnic discrimination occurs, but *why* racial and ethnic discrimination occurs (Bishop, 2005; Kempf-Leonard & Hawkins, 2005; Zimring, 2005); put another way, scholars know empirically that racial and ethnic bias occurs within the juvenile justice system but have been unable to reach a consensus as to what within the system process causes said bias. Priquero, Moffit, and Lawton (2005) claim this is because "the discussion of race and crime has been mired in an 'unproductive mix of controversy and silence'…. This is the case for two reasons. First, very few (if any) of the dominant criminological theories have adequately addressed the question of what accounts for race differences in criminal offending. Second, researchers studying criminal activity over the life course have tended not to employ or collect data for different races / ethnicities and neighborhood contexts" (p. 205, [sources omitted]).

Hawkins' and Kempf-Leonard's (2005) *Our Children, Their Children* was one of the first scholastic endeavors to address these issues by compiling what is currently known about racial and ethnic bias within the juvenile justice system and using it as a springboard to stimulate discussion and research. What is known is that there are two broad theoretical categories that account for racial and ethnic bias within the juvenile justice system: the differential treatment hypothesis and the differential offending hypothesis. I will briefly describe the two schools of thought and then conclude with an overview of what policies have been enacted to try and reduce, and ultimately eliminate, racial and ethnic bias within the juvenile justice system.

Differential Treatment. The differential treatment hypothesis contends that overrepresentation of ethnic minorities and youth of color in the juvenile justice system is attributable to inequities – intended or unintended – in juvenile justice practices (Bishop, 2005). Inequities arise from legislation, police administration, cultural stereotypes, and judicial administration – especially across jurisdiction – to name a just a few.

Legislation, while well intended for public safety, often gives rise to racial/ethical disparity by (1) providing too large of scope, thus pulling into the system many juveniles that were never intended to be included by law makers – this aspect will be developed further under the discussion pertaining to *The Changing Borders of Juvenile Justice* below – and (2) through direct targeting of minority populations. Both of these causes became increasingly prevalent in the 1980s-1990s, and can still be seen today. (For example, in Kansas, legislation has been passed that defines an individual – adult or juvenile – as a criminal street gang member if he/she commits certain felonious acts as a group (K.S.A. § 21-4226 (2009)); sets a minimum bail of $50,000 for criminal street gang members who are arrested for a person felony (K.S.A. § 21-

4229 (2006)); and provides for a presumption of incarceration if adjudicated guilty (K.S.A. § 21-4704 (k) (2009)). Since most juvenile offenders commit crimes as a group – see the discussion above under *Youth on Trial* – Kansas law, while designed to give more "teeth" in combating gang violence, has indirectly increased the number of juveniles considered gang members; a label that is more likely to involve the youth in the juvenile justice process for subsequent encounters with police – see discussion below. Additionally, with 95% of gang members being non-white (Bishop, 2005) and therefore likely to be from socio-economically challenged neighborhoods, increased bail is likely to keep them incarcerated before and during adjudication, and as discussed in more detail below, juveniles detained prior to adjudication are more likely to be placed into an out-of-home setting upon a finding of conviction; even if Kansas law did not presume they should be.)

One of the most well documented examples of "get tough" legislation causing racial disparity is the "war on drugs." Prior to the 1970s, drug offense arrest rates for white juveniles were higher than rates for African American youths. Once legislation geared to the "war on drugs" was enacted, arrest rates for white youths decreased, while rates for African American youths "skyrocketed," and by the 1990s, was "four to five times those for whites" (Bishop, 2005, p. 36). The political emphasis placed on combating drugs directed police to target lower income neighborhoods – minorities are more likely to live in lower income neighborhoods – where drug dealing was easily spotted, dealers were more likely to sell to strangers, unemployment rates meant there was a steady stream of individuals to step in and continue the distribution operation when a dealer was arrested, and operational costs for police was less expensive than conducting an operation in a higher income neighborhood. In fact, "[t]he National Criminal Justice Commission has concluded that racial disparities in drug arrests are attributable largely to

enforcement strategies that focus almost exclusively on low-level dealers in minority neighborhoods" (Bishop, 2005, p. 36).

The "war on drugs" illustrates one of three decisional areas involving police administration that contributes to racial/ethnic bias within the juvenile justice system: *Enforcement Strategies* – i.e. focusing on "hot spots," conducting "crack downs," or conducting "sweeps." The other decisional areas are *Manpower Allocation* and *Style of Policing*. Manpower allocation involves placing police patrols into areas of higher calls for service, which tend to be lower socio-economic neighborhoods that are often composed of large minority groups. While geographic distribution of officers looks good on the surface, it increases the number of eyes watching minority individuals, which in turn increases the likelihood of detection of criminal activity and arrest (Bishop, 2005). Style of policing refers to a *legalistic v. informal* approach to law enforcement. Larger police agencies tend to use a legalistic approach; that is they are formal in their treatment of all individuals and are more likely to arrest for minor violations of the law. Smaller agencies tend to use an informal approach; that is they are more likely to let minor infractions go with no enforcement or just verbal warning. Since larger police agencies are located in urban areas, and more minorities live in urban areas, minorities are more likely to be arrested (Bishop, 2005).

Tied to manpower allocation is an inequality stemming from cultural stereotypes. Specifically, police develop "typescripts" that are developed from neighborhood bias. Dangers associated with police work require officers to make quick decisions with little knowledge of the entire situation and underlying factors. While not intentionally biased, police develop scripts based on prior experiences to guide their actions. Routine activities, especially when assigned to

patrol high crime areas, lead to increase contact with minorities. Police then associate all individuals within the neighborhood, especially minorities, as being involved in criminal activity; thus, the police look more suspiciously at minorities and are likely to find violations and make arrests (Bishop, 2005).

The other inequality that stems from cultural stereotyping is citizen initiated. Groups of juveniles, especially minority juveniles, are perceived by citizens to be dangerous and engaged in criminal activity – an oft over misrepresented occurrence in popular media – thus, citizens are more likely to call police, bringing police into greater contact with minority youths than non-minority youths, who are then more likely to end up arrested (Bishop, 2005). A variation of control theory was suggested by Tittle and Curran (1988, as cited in Bishop, 2005) to account for this inequality: "[I]t is not the objective level of threat posed by minority groups that impels efforts to control them [minorities] but, rather, 'symbolic' aspects of threat. When whites perceive that there are concentrated populations of minorities disproportionately engaged in behaviors that provoke fear, anger, and the like, they subject them to intensified social control" (p.60). (This explanation, too, could also be applied to legislation that results in disparity.)

Judicial administration contributes to racial disparity in several ways. Two of them are discussed here. First, dispositions in juvenile court focus on three things – punishment, community protection and treatment – when deciding what actions to take. Judges in juvenile court place a greater emphasis on community protection and treatment. Community protection factors considered include, but are not limited to, detainment before and during adjudication, nature of the offense committed, and prior history with the court. Each of these factors is stacked against a minority from the start, for reasons previously discussed. Thus, while more

white youths are adjudicated delinquent, more minority youths are placed in out-of-home treatment (Bishop, 2005).

