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## THE FUTURE OF JUVENILE JUSTICE: IS IT TIME TO ABOLISH THE SYSTEM?\*

Robert O. Dawson\*\*

### I. INTRODUCTION

The juvenile justice system in the United States is approximately ninety years old. That age is old for a person and maybe also for a social-legal institution. There are signs it may be time to begin thinking about whether that system has served its purpose and should be abolished.

Initially, it is necessary to define what I mean by the juvenile justice system. I have in mind only that aspect of the jurisdiction of a juvenile court that includes criminal conduct and certain non-criminal conduct. Modern juvenile statutes normally label the former "delinquency" and the latter—often called status offenses—by various names, such as "Persons (or Children, or Juveniles, or Minors) in Need of Supervision." Usually included in the latter are running away from home, truancy, and (less often) incorrigibility or ungovernability. I exclude from consideration other elements of the possible jurisdiction of a juvenile court, such as adoption, termination of parental rights, child abuse and neglect, paternity, custody, and support.

I include within my definition of the juvenile justice system not only court proceedings but the entire legal process, beginning with law enforcement, through court intake and detention, informal and formal probation, and ending with the juvenile correctional process.

It is also necessary to state what I mean by abolition. I have in mind abolishing the juvenile justice system as a system separate from the criminal justice system. The result of abolition would be a merger of the two systems or, perhaps more accurately, an acquisition of the juvenile justice system by the larger criminal justice system. Abolition would not mean that all distinctions based on age would be obliterated; there would still be differences in how the

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criminal justice system treats defendants based on their ages. There would, for example, still be separation of youthful from older persons in pretrial and post-trial detention, treatment, and correctional facilities. The separations would not, however, be as rigid as they now are.

## II. WHY THE TIME MAY BE RIGHT TO CONSIDER THIS QUESTION

If one were to do an analysis over time of legal rights and legal structure, comparing the juvenile justice to the criminal justice system, with a view to determining the legal differences between the two systems, the results would not be uniform. Were it possible to conduct such an analysis with some precision, one would probably find relatively little difference between the two systems initially, say in the beginning of this century. Legal structures establishing juvenile justice as a separate system were just being established, but resources were slower in coming. The system initially existed more in name than in reality. It was not until about 1925 that virtually every American state had enacted legislation establishing a juvenile justice system separate from the criminal system.<sup>1</sup> There was initially more overlap in personnel operating the two systems. However, as the treatment philosophy underlying the juvenile justice system gained wider acceptance, the differences in legal rights and structure grew. Those differences were probably greatest in the late 1950s and early 1960s when the driving legal philosophy of the juvenile justice system was to entrust maximum discretion to the court and treatment staff with the absolute minimum of legal control.

But, beginning in the early 1960s, voices of dissent from the dominant legal philosophy grew.<sup>2</sup> There was increasing skepticism about the ability of the system to perform on its promises and increasing concerns about whether the abuses of power that occurred<sup>3</sup> were really aberrations or whether they were the norm.

This criticism of the system culminated in famous opinions of the United States Supreme Court in *Kent v. United States*<sup>4</sup> in 1966 and *In re Gault*<sup>5</sup> in 1967. The immediate reaction to these decisions was often to declare the juvenile system dead, but that pronouncement proved premature. The system survived that round of constitutional domestication, but did not remain unchanged. The major

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<sup>1</sup> F. MILLER, R. DAWSON, G. DIX & R. PARNAS, *THE JUVENILE JUSTICE PROCESS* 6 (2d ed. 1971).

<sup>2</sup> See, e.g., Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961).

<sup>3</sup> See *In re Gault*, 387 U.S. 1 (1967).

<sup>4</sup> 383 U.S. 541 (1966). See text accompanying note 10.

<sup>5</sup> 387 U.S. 1 (1967). See text accompanying notes 14-17.

legacy of *Kent* and *Gault*—and, later, *In re Winship*<sup>6</sup>—was the development and enactment of modern juvenile justice statutes.

That legislation reflected a different philosophy from the original statutes. The emphasis shifted from entrusting maximum power and discretion to system officials to limiting and controlling those powers. Room was made in the system for lawyers—as defenders, prosecutors, and judges. And, with the presence of lawyers, the system changed even more in the direction of a law-driven system and away from a treatment-driven system. To that extent, the juvenile system came increasingly to resemble the criminal system. The differences had narrowed as a consequence of those landmark Supreme Court decisions and the legislation they spawned.

Since the time of the “reform” legislation, there have been further developments that have narrowed the differences. We have lost even more of our faith in treatment and have replaced it with shadows of the criminal system philosophies of individual responsibility and punishment. We have increasingly embraced restitution, community service, and even fines in the juvenile system<sup>7</sup>—concepts that would have been anathema only a few years earlier. We have become increasingly concerned with the violent juvenile offender and have responded to that person by adopting even more of the characteristics of the criminal system.<sup>8</sup> In a few jurisdictions, we have even replaced the traditional, broad dispositional discretion of the juvenile court judge with a system of determinate sentences much like those now in vogue in the criminal system.<sup>9</sup>

In summary, the *legal differences* between the juvenile and criminal systems are now narrower than they have been at any point in our history since the juvenile system was created. We have, in a sense, returned full cycle to the beginning. To be sure, both the criminal and juvenile systems have undergone many changes in the past ninety years; but looking only at the legal differences between

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<sup>6</sup> 397 U.S. 358 (1970). See text accompanying note 18.

