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THE LAWS OF UNINTENDED RESULTS

by

HON. W. DON READER¹

Throughout history, the premises upon which the juvenile justice system are based swing like a pendulum, from one extreme to the next, never stopping in the middle. To understand why the pendulum never stops in the middle, we must begin by examining the juvenile justice system in its historical context.

Two disparate philosophical themes emerge out of a developmental review of the juvenile courts' history in the United States. One theme is of a court of law for children with legal and procedural safeguards; the other is that of the juvenile court as a social welfare agency with psycho-social remedies, attempting to reform wayward youth. "Should we punish?" or "Should we treat?" are questions that define the ambivalence and characterize the difficulties the court has had in discharging its diverse role. Roscoe Pound put it succinctly when he said, "The juvenile court is the illegitimate issue of an illicit relationship between the legal profession and the social work profession, and now no one wants to claim the little bastard."²

Prior to the juvenile justice movement, children were treated as chattels of adults without any rights, and if found guilty of a crime they were sentenced as an adult would be.³ Early reform groups did not accept the common notion that such harsh treatment would result in the rehabilitation of delinquents.⁴ In fact, many believed the conditions of the adult prisons led juries and judges to acquit the young, rather than send them to such inhuman places.⁵

1. Judge, Ohio Court of Appeals, Fifth Judicial District, Canton, Ohio. A.B. Dickinson College; J. D. University of Akron School of Law. In 1980, Judge Reader was President of the Ohio Association of Juvenile and Family Court Judges. Under his leadership, the juvenile justice statutes were rewritten, resulting in what is now called the Ohio Plan. He has also served as Vice Chairman of the Policy Advisory Group to the Department of Youth Services. Judge Reader has testified before the Ohio General Assembly, the United States Congress, and the judiciary committees in both the New Jersey and Nevada legislatures on issues relating to juvenile law. In July, 1989, Judge Reader was elected President of the National Council of Juvenile and Family Court Judges.

2. Although the exact source of this quote is unavailable, it is believed that Dean Pound made this statement at an early American Bar Association convention where he spoke about the juvenile court system.

3. W. DON READER & HELEN SACKS, *HISTORY OF THE JUVENILE COURT, HANDBOOK OF PSYCHIATRIC PRACTICE IN THE JUVENILE COURT* 5 (1992). See also *In re Mason*, 28 P. 1025, 1026 (Wash. 1892) (an infant under age 16 can be sentenced to imprisonment if convicted of a crime the same as an adult); see also JULIAN MACK, *THE CHANCERY PROCEDURE IN THE JUVENILE COURT IN THE CHILD, THE CLINIC, AND THE COURT* 310 (1925).

4. See Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135, 137 (1995).

5. See Susan K. Knipps, *What is a "Fair" Response to Juvenile Crime?*, 20 FORDHAM URB.

The New York City House of Refuge, which opened in 1825, was the first of these youth prisons.⁶ In a few years, other houses of refuge were established that accepted children convicted of crimes, as well as destitute youth.⁷ These facilities were advanced as preventive institutions designed to accept children of unfit parents. The Pennsylvania Supreme Court in *Ex parte Crouse*⁸ stated:

The object of charity is reformation by training of inmates: by imbuing their minds with principles of morality and religion; by furnishing them with a means to earn a living, and above all, by separating them from the corrupting influences of improper associates. To this end, may not the natural parents when unequal to the task of education, or unworthy of it, be superseded by the *parens patriæ* or common community?⁹

This case appears to be the first application in American law of the legal doctrine of *parens patriæ*, the state acting on behalf of the juvenile, which began the development of the virtually unrestrained powers of later juvenile courts.¹⁰

L.J. 455, 456 (1993).

6. BARRY KRISBERG & JAMES AUSTIN, *REINVENTING JUVENILE JUSTICE* 8 (1993). See also Robert W. Sweet, Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 390 (1991).

7. Ohio authorized cities to establish houses of refuge in 1857. See 54 LAWS OF OHIO 163 (1857). Some years later, Ohio Supreme Court Justice William White observed that Houses of Refuge were established "to place minors of the description [contained in the statute], and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority." *Prescott v. Ohio*, 19 Ohio St. 184, 188 (1869).

8. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839) (per curiam).

9. *Ex parte Crouse* involved a writ of *habeas corpus* directed to the manager of the House of Refuge of Philadelphia County, requiring them to produce Mary Ann Crouse, who was detained in the reformatory. The local Justice of the Peace committed Mary Ann Crouse upon the complaint of her mother, who claimed Mary Ann was "by reason of vicious conduct" beyond her mother's control. *Id.* at 9. The Pennsylvania Supreme Court denied the writ, noting, "The infant has been snatched from a course which must have ended in confirmed depravity; and, *not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it." *Id.* at 11.

10. READER & SACKS, *supra* note 3, at 6. These early courts used a broad interpretation of *parens patriæ* to commit youth to the authority of the State. Chief Justice Ryan of the Wisconsin Supreme Court accurately described the state's broad reach in *The Milwaukee Indus. Sch. v. Supervisors of Milwaukee County*, noting:

[I]n the first place, we cannot understand that the detention of the child at one of these schools should be considered as imprisonment, any more than its detention in the poor house; any more than the detention of any child at any boarding school, standing, for the time, *in loco parentis* to the child. Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of the parental power of restraint over children committed to it. And when the state, as *parens patriæ*, is compelled by the misfortune of a child to assume for it parental

Illinois adopted the first juvenile code in 1899,¹¹ which established the country's first juvenile court and radically altered the way courts dealt with children.¹² This early juvenile court imposed the then-overriding objective of rehabilitation to resolve cases. The Illinois law focused on the offender's character, rather than the nature of the offense, which was a reflection of and response to the developing "Child Savers" movement.¹³

Because the state's emphasis was on rehabilitation, and not punishment, there was no need for the formal protection of due process.¹⁴ Further devel-

duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. The state does not, indeed we might say could not, intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child, arising from want or default of parents. And, in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child, no more that the tenderest parent exercising like power of restraint over children. This seems too plain to need authority.

40 Wis. 328, 337-38 (1876). By 1881, the doctrine of *parens patriae* was well settled in Ohio. *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197, 204 (1881).

11. Illinois Juvenile Court Act, Ill. Laws 133 (1899).

12. Stanley J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1207-30 (1970) (discussing the state of juvenile justice in Illinois and nationally from the mid-19th century up to and including enactment of the Illinois Juvenile Court Act).

13. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 823-4 (1988). The Child Savers were predominantly middle class Americans who operated under the auspices of religious and civic organizations and sought to control and reduce juvenile crime, poverty, idleness, and other undesirable conduct by setting up institutions. William S. Geimer, *Ready to Take to the High Road? The Case for Importing Scotland's Juvenile Justice System*, 35 CATH. U. L. REV. 385, 388 (1986). The Child Savers saw a close connection between poverty, crime and urban slum life and argued the State had both a right and duty to intervene in a bad environment to save children from delinquency. Joel F. Hander, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 471(1988). Initially, the Child Savers favored breaking up the home and separating children from their unfit parents. *Id.*

14. READER & SACKS, *supra* note 3, at 6. One commentator described the informal nature of a juvenile proceeding reflecting the *parens patriae* philosophy: "The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, 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." Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909). A 1905 Pennsylvania Supreme Court decision also explains the new juvenile court's role in rehabilitation:

To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the [l]egislatures surely may provide for the salvation of such a child, if its parents or guardians be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection.

Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905).

opments based on this philosophy included informal, closed proceedings, which resulted in sealed records to avoid stigmatization.¹⁵ As a result, dispositions evolved based on the medical model of diagnosing social ills.¹⁶

During the 1920s, as the child guidance movement developed expertise, professional and mental health services available through the courts were expanded.¹⁷ Social workers and probation officers were now trained to divert delinquents away from institutions deemed too restrictive. The courts were given jurisdiction over children who committed adult crimes or who exhibited non-criminal or status offense behavior.¹⁸ These status offenders included truants, runaway youth, children beyond their parents' control, and those deemed incorrigible.¹⁹ Moreover, courtroom proceedings had little to do with law, and the lawyers' role was not prominent.²⁰

A new era of juvenile justice began in the 1950s, due in part to the greater mobility of juveniles, the growing problems of drug use, and the marked increase in violent youth gangs.²¹ Many segments of society became vulnerable, and critics of the juvenile justice system became more vocal and organized. Their potent attacks ranged from accusations of excessive judicial leniency with violent offenders²² to excessive harshness in depriving female status offenders of liberties.²³ Other criticisms related to the stigmatization of youths, discriminatory sentencing practices, and child abuse occurring in juvenile correction facilities.²⁴ The major thrust for change came with the

15. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law*, 79 MINN. L. REV. 965, 971 (1995).

16. Michael L. Langley et al., *The Juvenile Court and Individualized Treatment*, 18 CRIME & DELINQ. 79, 81 (1972).

17. READER & SACKS, *supra* note 3, at 6. See also Feld, *supra* note 13, at 824-25.

18. *Id.* at 825 n.12.

19. *Id.* See also Robison v. Wayne Circuit Judges, 115 N.W. 682, 683 (Mich. 1908); Hunt v. Wayne Circuit Judges, 105 N.W. 531, 533 (Mich. 1905); State *ex rel.* Olson v. Brown, 52 N.W. 935, 936 (Minn. 1892); People v. Glowacki, 22 N.Y.S.2d 22, 24 (N.Y. Super. Ct. 1940).

20. See Feld, *supra* note 15, at 968.

21. READER & SACKS, *supra* note 3, at 7. See also David R. Truman, Note, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 693-94 (1995) (discussing the history of gangs in the United States).

22. See Mark E. Bellamy, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 480 (1994).

23. Cheryl Dalby, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDP*, 12 LAW & INEQ. J. 429, 438-40 (1994) (discussing female status offenders and deprivations of liberty).

24. See, e.g., Martarella v. Kelley, 349 F. Supp. 575, 586 (S.D.N.Y. 1972) (discussing the deplorable conditions of New York's juvenile detention facilities in the context of the Eighth Amendment's ban on cruel and unusual punishment, specifically noting instances of abuse occurring within the facilities).

belief that the treatment model deterring delinquency had failed, and the juvenile court had not fulfilled its promise.²⁵ The decline in the era of rehabilitation had begun.

The pendulum began its swing and never stopped at the bottom. The United States Supreme Court's decision in *Kent v. United States* took note of the juvenile justice system's shortcomings.²⁶ In *Kent*, Justice Fortas wrote, "There may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults, nor the solicitous care and regenerative treatment postulated for children."²⁷ A few years later, *In re Gault*²⁸ established an innovative reform by holding that juveniles were entitled to the same procedural due process protections accorded adults, to wit, the right to counsel;²⁹ the right to notice of specific charges;³⁰ the right to confront and cross examine witnesses; the right to remain silent; and the right to subpoena witnesses in defense.³¹

Not long thereafter, an activist Supreme Court promulgated additional procedural protections in *In re Winship*.³² *In re Winship* provided that guilt must be proven "beyond a reasonable doubt" in juvenile proceedings.³³ Following these constitutional expansions, juvenile courts were bound by defined legal standards, as well as an existing social welfare philosophy — which are not always mutually inclusive obligations. The debate continued.

In the 1960s, when we hung out our dirty wash as a nation and social activism and permissiveness were on the rise, the country saw activism among legislative bodies. By July 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act,³⁴ which allocated funds for programs that emphasized community-based treatment and prevention. It established the of-

25. See *Kent v. United States*, 383 U.S. 541, 555 (1966). See also Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1104-06 (1991) (discussing the rejection of *parens patriae* and the implementation of the "just desserts" sentencing model in juvenile courts as a result of the juvenile courts' institutional failures to rehabilitate delinquents); Knipps, *supra* note 3, at 457.

26. *Kent*, 383 U.S. at 555-56.

27. *Id.* at 556.

