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THE JUDICIAL ROLE IN THE TREATMENT OF JUVENILE DELINQUENTS

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INTRODUCTION

For decades, a debate has occurred among scholars and professionals concerning how to deal with juveniles who have committed acts which would be criminal if they were adults. Some have argued that the state has a special interest in seeing that its youth grow to be productive adults. This view has resulted in a special status for youngsters and special juvenile courts when youngsters get into trouble. Others have argued that the reality of crime committed by juveniles is of such a nature that there is no longer any need for juvenile courts.

Prior to the passage of the Juvenile Offender Legislation which took effect on September 1, 1978,[1] the minimum age at which one could enter the adult criminal justice system in New York State was sixteen.[2] Persons under sixteen years of age were charged and tried for being juvenile delinquents, and their cases were

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[1] 1978 N.Y. Laws ch. 481, § 67.

[2] N.Y. FAM. CT. ACT § 301.2 (McKinney 1988).

adjudicated in the family court.[3] Since the passage of that legislation, a youth who is thirteen years of age and accused of murder in the second degree is tried not in the family court, but in the adult criminal justice system in a supreme or county court.[4] Similarly, a youth who is fourteen or fifteen years of age and accused of murder in the second degree, or a number of other serious crimes, is charged and tried in the adult criminal court.[5] Since the passage of the Juvenile Offender Legislation in New York and similar legislation in other states, the argument that juvenile courts are no longer needed has grown louder.

This Article reviews the debate among those who have argued and still argue for special clinical and rehabilitative treatment for youngsters accused of crime and those who argue that youngsters, for the most part, must be treated as adults. Part I reexamines some of the key cases decided by the U.S. Supreme Court which challenged the procedures in the courts established for the treatment of juveniles; part II discusses the reasons for today's trend toward

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[3] *Id.*

[4] New York's Criminal Procedure Law defines a juvenile offender as:

> (1) a person, thirteen years old who is criminally responsible for acts constituting murder in the second degree as defined in subdivisions one and two of section 125.25 of the penal law and (2) a person fourteen or fifteen years old who is criminally responsible for acts constituting the crimes defined in subdivisions one and two of section 125.25 (murder in the second degree) and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible; section 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); subdivisions one and two of section 130.35 (rape in the first degree); subdivisions one and two of section 130.50 (sodomy in the first degree); 130.70 (aggravated sexual abuse); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree) or subdivision two of section 160.10 (robbery in the second degree) of the penal law; or defined in the penal law as an attempt to commit murder in the second degree or kidnapping in the first degree.

N.Y. CRIM. PROC. LAW § 1.20(42) (McKinney 1992).

[5] *Id.*

harsher treatment of juveniles; part III looks at some of the innovative methods for addressing juvenile delinquency; and part IV assesses the role of the judge in this debate. In conclusion, this Article shows that the debate has been and is a continuing one, with a number of consequences for Americans, whoever prevails.

This Article does not address whether juvenile and family courts should be preserved, or whether such courts should continue to retain jurisdiction over young offenders.[6] Rather, this Article posits that judges who preside over matters in which children are directly or indirectly involved must be sensitive to the developmental needs and possible risks that these children face and, within the bounds of their judicial authority, must be pro-activist in the effort to prevent youth crimes and violence.

I. KEY CASES IN THE TREATMENT OF PERSONS ACCUSED OF JUVENILE DELINQUENCY

The modern watershed case on the treatment of juveniles accused of crime is *In re Gault*,[7] decided in 1967 by the U.S. Supreme Court. In holding that the Due Process Clause of the Fourteenth Amendment requires that certain procedural safeguards be given to juveniles charged with criminal activity, the Supreme Court discussed the issue of the clinical and rehabilitative approach to dealing with juveniles as opposed to treating them like adults. The Court concluded that the Due Process Clause requires proper notice of charges, the right to be represented by an attorney, the right against self-incrimination and the right of confrontation of

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[6] For a discussion of the arguments in favor of and in opposition to the abolition of family and juvenile courts, see Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y 199 (1992); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163 (1993).

[7] 387 U.S. 1 (1967).

witnesses.[8] All of these rights are guaranteed by the U.S. Constitution and most had been previously made applicable to the states by decisions of the Supreme Court.[9]

The *Gault* case revealed a number of practices which called into question the fairness of juvenile proceedings in Arizona. At the time of his arrest, Gerald Gault was fifteen years of age and was on probation for his involvement in the stealing of a wallet from a woman's purse.[10] On June 8, 1964, Gault and a friend were arrested for allegedly making an obscene phone call to a woman.[11] The *Gault* opinion contains the following description of the proceedings in the judge's chambers on June 9 and 15, 1964:

> On June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before the Juvenile Judge in chambers. Gerald's father was not there. He was at work out of the city. Mrs. Cook, the complainant, was not there. No one was sworn at this hearing. No transcript or recording was made. No memorandum or record of the substance of the proceedings was prepared. Our information about the proceedings and the subsequent hearing on June 15, derives entirely from the testimony of the Juvenile Court Judge, . . . Mr. and Mrs. Gault and Officer Flagg at the habeas corpus proceeding conducted two months later.[12]

Without any formal notice of the charges against him, without the testimony of the complainant, and after the judge had himself questioned the juvenile, Gerald was found to be a delinquent child; the judge committed him to the State Industrial School for the

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[8] *Id.* at 33-50.

[9] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in cases where defendant could receive sentence of imprisonment made applicable to states); Pointer v. Texas, 380 U.S. 1 (1965) (right to confront witnesses made applicable to states); Malloy v. Hogan, 378 U.S. 1 (1964) (right against self-incrimination made applicable to states); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel ensured to indigent defendants in state prosecutions).

[10] *In re* Gault, 387 U.S. at 4.

[11] *Id.*

[12] *Id.* at 5-6.

period of his minority, that is, until he reached the age of twenty-one years unless discharged earlier by due process of law.[13] An adult violating the applicable Arizona statute[14] could have been fined five dollars to fifty dollars or been imprisoned for no more than two months.[15]

No appeal of the sentence by the juvenile court judge was then possible under Arizona law.[16] Gault brought a habeas corpus proceeding in the Supreme Court of Arizona, which referred the matter to the superior court. The superior court dismissed the writ and the Supreme Court of Arizona affirmed.[17] Gault appealed to the Supreme Court of the United States.

In the *Gault* decision, Justice Abe Fortas dwelt at length on the reasons behind the whole juvenile court movement, which had spread from Illinois in 1899 to every state in the Union, the District of Columbia and Puerto Rico.[18] Briefly stated, the advocates of the juvenile court movement saw as detrimental the treatment of juveniles who were accused of criminal activity as adults. Their objective was to treat juveniles clinically, with the primary purpose being punishment rather than rehabilitation. Justice Fortas stated:

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The

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[13] *Id.* at 7-8.

[14] Under Arizona law, it is a misdemeanor when a person "in the presence or hearing of any woman or child . . . uses vulgar, abusive or obscene language . . . ." ARIZ. REV. STAT. ANN. § 13-377 (1989) (current version at ARIZ. REV. STAT. ANN. § 13-2904 (1994)).

[15] *Gault*, 387 U.S. at 9.

[16] *In re* Gault, 407 P.2d 760, 764 (Ariz. 1965).

[17] *Id.*

[18] *Gault*, 387 U.S. at 12-27.

