Canon to the Left, Canon to the Right...

Can the Juvenile Court Survive?

by
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CAN THE JUVENILE COURT SURVIVE?

That "noble experiment," the juvenile court, is in danger of destruction. For nearly twenty years supporters of the juvenile courts have feared the United States Supreme Court would deliver the coup de grace. It now appears far more likely its annihilation will come at the hands of those who first commissioned it, the state legislature.

The Charge of the Light Brigade -- The Juvenile Court Movement

For over one hundred years there were no special laws in this country for treating children who committed criminal acts any differently from adult offenders. Only "infants," those below the age of reason and therefore incapable of criminal intent, were exempt from prosecution and punishment. Children over the age of seven stood trial in criminal court for their crimes and could be sentenced to prison, or even to death, if convicted.

In the first quarter of the twentieth century, the juvenile court movement swept across the country like charging cavalry to rescue our children from the rigors of criminal prosecution and the inhumanity of incarceration in prison with hardened criminals. Armed with the new weapons of the then-developing behavioral sciences--psychiatry, psychology and sociology--the reformers hoped to treat and cure, rather than merely punish, the antisocial behavior of children. Within a few years of the establishment of the first juvenile court in Cook County, Illinois in 1899, most state legislatures had commissioned special courts to deal with the special problems of children.

Traditionally, juvenile justice in this country has been characterized by

the canons of care, concern, treatment, training and rehabilitation. The underlying justification for a separate juvenile justice system has been that children are not fully responsible for their antisocial behavior and can, if humanely treated in proper rehabilitation programs, become productive members of society. Crime, punishment, deterrence, retribution--these words did not legally apply to children, but only to adult criminals. Juvenile courts existed to help children in trouble with the law rather than simply to punish them or to make examples of them to deter others. These benevolent purposes were clearly stated in the early laws establishing the juvenile courts, and resulted in significant substantive and procedural differences between the criminal and juvenile justice systems.

Throughout the second quarter of the century, juvenile courts in most states exercised exclusive original jurisdiction over all persons under the age of eighteen charged with conduct prohibited by the criminal law. A child could be prosecuted in criminal court only if the juvenile court waived its jurisdiction and transferred the child for prosecution as an adult. That decision was to be made "in the best interests of the child and the public," and--consistent with the canons of individualized justice--it was generally based on case by case consideration of whether or not a particular offender was amenable to rehabilitation in the juvenile system.

The juvenile court also controlled its own intake, unlike the criminal justice system where the selection of cases for trial was a matter for the district attorney. Furthermore, while a criminal prosecutor's decisions regarding what charges to file and whether to accept a plea or proceed to trial were based primarily on legal factors, such as the offense involved, the defendant's prior record and the strength of the evidence, the intake officer

in juvenile court was to consider the social, psychological, educational and economic strengths and weaknesses of a child and his family. Consistent with the social casework model, which emphasized the search for the causes of delinquency and strategies of rehabilitation, juvenile court intake focused, to a substantial degree, on the offender rather than the offense. Accordingly, the intake officer had broad discretion to resolve cases through a variety of informal approaches if he felt that a formal petition and a hearing before the judge were unnecessary.

In those cases requiring judicial action, hearings before the judge were conducted in an informal manner. The formal procedures of a criminal trial and the constitutional rights intended to protect an accused criminal from abuses of power by the state were considered unnecessary in a system whose very purpose was to protect children from the rigors of criminal process and criminal punishment.

If the judge found a child to be within the jurisdiction of the juvenile court, whether for truancy or armed robbery, the full range of dispositional options was available. The criminal justice concept that punishment should fit the crime had no place in the determination of appropriate treatment for a misguided child. Whatever the conduct that brought the child to the court's attention, the juvenile court judge was to consider the broad range of social facts regarding the child and his family and to direct treatment "in the child's best interests" and in accordance with his needs. A stern warning might suffice for one child, while another might require formal supervision by a probation officer or commitment to the training school.

The juvenile justice system's focus on the offender rather than the

offense, on rehabilitation rather than punishment, also replaced the fixed term of imprisonment for crime with the indefinite juvenile commitment. Children committed to the training school could remain there until age twenty-one if their treatment required it, but were to be released as soon as they were "cured."

Despite the early success of its sweep across the nation, however, the juvenile justice movement faced serious ordnance and supply problems. The new weapons of diagnosis and treatment with which the campaign began never achieved their anticipated accuracy or effectiveness, and the monetary resources needed to pursue the new strategy effectively were never provided. The failure of the movement to achieve its ultimate objective--the solution to juvenile misbehavior--eventually began to erode public confidence in the juvenile court.