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

29. *Id.* at 34-42.

30. *Id.* at 31-34.

31. *Id.* at 42-56.

32. 397 U.S. 358 (1970).

33. *In re Winship*, 397 U.S. at 368. These constitutional expansions temporarily halted in *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), where the Court refused to extend the right to trial by jury to juvenile proceedings.

34. Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified at 42 U.S.C. § 5601 (1994)).

fice of Juvenile Justice and Delinquency Prevention to oversee these programs.³⁵ This influential legislation, which called for decriminalization, deinstitutionalization, and the elimination of court authority over status offenders, created a furor.³⁶ There were those who believed that the courts' authority was essential in dealing with status offenders, but this new approach was hailed by the civil libertarians, who advocated the separation of criminal and non-criminal youth in juvenile court.³⁷ The debate also continued over deinstitutionalization and closing down juvenile correctional facilities, which some advocated replacing with smaller, more open local facilities.

Federal incentives were inadequate to induce the states to implement these legislative reforms. However, many states nonetheless enacted enabling legislation to receive what little federal monies were available. What this legislation really said was, "Parents, you owe to your children the duty to care for, protect, house, feed, and educate." Then we said to the child, "You don't have to obey your parents, you don't have to go to school, you don't have to stay at home, and there is no one that can make you do any of these things." When the court lost its authority over status offenders, buttressed by the freedom cry of the sixties, we saw an explosion of runaways in the seventies and eighties.

A zealous preoccupation by the administrators of the Office of Juvenile Justice was forcing states and communities to accept and implement untested, unproven, and costly theories, which created havoc in the administration of juvenile justice throughout the seventies. Recent research suggests these policies were disruptive, counter-productive, and to a large extent unnecessary.³⁸ It appears that the *modus operandi* of the Office of Juvenile Justice was the following:

We have a theory. We believe it is correct. You states and cities must accept it, or you will not get any federal money. If you accept it, we Feds will pay for a small part of the cost of your programs. We will also pay for research that demonstrates that we were right. Now we are told by researchers that we were wrong, or they still don't know if we were right. But, you still have to do it our way if you want the money.

35. 42 U.S.C. § 5611 (1994). The agency was established within the U.S. Department of Justice under the authority of the Attorney General.

36. See Sweet, *supra* note 6, at 405.

37. See Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41 (1981) (asserting that "youth advocates" push state courts to strictly adhere to the JJDPA).

38. See NAT'L ADVISORY COMM. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *SERIOUS JUVENILE CRIME: A REDIRECTED FEDERAL EFFORT* (March 1984).

As more and more children were leaving home or running away, the cry went out that a million children a year were being kidnapped. Pictures of youth appeared on milk cartons throughout the country, and it did not take long for this idea of kidnapping to be shot down. Research indicated that less than one-half of one percent were being kidnapped, and that the balance were running away from either an abusive home, or seeking "freedom." Runaway youth migrated to our major metropolitan cities, where they were sexually abused, ended up in prostitution, or became involved in pornography.

During the 1980 reauthorization of the Juvenile Justice Act, the National Council of Juvenile and Family Court Judges, together with the Ohio Association of Juvenile Court Judges, sponsored the "Valid Court Order" amendment, which was carried by Representative John Ashbrook of Ohio.³⁹ For those states who had not abandoned the status offender, this gave the status offender one bite out of the apple before being treated in some cases as a delinquent.⁴⁰ In addition, the National Advisory Committee, reviewing the work of the Office of Juvenile Justice asserted that the office had no theory of delinquency causation.⁴¹ Further, Congress recommended that the office should become more involved with the serious offender problem and that the

39. Pub. L. No. 96-509, 94 Stat. 2757 § 11(a)(13) (1980) (codified at 42 U.S.C. § 5633(a)(12)(A) (1994)). This measure was passed and became law on December 8, 1980. *Id.* See also H.R. REP. NO. 946, 96th Cong., 1st Sess., at 27 (1980), reprinted in 1980 U.S.C.C.A.N. 6098, 6114. The valid court order amendment provides in part:

[T]o receive formula grants under this part, a State shall submit a plan . . . provid[ing] within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses (*other than an offense that constitutes violation of a valid court order or a violation of section 922(x) of Title 18 or a similar State law*) . . . shall not be placed in secure detention facilities or secure correctional facilities.

