

ISSUE

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Should Juvenile Courts Be Abolished?

YES: Barry C. Feld, from "Juvenile Justice in Minnesota: Framework for the Future," Council on Crime and Justice (2007)

NO: Vincent Schiraldi and Jason Ziedenberg, from *The Florida Experiment: An Analysis of the Impact of Granting Prosecutors Discretion to Try Juveniles as Adults*, The Justice Policy Institute (1999)

Learning Outcomes

After reading this issue, you will be able to:

- Discuss the *parens patriae* model of juvenile justice.
- Discuss the differences between a "rehabilitative" juvenile court, a juvenile version of a criminal court, and an integrated criminal court.
- Discuss whether U.S. juvenile courts have been characterized by a failure of implementation and/or conception.
- Discuss the characteristics of juvenile offenders who are transferred to adult criminal court.
- Discuss the risks that young offenders face in adult jails.

ISSUE SUMMARY

YES: Law professor Barry C. Feld contends that creating a separate juvenile court system has resulted in unanticipated negative consequences for America's children and for justice.

NO: Vincent Schiraldi, director of the Justice Policy Institute, and researcher Jason Ziedenberg maintain that moving thousands of kids into adult courts is unnecessary, harmful, and racist.

In the 1890s Judge Ben Lindsey, with the help of socially prominent and active citizens and their wives, helped to establish the juvenile court movement. His work was hailed as innovative and compassionate. Horror tales and news exposés of the dreadful treatment of America's youngsters in adult prisons, as well as in the adult courts, which often processed them as if they were common criminals, were well-known. Progressive elements among the rich and the intellectuals maintained something had to be done. They felt that child criminals and criminal children needed help, guidance, love, an opportunity for a second chance, and education, not punishment, humiliation, degradation, additional undeserved pain, and torment.

Soon states around the country had separate facilities for treating juvenile offenders as well as separate facilities for incarcerating them. In some areas judges were called "Masters" and were encouraged to be kind and sympathetic, not gruff, procedural, and legalistic. *Parens patriae* (state as parents) became the role of the juvenile court procedures. Guilt or innocence was not the issue, nor was "punishment." The goal was to determine through case studies what the needs of referred youngsters were, and then, if necessary, to provide for these needs through a juvenile facility. Such needs could include food, shelter, education, separation from terrible families or neighborhoods, separation from peers who smoked, and so on.

Since the function of the proceedings was to ascertain and provide needs, legalities such as determining guilt or innocence or even a specific sentence were ignored. Often youngsters who were not initially charged with criminal offenses but were status offenders were sentenced to juvenile facilities. Status offenses included truancy, running away from home, hanging out on the street, and sassing teachers or social workers. Some more progressive states had a classification system distinguishing such offenders. These terms included *CINS* (children in need of supervision) and *PINS* (persons in need of supervision). However, often they were housed under the same administrative roof as youngsters who were charged with more serious offenses.

The age range for juveniles varied from state to state; some classified juveniles as anyone who is 19 or younger, and most demarcated children from adults at age 18 or 16. Many juvenile facilities, though, would keep offenders until they were 21 "for their own good." Since the purpose of the juvenile system was to "help" youngsters, a 12-year-old who had been truant could be held in custody until he was 18 or even 21. Until Supreme Court decisions in the 1960s provided some basic constitutional rights, children were not entitled to an attorney, could not appeal their sentences, and could be held incommunicado indefinitely.

Yet the juvenile courts were almost universally considered progressive. Eventually, some had second

thoughts. It was theorized that the real function of the courts and juvenile system was to "Americanize" the children of immigrants and to more smoothly pipe marginal American children (poor white ethnics and blacks) into mainstream industrial society. According to this perspective, the juvenile court system, along with required public school education, functioned as socializing agencies more than as helping ones. Meanwhile, word slowly leaked out that many juvenile reformatories were quite different from what many people thought. Treatment was often non-existent, and a variety of cruelties were typical.

As we enter the twenty-first century still carrying the weight of a very conservative, get-tough-with-all-delinquent-kids mode, to some the question becomes, which is the lesser of two evils, juvenile courts or adult courts for criminal children? The issue is in many ways a very sad one for the protagonists. Barry C. Feld, who has worked to help troubled youth for many years, reluctantly advocates abolishing juvenile courts. He is convinced that trying to salvage the existing system will only enable the get-tough side to do even worse things to delinquents. Vincent Schiraldi, who is arguably America's top advocate for the compassionate treatment of children, is convinced that additional transfers of juveniles into adult courts will be a disaster. He and coauthor Jason Ziedenberg draw from empirical research to document their concerns.



YES 

Barry C. Feld

Juvenile Justice in Minnesota: Framework for the Future

Over the past four decades, judicial, legislative, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for youths that provides neither therapy nor justice. The Supreme Court in *Kent v. United States*, 383 U.S. 541, 556 (1966), observed that "juvenile justice" is an oxymoron: "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." Since the Supreme Court in *In re Gault*, 387 U.S. 1 (1967) mandated some procedural safeguards in delinquency adjudications, there has been a substantive and procedural convergence between juvenile and criminal courts. But even as delinquency sanctions have become more punitive, juvenile courts provide a procedural regime under which few adults charged with a serious crime would consent to be tried.

At the beginning of the twentieth century, economic modernization fostered rapid industrialization, immigration, and urbanization. Social changes altered family structure and function and promoted a newer cultural construction of childhood as a period of innocence and vulnerability. The Progressive movement emerged to address the host of problems associated with social change, combined their belief in state power with the newer conception of childhood, and enacted a number of child-centered reforms—juvenile courts, child labor laws, welfare laws, and compulsory school attendance laws (Feld, 1999). During this period, positive criminology supplanted classical explanation of crime as the product of free-will choices. Reformers attributed criminal behavior to deterministic forces, deemphasized individual responsibility, employed medical analogies to treat offenders, and focused on efforts to reform rather than to punish them. Juvenile courts melded the new vision of childhood with new

theories of social control, introduced a judicial-welfare alternative to the criminal justice system, and enabled the state, as *parens patriae*, to monitor ineffective child-rearing. Juvenile courts emphasized reform and rehabilitation, used informal procedures, excluded lawyers and juries, conducted confidential hearings, and adopted a euphemistic vocabulary. Judges imposed indeterminate and non-proportional sentences to secure juveniles' "best interests" and future welfare rather than to punish them for their past offenses.

