The Common Thread:
Diversion in the Jurisprudence of a Century of Juvenile Justice*

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"The first idea that should be grasped concerning the juvenile court is that it came into the world to prevent children from being treated as criminals."[i](Miriam Van Waters 1925 at 217-237)

The celebration of the Centennial of the Juvenile Court is not without its ironies. On the one hand, the institution has been a spectacular success in the United States and throughout much of the world. A juvenile court exists to deal with youthful law violators in all fifty states. No developed nation tries its youngest offenders in its regular criminal courts, and almost all the institutions that have been created in Europe, Japan, and the Commonwealth nations have been explicitly modeled in their language, procedures and objectives on the American Juvenile Court.[ii] No legal institution in Anglo-American legal history has achieved such universal acceptance among the diverse legal systems of the industrial democracies.

On the other hand, the philosophy of state intervention that has been most prominently associated with the creation of the Court had been effectively discredited for at least a generation before the centenary. Variously called "child saving," "the omnibus theory of delinquency," and, most memorably, "the rehabilitative ideal," the original justification we remember of the Juvenile Court was as an institution that would intervene forcefully in the lives of all children at risk to effect a rescue.[iii] Informal proceedings were preferred to formal ones so that the delinquent's needs could be determined. Broad and vague definitions of delinquency were favored so that all kids who needed help would fall within the new Court's jurisdiction. Large powers could be exercised in all cases so that help could be delivered to the deserving.

By the mid-1960s, the naive arrogance of the rehabilitative ideal had been exposed, never again to rule unchallenged in the Juvenile Courts (Allen 1964).[iv] Yet the court has thrived since the 1960s just as it had before. Was this post-child saving Juvenile Court just an empty shell, an institution that had outlived its mission but

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i. Miriam Van Waters, *The Juvenile Court from the Child's Viewpoint*, *in* THE CHILD, THE CLINIC AND THE COURT 217, 217 (Jane Addams ed., 1925).

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iii. See ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY. Ch. 1 (1969).

iv. FRANCIS ALLEN, *The Juvenile Court and the Limits of Juvenile Justice*, *in* THE BORDERLAND OF CRIMINAL JUSTICE 42, 50-54 (1964).

continued to function on sheer momentum? Or is the Juvenile Court a chameleon, taking on new justifications and theories of function as old theories die? If so, why is this particular judicial weather vane so universally popular?

In my view, a substantial step toward understanding both the institutional status and justifying rationale of the modern juvenile court is to revise our view of the original justifications of the new court for delinquent children. I think that two justifications existed from the start for creating a Juvenile Court, and I shall call these two different policies the *interventionist* and *diversionary* justifications for a separate children's court. The diversionary justification for juvenile court was always the most important of the two rationales, and it remains so today.

In the foundational period of the Juvenile Court, when different groups formed coalitions for different reasons, and when many reformers had multiple reasons to support a new court, the diversionary critique of criminal court processing of minors was always stronger and more widely accepted than the interventionist vision of the court. When it much later became apparent that the *interventionist* justification was in conflict with both the realities of court function and with the principles of legality and proportionality, the diversionary rationale for the court emerged as the central explanation for the court's separate operation. These diversionary principles of juvenile justice are well suited both to a modern theory of adolescent development and to principles of procedural fairness and proportionality in legal response to youth crime. My brief in these pages is to show both continuity and coherence to the diversionary rationale for juvenile courts through the first hundred years of their history.

Part I of this essay sets out the two discrete justifications for creation of a juvenile court and provides documentation of the diversionary agenda of turn-of-the-century reformers. Part II shows the extent to which the major programmatic elements of early juvenile justice were consistent with diversionary justifications and methods. Much of the work of the Juvenile Court, in its early as well as later years, was aimed at allowing kids to grow up in community settings. Part III addresses the modern concept of juvenile justice as reflected in two leading Supreme Court cases: *Gault* and *Winship*.[v] It was a diversionary theory of juvenile court that could accommodate due process rules without sacrifices of youth welfare. Part IV concerns the contemporary understanding of juvenile justice as a

[v]. IN RE GAULT, 387 U.S. 1 (1967); IN RE WINSHIP, 397 U.S. 358 (1970).

passive judicial virtue. I show that the effectiveness of juvenile courts in protecting youth from full criminal punishment is the heart of the reason the court has so many contemporary enemies.

