


Fall 1997

The Debate over the Future of Juvenile Courts: Can We Reach Consensus

Thomas F. Geraghty
Northwestern University School of Law

Steven A. Drizin
Northwestern University School of Law

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Thomas F. Geraghty, Steven A. Drizin, The Debate over the Future of Juvenile Courts: Can We Reach Consensus, 88 J. Crim. L. & Criminology 1 (Fall 1997)

This Symposium is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

SYMPOSIUM ON THE FUTURE OF THE JUVENILE COURT

FOREWORD—THE DEBATE OVER THE FUTURE OF JUVENILE COURTS: CAN WE REACH CONSENSUS?

THOMAS F. GERAGHTY* & STEVEN A. DRIZIN**

I. INTRODUCTION

In 1999 we will observe the centennial of the first juvenile court. It was founded in Chicago, Illinois by a group of reformers in reaction to the deprivation and abuse suffered by children in the adult criminal justice system.¹ These reformers believed

* Professor of Law, Northwestern University School of Law; Director, Northwestern University Legal Clinic.

** Clinical Faculty, Northwestern University Legal Clinic, Children & Family Justice Center.

¹ The first juvenile court was established in 1899 by reformers who included Jane Addams, Lucy Flower, and Clarence Darrow. *See generally* David S. Tanenhaus, *Policing the Child: Juvenile Justice in Chicago, 1870-1925* (1997) (unpublished Ph.D. dissertation, University of Chicago) (on file with author); Frank Kopecky, *Introduction to Juvenile Justice*, in *ILLINOIS JUVENILE LAW & PRACTICE* 1-5 (1997); JOAN GITTENS, *POOR RELATIONS, THE CHILDREN OF THE STATE IN ILLINOIS, 1818-1990*, 90-158 (1994); ROBERT M. MENNEL, *THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940*, 124-57 (1973). *But see* Sanford J. Fox, *A Contribution to the History of the American Juvenile Court to 1980* (Sept. 28, 1997) (unpublished manuscript, presented at the Janiculum Project Conference: Reviewing the Past and Looking Toward the Future of the Juvenile Court) (on file with authors) (acknowledging that Illinois reformers took the lead in attempting to reform corrections but identifying Judge Benjamin Lindsey of Denver, Colorado as the creator of the juvenile judge as a "therapeutic agent").

The first calls for the establishment of a juvenile court were based on concerns about the care of children facing and found guilty of criminal charges. The Juvenile Court Law of the State of Illinois was the outcome of many years of effort on the part of men and women interested in child care. Prior to its enactment in July, 1899, procedure with juvenile and adult offenders was practically identical. Children, no matter how young, were habitually taken to police court. If unable to secure bail, they were locked in cells, and, as penalty, or in default of payment of fine, were sent to the

that children and adolescents were fundamentally different from adults, and that non-penal environments were necessary for most delinquent children in order to steer them to productive and crime-free lives. The founders of the Illinois Juvenile Court were more concerned about the nature of the services provided to delinquent, neglected, and abused children than they were about the new juvenile court's procedural fairness.² The burgeoning influence of the social sciences, which gave hope that children's lives could be changed for the better through enlightened social service interventions, influenced these reformers and motivated them to develop a separate system for treating adolescent offenders.³ Within a few years, the juvenile court movement spread throughout the country, and separate juvenile court systems were established in every state.⁴

As the juvenile court approaches its 100th birthday, however, its future is less secure than at any point in its history. Recent increases in juvenile violent crime,⁵ including historic

House of Corrections along with criminals of every sort and age. Even if a thoughtful judge or a political friend could help free a child, the child was allowed to go back into the same environment that had caused his delinquency, without permanent help or supervision. CITIZENS' INVESTIGATING COMM., ILL., REPORT OF A COMMITTEE APPOINTED UNDER RESOLUTION OF THE BOARD OF COMMISSIONERS OF COOK COUNTY 9 (1912).

