THE JUVENILE COURT'S NEXT CENTURY—GETTING PAST THE ILL-FOUNDED TALK OF ABOLITION

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I. INTRODUCTION

Unbridled discretion of judges—in juvenile court or elsewhere—can threaten individual liberties and public welfare. Zealous students of jurisprudence, offended by such corruption of the ideal, may imagine adoption of procedural and substantive standards that would eliminate all discretion of judges. Unfortunately, what optimally emerges from such endeavors is merely a constructive "bridling" of the dangerous enterprise.

This simple observation underlies a focused discussion on the future of the juvenile court in the aftermath of calls from academia for its abolition. The court has a rich heritage and a future of promise that needs to be constructively envisioned. Its critics will do well to get beyond fruitless talk of sending all adolescent offenders into the criminal justice system and instead move to a more productive vision.²

¹ See In re Gault, 387 U.S. 1, 18 (1967) ("Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."). Redundant references to "unbridled" discretion have given the label a shopworn place in American legal literature. See Richard A. Posner, The Federal Courts 147 (1996) (discussing law clerks' reliance on such adjectives). It has been a mantra in commentaries on the juvenile court since it was employed by the United States Supreme Court in 1967. See Gault, 387 U.S. at 18. However trite, the phrase is useful to describe what might otherwise be identified as the determination of rights according to the "arbitrary description of a judge." 1 Joseph Story, Commentaries on Equity Jurisprudence 9 (12th ed. 1877); see id. at 15 (referring to the arbitrariness of "unbounded" judicial power). One juvenile court critic offers a usable alternative, speaking of the "limitless" discretion of judges in determining delinquency dispositions. Janet E. Ainsworth, Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C.L. Rev. 1083, 1099 (1991).

² As labels are always fashionable in the rhetoric of debate, the author's position exemplifies that of a "conservationist." See Adam D. Kamenstein, The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality, 18 Cardozo L. Rev. 2105, 2146 (1997). It seemingly would follow that Kamenstein and others can be considered either "abolitionists" or "anti-conservationists." See generally id. at 2108 n.10 (discussing one critic's view of the abolitionist perspective).
Among the many other remembrances being discussed in 1999, it seems appropriate to recognize that the twentieth century is the juvenile court's lifespan. Throughout the decades, as policy-makers have attempted to shape the juvenile justice system, some have wanted to abandon the effort. In the political arena, abolition was suggested by those who thought that individual rehabilitation efforts, shaped at the discretion of juvenile judges, were too soft on crime. In the last decade this same argument has cropped up repeatedly in academic circles, largely because of the concern that judicial discretion has permitted abuse of liberty interests of children and families. Put simply, nearly all of these proposals boil

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3 The proposition evidently was first published by a juvenile court practitioner in 1938. See Jesse Olney, The Juvenile Courts—Abolish Them, 13 CAL. ST. B.J. 1, 3, 6 (Apr.-May 1938) (expressing concerns both for the "star chamber" risk to juveniles and the "loophole to the young criminals in their escape from punishment"). During the last few decades, this view has appeared at least four other times in the literature of those publishing on the issue. See Martin Guggenheim, A Call to Abolish the Juvenile Justice System, 2 CHILDREN'S RTS. REP. No. 9, at 1 (ACLU/Juv. Rts. Project, New York, N.Y.) June 1978, at 9 (describing a position reportedly retracted); Frances B. McCarthy, Should Juvenile Delinquency Be Abolished?, 23 CRIME & DELINQUENCY 196, 196 (1977) ("Delinquency jurisdiction should be removed from the juvenile court and be allowed to revert to the criminal courts."); Irene Merker Rosenberg, Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists, 1993 WIS. L. REV. 163, 163-64 n.1, 174 n.66 (expressing the view that juvenile courts are "far superior" to criminal courts); Stephen Wiener & Mary F. Keller, The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?, 52 N.Y.U. L. REV. 1120, 1121 (1977) ("It is now commonly agreed that the juvenile court has failed to achieve its objectives."); Marvin E. Wolfgang, Abolish the Juvenile Court System, 2 CAL. LAW. No. 10, 1982, at 12 (expressing the isolated observation of Professor Wolfgang, confined to the topic of jurisdiction over chronic offenders).

4 Concerns about leniency of the courts have most commonly produced a call to abolish the system. See Alex Elson, Juvenile Courts & Due Process, in JUSTICE FOR THE CHILD, THE JUVENILE COURT IN TRANSITION 95, 95-96 (Margaret K. Rosenhelm ed., 1962) [hereinafter JUSTICE FOR THE CHILD] (describing the abolitionist approach while crediting judges and lawyers as authors of a more constructive approach). This concern seldom has been stated in legal literature. See Olney, supra note 3 (expressing concerns for both the "star chamber" risk to juveniles and the "loophole to the young criminals in their escape from punishment"); see also Ainsworth, supra note 1, at 1084 n.4 (noting the policy view of a Reagan-era administrator of the Office of Juvenile Justice and Delinquency Prevention). Nevertheless, it has been a force behind the increasing number of the class of juvenile crimes handled in adult court. See infra note 7 and accompanying text; see also Erik K. Klein, Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice, 35 AM. CRIM. L. REV. 371, 372-73 (1998) (explaining the political law-and-order position as a moving force behind the expanded waiver practice); Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 WAKE FOREST L. REV. 681, 689-93 (1998) (examining the punishment approach); Jennifer M. O'Connor & Lucinda K. Treat, Getting Smart about Getting Tough: Juvenile Justice and the Possibility of Progressive Reform, 33 AM. CRIM. L. REV. 1299, 1305-09, 1311-18, 1331-35 (1996) (surveying the "get tough" attitude toward juvenile corrections).

5 See Ainsworth, supra note 1, at 1101-18 (reviewing social and legal cause for extension of rights to children, and foreseeing expanded rights to counsel and jury
down to the preference for general laws over judicial discretion, both on procedural rights and on sentencing.6

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6 In the crisp words of one proponent of abolition, "the most appropriate place for lawmaking is in the legislature and not the judiciary," Kamenstein, supra note 2, at 2129. The same sentiment is evident in the body of juvenile court commentary offered since 1978 by Professor Barry Feld of Minnesota. See Barry C. Feld, Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default, 8 LAW & INEQ. J. 1, 3 (1989) (recommending "legislation to address the problems of sentencing serious young offenders"); Barry C. Feld, Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions, 62 MINN. L. REV. 515, 520, 572-85 (1978) [hereinafter Feld, Legislative Alternative] (discussing the "legislatively created waiver mechanism").

Adam D. Kamenstein alludes to the adverse effects of discretion on children and briefly notes the public concern for the weakening of criminal laws and for the integrity of judicial action. Kamenstein, supra note 2, at 2132, 2136, 2143 (hypothesizing about the possible negative effects on society that will take place when "the general commands of law are weakened" and pointing out blatant inconsistencies in the juvenile prosecution and sentencing systems). These concerns are woven into a philosophic concern for the "principle of legality" and the "internal-morality" of the justice system. Id. at 2126-31, 2139-44 (defining the principle as "a rule of law., and statement of the ideal").