> child—essentially good, as they saw it—was to be made "to feel that he is the object of the state's care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[19]

The Supreme Court, in *Gault*, did not reject completely the clinical and rehabilitative approach to the treatment of juveniles. Rather, the Court found some procedures so essential to due process that they applied to both adult and juvenile proceedings. As stated, these procedures, fundamental to fairness, included notice, the right to counsel, the right against self incrimination and the right to confrontation.[20] Nevertheless, the Court concluded, there were other practices, unique to juvenile courts, which could be continued and which were in line with the contentions of those advocating a clinical and rehabilitative approach to juvenile crime.[21] Those practices included processing juveniles separately from adults, not classifying juveniles as criminals, closing juvenile proceedings to the public and making juvenile records confidential.[22]

The trend of insuring fundamental fairness in juvenile, as well as adult, criminal proceedings continued in the Supreme Court case of *In re Winship*,[23] in which the Court held that due process required that the illegal act that a youth was charged with committing had to be proved beyond a reasonable doubt, rather than by a simple preponderance of the evidence.[24] In *Winship*, a judge of the

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[19] *Id.* at 15-16 (footnotes omitted) (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

[20] *Id.* at 10.

[21] *Id.*

[22] *Id.* at 22-25.

[23] 397 U.S. 358 (1970).

[24] *Id.* at 360.

Family Court of the State of New York found that a twelve-year-old boy had entered a locker and stolen a sum of money from a woman's pocketbook that he found inside.[25] The judge stated specifically that the proof might not be sufficient to establish guilt beyond a reasonable doubt, but it was sufficient to establish guilt by a preponderance of the evidence.[26] Holding first, "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," Justice William Brennan, writing for the Court, went on to conclude that the holding applied to juveniles at the adjudicatory stage, where a court determines whether the juvenile committed the crime with which he is charged.[27] As in *Gault*,[28] the Court noted that practices unique to juvenile courts, such as individualized treatment at the dispositional stage of the proceedings, could be continued.[29]

When the issue of jury trials in juvenile proceedings reached the Supreme Court in *McKeiver v. Pennsylvania*,[30] the Court concluded that jury trials were not essential to the fundamental fairness of those proceedings.[31] *McKeiver* involved delinquency proceedings in several cases arising in Pennsylvania and North Carolina.[32] In all of the cases, the request for jury trials had been denied. Justice Harry Blackmun, writing for four members of the Court,

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[25] *Id.*

[26] *Id.*

[27] *Id.* at 364-66.

[28] 387 U.S. 1 (1967).

[29] *Winship*, 397 U.S. at 364-66.

[30] 403 U.S. 528 (1971).

[31] *Id.* at 554.

[32] In one case, Joseph McKeiver, age 16, was charged with robbery, larceny and receiving stolen goods, felonies under Pennsylvania law. In another case, Edward Terry, age 15, was charged with assault and battery on a police officer and conspiracy, all misdemeanors under Pennsylvania law. The other cases involved approximately 45 African American children, ages 11 to 15, and arose out of demonstrations by adults and children who were protesting a school consolidation plan and school assignments. All except one juvenile were charged with willfully impeding traffic. One person, James Lambert Howard, was charged with willfully making riotous noise, being disorderly, interrupting and disturbing school during school sessions and defacing school furniture. *Id.* at 534-37.

noted that jury trials were not required in equity, workers' compensation, probate, or deportation cases.[33] Recognizing the fundamental fairness standard[34] required by *Gault*[35] and *Winship*[36] in juvenile proceedings, Justice Blackmun concluded "that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[37]

The continued recognition of the clinical and rehabilitative approach is illustrated by Justice Blackmun's statement that a jury trial could make the juvenile proceeding completely adversarial. He stated, "There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[38]

Because only four justices concurred with the opinion of Justice Blackmun in *McKeiver*, it was necessary to obtain another vote to have a disposition of the Court. Justices Byron White and John Harlan concurred in separate opinions, leading to affirmances of both the Pennsylvania and North Carolina supreme courts. Justice Brennan concurred in the decision with respect to the Pennsylvania convictions, but dissented as to the North Carolina convictions. Justice William Douglas dissented in a decision joined by Justices Hugo Black and Thurgood Marshall. All of the opinions, with the exception of that of Justice Harlan, addressed the clinical and rehabilitative approach to juveniles accused of conduct which would be criminal if they were adults.

Noting that the "criminal law proceeds on the theory that defendants have a will and are responsible for their actions,"[39] Justice White concluded that "[a] finding of guilt establishes that [defendants] have chosen to engage in conduct so reprehensible and injurious to others that they must be punished to deter them and

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[33] *Id.* at 543.
[34] *Id.*
[35] 387 U.S. 1 (1967).
[36] 397 U.S. 358 (1970).
[37] *McKeiver*, 403 U.S. at 545.
[38] *Id.*
[39] *Id.* at 551 (White, J., concurring).

others from crime,"[40] and that they are considered "blameworthy,"[41] and "are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system."[42] Comparing the juvenile justice system to the criminal justice system, Justice White concluded that the conduct of juveniles was not the consequence of a mature choice, but of environmental pressures beyond the control of the juvenile,[43] so that supervision and guidance rather than punishment were required.[44] In an almost classic statement of the theory behind the juvenile court, Justice White stated:

> Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be.[45]

While noting that a jury could be a check on an overzealous prosecutor, Justice White found protection against such activity in the intake policies and procedures of the juvenile court system.[46] Justice Brennan concluded that the jury trial was not always essential to the fundamental fairness of a juvenile proceeding. His differing views in the Pennsylvania and North Carolina cases were based upon what he felt were safeguards against oppression by the

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[40] *Id.* (White, J., concurring).
[41] *Id.* (White, J., concurring).
[42] *Id.* (White, J., concurring).
[43] *Id.* at 551-52 (White, J., concurring).
[44] *Id.* (White, J., concurring).
[45] *Id.* (White, J., concurring).
[46] *Id.* at 552 (White, J., concurring).

state in one case and the absence of those safeguards in the other.[47] In Pennsylvania, juvenile proceedings could be open to the public and public concern could serve to protect the integrity of the proceedings.[48] On the other hand, the proceedings in North Carolina were closed to the public and, in Justice Brennan's view, the juvenile had no protection against oppression by the state.[49] Hence, in North Carolina, he felt that juries should be required in juvenile cases.[50]

While noting the historical, clinical approach to the treatment of juveniles and arguing for the retention of the best features of that system, Justice Douglas concluded that jury trials were required in juvenile cases and he dissented.[51] The key factors for him were the prosecution of the juvenile for a criminal act and his or her possible incarceration until the juvenile reached twenty-one years of age.[52]

The tension between the clinical and adult approach to the treatment of juveniles is further illustrated in two murder cases before the U.S. Supreme Court involving sentences of death. In one case, *Thompson v. Oklahoma*,[53] the Court ruled by a five to three vote that a juvenile, fifteen years of age at the time of the murder, could not be put to death.[54] In the other case, *Stanford v. Kentucky*,[55] the Court ruled by a five to four vote that a juvenile, seventeen years of age at the time of the murder, could be put to death.[56]

In *Thompson v. Oklahoma*,[57] four persons were tried separately and convicted of the murder of Thompson's former brother-in-law,

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[47] *Id.* at 553-57 (Brennan, J., concurring in part and dissenting in part).

[48] *Id.* at 555-56 (Brennan, J., concurring in part and dissenting in part) (citing PA. STAT. ANN. tit. 11, § 245 (1968) (repealed 1972)).

[49] *Id.* at 556-57 (Brennan, J., concurring in part and dissenting in part) (citing N.C. GEN. STAT. § 7a-285 (1969) (repealed 1980)).

[50] *Id.* (Brennan, J., concurring in part and dissenting in part).

[51] *Id.* at 558 (Douglas, J., dissenting).

[52] *Id.* at 559 (Douglas, J., dissenting).

[53] 487 U.S. 815 (1988).