² As Joan Gittens observes:

Children unable to pay fines were incarcerated, working off their fines at the rate of fifty cents a day. Those who could not raise bail were held pending trial. In the year 1898, there were 575 children in the Cook County Jail; in the twenty months from March 1, 1897 to November 1, 1898, 1,983 boys passed through the Chicago House of Corrections. Twenty-five percent of the children in jail that year were committed for truancy. The Chicago Women's Club, in company with other child welfare reformers, had succeeded in persuading the board of education to establish the John Worthy School at the Chicago House of Correction in 1897 so that the children had some opportunity for schooling; but there were still no effective restraints on their association with adults when they were returned to their cells at night.

GITTENS, *supra* note 1, at 103.

³ *Id.* at 127-31.

⁴ By 1909, ten states and the District of Columbia had established juvenile courts. By 1925, all but Maine and Wyoming had juvenile courts. Wyoming was the last state to create a juvenile court (1945). See MENNEL, *supra* note 1, at 132.

⁵ The Department of Justice has calculated that from 1965-1992 violent crime among juveniles increased from an average of 65.1 offenses to 197.6 offenses per 100,000 juveniles. See UNIFORM CRIME REPORTING PROGRAM, FEDERAL BUREAU OF INVESTIGATION, AGE-SPECIFIC RATES & RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES, 1965-1992, 157 (1993).

It is important to keep this increase in perspective. The overwhelming majority of arrests for juvenile crime are for nonviolent offenses. In 1994, only 6 out of every 100

increases in juvenile homicides,⁶ have led politicians to “reform” the court by passing laws which minimize the court’s jurisdiction, including a new wave of laws that transfer more juveniles, at younger ages, into the adult criminal court system.⁷ In most cases, these youthful offenders, once transferred, are treated no differently from adults.⁸ In fact, “reforms” in the sentencing of adult offenders, like mandatory minimum sentencing and “truth-in-sentencing,” have made it increasingly common for youthful offenders to receive long incarcerative sentences in adult correctional facilities.⁹ In this rush to punish and incapacitate youthful offenders, policy makers have given less and less weight to the developmental perspective that led to the creation of separate courts and treatment interventions for juveniles and adults.¹⁰

juvenile arrests were for violent crimes. OFFICE OF JUVENILE JUST. & DELINQUENCY PREVENTION, *JUVENILE OFFENDERS & VICTIMS: 1996 UPDATE ON VIOLENCE 10* (1996) [hereinafter *UPDATE ON VIOLENCE*]. Moreover, the majority of violent crime arrests (56%) were for assault, a broad category which often involves the threat of harm rather than actual harm and encompasses shouting matches and schoolyard fights. *Id.* Finally, since reaching its peak in 1994, arrests of teenagers for violent crimes have dropped significantly in the past two years. In 1995, FBI data showed a 2.9% decrease in juvenile violent crime arrests. *Id.* In 1996, according to the FBI, juvenile arrests for violent crime dropped another 9.2%. See *Reno Hails Drop in Teens Arrested for Violent Crimes*, CHI. TRIB., Oct. 3, 1997, at 3.

⁶ The same Department of Justice survey calculated that juvenile homicides increased over the same period from 1.4 offenses to 5.0 offenses per 100,000 juveniles. *UPDATE ON VIOLENCE*, *supra* note 5, at 10. The recent increases in juvenile homicides are linked directly to the availability of firearms to juveniles. More than half of the country’s juvenile homicide arrests are concentrated in just six states and just four cities—Los Angeles, New York, Chicago, and Detroit—account for nearly a third of the juvenile homicide arrests. VINCENT SHIRALDI & ERIC LOTKE, *AN ANALYSIS OF JUVENILE HOMICIDES: WHERE THEY OCCUR AND THE EFFECTIVENESS OF ADULT COURT INTERVENTION I* (1996). The juvenile homicide rate has also dropped by 22.8% since reaching its peak in 1993. See Fox Butterfield, *With Juvenile Courts in Chaos, Critics Propose Their Demise*, N.Y. TIMES, July 21, 1997, at A1.

