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Are Children Simply Small Adults?

This sounds like a foolish question. We all know that this is not true, yet do we design our public policy to reflect the reality that children are not small adults? For example, do our criminal and juvenile justice laws reflect the fact that children are different from adults? The answer is "No," but times may be changing. That is what this article is about.

The juvenile court was founded on the perception that children are different than adults. At the time (1899), the field of psychology (then quite new) asserted that children were developing beings whose future could be redirected towards a productive life and away from a life of crime. The founders believed that the juvenile court could rehabilitate errant children. From the outset, the juvenile court resembled a problem-solving clinic more than a court of law. The juvenile court and juvenile corrections were separated from the adult criminal system. There were no attorneys and little due process; instead probation officers and service providers worked with the judge to redirect offending children. Proceedings and records were confidential so that a youth would be offered a fresh start and the stigma of a law violation would not make rehabilitation more difficult.

Much of that changed during the last half of the 20th Century in the United States. The courts and state legislatures modified the juvenile justice system, making it resemble the criminal justice system and sending more and more children into the criminal courts. The reasons for these changes included a loss of faith in the notion of rehabilitation, a perceived rise in violent crime committed by children, extensive media attention to youth crime, and a conclusion by some that the juvenile court did not work and did not adequately protect society from crime. Some even called for its abolition[1].

Significant political rhetoric accompanied these changes. For example, the Director of the Office of Juvenile Justice and Delinquency Prevention (the federal agency overseeing juvenile justice in the United States), stated that the country needed to "get tough" on juvenile crime, as juvenile offenders "are criminals who happen to be young, not children who happen to be criminals."[2] The rhetoric reached fever pitch when Professor John Dilulio, Jr., Director of the Brookings Institution for Public Management, invented the term "super-predators" to describe what he called a growing number of "totally out of control" "brutally remorseless" children of all ages who will create "a demographic crime bomb" that will wreak havoc on our country.[3] His conclusion was that, "we will have little choice but to pursue genuine get-tough law-enforcement strategies against the super-predators."[4]

Perhaps the earliest sign that the juvenile court was changing was the case of *In re Gault* 387 U.S. 1 (1967). *Gault* brought due process into the juvenile court, the United States Supreme Court declaring that children accused of crime were entitled to timely notice of the charges, an attorney at state expense, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. Identifying the failures of the juvenile court, the majority opinion stated that "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."[5]

But state legislatures were not concerned about due process or the rights of children. Driven by media stories of violent children, the perception that youth violence was increasing

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exponentially[6], and general public dissatisfaction with the juvenile justice system, state legislatures have over the past 40 years modified juvenile court statutory schemes to remove more and more children to the adult criminal system and make the juvenile court look more like the criminal court.[7] The legislation has taken many forms. Some states lowered the age when a child can be prosecuted as an adult, some have given greater powers to prosecutors to file charges against a child directly in criminal court, some mandated that certain crimes be prosecuted directly in the adult criminal court, others have restricted judicial discretion to keep a child in juvenile court when serious charges are filed, and still others opened juvenile proceedings to the public, and made record sealing more difficult.[8] Moreover, prosecutors - never part of the original juvenile court – are now an integral part of the juvenile court.[9] All of these changes were deemed necessary in order to accomplish the goals of "getting tough on juvenile crime" and "adult time for adult crime."

In several states most youths 15 years-of-age and over accused of felony crimes are automatically transferred to the adult criminal court and treated as adults for all purposes.[10] In California, the prosecutor can file criminal charges in the adult criminal court directly against a 14 year-old if the crime alleged is serious as described in the Welfare and Institutions Code.[11] Criminal court procedures make possible adult criminal sentences for these youth.

Many of these legislative changes were the result of sensationalized media attention to children committing crimes, inaccurate data, and myths about juvenile crime. In addition to the myth about super-predators, others involved a juvenile violence epidemic occurring in the late 1980's and early 1990's, juveniles frequently carrying guns and trafficking in them, juvenile offenders committing more and more violent crimes at younger ages, the public no longer supporting rehabilitation of juvenile offenders, and the juvenile justice system in the United States being viewed as a failure because it cannot handle today's more serious offenders.[12]

In the past decade there has been modest movement in the opposite direction. The United States Supreme Court has taken the lead in this movement, concluding that there are certain sanctions that are prohibited when applied to children even when those children are prosecuted in the criminal court for serious law violations. In order to reach these conclusions, the court has revisited the reasoning that resulted in the creation of the juvenile court – that children are different from adults.