Canon to the Left -- Procedural Reform

For over half a century, the advance of the juvenile court movement was virtually unchallenged. With few exceptions, constitutional attacks on this separate justice system for children were rebuffed by state appellate courts, and the United States Supreme Court maintained a policy of strict neutrality for many years, sidesteping these skirmishes through the expedient tactic of refusing to hear such cases. In the fifties and sixties, however, civil libertarians found powerful allies on the Supreme Court, and the canons of procedural due process were turned first on the criminal justice system and, when it had been blasted into constitutional submission, upon the juvenile courts.

In Kent v. United States,[1] the Court made a limited incursion into this previously unexplored territory. So well camouflaged was the Court's original foray into the juvenile field that to this day legal historians remain uncertain whether constitutional artillery was employed or merely the small arms fire of statutory interpretation. Aiming carefully at a narrow but "critically important" aspect of the juvenile court's responsibility--the decision to surrender its jurisdiction over a case and transfer a child for prosecution in criminal court--the Supreme Court imposed the requirement of a formal waiver hearing. Although in its opinion the Court sought to emphasize the limited nature of its objectives in Kent, many strategy analysts today see that case as a scouting mission, which tested the aging and weakened defenses of juvenile justice philosophy and established the line of attack for the campaign to follow.

Having found the range with its decision in Kent, the Court delivered a constitutional barrage with its opinion in Gault[2] the following year. Many long standing defenses of the juvenile court process were swept away in that attack, and with them many of the procedural informalities of the delinquency adjudication process. That single engagement won for juveniles charged with delinquent acts which might result in their confinement the Fifth Amendment privilege against self-incrimination and the rights to notice of the charges against them, to an attorney, to confrontation and cross-examination of witnesses, to a transcript of the proceedings and to an appeal.

The juvenile justice system as originally conceived suffered another blow in Winship,[3] which required that delinquency be proved beyond a reasonable doubt. Until then most states had required that delinquency be established only by a preponderance of the evidence.

Many feared that the decisions in Gault and Winship would mean the end of the juvenile court as a distinct and philosophically different approach to dealing with juvenile misbehavior. In fact, they did not. As the Supreme Court had emphasized repeatedly, these opinions affected only the adjudication hearing, in which the court determines whether the child has committed a delinquent act. The constitutional requirements of Gault and Winship were intended to enhance the accuracy of that fact-finding process, not to alter the basic philosophy of the juvenile justice system, embodied in the concepts of rehabilitation and individualized justice. Although the Court felt that the juvenile justice system had not achieved its benevolent purposes, it did not challenge either the merits of those goals or the unique intake and disposition processes for achieving them.

In McKeiver v. Pennsylvania,[4] the Supreme Court declared a temporary cease-fire, refusing to fire the final shot which "might well destroy the traditional character of juvenile proceedings." As Justice White explained in his concurring opinion, there remained, even after Kent, Gault and Winship, enough "differences of substance between the criminal and juvenile courts ... to hold that a jury is not required in the latter."

Canon to the Right -- Substantive Revolution

In the eleven years since McKeiver, however, those "differences of substance" have been disappearing before an onslaught of law and order legislation passed in response to the demands of an outraged public, alarmed by what they perceive as an explosion of serious and violent juvenile crime. Recent crime statistics demonstrate that this public perception is, in fact, a

misperception.[5] Nevertheless, it has provided the impetus for substantive attacks on the juvenile justice system more threatening than all the procedural reforms imposed by the Supreme Court. Some of these legislative responses to the problem of serious juvenile crime are designed to remove certain offenders from the "protection" of the juvenile system and to treat such offenders as criminals <u>in criminal court</u>. Other legislative approaches, however, alter the basic principles of the juvenile justice system, requiring the juvenile court to adopt criminal justice policies and to treat certain offenders as criminals <u>within the juvenile justice system</u>.

Since most juvenile crime is committed by sixteen and seventeen-year-olds, legislatures might have responded to public demands that they "get tough" with juvenile offenders by lowering the age of juvenile jurisdiction and placing all such offenders in criminal court. In fact, this has not happened. Although eight states exclude all seventeen-year-olds from juvenile jurisdiction,[6] and three more exclude both sixteen and seventeen-year-olds,[7] these are provisions of long standing in those states. Many bills have been submitted that would have lowered the age of criminal responsibility in other states, but what legislation has passed in the last decade has done just the opposite. Eight states have actually increased the upper limit of juvenile court jurisdiction;[8] none has lowered it.

