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UNITED STATES

THE JUVENILE JUSTICE SYSTEM IN THE UNITED STATES*

Paul MARCUS**

Introduction

A century ago the system of juvenile justice in the United States began to change. That change swept across the nation, with individual states—where most juvenile justice matters are resolved—using similar procedures designed particularly to rehabilitate juveniles, even in the most serious cases. Over the past twenty years, however, new change has occurred throughout the United States as to the adjudication and treatment of juveniles in connection with delinquency and criminal matters. In this article, I shall explore the traditional view of juvenile justice in the United States, look to the recent developments, and also consider the impact of international standards and principles on American law regarding juvenile justice.

The Early Development

As people in the United States began to move in large numbers from rural farm communities into urban areas, especially during the middle of the 19th century, attitudes regarding the treatment of children evolved. Less emphasis was placed on the punishment of young people who violated laws; instead, government officials looked to the factors which could be said to have caused such delinquency. As written by the United States Supreme Court:

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened

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criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child—essentially good, as they saw it—was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive [1].

The modern history of the juvenile justice system in the United States can be traced to a period just a few months before the beginning of the 20th century. The Illinois Juvenile Court Act of 1899 established special rules and procedures for dealing with children under the age of 16 [2]. This act was to become a model for similar laws throughout the United States.

These laws were premised on the view that state agencies working with children were acting in the role of *parens patriae*. That is, the agencies were substituting for the parents who seemingly would not or could not control or direct their children. Thus, the principle goal of the juvenile courts was not to sanction children who had transgressed, but rather to attempt to rehabilitate them into productive members of the community. Special facilities were created for juveniles so they would not have to go into prisons or jails where adult offenders would be present. These facilities for children, usually called juvenile halls or reformatories, were established to offer a setting where punishment would be replaced by a learning and supportive environment. Indeed, juveniles who were sent to such facilities were not found "guilty of crimes," but rather were "adjudged delinquent."

Within a short period after the establishment of the Illinois juvenile courts, hundreds of juvenile courts could be found all over the United States. Generally these courts were greeted with enthusiastic support for their treatment and education of juveniles, as

1. In re Gault, 387 U.S. 1, 15-16 (1967).

2. *See generally* Victoria Getis, The Juvenile Court and the Progressives (2000).

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opposed to punishment [3]. The changes were widely applauded. To be sure, few appellate court decisions during the first several decades of the establishment of these juvenile courts can be found which in any way criticized the policy of these courts, or even their practices and procedures. Prosecuting attorneys and judges were given considerable discretion in these courts, other than being scrutinized to avoid utilizing sanctions which appeared criminal in nature rather than rehabilitative. Children subject to jurisdiction in these courts were normally young, though no absolutely consistent pattern existed in the many states using the juvenile court approach. In most states the upper age limit for the juvenile court jurisdiction was 16 years old, 17 years old, or 18 years old [4].

The United States Supreme Court Provides Structure

The United States Supreme Court's involvement in the area of juvenile justice greatly altered both the process utilized and the protections offered to juveniles within the system [5]. The Court's seminal opinion is *In re Gault* [6]. The juvenile in that case was found to be delinquent after two hearings. He was sent to a reformatory for a period of up to six years. The Supreme Court there held that juvenile actions were different in nature from adult criminal proceedings. Still, the juvenile actions were covered by the Due Process Clause of the 14th Amendment to the United States Constitution[7] because the children were ultimately punished, at least to the extent that they could not live the lifestyle previously enjoyed.[8] The Court explained:
A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a

3. *See generally* John Watkins, The Juvenile Justice Century: A Sociological Commentary on American Juvenile Courts (1998).

4. *Id.*

5. Procedure in judicial proceedings has traditionally been viewed as especially important in the United States. "The history of American freedom is, in no small measure, the history of procedure." Malinski v. New York, 324 U.S. 401, 414 (1945) [Frankfurter, J., concurring].

6. 387 U.S. 1 (1967).

7. The 14th Amendment provides, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

8. 387 U.S. at 26-27.

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"receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours * * *." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.[9]

Because there were virtually no safeguards available to the juvenile during the two important state hearings, including the right to be represented by counsel,[10] the Court decided that the state procedure was unconstitutional.