Additionally, the location of the court plays a significant role in racial and ethnic disparity. Similar to styles of policing, courts too have a formal or informal atmosphere. Courts located within urban areas tend to be more formal, with bureaucratic procedures established for quicker processing of the high case load. Rural courts tend to be less formal, due to the fewer number of cases they have to process; furthermore, rural courts usually have more time to complete a more in-depth background investigation on adjudicated youths. Rural courts, though, tend to have less experience adjudicating juvenile matters and might not be as well versed in the intricacies of juvenile jurisprudence as urban judges (Bishop, 2005; Bray, Sample, & Kempf-Leonard, 2005).

Several social scientists have studied this "justice by geography" phenomenon; especially in relation to placement upon disposition. Traditionally, through the use of logistic analysis, race is seen as a contributing factor for placement; however, once other variables were accounted for – age, prior convictions, and pre-trial detention – race did not matter. When the location of the court is factored in, too, geography was determined to be of importance in placement for minority youth. Bray, Sample, and Kempf-Leonard (2005) suggest the logistic analysis methods used by social scientists are flawed in that the "multilevel nature of the court-offender relationship" is not taken into consideration (p. 277) and assumptions are made "about statistical independence that…data…do not merit" (p. 293). Instead, they used a method of statistical analysis new to the field of criminology – but traditionally used in etiology-based research – known as hierarchical linear modeling (HLM) to examine data from all juvenile court cases

processed in Missouri between 1992 and 1997 to evaluate the role race plays on placement in relation to geographical location. HLM corrects for the shortcomings noted in logistic analysis methods.

> First, we find that, indeed, geography matters – the likelihood of placement varies significantly across juvenile courts – confirming what a simple map might suggest to the naked eye. Second, we see that the odds of placement increase for older youths, black youths, those youths who have a history of prior referrals, and those who have been held in detention. This contradicts the results from the logistic regression analyses, which showed no significant influence for race when prior record, detention, and age were controlled. Where the hierarchical techniques make their most significant contribution… is in their ability to more accurately portray the observed court-to-court variation in placement odds. While the overall odds of placement vary across courts, this is due to cross-court variation in the effects of prior referrals and prehearing detention. The effects of age and race do not vary across circuits [courts]. Thus, the fact that a case involves a black youth will increase the chance of out-of-home placement *regardless* of the court in which the case is processed. The fact that the same youth was detained prior to his hearing also improves his chance of placement, but courts vary in how heavily this detention influences decisions to place…. Where logistic regression techniques suggest that urban or rural settings make a difference while race does not, hierarchical modeling techniques, which appropriately incorporate the nested, multilevel nature of the data, show the opposite…. [Therefore], we conclude that *justice is not blind to race* [emphasis added]…. the problems of racial disparity are equally distributed across courts. Regardless of the circuit in which a black male was adjudicated, he was more likely to be

placed outside the home than similarly situated white males. (Bray, Sample, & Kempf-Leonard, 2005, pp. 293-294)

Differential Offending. The differential offending hypothesis contends that overrepresentation of ethnic minorities and youth of color in the juvenile justice system is due to "race and ethnic differences in the incidence, seriousness, and persistence of delinquent involvement" (Bishop, 2009, p. 23). Social scientists and criminologists turn to arrest data to support this hypothesis. Arrest data shows that African Americans are arrested at higher rates for all offenses, except vandalism and alcohol related offenses, than whites (Bishop, 2005; Lauritsen, 2005). While "race and ethnicity may serve as a weak *predictor* of violent offending… [one must remember] that these factors are not direct *causes* in and of themselves" (Lauritsen, 2005, p. 97). Heterogeneous and socio-economic factors contribute more to understanding differential offending than race and ethnicity.

Just as the heterogeneity of an individual youth – e.g. impulsivity, risk seeking, aggressiveness – contributes to delinquency, so too does the heterogeneity of a youth's family. Families consisting of poor family management, family and marital discord, residential mobility, and a poor family economic environment tend to have offspring that engage in delinquent behavior; and families living in poverty tend to reflect these characteristics more so than other families (Piquero, Moffitt, & Lawton, 2005). Delinquency in the form of violence becomes a mechanism for survival. The demeanor of the youth often takes on an appearance of toughness, which is perceived as disrespect towards law enforcement and often leads to increased arrest and charging (Bishop, 2005). Compounding this issue is that minority youths, due to the violent living conditions of their home and community life, are more likely to carry some sort of weapon

than youths in middle and upper class neighborhoods, resulting in increased penalties when arrested (Lauritsen, 2005).

When evaluated at intake, these factors continue dominate. Poor family management is often linked to the number of parents and/or responsible family members available to be accountable for the youth and to make sure he/she stays out of further trouble and arrives at court proceedings. Many lower income minority families tend to be single parent families, often with the mother working multiple jobs. Thus, minority youths remain in pretrial detention more often than non-minority youths, furthering the racial disparity within the juvenile justice system (Bishop, 2005). Further, studies have show that probation officers view offending by African American youths to be because of “character defects,” while offending by white youths was more often attributed to mental illness; thus giving white youths access to specialized – and often out-patient based – treatment programs that African American youths do not receive access to (Bishop, 2005, p. 58).

When family discord and management problems were not present, socio-economic factors still contribute to delinquency. As already noted, poverty ridden neighborhoods tend to be filled with violence. To avoid exposure to this violence, parents will often have their children stay indoors to play. However noble their intentions in trying to protect their children, this too contributes to delinquency. By keeping the children indoors, interaction with others decrease and the children fail to develop interpersonal relationship skills completely; while at the same time, these children usually receive increases in responsibility, forcing them to grow-up faster. Both of which are factors that have been linked to delinquency (Piquero, Moffitt, & Lawton, 2005).

Finally, socio-economic factors affect low income African Americans to a greater extent than low income whites; which also increases racial disparity within juvenile justice.