Minnesota joined the nationwide movement and enacted its first juvenile court legislation effective June 1, 1905. Initially, the law to "regulate the treatment and control of dependent, neglected, and delinquent children" applied only to children under the age of 17 years. Reflecting the breadth of legislative concerns, the original act defined a "delinquent child" as any child who

violates any law of this state or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who without just cause and without the consent of its parents or custodian absents itself from its home or place of abode; or who is growing up in idleness or crime; or who knowingly frequents a house of ill fame; or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated; or who frequents any saloon or dram shop where intoxicating liquors are sold, or who patronizes or visits any public pool room or bucket shop; or who wanders about the streets in the night time without being in any lawful business or occupation; or who habitually wanders about any railroad yards or tracks or jumps or hooks on to any moving train or enters any care or engine without lawful authority; or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is

guilty of immoral conduct in any public place or about any school house.

The legislation's purpose clause further provided that it should be "liberally construed" to ensure "That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child to be placed in an approved family home and become a member of the family by legal adoption or otherwise." Amendments to the Juvenile Code effective January 1, 1918, raised the age of delinquency jurisdiction to children under 18 years of age, closed delinquency proceedings to the public, provided confidentiality for court records, and expanded juvenile courts' purpose to ensure that they "act upon the principle that to the child concerned there is due from the state the protection and correction which he needs under the circumstances disclosed in the case. . . ."

In 1967, the Supreme Court in *In re Gault* concluded that most states' juvenile court procedures violated the Constitution and required a substantial overhaul. *Gault* identified two crucial disjunctions between juvenile justice rhetoric and reality: the theory versus the practice of rehabilitation and the differences between the procedural safeguards available to criminal defendants and to delinquents. The Court required juvenile courts to use "fundamentally fair" procedures which included advance notice of charges, a fair and impartial hearing, the assistance of counsel, an opportunity to confront and cross-examine witnesses, and the privilege against self-incrimination. Although the Court based delinquents' rights to notice, counsel, and confrontation on generic notions of due process and "fundamental fairness" under the Fourteenth Amendment rather than the specific requirements of the Sixth Amendment, it explicitly relied on the Fifth Amendment to grant delinquents the privilege against self-incrimination. As a result, juvenile courts' proponents no longer could characterize delinquency adjudications as either "non-criminal" or "non-adversarial." In subsequent decisions, the Court further equated criminal and delinquency proceedings. In *In re Winship*, 397 U.S. 358 (1970), the Court required states to prove delinquency "beyond a reasonable doubt," rather than by the lower, civil "preponderance of the evidence" standard of proof. The Court reasoned that while *parens patriae* intervention may be a laudable goal to deal with miscreant youths, "that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were

he an adult." 397 U.S. at 367. However, in a plurality decision that produced five separate opinions, the Court in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), declined to grant delinquents all of the procedural safeguards of adult criminal trials. Although the Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), previously had held that the Sixth Amendment right to a jury trial applied to state criminal proceedings, *McKeiver* insisted that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label." 403 U.S. at 541. *McKeiver* held that the constitution did not require jury trials in state delinquency trials because "due process" required only "accurate fact-finding," which a judge could do as well as a jury. The *McKeiver* plurality denied that delinquents required protection from the State, invoked the imagery of the paternalistic juvenile court judge, ignored the jury's crucial role in upholding *Winship's* standard of "proof beyond a reasonable doubt," and rejected concerns that juvenile courts' closed hearings could prejudice the accuracy of fact finding. *McKeiver* emphasized the adverse impact that jury trials could have on the informality, flexibility, and confidentiality of juvenile court proceedings.

Gault and its progeny transformed the Progressives' conception of the juvenile court as a social welfare agency into a second-class criminal court for juveniles. Progressive reformers intervened on the basis of a child's "real needs" and viewed proof of a crime as secondary. Although *McKeiver* denied delinquents the right to a jury trial, *Gault* and *Winship* imported the adversarial model, attorneys, the privilege against self-incrimination, and the criminal standard of proof. By adopting some criminal procedures, the Court shifted the focus of the juvenile court from "real needs" to proof of criminal acts and formalized the connection between criminal conduct and coercive intervention. Although the Court did not intend to preclude juvenile courts' rehabilitative agenda, judicial and legislative changes have fostered a procedural and substantive convergence with criminal courts. Constitutional theory, states' delinquency laws, and actual practices continue to provide juveniles with "the worst of both worlds." Youths receive fewer and less adequate procedural safeguards than do adult criminal defendants, especially the right to a jury and access to effective assistance of counsel. Despite these deficiencies, once states provided delinquents with even a semblance of procedural justice, they more readily departed from a rehabilitative model and adopted "get tough" policies. Although racial inequality provided the initial impetus for the Court's focus on juveniles'

procedural safeguards, granting delinquents some rights legitimized the increasingly punitive, "get tough" penalties that now fall most heavily on minority offenders (Feld, 2003).

Since 1980, the Minnesota legislature and Supreme Court have adopted laws and rules of procedure that have fostered a criminalizing of juvenile justice. On the one hand, the explicit endorsement of punishment as an element of juvenile sentencing policy in Minnesota repudiates juvenile courts' original postulates that children should be treated differently than adults and contradicts *McKeiver's* assumptions that delinquents require fewer procedural safeguards than do adult criminal defendants. At the same time, many juveniles do not receive even the limited procedural safeguards that *Gault* envisioned (Feld, 1989; 1993). Although juvenile courts increasingly converge with criminal courts, Minnesota does not provide youths with either procedural safeguards equivalent to those of adult criminal defendants, or with special procedures that more adequately protect them from their own immaturity. Instead, state laws and judicial opinions place juveniles on an equal footing with adult criminal defendants when formal equality acts to their detriment, and employ less effective juvenile court procedures when they provide the state with an advantage (Feld, 1984; 1989; 1995). . . .