The response to the Supreme Court's decision was immediate and widespread, as state judges and legislators moved quickly to adjust systems to comport with the fairness requirements set down by the Justices in *Gault*. As a consequence, proceedings became more formal, but far more safeguards were present for the juveniles who were accused. For instance, it became clear—even in a juvenile proceeding—that the government is required to prove guilt beyond a reasonable doubt, viewed as an essential component of the basic fairness inherent in the criminal justice system [11].

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9. *Id*. at 27-28.

10. A right guaranteed under the 6th Amendment to the United States Constitution in the landmark decision of Gideon v. Wainwright, 372 U.S. 335 (1963). The Supreme Court went on to find in the *Kent* case, *infra*, that the juvenile accused was entitled to a host of protections in addition to counsel, such as written notice of the specific charges, application of the privilege against self-incrimination, the right to cross-examine accusers, and a formal determination of delinquency.

11. The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. . . .
We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.
In re Winship, 397 U.S. 358, 361, 365 (1970).

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Two important decisions of the United States Supreme Court especially affected procedural due process in juvenile proceedings. In the first, *Kent v. United States*,[12] the juvenile was taken into custody, questioned by the police for a number of hours, and detained for several days prior to any determination by a judge as to the likelihood of his having committed a crime. The United States Supreme Court there held that the juvenile's constitutional rights had been violated, as he had been denied a formal hearing during a significant period of time. The Justices laid out several basic requirements mandated by the Due Process Clause if the government wishes to proceed in a criminal prosecution, apart from the juvenile adjudication traditionally found with young people.[13] The juvenile is entitled to a hearing on the question of whether she can be prosecuted as an adult, she must be allowed representation by a lawyer at that hearing, the lawyer must be given access to any appropriate records relating to the juvenile, and if a decision is made to prosecute the juvenile as an adult, she is entitled to receive a written statement of reasons for that decision.[14] The role of the lawyer was especially emphasized by the Supreme Court in determining that basic fairness had not been followed in the proceeding:

It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice…. Appointment of counsel without affording an opportunity for a hearing on a "critically important" decision is tantamount to a denial of counsel…. "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a statement of reasons."[15]

The right to a jury trial is considered fundamental in the United States criminal justice system. Except for the most minor of charges, criminal proceedings against adult defendants are to be conducted with jury trials unless an affirmative waiver is made by the defendant [16]. The Supreme Court, however, refused to require a jury trial in

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12. 383 U.S. 541 (1966).

13. In *Kent* the government ultimately decided to prosecute the juvenile as an adult rather than process him through the juvenile system. *See* discussion of this process, *infra*.

14. 383 U.S. at 561-63.

15. *Id*. at 561.

16. The right to a jury trial is found in the 6th Amendment to the United States Constitution which states, in part, "in all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury . . . ." Duncan v. Louisiana, 391 U.S. 145 (1968) established that this jury trial

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juvenile proceedings. In one famous case,[17] the Court concluded that fundamental fairness did not mandate a trial by jury in a juvenile court action. The Justices were especially concerned that to order a jury trial would make the juvenile process into a more formal and adversary event and would eliminate the purpose of having the juvenile system be a more protective proceeding for the juvenile.

The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, detract from the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine criminal process. As the Court said:

The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise. . . . We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial. The States, indeed, must go forward. If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation [18].

Though not directly applicable to court proceedings involving juveniles, other rights have also been held to be necessary in matters involving juveniles. Foremost, perhaps, among these are the rights in connection with the interrogation process and confessions. Judges in the United States consistently write that constitutional protections regarding the interrogation process associated with adult criminal defendants apply with equal force to juveniles. Law enforcement officers must be careful to insure that statements received from juveniles are voluntary and not subject to undue coercion. The courts have not hesitated in striking down confessions viewed as improper under due process standards. With young offenders, being held in

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right was fundamental, though limited to serious offenses. *See also* Baldwin v. New York, 399 U.S. 66 (1970).

17. McKiever v. Pennsylvania, 403 U.S. 528 (1971).

18. *Id.* at 547.