⁷ See, e.g., Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197 (1993) [hereinafter *Feld, Criminalizing the Juvenile Court*]; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991) [hereinafter *Feld, Transformation of the Juvenile Court*].

⁸ See PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS & VIOLENT JUVENILE CRIME xv (1996) (executive summary).

⁹ See generally Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 389 (1996).

¹⁰ However, it should be noted that from the beginning, juveniles in Illinois charged with serious crimes were subjected to both juvenile and adult court jurisdictions. Concurrent jurisdiction remained the fact until 1907. On June 4, 1907, the Illinois legislature amended the then-existing Juvenile Court Act (which was listed in

The four articles in this issue of the *Journal of Criminal Law and Criminology* revisit the court's roots in developmental psychology, debate the extent to which adolescents differ from adults, and probe whether those differences continue to validate the underlying justification for the juvenile court. Although the authors have different visions of the future of juvenile justice, all four reaffirm the basic notion that most juveniles, because of their developmental differences, are less responsible for their actions than adults and should be punished differently from adults who commit the same criminal acts. This common sense notion—which should be obvious to anyone who has teenage children or can remember her own adolescence—provides the most compelling defense for maintaining separate justice systems for juveniles and adults.

The four articles in this Symposium present differing proposals about how our society should deal with children who commit crimes. The articles capture the range of questions and alternatives that scholars, practitioners, and policy makers are

the "Charities" statutory chapter instead of the "Courts" chapter) to include the following provision:

The court may in its discretion in any case of a delinquent child permit such child to be proceeded against in accordance with the laws that may be in force in this State governing the commission of crimes or violations of city, village, or town ordinance. In such case the petition filed under this Act shall be dismissed.

1907 Ill. Laws § 9a, 70-72.

While this provision allowed for discretionary transfers to criminal court, it was not until July 31, 1967 that this more explicit provision (now placed in the "Courts" chapter of Illinois law) was adopted:

If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State's Attorney shall determine the court in which that minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of a case from the jurisdiction of the Juvenile Court, the matter shall be referred to the chief judge of the circuit for decision and disposition.

ILL. COMP. STAT. 37/702-7(3) (West 1972).

Subsequent legislation formalized the transfer process, adding hearings and factors to assist judicial decision-making. Illinois amended the procedure in 1973 (judicial transfer); 1982 (automatic transfer to criminal court for certain crimes); 1985 (automatic transfer for certain crimes on school grounds); 1990 (automatic transfer for gang-related felonies or drug offenses in public housing); 1991 (automatic transfer for escape or bond violations); and 1995 (presumptive transfer, where after a finding of probable cause the burden shifts to the minor to rebut presumption for transfer). See Terence M. Madsen, *Transfer of Jurisdiction*, in ILLINOIS JUVENILE LAW & PRACTICE, *supra* note 1, at 3-18 to 3-19.

now considering when mapping the future of juvenile justice.¹¹ To what extent should we distinguish between the moral and criminal responsibility of children and adults? How should those differences play out in our juvenile and criminal justice systems? Should the juvenile court's delinquency jurisdiction be abolished because of its inability to achieve justice and because of the unfairness inherent in the court's judicial license to treat one child differently from another? Should the juvenile court be abolished because of the failure of its treatment and penal programs? Or, should the existing juvenile justice model be retained precisely because it, as opposed to the more formal criminal court, retains the flexibility to be responsive to the special developmental needs of children? These questions are at the heart of the debate over the future of the juvenile court. The authors of the four articles featured in this Symposium attempt to answer these questions.

¹¹ The on-going debate about the future of juvenile justice is robust. Compare, e.g., Feld, *Criminalizing the American Juvenile Court*, *supra* note 7 (after legislative, judicial, and administrative reforms, the juvenile court now converges procedurally and substantively with the adult criminal court), and Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) (contemporary society no longer views juveniles as the original founders of the juvenile court did, and juveniles would benefit from the procedural safeguards in adult criminal court), and Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990) (because of the schizophrenia of the juvenile court system, abolishing the juvenile court will promote juvenile rights), and Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to the Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995) (the assumptions behind the two-tiered juvenile and criminal court system engender many of the serious shortcomings of the juvenile court and exacerbate problems with the criminal court), with Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163 (benefits of the flawed juvenile court nevertheless outweigh procedural shortcomings because the criminal court cannot adequately protect the immaturity and vulnerability of minors), and Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989) (juvenile court should be given more procedural protections than criminal court).

