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The New Rehabilitation

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The New Rehabilitation

Daniel M. Filler[†]
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Introduction

America's century-old juvenile justice system is critically ill. That is the standard account offered by most progressive observers of the juvenile courts.[1] According to these critics, the nation has abandoned its long-term commitment to the treatment and rehabilitation of child offenders.[2] Indeed, the traditional narrative blames liberal hubris: the Warren Court's well-intentioned criminal procedure revolution unwittingly undermined the unique flexibility of the juvenile courts.[3] The downfall of progressive juvenile justice policy provides yet another example of the conservative political backlash to 1960's liberalism.[4]

The problem is, the story is simply not true. This article exposes a little noticed development in how America addresses juvenile crime: specialty courts. These tribunals divert particular types of offenders out of general juvenile courts, marking them for intensive

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[1] *See* text accompanying notes 70-75, *infra.*
[2] *See, e.g.,* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative 'Backlash'*, 87 MINN. L. REV. 1447, 1493-4 (2003)(arguing that in recent years, juvenile courts have abandoned rehabilitative ideal and become punitive).
[3] *See id.* at 1493-96.
[4] In recent years, progressive commentators have come to wonder whether certain decisions generated so much backlash that they actually inflicted long term damage to rights. *See, e.g,.* Barry Friedman, *Mediated Popular Constitutionalism,*101 MICH. L. REV. 2596, 2625 (2003) (discussing backlash to *Roe v. Wade* and *Brown v. Board)*; Jeffrey Rosen, *Kennedy Curse: On Sodomy, the Court Overreaches*, NEW REPUBLIC 15 (July 21, 2003) (noting backlash to *Roe* and expressing concern that *Lawrence v. Texas* might have similar effects).

rehabilitation and treatment.[5] Hundreds of such programs exist nationwide, transforming the experience of justice for tens of thousands of children.[6]

Why are people ignoring this explosive rebirth of the rehabilitative ideal? The academic community has come to a consensus about who makes criminal justice policy: legislatures.[7] But as this paper will explore, ordinary court functionaries – trial judges, lawyers, and other employees seeking to solve practical problems on the local level – have subverted the popular get-tough legislative agenda, and implemented their vision of sound juvenile punishment. This is the *new rehabilitation*.

Juvenile courts were created for the express purpose of rehabilitating offenders.[8] Most histories of modern American juvenile justice begin in 1899, when Illinois established the first separate juvenile court for prosecuting delinquent children.[9] Over the course of the next twenty-five years, virtually every other state adopted a similar tribunal for juveniles charged with crimes.[10] According to the accepted history of American juvenile justice, this commitment to rehabilitation began to wane in the second half of the twentieth century, particularly after the United States Supreme Court extended many criminal procedural rights to children during the civil rights revolution of the 1960's.[11] States narrowed the jurisdiction of the juvenile courts, exporting thousands of children into adult criminal courts. For those children remaining in the juvenile system, judges exercised less individualized judgment and served up increasingly punitive sentences.

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5 *See* text accompanying notes 88-120, *infra.*

6 *See* text accompanying note 128, *infra.*

7 *See* text accompanying note 69, *infra.*

8 *See* text accompanying notes 24-36, *infra.* This was at least the stated rationale of early proponents of juvenile courts. Some critics have argued that the true agenda of such advocates was somewhat more complicated, and less altruistic. *See, e.g.*, ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969).

9 The Juvenile Court Act of 1899, 1899 Ill. Laws 131 (Law of April 21, 1899).

10 CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 229 (1991).

11 *See* text accompanying notes 51-68, *infra.*

Progressive critics mourn the demise of this rehabilitative ideal, citing the Warren Court's extension of rights to child offenders as a catalyst for this shift.[12] They contend that the Supreme Court's extension of adult rights to child defendants those suspicious of rehabilitation to argue that juvenile courts had been rendered ineffective, since they could no longer intervene, treat, and rehabilitate the wayward child at an early stage.[13] Progressives have been so frustrated by juvenile courts in recent years that several leading scholars have argued that it is time to junk the juvenile justice system because it offers incomplete procedural protections paired with the brutality of adult criminal sanctions.[14] These critics thus join the chorus of liberals worried that the civil rights revolution has backfired.[15]

It turns out, however, that the accepted progressive critique of juvenile courts is incomplete. Over the past decade, a major new development has occurred within the American juvenile justice system that undermines the dominant view that juvenile rehabilitation is on its deathbed. Across the nation, in every state, local courts are creating new juvenile tribunals that explicitly seek to treat and rehabilitate juvenile offenders. These specialty courts, including drug, gun and mental health courts, are specifically created to change children's lives so that they do not re-offend. For the first time, we document and describe the development of these new

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[12] In 1967, for example, the Supreme Court for the first time required juvenile courts to provide defendants with an attorney, the right to notice of charges, the right to confront witnesses, and the right to appeal. *See In re* Gault, 387 U.S. 1 (1967). Later, in 1970, the Court held that children could not be convicted – adjudicated delinquent in the parlance of the juvenile courts – on anything less than proof beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358 (1970). One key difference remains between the treatment of children and adults: children prosecuted in the juvenile justice system are not entitled to a jury trial. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[13] *See, e.g.*, Feld, *supra* note 2, at 1495.

[14] *See, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997) ("states should abolish juvenile courts' delinquency jurisdiction"); Janet E. Ainsworth, *Re-Imagining Childhood and Restructuring the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1085 (1991)(stating that her article "calls for the abolition of the juvenile court"); Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990).

[15] *See* note 4, *supra.* For a highly regarded recent articulation of the view that there has been a judicial backlash to the Warren Court. *See* Larry Kramer, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 230 (2004) (discussing how Rehnquist Court uses public hostility to Warren Court decisions to create new doctrine even more conservative than that preceding the1960's.)

courts, placing them in proper context. In doing so, we cast the progressive critique of juvenile justice in a new light, because we suggest juvenile rehabilitation remains viable despite legislative hostility. We establish that critics' fears of an end to juvenile rehabilitation are premature, and that there is at least some chance that we are witnessing a renaissance of rehabilitation. The new rehabilitation is not the handiwork of legislators, however. Rather, juvenile specialty courts have been created from the ground up by local judges, lawyers, probation officers, and social workers – individuals we characterize as *street-level bureaucrats.* Given that these courts have become so widespread, why have so many critics missed this burst of rehabilitative zeal?

One reason, we think, is that commentators have assumed that legislatures make criminal law policy. In this view, policymaking is the domain of elected officials, enforcement belongs to the executive branch, and interpretation is the bailiwick of the courts.[16] Of course, most people recognize that appellate courts sometimes make policy, in the sense that their interpretation of laws and constitutions produces particular policy outcomes. But criminal law commentators have not fully recognized that local courts can pursue macro-policies at odds with legislative command. These bureaucrats created these new tribunals, typically cutting their cases from the general juvenile justice docket, in order to solve concrete problems: drug addiction, mental illness, and a proliferation of guns among children. These professionals chose rehabilitation as the best way to address juvenile crime. Whatever the popular response to the civil rights revolution, it does not seem to have deterred these individuals from building courts that suit their practical needs.

[16] I have previously suggested that viewed through the lens of juvenile court employee preferences, juvenile courts remain fundamentally focused on rehabilitation. *See* Daniel M. Filler, *Random Violence and the Transformation of the Juvenile Justice Debate*, 86 VA. L. REV. 1095, 1110 (2000).

Section I of this article offers the standard progressive account of the "Juvenile Justice Century."[17] This traditional history describes the rise, decline and fall of a unique, rehabilitative system of juvenile justice. In this narrative, rehabilitative juvenile courts remained vibrant until the Supreme Court extended certain constitutional rights to children. From that point on, legislatures began to abandon their commitment to rehabilitation. As a result, children now receive the worst of both worlds: fewer rights than adults and no rehabilitation in exchange. Section II then describes the rise of rehabilitative juvenile courts. We provide, for the first time, a comprehensive account of these new tribunals, which within one decade have sprouted up in every state. Critically, we establish that these courts are largely the product of street-level bureaucrats – judges, working in tandem with local lawyers, probation officers, and others – using specially earmarked federal money. Finally, Section III argues that these courts provide important insights into the nature of juvenile justice policy. It explains why street level bureaucrats created explicitly rehabilitative tribunals, in the face of legislative hostility to rehabilitation. It also suggests broader implications of the New Rehabilitation, including the possibility that one fundamental assumption of the all criminal law literature – that the adult criminal justice system has abandoned rehabilitation as a justification for punishment – may not be correct. It concludes by challenging those progressive critics who feel that the Warren Court overreached, with dire consequences, showing that effective, progressive policies such as rehabilitation can survive irrespective of public, and legislative, hostility to criminal procedural rights.

I. The Standard History of Juvenile Justice

[17] The term "juvenile justice century" is used by John Watkins. *See* JOHN WATKINS, THE JUVENILE JUSTICE CENTURY: A SOCIO-LEGAL COMMENTARY ON AMERICAN JUVENILE COURTS (1998).

According to most historians, the move to create special juvenile courts was the product of a broader movement within western culture.[18] In the late nineteenth century, criminologists touted a new science of crime. Challenging the notion of crime as grounded in free-will choice,[19] they argued that criminal conduct was the result of "antecedent forces – biological, psychological, social, or environmental."[20] In 1892, for example, Elbridge T. Gerry, president of the New York Society for the Prevention of Cruelty to Children, cited poverty, inadequate housing and neglect as causes of juvenile delinquency.[21] If crime could no longer be explained by free will, retributive punishment – imposition of a sentence based on an offender's moral responsibility – made no sense. At the same time, scholars and Progressive activists, motivated by a growing belief in science and rationality, became convinced that experts were capable of addressing the damage caused by these antecedent forces, and thus solving the crime problem. As Barry Feld explains it, "a growing class of social science professionals fostered the 'rehabilitative ideal', which requires a belief in human malleability and a consensus about the appropriate directions of personal change."[22] Since each individual would require a particular regime of treatment, a cornerstone of the new Progressive program was the individualization of punishment.[23] If courts were to effectively rehabilitate offenders, they would need to tailor their punishment to the precise needs of that individual.

The juvenile court, in this view, was the culmination of efforts of the positivist criminologists and Progressive activists. It would be a special tribunal designed to address the

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[18] *See, e.g.*, Feld, *The Transformation of the Juvenile Court – Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 332-38 (1999).

[19] *See* Feld, *supra* note 20, at 335; DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA 50-61(1980).

[20] *See* Feld, *supra* note 2, at 1457.

[21] *See* Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 405 (1999).

[22] Feld, *supra* note 18, at 336.

[23] See Bernard Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twentieth Century*, 70 U. CHI. L. REV. 105, 108 (2003).

individual needs of delinquent children, providing care and rehabilitation and insuring that they could go on to live good, productive lives. The Illinois legislature moved first to turn this new view of crime into substantive policy.[24] The Juvenile Justice Act of 1899 served as model for juvenile justice policy across the nation. This legislation, designed to "regulate the treatment and control of dependent, neglected and delinquent children,"[25] was the first attempt to create a specialized set of courts to deal with offenders under the age of sixteen.[26] The Act "defined a rehabilitative rather than punitive function of a court of special jurisdiction for neglected, dependent and delinquent children under the age of sixteen."[27] Within twelve years, twenty-two states followed Illinois' lead and created juvenile courts, and by 1925 every state except Maine and Wyoming had created a criminal justice system specifically for juvenile offenders.[28]

These courts operated on a *parens patriae* model of justice.[29] Most state statutes provided that juvenile courts would function as civil, rather than criminal, tribunals.[30] The judge was to serve as a loving parent – in most cases, father – providing the helpful discipline which would lead the child to a new, crime-free life. Juvenile courts were given a broad range of powers. Judges could intervene in a child's life with minimal instigation. If a child was charged with a crime, or a variety of pre-criminal acts such as vagrancy, truancy, and living an immoral

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[24] 1899 Ill. Laws 131 (Law of April 21, 1899).

[25] *Id.*

[26] *Id.*

[27] Cindy S. Lederman & Joy D. Osofsky, *Infant Mental Health Interventions in Juvenile Court: Ameliorating the Effects of Maltreatment and Deprivation*, 10 PSYCHOL. PUB. POL'Y & L. 162, 165 (2004).

[28] *See* Simonsen, *supra* note 12 at 229. Maine and Wyoming followed suit by 1945. *Id*.

[29] H. TED RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 54 (1985). Parens patriae is, quite literally, a paternalistic approach to juvenile rehabilitation. The term which means "father of the country," was derived from English equity courts who used the term to refer to judicial protection of people who could not legally take care of themselves, such as orphans, widows, and minors. Janet Gilbert, *et. al, Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1158 (2001);.

[30] Barbara Fedders, *et al.*, *The Defense Attorney's Perspective on Youth Violence*, in SECURING OUR CHILDREN'S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE (Gary A. Katzmann ed. 2002) at 86.

life**,** the court's jurisdiction attached.[31] Standard procedural protections were absent. The judge alone would hear the facts, witnesses were not required to appear in person, defendants were not entitled to juries, and in many jurisdictions, a judge could adjudicate a child delinquent – that is, find him guilty – on a mere preponderance of the evidence.[32] If a judge found that a child had committed a legal transgression, he could impose a wide range of sanctions – some light, and others harsh – irrespective of the severity of the underlying offense. According to the accepted history of these courts, judges focused on the individual needs and capacities of the offender and not on the characteristics of the crime.[33] They ordered offenders into any program the judge thought would "'cure' the youth", [34] and left the disposition process open for as long as necessary to insure that the child had indeed been rehabilitated.