Barry C. Feld's most recent abolitionist proposal is also built around concerns about judicial discretion, which he suggests "fosters lawlessness" and may constitute "a euphemism for idiosyncratic judicial subjectivity." Barry C. Feld, Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy, 88 J. CRIM. L. & CRIMINOLOGY 68, 91 (1997) [hereinafter Feld, Abolish] (explaining how the "individualized justice of a rehabilitative juvenile court . . . detracts from its utility as a court of law"). "[A] more consistent sentencing policy" remains at the heart of Feld's theses. Id. at 70, 115-23 (discussing his proposal "to formally recognize youthfulness as a mitigating factor"). Feld's earlier suggestions to abolish the court are found in Barry C. Feld, Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 MINN. L. REV. 141 (1984) (discussing the general case for abolishing the court); see also, Barry C. Feld, Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal," 65 MINN. L. REV. 167, 242 (1981) (finding "scant reason" and "little justification" for a separate system of juvenile courts); Barry C. Feld, The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes, 68 B.U. L. REV. 821, 909-15 (1988) (finding the criminal justice system to be an adequate substitute for juvenile courts); Feld, Legislative Alternative, supra, at 616 (addressing the issue as to whether the juvenile court can reconcile its "promise of rehabilitation with the rule of law" as a yet "unanswered question").

Criticism of the juvenile courts frequently involves denouncing one court characteristic such as the right to a jury trial absent in the juvenile courts of most states. See Ainsworth, supra note 1, at 1126-30 (premising the call for abolition on absence of jury trial right as well as inadequate court practices in extending children's constitutionally guaranteed right to counsel).
fully, through legislation limiting the power of a juvenile judge to keep jurisdiction over certain dangerous offenders. But zeal against discretion has not been confined to this limited area of exception to juvenile court jurisdiction. Instead, there persistently appears a group of observers, be they "abolitionists" or "anti-conservationists," who call for eliminating juvenile court jurisdiction over public offenses and envision prosecution of all children’s offenses in the criminal justice system.

This article will critically examine the suggestion that the juvenile courts be abolished, in part with reflection on historic efforts to improve the offering of equity in human welfare cases, to serve both individuals and the public’s aim to prevent greater disorder, while creating a jurisdiction that necessarily enlarges the discretion of individual judges. Flaws in equity jurisdiction, including those specific to juvenile courts, are discussed, followed by a review of constructive corrections of equity, including a statement of modern reforms that offers hope for a genuinely helpful juvenile court that more consistently lives within meaningful restraints under the rule of law. The article concludes by examining the remarkably flawed rationale offered for the proposition that juvenile offenders should be prosecuted and sentenced like adults and that judicial efforts to help adolescents rehabilitate their lives ought to be eliminated. Finally, I restate the cause for staying the course for a court of equity that protects children and society.

II. A HELPFUL JUDICIAL RESPONSE TO JUVENILE OFFENDERS

In the words of a nineteenth century English jurisprudence scholar,

[the law administered by the Lord Chancellor, or, in other words, Equity, had in it originally an arbitrary or discretionary element, but it in fact conferred real benefits upon the nation and was felt to be in many respects superior to the common law administered by the common-law Judges.]

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7 See John H. Wigmore, Juvenile Court v. Criminal Court, 21 ILL. L. REV. 375, 375-77 (1926) (recognizing and praising the benefits of the juvenile court, while also urging a balance in approaches so that the worst cases of juvenile crime be handled in adult court); see also, Klein, supra note 4, at 384-98 (comparing legislative waiver with discretionary waiver by judges or prosecutors).
8 See supra note 2 and accompanying text (discussing rhetoric employed in the debate on the future of the juvenile court).
9 See supra notes 3-6 and accompanying text.
10 A.V. Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 376 (8th
In resolving disputes under the rule of law, justice can be fairly characterized as the correct determination of which adversarial party is right and which is wrong. Typically, winners and losers are identified. In contrast, equity considers particular and compelling circumstances to determine a more "substantial" or "entire" justice. On the one hand it renders remedies more meaningful or complete, and on the other hand it softens the effects of laws that may become unconscionable or abusive in their application to an individual case. Examining the exigent circumstances of an individual case, the judge in equity, rather than merely naming winners and losers, undertakes the more demanding task of problem solving.

When equitable powers are devised for the special circumstances of human behavior, as occurs in the ever-expanding fields of family law, juvenile justice, child protection, and involuntary hospitalization, lawyers and judges, some of them new to the role of problem-solver, confront the uniquely daunting task of employing now-comprehensive bodies of law in complex social situations. This endeavor is toward the laudatory end of accomplishing individualized justice—taking into account the personal circumstances of each individual who comes before the court in these matters.

The mission of the juvenile court, in a larger sense, was
cast in the preventive role of helping—rehabilitating—youthful offenders.\textsuperscript{15} As justice is done to the individual, value is delivered to society. The task represents, as one criminologist observes, "the most important and ambitious effort yet undertaken by our law to give practical expression to the rehabilitative ideal."\textsuperscript{16}

While its duration is relatively young, it is myopic to view the juvenile court as a novel twentieth century legal experiment. The roots of its mission and practice—and its tie to the common law courts of equity—readily trace back to developments beginning many years earlier.\textsuperscript{17} One clear example of the court's longevity is its child-protective role—acting as \textit{parens patriae}—which has been part of Anglo-American law for at least 300 years.\textsuperscript{18}

\textsuperscript{15} See Van Waters, supra note 14, at 63-64 (discussing how rehabilitation requires insight on the "biological uniqueness" and "social worth" of the child). Denver Judge Ben Lindsey, at the turn of the century, insisted that "children are neither good nor bad, but either strong or weak," therefore he saw in a delinquent boy "not a criminal, not a bad boy, but merely a boy." BEN B. LINDSEY & HARVEY J. O'HIGGINS, THE BEAST 82, 134 (Robert E. Burke ed., 1970) (1910).

\textsuperscript{16} FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE; ESSAYS IN LAW AND CRIMINOLOGY 49 (1964).

\textsuperscript{17} See id. at 63 ("The legal basis of the Juvenile Court is rooted in equity. . . . Socialization of Juvenile Court Procedure depends on the clear, firm grasp of the principles of equity."); CHILDREN'S BUREAU, PUB. NO. 121, supra note 14, at 1 ("In children's cases the proceeding should be chancery or equity, and not criminal, in nature."). Equitable jurisdiction over personal welfare topics arises partly "from the peculiar relation and personal character of the parties, who are the proper objects of it" and partly "from a mixture of public and private trusts, of a large and interesting nature." 2 STORY, supra note 1, at 575 (characterizing equity jurisdiction as that exercised over "the persons and property of infants, idiots, lunatics, and married women").

\textsuperscript{18} See ALLEN, supra note 16, at 27 (reporting an early, even medieval, view of rehabilitation as an element of justice); Sanford J. Fox, Juvenile Justice Reform: An Historical Perspective, 22 STAN. L. REV. 1187, 1187-1230 (1970) (discussing the American history of juvenile court reform); id. at 1192-93 (noting the history the of common response to child protection and juvenile justice, which are now viewed as separate systems).