Perhaps the staunchest opponents of treating juveniles as adults are juvenile defense attorneys. They argue that the issue cannot be looked at in the abstract: anyone who examines actual children in actual cases will conclude that even treating juveniles who commit serious felonies as adults is not a viable solution. See, e.g., Wendy Anton Fitzgerald, *Stories of Child Outlaws: On Child Heroism and Adult Power In Juvenile Justice*, 1996 WIS. L. REV. 495; Abbe Smith, *They Dream of Growing Older: On Kids And Crime*, 36 B.C. L. REV. 953 (1995); Catherine R. Guttman, *Listen To The Children: The Decision To Transfer Juveniles To Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507 (1995); Francine T. Sherman, *Thoughts On A Contextual View Of Juvenile Justice Reform Drawn From Narratives Of Youth*, 68 TEMP. L. REV. 1837 (1995).

II. THE ARTICLES

Professor Stephen Morse would rest reform of the juvenile justice and criminal justice systems on the answer to one question: to what extent should young people be held responsible for their criminal activity? Morse argues that we should not delude ourselves—a “robust” theory of responsibility would result in most juveniles (mid-to-late adolescents) being held fully responsible for their actions.¹² He argues that research demonstrates that it is often difficult to distinguish between the moral responsibility of children and young adults. If this is true, why should the responsibility of a juvenile be less than that of a psychologically similarly situated young adult? Moreover, youth susceptibility to peer pressure does not justify differential allocation of responsibility.

Although juveniles may lack “the capacity for empathy . . . a component of normative competence,”¹³ many adults may also lack this characteristic. Should we treat all persons who lack empathy the same, the result being that some adults would be the beneficiaries of an “empathy” excuse? According to Morse, the youth factor of poor judgment is not a moral excuse, but should be taken into account in more flexible sentencing schemes which recognize an optimum degree of responsibility based upon developmental variables and a young person’s amenability to treatment.¹⁴ However, since classification of offenders is difficult, “and we are seldom sure about what works specifically for whom the various therapeutic interventions that might be tried . . . [t]he disposition of partially responsible adolescents thus presents a gargantuan dilemma.”¹⁵ The solution? “Perhaps the best we can do is some legislatively mandated reduction in punishment for all partially responsible adolescents,”¹⁶ a proposal that is mirrored in Professor Feld’s suggestion that a “youth discount”¹⁷ be provided to the children

¹² Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 17, 48, 47, 66 (1997).

¹³ *Id.* at 60.

¹⁴ *Id.* at 61-66.

¹⁵ *Id.* at 65.

¹⁶ *Id.* at 66.

¹⁷ Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 70, 115-31 (1997).

who, under his proposal, would no longer be tried in juvenile court.

The value of Professor Morse's work is that it forces us to examine a basic premise of juvenile court: that children are "morally" different from adults in their decision making capabilities. Having discussed the issue, and finding that there are differences, but not perhaps as pronounced as defenders of juvenile courts might like us to believe, Professor Morse acknowledges that creating sensible legislative responses to the dilemma he identifies "will not be a simple task."¹⁸

Professor Barry Feld's proposal is much more explicit and concrete. He renews his previous call for abolition of the juvenile court¹⁹ and argues for the recognition of youthfulness as a mitigating factor in sentencing youthful offenders in criminal court.²⁰ Abolition of the juvenile court is necessary because changes in the court's jurisdiction, purpose, and procedures since its inception have transformed the court from its "original model as a social service agency into a deficient second-rate criminal court that provides people with neither positive treatment nor criminal procedural justice."²¹ According to Feld, the juvenile court's problems cannot be remedied by simply increasing resources for rehabilitation or refining treatment techniques. The "very idea" of a court that attempts to combine criminal social control with social welfare is doomed to fail.²²

Feld's solution is an integrated criminal court that adopts a separate sentencing policy—a "youth discount"—for younger offenders.²³ Feld acknowledges developmental differences between most juveniles and most adults: juveniles are more likely, because of their age, grandiosity, and impulsivity, to be greater risk-takers than adults. They have little ability to think about the long-term consequences of their actions and are highly suscep-

¹⁸ Morse, *supra* note 12, at 67.