Proponents of this approach took the parenting model very seriously. Writing in the Harvard Law Review in 1909, Judge Julian Mack, a leading advocate for the modern juvenile justice system, described the process in painstaking detail. Among other things, he argued that the layout of the room was essential to effective adjudication. He believed that the judge was to be "[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him…."[35] Judge Mack wanted to take the juvenile into his charge

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[31] *See* Platt, *supra* note 10 at 140. The Illinois Juvenile Court Act of 1899 specifically authorized penalties for "pre-delinquent" behavior to provide judges with the ability to intervene in a child's life just like a parent would be empowered to do. *Id*. at 138.

[32] One notable aspect of juvenile justice systems is their nomenclature. Delinquency proceedings were, and in many cases remain, nominally civil, not criminal, actions. Children were not charged with indictments or informations, but petitions. They were not found guilty, but instead adjudicated delinquent. They did not receive sentences, but rather dispositions.

[33] Janet E. Ainsworth, *Re-Imagining Childhood and Restructuring the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1099 (1991).

[34] *Id.* at 1099-1100.

[35] Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

"not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."[36]

In the standard account, this model of juvenile justice remained fairly static until the 1960's. Commentators typically gloss over the period from 1925 – when these courts became ubiquitous – until 1966, when the Supreme Court began expanding criminal procedure protections to children. Describing this period, from 1899 to the mid 1960's, commentators sometimes note questions about the efficacy or fairness of the courts.[37] In addition, a group of critics has long attacked the juvenile courts on the grounds of race disparities.[38] On the whole, however, this period is treated with a sort of silent deference, as though the juvenile justice system was truly in its halcyon days.[39]

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[36] *Id*. Judge Mack described the *parens patriae* movement in the juvenile courts as getting away from the idea "that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma…." *Id*. at 109.

[37] *See* Zierdt, *supra* note 21, at 408 ("from time to time the objection was raised that juvenile proceedings were actually criminal proceedings…the consistent rebuttal to these constitutional concerns was that the juvenile court's decisions were the result of compassion."); Fedders, *supra* note 30 ("Notwithstanding the emphasis on 'saving' children, Judge Richard S. Tuthill of the Chicago juvenile court sent thirty seven juveniles to adult court in the first year of the new juvenile court's existence. The sentences imposed in juvenile court sometimes resulted in a longer period of incarceration than a child would have received if he had been prosecuted for the same offense in adult court.")

[38] *See* Feld, *supra* note 2, at 1484-5. Feld notes that a number of studies issued in the early 1960's showed that juvenile courts were processing and harshly punishing a disproportionate number of minority children. *Id.* Examples include William R. Arnold, *Race and Ethnicity Relative to Other Factors in Juvenile Court Dispositions*, 77 AM. J. SOC. 211, 211-12 (1971-72); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime at 82(1967); Sidney Axelrad, *Negro and White Male Institutionalized Delinquents*, 57 AM. J. SOC. 569, 570-71 (1951-52). Claims about disparate treatment of minorities, within the juvenile justice system, have continued even after the Court's extension of procedural rights to children. For example, there is some suggestion that African-Americans are transferred to adult court at rates greater than whites. See, e.g., U.S. Gen. Accounting Office, Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions 59 (1995) (indicating that in states studied, African-American children charged with violent offenses are transferred at 1.8 to 3 times the rate of white children charged with these crimes). But see Jeffrey Fagan, et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) (acknowledging racially disparate waiver rates but concluding that race only explained disparities with respect to murder cases).

[39] *See, e.g., Ainsworth*, supra note 33, at 1104-05 (suggesting that juvenile and criminal justice commitment to rehabilitation began to fade in the latter part of the twentieth century); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference it Makes*, 68 B.U. L. REV. 821, 825 (1988) (describing a half century where juvenile judges were guided by principles of psychology and social work)

By the 1960's, however, the Warren Court was increasingly interested in giving clearer shape to criminal procedural protections. In the 1967 landmark case, *In re Gault,* the Court held that juveniles prosecuted in juvenile courts were entitled to many procedural protections previously denied children.[40] The Court signaled the end of the unbridled discretion of juvenile court judges to conduct their hearings and trials in the manner of Judge Mack at the beginning of the century.[41] In *Gault,* a fifteen year old Arizona defendant charged with making a lewd phone call was taken into custody overnight without any notice to his parents.[42] The probation officer filed a pro forma petition that never actually identified what offense Gault had committed.[43] The judge never heard testimony from the victim; he was treated to the second-hand report of a juvenile probation officer.[44] The offender did not receive proper notice of the hearing, nor the assistance of counsel[45]. His hearing was never transcribed, and Arizona law made no provision for an appeal.[46] Gault was adjudicated delinquent and committed to an industrial school – the equivalent of a prison for children – until age 21 "unless sooner discharged by due process of law."[47] For the same offense, an adult could have received a fifty dollar fine or two months imprisonment.

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[40] 387 U.S. 1 (1967). The Court actually addressed delinquency proceedings a term earlier, in Kent v. U.S., 383 U.S. 541, 567 (1966). There, the Court held that children were entitled to certain procedural protections in the context of a juvenile transfer hearing.

[41] *See* Gault, *supra* note 40.

[42] *See id.* at 5.

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.* at 5, 7.

[47] *See id.* at 7. The testimony was conflicting as to whether the defendant actually placed the call or if he was with another boy who actually placed the call. After the female on the other end of the phone answered, the caller asked "have you got big bombers?" *See* Charles E. Springer, *Rehabilitating the Juvenile Courts*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 397, 405 n. 36. The Supreme Court's opinion did not describe the actual words uttered by Gault or his friend.

The Supreme Court rebelled. The majority held that juveniles facing delinquency proceedings in juvenile court were entitled to many of the same protections as adults.[48] They include notice of the specific charges to be addressed at the delinquency hearing, the assistance of counsel, protection against self-incrimination, and the ability to appeal the order of the trial judge.[49] If there was any remaining doubt that the juvenile justice system was moving quickly to replicate the adult criminal justice system, procedurally at least, the Court dismissed such questions in *In re Winship*. There, it held that a court could not adjudicate a child's delinquency on less than proof beyond a reasonable doubt, rejecting New York's use of the preponderance of the evidence standard.[50]

According to the usual history of the juvenile courts, this was the critical turning point, the moment at which rehabilitation would begin its slow demise. The traditional liberal account of juvenile justice suggests the rise of constitutional rights for delinquents unintentionally doomed the rehabilitative model. They argue that at that point, law-and-order activists turned on juvenile courts, suggesting that constitutional formalities undermined their ability to intervene early, informally, and aggressively with wayward youth. Paired with growing public anxiety

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[48] *Id*.

[49] *Id*. Because juvenile judges neither advised offenders of their right to counsel nor appointed counsel for them, most children continued to be unrepresented by counsel at delinquency proceedings. *See* W. VAUGHN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972). At the time *Gault* was decided, attorneys represented about five present of children appearing in delinquency proceedings. *See*, BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND JUVENILE COURTS (1993). As of the early 1990's, at least half of the defendants in juvenile courts were still unrepresented by counsel. *Id*. There are many different reasons why children may continue to be unrepresented. For example, some parents may be reluctant to retain an attorney, public defenders may not be available, judges may downplay the importance of retaining counsel, and treatment-oriented judges may not want an attorney to limit their discretion. *Id.*

[50] *In re* Winship, 397 U.S. 358 (1970). The Court extended the similarity between delinquency proceedings and adult criminal trials in the case of *Breed v. Jones*, 421 U.S. 519 (1975). In *Breed*, the court held that double jeopardy protected juveniles from he possibility of being tried in criminal court following a delinquency proceeding.

about crime, and particularly juvenile crime, a backlash against the rehabilitative ideal had begun.[51]

The standard description of this backlash identifies several ways in which states abandoned rehabilitation. First, legislatures narrowed the jurisdiction of the juvenile justice system by diverting some crimes to the adult system, making it easier to transfer individual defendants to adult court on a case-by-case basis, and shifting the age at which juvenile court jurisdiction attaches. Most juvenile courts have long offered prosecutors to transfer – or "waive" – particular child defendants to adult court, upon consent of the judge.[52] In recent years, many legislatures have changed the waiver process to make it easier to move children to adult court. In one change, many jurisdictions have shifted the burden of proof in these waiver hearings from the state to the defendant.[53] Other states have adopted mandatory waiver provisions, which

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[51] *See* Zierdt, *supra* note 21, at 411. The number of reported crimes increased from 1,861,261 in 1960 to 10,192,034 in 1974. Nancy E. Marion, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993 (1994) at Appendix 1 (*citing* U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* (1960-1975). This anxiety was fueled by a blend of reality and perception. Crime rates for both juveniles and adults were indeed on the rise from the 1960's on. *Juvenile Justice and Delinquency Prevention: Report of the Task Force on Juvenile Justice and Delinquency Prevention*, National Advisory Committee on Criminal Justice Standards and Goals (1976), at 1. According to one source, that juvenile arrests for violent crimes increased 293% between 1960 and 1975, while adult crime only increased 130% during the same period. Paul A. Strasburg, VIOLENT DELINQUENTS 13-14 (1978). Some scholars believed that the "perceived increase in youthful violence in the U.S. today appears to stem from the interest by the mass media in the problem of crime rather than to reflect any real increases." Eugene Doleschal & Anne Newton, *The Violent Juvenile*, 10 CRIMINAL JUSTICE ABSTRACTS 4, at 539-73 (1978). To try to counter the media reports, Judge Seymour Gelber stated that "[j]uvenile crime is not pervasive, not violent, not increasing, and not destined to destroy our society." Seymour Gelber, *Treating Juvenile Crime*, USA TODAY, January 1983, at 26. At least one study found that the actual number of personal crimes committed by juveniles decreased during the 1970's. Joan M. McDermott & Michael J. Hindelang, ANALYSIS OF NATIONAL CRIME VICTIMIZATION SURVEY DATA TO STUDY SERIOUS DELINQUENT BEHAVIOR, MONOGRAPH 1 (1981), at 10.

[52] *See* Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 1999 National Report*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (1999), at 86. In some states, prosecutors have the authority to make the decision as to whether children of a certain age will be tried as adults or will remain within the juvenile justice system. For example, one author has expressed concern about the number of cases that Florida prosecutors have transferred to adult court and about the current trend that seems to be increasing the number of states that allow prosecutors to decide the fate of juvenile offenders. Vincent Schiraldi & Jason Ziedenberg, *The Florida Experiment: Transferring Power from Judges to Prosecutors*, CRIMINAL JUSTICE, Spring 2000, at 47.

[53] At least fifteen jurisdictions had adopted such laws by the end of the 1990's. *See* Patrick Griffin, Patricia Torbet, & Linda Szymanski, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (1998), at 2. *See also* Jeffrey A. Butts, *Can We Do Without Juvenile Justice*, CRIMINAL JUSTICE, Spring 2000, at 53.

require judges to grant transfer requests if certain preconditions are met.[54] Thus, in South Carolina, a judge must transfer a case of any child over the age of 13, if he has been twice adjudicated delinquent and now faces charges on an offense carrying a maximum adult sentence of over ten years imprisonment.[55] Many states automatically transfer capital cases when the offender is over a certain age, such as fourteen.[56] In many jurisdictions, the entire transfer decision has been left to a prosecutor's discretion.[57] Finally, **s**ome states have lowered the age at which children automatically fall within the jurisdiction of adult criminal courts. For example, in New Mexico, offenders age fifteen and older charged with first degree murder are excluded from entering the juvenile courts.[58] The law simply prevents the offender from being defined as a "child."[59]

Commentators point to a second way in which legislatures have derailed rehabilitation: statutory limits on the individualization of juvenile sentences. They have attempted to achieve this both by demanding that judges base their sanctions solely on the nature of the offense – rather than the juvenile's circumstances – and by creating mandatory or suggested sentencing structures for particular crimes. According to one commentator, as of 1997, seventeen states and the District of Columbia had adopted some sort of mandatory minimum provision for certain

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[54] Indeed, by 1997, fourteen states had adopted these laws See Griffin, *supra* note 53, at 2.

[55] S.C. CODE ANN. § 20-7-7605 (2004).

[56] *See, e.g.*, MINN. STAT. ANN. § 260B.015 Subd. 5 (2000) (requiring transfer at the age of fourteen); Md. Code Ann., Courts & Judicial Proceedings § 3-804 (2000) (requiring transfer at the age of sixteen).