Because of its early history of conducting delinquency proceedings without due process protections for the child, the juvenile court's \textit{parens patriae} role has been commonly miscast in the singular sense as a claim of unbridled authority. See, e.g., Ainsworth, supra note 1, at 1098-99 (describing the "unprecedented expansion of state social control over adolescents"). Fundamentally, \textit{parens patriae} jurisdiction signaled a high purpose as "protector" of those who have "no other lawful guardian," "as in the nature of trust," with a responsibility of "care" for the infant's person and property. 2 STORY, supra note 1, at 576-78. Thus, the same role was the cornerstone of court action in placing the custody of children in divorce proceedings and in responding to evidence of the child's abuse or neglect. See id. at 589-90. The equity court, acting as \textit{parens patriae}, dealt essentially with "appointment and removal of guardians." Id. at 585 (explaining the United States' historic placement of early juvenile court jurisdiction with special courts which previously had jurisdiction over estates and guardianships). In the juvenile court, \textit{parens patriae} called for the judi-
III. TRIBULATIONS WITH EQUITY IN JUVENILE COURTS

The history of equity courts is littered with evidence of severe flaws and harsh criticism. Thus, there has been abundant censure of juvenile justice proceedings in this century, often directed as well to the other modern court activities—equity jurisdiction over divorce, child protection, guardianship, and involuntary hospitalization—that were chartered by legislative bodies to deal with complex human welfare issues.

Modern attacks on the juvenile courts are not the fruit of unprecedented insight, rather, they resemble complaints voiced throughout the twentieth century that are rooted in antiquity. Criticism has merely gained intensity as hopeful reformers encountered obstacles in their attempt to instill the constitutional restraints prescribed for the court by Kent and Gault in 1966-67.

Parens patriae jurisdiction was observed in the common law courts as early as 1722. Kamenstein, supra note 2, at 2108 n.11 (referring to the case of Eyre v. Shaftsbury, 24 Eng. Rep. 659 (Ch. 1722)).

Fluctuations between discretion and the rule of law have occurred in "[a]ll legal history." Children's Bureau, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. 346-1954, SPECIALIZED COURTS DEALING WITH CHILDREN 2 n.5 (1954) [hereinafter CHILDREN'S BUREAU, SPECIALIZED COURTS] (quoting Roscoe Pound). A friend of the juvenile courts noted in 1960:

[The slings and arrows that came the way of the courts [in the 1950's] seemed not only more copious but sometimes harsher than ever before. . . . One rather common characteristic was noticeable: there was a tendency to damn the philosophy—the whole idea—because in so many courts it appeared to be working imperfectly. All writers were heartily in favor of a fair trial for the juvenile delinquent; few said anything about a fair trial for the juvenile court.

Paul W. Alexander, Constitutional Rights in the Juvenile Court, in JUSTICE FOR THE CHILD, supra note 4, at 82, 82. A 1965 survey of the courts reported that "practically every significant aspect of the juvenile legal process is under heavy attack." Handler, supra note 19, at 7; see also, Margaret K. Rosenheim, Perennial Problems in the Juvenile Court, in JUSTICE FOR THE CHILD, supra note 4, at 1, 1-6 (observing that the flaws of the court, from its beginnings, included its severity, lack of fair process, and lack of resources). The problem, one observer explained, was simply the creation of power without legal protections. See Allen, supra note 16, at 54-56 (discussing the bad results of inadequate theory and the necessity of fair and reliable procedures).

Criticism of the lack of constitutional processes is documented at least as early as 1914. See Anthony M. Platt, The Child Savers, The Invention of Delinquency 158-63 (1969) [noting the point of view of Edward Lindsey, one of the earliest skeptics of the juvenile court's humanitarian goals].
Problematically, equity may be permissive, too quick to relieve its objects from strict application of the law. Often, equity courts abuse their intended beneficiaries under the guise of mercy. It has been no different for the juvenile courts. Much criticism of the juvenile justice system is well-founded and should be underscored, especially with respect to the persistent occurrence of abusive practices toward children and families. A compelling case has been made for a better juvenile court.

Briefly stated, the recurring abusive errors of the juvenile court have been most evident in its practices of confining children to institutions, usually for minor offenses, before and after a determination of wrongdoing, and in taking actions like these without taking needed steps to get competent counsel for the child. In addition, whether or not involving residential care, dispositions have often been implemented without valuable services for the child and his or her family. Finally, juvenile court confinement abuses continue in the face of evidence that they enlarge the likelihood of repeat offenses and thus defy the preventive aims of the court.

impact of Kent v. United States, 383 U.S. 541 (1966) and In re Gault, 387 U.S. 1 (1967); see, e.g., Gary B. Melton, Taking Gault Seriously; Toward a New Juvenile Court, 68 Neb. L. Rev. 146 (1989); Irene Merker Rosenberg, The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past, 27 U.C.L.A. L. Rev. 656, 661-709 (1980) (discussing Gault extensively). 24 See United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting) ("Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."); JOHN SELDEN, THE TABLE TALK OF JOHN SELDEN 64 (London, William Pickering 1847) (n.d.) (describing equity as "roguish," and no more certain than the length of the Chancellor's foot); Roscoe Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U. L. Rev. 925, 926 (1960) (quoting Lord Camden in 1705) ("The discretion of a judge is the law of tyrants. . . . In the best it is oftentimes caprice: in the worst it is every vice, folly and passion to which human nature is liable."). 26 Many of the most telling abuses in the juvenile courts have occurred in status offense cases. See CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 341 (1978) (describing many courts' attitudes towards status offenders). An important juvenile justice study shows court-ordered placements occurring in 30% of the cases (5,277 of 17,195) handled by a state juvenile justice system, and 65% of these placements (3,426 of 5,277) were ordered in misdemeanor and status offense cases, many of which were often the first reported offense of the child. See Barry C. Feld, Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration, 82 J. Crim. L. & Criminology 156, 183-91 (1991) [hereinafter Feld, Justice by Geography]. Another study of the related data indicates that over 40% of the placements for minor offenses occurred in cases where the child was not represented by counsel. See Barry C. Feld, The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make, 79 J. Crim. L. & Criminology 1185, 1236-38 (1989).

26 Volumes of material document these criticisms, and it distracts from the subject of this article to delve deeply into this material. The author has recently reported more completely on the topic in Gary L. Crippen, Can the Courts Fairly Ac-
In sum, children have encountered both of the troubling worlds observed by the United States Supreme Court in 1966, lack of procedural protections and lack of "solicitous care." Unfortunately, these worlds are more disturbing than imagined by the court three decades ago. Because of poor court practices that invite waiver of procedural rights, these rights are not enjoyed by children even when they are "guaranteed" by the rule of law. Moreover, patterns of a lack of care offer a picture of a world where long episodes of involuntary confinement are often used as punishment for minor acts of juvenile delinquency.

Given the examples of error in the juvenile court, it is inexcusable to premise its future on the repetitive promise to be helpful. Goodwill in the juvenile justice system, as in other such public pursuits, does little to reduce the threat of its abuses.

In the words of Dean Roscoe Pound, a significant proponent of the juvenile courts,

[9] child placement involves administrative authority over one of the most intimate and cherished of human relations. The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations. The latter may bring about a revolution as easily as did the former. It is well known that too often the placing of a child in a home or even in an institution is done casually or perfunctorily or even arbitrarily. Moreover effective preventive work through these courts requires looking into much more than the bad external conditions of a household, such as poverty or neglect or lack of disci-
pline. Internal conditions, a complex of habits, attitudes, and reactions, may have to be dealt with and this means administrative treatment of the most intimate affairs of life. Even with the most superior personnel, these tribunals call for legal checks.31

This individualized justice system has vital personal liberties in its hands and often abuses the trust bestowed upon it. Thus, it would be a mistake to rely on the persistently euphemistic treatment rhetoric of the juvenile justice system. A classic warning on the subject comes from C. S. Lewis, the late English scholar, writing approximately fifty years ago:

| It may be said that... Humanitarians... are not punishing, not inflicting, only healing. But do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be remade after some pattern of 'normality' hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown [sic] wise enough to cheat them with apparent success—who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious.... Mercy, detached from justice, grows unmerciful. That is the important paradox.... We ought long ago to have learned our lesson. We should be too old now to be deceived by those human pretensions which have served to usher in every cruelty of the revolutionary period in which we live.32 |

Placements are institutional confinement. Pre-hearing detention may be considered jailing or its equivalent. By any name, these remedies rightfully can not be chosen by a judicial authority that is free of significant legal restraints.