42 U.S.C. § 5633(a)(12)(A)(1994) (emphasis added). Under the valid court order provision, when a juvenile violates a court order, the judge may place the child in a detention facility. Dalby, *supra* note 23, at 441-45.

40. The majority of courts having addressed the issue of whether a juvenile judge can incarcerate a status offender have held that a status offender may be incarcerated when found in contempt of a valid court order, so long as the juvenile has notice and an opportunity to comply with the order, violation of the order is egregious, less restrictive alternatives were considered but found to be ineffective, and special confinement restrictions are made to prevent intermingling with delinquents. *In Interest of D.L.D.*, 327 N.W.2d 682, 689 (Wis. 1983); accord *In re Michael G.*, 747 P.2d 1152, 1161 (Cal. 1988); J.E.S., 817 P.2d 508, 512-513 (Colo. 1991); *In Interest of Darlene C.*, 301 S.E.2d 136, 138 (S.C. 1983). The Ohio Supreme Court has not addressed this issue, but in a thoughtful dissent, Justice Wright argued that Ohio should follow *In the Interest of D.L.D.* and the majority of other courts in determining whether a juvenile can be adjudged delinquent for violating a valid court order. *In re Trent*, 539 N.E.2d 630 (Ohio 1989) (Wright, J., dissenting).

41. See NAT'L ADVISORY COMM. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 38, at 7-8.

office should stop contributing to the demise of the family.⁴² The pendulum started swinging the other way.

In 1984, the National Advisory Committee for Juvenile Justice and Delinquency Prevention sharply criticized the previous policy initiative of deinstitutionalization and diversion. The Committee argued for a new federal focus on serious juvenile offenders, with emphasis on deterrence, fixed sentencing, and incarceration of youth. State legislatures responded by passing laws allowing juveniles to be transferred to adult courts.⁴³

In addition to this wave of "get tough" legislation, the United States Supreme Court's majority opinion in *Schall v. Martin*⁴⁴ was a clear indication of a more restrictive attitude toward children's rights. Writing for the Court, Chief Justice Rehnquist recognized that "the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child."⁴⁵ Consequently, the Court held that preventive detention of juveniles before trial was a legitimate state action to prevent pre-trial crimes.⁴⁶

No great leap is required to realize the public has a stake in what happens to young people. It expects children to be educated, which means that they should not drop out of school. It expects children to be healthy, not to become alcoholics before they are old enough to drive. It expects children to be controlled until they learn self-control, which means that they should not run the streets at night. It expects children to adhere to a moral code, at least to the extent of not producing their own children while still going through adolescence themselves. No segment of the public, other than a few professors and other fuzzy-headed social theorists have been heard to say that compulsory education laws should be repealed, as they would effectively be if truancy jurisdiction were eliminated; or that children should not obey their parents as they could if incorrigibility jurisdiction were eliminated; or that children should be allowed to smoke and drink to their hearts' content, as they might if possession and consumption of cigarettes and alcohol were no longer unlawful for children.

In 1984, the Metropolitan Court's Committee of the National Council of Juvenile and Family Court Judges published thirty-eight recommendations relative to the serious offenders. It is interesting to note that this Committee was composed of the presiding judges of thirty of the largest metropolitan

42. *Id.* at 9-10.

43. *E.g.*, ALA. CODE § 12-15-34 (1995); IDAHO CODE § 20-508 (1995); OHIO REV. CODE ANN. § 2151.26 (Baldwin 1995).

44. 467 U.S. 253 (1984).

45. *Id.* at 265 (internal quotation marks and citations omitted).

46. *Id.* at 274.

areas in our country, wherein more than one-half of the serious juvenile violent crimes were being committed. This author suggests that if these recommendations had been implemented by legislation, we would not be facing the problems that we are today. Moreover, this point is particularly significant when one realizes the seeds of this problem were sown in the permissive sixties and carried through into the seventies and eighties.