In 1983, the Minnesota Supreme Court replaced an urban- and rural-county patchwork of rules with one set of statewide rules to govern juvenile court proceedings (Feld, 1984). The new rules responded to *Gault's* requirements for greater procedural formality and marked a further criminalizing of juvenile courts. However, the Court made a number of policy decisions to provide delinquents with less adequate safeguards than those afforded criminal defendants. In every instance in which the Court had an opportunity to recognize youths' immaturity and vulnerability and to provide them with more effective procedural safeguards than those afforded criminal defendants, the Court treated juveniles just like adults. Conversely, in every instance in which the court had an opportunity to treat delinquents at least as well procedurally as criminal defendants, it adopted juvenile court procedures that provided less effective safeguards (Feld, 1984). As a result, juveniles in Minnesota continued to receive "the worst of both worlds." For example, when *Gault* granted delinquents the privilege against self-incrimination, the procedural safeguards developed in *Miranda v. Arizona*, 384 U.S. 436 (1966) also became available to juveniles. Allowing juveniles to waive their *Miranda* rights and their right to counsel under the adult standard of "knowing, intelligent, and voluntary" under the "totality of the circumstances"

is an example of formal equality producing practical inequality. Developmental psychologists long have recognized that juveniles—especially those younger than 16 years of age—lack the understanding, maturity, judgment, experience and competence to exercise legal rights on a par with adults (Feld, 2006). Despite youths' limitations, the Minnesota Court repeatedly has rejected appeals for additional procedural safeguards, such as the presence of a parent during interrogation, and instead endorsed the adult waiver standard (Feld, 1984; 2006). On the other hand, the legislature and Court adhere to *McKeiver* and continue to deny delinquents the right to a jury trial that adult criminal defendants enjoy. The denial of a jury right affects many other aspects of juvenile justice administration as well (Feld, 1984; 2003). Trial judges and juries apply *Winship's* standard of proof "beyond a reasonable doubt" differently and, as a result, it is easier for the state to convict delinquents in juvenile courts than it is to convict adults in criminal courts (Feld, 2003). Despite that, the Minnesota Supreme Court allows the state to include those procedurally deficient delinquency convictions in the criminal history score to enhance the sentences of adult offenders. *State v. McFee*, 721 N.W.2d 607 (MN, 2006). The *McKeiver* plurality denied delinquents a jury trial because it feared that juries would bring to the juvenile system "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." 403 U.S. 528 (1971). Illustrating the punitiveness and procedural schizophrenia of juvenile justice, the 1986 legislature opened delinquency hearings to the public of juveniles 16 years of age or older and charged with a felony level offense while simultaneously denying them the right to a jury trial. Minn. Stat. § 260.155 Subd. 1(c) (1986).

Although *Gault* likened the seriousness of a delinquency proceeding to a felony prosecution, Minnesota's use of the adult waiver standard—"knowing, intelligent, and voluntary" under the "totality of the circumstances"—to gauge juveniles' waivers of the right to counsel has denied many juveniles effective assistance of counsel (Feld, 1989; 1993). Research conducted in the late-1980s reported that a majority of juveniles who appeared in juvenile courts lacked the assistance of counsel. One-third of juveniles removed from their homes and nearly a quarter of delinquents confined in institutions were not represented by counsel at their delinquency adjudications (Feld, 1989; 1993). Moreover, despite statewide laws and procedural rules, juvenile justice administration varied widely throughout the state. Judges in different locales appointed counsel, detained, and sentenced youths very differently and provided "justice by geography" (Feld,

1991; 1993). Judges in urban counties appointed counsel for delinquents more than twice as often as did rural judges; the majority of youths in rural counties charged with felony offenses lacked representation (Feld, 1991; 1993).

In addition to geographic disparities, research reports substantial racial disparities in juvenile justice administration (Feld, 1989; 1993). Both nationally and in Minnesota, studies consistently report racial disparities in detention, sentencing, and waiver decisions by juvenile court judges (Feld, 2003). After controlling for the seriousness of the present offense and prior record, juvenile court judges are more likely to transfer minority youths than similarly situated white youths to criminal court (Feld, 2003). Empirical evaluations of juvenile court delinquency sentencing practices report two consistent findings. First, the ordinary principles of the criminal law—present offense and prior record—explain most of the variance in how juvenile court judges sentence delinquents. Because the state defines delinquency jurisdiction based on a child committing a criminal act, judges' sentencing practices focus primarily on the seriousness of the present offense and prior record. Secondly, after controlling for offense variables, juvenile courts consistently produce racial disparities in pre-trial detention and sentencing (Feld, 1999; 2003). Black youths engage in higher rates of violent offenses and use of firearms than do white juveniles and this accounts for some of the racial differentials in sentencing (Feld, 1999). Part of the differences in rates of offending by race is attributable to differential exposure to risk factors associated with crime and violence—poverty, segregation and cultural isolation in impoverished neighborhoods, lack of access to health care, and the like—and a “culture of the street” within some urban settings which exacerbates youth violence (Feld, 1999; 2003). Regardless of the causes of crime, no society and, especially the law-abiding victims within the affected communities, can tolerate youth violence. But, justice system responses may aggravate the cumulative disadvantage of minority youths. Research consistently reports that even after controlling for variables such as the seriousness of the offense and prior record, judges detain and sentence minority youths at higher rates than they do white youths (Feld, 1999; 2003). In a society marked by economic and racial inequality, minority youths are most “in need” and therefore most “at risk” for juvenile court intervention. The structural context of juvenile justice places minority youths at a dispositional disadvantage. Urban juvenile courts are procedurally more formal and sentence all delinquents more severely. Urban courts have greater access to detention facilities and juvenile

court judges sentence detained youths more severely than those who remain at liberty. Because proportionally more minority youths live in urban counties, the geographic and structural context of juvenile justice administration interacts with race to produce minority over-representation in detention facilities and correctional institutions (Feld, 1989; 2003). The Minnesota Council on Crime and Justice (2006) reported that the Hennepin County Juvenile Detention Center detained disproportionately more black juveniles for all forms of violations—new offenses, warrants, and arrest and detention orders—and for longer periods than their white counterparts. The Minnesota Supreme Court Task Force on Racial Bias in the Judicial System (1993) reported substantial disparities in Minnesota's juvenile justice system in rates of detention and out-of-home placement of minority youths compared with white juveniles charged with similar offenses and prior records. The Race Bias Task Force also reported substantial geographic disparities in detention and sentencing that compounded racial disparities.