IV. THE TRADITION OF HARNESING EQUITY— AND A CURRENT AGENDA

A century ago, Justice Story wrote that "equity must have

32 C. S. Lewis, The Humanitarian Theory of Punishment (1953), reprinted in C.S. Lewis, God in the Dock: Essays on Theology and Ethics 287, 290-94 (Walter Hooper ed., 1970); see Allen, supra note 16, at 18 (corroborating Lewis' view, observing that doing something for someone is also to do something to that person; and thus disputing the rigid distinction between rights in a criminal proceeding and a juvenile proceeding); see also Alexander W. Pisciotta, Saving the Children: The Promise and Practice of Parens Patriae, 1838-98, 28 Crime & Delinq. 410-25 (1992) (reviewing 19th Century failings of benevolence, especially in institutions and supporting a skeptical view of humanitarian rhetoric).
a place in every rational system of jurisprudence." This same observation is even more significant in the context of a helping role for juvenile courts and family courts of the twentieth century. The blending of equity and the rule of law, employing judicial discretion while at the same time bridling it, is a rich tradition in the historic effort to refine and preserve equity jurisdiction. In the common law, jurists reflected with satisfaction on the ultimate capacity of equity to reach, as Dean Pound later would state more succinctly, "a reasoned decision in the light of principles."  

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33 1 STORY, supra note 1, at 6 (explaining that "[e]very system of laws must necessarily be defective, and cases must occur, to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all").

34 This helping role is described in the following manner:

In recognizing the importance of maintaining a balance between individualization and the protection of legal rights, any suggestion must be avoided of a return to a mechanized, routine application of an "automatic" justice, which would be no justice at all and which would deny one of the most vital functions of a specialized court—that of giving the authoritative support needed to assure to all children the help, the care, and the treatment they need.

CHILDREN'S BUREAU, SPECIALIZED COURTS, supra note 22, at 4 (stating juvenile court philosophy). In this spirit, the Bureau prescribed certain principles to "be recognized as an essential part of individualized justice by all coming into contact with the court," including standards on intervention, notice, hearings, appeals, and dispositional limits. Id. at 6-7. In the colorful language of Judge Ben Lindsey of Denver, treating children as adults maimed young lives "by trying to make the gristle of their unformed characters carry the weight of our iron laws and heavy penalties." LINDSEY & O'HIGGINS, supra note 15, at 83.

35 See KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT 16 (3d ed. 1972) (discussing the unpredictability of the "rule of law" due to a blend of decision-making consisting of decisions made at times "without any principles" and at others, "by the application of known principles or laws"). Davis and Roscoe Pound remain two of America's foremost students of discretionary powers. On the same subject, Pound wrote: "All legal experience shows that the power of adjusting the operation of legal precepts to the exigencies of special circumstances is unavoidable if there is to be a complete system of justice according to the law." Pound, supra note 24, at 936-37. Ultimately Pound concluded, that the "security of the individual life requires equality, a balance of uniformity and predictability with adaptation to the exigencies of the individual life." Id. at 925. The promotion of this balance, Pound concluded, "is a standing problem of the science of law." Id. at 937. The "attempt to reduce all things to [a] rule in the nineteenth century" made "manifest" to Pound that there was a real need for discretion in the administration of justice. Roscoe Pound, Justice According to Law, 13 COLUM. L. REV. 696, 705 (1913).

Morris R. Cohen, also writing early in this century, concluded that, just as he foresaw anarchy if individual conscience were sovereign, the law "must also recognize that individual conscience may be a much more delicate instrument for moral apprehension, so that to suppress it is to bar the way for more enlightened justice." Morris R. Cohen, Positivism and the Limits of Idealism in the Law, 27 COLUM. L. REV. 237, 249 (1927); see also STORY, supra note 1, at 8-14 (discussing how equity courts are still bound by the principles of justice as formulated in courts of law).

36 Pound, supra note 24, at 927. The Englishman A.V. Dicey observed in the nineteenth century that "it was obvious that Equity was developing into a judicial system for the application of principles which, though different from those of the common law, were not less fixed." DICEY, supra note 10, at 376; see also Gee v. Prt-
In the juvenile justice system, a balancing of general law and discretion is partly embodied as an exercise in moderating calls for punishment with the preventive task of rehabilitating the offender. In the struggle to achieve this balance there is no greater argument for unconditional mercy than there is for rigid imposition of punishment. It is however, imperative that the good will of the court be harnessed by fair process and restraints against unnecessary deprivations of personal liberty.

It is evident in reflections on the history of equity that one is in very good company when resisting efforts either to abolish the juvenile courts or to perpetuate their past mistakes; ultimately though, both positions are apt to be simplistic and untenable. In contrast to these viewpoints, the Anglo-American legal tradition suggests a more thoughtful, vigorous struggle to restrain the helpful, preventive, rehabilitative work of these courts—the notion of equity—with rules of law that tend to reduce the danger that agents of the court do too much or too little. The goal is benevolence with restraint as an alternative to abolition of benevolence. Like democracy itself, equity and its offshoots are grievously flawed but better than any other approach we know.

No doubt, it is an awesome task to translate these general principles of jurisprudence into specific reform proposals. The juvenile justice system is an exceedingly complex enterprise, involving not only the rubrics of a specialized judicial agency but the workings of supporting social agencies. The court recognized early on that this duality required application of standards. One observer lamented, "heaven forbid any increase in socialization" if this meant that standards were ignored regarding the investigation and presentation of evidence of individual circumstances in a case (using assumptions rather than facts) or if "fears and prejudices" were permitted to govern decisions. Van Waters, supra note 14, at 65; see also Handler, supra note 19, at 12-45 (prescribing standards including an early proposal for a non-waivable right of counsel while recognizing the threat that a child might rightfully consider the offer of "help" as a signal of danger).
entire enterprise must be aimed at dealing effectively with the individual circumstances of an adolescent offender and his or her family. Nevertheless, the same complexities that make reform a daunting task equally suggest the likelihood of serious flaws in any rationale that proposes to simply abolish juvenile justice as we know it. As I will observe more particularly, these lapses are evident in the published proposals for abolition of the juvenile court.

The unrelenting efforts in recent decades to improve justice in the juvenile courts have made possible the identification of a positive agenda for reform, with many of its particulars now in place in a number of states. First, fair process requires a meaningful guarantee of the right to counsel, which, in turn, is a reform that should consist of three ingredients. The right must be non-waivable for any child in proceedings where the court may place the child in a residential facility. Deliberate efforts, probably through a public defender system, must substantially increase the quality of representation available. Likewise, quality services of counsel are needed for appeals from delinquency proceedings.32

Second, and in this instance regarding the substance of the court’s work, essential reforms must include effective dispositional standards, here also in three parts. The rubrics must be carefully crafted to directly confront the juvenile court pattern of ill-considered, unsuitable, unnecessary, and often discriminatory confinement of adolescents in residential facilities. Thus, the target of these standards must be the pretended efforts of rehabilitation that are in fact singularly retributive.33 Furthermore, the standards must be backed by a mandate for relevant trial court findings of fact. In addition, the mandate for appropriate findings must be upheld by an effective right of appeal.