As we move toward the end of the century, the pendulum is still moving and laws are being passed, I submit, that will produce unintended results. Toward this end, we must ask ourselves, "Are we so enamored with the successes of the adult prison system that we now send youth directly to an adult prison based on the offense, rather than individualized justice?" Such is the impact of legislation recently passed by the Ohio General Assembly, to wit, Amended Substitute House Bill 1,⁴⁷ wherein juveniles may be transferred directly to the adult criminal court for prosecution based upon certain charged offenses.⁴⁸

This legislation establishes offense categories. Category One Offenses are: aggravated murder; attempted aggravated murder; murder; and, attempted murder.⁴⁹ Category Two Offenses are: kidnapping; rape; voluntary manslaughter; involuntary manslaughter (F1); felonious sexual penetration; aggravated arson; aggravated robbery; and aggravated burglary.⁵⁰ A youth would be automatically bound over if one of the following applies: 1) the youth is fourteen years or older, has committed a felony offense, and has previously pleaded guilty or was convicted of a felony level offense in an adult court; or 2) the youth is fourteen years or older, has committed a felony offense, and is a resident of another state where he or she would be considered an adult; or 3) the youth is sixteen or seventeen years old and has been charged with a Category One Offense, or the youth is fourteen or fifteen years old, has committed a Category One Offense and has previously been committed to the Ohio Department of Youth Services for a Category One or Category Two Offense; or 4) the youth is sixteen or seventeen years old, has committed a Category One or Two Offense (except kidnapping) and has previously been committed to the Ohio Department of Youth Services for a Category One or Two Offense; or 5) the youth is sixteen or seventeen years old, has committed a Category Two Offense (except kidnapping), and displayed, brandished,

47. Am. Sub. H.B. 1, 121st Ohio General Assembly, Reg. Sess., (1995). The provisions of this bill went into effect on January 1, 1996. *Id.*

48. Am. Sub. H.B. 1 § 1.

49. Am. Sub. H.B. 1 § 1 (codified at OHIO REV. CODE ANN. § 2151.26(A)(1)(a)-(b) (Baldwin 1995)).

50. Am. Sub. H.B. 1 § 1 (codified at OHIO REV. CODE ANN. § 2151.26(A)(2)(a)-(b) (Baldwin 1995)).

indicated possession, or used a firearm during the commission of the act.⁵¹ Should any of the above be found by way of probable cause, the court will transfer the juvenile without an amenability hearing.⁵²

This legislation allows the juvenile court to transfer a youth fourteen years old or older who has committed a felony offense to the adult court.⁵³ As part of this process, the court must consider certain conditions in favor of transfer.⁵⁴ In addition, minimum sentences are provided for youth who commit certain acts.⁵⁵ For example, youths who have committed a Category Two Offense (except aggravated burglary) must serve a minimum of one to three years.⁵⁶

The same day the Ohio General Assembly passed House Bill 1, it also passed Senate Bill 2, which is an adult sentencing bill that is six hundred seventy-eight pages long.⁵⁷ This bill becomes effective July 1, 1996, and

51. Am. Sub. H.B. No. 1 § 1 (codified at OHIO REV. CODE ANN. § 2151.26(B) (Baldwin 1995)).

52. *Id.*

53. Am. Sub. H.B. 1 § 1 (codified at OHIO REV. CODE ANN. § 2151.26 (C)(1) (Baldwin 1995)).

54. Am. Sub. H.B. 1 § 1 (codified at OHIO REV. CODE ANN. § 2151.26(C)(2) (Baldwin 1995)) provides in part:

(C)(2) When determining whether to order the transfer of a case for criminal prosecution to the appropriate court having jurisdiction of the offense pursuant to division (C)(1) of this section, the court shall consider all of the following factors in favor of ordering the transfer of the case: (a) A victim of the act charged was five years of age or younger, regardless of whether the child who is alleged to have committed that act knew the age of that victim;

(b) A victim of the act charged sustained physical harm to the victim's person during the commission of or otherwise as a result of the act charged.