[54] *Id.*

[55] 492 U.S. 361 (1989).

[56] *Id.*

[57] 487 U.S. 815 (1988).

Charles Keene. All of the defendants were sentenced to death. The motive for the killing was, at least in part, the alleged abuse of Thompson's sister by the deceased.[58] The murder was particularly brutal. The autopsy indicated that the deceased had been beaten, shot twice, and cut in his throat, chest and abdomen.[59]

The issue before the Court was whether the sentence of death for a defendant, fifteen years of age at the time of the murder, violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[60] Citing a lengthy list of legislation that permitted adults to do things that a juvenile could not,[61] Justice Stevens, writing for a four-person plurality of the Court, concluded, "All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal fifteen-year-old is not prepared to assume the full responsibilities of an adult."[62] In making a judgment on whether to impose the death penalty on a fifteen-year-old, Justice Stevens answered two inquiries in the negative: first, "whether the juvenile's culpability should be measured by the same standard as that of an adult," and second, "whether the application of the death penalty to this class of offenders 'measurably contributes' to the social purposes that are served by the death penalty."[63] In response to the first inquiry, Justice Stevens stated, "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[64] As for the second inquiry, Justice Stevens found that

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[58] *Id.*

[59] *Id.* at 819.

[60] *Id.* at 818-19. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[61] Thompson v. Oklahoma, 487 U.S. 815, 824-25 (1988) (including the right to vote, serve on a jury, drive without consent of a parent, marry without parental consent, purchase pornographic materials and participate in legalized gambling without the consent of the parent); *see also id.* at 839-48 (appendix to the opinion by Justice Stevens).

[62] *Id.* at 824-25.

[63] *Id.* at 833.

[64] *Id.* at 835.

applying the death penalty to a fifteen-year-old did not serve the purpose of retribution or deterrence.[65] While society might justifiably exact retribution from an adult, the lesser maturity and responsibility of a juvenile made retribution inapplicable to the juvenile.[66] In addition, given the unmatured reasoning ability and the small number of persons under sixteen years of age put to death, imposition of the death penalty on juveniles had little deterrence effect.[67] Thus, Justice Stevens concluded that applying the death penalty to a fifteen-year-old violated the Eighth Amendment.[68]

It was the concurring vote of Justice Sandra Day O'Connor that provided the necessary majority to preclude the application of the death penalty to William Wayne Thompson. Justice O'Connor did not, however, subscribe to the proposition that the Eighth Amendment forbade the imposition of the death penalty on fifteen-year-olds in all circumstances. She thus challenged the conclusion of Justice Stevens that "[t]he road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a fifteen-year-old offender is now generally abhorrent to the conscience of the community."[69] The thrust of Justice O'Connor's concurrence was that the evidence, that societal standards of decency clearly opposed the death penalty for those defendants under sixteen years of age, had not been established.[70] While she was in agreement that there might be such a national consensus, she felt that the issue had not been resolved one way or the other.[71] Justice O'Connor concluded that, under the Oklahoma statute in question,[72] there was no minimum age at which a person

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[65] *Id.* at 836-37.

[66] *Id.* at 816.

[67] *Id.*

[68] *Id.* at 815.

[69] *Id.* at 832, 852-53 (O'Connor, J., concurring).

[70] *Id.* at 848-49 (O'Connor, J., concurring).

[71] *Id.* (O'Connor, J., concurring).

[72] "Child" was defined by Oklahoma statute as:

> any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with

could be put to death; it was unclear whether the Oklahoma Legislature intended to put fifteen-year-olds to death.[73] She stated:

> The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that fifteen-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering fifteen-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.[74]

In a dissent joined by Chief Justice William Rehnquist and Justice Byron White, Justice Antonin Scalia took issue with the conclusion that there was a national consensus that no one under sixteen years of age, no matter how mature, could be put to death.[75] Justice Scalia concluded that Oklahoma had carefully considered the appropriateness of putting Thompson to death and had concluded that it was a reasonable course.[76]

In *Stanford v. Kentucky*,[77] the Supreme Court rejected the contention that the imposition of the death penalty on sixteen or

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> murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy . . . .

Id. at 819 n.2 (citing OKLA. STAT. tit. 10, §1101(1) (Supp. 1987)). A procedure in Oklahoma permitted the child to be treated as an adult. *Id.* at 819-20.

[73] *Id.* at 857-58 (O'Connor, J., concurring).

[74] *Id.* at 857 (O'Connor, J., concurring).

[75] *Id.* at 859 (Scalia, J., dissenting).

[76] *Id.* at 863 (Scalia, J., dissenting).

[77] 492 U.S. 361 (1989).

seventeen-year-olds was cruel and unusual punishment in violation of the Eighth Amendment.[78] The majority concluded that there was no national consensus against applying the death penalty to juveniles.[79] In addition to Justice Scalia, who wrote the opinion, the other members of this majority included Chief Justice Rehnquist, and Justices White, O'Connor and Kennedy. In his opinion, Justice Scalia rejected the "array of socioscientific evidence concerning the psychological and emotional development of sixteen- and seventeen-year-olds"[80] which had been presented by those opposed to the death penalty. By contrast, Justice Brennan, writing in dissent, expressed views similar to those that he expressed in *Thompson v. Oklahoma*,[81] emphasizing the difference in the development and maturity of juveniles.[82] He was joined in dissent by Justices Marshall, Blackmun and Stevens.

II. TODAY'S TREND TOWARD HARSHER TREATMENT OF JUVENILES

Over the past two decades, serious violent offenses by youth under eighteen years of age have increased dramatically.[83] Juveniles are committing more serious crimes and these crimes are being committed at younger ages.

> Sixty percent of the juvenile delinquency cases processed in 1992 involved a juvenile under sixteen years of age, compared with 57% in 1988. In 1992, juveniles younger than age sixteen were responsible for 62% of all personal

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[78] *Id.* at 368.

[79] *Id.* at 370-71 (noting that "[o]f the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders").

[80] *Id.* at 377-78.

[81] 487 U.S. 815 (1988).

[82] Stanford v. Kentucky, 492 U.S. at 394-405 (Brennan, J., dissenting).

[83] *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION ("OJJDP"), U.S. DEP'T OF JUSTICE, A COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT AND CHRONIC JUVENILE OFFENDERS 1 (Dec. 1993) [hereinafter COMPREHENSIVE STRATEGY].

offense cases, 64% of all property offense cases and 39% of drug law violation cases.[84]

The FBI Violent Crime Index[85] reflects that in 1992, juveniles were responsible for 15% of reported arrests for murder, 16% for forcible rape, 26% for robbery and 15% for aggravated assault.[86] In 1992, 12.8%, or one out of every eight arrests for violent crimes were of juveniles.[87] These figures reflect an increase from approximately 58% in the number of juvenile violent crime arrests between 1972 and 1992.[88]

What is perhaps most disturbing about the increase in juvenile violent crime arrests is its contribution to the increase for certain types of the more serious violent crimes. Between 1983 and 1992, juveniles were responsible for 25% of the increase in murders, forcible rapes and robberies.[89] Between 1973 and 1987, juvenile murder arrests averaged about three arrests per 100,000 juveniles annually. However, by 1991, that rate had increased to 5.4 arrests per 100,000 juveniles. The 1992 rate of 5.0 arrests per 100,000 juveniles was the first decline in seven years.[90] Between 1988 and 1992 the number of juveniles arrested for murder increased by 51%, while the rate of adults arrested increased by only 9%.

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[84] JEFFREY BUTTS, OJJDP, U.S. DEP'T OF JUSTICE, DELINQUENCY CASES IN JUVENILE COURT 1992 (Fact Sheet No. 18, July 1994) [hereinafter FACT SHEET NO. 18].