> The important fact about rates of delinquents for Negro boys is that they too, vary by type of area. They are higher than the rates for white boys, but it cannot be said that they are higher than rates for white boys in comparable areas, since it is impossible to reproduce in white communities the circumstances under which Negro children live. Even if it were possible to parallel the low economic status and the inadequacy of institutions in the white community, it would not be possible to reproduce the effects of segregation and the barriers to upward mobility. (Shaw & McKay, 1942/1949, as cited in Piquero, Moffitt, & Lawton, 2005, p. 210)

> Because the poorest whites do not live in the kinds of ecologically concentrated, "truly disadvantaged" communities that the poorest of African-Americans live in…, the structural barriers and cultural adaptations that undermine social organization are magnified for African-Americans…. [W]hite neighborhoods and African-American neighborhoods offer starked [*sic*] contrasts in terms of the level of disadvantage. African-American neighborhoods, especially disadvantaged African-American neighborhoods, are likely to be geographically closer to poor and high-crime neighborhoods; the opposite is the case among white neighborhoods, even among disadvantaged white neighborhoods…Thus, the informal networks that provide the underlying social organization of these communities include long-term residents who are part of groups that actually contribute to or draw crime to their neighborhoods… In addition, because of the greater spatial clustering of disadvantage among African-

> American than among whites, the institutional and economic resources that diminish the likelihood of crime are fewer and farther away for African-American communities than is the case for disadvantaged white neighborhoods… (Piquero, Moffitt, & Lawton, 2005, p. 211)

Thus, socio-economic factors tend to influence differential offending more so than some innate criminogenic genetic code specific to ethnic minorities and individuals of color.

Remedial Social Policy. Perhaps the biggest, both in size and potential, remedial social policy was established by the federal government in 1974 and is still in effect today. When Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA) they incorporated a provision that required any state that wished to receive federal grant money for their juvenile justice system demonstrate efforts to reduce confinement of minorities until the level of incarceration – regardless of what type of institution was used – was proportional to the minority population of the general community. Amendments to the JJDPA in 2002 included provisions to that extended reduction efforts to contact situations, too. Collectively, these requirements are referred to in academic and political environments as the *disproportionate minority confinement / contact* (DMC) requirement (Pope & Leiber, 2005). The DMC requirement requires states to undergo four phases for compliance: *identification*, *assessment*, *intervention*, and *evaluation and monitoring*.

The intervention phase requires states to identify the extent of DMC. The extent of DMC within the juvenile justice system is not accurately known. When enacted, guidance was not provided on how to determine the extent. Each state developed their own methods of data collection; therefore, comparison between states is limited at best. Furthermore, several states

"collapsed" all minorities into one collective group, making it difficult to focus resources where minority overrepresentation might exist (Pope & Leiber, 2005).

The assessment phase requires states to determine why DMC exists within their system. Problems of data collection to effectively do this aside, some states have been able to determine specific areas that contribute to DMC. These areas include police decision making; race affected detention making decisions – and being detained increased likelihood of in-custody placement following dispositions; and extent of prior contact with the juvenile justice system, to name just a few (Pope & Leiber, 2005). I will not elaborate further on these areas, as they have previously been discussed.

The intervention phase requires the development of a plan to address the areas identified during the assessment phase, in order to reduce DMC. States have tried multiple plans which include direct services, e.g. community based alternatives to secure confinement; training and education, geared towards making police and court personnel sensitive to cultural differences; and system changes, e.g. diversification of personnel, legislative reform, and procedural changes (Pope & Leiber, 2005).

The evaluation and monitoring phase requires evaluation of the effectiveness of intervention plans and longitudinal monitoring of DMC rates (Pope & Leiber, 2005).

Realizing the wide methodology utilized across all 51 juvenile justice systems, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) has published several manuals that give guidelines to state agencies. While the OJJDP cannot force states to follow similar methodologies, by tying it to funding, the states most likely will comply; which will provide for

the most accurate data available as to the extent of DMC and allow for generalization between state systems to locate true causes for DMC and which programs are the most effective in reducing, and eventually eliminating, DMC.

A second remedial social policy area is calling for an increase in mental health services that are provided to incarcerated youth, especially minority youth; as well as an increase in mental health services available in socio-economically challenged neighborhoods, which tend to have higher rates of minority residents. I will not elaborate on how mental health contributes to delinquency – for this, see the discussion above under *Youth on Trial* – instead, I wish to point out some unique aspects of mental health issues as they pertain to minorities. First, access to mental health resources is scarce for poor socio-economic communities. Many parents seek to have their children adjudicated delinquent just to have access to mental health services (Cauffman & Grisso, 2005; Kempf-Leonard & Hawkins, 2005; Zimring, 2005). Not only does this increase DMC within the juvenile justice system, it imposes future hardships on their children for having a criminal record. Second, most of the criminogenic research pertaining to mental health has been completed on white populations, which might be significant when looking at minority populations (Cauffman & Grisso, 2005) – e.g. it is unknown if prevalence rates among whites and minorities are the same. Third, it is unknown if the signs and symptoms manifest themselves in the same manner. Finally, it is unknown if treatments designed for white youths will have the same therapeutic affect on minority youth.

Some studies have started to focus on these issues. One such study was conducted by Teplin, Abram, McClelland, and Duncan in 2002, where they used the Diagnostic Interview Schedule for Children (DISC) to examine 1,829 youths at the Cook County, Illinois detention

center between the ages of 10 and 18. This sample had been stratified between ethnicity, gender, age, and legal status. Furthermore, the DISC was administered within three days of admission to control for mental changes that occur throughout the adjudication process. Teplin, Abram, McClelland, and Duncan found

> that 65% of the boys and 71% of the girls met diagnostic and functional impairment criteria for one ore more psychiatric disorders…. [and that] [t]he general findings… indicate[d] that white youths have significantly higher rates of many mental health disorders and African-Americans have the lowest rates. The only change in this pattern is with separation anxiety – African-American youths display[ed] higher rates than whites. In addition, these data also suggest that females, and white females in particular, present with more mental health problems than males. (Cauffman & Grisso, 2005, pp. 398-399)

As this study shows, differences in mental illnesses between races does exist; at least in this instance. However, the DISC was designed to evaluate mental illness based off of research conducted on white youths. Further research is needed to determine if whites truly present with higher mental illness than non-whites; which if this turns out to be the case, differential offending claims pertaining to probation officers seeing offending by whites to stem from mental illness and offending by African Americans to stem from character defects might be a correct analysis and not one that contributes to racial bias.

The Changing Borders of Juvenile Justice

> The most serious juvenile crimes have always been the political Achilles' heel of the American juvenile court. Even when public opinion is tolerant of juvenile delinquency, the teen killer is the nightmare case for the juvenile justice system. In an age where the phrase *juvenile superpredator* is often heard in the federal congress and state legislatures, the deep-end adolescent offender is a particular threat to public acceptance of the mission and objectives of juvenile justice. If the court as a whole is politically vulnerable in such circumstances, the cases and procedures concerned with transfer to criminal court are doubly vulnerable. It is of little wonder, then, that legislation concerning transfer is a near-universal feature of the politics of juvenile justice. (Fagan & Zimring, 2000)

> Unhappily, the tendency of much modern legislation to view expansion of the waiver device as a sovereign remedy for the problems of juvenile justice in these times has obstructed thoughtful public consideration of what juvenile policy consists of, and by ignoring basic considerations threatens basic values. (Allen, 2000)