I. Two Theories of Change

Those who put their hopes in a new juvenile court to assume responsibility over young offenders had two reasons to assume the new court would be an improvement on the criminal processing of children. The first belief was that a child centered juvenile court could avoid the many harms that criminal punishment visited on the young. The reformers believed that penalties were unnecessarily harsh and places of confinement were schools for crime where the innocent were corrupted and the redeemable were instead confirmed in the path of chronic criminality. From this perspective, the first great virtue of the juvenile court was that it would not continue the destructive impact of the criminal justice system on children.

I call this theory of justification for juvenile court a *diversionary* rationale, an argument that the new court could do good by doing less harm than criminal processes. And those who believed the criminal courts to be destructive instruments best avoided include every single one of the new court's prominent supporters.

The signal characteristic of a diversionary argument for juvenile justice is its attention to the harmful nature of criminal punishment for the young. A classic and nearly complete litany of the harms of the criminal law comes on the first page of Juvenile Court Judge Tuthill's 1904 account of the treatment of delinquents prior to reform:

> "Prior to 1899 little was done in Illinois, and, so far as I know, in any other State in the Union, that was not wrongly done by the State toward caring for the delinquent children of the State. No matter how young, these children were indicted, prosecuted, and confined as criminals, in prisons, just the same as were adults pending and after a hearing, and thus were branded as criminals before they knew what crime was. The State kept these little ones in police cells and jails among the worst men and women to be found in the vilest parts of the city and town. **Under such treatment they developed rapidly, and the natural result was that they were thus educated in crime and when discharged were well fitted to become the expert criminals and outlaws who**

have crowded our penitentiaries and jails. The State had educated innocent children in crime, and the harvest was great. The condition in Chicago became so bad that all who were cognizant of this condition and were interested in correcting it sought a remedy. A bill was prepared and presented to the legislature of the State, which, in due time, and after overcoming much opposition, was enacted into a law known throughout the world as the "juvenile-court law of Illinois" (Tuthill, p. 1 [emphasis added]).[vi]

[vi]. Richard S. Tuthill, *History of the Children's Court in Chicago*, *in* CHILDREN'S COURTS IN THE U.S.: THEIR ORIGIN, DEVELOPMENT, AND RESULTS _____,_____ (Jane Addams ed., AMS Press 1973) (1904).

A similar rhetoric is reflected in accounts of the criminal justice system issued before and after the founding of the court by every one of the major public figures in the movement. Among the more colorful examples was Judge Ben Lindsey's characterization of the criminal court as an "outrage against childhood."[vii] William Stead speaks of a police station where "urchins of ten and twelve who have been run in for juvenile delinquency have found the police cell the nursery cradle of the jail" (Stead 1894).[viii] The criminal court was the common enemy that launched juvenile courts in America.

The diversionary justification for juvenile court can easily be contrasted with what I wish to call the **interventionist** justification for the new court. While the diversionary approach promised the avoidance of the criminal court's harms, the interventionist argument emphasized the positive good that new programs administered by child welfare experts could achieve. A child centered court was an opportunity to design positive programs that would simultaneously protect the community and cure the child. This was the notion of child saving that made the court's early justifications seem so extreme.

While the diversionary and interventionist justifications are conceptually quite distinct, there seems to have been little awareness at the Court's founding that these two approaches to justifying the new court might be in any conflict. The same people who believed in the diversionary virtues of a new court affirmed its interventionist potential as well (see e.g. Mack 1909).[ix] And because there was no contemporary awareness of potential conflict, the court's supporters did not have to choose between these separate but attractive rationales for the new institution.

But the diversionary rationale had several obvious advantages over an interventionist theory as a justification for an untested reform. In the first place, the new court could be counted on to achieve social good whether or not its treatment interventions worked. Avoiding the harms of the criminalization of children was a near-term benefit, whatever the programmatic potential of the new court's interventions might prove out to be.