Instead of taking such broad action, state legislatures have, like snipers, been picking away at the juvenile court's exclusive jurisdiction over juvenile crime with amendments aimed at particular classes of offenders. Such legislation occurs in two forms. Either certain offenders are excluded from the juvenile court's original jurisdiction so that they must be charged initially in criminal court, but with provisions for the criminal court to

refer appropriate cases to juvenile court in a kind of "reverse waiver." Or offenders are excluded totally from juvenile court jurisdiction by requiring that every such case must be prosecuted in criminal court.

Fourteen states now exclude some serious offenders from the jurisdiction of the juvenile court.[9] While several of these states have exclusion provisions of long standing,[10] there have been significant additions to the list of exclusionary provisions in recent years. Oklahoma added an excluded offense provision in 1979 which requires that sixteen and seventeen year olds charged with any of ten serious offenses be considered adults unless the criminal court certifies the case to juvenile court.[11] In 1980 Louisiana expanded the list of serious offenses for which children fifteen and older would be charged in criminal court.[12] Three states enacted excluded offense provisions in 1981: Idaho excluded children fourteen and older charged with murder, attempted murder, robbery, rape, mayhem, and assault or battery with intent to commit any such offense from juvenile court jurisdiction; Indiana excluded murder, kidnapping, rape or robbery, if committed either while armed or by one sixteen or older if bodily injury results; Vermont excluded juveniles fourteen and over charged with any one of eleven enumerated felonies.[13]

Perhaps the best known example, however, is New York's Juvenile Offender Law, passed in 1978.[14] New York law already required that persons sixteen and over be treated as adults, but until 1978 there was no way that juveniles under sixteen could be tried in criminal court regardless of the seriousness of the offense. The new law created the new category, "Juvenile Offender," for youth under sixteen charged with certain felonies and required that prosecution of all such juvenile offenders originate in the adult criminal

system. Youth as young as thirteen charged with second degree murder and youth fourteen or over charged with any one of a long list of felonies, including some forms of burglary, were classified as juvenile offenders. As with many other excluded offense provisions, the New York Law provides for transfer of such cases to Family Court. But the New York scheme for "reverse waiver" is far more complex than those of other states, permitting transfer of cases at several different stages of criminal proceedings, and requiring the prosecutor's consent before the most serious juvenile offenders may be transferred to Family Court.

In one sense these jurisdictional amendments accomplish a complete reversal of the juvenile justice philosophy of individualized justice which focuses on the characteristics of the offender rather than the offense. They replace the juvenile court's discretion to waive individual offenders for criminal prosecution with a rule of law which removes a whole class of offenders from the protection of the juvenile court. On the other hand, such legislation does not, of itself, alter the way in which the juvenile justice system deals with those who remain within its jurisdiction.

The public pressure to get tough on serious juvenile offenders has prompted legislatures in several states to substantially broaden the range of juvenile cases which may be waived for prosecution in criminal court. In recent years several states have reduced the minimum age at which juveniles may be waived.[15] Others have expanded the list of serious offenses for which juveniles may be waived for criminal prosecution.[16]

Like the exclusion legislation, expansion of the juvenile court's waiver authority may result in more juvenile offenders being tried as criminals, but

it does not effect any basic change in the principles and purposes of the juvenile court in the exercise of its jurisdiction. Statutory provisions for the surrender of jurisdiction by the juvenile court over those offenders whom it considers unamenable to juvenile rehabilitation have always been a part of most juvenile codes. Indeed, many of the original laws, and many existing juvenile codes, authorize the court, in its discretion, to waive any offender for criminal prosecution. Amendments that merely broaden the class of cases in which the court may consider waiver do not, therefore, reflect any change in traditional juvenile justice philosophy.