Each of these passages shed light on the current state of juvenile justice: to treat more and more juvenile offenders as criminal offenders. In doing so, the basic principles behind why the juvenile court was established as a separate, yet symbiotic, institution from the criminal court are being eroded; in fact, if the current trend in legislation continues, the juvenile court is likely to return to a state of common law jurisprudence in the dealings with juvenile offenders (Tanenhaus, 2005). *The Changing Borders of Juvenile Justice*, edited by Jeffrey Fagan and Franklin E. Zimring (2000) compiles a collection of essays that examine the phenomenon of transferring juvenile offenders into the adult criminal court. While transfer to the criminal court

was always an option, it was not until the 1970s – when political and social ideology shifted from "justice for the child" to "just deserts" (Tanenhaus, 2000, p. 33) – that transfer legislation started to find its way into political rhetoric; and it was not until the late1980s-90s – with the increase in drug and gang related crime – that transfer legislation started to take center stage in political rhetoric, with rally cries along the lines of "adult time for adult crime" (Feld, 2000). Collectively, these essays show that waiver of juveniles to adult court has not had the impact that was envisioned when transfer laws were created; in fact, the laws have had the opposite effect and have served to only "muddy the waters" of judicial jurisprudence (Fagan & Zimring, 2000). To understand this, it is helpful to examine the concept of transfer through four dimensions: *mechanisms, standards, rates,* and *consequences*.

Mechanisms of Transfer. There are generally three ways in which juveniles get waived to criminal court. The first is through the use of *judicial waiver*, which is also known as a *traditional waiver*. The judicial waiver involves the juvenile court judge making a decision as to whether or not the juvenile should be transferred to the criminal court for adjudication. The burden of proof is on the prosecution to show why transfer is necessary (Feld, 2000). Factors that are taken under judicial consideration are discussed next, under *Standards of Transfer*. One of the benefits of using this type of transfer is that it allows the defendant and his/her attorney a chance to participate in the waiver decision; that is to mount a defense as to why the juvenile should not be tried in the criminal court (Feld, 2000). With the advent of legislative transfer came a new form of judicial waiver, the *reverse-waiver*, also known as *transfer-back legislation*. The reverse-waiver is also a transfer decision that is made from the bench; however, it is a criminal court judge deciding if a juvenile originally charged in criminal court should actually be adjudicated in juvenile court. The burden of proof for the reverse-waiver is on the defense to

show why the youth should not be charged in criminal court (Frost Clausel & Bonnie, 2000). The problem with reverse-waivers is criminal court judges are normally not as well trained in the issues pertaining to juveniles, such as developmental stages or the myriad of treatment options available, to justly consider the request for reverse-waiver (Zimring, 2000); and the juvenile has already been exposed to the harsh, stigmatizing environment of the criminal court that cannot be removed, even if waved back to the juvenile court (Feld, 2000).

The second mechanism is through *legislative waiver*. Many versions of legislative waiver exist. The most common is through statutory requirements to charge certain juveniles directly in criminal court, thereby bypassing the judicial waiver process. This is commonly referred to as *offense exclusion* [from juvenile court] (Feld, 2000). A second legislative waiver option, which has started to gain some prominence in many jurisdictions, is *blended sentencing*, which is also known as *blended jurisdiction*. Under blended sentencing, a juvenile is adjudicated in either juvenile or criminal court and then sentenced to either a juvenile sentence, a criminal sentence, or a combination of both (Dawson, 2000; Redding & Howell, 2000). Formats of blended sentencing are dependant on jurisdiction. Five models of blended sentencing are in existence. The *juvenile-exclusive model* allows adjudication in juvenile court, with the option of imposing either a juvenile sentence, with the youth remaining in the juvenile system until he/she reaches the age of majority – usually 18 or 21; although some states have allowed juvenile courts to keep jurisdiction over offenders until they reach the age of 25 – or an adult sentence, at which time the juvenile is transferred into the custody of the adult correctional system. The *juvenile-inclusive model* allows adjudication in juvenile court, while imposing both a juvenile and an adult sentence; the adult sentence is then suspended unless the terms of the juvenile sentence are violated or a new offense is committed. The *juvenile-contiguous model* allows adjudication in

the juvenile court with the imposition of a juvenile sentence to be served until the youth reaches the age of majority, at which time, a transfer hearing is conducted to see if the youth will be transferred to serve an adult sentence in the criminal court. The *criminal-exclusive model* allows adjudication in the criminal court with the option of imposing either a juvenile or adult sentence, either of which is carried out within the jurisdiction of the criminal court. Finally, the *criminal-inclusive model* allows adjudication in the criminal court with the imposing of both a juvenile and adult sentence. The adult sentence is suspended as long as the terms of the juvenile sentence are completed and no new offenses are incurred (Redding & Howell, 2000).

John Stanoch, Chief Juvenile Court Judge for Hennepin County, Minnesota explains how blended sentencing came about.

> There's this tug of war going on between those who believe we've been too soft on juveniles…and those that feel we treat juveniles differently because we believe they can be reformed and rehabilitated… [Blended sentencing is] really a marriage of convenience between those that want to punish more and those that want to give kids one more chance. (as cited in Redding & Howell, 2000, p. 147)

The third mechanism, *prosecutorial waiver*, which is also known as *direct filing*, allows the prosecutor the option of filing charges in either juvenile or criminal court. Unlike offense exclusion, which says you *will* file in criminal court, direct filing says you *may* file in criminal court. In these cases, the legislature just shifted the decision from the judge to the prosecutor to decide if waiver should occur; and in doing so, removed any due process considerations by making decisions behind closed doors and eliminating the chance for the juvenile offender to

voice a defense (Feld, 2000); although the courts have ruled this is not so (Frost Clausel & Bonnie, 2000).

Normally, once a juvenile has been waived and adjudicated as an adult, regardless of the original waiver type, they cannot be tried for subsequent offenses, regardless of age or offense type, in juvenile court; that is, all subsequent offense violations must be charged through the criminal court. This *mandatory waiver* provision originates from the idea of "once an adult /always an adult" and is "designed to prevent jurisdictional conflicts between the juvenile and criminal systems as to waived juveniles who commit new offenses before achieving the boundary age rather than to express public policy as to which system cases should be prosecuted in" (Dawson, 2000, p. 58).

Standards of Transfer. Judicial waiver was primarily determined by the whim of the judge and political pressure prior to the 1960s. Lack of specific legislative guidelines and sporadic, at best, due process procedures contributed to this. However, the 1960s-70s saw an increase in standardization of judicial transfer, both through guidelines and legislative reform.

In 1962, the Advisory Council of Judges of the National Council on Crime and Delinquency published a study (in *Crime and Delinquency*) that criticized the judicial practice of transferring juveniles without considering what was in their best interest; acknowledged the fact that hearings would be prolonged by considering what was in the best interest of the juvenile; acknowledged that some juveniles should be transferred; and provided guidelines to assist judges – they were to consider prior record, physical and mental maturity, "pattern of living," offense type and viciousness, and the suitability of the facilities available to both the criminal and juvenile courts (Tanenhaus, 2000, pp. 31-32).