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vii. Ben B. Lindsey, *Colorado's Contribution to the Juvenile Court*, *in* THE CHILD, THE CLINIC, AND THE COURT 274, (Jane Addams ed., 1925).

viii. WILLIAM T, STEAD, IF CHRIST CAME TO CHICAGO (Chicago Historical Bookworks 1990) (1894).

ix. *See*, *e.g.*, Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

A second advantage of a diversionary perspective is the way that doing less harm fit the shape and orientation of the new court's major tool, probation. Community supervision is rarely an heroic intervention; it does not take extensive power over the lives of young offenders when compared to jails, prisons and work camps. It is also, in addition to its high moral principle, a method of responding to official delinquency that is relatively cheap.

At every level of discourse from pro-child rhetoric to economic self-interest, the diversionary perspective was monumentally attractive to those who were organizing a new court. It was an argument for juvenile courts without any known opponents or identified disadvantages, a foundation for the new court that was too obvious to be remembered clearly as a distinctive justification for change.

The Forgotten Foundation

If the diversion of youth from the rigors of criminal punishment was a dominant motive for the new court, why does this justification not play a larger role in the historical accounts of the creation of the court? While diversionary motives dominate the contemporary accounts of the court's early years, these efforts to reduce the gratuitous harms of the criminal court do not receive much notice in the historical critiques of the court that appeared in the 1960s and 1970s[x] (compare the papers in Addams 1925 with Platt 1969 and Schlossmann 1977).

Part of the reason later scholars give more account to the interventionist theory of juvenile justice is that such a claim was both novel and controversial, while child protective sentiments are so widely shared as to be without any singular importance at any particular historical moment. The pro-child sentiments of 1899 do not set that era far off from 1940 or 1980. The claims of interventionist prowess are considered by contrast a striking historical artifact by the 1960s and 1970s, if not before.

One other historical element that produced more emphasis on interventionist dogma than was otherwise justified was the fact that many accounts of the court's justifications were written by judges with a vested interest in

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[x]. *Compare* THE CHILD, THE CLINIC AND THE COURT (Jane Addams ed., 1925), *with* PLATT, *supra* note 3, *and* STEVEN SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE JUVENILE JUSTICE" (1977).

expanding the powers and prestige of this new office. Avoiding harm for children is a modest objective, indeed, when compared to the therapeutic rescue of those about to fall to the lower depths. The rhetoric of Judge Mack, for instance, seems prone to such claims; even the writing of Judge Lindsey, a non-interventionist for his time, was full of accounts of judicial rescue (Schlossmann 1977 at 55-57).[xi]

However understandable the failure of those who study court history to give sufficient attention to diversionary motives, this gap has led to a variety of unfortunate consequences. In the first instance, much late twentieth century work underestimates the capacities and misrepresents the motives of founding figures like Jane Addams and Julia Lathrop (see especially Platt 1969).[xii] In the second place, the failure to give prominent attention to avoiding criminal stigma for kids leaves these later histories with no explanation for the worldwide popularity of the juvenile court for delinquents. It was beyond doubt the avoidance of criminal justice damage that spread the juvenile court gospel across the world in the early years of the century, not an interventionist claim to judicial power. It was this type of diversionary child saving that generated nearly universal appeal.

The third problem with ignoring the diversionary rationale for juvenile court is that it makes it impossible to understand much of the developing nature of juvenile justice in the first half of the twentieth century by referring to the court's justification.

II. The Aims and Means of the Early Juvenile Courts

The early years of the twentieth century were not a period when new forms of intensive behavioral therapies were applied to either adults or juveniles brought before the Bar of Justice. The most serious of the commitment options open to the Juvenile Court was the state reformatory or training school, an institution with a nineteenth century program and a zero reputation for innovation or behavioral impact (Lathrop 290 in Addams 1925).[xiii] One searches the record in vain for major figures in creating the court who put their hopes in state schools

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[xi]. SCHLOSSMAN, *supra* note 10, at 55-57.

[xii]. *See, especially* PLATT, supra note 3.

[xiii]. Julia Lathrop, *The Background of the Juvenile Court in Illinois, in* THE CHILD, THE CLINIC AND THE COURT 290, 290 (Jane Addams ed., 1925).

of the industrial variety as an arena for child saving (Schlossmann 1977 at 64-66).[xiv] The sole virtue of the reform school was the fact that it was not a prison.