[57] By 1997, fifteen states had adopted direct-file waiver statutes that allowed prosecutors to take the case directly to criminal court if certain conditions had been met. *See* Griffin, *et al.*, *supra* note 53. *See e.g.*, ARIZ. REV. STAT. § 13-501 (West 1989 & Supp. 1998); ARK. CODE ANN. § 9-27-318(b) (Repl. 1993 & Supp. 1995); COLO. REV. STAT. ANN. § 19-2-517 (West 1990); D.C. CODE ANN. § 16-2301(3)(A) (1997); FLA. STAT. ANN. § 985.227 (West Supp. 1999); GA. CODE ANN. § 15- 11-5(b) (1994); LA. CHILDREN'S CODE ANN. art. 305 (West 1995); MASS. ANN. LAWS ch. 119, § 524 (Law. Co-op. 1994); MICH. COMP. LAWS ANN. § 600.606 (West 1982); MONT. CODE ANN. §41-5-206(1) (1997); NEB. REV. STAT. § 43-276 (1993); OKLA. STAT. ANN. tit. 10, § 7306-2.1, 2.12 (West 1998); VT. STAT. ANN. tit. 33, § 5505(c) (1991); VA. CODE ANN. § 16.1-269.1(A) (Michie Repl. 1996); WYO. STAT. ANN. § 14-6-203(c), (e)-(f) (Michie 1997).

[58] N.M. STAT. ANN. § 32A-1-8 (1978).

[59] *See* Griffin, *supra* note 53, at 8.

juvenile offenders.[60] In 1996, Arizona enacted a law that required a juvenile age fourteen and older who is adjudicated for a second felony in juvenile court to serve mandatory juvenile detention time, be placed under judicial intensive supervision, or be tried as an adult.[61] Utah, on the other hand, employs sentencing guidelines to assist the probation officer in preparation of the juvenile's dispositional report and sentencing recommendations to the court.[62]

A final way in which states have substantially altered their commitment to rehabilitation, according to the standard account, is in the way they articulate the purpose of juvenile justice. In recent years, several legislatures have adopted language that suggests that elected officials do not want juvenile sanctions to be rehabilitative. Since the Supreme Court handed down Gault, over a quarter of states have adopted "statements of legislative purpose to de-emphasize rehabilitation and the child's 'best interest' and to assert the importance of protecting public safety, imposing sanctions consistent with the seriousness of the offense, and ensuring individual responsibility and system accountability."[63] For example, in 1979, the Washington legislature adopted the Juvenile Justice Act which "makes it clear that youngsters who are being sentenced – i.e., deprived of liberty – are being punished rather than 'treated.'"[64] The Washington Act does not allow judges to deviate from the statutory sentences based upon his or her perception of the

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60 *See* Butts, *supra* note 53, at 54.

61 ARIZ. REV. STAT. ANN. § 8-341 (2004). However, there is also evidence that a couple of states have retreated from the use of mandatory minimum sentences for juvenile offenders. For example, in 1997, Oregon passed a measure that allowed offenders who were charged with specified crimes that previously carried a mandatory minimum sentence to receive other sentences if certain criteria are met. Patricia Torbet & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-1997 Update*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (1998), at 7.

62 *See, e.g.*, http://www.sentencing.utah.gov/Guidelines/Juvenile/juvguidelines.htm (last visited April 8, 2005); http://ojjdp.ncjrs.org/jjbulletin/9811/judicial.html (last visited April 8, 2005).

63 *See* Feld, *supra* note 14, at 83; Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN.J.L. & PUB. POL'Y 135 (1995); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

64 Ainsworth, *supra* note 33, at 1106-07 (*citing* Mary Kay Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289, 305-07 (1979)).

juvenile.[65] Prosecutors are also prevented from considering such factors as abuse, neglect, or whether the child would benefit from treatment.[66] Washington is not alone. For example, the purpose provisions of the Texas Juvenile Justice Code and the Wyoming Juvenile Justice Act start their list with explicit language that the laws are designed "to promote the concept of punishment for criminal acts", while Connecticut's legislature stated its goal as adequately protecting the community and holding children accountable for their behavior.[67] The view of

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65 *Id*. *See, e.g.*, WASH. REV. CODE § 13.40.150(4)(e) (1977).

66 *Id*. *See, e.g.*, WASH. REV. CODE § 13.40.070(3) (1977).

67 TEX. FAMILY CODE ANN. § 51.01 (2004); WYO. STAT. ANN. § 14-6-201 (2004). *See also* CONN. GEN. STAT. ANN. § 46b-121h (2004) (stating that the purpose of the statute is to "adequately protect the community" and to "hold juveniles accountable for their unlawful behavior"); Haw. Rev. Stat. Ann. § 57.1 (2004) (reiterating that the juvenile laws are "necessary [for the] protection of the community").

When writing their purpose clauses, other states have taken a more balanced, or restorative, approach. Such an approach pays equal attention to public safety, individual accountability to victims and the community, and the development in the offenders of those skills necessary to live law-abiding and productive lives. *See* http://www.ncjj.org/stateprofiles/overviews/faq9.asp (last visited April 6, 2005). Such states include Alabama, Alaska, California, Florida, Idaho, Indiana, Kansas, Maryland, Minnesota, Montana, New Jersey, Oregon, Pennsylvania, Washington, and Wisconsin. *See, e.g.*, CAL. WELF. & INST. CODE § 202 (West 1976); FLA. STAT. ANN. § 39.001 (West 1951); IDAHO CODE § 16-1801 (1963); IND. CODE ANN. § 31-6-1- 1 (West 1978); KAN. STAT. ANN. § 38- 1601 (1982); MD. ANN. CODE § 3- 802 (1957); MINN. STAT. ANN. § 260.011 (West 1959); MONT. CODE ANN. § 41-5-102 (1947); N.J. STAT. ANN. § 2A:4A-21 (West 1929); OR. REV. STAT. § 419.474 (1959); 42 PA. CONS. STAT. ANN. § 6301 (Purdon 1972); WASH. REV. CODE ANN. § 13.40.010 (1977); WIS. STAT. ANN. § 48.01 (West 1955).

Some states have retained a version of the standard purpose clause of the Juvenile Justice Act of 1925. Such provisions usually refer to the care and guidance that the child must be provided by the state. Some trace of the Juvenile Justice Act remains in the states of Arkansas, California, Florida, Georgia, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Jersey, Rhode Island, and South Carolina. *See, e.g.* ARK. STAT. ANN. § 9-27-302 (1975); CAL. WELF. & INST. CODE § 202 (West 1976); FLA. STAT. ANN. § 39.001 (West 1951); GA. CODE ANN. § 15-11-1 (1971); ILL. ANN. STAT. ch. 37, ¶ 701-2 (Smith-Hurd 1965); IOWA CODE ANN. § 232.1 (West 1904); MASS. GEN. LAWS ANN. ch. 119, § 53 (West 1906); MINN. STAT. ANN. § 260.011 (West 1959); MISS. CODE ANN. § 43-21-103 (1979); MO. ANN. STAT. § 211.011 (Vernon 1957); NEV. REV. STAT. § 62.031 (1949); N.J. STAT. ANN. § 2A:4A-21 (West 1929); R.I. GEN. LAWS § 14-1-2 (1944); S.C. CODE ANN. § 20-7-470 (Law. Co-op. 1981).

Still other states retain some portion of the Legislative Guide for Drafting Family and Juvenile Court Acts issued by the Children's Bureau in the 1960's. The Guide sets forth four purposes of juvenile justice act: (a) "to provide for the care, protection, and wholesome mental and physical development of children"; (b) "to remove from children committing delinquent acts the consequences of criminal behavior, and to substitute therefor a program of supervision, care and rehabilitation"; (c) to remove children from their homes "only when necessary for [their] welfare or in the interests of public safety"; and (d) to protect the "constitutional and other legal rights" of all parties involved. *See* http://www.ncjj.org/stateprofiles/overviews/faq9.asp . States that retain all or part of the Guide's directive include: Arkansas, Maine, Montana, New Hampshire, New Jersey, North Dakota, Ohio, Tennessee, Texas, Vermont, and Wyoming. *See* ARK. STAT. ANN. § 9-27-302 (1975); ME. REV. STAT. ANN. tit. 15, § 3002 (1977); MONT. CODE ANN. § 41-5-102 (1947); N.H. REV. STAT. ANN. § 169B:1 (1979); N.J. STAT. ANN. § 2A:4A-21 (West 1929); N.D. CENT. CODE § 27-20-01 (1969); OHIO REV. CODE ANN. § 2151.01 (Anderson 1969); Tenn. Code Ann. § 37-1- 101 (1970); TEX. FAM. CODE ANN. § 51.01 (Vernon 1943); VT. STAT. ANN. tit. 33, § 631 (1967).

conservative critics of the juvenile justice system was captured well by United States Congressman Bill McCollum, who commented that "serious juvenile offenders 'should be thrown in jail, the key should be thrown away and there should be very little or no effort to rehabilitate them.'"[68]

A consistent theme evident in scholarship focused on the rise and fall of rehabilitation has been the fundamental assumption that punishment policy is the product of legislative action. Thus, the various proofs used to show the trend away from rehabilitation all point either to new laws, adopted by states, or new statements of legislative purpose. On one hand this is not surprising, given the common assumption that the role of legislatures is to make policy. On the other hand, it reflects a more cramped conception of the policy making apparatus than is found in other areas of the criminal law literature. For example, the growing literature on plea bargaining recognizes the important role of prosecutors, and prosecutorial discretion, in determining actual sentences.[69] For whatever reasons, this broadened view of policy has not yet been incorporated into the punishment literature.

The perceived transformation of juvenile jurisprudence in recent years, however, has not gone unnoticed. Far from it, commentators now debate whether there remains a future for the rehabilitative juvenile justice system.[70] Several leading scholars have called for an end to a

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Only four states have language in their statutes that emphasizes the promotion of the best interests of the child as the sole or primary purpose of the juvenile court system: District of Columbia, Kentucky, Massachusetts, and West Virginia. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 53 (West 1906).

[68] Richard E. Redding, *Juvenile Offenders in Criminal Court and Adult Prison*, CORRECTIONS TODAY (April 1999), at 92 (quoting Florida Congressman Bill McCollum). McCollum sponsored the Violent Crime Control and Law Enforcement Act of 1994, which provided harsher treatment of child offenders and allowed juveniles age thirteen and older charged with committing a violent crime on federal property with a firearm to be tried in adult criminal court. Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796 (1994).

[69] *See, e.g.*, Stephan Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

[70] *See, e.g.*, Wallance J. Mlyniec, *The Special Issues of Juvenile Justice: An Introduction*, CRIMINAL JUSTICE, Spring 2000, at 4 (noting that in the past decade, state and federal legislators have begun to abandon individualized, rehabilitative juvenile justice, and asking what will happen in the next century); Arthur L. Burnett, *What of the Future? Envisioning an Effective Juvenile Court*, CRIMINAL JUSTICE, Spring 2000, at 6 (noting the shift from rehabilitation and treatment to punishment); Butts, *supra* note 51, at 50.

separate juvenile justice system because, they argue, it provides an incomplete basket of rights, while failing to offer substantial benefits to child offenders.[71] Indeed, these arguments gained such serious traction that the American Bar Association dedicated a panel to the doomsday proposals during their 1992 meeting.[72] Even those commentators who argue for maintaining the existing juvenile justice regime lament the demise of rehabilitation.[73] For many progressive, the popular rejection of rehabilitation is best understood as a backlash to the liberalism of the Warren Court. As Barry Feld, the leading scholar of juvenile justice, put it:

> By adopting some criminal procedures to determine delinquency, the Court shifted the focus of the juvenile court from the Progressive emphasis on "real needs" to proof of criminal acts; it formalized the connection between criminal conduct and coercive intervention and effectively transformed juvenile proceedings into criminal prosecutions. Although the Court did not intend its "Due Process" decisions to obviate the juvenile court's rehabilitative agenda, in the aftermath of Gault, judicial, legislative, and administrative changes have fostered a procedural and substantive convergence with criminal courts.[74]

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[71] *See, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997) ("states should abolish juvenile courts' delinquency jurisdiction"); Ainsworth, *supra* note 29, at 1085 (stating that her article "calls for the abolition of the juvenile court"); Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990). It should be noted, of course, that there have long been critics calling for the elimination of juvenile courts – either because they were seen as underprotective or overprotective of child defendants' rights. *See, e.g.*, Frances B. McCarthy, *Should Juvenile Delinquency Be Abolished?*, 23 CRIME & DELINQUENCY 196, 196 (1977) ("Delinquency jurisdiction should be removed from the juvenile court and be allowed to revert to the criminal courts."); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1121 (1977) ("It is now commonly agreed that the juvenile court has failed to achieve its objectives."). The reason that the Feld and Ainsworth proposals were so notable, however, is that they were a direct response to the authors' perception that juvenile courts were no longer providing rehabilitative justice.

[72] *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WISC. L. REV. 163, 164 (1993).

[73] *See, e.g., id.* at 165-66 ("I agree with Barry Feld that juvenile courts impose punishment in the name of treatment [but] I do not share his belief in the abolitionist solution.").

[74] *See* Feld, *supra* note ___, at 1493.

In this respect, Feld's critique resonates with a growing chorus of progressive commentators who sound a singular theme: the Warren Court's civil rights revolution seemed like a good idea, but it has turned out to be bad in the long term.[75]

The standard account ends on a down note. As we show in the next section, however, rehabilitation turns out to have been far more resilient that commentators suspected. Thanks to the work of local officials, it has returned with vigor to many juvenile courts across the United States in a new form: the specialty court.