In 1995, the Minnesota legislature enacted a comprehensive package of law reforms that fostered even greater substantive and procedural convergence between juvenile and criminal courts (Feld, 1995). In the early-1990s, increases in youth violence and homicide, especially within the urban black male population, provided impetus nationwide and in Minnesota to “get tough” and “crack down” on juvenile crime (Feld, 1999; 2003). The 1995 amendments used the offense criteria of the adult sentencing guidelines to make it easier to waive juveniles to criminal court and excluded from juvenile court jurisdiction youths 16 years of age and older charged with first-degree murder (Feld, 1995). Once the state tries youths in criminal court, judges sentence them as if they were adults and impose mandatory sentences of life imprisonment on youths as young as 14 or 15 years of age without any recognition of youthfulness as a mitigating factor. *State v. Mitchell*, 577 N.W.2d 481 (MN. 1998). Most significantly, the legislature enacted a blended sentencing law—Extended Jurisdiction Juvenile (EJJ) prosecution—through which the state tried youths in juvenile court with adult criminal procedural safeguards including the right to a jury trial and imposed both juvenile dispositions that continued until age twenty-one and a stayed adult criminal sentence (Feld, 1995). Although the legislature intended EJJ to provide judges with a stronger juvenile treatment alternative to waiver, the law instead had a substantial “net-widening” effect; judges continued to waive the same numbers and type of youths that they had transferred previously and revoked the probation and executed the adult sentences of nearly one-third of EJJ youths, many of whom were

younger and first-offenders (Podkopacz and Feld, 2001). Most of those youths, judges previously had decided should not be waived and many of them had their probation revoked for technical violations rather than new offenses. In addition, the legislation expanded and extended the use of delinquency convictions in the criminal history score to enhance the sentences of adults. As a result, waived juveniles and young adult offenders may receive substantially longer sentences based on delinquency convictions obtained without the right to a jury trial (Feld, 1995; 2003). In addition to increasing juvenile courts' sentencing powers, the new legislation also strengthened provision for appointment of counsel (Feld, 1995). Although the Minnesota legislature and Supreme Court long had recognized that only half of juveniles received assistance of counsel, earlier proposals to expand delivery of legal services foundered. The 1995 code required judges to appoint counsel for all youths charged with a felony or gross-misdemeanor offense or in which out-of-home placement is contemplated (Feld, 1995). Despite these changes, rates of representation of juveniles remain lower than those of adults charged with comparable offenses. And, the legislature again declined to provide delinquents charged with crimes the right to a jury trial.

The juvenile court in Minnesota today is a very different one from that envisioned a century ago. There has been a substantial convergence between the sentencing policies and procedures of the juvenile and criminal justice systems. And, in the contemporary juvenile court, youths continue to receive "the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." A study conducted by the Legislative Auditor of Minnesota's state-run institutions and largest private programs reported very high rates of recidivism and concluded that "Minnesota's most-used residential programs have shown a limited ability change entrenched criminal values and behavior patterns among juveniles" (Feld, 1995). Minnesota's legislation, judicial opinions, and juvenile justice practices emphasize the greater role of punishment. This is reflected in the juvenile code purpose clause, judges sentencing practices of ordinary delinquents, the greater use of the adult sentencing guidelines to structure prosecutorial decision-making, waiver and EJJ decisions, and the expanded role of delinquency convictions in the adult criminal history score (Feld, 1995). Notwithstanding *McKeiver's* fond hopes, juvenile courts' trials simply replicate those of criminal courts, albeit with fewer, less adequate procedural protections. The denial of a right to a jury trial affects every other aspect of juvenile justice administration—adherence to the criminal standard of "proof beyond a reasonable doubt," access to

and the performance of counsel, the timing of evidentiary hearings, and the like. Minnesota denies delinquents jury trials in an increasingly punitive juvenile justice system and then compounds that inequity when it uses those nominally rehabilitative sentences to extend terms of adult imprisonment. Finally, criminal courts sentence youths tried as adults without any formal recognition of youthfulness as a mitigating factor in sentencing. And all of these consequences fall disproportionately heavily on minority youth (Feld, 1999; 2003).

Confronted with Minnesota juvenile courts' punitive sentencing practices, Judge Gary Crippen, in *In re D.S.F.*, 416 N.W.2d 772 (Mn. Ct. App. 1987), posed three plausible policy options:

1. [T]he juvenile delinquency systems could be "restructured to fit their original [rehabilitative] purpose."
2. [W]e can . . . embrac[e] punitive dispositions as an acceptable and inherent part of delinquency proceedings, but call[] upon the Minnesota Legislature and the Minnesota Supreme Court to extend to accused juveniles all procedural safeguards guaranteed for adults in criminal cases. Most critically, we could assert the demonstrated need for jury trials in accusatory proceedings where juveniles may be incarcerated, and the additional need for representation by competent counsel in every case where a juvenile is faced with incarceration.
3. [W]e could call for dismantling a system that openly exacts from our younger citizens a sacrifice of liberties and gives in return a false promise to serve the best interests of those who come before it. The federal and state constitutions do not permit a criminal justice system without criminal procedural safeguards.

Two decades later, we face the same issues of procedure and substance against the backdrop of an even more punitive juvenile justice system in which youths continue "to receive the worst of both worlds." As long as juvenile courts operate in a societal context that does not provide adequate support and services for children in general, intervention in the lives of those who commit crimes inevitably will be for purposes of crime control, rather than for social welfare. Addressing the "real needs" of young people—social welfare, family assistance, health, housing, nutrition, education, segregation, and poverty—requires a public and political commitment to the welfare of children that extends far beyond the resources or competencies of any juvenile justice system.