Where did the reformers rest their programmatic hopes in the first quarter of the twentieth century? On social and educational change generally, and on community-based probationary supervision for the delinquent in his family setting. Compulsory education and child labor laws were the major objectives of progressive youth policy, not the operations of juvenile court. Within the juvenile court, the major programmatic advantage was probation (Lindsey in Addams 1925 at 274).[xv] The goal of the reformers in the words of Jane Addams was "a determination to understand the growing child and a sincere effort to find ways for securing his orderly development in normal society" (Addams 1925 at p. 2).[xvi] The dominant outcome of juvenile court process was probation as early as 1908, when probation was twice as likely in Milwaukee as all other court outcomes combined (Schlossman 1977 at Appendix 2, Table 2, p. 202).[xvii]

The emphasis on probation and community-based supervision fits nicely with a diversionary justification for juvenile courts. The job of the court is first not to harm the youth and then to attempt help in community settings. This same programmatic emphasis does not mesh well with the romantic rhetoric of child saving. Probation is at its essence an incremental social control strategy, one that relies on the basic health and functionality of the subjects' community life.

Even the more ambitious plans of probation advocates to get involved with families and schools were low intensity social control, particularly given the tiny budgets and volunteer staffs characteristic of the early years of the juvenile court. The only new programs that fit the profile of child saving were the secure "parental schools" for

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[xiv]. SCHLOSSMAN, *supra* note 10, at 64-66.

[xv]. Lindsey, *supra* note 7, at 274.

[xvi]. Jane Addams, *Introduction* to THE CHILD, THE CLINIC AND THE COURT 1, 2 (Jane Addams ed., 1925).

[xvii]. SCHLOSSMAN, *supra* note 10, app. 2, tbl. 2 at 202.

truants that hoped to marry coercive means to educational objectives and juvenile detention.[xviii] Both programs were sufficiently coercive to create tension with a pure diversionary agenda, but only the truancy programs approach the pattern one would expect to find in a court pursuing an aggressive interventionist philosophy.

The other major increase in social control was the explicit extension of all juvenile court sanctions to non-criminal behavior such as disobedience to adults, truancy, and curfew. Clearly, the court was not extending jurisdiction in this direction in the name of diversion. But the same jurisprudence of childhood dependency that supported these powers for status offenders also were a foundation for keeping young offenders out of criminal courts (Zimring 1982 [need page number/section).[xix]

There is one final respect in which the role of the juvenile court was more modest in the reform imagination than in some of the court's interventionist rhetoric. If child labor regulation and public education are the important public law enterprises of the new order for the young, both of these are centered in governmental operations that start apart from juvenile court. So too does the settlement house created by Jane Addams. To do less harm than criminal courts, the new legal setting for delinquency did not need to be a super-power, and it was not.

III. The Juvenile Court and the Rule of Law

It took two-thirds of the twentieth century before the United States Supreme Court considered the procedural protections that due process required when accused delinquents were in jeopardy of secure confinement in state institutions. One important issue in *In Re Gault*, decided in 1967, was the need for informality if the court was to achieve its child saving mission.[xx] Mr. Justice Harlan thought that rigid due process could disserve traditional juvenile justice. Dissenting from the *Gault* majority holding that due process requires recognition of a

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[xviii]. JEFFREY FAGAN & FRANKLIN E. ZIMRING, THE CHANGING BORDERS OF JUVENILE JUSTICE, Ch. 1 (Forthcoming).

[xix]. FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 35-40 (1982).