II. Juvenile Specialty Courts

A. The Creation of Juvenile Specialty Courts

The first significant experimentation with specialty courts occurred less than two decades ago in the adult criminal justice system. In 1989, the chief judge of Florida's eleventh judicial district –in Miami – issued an administrative order creating a new drug court.[76] The Dade County drug court took a new – or more accurately, old – approach to drug crime: rehabilitation. Offenders who would otherwise have been prosecuted in a traditional state criminal court were diverted to a special court which handled drug-related matters exclusively. In order to be eligible for the Miami drug court, the defendant must have been charged with possessing or purchasing drugs, tampering with evidence, solicitation for purchase, or obtaining a prescription by fraud, and the defendant must not have had more than two previous non-drug-related felony convictions, a history of violent crime, or an arrest for sale or trafficking.[77] Once in drug court, offenders were treated with a rehabilitative regime. They were routinely required to complete a treatment program such as Alcoholics Anonymous, or Narcotics Anonymous as well as attend

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[75] *See e.g.* Friedman, *supra* note 6, at 2625 (discussing backlash to *Roe v. Wade* and *Brown v. Board);*Rosen, *supra* note 6 (noting backlash to *Roe* and expressing concern that *Lawrence v. Texas* might have similar effects.) Derrick Bell has offered similar critiques of *Brown v. Board. See* Derrick Bell (forthcoming Alabama Law Review).

[76] Peter Finn & Andrea K. Newlyn, U.S. Department of Justice, Pub. No. NCJ-142412, *Miami's "Drug Court:" A Different Approach* (1993), at 3.

[77] FLORIDA STAT. ANN. § 948.08(6)(a) (2004).

counseling sessions and submit to random drug testing.[78] The defendant was expected to engage in "direct, regular, and frequent conversation with the judge to assist the rehabilitative process."[79] The system was built on both punishments and rewards. Offenders who stuck to the straight and narrow were offered rewards such as such as T-shirts, mugs, and tickets to baseball games. [80] Those who repeatedly used drugs were subject to tiered sanctions.

Due to the success of the Miami court, the energy of local officials, and the support of federal grant money, 1,078 drug courts had been established within fourteen years, providing services to over 312,500 individuals.[81] Proponents of drug courts cite lower recidivism rates, a decrease in drug use among participants, drug free babies, cost effective treatment, higher employment rates, and the ability to keep families together as reasons why these courts are preferable to the traditional criminal court model.[82]

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78 JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 39, 40 (2001).

79 *See* www.miamidrugcourt.com/about.html (last visited April 6, 2005).

80 *See* Nolan, *supra* note 78, at 40.

81 According to the National Association of Drug Court Professionals, as of September 8, 2003, there were: 1,078 drug courts; 693 for adults and 285 for juveniles, 86 family and 52 tribal courts; 300,000+ adults and 12,500 juveniles had enrolled in drug courts; 73,000 adults and 4,000 juveniles had graduated; and there had been a 70% retention rate. 1,000 drug free babies and 3,500 parents regained custody because of drug court efforts. *See* http://www.nadcp.org/ (last visited April 6, 2005). According to American University's Justice Programs Office, there are 1,367 drug courts in operation nationwide as of March 29, 2005. *See BJA Drug Court Clearinghouse Project: Summary of Drug Court Activity by State and County*, March 29, 2005, prepared by the Justice Programs Office, American University, *at* http://spa.american.edu/justice/publications/us_drugcourts.pdf#page=3.

82 *See, e.g.*, California Drug Court Project, *at* www.courtinfo.ca.gov/programs/drugcourts/about.htm (last visited April 6, 2005) (average treatment costs between $900 and $1,600 compared to $5,000 for the minimum period of incarceration); David Reichert, *Drug Courts Have Low Recidivism Rate*, 87 JUDICATURE 87 (2003) (claiming a rearrest rate of 27.5% over 2 years compared to a rearrest rate of 68% over three years); Daniel T. Eismann, *Drug Courts: Changing People's Lives*, 46 ADVOCATE (Idaho State Bar Journal) 16 (2003) (claiming that only 43% were employed prior to entering this court but that 96% were employed full-time by graduation); *Ohio Report Demonstrates Positive Outcomes from Drug Courts*, Behavioral Health Accreditation & Accountability Alert, at 2 (September, 2002) (stating that "drug court graduates on average were 15% less likely to be re-arrested than a comparison group that did not receive drug court services"); *Report Gives National Figure on Drug Court Recidivism Rates*, THE BROWN UNIVERSITY DIGEST OF ADDICTION THEORY AND APPLICATION, at 6 (September, 2003) (stating that a recent report noted that within one year of gradation, 16.4% of drug court graduates were rearrested for serious offenses, while it was 27.5% within two years).

C.f., Todd Hutlock, *Addressing Concerns About Drug Courts*, BEHAVIORAL HEALTH MANAGEMENT, at 16 (March, 2003). Despite the overwhelming number of proponents of drug courts, it is not without its critics. Hutlock reports that some critics claim that drug courts tend to focus on white, middle-class offenders, and that the drug court judges over-reach their boundaries. *Id*. at 20. Another criticism is that drug courts actually cost the criminal justice system more than regular courts because they bring more offenders into the system. *Id*.

Other specialty courts have surfaced in the succeeding years since the Dade County experiment. These include habitual offender, mental health, domestic violence, and gun courts. In Florida, repeat offender courts enjoy a smaller caseload, which allows prosecutors to offer tougher plea bargains.[83] By processing fewer cases, the court has the ability to hold more trials which allows the prosecutor to rarely accept a plea offer that does not include enhanced penalties for being a habitual offender.[84] In King County, Washington a mental health court was created to keep mentally ill offenders from spending unnecessary time in jail where they do not receive the mental health treatment services that they desperately need.[85] The New York domestic violence court provides a quick response to the needs of victims, as well as judicial supervision of cases from arraignment through post-disposition, and it sets up a system of accountability for those agencies responsible for monitoring the actions of the defendant.[86] While gun courts have also started to gain in popularity, they do not focus on the rehabilitation of the offender, rather they center on heightened sentencing for those convicted of crimes involving firearms.[87]

Juvenile specialty courts were designed to provide the same focused, rehabilitative approach, targeted exclusively at children. While it is hard to tell who actually created the first juvenile specialty court, Circuit Judge John Parnham in Escambia County, Florida (Pensacola)

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83 *See An Overview of Florida's Criminal Justice Specialized Courts* prepared by the Florida Senate's Criminal Justice Committee Staff Report Number 97-P-21, October 1997, *at* http://www.fcc.state.fl.us/fcc/reports/courts/ctsum.html (last visited April 6, 2005).

84 *Id.*

85 *See, e.g.*, http://www.metrokc.gov/kcdc/mhhome.htm (last visited April 6, 2005) for information on Seattle, Washington's mental health court.

86 *See* http://criminaljustice.state.ny.us/ofpa/domviolcrtfactsheet.htm for information about the New York domestic violence court. The purpose of domestic violence courts is to offer an "outcome oriented, problem solving, therapeutic court." Randal B. Fritzler and Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 145 (2000).

87 For example, in a New York City gun court one judge presides over all qualifying cases from beginning to end. Herbert Lowe & Glenn Thrush, *Gun Court to Expand Into Queens*, NEWSDAY, December 17, 2003, at A17. That same judge makes all rulings, presides over all hearings and trials, and imposes sentences on all offenders. *Id.* In New York City, in the first six months of the gun court, the median jail sentence rose from ninety days to one year, those receiving jail sentences rose as well from 4% to 44%, and probation has become virtually extinct for those who are found guilty of an offense involving carrying a concealed weapon. *Id.*

has been credited with creating the first juvenile drug court in 1995.[88] In this early, rudimentary juvenile drug court, the judge presided over both the regular Family Court docket as well as the separate Family Drug Court cases.[89] In order to enter the court, Judge Parnham required participants to plead guilty to contempt of court and accept a six month suspended sentence, as well as comply with any conditions added by the drug court sentence.[90]

The most pervasive form of juvenile specialty court is the drug court. Like adult drug courts, after the news of the perceived success of the first programs in 1995 began to spread, programs started to pop up across the country.[91] There are also juvenile courts that address drug and alcohol abuse by children, drug use by parents of children who are processed by dependency courts,[92] gun possession,[93] truancy,[94] violent acts committed by juveniles,[95] and even teen courts that are intended to impose peer pressure on young offenders for minor violations.[96]

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88 *See* Purvette A. Bryant, *Grants Will Help Volusia Battle Drug Abuse: The Federal Money Will Continue an Adult Drug Court for Nonviolent Addicts and Will Fund a Study for a Similar Drug Court for Teenagers*, ORLANDO SENTINEL TRIBUNE, June 10, 1999, at D3.

89 Adele Harrell and Alice Goodman, REVIEW OF SPECIALIZED FAMILY DRUG COURTS: KEY ISSUES IN HANDLING CHILD ABUSE AND NEGLECT CASES, The Urban Institute, February 1999, at 24, *available at* http://www.urban.org/UploadedPDF/speclizd.pdf.

90 *Id*. at 26.

91 In 1998, one of the first studies to look at the early juvenile drug court programs claimed that early "evaluations suggest that juvenile drug courts are providing a positive impact on the recidivism and retention rates of substance abusing juvenile offenders." Michelle Shaw & Kenneth Robinson, *Summary and Analysis of the First Juvenile Drug Court Evaluations: The Santa Clara County Drug Treatment Court and the Delaware Juvenile Drug Court Diversion Program*, 1 NATIONAL DRUG COURT INSTITUTE REVIEW 73, 74 (1998). One excellent source on juvenile drug courts is the American University Justice Programs Office. Its website provides an interactive map, for example, which allows a reader to identify all drug courts – juvenile and adult – by state and county, in many cases with date of initiation. *See* American University Justice Programs Office, School of Public Affairs, Drug Court Clearinghouse: Drug Court Activity by State, *available at* http://spa.american.edu/justice/map.php (last visited April 10, 2005).

92 *See, e.g.*, *Innovative Drug Court Program Offers Early Intervention, Reunites Families*, ALCOHOLISM & DRUG ABUSE WEEKLY, July 12, 2002, at 1. The article describes the Sacramento County Dependency Drug Court, part of the Juvenile Court, which sends parents to treatment within a short time of taking the children into protective custody. *Id*. at 4. In the first six months of the program, 37 families were reunited after successful completion of the program by the parents. *Id*. at 5.

93 *See* text accompanying notes 147-56, *infra*.

94 *See* text accompanying notes 164-5, *infra*.

95 In Yolo County, California, the Juvenile Violence Court and Intervention program targets juveniles between the ages of twelve and seventeen who have committed offenses that involve violence or who otherwise appear to be in need of anger management skills. *See* http://www.yolocounty.org/org/probation/juvenile.htm (last visited April 7, 2005). In addition to intensive monitoring, court appearances, anger management counseling, and

While the general jurisdiction of courts is usually devised by a state legislature, these specialty courts are typically homegrown creations. Local courts carve specialty dockets out of their general court business. The impetus for forming these new courts often comes from a local judge.[97] The idea of a specialty court may surface for a variety of reasons, including particular local case management issues (such as court overloading),[98] the concerns of juvenile judges or other players in the juvenile court system seeking better outcomes in particular cases,[99] or the growing notoriety of such courts in other jurisdictions.[100] In many cases, the availability of federal grant money to fund such projects may focus attention on these types of courts, and help motivate players to organize them.[101]

Whatever the triggering event, the typical history of these courts begins with a judge who reaches out to primary stakeholders in the judicial system, including prosecutors, probation officers, and defense attorneys, as well as other professionals routinely involved in – if not

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alcohol and drug treatment for the juvenile offenders, the parents are also provided with classes to help them deal with their children. *Id*.

[96] For descriptions of various teen courts throughout the country, see Kathiann M. Kowalski, *Courtroom Justice For Teens – By Teens*, CURRENT HEALTH 2, April/May 1999, at 29; Kathy Khoury, *Local Volunteers Take Active Role In Youth Justice*, CHRISTIAN SCIENCE MONITOR, April 8, 1999, at 1; Deb White, *Teen Court Works*, EDUCATION DIGEST, September 1999, at 26; Adrienne D. Coles, *Court Programs Granting Teenagers Jury of Their Peers*, EDUCATION WEEK, December 15, 1999, at 5.

[97] *See* Gilbert, Grimm and Parham, *supra* note 29, at 1197-98 (describing specialized courts as resulting from "judicial frustrations" and suggesting that creation of specialty courts was fruit of judicial work.)

[98] *See, e.g.*, Bureau of Justice Assistance, JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE March 2003 at 5 (published by the Office of Justice Programs, U.S. Dep't of Justice) (describing early specialty court dockets as driven by work overload).

[99] This presumably motivated Santa Clara County Superior Court in California, if their press releases are to be believed. *See, e.g.*, Press Release, *Santa Clara County Superior Court Commences Juvenile Mental Health Court*, March 19, 2001, *at* www.scsuperiorcourt.org/news/news_juvenment.htm (last visited April 6, 2005).

[100] *See* David Sheppard & Patricia Kelly, *Juvenile Gun Courts: Promoting and Providing Treatment*, JUVENILE ACCOUNTABILITY BLOCK GRANTS BULLETIN, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (May 2002), at 7, *at* http://www.ncjrs.org/pdffiles1/ojjdp/187078.pdf (last visited April 6, 2005) (noting that Jefferson County Alabama Judge Sandra Storm initiated a gun court "after reading about an adult gun court in Providence, R.I.").