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Vincent Schiraldi and
Jason Ziedenberg

➔ **NO**

The Florida Experiment: An Analysis of the Impact of Granting Prosecutors Discretion to Try Juveniles As Adults

"Anthony Laster is the kind of kid who has never been a danger to anyone. A 15-year-old, eighth grader with an IQ of 58, Anthony is described by relatives as having the mind of a five-year-old. Late last year, a few days after his mother died, Anthony asked another boy in his class at a Florida middle school to give him lunch money, claiming he was hungry. When the boy refused, Anthony reached into his pocket and took \$2. That's when Anthony ran smack into Palm Beach County prosecutor Barry Kirscher's brand of compassionless conservatism. Rather than handling the case in the principal's office, where it belonged, Mr. Kirscher decided to prosecute Anthony as an adult for this, his first arrest. Anthony spent the next seven weeks—including his

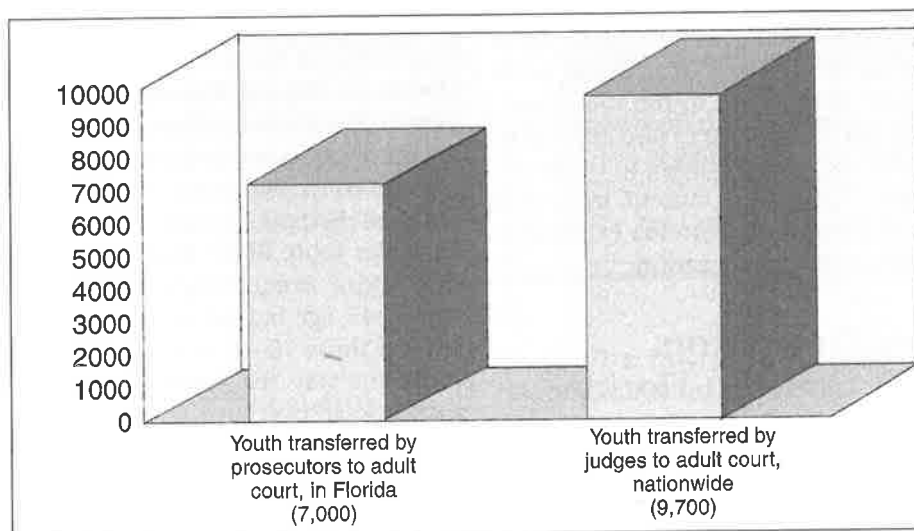
first Christmas since his mother died—in custody, much of it in an adult jail."¹

Introduction

Anthony Laster was one of 4,660 youth who Florida prosecutors sent to adult court last year under the wide ranging powers they enjoy with the state's direct file provisions. Florida is one of 15 states that allow prosecutors—not a judge—to decide whether children arrested for crimes ranging from shoplifting to robbery should be dealt with in the juvenile justice or criminal justice system.² While 43 states have changed their laws to make it easier for judges to send children into the adult criminal system

Figure 1

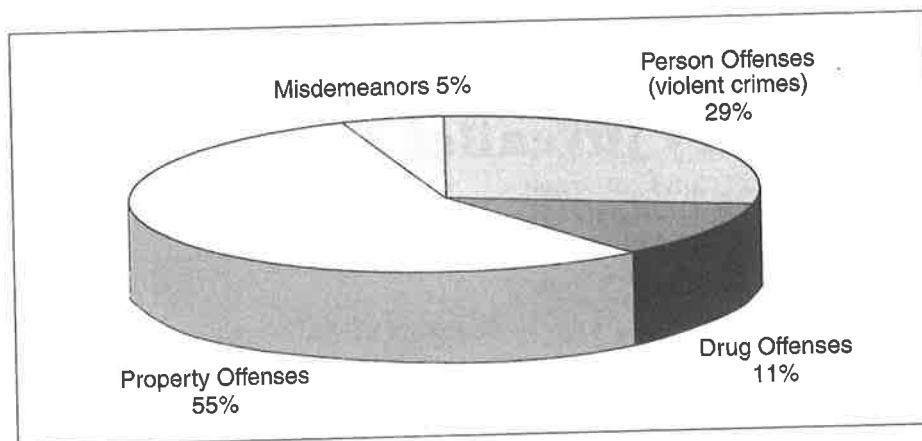
In 1995, Florida Prosecutors Rival Judges in the Rest of U.S. in Sending Youth to Adult Court



Source: The Urban Institute, 1998.

Figure 2

Most Youth Transferred by Prosecutors in Florida Were Charged With Non-Violent Offenses



Source: *Notre Dame Journal of Law, Ethics, and Public Policy* (1996).

since 1993, Florida is leading the nation in using prosecutors to make the decision to try children as adults. In 1995 alone (Figure 1), Florida prosecutors sent 7,000 cases to adult court nearly matching the number of cases judges sent to the criminal justice system nationwide that year.³

A juvenile crime bill currently being considered by the U.S. Congress (House-Senate Conference Committee) would give U.S. Attorneys even greater powers than those enjoyed by prosecutors in Florida.

The change in federal law would remove judges from the process of deciding which justice system would serve young people, and transfer that power to the sole discretion of prosecutors. The Justice Department also appears to support giving prosecutors expanded powers to try youth as adults in federal court.⁴ Given the current legislative drive, it is worthwhile to examine the Florida experience to see what the future will hold for the nation.

Profile: Who Are Prosecutors Sending to Adult Court in Florida?

I. Offense Category

When prosecutorial waiver was introduced in 1981, the percentage of delinquency cases transferred to adult court in Florida soared from 1.2% to nearly 9% by 1987.⁵ In fiscal year 1997-98, 6,425 of the 94,693 cases disposed of by judicial processing in Florida resulted in transfer to adult court. While these waiver provisions were originally designed to ensure that violent juvenile offenders were

being detained, a 1991 study of two representative Florida counties showed that only 28% of the youths prosecutors waived to adult court were for violent crimes.⁶ More than half (55%) of the youths prosecutors sent to adult court were charged with property offenses that involved no violence, and fully 5% were tried as adults for misdemeanors (Figure 2). Almost a quarter of the cases waived were first-time, low-level offenders.⁷

II. Disproportionate Minority Confinement

The most striking feature of Florida's transferred youth population profile is the extent to which minority youth are overrepresented in the ranks of the youth being referred to adult court. One study conducted by the Florida Department of Juvenile Justice found that black youths were 2.3 times more likely than white youth to be transferred in Florida.⁸ Even though non-whites account for 24% of the 10-17 age bracket in Florida, they currently represent 74% of those 10-17 held in the Florida prison system.⁹ "I think the way the system sets up programs shows some institutional bias," is the way one candid Florida prosecutor describes it.¹⁰