In 1966, the United States Supreme Court (USSC) concluded in *Kent v. United States*, 383 U.S. that “the loss of juvenile court protections through waiver decision was a ‘critically important’ action that required a hearing, assistance to counsel, access to social investigations and other records, and written findings and conclusions capable of review to a higher court” (Feld, 2000, 87). *Kent* included an appendix in their published opinion that listed the Juvenile Court of the District of Columbia’s criteria in determining if waiver to criminal court was warranted, as a guide to lawmakers, attorneys, and judges.

> An offense falling within the statutory limitations … will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or -- even though less serious -- if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.
>
> The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:
>
> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

> 4. The prosecutive merit of the complaint, *i.e.*, whether there is evidence upon which a Grand Jury may be expected to return an indictment …
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime …
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> 7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
>
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court. (*Kent*, 383 U.S. at 566-67)

Kent then put the states on judicial notice that the arbitrary nature of judicial waiver would not be tolerated. Subsequently, states passed legislation that used *Kent* as a template to establish formal judicial waiver criteria (Dawson, 2000; Feld, 2000).

In 1967, the USSC further emphasized the importance of due process rights in judicial proceedings. Delivering the opinion of the court, Supreme Court Justice Fortas stated *In re Gault*:

From the inception of the juvenile court system, wide differences have been tolerated -- indeed insisted upon -- between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles…. (387 U.S. at 14)

Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence -- and of limited practical meaning -- that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it… Under traditional notions, one would assume that, in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to

the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions. Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his "wanting to go to . . . Grand Canyon with his father," the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute. The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18. If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings. For the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years. If he had been over 18 and had committed an offense to which such a sentence might apply, he would have been entitled to substantial rights under the Constitution of the United States as well as under Arizona's laws and constitution. The United States Constitution would guarantee him rights and protections with respect to arrest, search and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed. So wide a gulf between the

> State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliche can provide…. (387 U.S. at 27-30)
>
> In *Kent* ... we stated that the Juvenile Court Judge's exercise of the power of the state as *parens patriae* was not unlimited. We said that "the admonition to function in a ‘parental' relationship is not an invitation to procedural arbitrariness." With respect to the waiver by the Juvenile Court to the adult court of jurisdiction over an offense committed by a youth, we said that there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. We announced with respect to such waiver proceedings that, while [w]e do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. We reiterate this view, here in connection with a juvenile court adjudication of "delinquency," as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution. (387 U.S. at 30-31)

In 1975, the USSC in *Breed v. Jones*, 421 U.S. at 519-520 imposed further guidelines on prosecutors and judges by requiring that states decide if they were going to try and sentence a delinquent as a juvenile or an adult, based on the merits of the charge, as the double-jeopardy clause of the Fifth Amendment applied to youths, too.

Incorporating all the new “guidance” from the USSC, judicial waiver became more structured and procedurally oriented. Judges started looking more at the totality of the circumstances to make a sound decision. Traditionally, judges consider the need for public

safety, i.e. offense and prior record; malleability, i.e. ability to respond to treatment; age, i.e. how much time does the youth have to complete treatment; and sanctions, i.e. can the juvenile court impose a penalty suitable for the offense (Dawson, 2000; Feld, 2000).

Offense exclusion is determined by the laws enacted by legislatures. Originally, excluded offenses were only those considered the most heinous of crimes – e.g. premeditated murder, felony homicide (a homicide committed during the commission of another felonious crime, such as robbery), kidnapping and sexually assaulting the victim, etc. – but "the rate and scope of legislative offense exclusion amendments continued and expanded" over time (Feld, 2000, p. 114). Often, the expansion included the addition of "Part 1" offenses, certain drug violations, and acts committed in the furtherance of gang activity (Dawson, 2000). Additionally, the age of exclusion from juvenile court continued to lower for these crimes (Dawson, 2000; Feld, 2000). Offense exclusion is usually a "get tough," knee jerk reaction to an isolated case that "inflames public fears and political passions" (Feld, 2000, p. 115); as such, offense exclusion tends to be overreaching and transfers more juveniles than necessary into the criminal court (Frost Clausel & Bonnie, 2000; Feld, 2000; Zimring, 2000). The effects of offense exclusion will be examined in more detail below under the section *Consequences of Transfer*.

Statutory requirements of direct filing are usually dependent on offense and age (Feld, 2000) and reserved for semi-serious offenses or those committed together by a juvenile and an adult. Here, legislatures would like to see juvenile offenders charged in criminal court, if the minimum standards are met, but they are not requiring prosecutors to do such; as is done by offense exclusion. Direct file laws allow the prosecutor to file cases based on political pressure, thus "protecting" the office, and direct file laws allow the prosecutor to force plea agreements

within juvenile court through the treat of having the case moved to criminal court (Dawson, 2000; Feld, 2000); either situation puts too much power in the hands of the prosecutor and threatens justice.

Rates of Transfer. "The number of minors transferred and the proportion of juveniles charged with crimes who are transferred are the two best measures of the rate of transfer to criminal court" (Fagan & Zimring, 2000, p. 7). Looking at absolute numbers between 1985 and 1995, a dramatic increase – 70.8 percent – in judicial waiver to criminal court can be seen (Dawson, 2000). Transfer rates are most likely higher, though, as the number of direct file cases and mandatory transfer are difficult, if almost impossible to track with the way data is currently reported. From the data that is available, though, some unique trends in transfer have been observed. First, prior to the "get tough on crime" focus of the 1990s, most waivers involved property crimes; since 1994, more person crime offenses were waived than property offenses (Dawson, 2000). Second, having a prior record increased the likelihood of waiver to criminal court when charged with a less serious offense (Bortner, Zatz, & Hawkins, 2000; Dawson, 2000). Third, most juveniles transferred are disproportionately male (Dawson, 2000). Finally, youths of color tend to be transferred at a higher rate than white youths (Bishop & Frazier, 2000; Bortner, Zatz, & Hawkins, 2000). I will not elaborate further on these trends, as the first is attributable to the shift in political ideology and rhetoric, and the other trends have been developed under reviews in prior sections.

Consequences of Transfer. Transfer to the criminal court can hold profound consequences on juveniles. Transfer, *per se*, is a type of sentencing decision. By changing jurisdiction from the juvenile to the criminal court, greater significance, and thus greater

punishment, is accorded to the offense (Feld, 2000). The 1994 data from the National Judicial Reporting Program reveled that

> 79 percent of all transferred youths convicted were sentenced to terms of incarceration. Sixty-three percent were sentenced to prison, many for lengthy terms. The average maximum sentence for transferred offenders sentenced to prison was 9.25 years. Sixteen percent were sentenced to jail. The remaining 21 percent were sentenced to probation. (Bishop & Frazier, 2000, p. 234)

This is alarming; especially when one considers just over 50% of all transferred juveniles are convicted of a violent felony crime and that more juveniles are being transferred at younger ages and without any prior offenses than before (Bishop & Frazier, 2000). Furthermore, criminal courts are less likely to mitigate sentencing based on age and immaturity.