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custody without the presence of adults may well make any resulting statement "involuntary."[19] The analysis here looks to a totality of the circumstances to determine if the defendant understood her rights under the Due Process Clause and voluntarily chose to speak. Important circumstances would include the nature and length of the detention, the age of the offender, and the lack of presence of a lawyer, family member, or friend:

The prosecution says that the youth and immaturity of the petitioner and the five-day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights. . . . A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.
There is no guide to the decision of cases such as this, except the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately

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19. Haley v. Ohio, 332 U.S. 596, 599 (1948):
We do not think the methods used in obtaining this confession can be squared with that due process of law which the Fourteenth Amendment commands.
What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. . . . No counsel or friend was called during the critical hours of questioning. . . .
This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days. . . .

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to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process.[20]

The courts have also been careful to determine that the constitutional Privilege Against Self -Incrimination applies to juveniles in much the same way as it applies to adults [21]. In one leading case, the question was whether the right to receive warnings under the well known *Miranda* rule was to be considered in connection with a juvenile proceeding. *Miranda* holds that statements received in response to custodial interrogation may generally not be admitted to prove the defendant's guilt unless the accused has been warned of the right to remain silent, advised that anything said can and will be used at trial, and told of the right to a lawyer during questioning, even if the accused cannot afford one.[22] In the juvenile case, the Supreme Court refused to establish separate *Miranda*-type rules regarding waiver of constitutional rights in juvenile proceedings. The Justices did, however, find that, as with adults, the question with juveniles is whether, under the totality of circumstances, the defendant understood her rights and freely gave them up.[23]

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20. Gallegos v. Colorado, 370 U.S. 49, 55-56 (1962).

21. The Fifth Amendment to the United States Constitution provides, in part, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

22. Miranda v. Arizona, 384 U.S. 436 (1966).

23. Fare v. Michael C., 442 U.S. 707 (1979). The Court discussed the point:

This totality of the circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Courts repeatedly must deal with these issues of waiver with regard to a broad variety of constitutional rights. There is no reason to assume that such courts—especially juvenile courts, with their special expertise in this area—will be unable to apply the totality of the circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. Where the age and experience of a juvenile indicate that his request for his probation officer or

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An unusual principle regarding constitutional rights for juveniles deals with the use of the 4th Amendment Search and Seizure provision in public school settings.[24] The Supreme Court has only once dealt with the matter substantively. In that case, however, the Justices rejected the claim that the 4th Amendment ought not to be utilized in the school setting because of the important *parens patriae* doctrine. As in other areas,[25] juveniles enjoy the protection of constitutional rights even in the public school setting. Still, because the school setting was not the usual sort of criminal on-the-street encounter, the Justices did not require a search warrant in order for school officials to search students, and allowed a search on a lower standard than probable cause, focusing on a "reasonable suspicion." The fact that the individual involved could be subjected to a serious criminal penalty if evidence of illegal activity was found did not move the Court, as attention here was on the juvenile being subject generally to broad restrictions by school officials.

[The] accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.[26]

One important constitutional right that has been given mixed treatment in the juvenile

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his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, the approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation.
Id. at 725-26.

24. The 4th Amendment to the United States Constitution provides in part, "The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

25. Such as the rights of students to communicate speech protected by the 1st Amendment to the United States Constitution. *See*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

26. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). The Court later extended the search doctrine to uphold the constitutionality of random drug testing of some students. *See* Vernonia School Dist. v. Acton, 515 U.S. 646 (1995).

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setting is Double Jeopardy.[27] While the United States Supreme Court has ruled that Double Jeopardy bars individuals from being tried and convicted twice—once as a juvenile and then as an adult after waiver to the adult courts—on the same charge,[28] that holding has been limited. In particular, no double jeopardy problem was found where a juvenile proceeding began with a special master's finding but finished with a decision by a judge.[29]

Major Changes to the Juvenile Justice System

Until very recently, the juvenile justice system in the United States was quite concerned with treating young people differently than adults in terms of the criminal process and its sanctions. One commentator noted that, historically, the American juvenile judges were directed to process juveniles "in a non-punitive and therapeutic manner."[30] We have seen, however, a dramatic change in attitude over the past two decades. Public perception has shifted in its view of juveniles and the juvenile justice system. Many Americans now conclude that juvenile crime has risen significantly, particularly violent crimes by ever-younger people. One sees numerous media references to, for example, vicious children, young thugs, youthful predators, and super-predators.[31] In fact, the evidence regarding juvenile crime rates is decidedly

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27. The Fifth Amendment to the United States Constitution provides, in part, "No person . . . shall . . . be subject to the same offense to be twice put in jeopardy of life or limb. . . ."