While the Supreme Court has stated that "[o]ur history is replete with laws and judicial recognition that children cannot be viewed as miniature adults,"[13] yet it permitted the execution of some children for serious law violations.[14] Recent scientific developments in neuropsychiatry along with actions by a few states curtailing the death penalty led the court to declare unconstitutional the death penalty and life without possibility of parole for children under 18 when the crime was committed.[15]

In 2002 the Supreme Court held that individuals with mental retardation could not be executed.[16] *Atkins* laid the foundation for cases involving juveniles. Thereafter, *Roper v Simmons*[17] and *Graham v Florida*[18] established that children are constitutionally different from adults for sentencing purposes. In these cases the court found that children's "lack of maturity" and "under-developed sense of responsibility" lead to recklessness, impulsivity, and heedless risk-taking. Children "are more vulnerable…to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Because a child's character is not as "well formed" as an adult's, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievable depravity." *Roper* and *Graham* emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

Roper and *Graham's* foundational principle is that imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children. "[O]ur society views juveniles … as 'categorically less culpable than the average criminal.'"[19] In 2012 *Miller v Alabama* the Supreme Court went further, holding that life without the possibility of parole cannot be automatically mandated for children even for homicide convictions, but that the trial court must exercise discretion in making that decision.[20] Some state court judicial decisions have followed the Supreme Court's lead and have struck down long sentences for children convicted of serious crimes as cruel and unusual punishment.[21]

Most of these Supreme Court decisions have been decided in the last decade. Up until the 21st Century, a 16 or 17 year-old could be executed or sentenced to prison for life. The seriousness of the crime committed was a sufficient basis for treating the juvenile the same as an adult offender. The Supreme Court decisions cited above have slowed down the process of treating child law-breakers the same as adults,[22] but several other changes should be considered. First, the process for transferring children to the criminal court, the waiver or fitness hearing, should be reexamined. At a waiver hearing,[23] the judge hears evidence from the prosecution, the defense, and from the probation officer who has completed an intensive social study. The judge has the opportunity to look carefully at all aspects of the offense and examine the youth who is before the court. With a thorough social study and a judicially supervised hearing, a judge is in the best position to determine whether a child should be prosecuted as an adult or retained in juvenile court. The judge can identify the children who have the best chance for rehabilitation. Neither the legislature nor the prosecutor should make the waiver decision. The legislature does not have the benefit of any particularized facts, while the prosecutor has only the police investigation on which to base his decision.

Second, the legislature should reexamine the possible penalties for youthful offenders who appear in the adult criminal court. We know now that a youth's brain development continues until the mid-20's.

The chance for rehabilitation remains possible. Forty, fifty and sixty year sentences are almost the same as life imprisonment. They go beyond public protection and reflect retribution. Moreover they disproportionally impact young people who will live longer than a 40 year old convicted of the same crime.

Lowering prison sentences has not been popular. It is difficult to recall the legislature ever reducing sentences for crimes. Being "tough on crime" has been an important political slogan for decades. Yet it is time for state legislatures to acknowledge the differences between children and adults and to recognize that children should have the opportunity to rehabilitate. It is time to recognize that laws relating to the punishment of children were poorly conceived and based on public hysteria and myths about youth crime. Paying attention to the scientific developments that persuaded the United States Supreme Court should lead state legislatures to restructure the length of sentences for juveniles convicted of crime even when those juveniles appear in adult criminal court. Public support for such legislative changes exists, but it must be translated into legislative action.[24]

Third, juvenile records should be automatically sealed at 18 years of age. A record can follow a person through life. If available to employers or schools, it can limit a person's ability to secure employment or positions of trust as well as make it difficult to avoid a life of criminality.[25] If social policy is to acknowledge and reflect that children are different from adults and that rehabilitation of youth is a goal, then access to juvenile records should be restricted.

The current record sealing process requires the youth to petition the juvenile court to have his or her juvenile record sealed. Studies show that most youth do not take the time to do so.[26] Indeed, it is the serious law breakers who are more likely to ask for their records sealed. At the California Department of Juvenile Justice (formerly the California Youth Authority) special attention is paid to sealing a youth's juvenile record upon completion of the program. No such counseling is provided to the children committing less serious crimes who are placed on probation in the community. The best policy is to automatically seal all juvenile records when the child reaches 18 years of age. These records could be unsealed should the youth end up in criminal proceedings, but for the great majority of youth, it would mean that they would know that their records are sealed when they reach 18 and that they can respond to an employer that they do not have a juvenile record.

The juvenile court came under attack during the last decades of the 20th Century. Public fear combined with political pressure and myths about youth crime led state legislatures to change their juvenile codes so that children were more likely to be prosecuted in criminal court. What was forgotten was that children are different from adults, are more susceptible to peer pressure, have less mature thought processes, and can and should not be held as responsible as adults for the crimes they commit.