[101] For example, Title V of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, allowed the Attorney General to provide grants to state and local courts to establish drug courts in their communities. The program is administered by the Drug Courts Program Office. *See* Marilyn Roberts, Jennifer Brophy, and Caroline Cooper, *The Juvenile Drug Court Movement*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (March 1997), at 1; Robin J. Kimbrough, *Treating Juvenile Substance Abuse: The Promise of Juvenile Drug Courts*, 5 JUVENILE JUSTICE 11 (1998) (published by the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention).

necessarily integral parts of – the juvenile justice system.[102] These may include police officers, school officials, social workers, therapists, and others. State legislatures do not seem to be significant players at this point. Although these new courts may, in practice, substantially alter the sorts of punishment imposed on delinquent children, they are typically seen as new procedural moves well within the power of local officials. Nor do the local officials necessarily seek to share the limelight for these efforts. Judges, and the judiciary, are quick to take credit for specialty courts,[103] and other professionals have similarly gained stature from their successes.[104]

The Jefferson County, Alabama Juvenile Gun Court provides a good example of how a specialty court comes in to being. In the mid-1990's, Birmingham, Alabama was suffering from high rates of juvenile gun violence. Judge Sandra Storm, a juvenile court judge in Jefferson County, the home to Birmingham, read an article in the *Birmingham News* discussing an adult gun court in Providence, Rhode Island.[105] She began the organizational process by convening a town-hall meeting to discuss the possibility of such a court.[106] She invited law enforcement officials, prosecutors, criminal defense attorneys, the Alabama Department of Youth Services (the operator of the state's detention facilities), and various social service agencies such as

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[102] *See, e.g.*, David E. Arrendono, *et al.*, *Juvenile Mental Health Court: Rationale and Protocols*, JUV. & FAM. CT. J. at 1 (Fall, 2001) (describing creation of Santa Clara's juvenile mental health courts as "the culmination of nine months of judicially convened meetings to establish ground rules and develop relationships"); Sheppard & Kelly, *supra* note 100 (published by the Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice) (describing how the Jefferson County Alabama judge created a juvenile gun court after holding a town meeting with "key representatives from the criminal justice system); *id.* at 5 (providing similar guidelines to judges considering starting a new gun court.).

[103] *See, e.g.*, Press Release, *Santa Clara County Superior Court Commences Juvenile Mental Health Court*, March 19, 2001, *at* www.scsuperiorcourt.org/news/news_juvenment.htm (boasting that "Santa Clara County Superior Court has assumed a national leadership role in addressing the issues of juvenile mental health by holding the nation's first Juvenile Mental Health Court" and that "Judge Davilla's JMHC will effect a more humane treatment of juveniles with serious mental illness, help relieve the overcrowding of detention facilities, and decrease recidivism among youth."

[104] *See, e.g.*, Arrendon, *supra* note 102 (article touting the success of the Santa Clara mental health court authored by various professionals involved in the court, including judges, a prosecutor, a public defender, a psychiatrist, a probation officer, and an employee of the state's office of family and children's services.)

[105] *See* Office of Juvenile Justice and Delinquency Prevention, PROMISING STRATEGIES TO REDUCE GUN VIOLENCE, Profile No. 43, Juvenile Gun Court – Birmingham Alabama (U.S. Dep't Justice).

[106] *Id.*

IMPACT, a local family counseling provider.[107] After building connections between these groups, and gaining their buy-in, the Family Court reallocated funds and other resources to support the program.[108] The court then began to hear a specialty gun court docket. Unlike any move requiring legislative action, this was relatively simple and quick. Funding beyond the standard Family Court line was obtained through grants.[109] Without a single vote in the Montgomery legislature, a new court – with a new agenda – had been created.

The same story surfaces elsewhere. In San Juan County, New Mexico, the Juvenile Probation and Parole Office presented the idea of creating a juvenile drug court to provide intensive treatment for children with substance abuse problems.[110] District Judge Byron Caton joined with other members of the District Court, the Public Defender's Office, the District Attorney, Juvenile Probation, local law enforcement agencies, school districts, and others to plan a new juvenile drug court.[111] The court accepted its first participants in September of 2000.[112]

Just as the state legislature plays little role in the creation of these courts, it typically is not involved in their initial funding.[113] Instead, local officials cobble together resources to support their new project. Some costs, such as judicial and secretarial salaries, may already be provided by the state. Other costs, such as salary of additional staff, and the costs of particular

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107 *Id.*

108 *Id.*

109 The Jefferson County gun court was able to operate because of funding from various grants, including one from the United States Department of Health and Human Services' Substance Abuse and Mental Health Services Administration, which provided funding for psychiatric and other mental health services. *See* Sheppard & Kelly, *supra* note 100, at 2.

110 *See* http://www.eleventhdistrictcourt.state.nm.us/programs/sanjuan/juv_drug_court/exec_sum/ (last visited April 6, 2005).

111 *Id*.

112 *Id*.

113 Initial funding is often sought from the U.S. Department of Justice. For example, the Volusia County, Florida, juvenile drug court was created with a $28,731 juvenile-planning grant from the Department of Justice. Bryant, *supra* note 98. The Clackamas County, Oregon, juvenile drug court is also wholly financed by federal grant money, in the amount of $500,000. Noelle Crombie, *Juvenile Court Shows No Mercy, More Results*, THE OREGONIAN, February 27, 2003, at South Zoner p. 1. Baltimore, Maryland opened the doors of its juvenile drug court in March of 2003 with federal grant money that it received in 2001. Julie Bykowiz, *Drug Court's Success Seen in Graduates, Officials Say: Ceremony Held for First 3 to Complete the Program*, THE BALTIMORE SUN, March 5, 2003, at 1B.

rehabilitative programs, may need new funding sources. In many cases, local officials have sought out either private or federal funding for their new initiatives. The San Juan County drug court cited above, for example, was originally funded with a federal grant from the Federal Office of Justice Programs.[114] State money often came later, but even it commonly took the form of grants from federally funded state pass-through grants, state supreme courts, and state agencies, rather than legislatively authorized direct funding.[115] State legislative funding has begun to surface, but is relatively new.[116] Prior to receiving financial support from the state legislature in 2003, Nevada's specialty courts were funded out of local government funds and money out of the State General Fund.[117] Arizona has at east eighty-four different problem-solving courts, including nineteen drug courts, and according to the National Drug Court Institute the state legislature does not appropriate one dollar for the support of these courts.[118]

One of the most significant funding sources for juvenile courts are federal grants. Notwithstanding state legislative hostility to rehabilitation, and alleged federal hostility to meddling in state criminal law, the Department of Justice appears committed to the creation of

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[114] Although initial funding came from the federal government, the state legislature later ratified the work of local bureaucrats by funding the courts through the statewide Juvenile Accountability Incentive Block Grant, which was administered by the Children, Youth and Families Department. *See id.*

[115] There is even evidence that the state judiciary itself is covering some, or most of the expenses of juvenile and adult drug courts. For example, in Louisiana, the state supreme court approved a grant out of its own expense fund to help cover the costs of the juvenile drug courts in St. Tammany Parish. Meghan Gordon, *Courts to Increase Spending in 2005: Budget for Treating Drug Offenders Rises*, TIMES-PICAYUNE, December 21, 2004, at Metro p. 1. The total amount of funds available to juvenile drug courts still did not reach $400,000 for 2005, about one-quarter of the amount spent on adult drug courts in the same parish. *Id*.

[116] According to the National Drug Court Institute, there are more than 1,667 problem-solving courts in operation across the country, including at least nine hundred and thirty-four drug courts. *See* http://www.ndci.org/courtfacts.htm (last visited April 6, 2005) (including the following types of courts: adult drug courts, juvenile drug courts, family drug courts, D.W.I. and D.U.I courts, reentry drug courts, tribal drug courts, reentry courts, community courts, mental health courts, teen courts, domestic violence courts, and others). Currently, twenty-one states have no legislation at all relating to drug courts (whether juvenile or adult), much less appropriations for them. *Id*. At least sixteen states that currently have specialty courts provide no state funding for drug courts. New Jersey leads the states by providing eighteen and a half million dollars of state funds to drug courts, and California is in second place with between fifteen and eighteen million dollars of funding. *Id.*

[117] *Assembly Bill 29 "Specialty Court Funding", 2005 Report to the Legislative Counsel Bureau*, prepared by the Administrative Office of the Nevada Supreme Court, at 3.

[118] *See* http://www.ndci.org/courtfacts.htm (last visited April 6, 2005). Illinois provides no monetary support to its twenty-one drug court programs. *Id*.

these courts. Title V of the Violent Crime Control and Law Enforcement Act of 1994 specifically sets aside federal funds to be used for drug court support.[119] This support takes the form of Juvenile Accountability Incentive Block Grants; the Department of Justice identified the establishment of juvenile drug court programs and juvenile gun court programs as among its twelve purpose areas.[120]

B. Profiles of Juvenile Specialty Courts

Juvenile specialty courts appear, at first, anachronistic. Juvenile courts were designed, originally, to provide individualized rehabilitative justice for children. Specialty courts are supposed to provide the same thing. Why then are they necessary? Because legislatures have worked diligently to undermine rehabilitative juvenile courts, existing court structures have difficulty delivering rehabilitative services. Specialty courts create new spaces where delinquency cases can be funneled to receive the individualized attention once dedicated to all children charged with delinquency. How do these specialty courts work? The stated purpose of specialty courts is to "[abandon] conventional adversarial roles in the interest of providing a more therapeutic and less contentious environment for the resolution of issues."[121]

Specialty courts pull cases out of the general delinquency docket and subject them to special, intensive handling on a smaller docket. Frequently, a defendant must enter a guilty plea – or its juvenile court equivalent – in order to become eligible for the special jurisdiction.[122]

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[119] *Id*. at 455-56; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 42 U.S.C. §§13701-14223 (1994).

[120] *See* Sheppard & Kelly, *supra* note 110, at 2; *Caroline* S. Cooper, *Juvenile Drug Court Programs*, JUVENILE ACCOUNTABILITY BLOCK GRANTS BULLETIN, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (May 2001), at 1, *available at* http://www.ncjrs.org/pdffiles1/ojjdp/184744.pdf.

[121] Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 65 (2002).

[122] *See* Harrell & Goodman, *supra* note 89, at 26. In Utah, Drug Court participants enter a "plea in abeyance," which is a guilty that is put on hold while the offender is in a drug court program. *See* http://www.utcourts.gov/drugcourts/ (last visited April 6, 2005). Once the offender has completed the program, the guilty plea is withdrawn and all of the charges are dismissed. *Id*.

Depending on the jurisdiction, it may be more or less difficult to divert the most serious cases from a punitive to a rehabilitative docket. In many states, the decision of whether to prosecute a child in adult court belongs to either a judge or district attorney. In these cases, judges and prosecutors committed to specialty courts retain the power to divert suitable children to a rehabilitative regime. Even in states with juvenile sentencing guidelines, it may be possible for children to enter conditional pleas which may be withdrawn later if they successfully complete a treatment program.[123] In these ways, specialty courts may remain open even to offenders explicitly targeted by legislators for tough sentences.

Once in these tribunals, offenders are subject to a unique sanction and reward regime that often bears little resemblance to the main line of delinquency cases. Instead of a hands-off probation, or a bid at the state "industrial school", children are brought back to court regularly to check on their progress. They receive stepped sanctions to punish small transgressions, and rewards to affirm small successes. They often include intensive, self-conscious treatment and counseling programs. They are therapeutic programs seeking to rehabilitate offenders.

The roles of actors within the juvenile justice process has been fluid over the past quarter century. Until the civil rights revolution at the Supreme Court, juvenile courts were driven primarily by judges, their professional staff (such as probation officers and social workers), and prosecutors. Lawyers, if they were present at all, had a more peripheral role. With *Gault,* and its progeny, juvenile courts changed to more closely resemble adult criminal courts. They became more adversarial, with a more clearly defined role for the defense attorney, and the judge became

[123] In one of our own experiences, district attorneys routinely circumvented legislatively imposed minimum sentences through use of conditional pleas. Thus, for example, a defendant pleads guilty to felony sale of a controlled substance, which carries a mandatory minimum, but sentencing is deferred. In the interim, the defendant enters a drug program. If she completes it successfully, the district attorney allows her to withdraw her plea, and enter a plea to possession – a charge that does not carry a mandatory minimum sentence.

more of a fact-finder and sentencer than a parent.[124] The advent of specialty courts has, to a significant extent, turned back the clocks, and it has done so consistent with *Gault*. Specialty courts have "all but abandoned conventional adversarial roles in the interest of providing a more therapeutic and less contentious environment for the resolution of issues."[125] Juvenile specialty courts have once again redefined the roles of court personnel, expert witnesses, defense attorneys, prosecutors, juvenile probation officers, and a host of others. The nonadversarial, treatment-based approach of most specialty courts has shifted the power structure by placing the decision-making in the hands of a few key participants while reducing the roles of those who are accustomed to actively participating in criminal and juvenile court proceedings.[126]

Juvenile specialty courts come in a variety of forms. The most common variation is the juvenile drug court. As of January 2005, there were 334 different juvenile drug court programs across the country, including at least one in every state, as well as another 162 such courts in the planning stage.[127] They serve tens of thousands of children.[128] Figure 1 shows the growth of these courts, nationally, in the past decade. [129]

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[124] Of course, the degree to which the judge truly acted like a parent is very much in doubt. Class and race differences between judges and their juvenile charges are likely to have transformed both the judge, and the child's, perception of their relationship.