Recent changes in the stated purposes of juvenile codes across the country, however, represent fundamental departures from the original rehabilitative purposes of the juvenile justice system. These new provisions introduce concepts and language previously foreign to the juvenile justice system, adopting the more explicitly punitive and social control purposes traditionally associated with the criminal law. Among the stated purposes of the juvenile law in many states today are protection of the public from criminal activity, holding juvenile offenders accountable for criminal behavior, providing punishment commensurate with crime, assuring prosecution and sanctions consistent with the seriousness of the offense, and providing effective deterrents to juvenile crime. Seven states have made such basic changes in the stated purposes of their juvenile codes since 1976.[17]

The introduction of principles of punishment, deterrence, accountability, and protection of the public into the purpose clauses of juvenile justice legislation is by no means the only manner in which legislatures across the country are reshaping the juvenile justice system. The new rhetoric of purposes clauses is being implemented by substantive changes which reduce or

eliminate the court's discretion to control its own intake, to transfer cases for criminal prosecution, to select the most appropriate disposition, and to make indefinite commitments. Unlike the decisions of the Supreme Court, many of these legislative actions strike at the heart of the substantive principles on which the juvenile justice system was established.

While some states have broadened the applicability of the juvenile court's traditional waiver discretion, others have sought to make criminal prosecution more likely by restricting that discretion. Provisions for mandatory or presumptive waiver have been enacted or expanded in several states. Mandatory waiver provisions eliminate the juvenile court's discretion to retain the case once certain conditions have been established. Presumptive waiver provisions shift the burden of proof on the issue of amenability from the prosecutor to the juvenile, or eliminate entirely the need for any consideration of the issue of amenability once probable cause to believe certain facts regarding the offense and prior record of the juvenile has been shown.

Since 1977 in California, a juvenile 16 or over charged with any one of eleven specified violent offenses, must establish his amenability to juvenile court disposition to avoid waiver for adult prosecution.[18] In the same year legislation became effective in Virginia which permits the juvenile court to disregard the issue of amenability to rehabilitation in considering whether to transfer for adult prosecution juveniles fifteen and older charged with murder, rape or armed robbery, thereby authorizing the court to treat the establishment of defendant's age and probable cause that he committed one of those offenses as conclusive proof of his unamenability.[19]

The Louisiana transfer provision was amended, effective January 1, 1979, to provide that the juvenile court might transfer the case of a child fifteen or older solely upon a finding of probable cause that the child had committed first or second degree murder, manslaughter, aggravated rape, armed robbery, aggravated burglary, or aggravated kidnapping, without any consideration of the amenability of the juvenile to rehabilitation.[20] When the Louisiana Supreme Court held that the Louisiana Constitution did not permit the legislature to authorize the transfer of juveniles to adult court according to the crime charged, without consideration of each case on its individual merits, and struck down the amendment,[21] the legislature passed another amendment which removed most of those offenses from juvenile court jurisdiction so that no transfer to adult court would be necessary.[22]

The Indiana Legislature has been particularly active in regard to that state's judicial waiver provision, having amended its statute every year from 1978 through 1981. Most recently, the Legislature provided for mandatory waiver, upon motion by the prosecutor, if the child is charged with a felony and has previously been convicted of a felony or a nontraffic misdemeanor.[23] Indiana also has presumptive waiver provisions, passed in 1979 and 1980. They provide that the juvenile court "shall" waive jurisdiction if there is probable cause to believe that a child, ten or older, has committed an act that would be murder if committed by an adult, or that a child sixteen or older has committed a class A or B felony or certain class C felonies, "unless it would be in the best interests of the child and of the safety and welfare of the community for him to remain within the juvenile justice system."[24]

Minnesota's new reference provision, passed in 1980, establishes a rebuttable presumption that certain chronic and violent offenders should be

prosecuted as adults.[25] The prior law had required that the prosecutor establish "by clear and convincing evidence that the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts." The new section provides that a prima facie case for such facts is established if the child was at least sixteen at the time of the offense and meets any of the specified combinations of present charge and prior record set forth in the matrix below.

PRESENT CHARGE	PRIOR FELONY ADJUDICATIONS IN PAST 24 MONTHS
First degree murder; any aggravated felony committed in a particularly cruel reckless or sophisticated manner	0
Second or third degree murder; first degree manslaughter, rape or assault	1
Second degree manslaughter, rape or assault; kidnapping; first degree arson; or aggravated robbery	2
Any other felony	3

Effective July 1 1980, Connecticut replaced its previous transfer provision with one which requires the transfer to criminal court of any child fourteen or older at the time he allegedly committed murder, a class A felony after a prior adjudication for a class A felony, or a class B felony after two prior adjudications for such an offense.[26]

Another amendment to the Connecticut law, while it does not require transfer, requires that the court hold a transfer hearing to consider it in the case of any child alleged to have committed a class A felony or a second