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33 See, e.g., MINN. STAT. § 260.185(1) (1998) (stating mandate for trial court findings of fact); In re Gault, 387 U.S. 1, 28 (1967) (stating due process demands “careful inquiry and judgment” with respect to the possibility of disposition without placement); In re Welfare of C.A.W., 579 N.W.2d 494, 497-98 (Minn. Ct. App. 1998) (enumerating elements of Rule 15.05 and its companion statute); MINN. R. JUV. P. 15.05(2)(A) (1998) (stating mandate for trial court findings of fact); MINN. R. JUV. P. 15.05(2)(B)(2) (1998) (unique supreme court rule enunciating standards of proportionality, need-based cause for placement, and placement suitability for individual).
Other necessary reforms include (a) mandates for appropriate dispositional hearings in all cases, including reviews of prior dispositions, (b) upgraded advisory practices as a condition to any waiver of the right to an adjudicatory hearing, (c) reduction of pre-hearing detention through development of assessment standards and program alternatives, (d) expedited appeal proceedings in any case where a child placement has been ordered, and (e) an extension to children of the same right as adults to have disputed charges determined by a jury. As with any court, the mission requires a thoughtful quest for able and interested judges who have the time and resources for the unique and demanding task.

41 See Minn. R. Juv. P. 5.03 (stating presumption for unconditional pre-hearing release, with rebuttal permitted only upon showing that the child is dangerous, in need of protection, or apt to abscond); Minn. R. Juv. P. 8.04(1) (1996) (stating helpful advisory list of rights for juvenile cases); Minn. R. Juv. P. 15.04, 15.07, 15.08 (1996) (mandating hearings on original and modified dispositions, including probation violation responses); Melton, supra note 23, at 168-77 (observing notable rehabilitative effect in up-front respect for due process protections); see also Bart Lubow & Joseph B. Tulman, The Unnecessary Detention of Children in the District of Columbia, 3 D.C. L. Rev. ix (1995) (discussing comprehensive urban detention reforms, and highlighting the need for alternative resources and objective risk assessments).

Some observers of the juvenile court especially covet the child's right to a jury trial, which is not available in the juvenile courts of three-fourths of the states. See Ainsworth, supra note 1, at 1121-26 (discussing availability of jury trials). The right to a jury trial in juvenile court has dubious value for children, especially when considering the predominance of minor cases and the prospect for enlarged jury trial rights in the handling of misdemeanors in the criminal courts. See Crippen, A Judge's Perspective, supra note 26 (reviewing the limited cause to abolish the juvenile courts in the quest for jury trials).

42 See Kent v. United States, 383 U.S. 541, 555-56 (1966) (citing the shortage of resources as a shortcoming of the juvenile courts). Much of the problem of resources will be remedied by courts that take responsibility for management/accountability of the system. See Gary Crippen, Center for the Study of Youth Pol., Making the System Work: Courts as Agents of Accountability in Family and Juvenile Cases 15-21 (1993) (discussing judges' and lawyers' involvement in securing the delivery of social services); see also James C. Howell, Abolish the Juvenile Court? Nonsense!, 4 Juv. Just. Update 1 (Feb.-Mar. 1998) (explaining how the effectiveness of the juvenile court is enhanced when the court is better integrated with other human service systems).

43 The contributions and shortcomings of specialized judges have not been adequately researched and reported. As a result, there is no occasion for an objective recommendation for designation of specialists or generalists to do the work of juvenile justice.

When juvenile court jurisdiction is handled by generalists, there is a tendency to worsen the chances for justice by failing to administer the caseload so that one judge deals with a case at all its stages. This is a severe mistake.

Furthermore, while all judicial systems face the peril of providing too little judicial service, which translates into a demand that cases be handled too quickly, the risks of error in hurrying cases are especially great in dealing with the unique chal-
V. THE FLAWED RATIONALE FOR ABANDONING JUVENILE JUSTICE

This discussion of prospective reform, both in theory and in proposals for better "bridling" of the juvenile justice system, ends with a final, critical question. Has some compelling case been made for giving up the effort, for simply prosecuting all childhood offenses in the criminal courts? An examination of the calls for abolishing the juvenile court shows surprising flaws, making the proposition premature if not ultimately untenable.

A. Hopelessness

The most common hypothesis for abolition is largely unstated, but it is rooted in the false assumption that abandonment of the juvenile justice system is a logical response to the recitation of its problems. The successful identification of specific reforms, however, challenges the "anti-conservationists" to show not only the past failings of the system but also to show that (a) identified reforms are either unworkable or actually unattainable, and (b) the aims of juvenile justice can be achieved in the criminal courts.44

More deliberate statements of cause to abolish the juvenile courts have now appeared. A discussion of this literature is begun with reference to a pair of propositions that question the worth of a rehabilitative approach with adolescent offenders.

B. Treatment v. Punishment

Proponents of abolition have discounted the value of juvenile justice system efforts to treat or rehabilitate children, suggesting that society abandon corrections developments of this kind that have unfolded over centuries.45 Slighting the burden to show that treatment efforts are futile, these critics largely have rested their hypotheses on the notion that defenders of the rehabilitation effort have not proven its worth.46
Significantly, in their occasional attempts to illustrate failed rehabilitation efforts, critics cite mostly studies on the adverse affects of institutional care. Unwittingly, they employ this evidence as a prelude to the proposition that juveniles should be prosecuted in the criminal justice system, where institutional remedies are a hallmark. Use of this evidence is problematic because it overlooks 70% of juvenile court dispositions, namely those that do not employ an institutional placement. Finally, these critical observations are premised on a deficient look at literature, disregarding numerous studies that demonstrate the effectiveness of treatment approaches, including those that utilize well-conceived institutional programs.

One deficiency is obvious in the utilization of definitions of 'childhood' as developed early in this century. These definitions do not account for many mature and dangerous young offenders, who are candidates for a retributive approach. It is too easily overlooked that the juvenile justice system can and...
does succeed with the great majority of adolescent offenders without the threat of punishment. However challenging the effort to identify the treatable child, the courts—significantly, like parents—have ample reason to expect that most juveniles can be corrected without putting them in jail or threatening to do so. The worst results in dealing with adolescent offenders have occurred as products of putting juveniles in severe confinement.

C. General Economic Reform?

Criticism of the rehabilitative aim includes the added contention that a helping, case-by-case approach is a poor substitute for "social structural change" and may serve as an "alibi" to avoid fundamental steps of "supporting families, communities, schools, and social institutions" to meet the needs of youth. This entirely political analysis, in many respects a futile cry for the moon, takes no account of the significant contribution of the juvenile justice system, which may be, in its early and determined dealings with young offenders, one of society's most valuable public programs for prevention of crime and other social disorder. Moreover, because belief in the leniency of the juvenile courts is one of the primary political sentiments that is brought to bear against the juvenile courts, it is difficult to imagine the political environment that would abolish the courts and, in the next breath, adopt sweeping social reforms that benefit children.

To further a discussion of the cases made for abolition,

51 See ALLEN, supra note 16, at 57 (explaining that the gains for children made possible through the rehabilitative approach "demand acknowledgment in any appraisal of the court and its work"); see also O'Connor & Treat, supra note 4, at 1333 ("There is a striking consensus among researchers, jurists, and law enforcement officials about what kinds of programs are proven to reduce recidivism and to rehabilitate juveniles.").