Policy Impact in Florida

I. Sentencing: Longer Terms for Youths in Adult Court?

While some have suggested that huge numbers of children are being held in adult facilities across the state, it is

not clear that youth going to adult court via prosecutorial waiver are serving long sentences. A study published in the *Notre Dame Journal of Law, Ethics and Public Policy* found that, of the youth who were incarcerated after disposition, half received short sentences, some shorter than they would have received in the juvenile justice system. The majority (54%) of those sentenced to prison were released within three years.¹¹ A 1998 survey of the Florida transferred population shows that a majority of youth prosecutors sent to adult court for property, drug and weapons offenses received jail sentences or probation terms well within the range of what could have been prescribed to them in the juvenile court.¹² The same study showed that in 1995, 61% of the youth found guilty in adult court were incarcerated, but only 31% were served prison terms.¹³

II. More Youths to Adult Jail and to Juvenile Detention

While it might be expected that prosecutorial waiver would reduce the number of youths being funneled into Florida's juvenile justice system, the opposite has been true. Between 1993 and 1998, the number of annual commitments to Florida's juvenile justice system increased by 85% despite its liberal use of waiver to adult court. Florida has the sixth highest incarceration rate for youth per 100,000 in the nation, and detains young people at a rate 25% greater than the national average.¹⁴ This happened during a time when the number of waiver cases was increasing, and the number of felony referrals to the juvenile justice system was decreasing. This is happening, despite the fact that youths waived to adult court are held before trial in adult jails, further slackening the numbers that would need to be held in juvenile detention. Rather than the happy prospect of devoting more resources in the juvenile justice system to fewer youths, the system has widened its "net of control" by committing youth for lower level offenses.¹⁵

Crime Control Impact

I. Recidivism: Adult Court Prosecution Increases Propensity for Crime

Quantitative: Studies and Data

A number of studies have shown that youth sent to adult court generally recidivate at a higher rate than they do if they are sent to the juvenile justice system. A series of studies in Florida have analyzed what happens to youth referred to adult court—90% of whom are referred there directly by a prosecutor. A study published in the journal

Crime and Delinquency showed that youth transferred to adult court in Florida were a third more likely to reoffend than those sent to the juvenile justice system.¹⁶ The transferred youths reoffended almost twice as fast as those who were sent to juvenile detention.¹⁷ Of those who committed new crimes, the youth who had previously been tried as adults committed serious crimes at double the rate of those sent to juvenile court.¹⁸ While a 1997 study by the same authors showed that property offenders were slightly less likely to recidivate when transferred to adult court, the authors note: "Once the effect of offense type was controlled, the logistic regression analysis indicated that transfer led to more recidivism. Moreover, the transferred youths who subsequently reoffended were rearrested more times and more quickly than were the non-transferee youth who reoffended regardless of the offense for which they were prosecuted . . . although property felons who were transferred may have been less likely to reoffend, when they did reoffend they reoffended more often and more quickly."¹⁹

JUVENILE OFFENDERS GENERALLY FOLLOW ONE OF THREE PATHS TO ADULT COURT

Judicial Waiver: *A juvenile court judge waives jurisdiction over the case after considering the merits of transfer for the individual youth.*

Legislative Exclusion: *A state legislature determines that an entire class of juvenile crimes should be sent to adult court automatically, usually serious and violent offenses.*

Prosecutorial Discretion: *A state or local prosecutor has the authority to file charges against some juveniles directly in adult court.*

Source: The Urban Institute, 1998

Qualitative: Interviews With Youths in Deep End Juvenile Programs

The same authors recently conducted in-depth interviews with fifty youths sent to prison by Florida prosecutors, versus fifty who were sent to a state "maximum risk" juvenile detention facility.²⁰ This study found that the youth themselves recognized the rehabilitative strengths of the juvenile justice system in contrast to the adult prison system.

Sixty percent of the sample sent to juvenile detention said they expect they would not reoffend, 30% said

they were uncertain whether they would reoffend, while 3% said they would likely reoffend. Of those expected not to reoffend, 90% said good juvenile justice programming and services were the reason for their rehabilitation. Only one of the youths in juvenile detention said they were learning new ways to commit crimes. Most reported at least one favorable contact with a staff person that helped them. As such, the juvenile justice system responses were overwhelmingly positive:

A: "This place is all about rehabilitation and counseling. . . . This place here, we have people to listen to when you have something on your mind . . . and need to talk. They understand you and help you."

B: "They helped me know how to act. I never knew any of this stuff. That really helped me, cause I ain't had too good a life."²¹

By contrast, 40% of the transferred youth said they were learning new ways to commit crimes in prison. Most reported that the guards and staff in prisons were indifferent, hostile, and showed little care for them. Only 1/3 of the youths in prison said they expected not to reoffend. Not surprisingly, the youths sent to prison by prosecutors responded in an overwhelmingly despondent and negative way:

C: "When I was in juvenile programs, they were telling me that I am somebody and that I can change my ways,

and get back on the right tracks. In here, they tell me I am nobody and I never will be anybody."

D: "In the juvenile systems, the staff and I were real close. They wanted to help me. They were hopeful for me here. They think I am nothing but a convict now."