[125] Thompson, *supra* note 121, at 65.

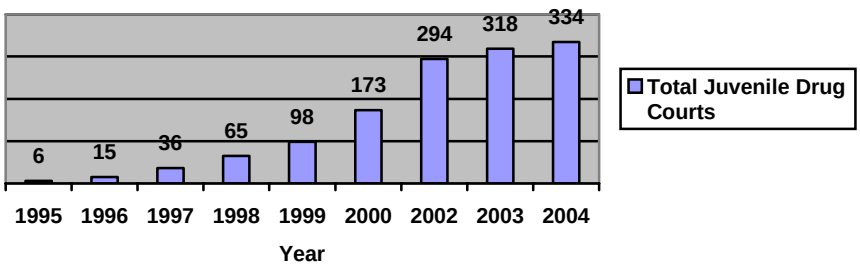
[126] One author has stated that "[t]his shift from a conventional framework to one in which prosecutors and defense counsel assume a more collaborative posture has 'altered the dynamics of the courtroom, including at times, traditional features of the adversarial process.'" Thompson, *supra* note 131, at 77 (*quoting* John Feinblatt, *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 292 (2000)). The shift was also described as one from a "lawyer-driven" process to one that it "judge-driven." *Id*.

[127] *See Drug Court Activity Update: January 1, 2005*, American University, OJP Drug Court Clearinghouse, *available at* http://www.csdp.org/research/2004factsheet.pdf (last visited April 6, 2005).

[128] *See Drug Court Activity Update: Summary Information July 1, 2001*, American University, OJP Drug Court Clearinghouse, *available at* http://spa.american.edu/justice/resources/juvenilecourtactivity.pdf (last visited April 6, 2005). This report, issued in 2001, when only 167 juvenile courts were in existence – many of which had been started within the year – found that 12,500 children had already participated. Although we have not found precise data since this time, this number has surely soared since that time.

[129] *See id.*

Figure 1: Juvenile Court Growth 1995 - 2004



Juvenile drug courts provide participants with "intensive and continuous judicial supervision," and they deliver an "array of support services necessary to address the problems that contribute to juvenile involvement in the justice system."[130] One juvenile drug court has been described as diverting "non-violent juvenile offenders exhibiting alcohol or substance abuse behavior from the traditional juvenile court process to an intensive individualized treatment process."[131] Drug courts are available to more than just children charged with drug crimes. The majority of such courts are also open to children facing theft and other property charges, and a sizable minority even accept children charged with assault.[132] Most of them share the same fundamental characteristics:

- much earlier and much more comprehensive intake assessments;
- much greater focus on the functioning of the juvenile and the family throughout the juvenile court process;
- much closer integration of the information obtained during the assessment process as it related to the juvenile and the family; much greater coordination among the court, the treatment community, the school system, and other community agencies in responding to the needs of the juvenile and the court;
- much more active and continuous judicial supervision of the juvenile's case and treatment process; and
- increased use of immediate sanctions for noncompliance and incentives for progress for both the juvenile and the family.[133]

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130 See Cooper, *supra* note 101, at 1.

131 Warren R. McGraw, *Cabell County Juvenile Drug Court Serves as a Model*, WEST VIRGINIA LAWYER, August, 2001, at *8.

132 *See Drug Court Activity Update: Summary Information July 1, 2001*, *supra* note 128.

133 *See* Roberts, *supra* note 101. However, "all juvenile drug courts are not cut from the same cloth." Sloan & Smykla, *supra* note 9, at 358. Sloan and Smykla did find that most courts provided "reasonable costs to their

In order to implement the above goals, drug courts employ a team approach. The judge typically heads up the team, but she coordinates a communal effort that includes the prosecutor, defense attorney, treatment providers, evaluators, probation officers, school representatives and others.[134] As opposed to the adult model where the offender may start the process in drug court, juveniles are usually adjudicated delinquent first, followed by placement in a drug court.[135] In essence, a juvenile is required to both concede guilt and waive a panoply of rights – including a robust version of the right to counsel – in order to benefit from this "nonadversarial" procedure. It is this process that understandably makes defense attorneys uncomfortable. After all, they are in essence conceding not only a client's guilt, but also the attorney's ability to help the child navigate the consequences of his plea.[136] The "collaborative nature of treatment courts" cuts

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clients;" focused on a "core group of offenders;" involved outside agencies; maintained "contact among the offender, the family, and the court;" and employed different forms of sanctions and incentives in order to achieve client compliance with the treatment regimen. *Id*.

[134] *See* Cooper, *supra* note 101, at 3. This team approach is a far cry from what one would expect to observe in a juvenile or adult criminal proceeding. It is hard to imagine a judge, prosecutor, and defense attorney who consider themselves part of team whose goal it is to try to place an offender in a treatment program and not to argue over the intricacies of the law of evidence or the finer point of the criminal law. *See* Sloan & Smykla, *supra* note 9, at 340. The ultimate decision authority rests with a judge, but in Delaware, Ohio, for example, "many of the decisions are made jointly by the drug court team." *See* Deborah Koetzle Shaffer & Edward J. Latessa, *Delaware County Juvenile Drug Court Process Evaluation*, University of Cincinnati, Center for Criminal Justice Research, Nov. 2002, at 2, *available at* http://www.uc.edu/criminaljustice/ProjectReports/Delaware_process_eval.pdf (last visited April 6, 2005**)**.

This new role of a judge as part of the treatment "team" has not been without controversy. In Oklahoma, a drug court participant was not allowed to continue the treatment program when he tested positive for cocaine use on at least five different occasions. Alexander v. State, 48 P.3d 110, 112 (Okla. Crim. App. 2002). He argued that the trial judge's participation in the case as a member of the defendant's Drug Court Team necessarily led to bias on the part of the judge. *Id*. However, the state statute creating the drug court program allows participants of the team to serve in their regular capacity on the case at hand. Okla. Stat. Ann. Tit. 22 § 471.1 (West 2003). Unless a defendant can show facts that prove that the judge was biased against the defendant when he terminated the defendant's participation in the program, the court held that an appeal based upon the bias of the trial judge will not be successful. One author has stated that this case poses the question of whether it is "appropriate for drug courts to undertake the activities that they do when the activities could be, perhaps more appropriately, located in the executive branch of government?" Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, at 944 (2003).

[135] *See* Cooper, *supra* note 101, at 6. In Delaware County, Ohio, for example, almost 95% of all participants in juvenile court had been adjudicated delinquent (in other words, had plead, or had been found guilty) of their current charges. *See* Shaffer and Latessa, *supra* note 140, at 11.

[136] During an interview with an Oakland County Circuit Court judge the interviewer asked, "Why should a defense lawyer recommend that his or her client plead guilty?" Kevin M. Oeffner, *Juvenile Drug Treatment Court: An Interview with Circuit Judge Edward Sosnick*, LACHES (November, 2001), at 28, *available at*

against the grain of what defense attorneys are trained to do.[137] The drug court continues to exercise control over the case to ensure that the juvenile completes his prescribed treatment program.

From drug court, the juvenile is often directed to a substance abuse or drug treatment program. In addition to the intensive treatment and counseling, participants usually submit to frequent random drug tests and are often required to appear before the judge presiding over the case.[138] They may also receive family support services, mentoring, and tutoring, and participate in recreational activities and community service.[139] Judges use both carrots and sticks to encourage compliance by the juvenile. In Delaware County, Ohio, juveniles who successfully avoid drug use are given rewards such as reduced community service, decreased drug testing, fewer court appearances, and extended curfew.[140] In exceptional cases they may receive gifts such as tickets to sporting events and gift certificates.[141] In Mendocino County, California participants may be rewarded with "[t]ickets for movies, athletic events, and food" when they complete phases of the program.[142] In the Juvenile Drug Court of Jefferson Parish, Louisiana, "clients" who reach certain goals will be provided incentives such as extended curfew, movie

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http://www.co.oakland.mi.us/circuit/assets/docs/laches/juvenile-drug-treatment-court.pdf (last visited March 6, 2004). The judge answered that juvenile drug treatment court keeps the child from being incarcerated, and it allows the child to enter into a treatment program that is "family-focused." *Id*.

137 Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 56 (2000).

138 McGraw, *supra* note 138, at *8. Of course, the requirements for graduation from some programs are quite extensive. For example, the drug court administered by the Monroe County, New York Family Court requires that a participant meet the following requirements in order to graduate from the program: (1) be in drug court for at least 20 weeks after admission, (2) 20 consecutive weeks of clean urine tests, (3) proof of optimum school performance, (4) no unexcused absences at court appearances for 16 weeks, (5) no unexcused school tardiness or absence for 12 recommendation by the treatment provider, case manager, school representative, family, and court. *See* Anthony J. Sciolino, *Juvenile Drug Treatment Court Uses "Outside the Box" Thinking to Recover Lives of Youngsters*, NEW YORK STATE BAR JOURNAL, May, 2002, at 37.

139 *See, e.g.*, Shaffer & Latessa, *supra* note 134, at 5.

140 *See id.*

141 *See id.*

142 *See* http://www.mendocino.courts.ca.gov/drug-j.html#6 (last visited April 6, 2005).

passes, sports or concert tickets, reduction of community service hours, and food coupons.[143] On the other hand, judges sometimes impose sanctions when the child does not succeed. These range from writing an essay or being subject to greater drug testing, to house arrest or a period in boot camp. A participant's total failure – often in the form of a new offense, departure from a drug facility, or other egregious violations – may result in her expulsion from the drug court program. In most cases, juvenile drug courts attempt to involve parents and other family members in the offender's treatment. As one juvenile court judge put it, juvenile drug court is "family-focused."[144] "Young people need the support structure that the family provides."[145] The key attribute of juvenile drug courts is that they seek to transform the child's behavior. They work to break the child's dependence on drugs, and as a consequence, reduce the likelihood that he will commit future crimes of any sort. While the efficacy of such courts remains in doubt, there is no question about the nature of the project: treatment and rehabilitation.[146]

Another form of specialized juvenile court is the gun court. Judges have developed significant gun court programs in Detroit, Indianapolis, New York City, Washington D.C., Baltimore, and other major U.S. cities.[147] The Birmingham, Alabama juvenile gun court has received particular attention.[148] That program has been described as having "successfully

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143 *See Jefferson Parish Drug Treatment Court Policy Manual*, at 12, *available at* http://dcpi.ncjrs.org/pdf/Jefferson%20Parish%20Juvenile%20Policy%20&%20Procedure%20Manual.doc (last visited April 6, 2005).

144 *See* Oeffner, *supra* note 142.

145 *See id.* In response to a question asking why defense lawyers should recommend that their clients plead guilty so that they may enter drug treatment court, Judge Sosnick replied "[y]ou should not underestimate the importance of the family support structure in overcoming substance abuse." *Id*. Of course, parents are not always eager to participate in the rehabilitation of their children. Courts sometimes use persuasion, or even coercion – the threat of jail – to encourage parental involvement. *See* Cooper, *supra* note 130, at 10.

146 As the University of Cincinnati's review of the Delaware County, Ohio drug court put it, "treatment is an essential component of the… drug court." *See* Shaffer & Latessa, *supra* note 140, at 4. For a review of the literature on the efficacy of juvenile drug courts, *see* Sloan & Smykla, *supra* note 9, at 345-47.

147 Some juvenile gun courts were created to increase the level of sanction on children. In some jurisdictions, officers routinely declined to arrest children with guns, releasing them instead to their parents. *See id.*

148 *See e.g.*, www.usdoj.gov/ag/speeches/2001/0815jeffersonco.html (last visited April 6, 2005), for Attorney General John Ashcroft's comments praising the Jefferson County Gun Court on 8/15/2001. Australia has

reduced recidivism rates" and to have helped reduce violent crime in the community as a whole.[149] Juvenile gun courts are, by and large, treatment-based courts designed to teach children how to be responsible and how to shy away from carrying weapons, using drugs, and committing crime. Much like drug courts, the great majority of children within the gun court will first plead guilty to the offense.[150] While the judge coordinates the juvenile gun court, probation officers play a central role, having the authority to provide both sanctions and services to offenders. In the Jefferson County Juvenile Gun Court, the JPO has the ability to make recommendations to the judge regarding the type of treatment program that is appropriate to the individual and the extent of sanctions that ought to be imposed.[151] Probation officers, with the assistance of others, develop treatment plans that become part of the child's probation.

Treatment of offenders in the Jefferson County program includes a 28-day boot camp, parental education, a substance abuse program, intensive follow-up, and community service.[152] All juveniles that are arrested for gun-related offenses are retained, and a hearing is held within seventy-two hours.[153] It is at this hearing that the offender is given the opportunity to either request a trial or plead "true," which will cause him to enter into the Gun Court program.[154] At this point, the juveniles are sent to the High Intensive Training program in Prattville, Alabama, which is a 28-day boot camp where instructors instill self-discipline, respect for authority, and

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considered implementing juvenile gun courts similar to the one in Birmingham, Alabama. *See* www.smh.com.au.articles/2003/11/12/1068329638407.html?from=stroyrhs (last visited April 5, 2005).

149 *See* Sheppard & Kelly, *supra* note 100.

150 *Id.* at 8.