<sup>7</sup> See, e.g., INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO DISPOSITIONS 42-56 (1980).

<sup>8</sup> For example, in 1987, Texas enacted a determinate sentence statute for violent juvenile offenders that permits a lengthy sentence to be imposed by the juvenile court. The first part of the sentence is served in the juvenile training school. At age 18, there is a second juvenile court hearing to decide whether to release the respondent on juvenile parole or to transfer him or her to the adult prison system for further service of sentence. See Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943 (1988).

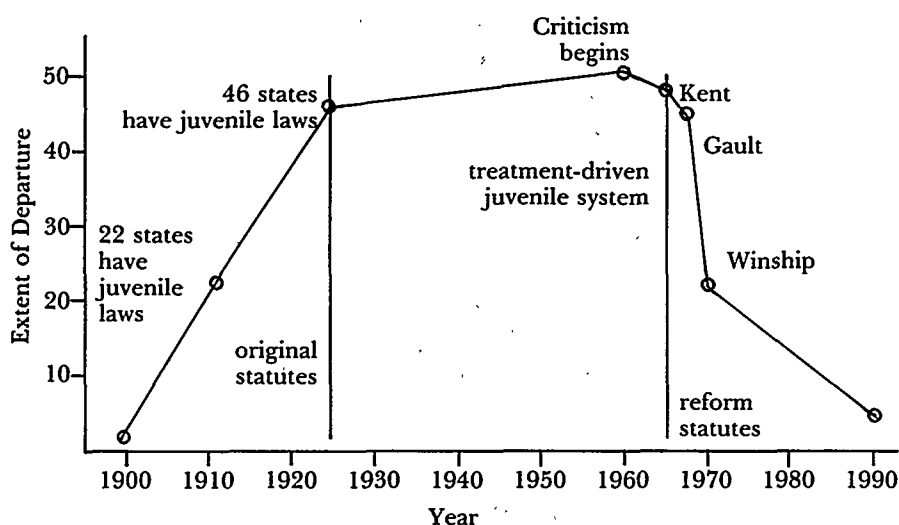
<sup>9</sup> The State of Washington has done so. See WASH. REV. CODE ANN. § 13.40.010 (1989).

the two systems, we do appear now to be very close to the beginning.

I have included an impressionistic chart of the differences in the extent of departure of the legal rights and structure of the juvenile system from the criminal over the past ninety years. Landmark events are noted on the chart. Of course, the chart lacks quantitative validity; it is instead intended merely to suggest visually the magnitude of differences I have observed.

**GRAPH 1**

**AGGREGATE DIFFERENCES IN LEGAL RIGHTS AND STRUCTURE**



One now encounters juvenile court judges who state (with disgust) when an appellate court requires adherence to a rule of procedure normally associated with the criminal system, "We might as well give up and abolish the juvenile system." One also encounters prosecutors and defense attorneys who articulate the same thought, some with disgust and some with relish. To the juvenile justice traditionalist, the system seems to have changed far beyond any recognition.

Taking a "legal snapshot" of the two systems at this time shows differences that are more nominal than substantial. We apply similar rules for both arrests of adults and for taking children into custody and for custodial interrogation. Identical rules for searches and pretrial identification apply. There is pervasive plea bargaining in both systems, only we are more likely to acknowledge it openly in

the criminal system than the juvenile. The government is required to prove its case beyond a reasonable doubt in both systems and exclusionary rules apply with equal force. The guilt/innocence phase of court proceedings are separated from the sentencing phase in both systems, with the broad judicial discretion historically associated with the juvenile system now largely confined to the sentencing phase, as has long been true in the criminal system.

A cynic would examine the legal structure of the juvenile justice and criminal justice systems and conclude that one is an exact parallel of the other. The cynic might add that the only difference is in terminology and that such a difference exists only fraudulently to mask the underlying sameness. Thus, adults are "arrested" but juveniles are "taken into custody" even when the same law enforcement officer exercises the power and takes the person to the same police station. Adults are "booked" into custody, while juveniles are "processed." Adults are "jailed" awaiting trial or release pending trial, while juveniles are "detained." Adults plead "guilty" or "not guilty" to the "charge" in the "indictment" or "information," while juveniles plead "true" or "not true" to the "allegation" in the "petition" or "complaint." Adults "plea bargain" most of their cases, while juveniles "stipulate" most of theirs. Adults have "trials" while juveniles have "adjudication hearings." Adults are found "guilty" or "not guilty" while juveniles are found to be "within the jurisdiction of the court" or "not within the jurisdiction of the court." An adult case proceeds to "sentencing" if the "defendant" is found guilty, while a juvenile case proceeds to "disposition" if the "respondent" is adjudicated. While both can be placed on probation, an adult who does not receive probation is likely "sentenced" to "prison" while a juvenile is "committed" to a "training school." An adult in prison is an "inmate" while a juvenile in a training school is a "resident" or a "student." An adult frequently is released from prison conditionally on "parole," while a juvenile often is released from training school conditionally on "aftercare."