"serious juvenile offense" after his fourteenth birthday.[27] Similarly, the new Washington Juvenile Justice Act, although it does not require the transfer of certain offenders to adult court or even create a presumption that transfer is appropriate in certain cases, does require that the juvenile court hold a transfer hearing to consider the matter, rather than leaving this optional, in any case in which a sixteen or seventeen year old is charged with a Class A felony or attempted Class A felony or in which a seventeen year old is charged with any of six other specified offenses.[28]

The Kentucky Unified Juvenile Code, effective July 1, 1982, replaced existing transfer provisions with one which, like Connecticut and Washington, requires that transfer be considered in certain cases, but in addition places on the juvenile the burden of establishing his amenability if any one of several factors is established by the prosecutor. A transfer hearing must be held in any case involving a child over fourteen charged with a capital offense or a Class A or B felony, a child over sixteen charged with a Class C or D felony who has two prior delinquency adjudications for felonies, or a person previously convicted as a youthful offender and presently charged with a felony. If at that hearing the Commonwealth establishes probable cause either (1) that in the commission of the offense the child caused serious injury or any injury by the use of a weapon or (2) that the child has a prior felony adjudication within one year prior to commission of the present offense or (3) that the child has within the last year violated the conditions of a dispositional order imposed following a felony adjudication, then the child "shall" be transferred unless the court is "is convinced" otherwise by reasons presented by the child.[29]

The transfer of juvenile offenders for prosecution in adult criminal court has traditionally been the matter within the sound discretion of the juvenile court. Consistent with the principles of individualized justice, it involved case by case consideration of the offender's suitability to the rehabilitative strategies of the juvenile system. These recent legislative changes have substantially increased the influence of three objective factors--age, present charge and prior record--in the determination of the transfer issue. Correspondingly, they have reduced both the degree of judicial discretion and the role of individual offender characteristics in the exercise of that discretion.

Substantively quite similar to mandatory waiver provisions, although procedurally different, is another legislative response to the problem of the serious and violent juvenile offender--the grant of concurrent jurisdiction over such offenders to both the juvenile and criminal courts in place of the traditionally exclusive jurisdiction of the juvenile court. Such a change removes from the juvenile court judge his usual discretion under judicial waiver provisions to decide whether certain offenders are beyond the reach of the rehabilitative tools of the juvenile system and should be proceeded against in adult criminal court. Concurrent jurisdiction provisions give the district attorney the discretion to elect the forum for prosecution in the first instance, without requiring him to file the case in juvenile court and then to request waiver or to demand transfer of the case for criminal prosecution. In all, eight states now provide for concurrent jurisdiction over serious juvenile offenders.[30] Since 1970 the District of Columbia Act has permitted the U.S. Attorney to file charges in criminal court against a youth sixteen or over if the alleged offense is murder, forcible rape, first degree

burglary, armed robbery or assault with intent to commit any of those offenses.[31] In 1973 Colorado authorized the prosecutor to file criminal charges against juveniles sixteen or over charged with certain serious felonies if they had been adjudicated for a prior felony within the previous two years. That provision was subsequently expanded to include fourteen- and fifteen- year-olds charged with violent Class 1 felonies or with any felony if the child also has a prior felony adjudication within two years.[32] In Florida the Juvenile Justice Act was amended in 1978 to permit the prosecutor to file criminal charges against any juvenile sixteen or over. The child, however, had an absolute right to have his case removed to juvenile court unless he had a prior record of two delinquency adjudications with one being for a felony. In 1981 this right of removal was limited to children charged with misdemeanors, thereby giving the prosecutor absolute discretion in regard to felony offenders sixteen and older.[33] Most recently, the state of Vermont, when it increased the maximum age of juvenile court jurisdiction from sixteen to eighteen in 1981, did not eliminate the criminal courts' jurisdiction over sixteen and seventeen year olds but granted to the prosecutor the discretion to proceed in either court.[34]

The power of the prosecutor, the champion of law and order, has been increased significantly by the adoption of the presumptive and mandatory transfer provisions and the concurrent jurisdiction provisions described above. Such legislation permits the prosecutor to control the juvenile court transfer process through his control of the charging process. The clear trend of recent amendments is a shift away from the discretion of juvenile court intake officers and judges to consider the social factors of a child and his family; it is toward criminal justice policies of prosecutorial discretion and decision-making based on present offense and prior record.