Conviction in the criminal court often extends punishment for the youth beyond the sentence imposed. Most convicted youths are being released from prison at a time in their lives where society expects them to earn a living and become a productive citizen in society. These youths, however, have not had a chance to develop appropriate social skills or develop skills necessary to do what is expected of them; plus, the stigma of an adult conviction keeps many employers from hiring them, not to mention the fact that many job opportunities have been made unavailable to them through legislation (Bishop & Frazier, 2000).

Transfer has consequences beyond the sentencing. Often additional resources are not provided for when transfer laws are enacted; and without additional resources, backlogs in the docket are likely to occur, resulting in an increasing wait time for the juvenile; which has a

negative impact on the youth. First, juveniles tend to perceive time differently than adults. A wait of three months might seem minor to adults, but to a juvenile, it is the equivalent of a summer vacation. Second, while waiting for trial, transferred juveniles fall under the jurisdiction of adult corrections. Not only does this impose staffing and facility challenges for correction personnel – as most adult facilities are not equipped to handle youths, nor are personnel trained in child psychology and behavior management – but the juvenile is exposed to the adult prison culture and all the consequences that entails. Finally, even if the case is dismissed, the wait from the backlog also increases the time the juvenile is away from school. Most delinquents are already struggling in school and this pushes them further back; often, the school does not have the resources to help the juvenile get caught back up for the time he/she missed (Bishop & Frazier, 2000).

Finally, studies have shown that threat of criminal punishment does not deter a juvenile from engaging in crime (Bishop & Frazier, 2000; also see *Youth on Trial*). In fact, being tried in the criminal court, as opposed to the juvenile court, actually increases recidivism among delinquent youth (Bishop & Frazier, 2000). One might ask, then, is transfer, especially legislative transfer, really in the best interest of out youth? Zimring and Fagan (2000) address this point:

> One corollary of a commitment to a rule of law is that, all other things being equal, observers should prefer a system based on preannounced rules and standards [i.e. offense exclusion] to a system that puts the final power of decision in the hands of a governmental official with discretionary power [i.e. judicial or prosecutorial waiver]. So if the other costs and benefits of rule-based verses discretionary systems were quite close,

the preference should go to the rule-based system…. But all other things are not equal in the competition between rule and discretion in structuring transfer decisions…. The general phenomenon that lies behind the rule-versus-discretion competition for a waiver is that using general standards will require transfer in many cases where frankly discretionary approach would often result in retention in the juvenile court. The particular cost of requiring binding rules is that many more young offenders get transferred than if a juvenile court judge could make a decision without any binding rules to force his or her decision. Rules tend strongly to be overbroad because they place emphasis on the worst-case scenario of a very serious young offender who cannot be effectively treated or long restrained. This is an inherent problem and probably an insoluble one as well. But the choice in transfer policy is not between overbreadth and lawlessness. The right kind of standards for transfer are those that create the necessary conditions for transfer eligibility… A rule orientation can provide the *necessary* conditions for transfer to criminal court without generating needless expulsion from juvenile court, but rules cannot provide the *sufficient* conditions for transfer without the overbroad transfer as an inevitable result. If the legislative process is best restricted to generating the necessary conditions for transfer, legislation must delegate the power to decide in individual cases either to judges or prosecutors…. As between prosecutors and judges, our preference would rest with the judiciary. But the need for discretion and to restrict legislative standards to necessary conditions is independent of the discretionary agency one chooses to carry out this *vital* [emphasis added] function. (pp. 416-417)

Judging Children as Children

Out of all the books reviewed, *Judging Children as Children* (Corriero, 2006) was the only one written by a non-scientist – e.g. sociologist, psychologist, criminologist, etc. – by trade; it was authored by the Honorable Michael A. Corriero, who has been practicing juvenile law since 1969, both as a prosecutor and defense attorney, and has sat on the bench of New York's Criminal Courts since 1982; primarily in the Youth Part (a specialized court within the adult criminal court system that hears only cases involving juvenile offenders). I found Judge Corriero's pragmatic view of how juveniles are adjudicated insightful, allowing for both a layperson and social, political and/or legal scholar to fully understand how the political milieu since the late 1980s – while attempting to increase public safety and reduce juvenile delinquency – ended-up creating a system that exposes the public to increased victimization, economic burden, undermines historical principles of jurisprudence and American ideals, and is innately biased towards juveniles; in sum, the wholesale move of juveniles being adjudicated in criminal instead of juvenile courts created by legislative actions "represented a dramatic shift in policy from 'individualized justice' to punishment and retribution as a first resort" (Corriero, 2006, p. 128) by "[engaging] in a collective regression that resulted in discarding or ignoring ancient assumptions, conventional wisdom and conscientious research concerning the nature of childhood and criminal responsibility" (p. 128). Judge Corriero supported his claims through case examples and current scientific research, much of which has been reviewed above; as such, I will not elaborate further on these findings. I turn instead to the main premise of Judge Corriero's book: A proposal for a juvenile justice system [that works].

One must understand the current policy of how juvenile offenders are treated in American society as a starting point to understanding why and how the system should be changed.

> Our current juvenile justice policy is heavily shaped by the assumption that swift and appropriately severe punishment deters crime in individuals and in general. The deeper assumption is that after weighing the risks and benefits of pursuing illegal activity, individuals will make rational choices. General or society-wide deterrence occurs as a result of public or publicized, punishment when law-abiding citizens and those contemplating crime learn vicariously that crime is not worth the risk of punishment. (DeBrovner, 2006, p. 93)

As we know from the scientific research discussed earlier, this policy is doomed to fail; as it is founded on faulty premises when the nature of adolescence is considered. In fact, swift and severe punishment without rehabilitation normally leads to an increase in crime, not deterrence (Corriero, 2006). What is needed instead, when dealing with adolescents, is a methodology that focuses on a juvenile offender's "character building, family involvement, mentoring and socialization, and forging a social bond [with the judge]" (DeBrovner, 2006, pp. 92-93). Judge Corriero incorporates this methodology into his courtroom and into his four-objective proposal that provides a synergistic union between the adult criminal and juvenile court systems "that recognizes the vulnerability and malleability of adolescents, without compromising public safety" (Corriero, 2006, p. 167). These objectives (summarized) are:

1. Better identification of dangerous, violent offenders routed in statutory strategy.

2. Punishments that serve to educate, i.e. lead to reintegration.

3. System flexibility to allow participation in alternate-to-incarceration programs if the juvenile is determined to be malleable.

4. The ability to remove the stigma of conviction when the juvenile has demonstrated conformity to the norms and mores of society, i.e. a legalistic means of reintegration is provided, allowing the juvenile to become a productive member of society.