[85] "The FBI monitors changes in the level of violent crime by tracking the volume of four specific crimes. Combined, these four offenses—murder, forcible rape, robbery and aggravated assault—form the FBI's Violent Crime Index, which has become an accepted barometer of violent crime in the U.S." HOWARD N. SNYDER, OJJDP, U.S. DEP'T OF JUSTICE, JUVENILE VIOLENT CRIME ARREST RATES 1972-1992 (Fact Sheet No. 14, May 1994) [hereinafter FACT SHEET NO. 14].

[86] HOWARD N. SNYDER, OJJDP, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 1992 (Fact Sheet No. 13, May 1994) [hereinafter FACT SHEET NO. 13].

[87] HOWARD N. SNYDER, OJJDP, U.S. DEP'T OF JUSTICE, VIOLENT CRIMES CLEARED BY JUVENILE ARREST (Fact Sheet No. 15, May 1994) [hereinafter FACT SHEET NO. 15].

[88] FACT SHEET NO. 14, *supra* note 85.

[89] HOWARD N. SNYDER, OJJDP, U.S. DEP'T OF JUSTICE, ARE JUVENILES DRIVING THE VIOLENT CRIME TRENDS? (Fact Sheet No. 16, May 1994) [hereinafter FACT SHEET NO. 16].

[90] FACT SHEET NO. 14, *supra* note 85.

During this same period, juvenile arrests for forcible rape increased by 17%, while the increase for adults was only 3%. Juvenile arrests for robbery increased by 15%, while arrests for adults increased by 13%.[91] Juvenile arrests for aggravated assault increased by 49%, compared with a 23% increase for adults. Weapon law violation arrests increased by 66% percent for juveniles, but only by 13% for adults.[92] In 1992, law enforcement agencies in the United States reportedly made 2.3 million arrests of persons under eighteen years of age.[93] Significantly, 36% of these juveniles arrested were below the age of fifteen.[94]

Largely as a result of increasingly violent youth, juvenile and family court delinquency cases have increased. In fact, "[t]he number of delinquency cases handled by juvenile courts increased 26% between 1988 and 1992."[95] In 1990, juvenile and family courts disposed of 31% more violent cases than in 1986.[96] These cases included 64% more homicide and 48% more aggravated assault cases.[97] Nonetheless, the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention ("OJJDP") reports that these increases in violent crime committed by juveniles are not what has driven up the overall national increase in violent crime during the past ten years. Rather, adult violence was responsible for more than 80% of the overall growth in violent

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[91] FACT SHEET NO. 14, *supra* note 85. "Between 1969 and 1989 juvenile involvement in robbery declined substantially, dropping from 23% to 10%. Since 1989 the proportion of robberies cleared by juvenile arrest has increased annually, but is still far below the levels of the late-1960s." FACT SHEET NO. 15, *supra* note 87.

[92] Studies published in June of 1992 by the American Medical Association reported that one-third of high school students admit to having easy access to handguns, and that six percent say that they bring guns to school. Phillip J. Hills, *More Teenagers Being Slain by Guns*, N.Y. TIMES, June 10, 1992, at 19.

[93] FACT SHEET NO. 14, *supra* note 85.

[94] "These young juveniles were involved in 11% of juvenile murder arrests, 38% of forcible rape, 28% of robbery, 32% of aggravated assault, 41% of burglary, . . . 45% of runaway, 30% of weapon, and 15% of drug law violation arrests . . . ." FACT SHEET NO. 13, *supra* note 86.

[95] FACT SHEET NO. 18, *supra* note 84.

[96] The number of delinquency cases disposed of by juvenile courts increased by 10% from 1986 to 1990. COMPREHENSIVE STRATEGY, *supra* note 83, at 2.

[97] COMPREHENSIVE STRATEGY, *supra* note 83, at 2-3.

crime.[98] These studies, however, reveal that the extent of juvenile responsibility for such growth in violent crime is far greater than it had been in the past.[99]

Children are also the victims of violent crimes at alarmingly increasing rates. Teens are more than twice as likely as adults to become the victims of violent crime.[100] Almost 4,000 children were murdered in the United States in 1992.[101] The firearm-related homicide rate for teens increased over 150% between 1985 and 1994.[102] In 1991 alone, an estimated 5,356 children died in the United States as a result of both intentional and unintentional gunfire,[103] and it is estimated that 30 to 67 children are injured by gunfire each day.[104] It is also estimated that one million teens between twelve and nineteen years of age are raped, robbed, or assaulted each year.[105] Still, many other children are witnesses to violence. Often, the perpetrators of violent crimes against children and young adults are other youth. In 90% of the cases, these young

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[98] FACT SHEET NO. 16, *supra* note 89.

[99] FACT SHEET NO. 16, *supra* note 89. In 1983, juveniles were arrested for 9.5% or 119,000 of the total 1,258,000 violent crime arrests. In 1992, juveniles were responsible for 12.8% or 247,000 of the total 1,932,000 violent crime arrests. FACT SHEET NO. 16, *supra* note 89.

[100] Joanne C. Lin et al., *Youth Violence: Redefining the Problem, Rethinking the Solutions*, 28 CLEARINGHOUSE REV. 357, 357-58 (1994) (citing AMERICAN PSYCHOLOGICAL ASS'N, COMMISSION ON VIOLENCE AND YOUTH, VIOLENCE & YOUTH: PSYCHOLOGY'S RESPONSE 42 (1993)). In 1987, almost 1 in 17 children, ages 12 to 17, were victims of violent crime. That ratio increased to more than 1 in 13 by 1992. However, during the same period, the rate for persons 35 years and older showed no significant fluctuation (1 in 81 or 12.3 per 1,000 persons in 1987, compared with 1 in 72 or 13.9 per 1,000 persons in 1992). JOSEPH MOONE, OJJDP, U.S. DEP'T OF JUSTICE, JUVENILE VICTIMIZATION: 1978-1992 (Fact Sheet No. 17, June 1994).

[101] Lin et al., *supra* note 100, at 357 (citing FBI, CRIME IN THE UNITED STATES: 1992 UNIFORM CRIME REPORTS tbl. 2.4 (1993)).

[102] Lin et al., *supra* note 100, at 358 (citing Delbert Elliott, Youth Violence: An Overview, Address at the Aspen Institute's Children and Violence Conference (Feb. 1994)).

[103] THE CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK 64 (1994).

[104] *Id.*

[105] Lin et al., *supra* note 100, at 357 (citing NATIONAL GOVERNORS' ASS'N, KIDS AND VIOLENCE 1 (1994)).

perpetrators share the same ethnic background and demographic profile as their victims.[106]

Generally held public perceptions concerning the extent and nature of juvenile crime[107] have resulted in a "get-tough" public sentiment toward delinquency and a series of "get-tough" approaches to the treatment of young offenders in recent years. These new laws and policies have included prosecuting younger children as adults for certain crimes, as well as imposing mandatory, longer and more restrictive placements of adjudicated delinquents and other young offenders.[108] The National Center for

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[106] Lin et al., *supra* note 100, at 358 (citing Donna Garnett, *Dimensions of Youth Violence, in* KIDS AND VIOLENCE 19 (NATIONAL GOVERNORS' ASS'N ed., 1994)).