151 *See, e.g.*, www.jeffcointouch.com/jeffcointouch/directory/dd53am.htm (last visited April 6, 2005).

152 *Id.*

153 *Id.*

154 *Id.*

problem-solving skills.[155] Jefferson County also requires parents to attend a seven-week workshop; failure to attend can result in the incarceration of the parent.[156]

Local officials have also created juvenile mental health courts. The first such tribunal was created in San Jose, California – Santa Clara County – in 2001.[157] Since then, juvenile mental health courts have opened in Los Angeles, Miami and Cincinnati, among other places.[158] Much like the Birmingham drug court, the Santa Clara mental health court was the result of the efforts of a local judge, Raymond Davilla, who spent nine months designing ground rules and developing the necessary professional connections and relationships.[159] Professionals from many different disciplines were instrumental in designing the court, and making it function.[160] The court team connects defendants and their families with mental health service providers in the county, insuring that the children receive essential treatment services.[161] As in drug court, cases are closely supervised and reviewed frequently by the judge.[162] Although children fourteen and over who have committed serious violent offenses are not eligible for the program, those under

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155 *Id.*

156 *Id.*

157 *See* David E. Arredondo, *Juvenile Mental Health Court: Rationale and Protocols*, JUVENILE AND FAMILY COURT JOURNAL, Fall, 2001, at 1. As a result of resistance to the use of the label "mental health", the court changed its name to "CITA" – the Court for the Individualized Treatment of Adolescents. *Id.* at 2.

158 *See* http://www.lasuperiorcourt.org/juvenile/dependency.htm (last visited April 6, 2005), for an explanation of the Los Angeles County Juvenile Mental Health Court; Cindy S. Lederman, *Mental Health Trends in 2003: Miami's Infant and Young Mental Health Program: A Place Where Healing Begins*, National Center for State Courts (2003); Sharon Coolage, *Mental Health Court Helping Kids*, CINCINNATI ENQUIRER, July 6, 2004, *available at* http://www.enquirer.com/editions/2004/07/06/loc_loc1acourt.html (last visited April 6, 2005). *See also*, *The Role of Specialty Mental Health Courts in Meeting the Needs of Juvenile Offenders*, Judge David L. Bazelon Center for Mental Health Law, Sept. 2004, *available at* www.bazelon.org/issues/criminalization/publications (last visited March 16, 2005).

159 *See* Press Release, *Santa Clara Superior Court Commences Juvenile Mental Health Court*, March 19, 2001, *available at* www.sccsuperiorcourt.org/news/news_juvenment.htm (last visited March 16, 2005); Arredondo, *supra* note 157, at 1.

160 One way to understand the collaborative nature of this court is to consider the number of authors attached to a professional journal article touting the court: fully eight different people are listed. The article was written by three judges in Santa Clara County, a public defender, a prosecutor, a probation officer, an employee with the county's mental health department, and a physician serving as a consultant to the project. *See* Arredondo, *supra* note 157. The inclusion of these authors can presumably be seen as part of the general buy-in process for the different participants.

161 *See id.*

162 *See id.*

fourteen who commit these offenses, and those over fourteen who commit other serious offenses may participate.[163] The court thus diverts children that might otherwise receive non-rehabilitative sanctions.

In addition to drug, gun, and mental health courts, juvenile courts are also creating specialized programs for issues such as truancy and other lesser offenses. Truancy courts attempt to intervene with children in elementary and middle schools that display a recurring pattern of absenteeism before they are referred to a family court for juvenile adjudications.[164] These courts are often staffed with volunteer judges who want to address truancy issues before they develop into more serious delinquent behavior.[165] Teen courts, also called youth or peer courts, are emerging as a popular alternative for juveniles charged with status offenses and misdemeanors, such as shoplifting and possession of alcohol.[166] The idea behind such courts is that jury sentences by a teen's peers will have an immediate effect and will cause him to learn from his mistakes.[167] It is thought that if you reach adolescent offenders when they are "developing skills, habits, and attitudes that will prepare them" for adulthood then you can prevent them from committing more serious offenses in the future.[168] Teen courts are structured much like a high school mock trial – the defendant is represented and prosecuted by teen

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163 *See id.* at 9-11.

164 For example, the Rhode Island Truancy Court was developed to reduce truancy rates by joining with schools, health providers, and families to address the causes and solutions to fight truancy. *See* http://www.courts.state.ri.us/truancycourt/default.htm (last visited April 6, 2005). The description of the St. Louis Truancy Court, staffed by volunteer judges, states: "Recognizing that truancy is a significant predictor of juvenile delinquent behavior and long-term economic hardship, the Truancy Court intervenes with elementary and middle school students displaying a pattern of absenteeism before the students need to be referred to the Family Court for truancy." *See* http://www.co.st-louis.mo.us/circuitcourt/truancy.html (last visited April 6, 2005).

165 *Id*.

166 For descriptions of various teen courts throughout the country, see Kathiann M. Kowalski, *Courtroom Justice For Teens – By Teens*, CURRENT HEALTH 2, April/May 1999, at 29; Kathy Khoury, *Local Volunteers Take Active Role In Youth Justice*, CHRISTIAN SCIENCE MONITOR, April 8, 1999, at 1; Deb White, *Teen Court Works*, EDUCATION DIGEST, September 1999, at 26; and Adrienne D. Coles, *Court Programs Granting Teenagers Jury of Their Peers*, EDUCATION WEEK, December 15, 1999, at 5.

167 *See* Jeffcointouch, *supra* note 151.

168 Tracy M. Goodwin, *et al*., *Peer Justice and Youth Empowerment: An Implementation Guide for Teen Court Programs*, American Probation and Parole Association, 1998, at 4.

attorneys who are assisted by adult attorney volunteers.[169] The most common disposition in teen courts is community service, but victim apologies, letters, essays, teen court jury duty, and monetary restitution are also popular.[170] The end result is intended to be that the "pride and ownership" will translate into a lower recidivism rate and that teens who commit these minor offenses will not graduate to more serious crimes in the future.[171]

III. Understanding the New Rehabilitation

In the prior sections, we have documented the prevailing progressive narrative about juvenile justice, and contrasted that story with the facts on the ground. In this part, we attempt to make sense of the developments we documented in section two. First, we apply political science literature on street level bureaucrats to explain why local officials have established tribunals that fly in the face of the prevailing legislative agenda. Then we consider the implications of our research for issues beyond juvenile justice jurisprudence.

A. Why Specialty Courts?

Legislatures want tough, non-rehabilitative responses to juvenile crime. Why then have local officials worked so hard to establish juvenile courts that run contrary to popular will? We think that these efforts can be best explained by considering the particular place of trial judges, public service lawyers, probation officers, and other juvenile court regulars within the criminal justice policy apparatus. As we have shown, most criminal law commentators judge public policy by reference to legislatures, and legislative actions. An important strand of political science literature, pioneered by MIT political scientist Michael Lipsky, shows that legislative

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169 *See* Jeffcointouch, *supra* note 151.

170 Burnett, *supra* note 70, at 9.

171 For a discussion of the success of one teen court program in Kentucky in terms of recidivism rates and sentence completion, see K.I. Minor, *et al*., *Sentence Completion and Recidivism Among Juveniles Referred to Teen Courts*, 45 CRIME & DELINQ. 467 (1999). The authors state that over two-thirds of the participants did not recidivate and that there was a completion rate of over seventy percent. *Id*.

preferences are an incomplete basis for evaluating actual, applied public policy.[172] Because most legislative action in the area of criminal law must be implemented by local officials, the decisions of these individuals substantially affects that actual criminal justice policies in effect. Lipsky focuses primarily on officials he terms "street level bureaucrats."

Street-level bureaucrats are "public service workers who interacts directly with citizens in the course of their jobs, and have substantial discretion in the execution of their work."[173] These include "teachers, police officers and other law enforcement personnel, social workers, judges, public lawyers and other court officers… who grant access to government programs and provide services within them."[174] They are hired to execute broad public policy objectives, but they are often driven by their own personal priorities. As public service workers, they may be motivated by altruistic desires.[175] In many cases, people who choose to work with child offenders may do so out of a genuine desire to help children, and resolve vexing social issues. At the same time, because of bureaucratic pressures to process cases, they are also driven by the desire to find ways of dealing with what can be overwhelming workloads.[176] Finally, they may also act in ways consistent with their own interest in maintaining and expanding their own autonomy.[177]

The very idea of categorizing trial judges, prosecutors, and defense attorneys as bureaucrats make strike some readers as odd. The popular conception of a bureaucrat is a faceless, soulless functionary working out of sight, deep within a public agency. The popular conception of a judge is of a powerful, highly public individual working to effect justice. However, the individuals that populate local courts, and particularly trial judges, are classic

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172 *See, generally,* MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1981).

173 *Id.*

174 *Id.*

175 *See id.* at 72.

176 *See* Brenda D. Smith & Stella E.F. Donovan, *Child Welfare Practice in Organizational and Institutional Context*, 77 THE SOCIAL SERVICE REVIEW 541, 3 (2003).

177 *See* Lipsky, *supra* note 172, at 19.

examples of *street level* bureaucrats. In his analysis, Lipsky describes street level bureaucrats as having considerable discretion, relative autonomy from institutional authority, a shortage of available resources with which to do their jobs, and conflicting messages about the goals they are supposed to achieve.[178]

The street-level bureaucrat tends to deliver policy in a manner that is "immediate and personal."[179] They are often expected to act as advocates, using their skills to "secure for clients the best treatment or position consistent with the constraints of the service."[180] Lipsky identifies the professionals that populate local courts as prototypical street level bureaucrats. Writing in 1981, even before the rise of either adult or juvenile specialty courts, he pointed out that judges used their discretion over individual cases, as well as their relationships to court staff and social service providers, to "refer presumptive offenders to social programs, the successful completion of which will result in obviating their sentences."[181] Other scholars have focused on the "interdependence of judges, prosecutors, and defense counsel" and have asserted that those individuals have created a kind of bureaucracy out of the social settings in which they find themselves operating.[182] The individuals responsible for creating juvenile specialty courts are prototypical street level bureaucrats, and it appears that they behave in ways consistent with that classification.

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178 *See id.* at 13-40.

179 *See id.*, at 8.

180 *Id.* at 72.

181 *See id.* at 19.

182 Herbert Jacob, *The Governance of Trial Judges*, 31 LAW & SOC'Y REV. 3, 5 (1997) (*citing* ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE (1967)). Other scholars have focused on the "routinization of the courts' work, increasing division of labor and specialization, and the perceived transformation of judges from professionals to 'technocrats.'" *Id*. (*citing* WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS (1990)). *See also* Deon Brock, Nigel Cohen, and Jonathan Sorensen, *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. CRIM. L. 43, 44 (2000) (courts have become a "quasi-bureaucratic" organization by displaying "attributes similar to those found in bureaucratic structures in an attempt to perform their duties.").

We posit six reasons why local juvenile courts have created these tribunals. Using Lipsky's analysis as a lens, we suggest that local officials may be acting on their personal beliefs and values, managing scarce resources, and working to preserve their jobs and autonomy. Three other explanations, not grounded in the street level bureaucracy literature, also seem viable. Local courts may have created specialty courts as a quick response to a new, and under-appreciated problem. They may be acting on the will of the local community, even if it conflicts with the desires of the state as a whole. Or they may have created these courts for the most basic reasons of all: they are effective.

First, in creating special rehabilitative tribunals for children, many are acting in accord with their own beliefs about the proper role of juvenile justice. Research focused on teachers shows that, among those accorded significant discretion and control over their work, "their individual theories of justice have an important effect on the final implementations of public policies."[183] Many juvenile court employees appear to have a strong commitment to rehabilitation. Anecdotal evidence, at least, suggests that many judges do not share legislators' sense that rehabilitation is either undesirable or pointless. For example, in a 1999 article, Judge Gary L. Crippen argued that "the juvenile justice system can and does succeed with the great majority of adolescent offenders without the threat of punishment."[184] Judge Arthur L. Burnett, Sr. argued for individualized, medicalized treatment of children.[185] Using language reminiscent of Julian Mack's 1909 article touting the juvenile courts, he argued:

> [Judges] must fully understand and appreciate the stages of child development, the educational needs of children at various stages of their development, and child behavioral issues. To that purpose, the juvenile court judge and judicial officer must be sufficiently

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[183] Marisa Kelly, *Theories of Justice and Street-Level Discretion*, 4 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY 119, 138 (1994).

[184] *See* Gary L. Crippen, *The Juvenile Court's Next Century: Getting Past the Ill-Founded Talk of Abolition*, 2 U. PA. J. CONST. L. 195, 210-11 (1999). Crippen was a judge on Minnesota's Court of Appeals.

[185] *See* Burnett, *supra* note 70.