An adult who is found guilty of having committed a crime is a "criminal"; a juvenile who is found to have committed the same crime is a "delinquent" or simply "within the jurisdiction of the court." The law specifically and in no uncertain terms declares that the juvenile adjudication is not a conviction of crime and carries none of the legal disabilities associated with such a conviction. In certain circumstances, we find even the term "delinquent" too harsh a judgment to place on the shoulders of a juvenile; instead, he or she is called a "Person in Need of Supervision" or some such similar euphemism. So ingrained is the difference in terminology, yet so

self-consciously maintained, that when a judge or attorney is speaking about a juvenile case and accidentally says the child was "convicted," he or she is likely immediately to correct the error, with a slight smile, by saying, "I mean adjudicated, or whatever you want to call it."

If the only justification for maintaining a separate juvenile justice system were the advantages that accrue from a distinct legal structure, a compelling case for abolition might be made. And, as will be shown later, there are substantial advantages that could accrue from "folding" the juvenile system back into the criminal. But there are considerations, some of which have little to do with different legal structures, that might give us pause in such an undertaking. Here, we are going to look at the advantages and the disadvantages of abolition. As in most such matters, conclusions depend upon the balance that can be struck between the two.

### III. THE CASE FOR ABOLITION

There are two major clusters of arguments for abolition, which will be discussed in order: resource savings and eliminating frictional costs.

#### A. RESOURCE SAVINGS

Initially, it is important to observe that the wall that separates the systems is more complete in some jurisdictions than others, and in some places in the same jurisdiction than in other places. This fact has an important bearing on the resource savings that may be expected from the proposed merger. In some states, the same administrative structure, both line and staff, services both juvenile and criminal courts. In most, however, there is either a different structure from top to bottom or parallel divisions of the same state-wide department. In any event, in many jurisdictions there are adult probation officers and juvenile probation officers who are different people and work out of different offices with different support staff. In other jurisdictions, a probation officer's caseload may include some juveniles and some adults.

Similar distinctions may be found in the judiciary. In rural areas, the only judge available will be both the juvenile and the criminal court judge (and would also hear probate, divorce, general civil, and other types of cases). In urban areas, there are likely to be separate judges for the juvenile and criminal courts. In any event, the central point is that we already have in some parts of the country a

substantial integration of resources between the systems. Abolition would not save resources in those places.

However, in jurisdictions without resource integration, the savings could be substantial. Duplication of many staff positions and functions could be eliminated—from computer systems to personnel officers to auditors to receptionists. Whether such duplication would be eliminated is, of course, another question. Merger would also permit more efficient use of courtroom space and personnel, such as bailiffs and court reporters. It should be observed, however, that in many localities such a savings would be difficult to achieve because the juvenile courtroom is located in a juvenile or family justice center several miles from the courthouse.

It would be possible, with relative ease, to combine juvenile and adult field probation officers and parole officers. Substantial savings might result from such a merger, especially in the elimination of duplicated staff positions and functions. However, juvenile probation officers perform many functions for which there are no counterparts in adult probation work. Juvenile officers frequently serve as intake and screening officers for the court system and also work directly with juveniles in pretrial detention facilities.

Merger might make some resource savings possible in detention and correctional facilities. It would at least create some opportunities for greater flexibility, both in assigning inmates (residents) to facilities and in transferring them from one facility to another. An old juvenile facility might be converted into a minimum security adult facility. One wing of an adult facility might be converted into a facility for youthful offenders. Of course, there would emerge a substantial turf battle between the county sheriff, who operates the local adult detention facilities, and the (former) juvenile probation department, which operates the local juvenile detention facility. Probably, the sheriff would win and would take over the juvenile detention facility.

In summary, the extent of resource savings resulting from merger would vary widely from place to place. It would depend upon the extent of pre-merger administrative integration, the configuration of physical facilities, and the extent to which officials wish to effect a resource savings or to maintain their own turfdoms after merger. The savings could range from great to almost none at all.

#### B. FRICTIONAL COSTS

The juvenile justice and criminal justice systems are not totally separate from each other. There are bridges over which cases can



and do pass from one system to the other. However, the fact that the systems are legally distinct makes those passages more difficult and more costly than if the systems were merged together.

### *1. Eliminating Transfer Costs*

Almost all juvenile systems have some mechanism for dealing with the case or the respondent that is beyond the capability of the system. Typical is the "*Kent* style"<sup>10</sup> transfer procedure. A case is filed in juvenile court against a respondent in the upper juvenile court age range. A prosecutor has discretion whether to handle that case as an ordinary delinquency case or to seek transfer of the case to criminal court for prosecution as an adult. Typically, a petition or motion for transfer must be filed, social and psychological studies conducted, and an extended, adversarial hearing held before the question of whether to retain the respondent in the juvenile system or to transfer him or her to the criminal system can be presented to a juvenile court judge.