¹⁹ See, e.g., Feld, *Transformation of the Juvenile Court*, *supra* note 7, at 722-25; 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); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 274 (1984); Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Youth Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 242 (1980).

²⁰ Feld, *supra* note 17, at 95-97.

²¹ *Id.* at 90.

²² *Id.* at 132.

²³ *Id.* at 70, 115-31.

tible to negative peer influences.²⁴ These differences justify more lenient sentences for juveniles. The "binary distinction between infant and adult that provides for states' legal age of majority and the jurisprudential foundation of the juvenile court ignores the reality that adolescents develop along a continuum"²⁵ A single criminal court with a "youth discount" would be "more responsive to the needs of youth than the current version of the juvenile court."²⁶ Moreover, an integrated criminal court would provide youthful offenders with substantive protections "comparable to those afforded by juvenile courts, assure greater procedural regularity in the determination of guilt, and avoid the disjunctions caused by maintaining two duplicative and inconsistent criminal justice systems."²⁷

Feld also makes the constructive suggestion that "[s]tates should maintain separate age-segregated youth correctional facilities to protect both younger offenders and older inmates."²⁸ The facilities housing youth should "provide them with resources for self-improvement on a voluntary basis"²⁹ The state has an obligation to provide juveniles with these resources not because juveniles have a "right to treatment" or because such services will necessarily reduce recidivism, but because most juveniles will return to society one day. Failure to provide them with opportunities for growth while they are incarcerated will guarantee "greater long-term human, criminal, and correctional costs."³⁰

There are, however, dangers inherent in Feld's approach. As Feld states,

[a]lthough abolition of the juvenile court, enhanced procedural protections, and a "youth discount" constitute essential components of a youth sentencing policy package, nothing can prevent legislators from selectively choosing only those elements that serve their "get tough" agenda, even though doing so unravels the threads that make coherent a proposal for an integrated court.³¹

²⁴ See Feld, *supra* note 17, at 33; Morse, *supra* note 12, at 30; Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1787 (1995).

²⁵ Feld, *supra* note 17, at 115.

²⁶ *Id.* at 69.

²⁷ *Id.*

²⁸ *Id.* at 130.

²⁹ *Id.* at 131.

³⁰ *Id.*

³¹ *Id.* at 133 (citation omitted).

The same can be said for Feld's proposal for requiring states to provide youthful offenders with educational, social services, and job training while incarcerated.³² Legislators have been more than eager to cut back such services in adult correctional facilities.³³

Professors Elizabeth Scott and Thomas Grisso evaluate the differences between adults and delinquent youth and conclude that there are substantial differences between very young juveniles and adults in "moral, cognitive, and social development."³⁴ However, they also conclude that by mid-adolescence the differences between adolescent and adult decision making are more subtle. "A categorical presumption of adolescent nonresponsibility, such as that which was endorsed by the traditional juvenile justice system, is hard to defend on the grounds of immaturity alone."³⁵ Their developmental evidence "supports the argument of the post-*Gault* reformers of the 1970s and 1980s that a presumptive diminished responsibility standard be applied to juveniles."³⁶ For Scott and Grisso, unlike Feld, this presumptive diminished responsibility is best applied in juvenile court systems. The criminal justice system cannot respond to this developmental reality: "[t]he ability or inclination of the criminal justice system to tailor its response to juvenile crime so as to utilize the lessons of developmental psychology is questionable. The evidence suggests that political pressure functions as a one-way ratchet, in the direction of ever stiffer penalties."³⁷

Scott and Grisso also question the assumption accepted by Professors Morse and Feld, that most juvenile delinquents, even by mid-adolescence, are as cognitively competent as adults to make decisions. According to Scott and Grisso, the studies supporting the claim that the cognitive decision-making abilities of adolescents and adults are comparable involved mostly non-delinquent youths from middle class backgrounds who were of above-average intelligence.³⁸ Scott and Grisso question the ap-

³² See *id.* at 131.