The juvenile justice philosophy of rehabilitation and individualized treatment, embodied in the grant of broad dispositional discretion to the court and the provision for indeterminate commitments, repeatedly has come under attack from the left. Civil libertarians have objected to the injustices of a sentencing system that permits minor offenders to be locked up for longer periods of time than more serious offenders. Constitutional challenges to indeterminate sentencing have not succeeded, however. The lower courts have sustained the indefinite commitment of delinquent children to correctional agencies, and the United States Supreme Court's opinions in Gault, Winship and McKeiver addressed only the adjudication phase of the juvenile process.

Law and order advocates, on the other hand, have criticized the sentencing policies of the juvenile justice system for failing to adequately protect the public from serious and violent juvenile offenders. These attacks from the right, capitalizing on the public concern over rising crime rates and the system's apparent inability to effectively rehabilitate youth, have had much more success in the state legislatures than have constitutional challenges in the courts.

On occasion, a coordinated attack can achieve complete victory. To date, however, Washington is the only state which has enacted comprehensive determinate sentencing legislation for all juvenile offenders. This was accomplished as part of the comprehensive revision of the state's juvenile laws embodied in the Juvenile Justice Reform Act of 1977,[35] which was supported by a broad spectrum of groups ranging from the ACLU to the King County prosecutor's office and the Seattle Police Department. Under the new law a juvenile convicted of a crime is assigned a point score, calculated on

the basis of a formula which takes into account his age, prior criminal record and severity of the present offense. This point score determines the juvenile's classification as a minor, middle or serious offender, and standard dispositions are established for each of the classifications. The standard disposition for minor offenders precludes institutional commitment; for serious offenders commitment is mandatory; and for middle offender short term commitments are optional. Unlike most of the law and order legislation passed in many states which deals specifically with sentencing the serious offender, the determinate-sentencing system in Washington applies to all offenders. Those who do not go to institutions receive a predetermined schedule of fines and community service assignments according to their crimes and prior records. Those who go to institutions recieve specific sentences according to a similar schedule.

More often, it is the law-and-order forces which prevail with a charge directed at the current weak point in the juvenile justice system's defenses against legislative intrusion. Most of the recent legislation restricting the courts' traditionally broad dispositional discretion and the discretion of juvenile correctional authorities to release an offender as soon as he has been "cured" has been directed specifically at the sentencing of serious, violent and habitual offenders. Under Illinois' Habitual Offender Act, a youth adjudicated for one of a specified list of violent crimes who has had two prior felony adjudications must be adjudged an Habitual Juvenile Offender and committed to the Department of Corrections until his twenty-first birthday without possibility of parole.[36] In 1977 the Colorado legislature imposed mandatory sentencing upon the juvenile courts, requiring that judges must sentence a youth fifteen or older who has committed a designated crime of

violence, or a child of any age who has committed a second felony offense, to a minimum one year stay in a state institution or other out-of-home placement.[37] In Delaware a youth who is adjudicated for a felony within 13 months of a prior felony adjudication is designated a serious delinquent and must be committed by the court to the Department of Correction for institutional for a period of not less than six months. In addition, such serious delinquents may not be released from the institution without court approval.[38] The Connecticut Legislature in 1979 adopted a unique mandatory sentencing provision for certain "serious juvenile offenders" which hearkens back to one of the earliest and most severe sanctions for offenses against society--banishment. In addition to insisting that the juvenile court at least consider the transfer of such offenders for criminal prosecution, the Legislature provided that if the court retains the case, and upon adjudication commits the child to the department of children and youth service, "the court shall impose a period of one year during which the department...shall place the child out of his town of residence...."[39]

Although legislation designed specifically to protect the public by insuring the incarceration of the most serious juvenile offenders is much more common than the comprehensive sentencing scheme in Washington, both are designed to reduce the traditional discretion of juvenile court judges and correctional officials to tailor disposition, treatment and release decisions to the rehabilitative needs and the rehabilitative progress of the individual offender. They represent a significant move toward the criminal justice philosophy of punishment proportional to the offense, replacing the dispositional social study with the "rap sheet." They promote the new goals of deterrence, retribution, public safety, accountability and proportionality

previously associated only with the criminal law, rather than the traditional juvenile justice principles of rehabilitation and individualized treatment.