(c) The child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged, other than a violation of section 2923.12 of the Revised Code.

(d) The child who is alleged to have committed the act charged has a history indicating a failure to be rehabilitated following one or more commitments pursuant to division (A)(3),(4),(5),(6), or (7) of section 2151.355 of the Revised Code.

(e) A victim of the act charged was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the act charged, regardless of whether the child who is alleged to have committed that act knew the age of that victim.

55. OHIO REV. CODE ANN. § 2151.355 (A)(4)-(5) (eff. until 6-31-96); *see also* OHIO REV. CODE ANN. § 2151.355 (A)(4)-(5) (1996) (eff. 7-1-96).

56. *Compare* OHIO REV. CODE ANN. § 2151.355(5)(a) (Baldwin 1995) *with* OHIO REV. CODE ANN. § 2151.26(A)(2) (Baldwin 1995) (defining category two offenses)).

57. S.B. 2, 121st Ohio General Assembly, Reg. Sess., (1995).

effectively repeals the transfer section, the definitional section, and the dispositional sections of House Bill 1.⁵⁸ Moreover, Juvenile Rule 30, entitled "Relinquishment of Jurisdiction for Purposes of Criminal Prosecution"⁵⁹ has not been modified, vacated, or repealed, so it remains uncertain whether juvenile courts can proceed according to the rule instead of the new statutory provisions.⁶⁰

House Bill 1 and similar legislation are based on the perception that juveniles are responsible for most of the violent crime being committed in this country. The National Center for Juvenile Justice, under a grant from the Office of Juvenile Justice, published *Juvenile Offenders and Victims: A National Report*, detailing juvenile crime statistics.⁶¹ In this report, there are two important sets of statistics. Using the National Crime Victimization Survey, it was found that juveniles committed nineteen percent of the crimes of vio-

58. Compare Am. Sub. H.B. 1 § 1, 121st Ohio General Assembly, Reg. Sess., (1995) with S.B. No. 2, 121st Ohio General Assembly, Reg. Sess., (1995) §§ 2151.011, 2151.26 & 2151.27. It is certain that corrective legislation will be introduced to rectify this error, but it is submitted that this is a further indication of the "knee jerk" reaction to a purported problem that simply does not exist to the extent reported in the national media.

59. OHIO R. JUV. P. 30.

60. OHIO R. JUV. P. 30(D), Prerequisites to Transfer, provides:

The proceedings may be transferred [to criminal court] if the court finds there are reasonable grounds to believe both of the following:

(1) The child is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;

(2) The safety of the community may require that the child be placed under legal restraint for a period extending beyond the child's majority.

OHIO R. JUV. P. 30. The Rules of Juvenile Procedure also provide a balancing test for the court to follow in determining amenability to rehabilitation. OHIO R. JUV. P. 30(F) provides:

In determining whether the child is amenable to the treatment or rehabilitative process available to the juvenile court, the court shall consider the following relevant circumstances:

(1) The child's age and mental and physical condition;

(2) The child's prior juvenile record;

(3) Efforts previously made to treat or rehabilitate the child;

(4) The child's family environment;

(5) The child's school record;

(6) The specific facts relating to the offense for which probable cause was found, to the extent relevant to the child's physical or mental condition.

OHIO R. JUV. P. 30(F).

61. HOWARD N. SNYDER & MELLISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND

lence.⁶² Persons most likely to be victimized by juveniles were individuals between ages twelve and nineteen.⁶³ In contradistinction, juveniles were seldom the offender in crimes against older victims.⁶⁴ For example, seven percent of robberies of "persons ages twenty to thirty-four were committed by juveniles, and victims above age fifty rarely reported they were robbed by juveniles."⁶⁵

The second source of information addressing the relative volume of crime committed by juveniles and adults comes from the Federal Bureau of Investigation. In 1991, The FBI reported only "eleven percent of all violent crimes, i.e., murder, forcible rape, robbery, and aggravated assault, were cleared by the arrest of a person under age eighteen."⁶⁶ Juveniles were also arrested in only twenty-two percent of all cleared property crime, i.e., burglary, larceny, motor vehicle theft, and arson.⁶⁷

This report also found that although juveniles were responsible for a disproportionate share of the increase in violent crime, it was not accurate to say that juveniles were driving the violent crime train. In fact, adults were responsible for seventy percent of the recent increase in violent crime.⁶⁸ Therefore, juveniles were responsible for thirty percent of the violent crime increase between those same years.