[107] Public perceptions about juvenile crime are not always supported by the facts. The number of juvenile offenses has remained relatively static. It is the level of violent offenses which has increased. *See A National Agenda for Children: On the Front Lines with Attorney General Janet Reno*, 1 JUVENILE JUST. 2 (Earl E. Appleby, Jr. et al. eds., 1993). However, this increase in violent crime has not driven up the overall increase in crime over the past 10 years. *See* FACT SHEET NO. 16, *supra* note 89. Similarly, evidence does not support the public's perception that there has been a significant increase in the number of serious violent or chronic juvenile offenders. In fact, 50 to 75% of all violent crimes committed by juveniles are committed by a mere 2 to 15% of male juveniles. *See* Lin et al., *supra* note 100, at 358 (citing Terence Thornberry, *Risk Factors for Youth Violence, in* KIDS & VIOLENCE 10 (NATIONAL GOVERNORS' ASS'N ed., 1994); COMPREHENSIVE STRATEGY, *supra* note 83, at 1-2).

[108] By 1993, 18 states had excluded serious or violent offenses from juvenile and family court jurisdiction and 12 states had concurrent jurisdiction with adult criminal courts. Fifteen was the upper age for juvenile court jurisdiction in 3 states, age sixteen in 8 states, age seventeen in 39 states and the District of Columbia, and age eighteen in Wyoming. COMPREHENSIVE STRATEGY, *supra* note 83, at 29 n.2. The Federal Crime Bill, signed into law on September 13, 1994, in some respects mirrors the get-tough laws adopted in recent years by state legislatures. PUB. L. NO. 103-322 (1994). The bill allows the federal prosecution of juveniles 13 years of age and older for certain serious crimes and for crimes involving a gun. It also authorizes the federal government to help states develop systems to prosecute more 16- and 17-year-olds as adults for certain violent crimes. It stiffens sentences for federal crimes committed by juvenile gang members, and provides, generally, for a maximum one-year jail sentence for gun possession by juveniles. Other provisions include the imposition of the death penalty for several dozen federal crimes, including gun murders committed during a federal drug or violent felony and mandatory life

Juvenile Justice estimates that in 1990, approximately 176,000 juvenile cases involving persons under eighteen years of age were transferred from juvenile courts to adult courts for prosecution.[109] These cases do not include cases of juveniles filed directly in adult courts as a result of prosecutorial discretion, or legislation giving adult courts exclusive jurisdiction. It is estimated that in 1978, only 9,000 juveniles were prosecuted in state criminal courts as a result of such jurisdictional, waiver, or transfer provisions.[110] Concomitantly, between 1984 and 1990, the number of juveniles admitted to adult prisons, increased by 30%, from 9,078 to 11,782.[111] Between 1986 and 1990, delinquency cases processed by juvenile and family courts increased by 10%.[112] This is equivalent to fifty cases per one thousand juveniles in the population.[113] Similarly, between 1983 and 1993, the number of juveniles admitted to public and private juvenile custody facilities increased by 19%, from 638,309 to 760,644.[114]

Some argue, however, that it is not the increase in crime but public and legislative responses to it which have resulted in swelling prison populations and juvenile placements.[115] While reported overall crime increased by 8%, the nation's prison population increased by 134% between 1980 and 1990.[116] Admissions to juvenile facilities increased by 19% in the ten years ending in 1992. Of those juveniles detained and incarcerated in 1991, more than one-half were being held for nonviolent offenses.[117]

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imprisonment for certain third-time violent felons. *See* Holly Idelson & David Musci, *Crime Bill Provisions*, CONG. Q., Dec. 1994, at 3526, 3529-31.

[109] Lin et al., *supra* note 100, at 366.

[110] COMPREHENSIVE STRATEGY, *supra* note 83, at 29.

[111] COMPREHENSIVE STRATEGY, *supra* note 83, at 30.

[112] COMPREHENSIVE STRATEGY, *supra* note 83, at 28.

[113] COMPREHENSIVE STRATEGY, *supra* note 83, at 28.

[114] COMPREHENSIVE STRATEGY, *supra* note 83, at 29.

[115] Joseph D. Lehman et al., *Reducing Risks and Protecting Our Youths: A Community Mission*, CORRECTIONS TODAY, Aug. 1994, at 94.

[116] *Id.*

[117] Lin et al., *supra* note 100, at 366 (citing DALE PARENT ET AL., OJJDP, U.S. DEP'T OF JUSTICE, CONDITIONS OF CONFINEMENT: A STUDY TO EVALUATE CONDITIONS IN JUVENILE DETENTION AND CORRECTIONS FACILITIES (1993)); *see also* Mark Curriden, *Hard Times for Bad Kids*, A.B.A. J., Feb. 1995, at 66-67.

III. INNOVATIVE METHODS FOR ADDRESSING JUVENILE DELINQUENCY

We have moved away from the protective and rehabilitative principles which underlay the development of juvenile and family courts to harsher, more punitive approaches to the treatment of young offenders. Have these get-tough approaches been effective? Are they justified in most cases? Do stiffer sentences and confinement in adult institutions have a deterrent effect on juvenile violent behavior? Are there valid reasons for continuing to process certain, if not all, youth in traditional juvenile or family courts?[118]

Public demand for an immediate response to youth violence has caused much of the discussion, legislation and policy to focus on what to do with young offenders once they have been arrested. Those who have studied and worked in the criminal and juvenile justice systems, however, have for some time recognized the folly of attempting to solve delinquency by merely focusing on offenders after their criminal behavior has taken place.[119] The most that can be hoped for at this point is to reduce the risk of future criminal involvement.[120]

More than rehabilitation and punishment, if appropriate, the key to stemming the increase in juvenile crime may lie in risk-focused prevention.[121] For fifty years, criminal justice researchers and social scientists have been studying the root causes of delinquency. Their work has disclosed the existence of factors which tend to increase the risk of future delinquent behavior. Among the factors

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[118] Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y 199 (1992); *see* Lin et al., *supra* note 100, at 366.

[119] Lehman et al., *supra* note 115, at 94, 96.

[120] Lehman et al., *supra* note 115, at 94, 96.

[121] OJJDP, U.S. DEP'T OF JUSTICE, URBAN DELINQUENCY AND SUBSTANCE ABUSE (July 1993) [hereinafter URBAN DELINQUENCY AND SUBSTANCE ABUSE]; *see* BARBARA ALLEN-HAGEN ET AL., OJJDP, U.S. DEP'T OF JUSTICE, JUVENILES AND VIOLENCE: JUVENILE OFFENDING AND VICTIMIZATION (Fact Sheet No. 19, Nov. 1994) [hereinafter FACT SHEET NO. 19]; CAROLYN SMITH ET AL., RESILIENT YOUTH: IDENTIFYING FACTORS THAT PREVENT HIGH-RISK YOUTH FROM ENGAGING IN SERIOUS DELINQUENCY AND DRUG USE (1993).

which research has identified as placing children at risk are: child abuse and neglect, ineffective parenting and discipline, family disruption and dysfunction, exposure to violence, conduct disorder and hyperactivity, school failure and learning disabilities, negative peer influences, limited employment opportunities, inadequate housing and residence in high-crime communities.[122] Studies have also disclosed that delinquency is associated with early sexual activity, pregnancy and substance abuse.[123]

Some of the most interesting and promising developmental research in the field of juvenile delinquency risk assessment has

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[122] COMPREHENSIVE STRATEGY, *supra* note 83, at 23-24; JOY G. DRYFOOS, ADOLESCENTS AT RISK: PREVALENCE AND PREVENTION 94-95 (1990); SMITH ET AL., *supra* note 121, at 5-7; Lin et al., *supra* note 100, at 359-62; FACT SHEET NO. 19, *supra* note 121, at 3; URBAN DELINQUENCY AND SUBSTANCE ABUSE, *supra* note 121, at 15-28; CATHY SPATZ WIDOM, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CYCLE OF VIOLENCE (Oct. 1992).