52 Any parent can appreciate the significance of original juvenile court aims to aid the "civilizing forces," including home and school, in helping children, and thus, by doing so, also "protect society by making the children good members of society." LINDSEY & O'HIGGINS, supra note 15, at 135; see id. at 133-32 (discussing initial tactics of a judge in a court of this kind).

53 See, e.g., Feld, Abolish, supra note 6, at 85-86 n.34 (discussing generally negative effects of confinement).

54 Id. at 95; see id. at 93-95, 134-36 (describing the failure of the juvenile court system as one of conception because it attempts to combine efforts to control criminals with social welfare goals).

55 The pursuit of individualized justice in the juvenile courts is not at odds with major social reforms. See NICHOLAS LEMANN, THE PROMISED LAND 120-29 (1991) (describing how during the 1980's, activists in the juvenile justice system had a notable part in producing one of the most substantial packages of social reforms in American history).
attention will be given to five theses suggesting that juvenile court injustices are inherent in its rehabilitative aims, making it imperative to abandon the system in favor of adult court jurisdiction over children's cases.

1. *Soft on Crime?*

Do juvenile court dispositions weaken the law enforcement effort, threatening public safety?\(^{56}\) The case on leniency of the juvenile court has not been established. The claim is especially suspect at the end of this century, following two decades of escalating legislation to permit punitive dispositions and to provide for adult sentences for serious juvenile crimes. The absence of evidence suggesting a problem of leniency explains the sparse reference to the point in legal literature and also undermines the credibility of propositions for abolition that merely assume the problem.\(^{57}\) The suspicion of leniency is fed by political rhetoric regarding juvenile arrests, much of which has involved careless exaggeration.\(^{58}\) In addition, there is ample reason to seriously doubt the significance of crime-rate reports based on arrest records, a fact that should signal caution to the wary.\(^{59}\)

Finally, a plea for severity is evidently premised, in the political arena, on revelations of unusually violent offenses by some young people. Whatever merit may exist for this position, the argument carries no weight for the cause of abolishing the juvenile courts because cases of this kind are rarely encountered. In fact, over 80% of all juvenile cases involve accusations of a misdemeanor or a status offense, mostly by children who are under 15 years of age.\(^{60}\) It is within this arena that the juvenile courts serve their fundamental preventive purpose in dealing with these adolescent offenders.

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56 See *supra* note 4 (discussing the political call for abolishing the juvenile courts, which is uncommonly advocated in legal literature).

57 Kamenstein uses the point in argument, asserting a "negative effect on society-at-large" but rests on the notion that this effect occurs when the courts weaken the enforcement effort, without ever addressing the evidence regarding occurrence of any such pattern of weakening. Kamenstein, *supra* note 2, at 2132.

58 See Howell, *supra* note 42, at 1, 2, 10 (discussing how some abolitionists are acting on erroneous information regarding the effectiveness of the juvenile courts); see also Conward, *supra* note 50, at 46-48 (discussing misconstruction of statistics and media distortions of evidence).

59 For example, Feld's reports on empirical evidence include the remarkable showing that juvenile felony petitions were filed for only 18.6% of reported FBI Part I felony arrests for juveniles ages 10 to 17. Feld, *Justice by Geography, supra* note 25, at 177.

60 See *id.* at 183 & 172-83 (discussing statistics of age, offense, and prior referrals).
'delinquencies'.

2. Retribution by Another Name?

As the question as to whether the juvenile courts are too lenient is still pending, we are confronted with a crucial question: can a case for abolition safely be rested on the proposition that the court's dispositions are too severe, while at the same time these very dispositions are hiding a pattern of punishment (and abhorrent racial discrimination\(^{61}\)) under a veneer of concern for treating the adolescent offender?\(^{62}\)

Here, the proponents of abolition have evidence that demonstrates a severe problem,\(^{63}\) instead of using their knowledge to address their concerns, they misuse this information to reach an unjustified conclusion.

The proven error of severity is in the abusive use of residential placements. Interestingly, however, approximately 70% of the juvenile justice system caseload does not involve a placement.\(^{64}\) So we're left with the inevitable question: what will criminal court jurisdiction correct—the problems of the 30%, those of the others, or the selection of the cases which do not need a placement? Unfortunately, this question has barely entered into the literature addressing the abolition of juvenile courts.

For the 70% left in their homes by the juvenile courts, what should they anticipate in a criminal court? Is this a court that will be equally cautious about public safety demands, especially in the environment following a legislative choice, no doubt prompted by advocates of law and order, to abolish the juvenile court?

How about the other 30% who require placement? Will they get less severe treatment in the adult courts? Perhaps under certain suggested youth sentencing schemes they may

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\(^{61}\) See Feld, Abolish, supra note 6, at 84.

\(^{62}\) This suggestion rests partly on the notion that most states to some extent have abandoned their pursuit of rehabilitation in the juvenile courts in favor of express aims to serve public safety interests. See, e.g., id. at 74-86. But this proposition is overstated. See Crippen, A Judge's Perspective, supra note 26 (citing the prevalence of statutes aimed at protecting the rehabilitative aims of the juvenile courts); Linda F. Giardino, Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America, 5 J.L. & POLY 223, 234-35 (1996) (discussing the 1980 supplementation of Minnesota's "exclusively benevolent and rehabilitative" statutes with "competing goals of maintaining the integrity of the substantive criminal law").

\(^{63}\) See, e.g., Feld, Justice by Geography, supra note 25, at 189 (reporting a study of Minnesota data showing a statewide placement rate of 29.6% and variations for urban, suburban, and rural jurisdictions).

\(^{64}\) See Feld, Abolish, supra note 6, at 91-92.
expect confinement for shorter terms. But what facilities will be employed? More particularly, will they involve something better than jails and their attendant problems of recidivism? Will these sentencing schemes be tolerable enough to permit plea bargains and stayed sentences that provide for longer confinement in other facilities—some of them equally oppressive but more benignly portrayed and perceived? Without fully exploring these hazards it would be premature to opt for criminal court jurisdiction.

Finally, how will the criminal courts sort out the 70% from the whole, in order to spare this majority from confinement? Of course, these judicial decisions are discretionary, yet at the same time they beg for control. These dispositions look for guidance through sentencing standards, a mandate for findings of fact, and a meaningful right of appeal. While these reform practices are not characteristic of the criminal justice system, they can be provided in juvenile court. Unfortunately, the anti-conservationists place these decisions in the hands of judges who are not faced with the challenge of the juvenile court to understand young people and the best approaches for dealing with them.

3. The Plea for Certainty

Whether the rehabilitation standard is predominantly severe or lenient, two authors who propose abolishing the juvenile courts rest their cases heavily on the need for certainty, a plea not substantially different than countless other historic indictments of equity. These critics advance the argument

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65 See id. at 96-121 (resting his abolition thesis on a sentencing scheme with discounts for youth).

66 Feld suggests that adolescents should not be confined in adult jails or 'punk prison,' but in age-segregated "correctional facilities." Barry C. Feld, Criminalizing the American Juvenile Court, 17 CRIME & JUST. 197, 256 (1993). As Feld acknowledges, the plea for new capital resources is not a likely avenue for reform in dealings with adolescent offenders. Id. at 256. This suggestion for resources must come before the same legislative authorities who are electing to abolish the juvenile courts (most likely due to concerns confined to public safety). See Robert O. Dawson, The Future of Juvenile Justice: Is it Time to Abolish the System?, 81 J. CRIM. L. & CRIMINOLOGY 136, 141-42, 148-49, 155 (1990) (observing that resource investment depends to some extent on preserving a separate juvenile court).