Is it possible to project the increase in juvenile violent crime for the next ten to fifteen years? Estimates vary widely, but it is reasonable to assume that it will increase, and possibly increase dramatically. However, in this quest for statistical certainty, we must not lose sight of the method by which we collect our samples. For example, a juvenile judge presiding in a small county who committed four juveniles in 1994 and eight in 1995 increased his commitment rate one hundred percent. Conversely, a juvenile judge in a larger county who

DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT (Aug. 1995). See also Ira M. Schwartz et al., *Public Attitudes Toward Juvenile Crime and Juvenile Justice: Implications for Public Policy*, 13 *HAMLIN J. PUB. L. & POL'Y* 241, 248 (1992) (detailing public perception of serious juvenile crime increases).

62. See SNYDER & SICKMUND, *supra* note 61, at 47.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 48.

67. *Id.* Could this statistic be the reason that aggravated burglary was excepted out of the minimum sentencing under HB 1? A possible reason for the difference between the two reporting authorities is that adult crimes are more serious and therefore more likely to be reported. If this is true, the differential reporting would make the juvenile contribution to crime smaller from law enforcement's perspective than from the victims' perspective.

68. *Id.* at 110.

commits fifty in 1994 and seventy-five in 1995 increased his commitment rate by only fifty percent.

The national media has, as is their fashion, taken the percentages of increase and the projections of increase, and headlined them. Politicians, as is their fashion, have reacted by passing laws that are punitive and punishment oriented, replacing the individualized justice that has been the heart of the juvenile system in the past. Thus, Ohio adopted House Bill 1, referred to earlier, which retains judicial discretion but also adds statutory exclusion depending upon the juvenile's age and offense. Will it reduce violent juvenile crime? Only time will tell. However, the experience in other states indicates that mandatory transfer does not impact violent crime. For example, New York and Florida have had statutory exclusion for many years, and reports indicate that their juvenile crime increase exceeded the national average.⁶⁹ Moreover, in 1992 New York, Florida, New Jersey, Maryland, and California, respectively, had the highest juvenile violent crime arrest rates.⁷⁰

It is a sad commentary that many youths will end up in adult jails with little or no hope of a rehabilitative effort. The juvenile justice system has been the step-child of the criminal justice system since its inception. A common sense approach to crime indicates the best opportunity to prevent crime is to deter it.⁷¹ In the past, juvenile judges and juvenile justice professionals have been given the impossible task of habilitating or rehabilitating juvenile offenders without the wherewithal to do so.

A few years ago, I appeared before a Senate Committee testifying on behalf of the reauthorization of the Juvenile Justice Act. The chairman of that committee remarked publicly that children do not vote and children do not have PACS, and therefore their voice is not too loud in the halls of Congress. Is it too late to hope the anti-system advocates, with their untested theories, the members of the Ohio General Assembly, juvenile judges, and juvenile justice professionals can sit down and determine the best approach to the problem? There is no need for studies because the juvenile courts have been studied to death. What is needed is a cooperative effort and money. It has been said that our children constitute twenty-five percent of our population and one hundred percent of our future. There is no quick fix and no sure answer, but I submit that House Bill 1 is not the total answer.

69. HOWARD N. SNYDER & MELLISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE JUVENILE OFFENDERS AND VICTIMS - A FOCUS ON VIOLENCE 4 (May 1995).

70. *Id.*

71. George Bundy Smith & Gloria M. Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL'Y 347, 366 (1995) (arguing the key to preventing juvenile crime may lie not in rehabilitation, but in "risk-focused prevention").