"Up to 90% of juvenile delinquents and convicts report being abused as children." Paula Craucher Thracher, *Help Available to Stop Child Abuse*, ATLANTA J. & CONST., Apr. 23, 1992, at A18. "[B]eing abused or neglected as a child increases a person's risk of arrest as a juvenile by 53%, as an adult by 38% and for violent crime by 38%." *Adult Impact of Child Abuse Greater Than Had Been Thought*, MIAMI HERALD, Feb. 18, 1991, at 4A. "Abused or neglected children grow up to have lower IQs, fewer jobs, more arrests and more drug and alcohol abuse . . . ." *Id.* "As many as one in fifty U.S. children under 15 may have a parent in jail or prison, which puts youngsters at extra risk for . . . delinquency . . . ." *1 in 50 Kids May Have a Parent in Jail*, CHI. TRIB., Aug. 10, 1993, at 12. Some 70% of children in juvenile court are from single-parent households. Cindy Loose & Pierre Thomas, *'Crisis in Violence' Becoming Menace to Childhood*, WASH. POST, Jan. 2, 1994, at A1. The more chronic the criminal, the more likely it is that some of his or her relatives are also criminals. This tends to show that delinquency is learned from one's family. *Imprisonment, Family Affair*, CHI. TRIB., Feb. 2, 1992, at 24. Mothers who drink alcohol or take drugs during pregnancy cause their babies to grow up with learning disorders, a problem which leads to delinquency. *Id.* Residence in disadvantaged neighborhoods is an important factor in fostering criminal behavior. *Id.* "Eighty percent of delinquents and those with some delinquency in their records suffered learning disabilities, and poor vision was a contributing factor in fifty percent of those cases, the statistics showed." *Delinquency and Vision Are Linked*, PHILA. INQUIRER, Feb. 5, 1984, at K6. "With classroom failure comes decreasing motivation. They then cut the classes . . . and progress from . . . truancy to . . . dropout, to brushes with the law." *Id.*

[123] DRYFOOS, *supra* note 122, at 98-104.

focused on "protective factors," also referred to as "resiliency," in children who are exposed to established risk factors for delinquency.[124] Protective factors are those which decrease the likelihood that a youngster will engage in criminal conduct, notwithstanding the existence in his or her life of one or more established risk factors for serious delinquency.[125] One such study, the Rochester Youth Development Study, followed one thousand Rochester public school children for four and one-half years. The study found that over sixty percent of those adolescents with five or more known risk factors failed to become involved in serious delinquency or drug use and, in fact, appeared to be resistant to such negative outcomes. The study identified a number of protective factors in these children. Protective factors fall into three categories: (1) family factors, that is, parental supervision and attachment to parents; (2) educational factors, that is, reading and mathematic ability, parental and teacher expectation and attachment to teachers; and (3) peer factors and other resources, that is, self-esteem, religious affiliation, mentors and social activities. The study found that significantly higher mathematics and reading scores, commitment to school, parental involvement and personal self-esteem consistently distinguished resilient youth from non-resilient youth.[126]

It should be noted, however, that while numerous risk factors are commonly identified by most researchers as risk factors for delinquency,[127] researchers have not as yet been able to identify the exact cause(s) for delinquency.[128] Nor has the identity of a combination of causal factors, which are most crucial in explaining delinquency, emerged from their research.[129] The difficulty in naming the causal link to delinquency may be in the fact that the

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[124] *See* SMITH ET AL., *supra* note 121, at 5.

[125] *See* SMITH ET AL., *supra* note 121, at 4-5.

[126] *See* SMITH ET AL., *supra* note 121, at 19.

[127] *See supra* note 122 and accompanying text.

[128] COMPREHENSIVE STRATEGY, *supra* note 83, at 9; EDMUND W. GORDON & LAUREN DOHEE SONG, VARIATIONS IN THE EXPERIENCE OF RESILIENCE 27-29 (Margaret Wang & Edmund W. Gordon eds., 1994); SMITH ET AL., *supra* note 121, at 1.

[129] SMITH ET AL., *supra* note 121, at 1.

exact cause for any human behavior is never easily ascertained. The exposure to one or more known risk factors, therefore, in no way presumes subsequent delinquency.[130] Stuart Greenbaum has addressed the problem in this way: "Every child possesses unique characteristics influenced by family, school, peers, and the community that guide the child's response to a given risk factor . . . . [N]o single cause accounts for all delinquency. Likewise, no single pathway invariably leads to a life of crime."[131] Nevertheless, the identification by social scientists of factors which generally place children at risk, and of naturally occurring protective qualities in some children which cause them to be resilient to such risks, suggests specific areas of intervention which should be components of any delinquency prevention or treatment effort.[132]

Several principles and themes, helpful in the design of prevention and treatment programs, have emerged from risk and resiliency research. The first is that risks occur in several spheres and throughout a child's development.[133] Thus, delinquency prevention and treatment efforts must be comprehensive, addressing a child's family life, educational and emotional needs, as well as his or her community environment. Apart from families, schools have the most impact on children. When most effective, schools provide children with, or refer children for, appropriate mental health counseling, recreation, tutoring, vocational training and leadership training. Schools can also provide substance abuse, pregnancy and violence prevention programs, such as mediation, conflict resolution training and law-related educational programs.[134]

In addition, the neighborhood in which a child resides can either place a child at risk or foster protective factors.

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[130] SMITH ET AL., *supra* note 121, at 1; Stuart Greenbaum, *Drugs, Delinquency, and Other Data*, 2 JUV. JUST. 2, 2-3 (1994).

[131] Greenbaum, *supra* note 130, at 2-3; *see also* SMITH ET AL., *supra* note 121, at 1.

[132] SMITH ET AL., *supra* note 121, at 2; Lehman et al., *supra* note 115, at 94, 96.

[133] COMPREHENSIVE STRATEGY, *supra* note 83, at 5, 9; Lehman et al., *supra* note 115, at 97.

[134] Lin et al., *supra* note 100, at 363.

> The critical feature most directly related to [youth] violence is the absence of effective social or cultural organization in poor neighborhoods. High levels of transiency and constant turnover in public housing [for example] make it difficult to forge community relations. Chronic unemployment results in isolation from legitimate labor markets and undermines the value of finishing high school.[135]

Every person or institution that touches a child's life and interacts with a child's family can contribute positively to that child's development. Effective prevention and treatment efforts intended to address risk factors, therefore, must be geared toward a child's chronological development and must be implemented over the long term.[136]

Second, children are generally most vulnerable to risk factors that occur during their early development.[137] Because "family life occupies center stage in most theories of child development,"[138] poor early caregiving environments, including family disruption and discord, economic hardship, abuse and neglect and family deviance, such as criminal involvement and alcoholic or drug addicted parents, present especially significant risks.[139] Research suggests that early exposure to domestic violence or child abuse increases the risk of violent behavior during adolescence by as much as forty percent.[140] Because the family is the first and single most important influence in a child's life, it is also the first and most significant line of defense against delinquency.[141] Intervention programs should, therefore, strengthen the family and foster a child's healthy development from prenatal care through adolescence.[142] These programs should encourage the maintenance of a viable biological or adoptive family unit and bonding between parent and child, and provide support for families in crisis.

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[135] Lin et al., *supra* note 100, at 360.
[136] Lin et al., *supra* note 100, at 363.
[137] SMITH ET AL., *supra* note 121, at 2.
[138] SMITH ET AL., *supra* note 121, at 2.
[139] SMITH ET AL., *supra* note 121, at 2.
[140] Lin et al., *supra* note 100, at 359 (citing WIDOM, *supra* note 122).
[141] COMPREHENSIVE STRATEGY, *supra* note 83, at 10.
[142] COMPREHENSIVE STRATEGY, *supra* note 83, at 10.