67 Kamenstein pleads for a "principle of legality" and an "inner-morality of law," so that adolescents have notice of the substance of the law and the Judiciary has "integrity." Kamenstein, supra note 2, at 2126-31; see id. at 2131-44 (indicating the juvenile court for offending these principles).

Feld suggests that public policy should take age into account for a sentencing discount, but that considering any other factors in a disposition is too subjective to be rational or fair. See Feld, Abolish, supra note 6, at 91-92, 121-25 (discussing how
beyond a matter of theory, arguing that uncertainty in the courts' goals has the practical consequence of mis-shaping youthful offenders. Without certainty, one critic suggests, a young person will not sense blame, learn right from wrong, or "consider himself having been dealt with justly."

Suggestions for certainty have a rightful place in theoretical discussions of judicial discretion, but there is no precedent to support the purist notion of a certain rule of law. That uncertainty is sensed by adolescents in juvenile court, that this has an ill effect on them, or that they would be better educated and impressed by a criminal court is mere speculation; the notion is in fact flatly contradicted by evidence that severe institutional dispositions have failed to rehabilitate young offenders. Some critics come very close to the indefensible proposition that jailing kids is good for them and creates the kinds of attitudes and insight that society wants them to have.

Finally, evidence on the effectiveness of treatment, as discussed earlier, belies the theoretical concern for promoting a class of lawless youth. This evidence also eliminates another exaggerated problem of uncertainty, the added assertion that rehabilitation decisions are irrational because there are no scientific means to choose effective treatment programs.

the introduction of subjective elements into the explanations of juvenile behavior will undermine the objectivity of the law. Both Kamenstein and Feld find an advantage of certainty in simply eliminating the question of whether a child will be prosecuted in the juvenile court or adult court. See Feld, Abolish, supra note 6, at 127 (discussing the benefits of an integrated court system); Kamenstein, supra note 2, at 2135-37.

The pursuit of a theory of certainty has already produced questionable results related to the topic of juvenile offenders. Legislative transfer of cases to adult court has led to demonstrably arbitrary actions. See Richard E. Redding, Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research, 1997 UTAH L. REV. 709, 741-42 (1997) (discussing these "subjective and inconsistent" results); see also Conward, supra note 50, at 49 (citing evidence on the shortcomings of Florida's automatic waiver approach); O'Connor & Treat., supra note 4, at 1314-18, 1335 (reviewing criticism of current waiver practice).

70 See infra notes 69, 71 and accompanying text.

Kamenstein, supra note 2, at 2134-35. Feld agrees, suggesting that "[b]y denying youths' personal responsibility, juvenile courts' treatment ideology reduces offenders' duty to exercise self-control, erodes their obligation to change, and sustains a self-fulfilling prophecy that delinquency occurs inevitably for youths from certain backgrounds." Feld, Abolish, supra note 6, at 126.

71 See supra note 46 (reporting Feld's conclusion that court dispositions are irrational because nothing is known about the effectiveness of particular treatment programs for particular children).
4. Will Reform be Too Costly?

One critic adds an economic dimension to the list of concerns of uncertainty, suggesting that the attempt to employ subjective measures of the need for treatment "hardly seems worth the judicial burden and diversion of resources that the effort would entail." Again, the argument is merely ornamental to a stated doubt on the value of rehabilitation efforts. If treatment is effective, who is to say that the immeasurable gain is offset by concern for the burdens of the judiciary? It would be a burden no greater or worse than from any other judicial step taken in the pursuit of justice. Moreover, the cost criterion is an inappropriate part of the discussion without imagining the cost and benefit of the imagined alternative of criminal court confinement of children.

5. Will Reform Result in Unfair Process?

Finally, critics of the modern juvenile court have frequently speculated that the infusion of due process into the system invites punitive dispositions, displacing the rehabilitative mission of the court. A correlated concept also is advanced, namely that a faithful use of rehabilitative dispositions will sacrifice the child's right to fair process. Although these observations have often been made, they can only be regarded as mere assumptions, and not as a report of findings. They are also speculative pre-judgments on the worth and attainability of well-conceived reforms that have been reviewed in this article and elsewhere.

The roots of these assumptions evidently lie in the mistaken notion that the rehabilitative effort, under the equity banner of parens patriae, is a demonstration of raw court

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72 Feld, Abolish, supra note 6, at 122; see also id. at 127 (noting that resources are saved in eliminating questions on transfer of cases to adult court).
73 See supra note 65 and accompanying text (discussing special facilities imagined for children sentenced in adult courts); see also Conward, supra note 50, at 71-72 (describing studies comparing the economic value of punishment approaches and the immensely superior economic prospects in prevention programs).
74 See Feld, Abolish, supra note 6, at 86-87. Judges, among others, have expressed this concept. See Klein, supra note 4, at 382 (describing the shift in the court's philosophy "from rehabilitation to "punishment and incapacitation").
75 See Feld, Abolish, supra note 6, at 92 ("[J]udges will impose haphazard, unequal, and discriminatory punishment on similarly situated offenders without effective procedural or appellate checks."). This view merely demonstrates how the present is like the past, when founders of the juvenile court anticipated that its benevolence would eliminate the need for procedural protections. See id. at 71-72 (discussing the court's former "individualized" approach to determining the best interests of the child).
power over individuals. As such, the infusion of due process limits that power and distorts the rehabilitative aim. This assumption is incorrect because the rehabilitative approach and parens patriae have a deeply-rooted protective dimension as well, manifested as a discipline of the court to limit the harm that may be inflicted on children. Thus, as many court scholars have noted, efforts to rehabilitate serve a purpose parallel to the extension of constitutional rights to the child, and therefore the two should be compatible.

Finding such shortcomings in the rationale advanced for discontinuing efforts to preserve and improve the juvenile courts, we must next ask: Why are these courts so vigorously condemned?

D. Are the Juvenile Courts an Arbitrary Target?

Observers of American jurisprudence would find it difficult to discern why the juvenile courts in particular have been identified from among the nation's equity courts as a target for abolition. The explanation does not lie in a comparison of the supposedly dangerous levels of judicial discretion. On this score, juvenile courts are rivaled, for example, by the judicial bodies empowered to order involuntary hospitalization for mental health treatment, which can be in some instances, potentially interminable. The discretion of juvenile judges is mired with limitations when compared with the almost total discretion of a trial judge over the placement of a child of divorced parents. Judges in delinquency cases also have

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76 See supra note 19.
77 See id.
78 See AUSTIN & KRISBERG, supra note 50, at 183 (observing that a protective effort is not advanced by secret or casual processes).

The blend of due process and rehabilitation is the unique consequence of fair process on adolescent offenders. See Ainsworth, supra note 1, at 1119-21 (observing that socialization of young offenders is dependent on fair court process); Melton, supra note 23, at 181 (concluding that the juvenile courts contribute singularly to rehabilitation by demonstrating fairness in the offering of due process, in spite of the conclusion that treatment efforts are of doubtful value).