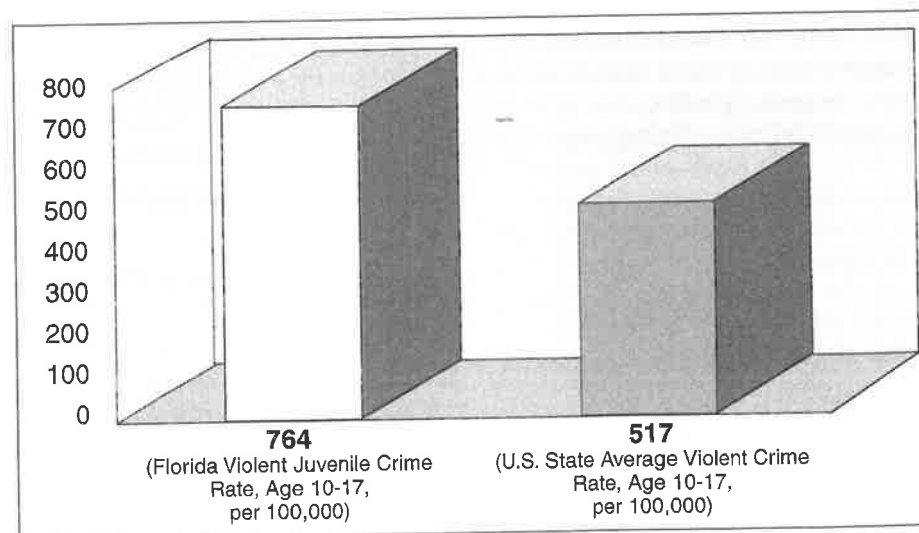
II. Crime Control Impact: Crime Rate

Despite having prosecutorial waiver on the books since 1981, Florida has the second highest overall violent crime rate of any state in the country, and that status has remained virtually unchanged throughout the 1990s.²² Florida's violent juvenile crime rate is fully 48% higher than the national average (Figure 3).²³

Though Florida leads the nation in using prosecutorial waiver, the other 14 states which allow states attorneys discretion to send youth to criminal court do not fare much better. Of the 15 states that currently employ prosecutorial waiver provisions, five (Florida, Arizona, Massachusetts, the District of Columbia and Louisiana) are among the ten states with the highest violent crime arrest rate (age 10-17). While the rest of the nation enjoyed a decline in juvenile crime between 1992 and 1996, five states that employ prosecutorial waiver—Arkansas, Nebraska, Arizona, Virginia, and New Hampshire—actually experienced an increase in their violent juvenile crime rates.²⁴

Figure 3

Florida Has the Second Highest Violent Crime Rate in the Country,
48% Higher Than the National Average



The Risks Youth Face in Adult Jails

The children who prosecutors are sending to adult court in Florida face greater threats to their life, limb and future when they enter Florida's adult jail and prison systems. These well-documented risks affect both the youth who are convicted in adult court, and those (like Anthony Laster) who are merely being held in pre-trial detention in jail, on crimes of which they may be exonerated.

One study has shown that youths are five times more likely to report being a victim of rape when they are held in an adult facility versus juvenile detention.²⁵ Youth in adult jails are also twice as likely to report being beaten by staff and 50% more likely to be attacked with a weapon. A Justice Department study done in 1981 showed that the suicide rate of juveniles in adult jails is 7.7 times higher than that of youth in juvenile detention centers.²⁶

The Will of the People?: Public Opinion and Prosecutorial Waiver

A survey published in the journal *Crime and Delinquency* found that a majority of Americans oppose changing federal law to allow for prosecutorial waiver of youth to adult court.²⁷ When asked, "Would you agree strongly, agree somewhat, disagree somewhat, or disagree strongly that federal prosecutors should have total discretion to try juveniles as adults for all felonies?" 56% of a nationally representative sample of Americans disagreed or disagreed strongly with the idea (41% agreed, and 3% said they had no opinion). Nearly twice as many respondents were strongly opposed to the idea compared to those who strongly supported it (29% vs. 16%).²⁸

Conclusion

As the United States Congress and states around the country weigh various approaches to curbing juvenile crime, the "Florida Experiment" of giving prosecutors broad discretion to decide whether juveniles should be tried as adults has come under serious consideration.²⁹ On almost every measure examined in this report—statewide crime control, individual recidivism, racial equity, and the youth's own perception of future offense behavior—the Florida system of prosecutorial discretion waiver was found wanting.

Notes

1. Schiraldi, Vincent. "Prosecutorial Zeal vs. America's Kids." *The Christian Science Monitor*, March 22, 1999.
2. The 15 states or jurisdictions which employ Direct File (prosecutorial discretion waiver) include Arkansas, Colorado, Florida, Georgia, Louisiana, Michigan, Nebraska, New Hampshire, Vermont, Arizona, Massachusetts, Montana, Oklahoma, Virginia, and the District of Columbia. Griffin, P., Torbet, P., and Szymanski, L. 1998. "Trying Juveniles as Adults in Criminal Court: Analysis of State Transfer Provisions." Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.
3. Butts, Jeffrey A. and Adele V. Harrell. "Delinquents or Criminals: Policy Options for Young Offenders." Washington, D.C.: The Urban Institute, 1998, p. 6.
4. "In our view, the system should be fundamentally altered so that, in appropriate circumstances, the prosecutor alone determines whether to prosecute the juvenile as an adult." Gregory, Kevin V., Deputy Assistant Attorney General, in Testimony before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, March 10, 1999.
5. 1999 Annual Report and Juvenile Justice Fact Book, Florida Juvenile Justice Accountability Board, February, 1999.
6. Bishop, Donna M. and Charles E. Frazier. "Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Discretion." *The Notre Dame Journal of Law, Ethics and Public Policy*, Vol. 5: pp. 281-302, 1991.
7. Ibid.
8. Department of Juvenile Justice-Management Report, No. 42. March 24, 1996.
9. Inmate Population: Current Inmate Age. Agency Annual Report, Department of Corrections, 1998.
10. Bishop, Donna M. and Charles E. Frazier, "Race Effects in Juvenile Justice Decision Making: Findings of a Statewide Analysis." *The Journal of Criminal Law and Criminology*, Vol. 86, 1996.
11. Bishop, et al., 1991.
12. Bishop, Donna M. and Charles E. Frazier, "The Consequences of Transfer" in *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court*. Chicago: University of Chicago Press [in press].
13. Bishop, Donna M., Charles E. Frazier, Lonni Lanza-Kaduce and Henry George White. "Juvenile Transfers to Criminal Court Study: Phase I