[xx]. *Gault*, 387 U.S. at 25-26.

privilege against self-incrimination, the right to confront witnesses and the right to cross-examination, Harlan argued that:

> "First, quite unlike notice, counsel, and a record, these requirements might radically alter the character of juvenile court proceedings. The evidence from which the Court reasons that they would not is inconclusive, and other available evidence suggests that they very likely would. At the least, it is plain that these additional requirements would contribute materially to the creation in these proceedings of the atmosphere of an ordinary criminal trial, and would, even if they do no more, thereby largely frustrate a central purpose of these specialized courts [references deleted]."[xxi] (Mr. Justice Harlan, 387 U.S. 1, at 75)

His suggestion was that such procedures could jeopardize the substantive mission of the juvenile court. Yet, Justice Fortas, writing the majority opinion, argued that there was no serious tension between the therapeutic intentions of the juvenile court and procedural protections for the accused who come before the court. He argued:

> "While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite...."[xxii] (Justice Fortas *In Re Gault* 387 U.S. 1, at p. 27)

Rather than take one side in this debate, I wish to argue that the contrast between interventionist and diversionary theories of the court will decide whether there is tension between the court's objective and due process standards. For an informal and interventionist juvenile court, standards of proof and defense lawyers are a major drawback to identifying children in need and providing them with help. If that is the mission of the juvenile court, then due process will be a major handicap to its achievement. But if saving kids from the gratuitous harms inflicted

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[xxi]. *Id*. at 75 (Harlan, J., dissenting).
[xxii]. *Id*. at 27.

by the criminal process is the aim, there is no inherent conflict between due process and the Court's main beneficial functions.

The best illustration of the tension between due process and an interventionist court is the issue raised by the case of *In Re Winship* in 1970. The state of New York allowed a petition alleging delinquency to be sustained in Juvenile Court if the state proved such facts by a preponderance of the evidence, the usual standard of proof in civil trials.[xxiii] The appellants, using *Gault* as authority, argued that delinquency could only be established by proof of its constituent facts beyond a reasonable doubt. The Supreme Court agreed with this conclusion.[xxiv]

But what is the justification for requiring proof beyond a reasonable doubt in criminal cases? The usual law day speech tells us that erroneous acquittals are less socially harmful than erroneous convictions: "It is better that ten guilty men go free than that one innocent man gets convicted!" But if the Juvenile Court is there to help delinquents, what is the sense in saying "It is better that ten kids who need help do not get help than that one kid who does not need help is erroneously assisted!" If the dominant purpose of juvenile justice was forceful intervention for the child's own good, the rules in *Gault* and *Winship* were a decisive rejection of the juvenile court's jurisprudence.

But every aspect of due process protection can be consistent with a diversionary theory of juvenile justice. If the principle benefit of juvenile court is that it keeps kids from the destructive impact of the criminal courts, this benefit may be provided whether or not the new court makes a formal sanctioning decision in a particular case. A high burden of proof or a children's lawyer will not cost the court its diversionary function.

There is also no threat to the diversionary rationale of juvenile court from recognition that terms like delinquent carry stigma and that juvenile court sanctions may function as punishments. As long as the juvenile court

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[xxiii]. *Winship*, 397 U.S. at 360.

[xxiv]. *Id*. at 368.

can be seen as the lesser of evils, a diversionary view of the court can be quite worldly, and need not deny that punitive motives might color sanctioning decisions in the children's court.

The interventionist view of court processes was always more fragile. A positive characterization of Juvenile Court interventions is necessary to justifying the venture. To call what the juvenile court does to delinquents a punishment is to deny the truth of a central premise of the interventionist theory.

Viewed in this light, the majority opinion in *Gault* rejected one enduring rationale for a separate juvenile court and elevated a second theory to supremacy. The Juvenile Court that the United States Supreme Court approved was child protective chiefly by keeping kids out of prisons and jails.[xxv] Such an institution could be parsimonious with its own punishments -- restricting them to cases with strong evidence and fair procedures -- without threatening its own substantive mission. The arrogance of unqualified judicial power was not necessary to this version of the court's purposes. After *In Re Gault* in 1967, diversion was the approved version of Juvenile Justice in the United States, and probably in the rest of the developed world. Some Juvenile Court judges might have shed a tear at the way Abe Fortas deconstructed the interventionist facade of juvenile courts. But the *Gault* majority did not undo or completely reorient the court that Grace Abbott and Julia Lathrop and Jane Addams supported. The diversionary institution they wished had passed the tests of *In Re Gault* and *In Re Winship* with flying colors.

IV. Diversion in the Modern Court

The twentieth century has seen many changes in the culture and institutions of the United States. The juvenile court, itself just an experiment at the beginning of the century has witnessed changes to its clientele, its political and legal constituencies, and in its operations.