Judge Corriero believes these objectives can be accomplished by incorporating many strategies and processes into one.

(1) The waiver decision must be returned to its historical design; that is waiver needs to be judicial and via a due process hearing and not through legislative or prosecutorial waiver systems. Furthermore, the judge hearing the case should be one that has familiarity in child and adolescent developmental factors gained through experience.

(2) All offenders under the age of 18 shall start their adjudication in a juvenile court and no juvenile under the age of 14 should be waived to adult criminal court “unless it can be established by clear and convincing evidence that such a youth is competent to understand and assist in the proceedings against him” (Corriero, 2006, p. 174).

(3) Incarceration should be viewed as something other than an end in itself; that is juveniles incarcerated should receive both academic assistance and therapeutic treatment to allow them to become productive citizens upon release.

(4) Incorporation of a mechanism that allows youths who have demonstrated conformity to social norms and mores a way to expunge their criminal record that "presents an all but insurmountable bar to economic opportunity and might well prove a lifelong handicap" (Corriero, 2006, p. 172) because of the sanctions imposed on individuals with a felony conviction; especially when many juvenile offenders' convictions are on first offenses and only because of legislative transfer laws required the juvenile to be adjudicated as such without consideration of his/her complicity in the offense. After all, "America is the land of [the] second chance and when the gates of prison open, the path ahead should lead to a better life" (President George W. Bush, as cited in Corriero, 2006, p. 171).

(5) Passing legislation that empowers judges with the flexibility to tailor dispositions to each individual juvenile.

> We can improve a juvenile justice system's response to delinquent offenders by providing judges in both the juvenile and criminal courts with authority to impose graduated sanctions through a continuum of treatment alternatives that include immediate intervention, intermediate sanctions, community-based alternatives as well as incarceration. Laws that require offense-based sanctioning mandating minimum periods of incarceration based on what the offender has done, rather than on what he is willing and capable of doing, emphasize punishment and incapacitation over rehabilitation. Such legislation is inconsistent with a system that requires flexibility to accommodate the individuality and potential of juvenile offenders. (Corriero, 2006, p. 171)

(6) Establishing a specialized "Youth Part" section within all adult criminal courts that is responsible for hearing all cases of juveniles transferred – regardless of mechanism – to the adult

criminal court for adjudication. This will provide consistency for the offender and help establish the social bond necessary between judge and juvenile needed for rehabilitation and effective disposition. A youth part will also allow the judge to become a specialist in his field, which in turn will ultimately improve efficiency in case management. To assist in this, Judge Corriero (2006) suggests, if funding is available, to create within the court a position “resource coordinator” (p. 158) that would be responsible for staying abreast of and evaluating all public and private programs available for treating juvenile delinquents; a “court liaison” (p. 159) that would work within the child welfare and school agencies to help facilitate the placement of the offender back into theses institutions; to establish a information network that allows real-time data exchange between schools, social service agencies, and the court that would allow the judge to make timely decisions; and the creation of appropriate court rooms that can accommodate all the necessary parties required on a juvenile case. Additionally, the court room should have appropriate holding facilities that are designed with the adolescent psyche in mind; not the holding cells with solid iron doors and open communal toilets that are so common for adult offenders.

(7) Finally, legislatures need to create a secure metal health facility that is under the control of the court to provide treatment for offenders that are deemed too dangerous to public safety that they cannot be released. Currently, many jurisdictions do not have adequate in-patient psychiatric treatment within prisons to address the underlying mental conditions that contribute to offending.

These changes, if implemented in all juvenile jurisdictions, would, according to Judge Corriero, ultimately lead to reduction of crime in the present and the future, i.e. when juvenile

offenders are released as adults into society, through the treatment of youths with dignity and respect while still incorporating firmness and responsibility to society for their involvement in crime. However, Judge Corriero does conclude his book with one caveat to policy makers:

> The goal of any comprehensive plan should be the prevention of juvenile crime. Courts only get involved with a juvenile after a crime has been committed. "Once a juvenile is apprehended by the police and referred to the juvenile court, the community has already failed; subsequent rehabilitative services, no matter how skilled, have far less potential for success than had they been applied before the youth's overt defiance of the law" [footnotes omitted]. (2006, p. 177)

Discussion

Paraphrasing Franklin E. Zimring, Steinberg and Schwartz (2000/2003) wrote:

> Few issues challenge a society's ideas about both the nature of human development and the nature of justice as much as serious juvenile crime. Because we neither expect children to be criminals nor expect crimes to be committed by children, the unexpected intersection between childhood and criminality creates a dilemma that most of us find difficult to resolve. (p. 9)

This dilemma is the heart of the debate over the juvenile justice system. Indeed, America has traditionally taken two distinct approaches regarding the juvenile justice system: (1) protection of "misguided" children, thus mitigating the seriousness of their offenses, or (2) punishing "criminally responsible" children, thus categorizing children as something they are not – an adult. These two options were seen as the only possible courses of action. However, as the

reviews showed, there is another course; a course that needs to be taken if America truly wishes to seek justice in its treatment of juvenile delinquents; a treatment that would satisfy the demand for retribution while still validating the worth of the juvenile and empowering him/her to become productive members of society. This course of action is to eliminate the dichotomy of a juvenile being considered either child or adult and to establish laws that are harmonious with the nature of humans and in accord with the scientific literature. A three classification scheme should be used: child, adult, or *adolescent*. Treating juveniles in accordance with their nature, i.e. as adolescents, is paramount to seeking justice. Aristotle wrote his *Treatise on Rhetoric* circa 367 BC, in which he described the nature of the adolescent youth. Aristotle's description holds true today; as verified by what the social scientists discussed above noted about adolescence.

> In terms of their character, the young are prone to desires and inclined to do whatever they desire… And they are impulsive and quick-tempered and inclined to follow up their anger [by action]. And they are unable to resist their impulses; for through love of honor they cannot put up with being belittled but become indignant if they think they are done a wrong. And though they love honor, they love victory more; for youth longs for superiority, and victory is a kind of superiority…. And they are sensitive to shame; for they have been educated only by convention and do not yet understand other fine things…. For they live more by natural character than by calculation, and calculation concerns the advantageous, virtue the honorable. *And more than other ages of life they are found of friends and eager for companions* [emphasis added], because they enjoy living with others and do not yet judge anything on the basis of advantage; thus they do not judge friends that way. *And all the mistakes they make are in the direction of excess and vehemence* [emphasis added]…; for they do "everything too much": they love too

> much and hate too much and all other things similarly. And they think they know everything and strongly insist on it; for this is the cause of their doing everything too much. *And the wrongs they commit come from insolence, not maliciousness* [emphasis added]…. [A]nd they are fond of laughter and, as a result, witty; for wit is cultured insolence. Such, then, is the character of the young. (Aristotle c. 367 BC, trans. by George A. Kennedy, 1991, as cited by Corriero, 2006, pp. 25-27)

Just as in Aristotle's time, so too is it now that the understanding of youthful nature is necessary for comprehending the actions taken by youth, and by extension, their motivation for engaging in delinquent behavior. In order to truly establish a juvenile justice system that will function to rehabilitate delinquents while holding them accountable for their actions while at the same time preparing them to function in society as productive citizens – the true meaning of justice for juveniles – court, law enforcement, and correction personnel, along with those responsible for creating policy and law, and treating juveniles, must function from a perspective that is consistent with the nature of the youth. Currently, most systems in place are failing to do so; as such, the juvenile justice system is in a state of turmoil; that is the juvenile justice system is currently failing America's youth, and ultimately, every American citizen. From the review of the literature, I can reach no other conclusion. This is the state of the juvenile justice system – or rather the 51 separate juvenile justice systems that collectively make up the American juvenile justice system – in the United States.