28. Breed v. Jones, 421 U.S. 519, 529-30 (1975):
As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens—psychological, physical, and financial—on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offence." . . .
Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "anxiety and insecurity" in a juvenile, and imposes a "heavy personal strain."

29. Swisher v. Brady, 438 U.S. 204 (1978).

30 Note, *The Disparate Treatment of Males and Females Within the Juvenile Justice System*, 2 Washington Univ. Jnl. of Law & Pol'y 429, 432 (2000).

[31]. *See generally*, Shepherd, *Recapturing the Child in Adult Court*, Winter 2002, Criminal Justice at 56, 58.

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mixed. While some studies state that "juvenile violence has spread like an epidemic," others point out that juvenile crime has "dropped significantly over the past several years."[32]
Whatever the empirical basis for the conclusion, it is clear that the American public and legislators have become convinced that more violent juvenile crime exists and that a harsher process for juvenile crime adjudication is necessary in order to respond to a crisis situation. As a consequence, considerably more cases may be found today in which juveniles are being transferred to adult criminal courts and tried as criminals rather than as juvenile transgressors. And, juveniles found guilty are being punished more severely than in years past.

Transfer of young people to adult criminal courts[33] can occur in several ways. One is based on a judicial waiver, a process by which the juvenile judge determines that it would be in the best interest of all for the transfer of the juvenile to the adult criminal justice system.[34] Another involves the prosecuting attorneys being given the power to require the transfer through an exercise of discretion.[35] In still other states, the

32. *Id*. The numbers are somewhat confusing. One study indicated that arrest rates for violent juveniles rose dramatically toward the end of the 20th century. *See* Note, *Not Kids Any More: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 Boston College L. Rev. 391, 392 (2001). But another found that during that same period, arrests of juveniles for violent crimes had dropped quite significantly. Shephard, *supra*, quoting the Office of Juvenile Justice and Delinquency, U.S. Dept. of Justice, OJJDP Statistical Briefing Book, December 2000. For a thoughtful analysis of this seeming inconsistency, see, Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. Rev. 401, 411-13 (1999). The most recent analysis indicates an extremely sharp decline in violent crime among American juveniles. In a study just released by the Urban Institute, the researchers concluded that "the rate of juvenile violent crime in 2000 was lower than at any time in the previous two decades," and this was achieved while the number of juveniles in the United States grew from 27,000,000 to over 31,000,000. *See* Morin, *The Idea Industry*, Washington Post, A-17 (April 9, 2002).

33. There is a tremendous range of minimum age for the transfer of juveniles throughout the United States. In some states the age can be as low as ten while in others it is higher, and in still others there is no specified minimum age requirement at all. *See* Chamberlain, *supra*, 42 B.C. L. Rev. at 399.

34. *See, e.g.*, Mississippi Code, 43-21-157 (2001).

35. *See, e.g.*,California, Cal. Welf. & Inst. Code § 707(d).

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legislators have determined that a mandatory transfer of juveniles to the adult system may be necessary, normally for specific and quite violent crimes.[36]

The transfers of juveniles to adult criminal courts are based upon a variety of factors:
—the seriousness of the alleged offense
—the way in which the offense was committed
—whether it was a property crime or one involving violence against others
—the likely success of the complaint
—whether other individuals (either juveniles or adults) were involved in the crime
—the sophistication and maturity of the subject juvenile
—the past record of that juvenile
—the likely rehabilitation of the youngster within the juvenile court system.[37]

Special Concerns As to Juveniles in the United States Court System

A number of significant concerns regarding juveniles in the United States criminal justice system have surfaced in recent years. It is important to explore a few of these.