[xxv]. *Gault*, 387 U.S. at 22.

But the core concern of the court "to prevent children from being treated as criminals" is just as clear in 1999 as in 1899. As the usual period of schooling and economic dependency in adolescence has lengthened over the twentieth century, the maximum age for juvenile court delinquency first drifted upward to the eighteenth birthday in most states, and then stayed at eighteen in most states, reflecting an age boundary close to the mode for high school graduation. The period of semi-autonomy that now spans most of the teen years is spent for the most part in the delinquency jurisdiction of juvenile courts (Zimring 1982 at Chapters 3 and 7).[xxvi] This section will show that a consistent diversion orientation of juvenile justice can be observed in recent policy developments.

Modern Reform -- The Juvenile Justice and Delinquency Prevention Act of 1974

The due process requirements discussed in the previous section were closely followed by the first major federal legislation designed to influence the substantive content of state juvenile justice policy by providing financial rewards to state systems that met the federal standards.[xxvii] The two major targets of the 1974 Juvenile Justice legislation fit quite comfortably under a traditional diversionary view of the court's objectives. The first push of the federal law was to remove minors from American jails and prisons.[xxviii] The protective segregation of children had been at the heart of the diversion agenda in 1899. While the original reformers would have been disturbed to find that 75 years of American history had not yet achieved this primitive reform, the continuing struggle to attain separate housing for kids in confinement was an essentialist diversionary reform in obvious accord with the original vision of the court.

So too was the second major objective of the 1974 legislation, the deinstitutionalization of status offenders.[xxix] The saga of the status offender was one of the great failings of the interventionist theory of juvenile courts. In the original legislation, the non-criminal behaviors later to be called status offenses were simply another

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[xxvi]. ZIMRING, *supra* note 19, chs. 3 & 7.

[xxvii]. Juvenile Justice and Delinquency Prevention Act of 1974 §223(A), 42 U.S.C. §5633(a) (1994).

[xxviii]. §102, 42 U.S.C. §5602.

[xxix]. §311, 42 U.S.C. §5711(a).

behavior that could justify a finding of delinquency as well as any placement that the juvenile court was justified in ordering for a delinquent.[xxx] Kids who ran away from home or were disobedient or truant could be committed to the same institutions that were dispositional options for the juvenile burglar and auto thief.

There were two problems associated with secure institutional confinement for non-criminal misbehavior -- it was grossly unfair and it was manifestly ineffectual. By 1974, the need to scale back on this branch of the rehabilitative ideal was a near consensus among the youth welfare profession (Zimring 1982 at Chapter 5).[xxxi] The direct conflict between not allowing the Juvenile Courts to order secure institutions for truants and an interventionist theory of the court is obvious.

But there is no necessary conflict between limits on the coercive interventions allowed for non-criminal behaviors and a diversionary theory of juvenile justice. Simply because reformers wish to keep adolescent law violators out of prisons and jails does not mean that the same observers support serious punishment for non-criminal kids. Quite the opposite. While juvenile court treatments for young offenders are found in most developed nations, the strong interventionist claim that produced training schools for truants was nowhere near as widespread in popularity as the juvenile court itself. Foreign courts did not adopt such policies because diversionary theories did not require them. The federal legislation, like the constitutional cases that preceded it, can be seen as endorsing diversion as the theory of the modern court to the exclusion of interventionism.

Diversion and the Punitive Assault on Juvenile Justice

Perhaps the most dramatic evidence of the efficacy and importance of diversionary policies in modern juvenile justice is the sustained attack on the modern juvenile court by the political forces of law and order. At the federal level, Republican legislative majorities have been attempting to use federal financial incentives pioneered in the Juvenile Justice and Delinquency Prevention Act of 1974 to push a series of standards designed to create more

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[xxxi]. ZIMRING, *supra* note 19, Ch. 5.

punitive sanctions within the delinquency jurisdiction of the juvenile court and easier transfers of serious juvenile offenders to criminal courts.[xxxii]

The rhetoric in support of this legislation uses new phrases to describe the juvenile court outcomes that are desired -- terms like "accountability" and "graduated sanctions."[xxxiii] But the common enemy of the transfer policies and the harsher juvenile court punishments proposed in the legislation is a juvenile court tradition that seeks to avoid permanent stigma and disfiguring punishments of delinquents. The terms of reprobation aimed at the court by its critics on the right are a tribute to the Court's diversionary intent -- "revolving door justice," "slap on the wrist," "Kiddie Court." To the extent that the attacks by its critics are based on empirical truth, those assaults pay tribute to the efficacy of a court that has been seeking to avoid the harshest outcomes for its caseload for the entire of the twentieth century.