Family preservation or homebuilder services have been utilized in a number of jurisdictions to preserve and strengthen families that are at risk of having a child removed from the home due to abuse, neglect, or a delinquency adjudication. Specially trained social workers provide intensive in-home support and counseling. Services provided include parenting skills training, assisting parents in advocating for their children at school, accessing public services, developing household management skills and improving family dynamics.[143] These efforts should involve major spheres of influence, such as religious institutions, schools and community-based organizations.[144]

Third, the more risks to which a child is exposed, the greater the likelihood of delinquent or other destructive behavior. A single stressor rarely determines delinquency. All individuals are exposed to some stress during a normal life course.[145] Rather, "it is the additive and cumulative effects of stressors which tend to produce more consistently negative outcomes."[146] Evidence suggests that risk increases exponentially with exposure to more than one risk factor and that interventions, therefore, are likely to be more effective if they address more than one potential problem, such as delinquency, substance abuse and violent behavior.[147]

Fourth, delinquency "follow[s] a set of behavioral pathways that progress from less serious to more serious forms of behavior. Prevention programs [therefore] should be designed to intercept or short circuit youth in these pathways before their behavior becomes more ingrained."[148] Some research suggests three pathways of problem behavior in young people which lead to serious

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[143] MARY LEE ALLEN ET AL., HELPING CHILDREN BY STRENGTHENING FAMILIES: A LOOK AT FAMILY SUPPORT PROGRAMS 72-73 (1992).

[144] *Id.*

[145] FACT SHEET NO. 19, *supra* note 121, at 3-4; SMITH ET AL., *supra* note 121, at 3.

[146] FACT SHEET NO. 19, *supra* note 121, at 3-4; SMITH ET AL., *supra* note 121, at 3.

[147] SMITH ET AL., *supra* note 121, at 18; Lehman et al., *supra* note 115, at 97.

[148] URBAN DELINQUENCY AND SUBSTANCE ABUSE, *supra* note 121, at 29.

delinquency.[149] The first pathway is authority conflict. Children may begin, as young as three or four years of age, to engage in stubborn behavior, followed by defiance in pre-adolescence. The next step is authority avoidance, which might include truancy, breaking curfews and running away. Second is the covert pathway. It begins at about eleven years of age with minor covert acts, such as frequent lying and shoplifting, and progresses to vandalism and then moderate and serious delinquency. Third is the overt pathway. It begins in pre-adolescence with bullying, and escalates to physical altercations and violent acts.[150] It is important that those involved in delinquency prevention recognize the characteristics of these pathways at early stages of development when treatment is likely to be successful.

Fifth, protective factors, which often come into play in a child's later developmental stages, operate to buffer, counteract, or moderate the effect of exposure to risks.[151] Moreover, cumulative protective factors increase resilience to serious delinquency.[152] "A key strategy to counter risk factors in young people's lives is to enhance protective factors . . . ."[153] Research has indicated the importance of a child's attachment to at least one parent and of providing a child with structure, rules and expectations for achievement and for socially conforming behavior.[154] The ability to succeed in school, supportive teachers and a commitment to learning have been found to operate as protective factors.[155] Also important are "connections with peers and activities which are socially rewarding and which . . . foster prosocial values."[156] Finally, intelligence and cognitive capacity, personal confidence and self-esteem, connections with supportive non-parent adults or

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[149] COMPREHENSIVE STRATEGY, *supra* note 83, at 24; Greenbaum, *supra* note 130, at 3-4.

[150] Greenbaum, *supra* note 130, at 3-4.

[151] SMITH ET AL., *supra* note 121, at 7; Lehman et al., *supra* note 115, at 97.

[152] SMITH ET AL., *supra* note 121, at 25.

[153] FACT SHEET NO. 19, *supra* note 121, at 4.

[154] SMITH ET AL., *supra* note 121, at 8.

[155] FACT SHEET NO. 19, *supra* note 121, at 4; SMITH ET AL., *supra* note 121, at 8.

[156] SMITH ET AL., *supra* note 121, at 8.

mentors and religion or a consistent faith perspective, have all been associated with resilience.[157] Successful violence and delinquency prevention programs provide children with opportunities to succeed and to build self-esteem, foster socially appropriate behaviors and allow children to bond with caring adults.[158]

Because 50 to 75% of all violent offenses by juveniles are committed by a mere 2 to 15% of male juveniles,[159] it is essential that any effort to reduce youth violence and delinquency specifically target hard-core, chronic offenders.[160] To interrupt criminal conduct and stimulate law-abiding behavior, research suggests that a system of graduated sanctions, which combine accountability and increasingly intensive treatment, is most effective.[161] Graduated sanctions should encompass a broad range of community-based and residential alternatives, all of which must involve the juvenile's family, coupled with intensive aftercare.[162] Rehabilitation and treatment efforts for chronic and other young offenders must be specifically designed to address risk factors and the protective needs of the individual child.[163]

IV. THE ROLE OF THE JUDGE IN THE REHABILITATION OF DELINQUENTS AND IN THE PREVENTION OF DELINQUENCY

Ever since the movement for the clinical and rehabilitative treatment of juvenile delinquents began during the nineteenth century, judges have played a crucial role. When proponents to the juvenile court system envisaged the judicial role, they saw persons both trained and inclined toward the view that juveniles required the special protection of the state. The ultimate goal was to have

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[157] SMITH ET AL., *supra* note 121, at 8-9.

[158] FACT SHEET NO. 19, *supra* note 121, at 4.

[159] Lin et al., *supra* note 100, at 358.

[160] COMPREHENSIVE STRATEGY, *supra* note 83, at 36.

[161] *See* JOHN J. WILSON & JAMES C. HOWELL, OJJDP, U.S. DEP'T OF JUSTICE, SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS: A COMPREHENSIVE STRATEGY (Fact Sheet No. 4, Aug. 1993).

[162] *Id.*; COMPREHENSIVE STRATEGY, *supra* note 83, at 36-37; FACT SHEET NO. 19, *supra* note 121, at 4.

[163] COMPREHENSIVE STRATEGY, *supra* note 83, at 39-41; FACT SHEET NO. 19, *supra* note 121, at 4; WILSON & HOWELL, *supra* note 161, at 4.

juveniles grow to be productive citizens in their communities. And, it was the judge, even though he or she required much assistance, who was there to insure that the ultimate goal of a productive citizen was always kept in view.[164]

It can be argued that cases such as *In re Gault*[165] and *In re Winship*[166] did not foreclose a different and caring approach to the treatment of juveniles who came into contact with the criminal justice system. Rather, the objective of those cases was to insure fundamental fairness in the determination of the facts, which is the prime consideration in the disposition of a case. Today, a primary role of the juvenile and family court judge, as it relates to crime and delinquency, is to ensure legal and constitutional rights to the accused juvenile. Delinquency actions have evolved from informal, almost ex parte matters, to formal adversarial proceedings in which juveniles must be afforded specific due process rights. "As an integral part of the decision-making process, the judge must make certain that [children] appearing before the court receive the legal and constitutional rights to which they are entitled."[167]

Today, no less than when the clinical and rehabilitative approach was at its height and no less than when the U.S. Supreme Court decided that fundamental fairness required notice of the charges, the right to counsel, the right against self-incrimination, the right to confront witnesses against him or her and proof beyond a reasonable doubt of the allegedly criminal conduct, the judge is at the center of what happens to youth accused of crime. The kind of role that the judge plays and is willing to play will, in more instances than not, has a determinative effect in the life of that young offender.