³³ See generally Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373 (1995).

³⁴ Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 174 (1997).

³⁵ *Id.*

³⁶ *Id.* at 174-75.

³⁷ *Id.* at 189.

³⁸ *Id.* at 159-60, 160 n.86 (citing studies).

plicability of these studies to children involved in the juvenile justice system, many of whom have learning disabilities and emotional problems that may delay their capacity for understanding.³⁹

Not only would it be a mistake to overestimate the cognitive competence of many delinquent youths, but Scott and Grisso also warn that it is a mistake to underestimate the effects of developmental factors on the ability of juveniles to participate meaningfully in decision making concerning their court cases. Citing recent research, Scott and Grisso note that "delinquent adolescents are at risk of becoming less competent participants in their defense than are adults, and that this risk is especially great for youths under the age of fourteen."⁴⁰ Studies of "average" fourteen to seventeen-year-olds have shown no significant differences between adolescents and adults in their basic understanding of trial-related matters, but again these studies may not be applicable to delinquent youths.⁴¹ Other studies—which demonstrate that adolescents with lower intelligence scores, learning disabilities, and other mental disorders, are less likely to understand the legal process—suggest that the problem of incompetence among juvenile delinquents may be widespread.⁴² Although the research is not precise enough to draw a bright line about the age of criminal adjudication, Scott and Grisso suggest that until age fifteen, the developmental differences between youths and adults are sufficient to raise substantial issues about the procedural fairness of trying these youngsters in adult court.⁴³

³⁹ *Id.* at 157-60.

⁴⁰ *Id.* at 169 (citing Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, PSYCH., PUB. POL. & L. (forthcoming 1998)).

⁴¹ *Id.*

⁴² *Id.* (citing studies).

⁴³ *Id.* at 157-60, 168-69. Scott and Grisso note that "[t]he behavioral traits and inexperience that in general characterize youthful offenders" should be taken into account in sentencing "immature" adult offenders more leniently. *Id.* at 175. Unlike Morse, however, Scott and Grisso do believe that juveniles, as a class, should be held less responsible and punished less severely than similarly-situated adults. With adults, reduced punishment reflects an "individual deficiency, a failure to attain an adult level of maturity and experience." *Id.* at 176. Consequently, with minors, the behavioral differences are typical of a developmental stage shared by other minors of the same age. *Id.* Thus, a categorical response to adolescents as a group—a presumption of diminished responsibility—is appropriate. *Id.*

Writing as a practitioner who represents children charged with serious crimes in juvenile and in criminal court, Professor Thomas Geraghty draws upon his experience of representing children, as well as the same rich interdisciplinary work relied upon by Morse, Feld, and Scott and Grisso to suggest a way of reconceptualizing and reinvigorating juvenile courts.⁴⁴ Professor Geraghty argues that the challenges to the legitimacy of juvenile courts posed by Morse and Feld must be taken seriously and constructively because they focus the attention of juvenile court "preservationists" on the difficult and sustained work that must be done if a separate juvenile court system is to survive.⁴⁵ The challenges are constructive because they are based upon valid criticisms of past and present assumptions about the nature of the children who appear in juvenile court. The challenges are fair because juvenile courts have historically failed to provide procedural protection, effective interventions and treatments, and measured and consistent imposition of moral responsibility.⁴⁶ Acknowledging these failures, Professor Geraghty argues that the model of a specialized court for delinquent children and specialized treatment and rehabilitation interventions for children holds more potential for doing justice to children and protecting society than does a unified juvenile/criminal justice system.⁴⁷