Such legislation also increases the probability that plea bargaining will invade the juvenile justice process. Long considered a necessary evil of the criminal justice system, but anathema in juvenile court, plea bargaining requires that the district attorney have the discretion to prosecute a defendant on more serious charges with more serious consequences. The prosecutor may then bargain away such options in exchange for the defendant's plea of guilty to a lesser charge. Traditional juvenile code provisions granted broad discretion to the intake officer, the judge and the correctional staff, leaving the prosecutor little room and little incentive to negotiate pleas. Much of the recent legislation reviewed provides the prosecutor with bargaining power he never had before in juvenile cases. Power to charge a juvenile with an offense which would result in criminal trial and criminal punishment or to charge an offense which, upon adjudication, would permit or even require the juvenile court to impose stiffer penalities provides the prosecutor with effective bargaining chips for negotiating a juvenile's surrender on more favorable terms. Some states have sought to mitigate the potential for prosecutorial abuses with legislation which discourages overcharging to establish criminal jurisdiction by providing that, upon conviction of a lesser included offense, the defendant must be transferred for disposition as a delinquent by the juvenile court. Others, however, permit the criminal court, once it acquires jurisdiction of the offense charged, to retain jurisdiction of the case for sentencing even when the offense for which the defendant is convicted is not within the original jurisdiction of the criminal court.

Into the Valley -- Final Thoughts

After half a century of conquest and occupation the juvenile court has in recent years entered a valley in which it has been caught in a withering cross-fire which may ultimately destroy it. From its left, the canons of the civil libertarians fired the first volleys in the form of Supreme Court decisions imposing due process requirements upon the juvenile court. From the right, the forces of law and order have moved, through legislation, to force fundamental changes in the purposes of the juvenile justice system and the substantive provisions of the juvenile law.

The conflict between the principles of civil liberty and social control has long been a part of the criminal justice system. Now, apparently, it is being waged in the context of the juvenile justice system. To the juvenile court, caught in the middle, it is of little consequence whether the fire from each side is directed at the other or at the court itself; together they threaten the court's very existence as a system of justice based on principles which are fundamentally different from those of the criminal law.

The level of the conflict is likely to escalate. Even as he acknowledged those "differences of substance between criminal and juvenile courts" eleven years ago, Justice White conceded that the States were "free if they extend criminal court safeguards to juvenile court adjudications, frankly to embrace condemnation, punishment, and deterrence as permissible and desirable attributes of the juvenile system." Many state legislatures have embraced such criminal justice goals for their juvenile justice systems; few have accorded juveniles the full panoply of criminal justice protections. When confronted with the question whether juveniles charged with "crime" in a court

whose declared purposes are to "condemn," to "punish," and to "deter" such conduct, the Supreme Court may conclude that it can no longer permit states to deny the rights to trial by jury and to bail to juvenile "criminals." State legislatures, if confronted with the obligation to extend to juveniles all the rights of adult criminal defendants, might well subject all juveniles offenders to criminal trial and criminal punishment.

The juvenile justice system, if it survives at all, may soon become not a separate and philosophically different approach from the criminal justice system, but merely a separate criminal justice system for criminals under the age of eighteen.

[1]383 U.S. 541 (1966).

[2]In re Gault, 387 U.S. 1 (1967).

[3]In re Winship, 397 U.S. 358 (1969).

[4]403 U.S. 428 (1971).

[5]Snyder, H. and Hutzler, J., The Serious Juvenile Offender: The Scope of the Problem and the Response of Juvenile Courts, National Center for Juvenile Justice, Pittsburgh, PA, 1981.

[6]Ga. Code Ann. Sec. 24A-401(c)(1); S.H.A. Ch. 37, Sec. 702-2; C.J.P. Art. 13; M.G.L.A. Ch. 119, Sec. 52; M.C.L.a. Sec. 712A.2(a); V.A.M.S. Sec. 211.031.1(2); S.C. Code Ann. Sec. 14-21-510(A)(3); V.T.C.A., Family Code Sec. 51.02.

[7]Conn. Gen. Stat. Ann. Sec. 46b-120; Family Court Act Sec. 712(a); N.C. Gen. Stat. Sec. 7A-507.

[8]Ala. Code Sec. 12-15-1; F.S.A. Sec. 39.01(7); 15 M.R.S.A. Sec. 3003(14); N.H.R.S.A. Sec. 169-B:2(II); N.D. Cent. Code Sec. 27-20-02(1); S.C. Code Ann. Sec. 14-21-510; Vt. Stat. Ann. tit. 33, Sec. 632(11); Wyo. Stat. Ann. Sec. 14-1-101(a).

[9]Delaware, Indiana, Idaho, Kansas, Louisiana, Maryland, Mississippi, Nevada, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island and Vermont.