I turn now to my original question: Is the American juvenile justice system entering into a new epoch by allowing jury trials for juvenile court proceedings? No. The introduction of jury trials at the juvenile court level, and not just the criminal court level, is just the natural extension

of legislative change, based off public and media (incorrect) perception of juvenile crime in society. Jury trials at the juvenile level still fall within a Punitive Period categorization. Indeed, I contend that jury trials for juveniles will actually increase punitive sanctions on juvenile offenders – see previous discussion above under *Youth on Trial*. This is something that America as a just society should not allow. The juvenile justice system, an American created institution, needs to be strengthened; we cannot just rest on our laurels. What started out as a noble concept has eroded through political ideology based on *pathos* and not *logos*. We need to return to dealing with our youth based on *logos*. Perhaps Barry A. Krisberg (2005) sums this argument up best:

> Most of us would not tolerate existing juvenile justice policies (e.g., trying very young children in criminal courts or mandatory penalties) if these were directed at our own children. Most of us would seek a system that was compassionate, that tried to understand our child as an individual, and that sought to restore that youth to productive citizenship. We seem to tolerate a punitive, second class justice system because we falsely believe that this social control apparatus is designed for other people's children. However, *only when our communities embrace all young people as out own children can we even hope to achieve a reality of juvenile justice that is worthy of our nation's best ideals* [emphasis added]. (p. x)

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Appendix A

Several criminological, psychological, and sociological theories that were used throughout the reviewed books are listed here. This listing is intended as a quick reference only to different explanations for delinquency. Only the general concept of the theory has been described; applicability and validity of each theory will not be evaluated.

Culture Conflict Theory – This theory focuses on conduct norms of a social group. Juveniles are culturalized to their social group, thus delinquency occurs when what is acceptable to their social group is not acceptable to the norms of the dominant social group; i.e. the delinquent culture has a set of values that condone or permit violations of the law.

Differential Association Theory – This theory states that delinquency is learned through interaction with other delinquents or criminals.

Labeling Theory – This theory is also known as **Social Reaction Theory** and focuses on behaviors labeled as deviant or criminal. When a juvenile engages in an action that society reacts to by labeling deviant, the juvenile starts to incorporate a persona of being a deviant, even if the juvenile never held a self-view of being deviant before, and starts acting in more a deviant manner. In essence, the juvenile starts living the life of what he has been labeled by society in a sort of self-fulfilling prophecy.

Liberation Theory – This theory focuses on gender. Increase in crime by females is due to the removal of suppressive environments, i.e. liberation, which traditionally categorized male/female roles. Female physicality and assertiveness have become the norm, even glorified in the media,

business, and domestic environments, and as such, females have become more aggressive in obtaining these goals. In essence, females have always had predisposed criminal tendencies, but these tendencies were kept "in check" by the repressive environments females were subjected to; now liberated from repressive environments and empowered, these predisposed criminal tendencies are no longer in check and are allowed to grow, often taking on characteristics / appearances that have been traditionally associated with males.

Mental Illness Theory – This theory focuses on mental illness as the underlying factor for delinquency and claims that mental illness in juveniles has a greater role than that for adult offenders. Mental illness does not refer to an insanity plea, but claims disorders and dysfunctions acknowledged in the *Diagnostic and Statistical Manual of Disorders* – in particular: Attention-Deficit / Hyperactivity Disorder (ADHD), Conduct Disorder (CD), Posttraumatic Stress Disorder (PTSD), substance abuse, and learning disorders – cause diminished judgment. Juveniles with diminished judgment engage in criminal acts since they cannot comprehend their actions nor can they comprehend long term consequences of their actions; as compared to juveniles without mental illnesses.

Script Theory – This theory is a subset of the social interactionist theory (see below). Adolescents develop "scripts" on how to act from their experiences interacting with and observing different environments. The scripts are then filed away in their subconscious. When certain cues are observed, the adolescent responds automatically, acting out the script; thus, depending on how the script was composed, the subconscious actions of may or may not be delinquent.

Social Control Theory – This theory is also known as **Social Bonding Theory** and focuses on the circumstances that prevent delinquency, rather than motivations for delinquency. Juveniles that do not engage in delinquency are bonded to a life within the law through attachment, involvement, commitment, and belief in a social institution, e.g. the family unit. Juveniles that lack bonds to another individual or social institution are thus more likely to engage in delinquent behavior.

Social Disorganization Theory – This theory states that delinquency is a result of the community that the juvenile lives in. Communities that are "disorganized" because of high poverty rates, ethnic heterogeneity, and residential mobility will have higher rates of juvenile delinquency because the environment leads to the breakdown of traditional institutions – such as the family and church – that provide support to the juvenile to withstand the negative peer influences of other delinquents that live within the community.

Social-Interactionist Theory – This theory states that delinquency is a result of decisions made by the juvenile that are derived from the interaction between motivation and social environment. In any situation, norms of what is expected, combined with the opportunity to commit crime, the individuals present (and their perceived status and threat level), and the controls in place (e.g. police, parents, video, etc.) all combine to make the social environment and affect how a juvenile will respond. The cost to the juvenile and how (s)he feels combine to form motivation. Peer pressure and perceived opportunities available are (perhaps) the greatest underlying factors within this theory that cause juveniles to act in a delinquent manner.

Structural and Subcultural Theory – This theory is also known as **Anomie Theory** or **Strain Theory** and looks at the interplay in society between aspirations (goals, which are normally tied

to status) and opportunities (institutionalized means to acquire goals). Delinquency occurs when one does not have the legal (institutionalized) means to obtain his/her goal and turns to an alternate mechanism of crime to obtain status.

Transitory Phenomena Theory – This theory states that delinquency is a naturally occurring part of life; that is, delinquency is intrinsic to adolescence. Delinquent behavior peaks around 15-18 years of age and then naturally subsides for the majority of adolescents as they transition into adulthood (usually considered 21-24 years of age).