III. CONCLUSION

The articles in this Symposium place in sharp focus important views on the future of juvenile justice. Morse and Feld question the continuing normative viability of the concept of a separate juvenile court: Morse, because of the juvenile court's failure to articulate a "robust" theory of responsibility; and Feld, because of the vagueness of standards (i.e., "amenability to treatment") that distinguish among those who should be subject to the juvenile court's jurisdiction and the juvenile court's lack of procedural protections for children. Scott and Grisso argue for a more sophisticated juvenile court, one that would continue

⁴⁴ Thomas F. Geraghty, *Justice for Juveniles: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190 (1997).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

to learn from the lessons of developmental psychology and would shape its jurisdiction and dispositions accordingly.

Even if juvenile courts remain conceptualized as they are, the approaches to juvenile justice described in these articles present significant tensions which must be resolved. For example, implementation of Professor Morse's theories of moral responsibility would result in more children being tried as adults. Professor Feld's recommendations would require dismantling the juvenile court and revolutionizing the way that the adult criminal court system thinks about children. Professors Scott and Grisso argue for a re-vitalization of juvenile courts based upon a deeper understanding of the psychological and social forces which bring children into court. Professor Geraghty's view is that we should return to a juvenile justice system in which nearly all children are tried in juvenile court.

How should we choose between these competing models of justice for young offenders? How should our legislators, judges, prosecutors, defense lawyers, probation officers, social workers, psychologists, and psychiatrists respond as they chart the future course of justice for children?

The work of Morse, Feld, Scott and Grisso, and Geraghty contain ideas that could be utilized together to structure and to maintain a just court system for children. Morse's theory of responsibility reminds us that juveniles should be held morally accountable for their criminal behavior. In order for the juvenile court to survive into the next century, advocates for the juvenile court system must address the public's perception that the court has too often sought to excuse delinquency on account of the offender's youthfulness. Feld's powerful critique of the juvenile court instructs us to be vigilant about children's due process rights and to force the juvenile court, wherever possible, to live up to its rehabilitative mission. The current lack of due process, including in most states the lack of a right to a jury trial, and in many instances, the lack of counsel,⁴⁸ coupled with the lack of resources aimed at rehabilitating offenders, continues to mean, almost thirty years after *Gault*, that children in juvenile court often receive the "worst of both worlds." Scott and Grisso tell us that new and evolving research in developmental psychology,

⁴⁸ See, e.g., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (Patricia Puritz ed., 1995).

coupled with research concerning promising interventions for youthful offenders, justifies the continuing need for separate courts for children and adolescents.

Finally, Geraghty argues that what is needed is a new, reinvigorated juvenile court, that is sensitive to the developmental needs of juveniles in each case, flexible enough to respond to new discoveries in social science research, and willing to invest in and experiment with the promising new interventions for offenders. To respond to Professor Feld's concerns, the new juvenile court must provide procedural protections, including the right to a jury trial in many cases, and must be staffed by the most experienced and learned prosecutors, defense attorneys, and judges. State-of-the-art interventions must also be created and maintained.⁴⁹

Scott and Grisso also caution us that while due process rights for children and adolescents are important, transferring offenders to adult court will not ensure them procedural due process. Because many youthful offenders may be incompetent due to their cognitive disabilities and developmental limitations, they may not be able to fully participate in their defense and take advantage of the right to a jury trial and other enhanced due process rights afforded them in criminal court.

When read together, these articles provide an outline for the juvenile court for the twenty-first century. A juvenile court that holds youthful offenders accountable, in a system that ensures fair and just adjudications by providing juveniles with due process—especially a meaningful right to counsel—in an environment that is sensitive to their developmental and cognitive limitations, and that lives up to the promise of the founders to attempt to rehabilitate offenders, should be a vital community resource. The message from all four articles to those who will shape the juvenile court of the future is to remember always that children and adolescents are developmentally different from adults, that these differences often lessen a juvenile's culpability, and that it should be possible to design a system that balances the needs of children with society's need to impose responsibility and protect itself.

⁴⁹ For a description of new and revitalized approaches to providing services to at-risk youth, see Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791 (1995).