- Final Report." Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 1998.
14. Snyder, Howard N. and Melissa Sickmund. "Juvenile Offenders and Victims: Update on Violence." Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 1998.
 15. Bishop and Frazier [in press].
 16. Bishop, Donna M. et al. "The Transfer of Juveniles to Criminal Court: Does It Make a Difference?" *Crime & Delinquency*, Vol. 42, No. 2, April 1996.
 17. Ibid.
 18. Ibid.
 19. Bishop, Donna M., Charles E. Frazier, Lon Lanza-Kaduce and Lawrence Winner. "The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term." *Crime and Delinquency*, Vol. 43, No. 4, October 1997.
 20. Bishop and Frazier, Office of Juvenile Justice and Delinquency Prevention, 1998.
 21. Ibid, and keynote address, National Association of Sentencing Advocates Conference, Miami, Florida, April 15, 1999.
 22. Snyder, p. 22.
 23. Ibid.
 24. Kathleen Maguire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics 1997*. U.S. Department of Justice, Bureau of Justice Statistics, 1997; (1996); (1995). U.S. Department of Justice, Bureau of Justice Statistics. Washington, D.C., USGPO, 1998 (1997); (1996).
 25. Fagan, Jeffrey, Martin Forst, and T. Scott Vivona. "Youth in Prisons and Training Schools: Perceptions and the Consequences of the Treatment Custody Dichotomy." *Juvenile and Family Court*, No. 2, 1989, p. 10.
 26. Flaherty, Michael G. "An Assessment of the National Incidences of Juvenile Suicides in Adult Jails, Lockups and Juvenile Detention Centers." The University of Illinois, Urbana, Champaign, 1980.
 27. Schiraldi, Vincent and Mark Soler. "The Will of the People: The Public's Opinion of the Violent and Repeat Juvenile Offender Act of 1997." *Crime and Delinquency*, Vol. 44., No. 4, October, 1998.
 28. Ibid.
 29. For example, in March, 2000, Californians will be voting on the "Gang Violence and Juvenile Crime Prevention Act of 1998" initiative, which will give prosecutors discretion to try certain juveniles as adults at the age of 14.

VINCENT SCHIRALDI was one of the nation's foremost advocates for the compassionate treatment of children. He was a prolific scholar who published many influential books and articles focusing on justice system policies. He served most recently as a senior research fellow at Harvard's Kennedy School of Government. He passed away in 2016.

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EXPLORING THE ISSUE

Should Juvenile Courts Be Abolished?

Critical Thinking and Reflection

1. Do violent youth deserve capital punishment?
2. Are the arguments to abolish juvenile courts valid?

Is There Common Ground?

As the public and politicians increasingly reflect intolerance toward criminals, especially violent ones, might Feld's proposal be viewed as an extreme one rising from desperation? That is, if we lived in different times, needed monies and staffing for juvenile courts, facilities, and services in the community would be provided. Is Feld's "sliding scale" fair for youngsters in adult courts? Can it be argued that because it is impossible to tell precisely how emotionally "developed" a youth is, it is ethically and legally unacceptable to sentence one youngster to a longer term than another youngster who did the same crime? Is Feld correct when he asserts that the juvenile court concept itself is untenable because it is impossible to have both the goal of crime control and treatment simultaneously? For instance, Schiraldi and Ziedenberg could argue that if courts were sympathetic toward and knowledgeable of youth, programs could be developed to treat children and consequently to reduce their involvement in crime.

For the most part, Schiraldi and Ziedenberg base their arguments on a Florida study. Is that a good basis for suggesting national policy, especially since Florida is an extreme case? Are the authors confusing the issues of waivering kids to adult courts and incarcerating kids in adult jails and prisons? Does their drawing from tear-jerking testimonies of selected child cases really serve to clarify the issue? For instance, might one just as easily juxtapose their reports with sad statements from victims of juvenile violence?

Can the two positions be synthesized? If federal monies were provided for randomly selected states to experiment with abolishing juvenile courts for, say, 20 years, would that be a better basis for deciding what is best for society and for child criminals? Meanwhile, should juvenile courts be abolished, as Feld says, or should the traditional system be maintained, as Schiraldi and Ziedenberg suggest?

Additional Resources

Among the many works by Feld pertaining to the issue is his *Readings in Juvenile Justice Administration* (Oxford University Press, 1999). Among the many publications of the Justice Policy Institute, which is directed by Schiraldi, is *Second Chances: One Hundred Years of the Children's Court* (1999).

A positive, though balanced, overview is "Juvenile Justice: A Century of Experience," by S. Drizin, *Current* (November 1999). Several highly favorable articles on juvenile courts can be found in the special issue of *Juvenile Justice* entitled "100th Anniversary of the Juvenile Court, 1899-1999" (December 1999), published by the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Several other relevant reports are available from the OJJDP, including *From the Courthouse to the Schoolhouse: Making Successful Transitions* (March 2000), *Focus on Accountability: Best Practices for Juvenile Court and Probation* (1999), and *Offenders in Juvenile Court, 1996* (1999). Two helpful overviews of female offenders and the system are *Women Offenders* by L. Greenfeld and T. Snell (December 1999), published by the Bureau of Justice Statistics, and *Juvenile Justice Journal*, vol. VI, no. 1 (Investing in Girls: A Twenty-First Century Strategy) (October 1999), published by the OJJDP. An alternative system that neither of the protagonists address is teen courts, which are explored in J. Butts, D. Hoffman, and J. Buck, *Teen Courts in the United States: A Profile of Current Programs* (1999), also available from the OJJDP.

An excellent source from the federal level is S. G. Mezey's *Children in Court: Public Policymaking and Federal Court Decisions* (State University of New York Press, 1996). A brief discussion of a judge's analysis is "Judge Recommends Overhaul of Juvenile Supervision System," *Criminal Justice Weekly* (August 3, 1999). Two news articles that outline problems and prospects of the juvenile court system are "Regrettable Regression in the Way We

Treat Young Criminals," by L. Dodge, *The Washington Post* (August 29, 1999) and "Juvenile Court Comes of Age," by C. Wetzstein, *The Washington Times* (August 29, 1999). An analysis of gender differences can be found in "Explaining the Gender Difference in Adolescent Delinquent Behavior: A Longitudinal Test of Mediating Mechanisms," by X. Liu and H. B. Kaplan, *Criminology* (February 1999).

Internet References . . .

The Heartland Institute

<http://heartland.org/policy-documents/abolish-juvenile-justice-system>

Urban Institute

www.urban.org/publications/1000232.html