Although transfer hearings undoubtedly occur in substantially fewer than one percent of the eligible cases that flow through the juvenile courts, they occupy a disproportionate amount of the time and energy of juvenile officials. Because transfer is extremely serious and the stakes are great for the respondent and society, the process is protracted and the hearing extremely adversarial. A transfer hearing is to the juvenile court what a capital murder case is to the criminal court.

The result of a transfer decision is merely to place the case in criminal court. It is not a trial. All of the trial and pretrial steps in the criminal court remain yet to be taken. A merger of the systems would totally eliminate the need for a transfer mechanism of any kind. The resource savings could be substantial.

### *2. Avoiding Frictional Miscarriages*

The separation of the juvenile justice from the criminal justice system is ordinarily based on the age of the offender at the time the offense is believed to have been committed. Thus, in many jurisdictions, if the offense is committed a day before the actor's seventeenth (or eighteenth) birthday, he or she must be treated as a juvenile and can be treated as an adult only if a transfer mechanism is invoked successfully. However, if the offense is committed on or after the seventeenth (or eighteenth) birthday, the case is a criminal

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<sup>10</sup> *Kent v. United States*, 383 U.S. 541 (1966).

case from the very beginning and the juvenile court has no involvement.

The difficulty with the system is that it assumes the appropriate officials will know the actor's true age. It happens that sometimes the arrested person will misrepresent his or her age in order to be handled in one or the other of the systems. Also, it is not uncommon for there to be official uncertainty about the age of the person arrested because of the lack of reliable documentation. When this occurs, it can cause substantial problems. In some systems, if the ruse is carried out long enough, it can mean that the actor goes free.<sup>11</sup>

Certainly, merger of the systems would eliminate any problems that occur because of the misrepresentation of the age of the accused or even official uncertainty as to age. While one cannot assert that such events occur often, they do occur, and when they do, the results are quite disruptive.

### 3. *Providing for Continuity of Services*

One of the abiding ironies of our handling of the chronic offender is that, although upon each pass through the juvenile system he or she is dealt with more harshly, upon becoming an adult, he or she is given a fresh start. A hardened juvenile offender a few days ago, he or she is now a first offender in adult court.

To some extent, this effect results from the confidentiality of records in the juvenile system that impedes the easy flow of information to criminal system officials. But, even when full information about juvenile involvement has been disclosed, there is an undeniable tendency on the part of criminal justice officials to discount that information substantially in making adult dispositional decisions. The person is treated as a first offender because he or she is a first offender in the system that is making the decision.

The "fresh start" phenomenon reflects more than anything else the attitudes of criminal justice officials toward the juvenile justice system. They view themselves as the real legal control system and the juvenile system as a "kiddie court" that only plays at legal control. This macho attitude ironically leads criminal justice officials to adopt a fresh start approach when a juvenile violator graduates to the criminal system.

That attitude is one reason why a surprising number of

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<sup>11</sup> See, e.g., Dawson, *Responding to Misrepresentations, Nondisclosures and Incorrect Assumptions About the Age of the Accused: The Jurisdictional Boundary Between Juvenile and Criminal Courts in Texas*, 18 ST. MARY'S L.J. 1117 (1987).

juveniles transferred to adult court for prosecution end up on adult probation supervision and why at least some persons of juvenile age and with prior juvenile system experiences who are arrested without identification misrepresent themselves as adults. A merger of the two systems would probably eliminate this totally inappropriate notion of a fresh start on crime when adult age is reached.

#### IV. THE CASE AGAINST ABOLITION

The case against abolition is based on the same reasons the system was established in the first place. To a degree, then, it is an examination of the extent to which those initial reasons still have validity. The case against abolition is based on three clusters of arguments: 1) the notion that minors have less responsibility for their misconduct than do adults; 2) the greater rehabilitation potential of minors, justifying greater devotion of resources; and 3) the avoidance of inappropriate legal rules.

##### A. LESSENERED RESPONSIBILITY

One reason for having a separate juvenile justice system is a belief that it is inappropriate to hold children to the same standards of responsibility as adults. Based on this same belief, the common law recognized a defense of infancy to a charge of crime. The matter of where to draw a line between childhood and adulthood is subject to different views and is ultimately arbitrary, but most people would agree that a line must be established and maintained. We simply react differently to misconduct by a twelve year old than to the same misconduct by a twenty year old.

We attach severe legal consequences to misconduct by the twenty year old. We label it a crime and the offender a criminal. We say that person has chosen to act badly. While we may recognize social and other restrictions on his or her freedom to choose, we believe that a choice was made and that one can be made by others in similar circumstances. We attach severe legal consequences in part to influence the choices others will make. We feel free to select the worst of adult malfactors for punishment, sometimes quite severe punishment. We save those we can and punish those we cannot.