79 See Crippen, A Judge's Perspective, supra note 26 (expanding on this analysis and stating the case for a juvenile court that offers children 'the best of both worlds,' including solicitous care and treatment, and at least those protections afforded to adults).
80 See Lois A. Weithorn, Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates, 40 STAN. L. REV. 773, 783-98 (1988) (exploring the process, with and without court hearings, that continues to explain the overwhelming volume of juvenile placements).
81 In this judicial activity, only one state, West Virginia, states a notable standard of law on the topic; in most states, the occasion for an appellate correction of a placement on a standard of law is almost non-existent. Gary Crippen, Stumbling Be-
identical powers that are no less dangerous in child protection proceedings. Does the explanation for this targeting of juvenile justice relate to the consequences of its errors? Probably not, considering that the effects of court jurisdiction over children and adults in hospitalization, child protection, and divorce proceedings can in many instances be similar or even worse.

Although it is speculative to explain the emergence of literature that proposes abolition of juvenile justice as we know it, the occurrence may be due to mere expediency. As we have seen here for example, there is an evident, albeit unworthy, alternative to the court of equity—juvenile offenders seemingly could be prosecuted in the criminal courts. Nevertheless, the explanation for the proposal might be in simply recognizing that the thesis is uniquely provocative and thus a natural magnet for a publication-driven academic world.

E. The Plan

Finally, those who would destroy the juvenile courts have taken the logical step of offering an alternative, although they usually address the topic fleetingly. As already suggested, the plan is as flawed as the need. The proposal is to abolish, and it basically calls for prosecuting all adolescent offenders in the adult criminal courts. Notwithstanding its proposition, there has been no demonstration that the criminal courts can deliver justice to children.

Some who suggest abolishing the juvenile courts have made no reference to the criminal court alternative or have stated unwarranted assumptions about its characteristics. Ironically, a primary proponent of criminal court jurisdiction faults critics of his position because few of them “even attempt any longer to defend the institution on its own merits, but only to justify it by comparison with criminal courts, which they contend are worse.” This juvenile court critic contends only that the juvenile courts and criminal courts

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*yond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference, 75 MINN. L. REV. 427, 438 (1990) (discussing the “prescribed... primary caretaker preference”).

82 See generally Feld, Abolish, supra note 6, at 91.

83 See Rosenberg, supra note 3, at 173-74 (analyzing the perils in criminal courts that dampen concerns for problems of the juvenile courts).

84 See, e.g., Federle, supra note 5, at 49-50 (stating unexplained assumptions about the quality of justice in the criminal justice system).

85 Feld, Abolish, supra note 6, at 96.
are "equally" deficient. Yet he offers an adult court sentencing proposal with the express premise that he does "not propose simultaneously to completely reform the criminal justice system." Thus, as abolition is proposed, its advocates evidently suggest employing one imperfect system rather than another. Taking into account the current unwillingness of the anti-conservationists to examine the criminal court alternative, it is evident that the case for abolition is premature and critically incomplete. The problems of the criminal court plan are strikingly revealed by clarifying a central but often-overlooked characteristic of the proposal to abolish the juvenile courts. It follows from the notion of abolition that critics are no longer looking at a proposal to transfer jurisdiction for a class of cases, but rather are formulating a plan for all cases. Over 80% of the juvenile court caseload involves accusations of misdemeanor and status offenses. Thus, we will not understand the workings of the criminal court by merely examining its handling of felony cases, but rather instead by looking at its operations in dealing with a massive caseload of misdemeanor offenses.

This facet of the abolition proposal has major implications for the consideration of control of waivers, provision of counsel, and guarantee of other constitutional rights in the misdemeanor courts. Thus, an abolitionist's hope that juveniles "get the same caliber of legal counsel, operating under the same standards of zealous advocacy, as adult defendants receive" becomes problematic. Abolitionists expect improved justice from misdemeanor courts that are common forums for group advisories dealing summarily with topics unknown to children. There is no evidence that competent counsel is commonplace in these courts or for appeals from their decisions.

The misdemeanor and status offense caseload also prompts alarm about criminal court sentencing practices. In adult courts, children charged with these offenses would normally face the prospect of 90 days confinement, somewhat discounted in the sentencing scheme proposed by one propo-
The question then becomes: what facilities will be employed? In addition, how do proponents of a punishment scheme expect to cope with the consistently alarming evidence on the rate of recidivism of children following experiences in confinement? Furthermore, given the threat of punitive confinement, what dispositions can be expected through plea bargains and a stay of punishment? None of these questions have been explored to date.

The specter of criminal court dealings with minor adolescent offenses has prompted one proponent of the practice to assert that the caseload will be reduced, by diversion of cases and decriminalization of offenses, due to insights on the problem by prosecutors and legislators. This contention is unwarranted in light of historic difficulties in gaining support for diminished public scrutiny of adolescent misconduct. Moreover, if the cases are treated in an alternative fashion, such as in child protection proceedings, they will face the same type of juvenile court problems deplored by abolition proponents and confronted by those who would continue to reform the juvenile courts.

VI. STAYING THE COURSE FOR A HELPFUL COURT

Most of the 193 countries of the world that are recognized by the United Nations, excepting only the United States and Somalia, a country which has no functioning government, are committed to the following, as well as other propositions of the international convention on the rights of the child: "In all
actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.\textsuperscript{99}

The inaction of our federal government on this declaration coincides with a failure of most lawmaker bodies in this country to positively state a definitive, supportive public policy on the welfare of our children. Notwithstanding these failures, our states have uniformly advanced a policy to protect the interests of adolescent offenders in juvenile courts, leading one of the century's most notable jurisprudential voices to praise the development as the "greatest forward step in Anglo-American jurisprudence since Magna Charta."\textsuperscript{100}

The task of the juvenile justice system, singularly, is the prevention of public peril by helping children—identifying their best interests—early in the course of their experiences that may include public offenses.\textsuperscript{101} This mission can be most aptly achieved, considering that the bulk of juvenile justice activity involves non-felony level offenses.\textsuperscript{102}

It is shameful, rivaling the nation's problems in failing to declare a policy to serve the interests of children, that agents of the juvenile court have often abused their trust, most certainly harming the objects of their beneficence. It is also equally shameful at this point, that some have even considered abandoning our most notable endeavor to uphold children's interests—at least so long as positive, effective reforms

\textsuperscript{99} U.N. CONVENTION ON THE RIGHTS OF THE CHILD art. 3, para. 1.

\textsuperscript{100} Alexander, supra note 30, at 353 (quoting Roscoe Pound in 1951). Significantly, while critics might wish otherwise, this considered opinion of Dean Pound did not occur prior to the surfacing of major critical analysis of the juvenile courts. See supra note 22 and accompanying text.


We can keep tinkering with laws so we can ship more and younger children to adult court, but this does nothing to return juvenile courts to their original mission: to deal with young people before they become hardened criminals. The right questions in the debate about youth and crime are: How do we save first-time offenders from lives of crime? How do we turn the best of our legal profession toward saving children? Only when we deal with these issues will we start to "crack down" on juvenile crime. Along the way, we just might find that the notion of treating children differently from adults, simply because they are children, is not so outdated after all.

\textsuperscript{102} Id. Colorfully, Denver's early juvenile judge, Ben Lindsey, told police that his job was to save boys and not bicycles, so that "we can save bicycles in the future that we could not save in the past." LINDSEY & O'HIGGINS, supra note 15, at 144.

\textsuperscript{99} See supra p. 157 and note 60 and accompanying text.
of the enterprise remain to be adopted, employed, and evaluated. Although the proposals made to date for abolishing the juvenile courts may reflect sincerely held commitments to the interests of children, at this stage of the discussion they can be considered no more than premature at best, as they are evidently still wanting for a sound rationale.