Truth to the Rumor?

But is there any truth to the rumor that juvenile courts protect delinquents from destructive punishments? When one peeks behind the rhetoric of current debates about responses to youth crime, there is very little analysis that compares sanctions for similar offenses across the boundaries of juvenile and criminal courts, and ignorance of the impact of juvenile court processing on punishment outcomes for different types of crime is not a recent problem (see Greenwood, Petersilia and Zimring 1980).[xxxiv] My own belief is that juvenile courts have always generated some diversionary benefits to many classes of young offenders, but that the size and distribution of diversionary benefits varies by period, by type of youth and by type of offense. There is no excuse for the near zero research base on this important issue, a situation that makes determining the aggregate impact of juvenile court case processing on punishments into a guessing game.

[xxxii]. *See* S.10, 105th Cong. (1997); H.R. 3, 105th Cong. (1997).

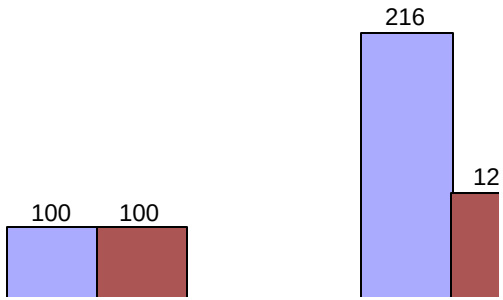
[xxxiii]. *See*, *e.g.*, S. Rep. No. 105-108 (1997); H.R. Rep. No. 105-86 (1997).

[xxxiv]. *See*, PETER GREENWOOD, JOAN PETERSILIA & FRANKLIN E. ZIMRING, AGE, CRIME, AND SANCTIONS: THE TRANSITION FROM JUVENILE TO CRIMINAL COURT (1980).

My best guess is that the protective impact of a diversionary juvenile court on sanctions for youth crime is largest when punitive policies are at their most dominant in criminal courts, in other words in ages like the American present. The larger the punitive bite of the criminal court system, the more likely it will be that a separate court for the youngest offenders takes some of that bite out of the state sanctions that the youngest offenders receive.

Figure 1 provides fairly careful estimates of public facility confinement for youth age 14-17 and young adults age18-24 for 1971, 1991 and 1995. For the 14-17 group, I combine juvenile detention facilities, training schools, camps, etc., with the number of 14-to-17-year-olds in prisons and jails. Only the juvenile facilities are under the control of the Juvenile Court, but total secure incarceration is the best measure of total governmental control. The figure is formatted with each age group's rate in 1971 expressed as 100 so that the changes over time are emphasized.

Figure 1. **Trends in Incarceration for Juveniles (13 to 17 year olds) and Young Adults (18 to 24 year olds)**



Young Adult
1971 = 393 per 100,000

Juvenile
1971 = 508 per 100,000

Sources: Children in Custody, Sourcebook of Criminal Justice Statistics

As the fine print in Figure 1 indicates, the incarceration rates for the two groups are not greatly different in 1971: the 18-to-24-year-olds have a jail and prison rate that is 28% higher than the total public incarceration rate of 14-to-17-year-olds. Trends after 1971 for the two groups diverge. The period 1971-1991 was not a typical interlude in the history of American crime policy. It was, instead, the period of the most substantial growth in the scale of imprisonment in the history of the Republic (Zimring and Hawkins 1991).[xxxv] Never was the pressure for confinement as consistent and substantial. Total confinement for the younger group increased by 21% while the incarceration rate of young adults more than doubled. By 1991, the difference in incarceration rates for the two groups was more than 2 to1, and this very substantial gap is one reason why those who had succeeded in radically altering punishments in criminal courts night have resented the stability in policy and outcome that occurred for younger offenders.