The United States Supreme Court has started a movement back towards the original juvenile court. It remains to be seen if state legislatures will acknowledge that they over-reacted to the media hysteria of the late 20th Century and will have the courage to modify their laws so that the rehabilitative ideal can be achieved. No, children are not little adults – they are children, developing human beings. Our justice system should reflect this reality.

ENDNOTES

1. Ainsworth, Janet, "Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court," *North Carolina Law Review*, Vol. 69 at pp 1083-1133; Feld, Barry, "Transformed but Unreformed: Juvenile Court and the Criminal Court Alternative," paper presented at the American Society of Criminology, Annual Meeting, 1990, Baltimore, Maryland.
2. Regnery, Alfred, "Getting Away With Murder: Why the Juvenile System Needs An Overhaul," 34 *Policy Review* 65 (1985).
3. Delulio, John, "The Coming of the Super-Predators," *The Weekly Standard*, November 27, 1995, Vol. 1, No. 22, p. 23.
4. Id. Professor Delulio has since retracted his statements about super-predators and admitted he was incorrect. Juvenile arrest rates have dropped significantly and as Professor Zimring has written, "His theories on super-predators were utter madness." Baker, Elizabeth, "As Ex-Theorist on Young 'Super-predators,' Bush Aide Has Regrets," *The New York Times, http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aid...*
5. *In re Gault*, 381 U.S. 1 (1967) at p. 5.
6. This is one of the untrue "myths" concerning youth crime. See Zimring, Frank, "The Youth Violence Epidemic: Myth or Reality?", Wake Forest Law Review, Vol. 33, Fall, 1998, at p. 727.
7. Deitch, M. et. al. (2009) "From Time Out to Hard Time: Young Children in the Adult Criminal Justice System," Austin, TX, The University of Texas at Austin, LBJ School of Public Affairs
8. Id. At pp 19-34
9. Sagatun, I., & Edwards, L., "The Role of the District Attorney in Juvenile Court," *Juvenile and Family Court Journal*," Vol. 34, No. 2, May, 1979.
10. Deitch, M. et. al. *op.cit.* footnote 7 at p. 22.
11. California Welfare and Institutions Code section 707(d)
12. All of these myths and more are discussed in Howell, James, *Preventing and Reducing Juvenile Delinquency*, SAGE, (2009), Chapter 1, pp. 3-16.
13. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."
14. *Stanford v Kentucky*, 492 U.S. 361 (1989)
15. *Roper v Simmons*, 543 U.S. 551 (2001) and Graham v Florida, 130 S. Ct. 2011
16. *Atkins v Virginia* (2002) 536 U.S. 304
17. *Roper v Simmons*, *op.cit.*, footnote 13
18. *Graham v Florida*, *op.cit.* footnote 13
19. *Roper v Simmons, op.cit.* footnote 13 at 567
20. *Miller v Alabama*, 132 S.Ct. 2455 (2012). In still another case the Supreme Court held that age is relevant when determining police custody for *Miranda* purposes. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).
21. In the case of *People v Caballero*, 145 Cal.Rptr.3d 286, the California Supreme Court struck down a sentence of 110 years to life for the crime of attempted murder holding that the sentence did not provide the juvenile defendant with a realistic opportunity to obtain release through demonstration of growth and maturity.
22. Some critics assert that *Roper* was incorrectly decided and argue that the death penalty may be appropriate for some juveniles. See Rowe, J., "Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of Roper v Simmons and the Future of the Juvenile Justice System," *California Western Law Review,* Vol. 42, Spring, 2006, p. 287; Jovanovic, A., "Roping in Roper: The Problem with Bright Line Rules in Juvenile Death Penalty Cases," *Michigan State University Journal of Medicine & Law*, Vol. 14, Spring, 2010, pp 281-311.
23. Different terms are used in various states. Waiver refers to the juvenile court waiving a minor to the adult criminal court. Fitness refers to the judicial determination whether a youth is "fit" to remain in the juvenile court. Other terms include transfer, certification, remand, removal, and declination of jurisdiction. This article will use the term fitness hearing.
24. "Public Willing the Pay More for Rehabilitation of Juvenile Offenders," ModelsforChange, *http://www.modelsforchange.net/newsroom/18*
25. Edwards, L., & Sagatun, I., "A Study of Juvenile Record Sealing Practices in California," Pepperdine Law Review, Vol. 4, (1977), pp 543- 572 at p. 544; Sagatun, I., & Edwards, L., "The Significance of Juvenile Records," Juvenile and Family Court Journal, Vol. 30, February, 1979, at pp 29-35.
26. Id.