Judges, therefore, must be creative and flexible in fashioning dispositional orders which are tailored to address the individual needs of the juvenile. How effective a judge is in accomplishing this is, of course, directly related to the quality of the information

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[164] *See* Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 1-45 (1992).

[165] 387 U.S. 1 (1967).

[166] 397 U.S. 358 (1970).

[167] Edwards, *supra* note 164, at 25.

before the judge.[168] Thus, apart from having a thorough understanding of the dispositional alternatives authorized by law,[169] the juvenile and family court judge must effectively utilize diagnostic and investigative tools. He or she must also be aware of the treatment services and resources available, through private and public agencies, both in placement facilities and in the community.

Today, perhaps more so than when juvenile and family courts were created, judges do and must play crucial roles in not only the rehabilitation of young offenders but in the effort to prevent juvenile violence and delinquency. The structure of juvenile and family courts and the types of proceedings over which they have jurisdiction make judges who sit in these courts uniquely qualified, and situated, to take an active role in preventing delinquency.

Typically, juvenile and family courts also have jurisdiction over abused, neglected and abandoned children, and truants, runaways and ungovernable youth.[170] Some of these courts, like New York State Family Court, handle domestic violence, paternity, support, custody, visitation, foster care review, termination of parental rights

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[168] *See* Edwards, *supra* note 164, at 25.

[169] The New York Family Court Act permits a judge, following adjudication to dismiss a delinquency petition, N.Y. FAM. CT. ACT §§ 352.1, 315.2, 315.3 (McKinney 1983 & Supp. 1995); to grant a conditional discharge, *Id.* § 353.1 (McKinney 1983); to place a child on probation, *Id.* § 353.2 (McKinney 1983 & Supp. 1995); or to place a child away from his or her home, *Id.* § 353.3-.5 (McKinney Supp. 1995).

> Placement is perhaps the best example of the remarkable flexibility which has been granted to the Family Court [Judge in New York] in framing a suitable dispositional order . . . . The court may choose to place the child with a relative, with the Commissioner of Social Services or with the Division for Youth . . . for residential care by those agencies or for replacement with another specific agency or a class of agencies. In addition, the duration of placement is solely a matter of court discretion [within the prescribed maximum periods] and may be reviewed or modified at any time.

Id. § 353.3 (Practice Commentary).

[170] Juvenile and family courts exist in all 50 states and the District of Columbia. Each of these courts differ in structure and jurisdiction. However, most have jurisdiction over three types of cases: "(a) delinquent children, (b) children who are 'status offenders' [runaways, truants and ungovernable] and (c) abused, abandoned and neglected children." Edwards, *supra* note 164, at 5.

and adoption proceedings as well.[171] Thus, judges who sit in juvenile and family courts frequently have contact with children who are at risk of becoming delinquent, or with the parents, caretakers or siblings of these children, long before these at-risk children enter adolescence and appear in court as respondents in delinquency cases. Such prior contact with at-risk children and their families provides judges and juvenile court probation services with an opportunity to intervene and remove or ameliorate the factors which place children at risk and to put in place those services which might foster resiliency in these children.

While generally not viewed as a delinquency prevention measure, evaluations and assessments of children and their home environments routinely occur in child protective proceedings, as well as in disputed custody and visitation matters. In these cases, the court is required to focus upon the needs and "best interests" of the child.[172] Judges, also, are more likely to view truants and children who engage in other "status offenses,"[173] as at risk of becoming delinquent in light of the plethora of evidence, both anecdotal and empirical, indicating that truancy and ungovernability are precursors to delinquency.[174] In fact, New York law mandates that alleged status offenders and their guardians be diverted from the family court to social services agencies,[175] where they are provided with individual and family counseling, remedial education, medical, psychiatric and other appropriate services.

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[171] N.Y. FAM. CT. ACT § 115 (McKinney Supp. 1995).

[172] *See* N.Y. FAM. CT. ACT §§ 1017(b), 1022(iii), 1028(b), 1030(c), 1052(b)(i)(A), 1082(4) (McKinney 1983 & Supp. 1995); Eschbach v. Eschbach, 56 N.Y.2d 167, 170, 436 N.E.2d 1260, 1262, 451 N.Y.S.2d 658, 660 (1982); Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 94, 432 N.E.2d 765, 767, 477 N.Y.S.2d 893, 895 (1982).

[173] "Status offenders are children who have committed an offense which would not be [a] crime if committed by an adult. Status offenses include truancy, running away from home, curfew violations, being beyond the control of parents, using tobacco and alcohol, and unruly behavior." Edwards, *supra* note 164, at 10; *see also* N.Y. FAM CT. ACT § 732 (McKinney 1983).

[174] DRYFOOS, *supra* note 122, at 98-104; Curriden, *supra* note 117, at 69; *Delinquency and Vision Are Linked*, L.A. TIMES, Feb. 5, 1984, at K6; Lin et al., *supra* note 100, at 359.

[175] *See* N.Y. FAM. CT. ACT §§ 734-735 (McKinney Supp. 1995).

Juvenile and family court judges, as well as all judges who handle cases in which children are involved, have an opportunity to become actively involved in the delinquency prevention effort. Such opportunities exist even when the child is neither a party to nor the subject of the proceeding. For instance, in cases involving spousal abuse, the court's immediate response is to protect the family from the abuser by, for example, excluding him or her from the home and, at disposition, to direct, inter alia, that the batterer receive rehabilitative services. However, because children who witness domestic violence are clearly at risk of becoming violent and delinquent,[176] it is essential that these children are not only protected from domestic violence, but are provided with counseling and appropriate services.

The modern juvenile and family court judge has many other roles to play, all of which are designed to assist the juvenile to achieve his or her full potential.[177] The National Council of Juvenile and Family Court Judges, in its publication, *Children and Families First: A Mandate for America's Courts*,[178] describes the modern juvenile or family court judge as having a number of characteristics and roles. These include: (1) willingly advocating for the needs of children and families; (2) being educated in and having an understanding of family dynamics and child development; (3) being committed to principles of treatment, rehabilitation and family preservation, as well as having a regard for community protection and accountability; (4) assuming leadership in improving the administration of justice for children and families, by, inter alia, taking an active role in the development of policies, laws, rules and standards by which these courts and their allied agencies and

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[176] *Adult Impact of Child Abuse Greater Than Had Been Thought*, MIAMI HERALD, Feb. 18, 1991, at 4A; Katherine Boo, *The Tower Girls at D.C. Home, Delinquent Teens Struggle to Recover the Futures They Left Behind*, WASH. POST, Feb. 12, 1995, at A1; *Help Available to Stop Child Abuse*, ATLANTA J. & CONST., Apr. 23, 1992, at A18; Lin et al., *supra* note 100, at 359; Edgar C. Walker & Lisa Fischel Wolovick, *Children Who Witness Violence*, N.Y.L.J., Oct. 17, 1994, at 1.

[177] Edwards, *supra* note 164, at 25.

[178] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILDREN AND FAMILIES FIRST: A MANDATE FOR AMERICA'S COURTS.

systems function; and (5) exercising the authority which exists to order, enforce and review the delivery of specific services and treatments for children and families.[179]

CONCLUSION

The role of the judge in proceedings involving juveniles accused of criminal behavior has changed drastically over the decades. In part, this is because no one has yet come up with an ideal solution for dealing with juvenile delinquency or how to prevent it. The reforms brought about by cases such as *In re Gault*[180] were necessary to protect the constitutional and legal rights of juveniles accused of crimes. As important as these rights are, the judge who deals with criminal behavior by juveniles has a unique role to play by using his or her authority and influence to turn those potentially or actually delinquent children into productive citizens of our society.

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[179] *Id.* at 3-4.

[180] 387 U.S. 1 (1967).