[10]Del. Code Ann. tit. 10 Sec. 921, tit. 10 Sec. 938(a)(1); Ky. Rev. Stat. Ann. Sec. 38-1602; Md. CJ Sec. 3-804; Miss. Code Ann. Sec. 43-23-29, Secs. 43-21-159 and 105; Nev. Rev. Stat. Sec. 62.040(c)(1); N.M. Stat. Ann Sec. 32-1-3(0); Family Court Act Sec. 712, 30.00 CPL; 42 Pa. C.S.A. Secs. 6302, 6303(a)(2), 6322; R.I. Gen. Laws Ann. Sec. 14-1-17.1.

[11]10 Okl. St. Ann. Secs. 110(a), 1104.2.

[12]C.J.P. Art. 13 Sec. 1570.

[13]Idaho Code Sec. 16-1806A; Ind. Ann. Stat. Sec. 31-6-2-4; Vt. Stat. Ann. tit. 33 Sec. 635a.

[14]Family Court Act Sec. 712, 30.00 CPL.

[15]These include New Jersey, which in 1978 lowered its minimum transfer age from sixteen to fourteen, Indiana, which in 1979 and 1980 amended its waiver provision to provide for transfer of children as young as ten years old who are charged with homicide, and Idaho, which reduced its waiver age from

fifteen to fourteen on March 30, 1981. N.J.S.A. Secs. 2A:4-48, 2A:4-49; Idaho Code Sec. 16-1806(1)(a); Ind. Ann. Stat. Sec. 31-6-2-4(b)(2.

[16]Connecticut, which until 1976 permitted transfer of fourteen and fifteen year olds for murder only, expanded that provision to include many repeat felony offenders. Conn. Gen. Stat. Ann. Sec. 46b-127. As of July 1 1979, Mississippi permits the transfer of any alleged delinquent thirteen or older; the prior law had authorized waiver only in felony cases. Miss. Code Ann. Sec. 43-21-157, Sec. 43-23-29. Montana expanded its waiver provision in 1981 to include attempts to commit certain offenses. Mont. Rev. Codes Ann. Sec. 41-5-206(1)(a)(x).

[17]West's Ann. Welf. and Inst. Code Sec. 202(b); R.C.W. Sec. 13.40.010(a),(c),(d),(h); 15 M.R.S.A. Sec. 3002(c); F.S.A. Sec. 39.001(2)(e); Ind. Ann. Stat. Sec. 31-6-1-1(1); M.S.A. Sec. 260.011(2); N.M. Stat. Ann. Sec. 32-1-2(F).

[18]West's Ann. Welf. & Inst. Code Sec. 707.

[19]Va. Code Ann. Sec. 16.1-269(A)(3).

[20]LSA—R.S. tit. 13 Sec. 1571.1.

[21]State ex rel Hunter, 387 So.2d 1086 (La. 1980).

[22]LSA—R.S. tit. 13 Sec. 1571.A(5).

[23]Ind. Ann. Stat. Sec. 31-6-2-4(e).

[24]Ind. Ann. Stat. Sec. 31-6-2-4(c),(d).

[25]M.S.A. Sec. 260.125.

[26]Conn. Gen. Stat. Ann. Sec. 46b-127.

[27]Conn. Gen. Stat. Ann. Sec. 46b-126(a).

[28]R.C.W. Sec. 13.40.110.

[29]Ky. Rev. Stat. Ann. Ch. 208E Sec. 86, Ch. 208F Sec. 96.

[30]Ark. Stat. Ann. Sec. 45-420; C.R.S.A. Sec. 19-1-104(4)(b); D.C.C.E. Sec. 16-2307; F.S.A. Sec. 39.02(2); Ga. Code Ann. Sec. 24A-301; Neb. Rev. Stat. Sec. 43-202; Vt. St. Ann. Secs. 635, 635(a); Wyo. Stat. Ann. Sec. 14-6-203(c).

[31]D.C.C.E. Sec. 16-2307.

[32]C.R.S.A. Sec. 19-1-104(4)(b).

[33]F.S.A. Sec. 39.02(2).

[34]Vt. St. Ann. Secs. 635, 635(a).

[35]R.C.W. Title 13.

[36]S.H.A. Ch. 37 Sec. 705-12.

[37]C.R.S.A. Sec. 19-3-113.1.

[38]Del. Code Ann. tit. ## Sec. 937(1).

[39]Conn. Gen. Stat. Ann. Sec. 46b-140(e)(1),(2).