With children, we are more likely to look outside the actor to understand the misbehavior. We are likely to look at parents, school, neighborhood, and companions. We view the education and development of the child as incomplete and, therefore, do not hold him or her to adult standards of conduct. We find it much

easier to forgive the misconduct of a child than an adult. After all, the adult should know better.

So, for children we seek to avoid the imposition of the same severe sanctions that we affirmatively desire to impose on adults. We avoid the label "criminal" and its legal and social consequences. We solemnly declare that the juvenile justice system, which looks much like the criminal system, is civil in nature and that the child has engaged in delinquency, not criminality. We carefully provide for confidentiality of proceedings to protect the child. We protect court and other records from public inspection and, often, destroy or seal them once the process has expended itself and the child has been "rehabilitated."

For children, we believe they will behave as they are labeled by adults—that if we call the child bad, that is the way he or she will view himself or herself and, consequently, behave in the future. Therefore, we attempt to avoid labeling in the juvenile system because we fear that with impressionable children it will have the opposite effect we believe it to have with adults.

If the juvenile system were merged with the criminal, this philosophy of lessened responsibility would, to some extent, have to change. We would have to be willing to call the ten, eleven, and twelve year old who commits a crime a criminal, even though in the criminal system we might treat the child differently from the twenty year old who engages in the same conduct. One might question whether this is a step that we are prepared to take.

There is also the problem of status offenses, such as running away, truancy, and incorrigibility. If we merge the juvenile system into the criminal, we will lose this subsystem. That might be good or bad, depending upon whether one believes the juvenile system to have any business dealing with those problems—a matter of some current controversy. The loss would be almost certain, however, since it is doubtful that a state legislature would be willing to make it a criminal offense for a child to run away from home, or to be truant from school, or to disobey parents' orders. It is, of course, quite another matter to make such conduct a subject of juvenile court jurisdiction, especially when we label it something less serious than delinquency, such as "PINS"<sup>12</sup> or "MINS."<sup>13</sup> The fact that we engage in juvenile sublabeling is strong evidence that we would be unwilling to handle such problems in the criminal system. After all,

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<sup>12</sup> "Person in Need of Supervision."

<sup>13</sup> "Minor in Need of Supervision."

if we are unwilling to call such conduct delinquent, would we be willing to call it criminal?

To merge the juvenile back into the criminal system is inevitably to abandon all or part of the notion of lessened responsibility of children for their conduct. Childhood would, to be sure, still be taken into account by prosecutors, judges, and juries in the criminal system and would undoubtedly be a major mitigating factor in individual cases. But the labeling would remain that of the adult and many of the legal disabilities of that label would apply to children in the criminal system.

How would the merged system work in those jurisdictions in which judicial sentencing discretion in the criminal system has been replaced by salient factor scores, offense severity scales, and matrices of the two? It might be necessary to reexamine the applicability of various determinate sentence schemes to youthful criminal offenders, since those schemes are premised in part on notions of adult responsibility. But that is a detail that could be worked out. Perhaps a new scale of mitigation could be added to take account of childhood.

#### B. GREATER REHABILITATION POTENTIAL OF CHILDREN

It is now fashionable to doubt the capability of the criminal system to rehabilitate offenders. Too many recidivism studies have been conducted with too many dismal results to permit many knowledgeable observers to maintain the faith. To a lesser extent this agnosticism has even crept into the juvenile system. We now think of "managing" juvenile offenders, rather than "rehabilitating" them. Those who still believe in the rehabilitation of children are likely now to place emphasis upon keeping the juvenile system from interfering with the natural process of maturation into adulthood rather than upon affirmative steps the system can take to rehabilitate an offender: first do no harm, then cure if you can.

It was, of course, one of the prime beliefs of the early juvenile system that children's behavior would respond to the intelligent application of public resources—that we could cure delinquency with the proper effort and with sufficient resources. To some extent, that belief even penetrated the criminal system and spurred the development of probation services, residential treatment facilities, and even treatment programs within the fences of prisons. There are people in both systems who still believe in rehabilitation, but there are proportionally more of them in the juvenile system than in the criminal.

Why is that? Some are merely traditionalists who still hold the

beliefs of the pre-1960s. Others acknowledge the obstacles to rehabilitation, but believe that if the juvenile system can shelter a child from the destructive consequences (including legal ones) of his or her conduct until he or she has passed through the difficult years of adolescence, he or she may have a fighting chance of law-abiding adulthood. For them, there are sufficient success stories to cancel the depressing statistics. For them, the goal of the system is to keep the government off the children's backs until they can mature. In any event, many people believe that adolescence is a period of great life change during which anything is possible, and that if public and private resources are likely to be effective, it is during that period.

That belief likely accounts for the undeniable truth that children attract resources. It is easy to be sentimental about children, even those who misbehave in significant ways. They do, after all, have less responsibility for their conduct than do adults. There is always room for the belief that resources applied to children may actually make a difference in adulthood.