> immersed and gain a depth of understanding that equals the substantive knowledge expected of social workers and psychologists who deal with children and their behaviors. They should receive specialized training which is comprehensive and multidisciplinary. They also must become culturally sensitive so as to appropriately evaluate each child who comes before the juvenile court on the basis of his or her own character and individual value system.[186]

In his account of the Los Angeles juvenile court, Edward Humes found similar views among judges and probation officers.[187] And in his book, one observer points out that it "is the simple reality that programs that punish are far more popular than those that prevent."[188]

One of us worked as a public defender for five years, in both Philadelphia and New York City. Our own experience was consistent with these published comments. Many juvenile judges, probation officers, defense lawyers, and even prosecutors shared the view that children were less culpable than adults, deserved more individualized treatment, and were more capable of rehabilitation. This is not to say that these views were universal. Others within the system were more dubious about the efficacy of juvenile rehabilitation. Compared with the views of adult court bureaucrats, however, employees in the juvenile court were far more likely to imagine that offenders' lives could be changed through court intervention. And the social pressure within the communities of juvenile justice professionals – communities that are often physically separated from their adult counterparts, working in different offices or courthouses may lead to co-optation of those employees who might otherwise prefer a harsher approach to child crime.

Second, juvenile court employees, and particularly judges, may create juvenile specialty courts as a way of managing limited resources. Judges are responsible for rationing the

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186 *Id.* at 8.

187 *See, e.g.*, Humes, *supra* note 201, at 176-78.

188 *Id.* at 178.

resources at their disposal.[189] As Lipsky points out, "[l]ower court judges are typically inundated with cases, often causing delays of several months in providing defendants their day in court."[190] Judges may see juvenile specialty courts as a way to increase their sentencing options – allowing them to be more creative in order to both dispense justice and alleviate some of the stress on both juvenile detention facilities and the regular juvenile courts. Specialty courts employ the process of "creaming," whereby the judges or district attorneys determine which individuals are most likely to succeed in a treatment program.[191] They seek out children likely to benefit from a rehabilitative regime. Many courts require the participation of parents – without parental participation it is thought that the child will not be able to successfully complete some drug treatment programs.[192] Because of limitations on the type of offense, the requirement of parental participation, and other criteria that must be met in order for a child to meet the qualifications of specialty courts, it is left to the judges to determine who meets the criteria and who must enter the regular juvenile court system without the benefit of the treatment programs that specialty courts often provide.

On the other hand, resource rationing does not seem to be a fully convincing explanation for the creation of specialty courts. In the short run, at least, these courts may demand more resources. Because of the intensive, multi-disciplinary approach to these cases, judges, lawyers, and other public employees must spend more time on the individuals in these programs. In the long run, if rehabilitation does work, they may reduce court caseload. One possibility, which has yet to be explored, is that in jurisdictions with specialty courts, judges are more likely to transfer those offenders ineligible for specialty courts to adult court. In this way, then, local courts

189 *See* Lipsky, *supra* note 172, at 105.
190 *Id.* at 30.
191 *See* Smith, *supra* note 176, at 4.
192 *See* text accompanying note 144, *supra*.

effectively allocate more resources to those children understood to be amenable to treatment, while reducing the resources allocated to all others.

A third explanation for the creation of these courts is that individuals are acting out of self-preservation. They may be hoping to protect their existing positions. Alternately, they may seek to guard and expand existing levels of discretion and authority in the face of legislative efforts to dictate punishment policy. We know that individuals employed in other areas of the criminal justice field advocate for public policies consistent with their own economic interest. For example, prison guards in California have consistently lobbied for tougher drug sentencing laws.[193] In the same way, the battles between federal trial judges and Congress over sentencing guidelines – implicated, if not directly addressed in the *United States v. Booker* case[194] – reflect the desire of local judges to make proper and just decisions, notwithstanding legislative diktat to the contrary.

Specialty courts, by virtue of their focus on intensive, individualized treatment, necessarily require extensive participation by probation officers, counselors, judges, attorneys, and others. An increase in the number of children sentenced to probation, assessment, treatment, counseling, community service, and other non-incarcerative programs necessitates an extensive specialty court bureaucracy. These cases return to court frequently, necessitating greater day-to-day involvement by lawyers and probation officers. To the degree that juvenile courts send their cases to adult court, or impose jail sentences based on guidelines, the need for the individual time-intensive attention of many of these employees would be likely to diminish.

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[193] *See, e.g.*, Daniel Macallair and Chuck Terry, *Drug Policy and Prison Population*, SAN DIEGO UNION-TRIBUNE, July 28, 2000, at B11. By advocating longer sentences, the prison guards' union hopes to create a need for more prisons in an effort to protect the employment f its members. *Id*. California's three-strikes law is also seen as a "lucrative" law for prison guards. *See* Joe Domanick, *They Changed Their Minds on Three Strikes. Can They Change the Voters'?*, LOS ANGELES TIMES, September 19, 2004, at LOS ANGLES TIMES MAGAZINE p. 10.

[194] 125 S. Ct. 738 (2005). The Court, in *Booker*, struck down the federal sentencing guidelines.

Perhaps an even more potent self-preservation motivation has been the availability of federal money to develop juvenile specialty courts. Local courts are funded by states, and as a result always suffer under tight budgetary constraints. When the federal government presents an opportunity to fortify local budgets with grant money, everyone in the court benefits. Over the past decade, the federal government, through the Department of Justice, has actively assisted local officials in creating drug and gun courts through provision of both funding and technical expertise.[195] This move is particularly intriguing because it has had the effect of empowering local officials to undermine state legislative objectives. Indeed, Congress itself has appeared relatively hostile to individualized sentencing and rehabilitation.[196] Nonetheless, by directing money to local courts attempting these creative approaches to rehabilitation, the federal government has, in effect, encouraged an end-around of similar state legislative objectives. From the point of view of local bureaucrats seeking to preserve their jobs, new federal money has proven to be an exceptional opportunity to maintain funding for their own positions, while at the same time allowing them to shape policy to match their own policy preferences.

While these explanations offer substantial promise, we believe a few other factors might also be in play. For example, it is possible that specialty courts are a new solution to new problems identified at the local level. Legislatures move at a relatively slow pace to address social problems both because action is inherently difficult – many different individuals must agree – and because lawmakers often learn of new developments slowly. Local officials, on the other hand, are likely to identify new challenges very quickly. A trial judge will notice when she is suddenly seeing a rash of methamphetamine cases. Thus, the rise of specialty courts might simply reflect the fact that local officials have responded quickly and flexibility to new

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195 *See* text accompanying notes 119-20, *supra*.

196 This hostility is well represented by the federal sentencing guidelines which lack substantial individualization, and carry heavy sentences.

problems. On the other hand, it does seem that juvenile drug use, mental illness, and gun possession predate 1995. It seems more likely that local courts were simply frustrated with the non-rehabilitative solutions offered by state legislatures.

Another possibility is that judges are responding to local political pressure. While state legislatures reflect the will of the state as a whole, and are often dominated by rural and suburban legislators, local judges and prosecutors answer to a far narrower constituency. To the extent that judges must show city residents that they are attacking crime creatively, they may have incentives to dream up new approaches to their juvenile docket. Indeed, the tension between the agenda of a state legislature as a whole, and a locally elected judge, both seeking to flex their muscles, may do much to explain why the two would operate in conflict.[197] Additional research must be done to determine the degree to which these courts are the product of urban judges, or judges serving constituencies that look significantly different than the makeup of states as a whole. The assymetrical political pressures between state and local elected officials may provide a significant explanation for the policy dissonance, however.

A related reason for the rise of these courts, at the local level, is perhaps most heartening of all. Perhaps they work. Local officials seeking to impress voters are likely to seek out effective justice policy. While legislatures have condemned rehabilitation categorically, there is every reson to believe that it is effective, at least with respect to selected children. Specialty courts may function as a triage mechanism. Children not amenable to treatment will be punished as the legislature desires; those identified early on as good candidates, however, can be diverted

[197] When court business increases and new courts are required, "city interests must go to the state legislature or to Congress with their request." HERBERT JACOB, CRIME AND JUSTICE IN URBAN AMERICA 73 (1980). While the urban courts make many of the decisions which affect life in the city, "lawmakers from all over the state or nation decide on court structure and organization." *Id.*

from the legislatively created courts of general jurisdiction, and rehabilitated in the locally created specialty courts.

B. Implications

Specialty courts are only one aspect of modern juvenile justice. Scholars should begin to examine the remaining parts of these systems, determining how street level bureaucrats are handling the rest of the juvenile court docket. Are there other processing innovations that substantively change case outcomes? Are certain offenders or cases being sent to specially rehabilitative probation units? Are court employees using their discretion in other ways to undermine legislative preferences for tough treatment of child offenders? We believe that future research must focus on whether specialty courts are the prime site for juvenile rehabilitation, or simply a visible manifestation of a broader rehabilitative policy. As a public defender, one of us found that juvenile prosecutors sometimes declined to transfer relatively serious cases due to the lawyers' discomfort with placing children in adult prisons. Much existing research on penal policy has focused on legislatures; a new body of scholarship looking at street level bureaucrats would do much to enrich our understanding of how juvenile courts really function.

Specialty courts may also introduce trouble of their own. For years, juvenile courts have been accused of treating children differently on the basis of race. For example, one study concluded that African-American children were being transferred to adult court in greatly higher numbers than white children.[198] Juvenile specialty courts introduce the possibility of similar disparate treatment. We know that in early reporting of juvenile drug court numbers, white

[198] *See* U.S. GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE: JUVENILE PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 59 (1995) (finding that in the states surveyed, African-American children charged with violent offenses were transferred at 1.8 to 3 times the rate of white children charged with the same crimes). *Cf.* Jeffrey Fagan, *et al.*, *Racial Determinants of the Judicial Transfer Decision: prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) (noting that race could only help explain the disparities with respect to children charged with murder).

children constituted the largest racial group receiving this sort of rehabilitative treatment.[199] Because specialty courts individualize justice, they are highly discretionary. This discretion should be monitored to assure that it is not used inappropriately. On a macroscopic level, the very structure of these courts – designed to include some offenses, and exclude others – introduces the risk that they will treat different racial groups differently. For example, a drug court that excludes offenses committed disproportionately by one racial group might produce a seriously disparate impact. It is essential that rehabilitation – essentially, the judgment that a child can be saved – be available on a truly race-neutral basis. Researchers should evaluate these tribunals to assure that this is the case.

Another important question raised by this research implicates the broader field of criminal law. Juvenile specialty courts make up a relatively small portion of American drug courts.[200] We have not examined the history of these courts, or considered whether they too are the work of street level bureaucrats. Many of the pressures that lead local court employees to develop juvenile specialty courts appear to apply with equal force to adult courts. For example, the tension between local and statewide constituencies – and their policy priorities – is likely to affect adult courts in a similar fashion. The broader criminal law literature, to date, has not accounted for either a rebirth of rehabilitation, or the role of street level bureaucrats in that renaissance. Scholars ought to consider whether rehabilitation is gaining traction in adult court, and the genesis of that change, if it is occurring.

Finally, and perhaps most importantly, we think this research offers progressive cause for hope. Many have grown worried that the Warren Court's civil rights advances are not only

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[199] *See Juvenile Drug Court Activity Update: Summary Information July 1, 2001*, *supra* note 128. We do not know whether this number is disproportionate to the number of white children within the broader juvenile justice system.

[200] For example, recent research suggests that there are over 1250 drug courts, total, within the United States. *See Drug Court Activity Update*, *supra* note 127.

fading, but were in effect self-defeating. Liberals – demoralized by electoral losses – have come to question the value of what once were great victories. But this paper shows that, notwithstanding national and state hostility to criminal procedural rights, the policy makers closest to social problems – in this case, judges and other participants in the juvenile justice process – will make decisions based on what is effective.[201] And, progressives should be heartened to learn that their ideals, and the experienced reality of street level bureaucrats, turn out to be the same.

Conclusion

There is big news in the juvenile justice system, but it is not yet appearing in the literature. Juvenile specialty courts have reinvigorated rehabilitation, offering tens of thousands of children a chance to reconstruct their lives. The mere existence of these courts undermines the dominant theme of progressive juvenile justice scholarship: that the rehabilitative agenda of juvenile courts began a slow death in the aftermath of the Warren Court's criminal procedure revolution. At the same time, the fact that these courts have developed locally exposes a primary reason for the gap in legal scholarship. Critics have been looking in the wrong place to determine punishment policy. While legislators have a role in developing a juvenile justice agenda, street level bureaucrats play a major part in determining how the court system will

[201] There are, of course, democratic concerns implicated by the devolution of power from legislatures to local officials, particularly if they are unelected. We have long understood that citizens, through their elected representatives, have the right to adopt criminal justice policy. Indeed, the modern rejection of common law crimes reflects, to some extent, a desire that decisions about criminal law lay in the hands of legislators, and not judges. Certainly the rise of sentencing guidelines reflects a desire by legislators to retain control over the punishment function. Our research suggests that despite these efforts, sufficient room remains for street-level bureaucrats to exert significant control over concrete matters of criminal justice policy. In some cases, we suspect, these local decisions are not even motivated by honestly held punishment preference, but rather by concerns of self-interest. While we are less concerned about locally elected officials usurping the will of statewide legislative bodies, we do believe that ability of unelected local officials to undermine policies adopted democratically gives some basis for pause.

address childhood crime. The implications of this research are varied. First, it suggests that rehabilitation still maintains an important place in juvenile justice. Second, it calls into question a growing anxiety among progressive scholars that the Warren Court's extension of procedural rights to children has undermined the viability of a rehabilitative regime. Finally, it raises broader questions about the assumptions of all criminal punishment scholars that legislatures determine punishment policy, and that as a result, rehabilitation has been abandoned. At minimum, we believe that the tearful eulogies for rehabilitation must be called off, for it appears that its death has been greatly exaggerated.