Impact on Minorities

As is true in many countries, the criminal justice system appears to have a disproportionate impact on members of minority group.[38] That conclusion is readily

36. *See, e.g.*, Fla. Stat. § 985.227 (2001). In some states with particular crimes there is a "presumptive waiver," this presumption being that a juvenile who commits certain violent crimes should be tried as an adult unless that child can prove to the contrary. The burden, thus, is on the juvenile to prove that the juvenile justice system is a more appropriate forum under the circumstances. *See* Kline, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 American Crim. L. Rev. 371, 387 (1998).

37. Kent v. United States, *supra*, 383 U.S. at 566-67. See discussion, *supra*, text accompanying notes 12-15. *See generally* Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime and Justice 81 (2000); Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 Notre Dame J. of Law, Ethics & Pub. Policy 101 (2002).

38. The problem is hardly uniquely American. As to other common law based nations, *see, e.g.*, *Statistics on Race and the Criminal Justice System* (Home Office 2000) [United Kingdom]; LaPrairie, *Reconstructing Theory: Explaining Aboriginal Over-Representation in the Criminal Justice System in Canada*, 30 Australian & New Zealand J. of Crim., 1997 JC LEXIS 3, 6 (1997) [Canada]; Harding, *The Excessive Scale of Imprisonment in Western Australia: The Systemic*

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reached through statistics on juvenile crime arrests for the United States in recent years. For instance, almost 80 percent of the juvenile population in the United States is white, while more than 40 percent of those arrested for violent crimes are African-American juveniles.[39] This pattern of minorities, particularly African-American juveniles, being arrested at a much higher rate is especially true for crimes involving violence against others.[40] While the evidence of this disparity of impact is just beginning to be studied in depth, one must take pause after seeing the way the juvenile justice system has responded, particularly along racial lines.[41]

Female Juveniles

The crime rate among young girls in the United States is increasing at a considerably faster rate than it is among young boys. In recent years, females comprised more than a quarter of all juvenile arrests, up greatly over earlier years.[42] Unfortunately, it is clear that "virtually all models of juvenile criminality, especially those focusing on delinquency, are based on disadvantaged males in public settings."[43] Researchers and judges are reaching consensus that the juvenile justice system is designed "almost exclusively to treat particular forms of male misconduct."[44] And, indeed, this design may tend to result in longer sentences for females than males and result in higher recidivism rates among girls than among boys.[45] The area of gender and equality in the juvenile justice system had not been truly addressed until recently.[46]

Causes and Some Proposed Solutions, 22 U. of Western Australia L. R. 72, 76-77 (1992) [Australia].

39. Crime in the United States 1998, Table 43.

40. *Id*.

41. *See generally*, Podkopacz and Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. of Cr. L. and Crim. 449, 459-60 (1996).

42. Crime in the United States, *supra*, Table 35. *See also* Lederman and Brown, *Entangled in the Shadows: Girls in the Juvenile Justice System*, 48 Buffalo L. Rev. 909 (2000).

43. Report of the Florida Supreme Court Gender Bias Commission, 42 Fla. L. Rev. 803, 909 n.481 (1990).

44. *Id*.

45. Note, *The Disparate Treatment of Males and Females Within the Juvenile Justice System*, 2 Wash. Univ. Jnl. of Law & Pol'y 429, 446 (2000).

46. Eggers, *The "Becca Bill" Would Not Have Saved Becca: Washington State's Treatment of Young Female Offenders*, 16 Law & Ineq. J. 219 (1998).

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The Very Young Offender

The very young offender in the United States is viewed as being about 12 years of age or less. These children comprise a significant percentage of those committing crimes.[47] Unfortunately, when such young children commit crime, the evidence indicates they are then more likely to commit crimes in the future of an even more serious and violent nature.[48] Only recently has an understanding of this severe difficulty begun to surface in the legal community in the United States. The criminal justice adjudication process is not focused on such youthful offenders, nor are the detention or correctional facilities, yet this change seems to be occurring very quickly. In particular, more young offenders are being processed in the justice system. Indeed, "laws allowing juveniles to be tried at a younger age are emerging faster than researchers can assess their usefulness."[49]