Children attract public resources. That is why juvenile probation officers almost always have lower caseloads than their adult counterparts. That is why juvenile institutions are smaller and comparatively better staffed than adult facilities. That is why there are comparatively more public facilities for children than for adults. We are simply willing to put our public monies on children more than on adults.

But the big difference is in private resources. An integral part of any juvenile justice system is a network of private, charitable, or religious institutions, facilities, and programs. These can be used by juvenile courts and their staff for placement or referral. These private "correctional" resources are used by the juvenile system thousands of times each year. There really is no adult counterpart to this private segment of the juvenile system, at least not in anything like comparable size.

What would happen to these public and private resources if the juvenile system were merged with the criminal? Would they continue at their current levels, or would they recede because there is no longer an easily identifiable beneficiary—the children of the city, county, state, or nation? Of course, no one really knows what would happen, but there is a risk that these public and, particularly, private resources would gradually recede. Juvenile and adult caseloads on probation, in institutions, and other facilities would gradually equalize at closer to the adult level than the juvenile.

This would likely occur because it would be difficult to maintain

that part of the clientele of the criminal system is ripe for rehabilitation, while other parts are not. We would probably have more resources for younger criminals than for older, but the difference would not be as great as it now is. There would be a tendency to blur our devotion to rehabilitation as a consequence of merger, just as there would be a tendency to blur our concepts of responsibility as a consequence of the same merger.

Perhaps these public and private resources could be better spent elsewhere, perhaps not. In any event, one likely consequence of merger would be a net decrease in the resources now devoted to the two systems combined. But, new found efficiencies might cause a net increase in the effectiveness with which those diminished resources are used.

#### C. AVOIDING INAPPROPRIATE LEGAL RULES

The legal rules of procedure that govern the criminal and juvenile systems are virtually the same as a consequence of the due process decisions by the United States Supreme Court and the round of reform legislation that followed. There is a right to counsel and to provision of counsel at public expense if the accused is unable to afford counsel.<sup>14</sup> There is a privilege against self-incrimination in each system, despite the juvenile system being nominally civil.<sup>15</sup> There is a right to confrontation and cross-examination of witnesses.<sup>16</sup> There is a right to notice of charges<sup>17</sup> and to a requirement that the government prove its charges beyond a reasonable doubt.<sup>18</sup> There is also protection against twice being placed in jeopardy for the same offense.<sup>19</sup> The fourth amendment, with its exclusionary rule, applies in both systems,<sup>20</sup> as do the requirements of *Miranda*.<sup>21</sup>

The only federal constitutional right adults charged with a criminal offense enjoy that a juvenile charged with the same conduct does not is the right to trial by jury. The Supreme Court halted the due process revolution in juvenile justice at that point.<sup>22</sup> A handful of states provide for jury trials as a matter of state law, but most do

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<sup>14</sup> *In re Gault*, 387 U.S. 1, 34-42 (1967).

<sup>15</sup> *Id.* at 42-57.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 31-34.

<sup>18</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>19</sup> *Breed v. Jones*, 421 U.S. 519 (1975).

<sup>20</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>21</sup> *Fare v. Michael C.*, 442 U.S. 707 (1979).

<sup>22</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

not.<sup>23</sup>

If the juvenile system were merged into the criminal, there would be no denying children charged with criminal offenses the right to trial by jury. That would be a healthy development in the law—one the Supreme Court should have taken years ago when it had the opportunity. In any event, it could potentially create a major change in the way we do business in the juvenile system—a change that many a juvenile justice traditionalist would contemplate with horror.

But there is another change that might occur that would be unqualifiedly catastrophic. Children in the criminal system would have the right to bail. Bail is a peculiar constitutional right. It is beneficial to the accused only if he has no other means of being released from pretrial confinement. Otherwise, it is a burdensome and corrupt system. In some communities, bailbondsmen control who is released and who is not before trial; in many, they exert great political influence over the local criminal justice system.

Increasingly, in the criminal system, bailbondsmen are being replaced by public bail systems. A quick investigation is conducted and if the accused shows ties to the community and, therefore, is likely to appear for trial, he or she is released on his or her own recognizance without the necessity of posting security or purchasing a bail bond. In a variation on that practice, he or she may be required to deposit a percentage of the bond amount with the court. Unlike a bail bond premium, however, this amount is returned to the person posting it if the accused makes all of his or her court appearances. Fortunately, in many communities, these public systems have totally displaced the traditional bailbondsmen—but not in all.

Where bailbondsmen exist, they are extraordinarily powerful. They are likely to view adolescents as poor risks to appear for trial and are likely to be less willing to post bond for them than for an adult with a proven record of appearing for trial each time he or she is arrested. There could be no denying the applicability of the bail bond system that happens to exist in any community to juveniles now charged in criminal cases.

Bail has been handled in the juvenile system by pretending that it does not exist. The modern juvenile statute does not provide a right to bail and does not deny the right to bail. It simply ignores the subject entirely. Instead of providing by statute for a right to

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<sup>23</sup> See INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO ADJUDICATION 51-56 (1980).



bond in juvenile proceedings, modern statutes typically provide for a prompt judicial detention hearing to be conducted under statutory release criteria.<sup>24</sup> While there are a few appellate opinions holding that such a hearing is an adequate substitute for bail,<sup>25</sup> the matter has not been fully tested, for no one has the heart to risk opening the doors of the juvenile justice center to the bailbondsman.