The pattern during the early 1990s is more complicated. The rate at which 14-to-17-year-olds were incarcerated grew almost as much in the four years after 1991 than in the two decades prior to 1991. For that reason, it may look like a significant shift toward toughness had finally taken hold. But the growth in young adult incarceration was much greater than in the younger age group, so that the gap between older juveniles and young adults actually widened in the early 1990s. The incarceration rate per 100,000 grew by about 80 for the 14-17 group, and more than three times as fast for 18-24.

What was the performance of the juvenile justice system in such an environment? For 1971, the federal report "Children in Custody" found a rate of institutionalization that translated to a rate of 446 per 100,000 while the jail and prison population that year was 562 per 100,000 for all persons between 18 and 24, the best comparison group for older juveniles.

The trends in incarceration rates are quite a contrast. The young adult incarceration rate doubled after controlling for changes in population while the juvenile rate was absolutely level. The first induction that these data

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[xxxv]. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT, Ch. 5 (1981).

support is that what this study has called the diversionary objective of the juvenile justice system insulated delinquents from the brunt of a high magnitude expansion in incarceration in the criminal justice system. Figure I is one of the most dramatic demonstrations I have ever seen of how two separate courts can pursue quite different crime control policies over a sustained period of time. If diversion was an organizing principle of modern juvenile justice, then the Juvenile Courts were keeping their promises through the 1970s and 1980s in the United States.

Their consistent incarceration limiting policy generated substantial political pressure on juvenile courts in the United States while the criminal justice system experienced two decades of uninterrupted penal expansion. Indeed, the data in Figure I suggest a new explanation for the flurry of legislative activity to create larger punishments for juvenile offenders. The usual account of juvenile crime legislation is the concern of politicians and citizens with juvenile crime and violence (Zimring 1998 at Chapter 1).[xxxvi]

But what Figure I shows is that the political forces that had produced extraordinary expansion through the rest of the penal system had been stymied in juvenile courts. In that sense, the under-18 population became the last significant battleground for a get tough orientation that had permeated the rest of the peno-correctional system. The performance of American juvenile courts over 1970s and 1980s had been exceptional, and this rendered the system vulnerable to the same attacks that had succeeded decades before in criminal justice.

From this perspective, the angry assaults on juvenile courts throughout the 1990s are a tribute to the efficacy of juvenile justice in protecting delinquents from the incarcerative explosion that had happened everywhere else. The largest irony of the 1990s from a diversionary standpoint is that the Juvenile Courts were under constant assault not because they had failed in their youth serving mission, but because they had succeeded in protecting their clientele from the new orthodoxy in crime control.

Conclusion

[xxxvi]. FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE, Ch. 1 (1998).

For those who see adolescence as a stressful and experiment-laden transition to adulthood, growing up is the one sure cure for most juvenile crime. The policy objective that drew many adherents to the notion of a juvenile court was as a place where it would be possible "to understand the growing child -- and to find ways for securing his orderly development in normal society" (Addams 1925 at p. 2).[xxxvii]

A criminal law that removed youth form community settings and thrust them into lock ups and jails was seen as a principal threat to adolescent development in normal society. For this reason, the juvenile court "came into the world to prevent children from being treated as criminals."[xxxviii] This was and is "the first idea that should be grasped concerning the juvenile court."[xxxix] It is a rationale of tremendous durability, more humble in its ambitions and closer to institutional reality than the rehabilitative ideal ever was. The diversionary theory of juvenile court jurisdiction was not an alternative to helping juvenile offenders but it was a more particular and more limited kind of help than plenary child saving. It was a modest, focussed way of helping young offenders survive both adolescent crime and the experience of social control with their life chances still intact.

The historical record suggests that the diversionary juvenile court was a reform more worldly and sophisticated than history scholarship has yet acknowledged. There is in the early history of juvenile court the basis for a jurisprudence of patience and restraint, an institutional commitment to do less harm than the criminal courts did to young offenders. This was a very good idea in 1899. It still is.

[xxxvii]. Addams, *supra* note 16, at 2.

[xxxviii]. Van Waters, *supra* note 1, at 217.

[xxxix]. *Id*.