Capital Punishment and Juveniles

Very few countries in the world execute criminal offenders who are minors when they commit their crimes. Sadly, the United States is one of them.[50] Of the 38 American states which authorize the death penalty, 23 allow its use for those under the age of 18 when they have committed capital homicide offenses. At the current time, a small number of individuals[51] have been convicted of such capital offenses and are scheduled to be executed. Some were recently convicted, others were tried long ago (up to 20 years).[52]

The United States Supreme Court has spoken only twice to the broad question of whether it violates the United States Constitution to execute individuals who were minors when they committed their crimes. In one case the Court held that it would be

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47. The estimate is that somewhere between and 10 and 20 percent of all juvenile crimes in the United States are committed by such young children. *See* Office of Juvenile Justice and Delinquency Prevention (OJJDP), Research 2000, New Findings, Research on Very Young Offenders.

48. *Id.*

49. Dejong and Merrill, *Getting "Tough on Crime": Juvenile Waiver in the Criminal Court*, 27 Ohio Northern Univ. L. Rev. 175, 183 (2001).

50. The others are reported to be Iran, Pakistan, Nigeria, and Saudi Arabia. *Id.* at 191.

51. One commentator estimates the number at 74. *See* Lynn Cothern, *Juveniles and the Death Penalty,* Coordinating Council on Juvenile Justice and Delinquency Prevention, November 2000.

52. *Id.*

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contrary to the Cruel and Unusual Punishment Clause[53] for a child under the age of 16 at the time of the crime to receive the death penalty. As the Court stated:

The Department of Justice statistics indicate that about 98% of the arrests for willful homicide involved persons who were over 16 at the time of the offense. Thus, excluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders. And even with respect to those under 16 years of age, it is obvious that the potential deterrent value of the death sentence is insignificant. . . . [W]e are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age had made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, "nothing more than the purposeless and needless imposition of pain and suffering," and thus an unconstitutional punishment.[54]

In another case, however, the Court concluded that it would not run contrary to the United States Constitution to impose the death penalty on an individual who committed a crime at age 16 or 17:

[O]ur job is to *identify* the "evolving standards of decency"; to determine, not what they *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. In short, we emphatically reject petitioner's suggestion that the issues in this case permit

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53. The 8th Amendment to the United States Constitution provides: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

54. Thompson v. Oklahoma, 487 U.S. 815, 837-38 (1988). The Court explained:
The line between childhood and adulthood is drawn in different ways by various States. There is, however, complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor for several important purposes. In no State may a 15-year-old vote or serve on a jury. Further, in all but one State a 15-year-old may not drive without parental consent, and in all but four States a 15-year-old may not marry without parental consent. Additionally, in those States that have legislated on the subject, no one under age 16 may purchase pornographic materials (50 States) and in most States that have some form of legalized gambling, minors are not permitted to participate without parental consent (42 States). Most relevant, however, is the fact that all States have enacted legislation designating the maximum age for juvenile court jurisdiction at no less than 16. All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.

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us to apply our "own informed judgment," regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds. . . .

We discern neither a historical nor modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age.[55]

International Law and the United States Criminal Justice System

The United Nations Convention on the Rights of the Child, adopted in 1989, and the Rome Statute of the International Criminal Court, approved in 1998, have had a great impact on the laws of many countries regarding juvenile justice. Their influence in the United States, however, appears to have been minimal. The United States is not a signator to either of these actions and while American critics harshly condemn the reluctance of government officials in the United States to focus on these important treaties,[56] the rules developed under the Rome Statute and the Convention appear to be referred to rarely in American courts. To be sure, a few cases can be found in which a United States judge substantively relied on these international actions to resolve major issues in juvenile justice matters.

Judges in the United States do not, though, wholly ignore these treaties. Some courts here have discussed them and, presumably, have been somewhat influenced by them as instruments reflecting customary international law.[57] Still, American courts either

55. Stanford v. Kentucky, 492 U.S. 361, 378-80 (1989).

56. *See, e.g.*, Baird and Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J. of Law and Pol'y 177, 184 (1996) [United States policy regarding children "is not only destroying the traditional idea that rehabilitative care and legislative protection were created to help children in trouble, it is also violating international law and destroying the reputation of the United States as a leader in the human rights community."]; Levesque, *Future Visions of Juvenile Justice: Lessons from International and Comparative Law*, 29 Creighton L. Rev. 1563, 1580 (1996) ["although the United States has endorsed the international children's rights standards, it continues to employ a punitive approach to juvenile justice."]