Yet, if the juvenile system were to be abolished, it would be difficult not to treat adolescents charged with criminal offenses like adults charged with the same offenses. Bail schedules would have to apply to all. Because of the volume of cases, bond would be set without much attention to the individual characteristics of the arrestee. In some communities fortunate enough to have release on recognizance programs, many adolescent offenders would be released. However, in those communities without such programs, release would depend upon the willingness and financial ability of the adolescent's family to post bond and upon the willingness of a bailbondsman to write a bond.

Since most adolescents involved in the juvenile process are totally dependent upon their families for money, whether they would be released on bond would depend not upon their resources, but upon those of parents and other relatives. Usually, that money could be better spent elsewhere, and the parents appreciate that fact. Further, they are very likely feeling quite hostile to their arrested child at that moment and, even if resources are available, may be unwilling to part with them for bail.

In summary, the bail bond system is a major problem in the criminal justice system. It is a problem that has, by common consent, been avoided in the juvenile justice system. Merging the two systems would likely make bail bonds a problem in the juvenile system for the first time. Bail bonds are, further, even less appropriate in the juvenile system than in the criminal because children lack resources of their own.

## V. HOW WOULD LIFE BE DIFFERENT UNDER THE MERGED SYSTEM?

The answer to that question depends in part on how different it is under the separate systems. The practical consequences of a merger would be great or small depending upon the legal structures and allocation of resources to the juvenile and criminal systems prior to merger. Here, we shall take a case through the merged system in an effort to detect differences. We shall assume that the now

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<sup>24</sup> See, e.g., TEX. FAM. CODE ANN. 54.01 (Vernon 1987).

<sup>25</sup> See, e.g., L.O.W. v. District Court, 623 P.2d 1253 (Colo. 1981).

abolished juvenile system was fully implemented both legally and in terms of resources. That will suggest a maximum model of difference as a consequence of merger.

Bill Bob, fifteen years of age, is taken into custody for a felony offense—burglary.

Before merger, he would have been taken from the streets to a special division of the police department, called the Youth Services Division. He would have been processed, but probably not photographed or fingerprinted. His parents would have been contacted by a Youth Services officer. That officer would have screened the paperwork submitted by the arresting officer for factual and legal sufficiency. It is possible that the officer might have questioned Bill Bob in an attempt to clean up several recent unsolved burglaries. In any event, if this were Bill Bob's first felony offense, and if his parents were moderately concerned and stable, chances are that Bill Bob would have been released by Youth Services from its custody to that of the parents on the promise of the parents to bring him to juvenile court when required. The paperwork generated by the taking of Bill Bob into custody would probably have remained at a local law enforcement level, not sent to a central state or federal depository of criminal records. If Bill Bob had not been released to his parents, he would have been transported by a Youth Services officer to the intake office of the juvenile court, located at the juvenile detention facility. If the arrest had been newsworthy, the local papers would merely report that a juvenile had been taken into custody for burglary, without identifying Bill Bob.

Under the merged system, Bill Bob would be taken from the streets to Central Booking. There he would be photographed and fingerprinted. He might immediately be placed in a cell, probably in a cellblock reserved for youthful criminal offenders, or might be taken to the Burglary Division for questioning, where an effort might be made to clean up recent unsolved burglaries. Someone in the police department might or might not attempt to contact Bill Bob's parents: that would be a matter of local law enforcement policy, since the state law would no longer require it. Once Burglary is through with him, Bill Bob would be returned to his cell to await his first appearance in court. The next morning, his fingerprints and a record of his arrest would be mailed to the central state depository for criminal records and to the F.B.I. If newsworthy, the local paper would fully report the arrest, including Bill Bob's name.

Before merger, Bill Bob, if not released to his parents by police, would have been interviewed by a juvenile court intake worker, who would have attempted to determine how serious the matter was.

The worker would have examined, by computer or manually, the available records to determine whether Bill Bob was already on juvenile probation and whether he had any prior referrals to the juvenile court. The worker would have attempted to contact Bill Bob's parents. If they showed an interest in Bill Bob's release, chances are he would be released to them, pending further court processing. If Bill Bob had not been released by intake, he would have been processed into the juvenile detention facility, where he would have been enrolled in academic classes in an effort to prevent a major interruption of his schooling. A detention hearing might shortly have been held, at which Bill Bob would probably have been released if his parents were sufficiently interested in him to show up at the hearing.

After merger, in some communities, Bill Bob would be called from his cell to be interviewed by a personal recognizance program worker in order to determine whether he would be a suitable candidate for release without security. In other communities, bail would be set from an offense schedule and Bill Bob would remain in jail until a bail bond could be purchased by his family or until a lawyer was appointed (or was hired by the family) who could persuade a judge to reduce bond to an amount the family could raise. Bill Bob would be brought before a judge, probably the morning after his arrest. There, he would be warned of his legal rights, informed of the bond amount, and, perhaps, given the opportunity to apply for the appointment of counsel if indigent. If unable to make bond, Bill Bob would remain in the county jail, where he would watch television.

Before merger, Bill Bob's case would have been evaluated by an intake officer and, perhaps, by a prosecuting attorney. A decision would have been made whether to handle the case informally or to file a petition in juvenile court alleging the offense of burglary. The case would likely have been handled informally unless Bill Bob had an extensive record of prior referrals to the court. If a petition had been filed, a date for an adjudication hearing would have been set and Bill Bob, his lawyer, and his parents would be expected to be in court for that hearing. If the evidence against Bill Bob was strong, it would be expected that his attorney would have advised Bill Bob to stipulate to the evidence in the expectation that such a step would guarantee that the judge would give probation in the case.

In the merged system, the complaint filed by the police would be forwarded to the prosecutor's officer for review of legal sufficiency. In some jurisdictions, the case would in due course be presented to a grand jury for an almost-certain indictment. In other

jurisdictions, Bill Bob might receive a short probable cause hearing in front of a magistrate before the prosecutor filed an information.

Before merger, all of the court proceedings in Bill Bob's case would have been non-public, as would have been all of the court and other legal papers filed in the case. After merger, all of the court proceedings would be open to the public, although, unless the case is extremely newsworthy, at most only a few courthouse regulars might be expected to be present (unless Bill Bob is unfortunate enough to be in court the day Miss Jones brings her eighth grade civics class to observe justice in action). All of the papers in the case that were filed with the clerk of court would also be open to public inspection, although that is not much of a problem because finding the file (even for a court proceeding) often presents some difficulty.

After merger, Bill Bob's lawyer would plea bargain with the prosecutor, seeking a disposition that would permit his or her client to remain on the streets. Whether this materialized would depend mainly upon his prior record, all of which is open and available to the prosecutor and the court. If the record is extensive, Bill Bob, despite his youth, might receive a short prison sentence or perhaps a form of "shock probation," which might even include elements of the boot camp experience for youthful, male offenders.

Before merger, if Bill Bob had been committed to the state training school system, he would have been evaluated and probably assigned to a cottage or dormitory style living arrangement with children approximately his own age and under the supervision of house-parent types. He would have gone to school and perhaps received some vocational training and maybe even some counseling.

After merger, if Bill Bob was sentenced to prison, he would be transported to a large institution for youthful criminal offenders. There he would work and might also receive some vocational training or academic schooling. Forget about counseling. He would live with one or two other inmates approximately his age in a cell in a cellblock under the control of a correctional officer who most definitely is not a house-parent type. If he became a chronic disciplinary problem in the youthful offender institution, he could be transferred administratively to a less desirable facility.

Bill Bob would eventually be released on parole. Before merger, the time as a "resident" would probably be one-third to one-half the time after merger spent as an "inmate." Upon release, before merger, Bill Bob would have a record as a delinquent, although that record would not be public and would be relatively inaccessible from computer terminals. After merger, Bill Bob would

have a record as a criminal, and that record would be universally available to any law enforcement officer in the nation with access to a computer terminal and with Bill Bob's full name and date of birth.

Before merger, Bill Bob might be eligible to return to juvenile court, after a respectable time following release from "aftercare," to petition the juvenile court for a sealing or expunction of his juvenile records. After merger, Bill Bob can forget about expunction. He had best spend his time memorizing an explanation for the arrest and subsequent events that he will be required to give for the rest of his life no matter how straight he goes.

#### VI. ON BALANCE, DON'T ABOLISH IT

There are some very good arguments in favor of abolishing the juvenile system by merging it into the criminal. There might be some resource savings through efficiencies and some troublesome frictional costs would be eliminated. The criminal system's inappropriate concept of a fresh start on crime would likely be eliminated or greatly modified by merger.

These are all substantial gains. The losses would, however, be even more substantial. We would lose control over status offenses. While that is controversial, I wonder what a patrol officer is supposed to do when he or she observes a fourteen year old walking the streets at 3:00 a.m. if there is no justice system jurisdiction over running away from home. There are a number of communities that have invested considerable thought and resources into dealing with these status offenders. It is unlikely the legislatures would be willing to make such conduct criminal, and it would be inappropriate to do so. We would simply be withdrawing official authority over such conduct. Of course, status offenses could be made a type of parental neglect and some of the slack taken up in that fashion.

Do we really want to deal with bailbondsmen in our juvenile system? That would be a retrogressive step of giant proportions.

Finally, the undeniable fact is that children attract resources, both public and private. That is why the juvenile system is comparatively better funded and staffed than the criminal system. The juvenile system has a level of resources that officials in the criminal system can envy but not attain. Merger would have a leveling effect. Unfortunately, it would likely be a downward leveling effect. Public and private resources would flee from service to children in trouble with the law because the legislature abandoned all pretense of helping them by abolishing the legal system designed to deal only with them.