57. *See, e.g.*, BeHarry v. Reno, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002) where the court recognized that "the CRC does not have the force of domestic law under the treaty clause of the Constitution. Non-ratification does not, however, eliminate its impact on American law." The court explained further:

use them only on peripheral matters, or conclude that because the United States has not ratified the actions, they are not binding on United States courts in either federal or state jurisdictions [58].

The CRC has been adopted by every organized government in the world except the United States. This overwhelming acceptance is strong reason to hold that some CRC provisions have attained the status of customary international law.

Id. at 600. Certainly, some American judges can be strongly influenced by important international principles in other settings, too. *See, e.g.*, Estate of Winston Cabello v. Fernandez-Lacios, 157 F. Supp. 2d 1345 (S.D. Fla. 2001); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D. N.J. 1999).

58. People v. Barnes, 2002 WL 53230 (Cal. App. 2002). One thoughtful commentator has explained the "several reasons [which] account for the United States' failure to take the international standards seriously." These are:

Although the United States has endorsed the Convention, it continues to employ a punitive approach to juvenile justice. Several reasons account for the United States' failure to take the international standards seriously. First, it is not uncommon for countries that have ratified major children's rights treaties to also ignore their obligations. Article Four provides an example of the qualified nature of the obligations assumed by States Parties to the Convention. By attaching the term "appropriate" to the measures a State is to undertake, the drafters provided a convenient rationale for any State inclined to ignore or give *pro forma* effect to its provisions. Like most human rights texts, the Convention is riddled with qualifying language and subjective terms that can be interpreted and applied in whatever manner a State Party chooses. Second, many nations nullify international treaties and agreements by narrowly interpreting their obligations and rights.

Third, the *Gault* and *Kent* decisions have more positively affirmed procedural rights for juveniles in the United States, while other nations place greater emphasis on the unique interests and capacities of juveniles. The *Gault* reforms arose precisely because of the tension between due process rights and the primacy of the child's best interests in the juvenile justice system. Fourth, juvenile crime is an area historically regulated by states. And although Congress has the power to enact legislation to implement the Convention, it has proven unwilling to use its treaty power to infringe state sovereignty. Finally, reversing the current trend toward punitive measures is difficult because law and policy continue to be shaped by political crises resulting from extreme but rare cases involving juveniles.

Fagan, note 37 *supra*, 16 Notre Dame J. of Law, Ethics and Pub. Policy at 105-06.

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CONCLUSION

The well established system of juvenile justice in the United States has undergone tremendous changes in recent years. Moving from a model of rehabilitative goals toward a far more punitive approach, the American courts have begun to process more juveniles as adults than ever before. The positive side of this development is that constitutional rights traditionally enjoyed by adults in the criminal justice system have become transferred to juveniles in such matters. The negative side of this trend is that very young people are being processed in a system ill-designed for that purpose, a system established to dispense punitive justice rather than to concentrate on developmental progress and the promise of young people.[59] Whether this movement will remain a permanent feature of the United States juvenile justice system is not at all clear. If crime rates drop, pressure will build to look to the more rehabilitative — and arguably more cost efficient [60] — aspects of the traditional juvenile justice system.[61] At this point, however, the move away from the traditional approach is concrete.

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59 For an excellent discussion, *see*, Zierdt, *supra*, 33 U.S.F. L. Rev. at 433-34.

60 The chief benefit, according to many, is in the juvenile court's impact on controlling repeat illegal actions by felony juvenile offenders, at least in comparison with the adult courts. *See* Fagan, note 37 *supra*, 16 Notre Dame J. of Law, Ethics & Pub. Policy at 126.

61. A shift back seems to be starting, with some legislators moving to raise the age limits for juvenile courts back to the traditional 18 years old. *See*, Ferdinand, "Seventeen an Awkward Age," Washington Post, March 27, 2002, A3.