The New Rehabilitation

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INTRODUCTION

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

The problem is that the story is simply not true. This Article exposes a little-noticed development in how America addresses juvenile crime: specialty courts. These tribunals divert particular types of offenders out of general juvenile courts, marking them for intensive rehabilitation and treatment.\(^5\) Hundreds of such programs exist nationwide, transforming the experience of justice for tens of thousands of children.\(^6\)

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

Juvenile courts were created for the express purpose of rehabilitating offenders.\(^8\) Most histories of modern American juvenile justice begin in 1899, when Illinois established the first separate juvenile court for

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1. See infra text accompanying notes 71-76.
2. See, e.g., Barry C. Feld, Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,” 87 Minn. L. Rev. 1447, 1493-94 (2003) (arguing that in recent years, juvenile courts have abandoned a rehabilitative ideal and become punitive).
3. See id. at 1493-96.
4. In recent years, progressive commentators have come to wonder whether certain decisions generated so much backlash that they actually inflicted long-term damage to rights. See, e.g., Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596, 2625 (2003) (discussing backlash to Roe v. Wade and Broom v. Board of Education); Jeffrey Rosen, Kennedy Curse: On Sodomy, the Court Overreaches, New Republic, July 21, 2003, at 15 (noting backlash to Roe and expressing concern that Lawrence v. Texas might have similar effects).
5. See infra text accompanying notes 78-122.
6. See infra text accompanying note 124.
7. See infra text accompanying note 71.
8. See infra text accompanying notes 24-36. This was at least the stated rationale of early proponents of juvenile courts. Some critics have argued that the true agenda of such advocates was somewhat more complicated and less altruistic. See, e.g., Anthony M. Platt, The Child Savers: The Invention of Delinquency 3-12 (1969).
prosecuting delinquent children.\textsuperscript{9} Over the course of the next twenty-five years, virtually every other state adopted a similar tribunal for juveniles charged with crimes.\textsuperscript{10} According to the accepted history of American juvenile justice, this commitment to rehabilitation began to wane in the second half of the twentieth century, particularly after the United States Supreme Court extended many criminal procedural rights to children during the civil rights revolution of the 1960s.\textsuperscript{11} States narrowed the jurisdiction of the juvenile courts, exporting thousands of children into adult criminal courts. For those children remaining in the juvenile system, judges exercised less individualized judgment and served up increasingly punitive sentences.

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

\begin{itemize}
  \item \textsuperscript{9} Juvenile Court Act, 1899 Ill. Laws 131.
  \item \textsuperscript{10} CLIFFORD E. SIMONSEN & MARSHALL S. GORDON III, JUVENILE JUSTICE IN AMERICA 31 (1982).
  \item \textsuperscript{11} See infra text accompanying notes 53–70.
  \item \textsuperscript{12} In 1967, for example, the Supreme Court for the first time required juvenile courts to provide defendants with an attorney, the right to notice of charges, the right to confront witnesses, and the right to appeal. In re Gault, 387 U.S. 1, 33–36, 55–58 (1967). In 1970, the Court held that children could not be convicted—or adjudicated delinquent in the parlance of the juvenile courts—on anything less than proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 368 (1970). Still, one key difference remains between the treatment of children and adults—children prosecuted in the juvenile justice system are not entitled to a jury trial. See McKeiver v. Pennsylvania, 403 U.S. 528, 545–50 (1971).
  \item \textsuperscript{13} See, e.g., Feld, supra note 2, at 1495.
  \item \textsuperscript{15} See supra note 4. For a highly regarded recent articulation of the view that there has been a judicial backlash to the Warren Court, see LARRY KRAMER, \textit{THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW} 230 (2004), which discusses how the Rehnquist Court used public hostility to Warren Court decisions to create new doctrine even more conservative than that preceding the 1960s.
\end{itemize}
It turns out, however, that the accepted progressive critique of juvenile courts is incomplete. Over the past decade, a major new development has occurred within the American juvenile justice system that undermines the dominant view that juvenile rehabilitation is on its deathbed. Across the nation, in every state, local courts are creating new juvenile tribunals that explicitly seek to treat and rehabilitate juvenile offenders. These specialty courts, including drug, gun, and mental health courts, are specifically created to change children's lives so that they do not re-offend. This Article documents and describes the development of these new courts, placing them in proper context. In doing so, it casts the progressive critique of juvenile justice in a new light by suggesting that juvenile rehabilitation remains viable despite legislative hostility. This Article establishes that critics' fears of an end to juvenile rehabilitation are premature, and that there is at least some chance that we are witnessing a renaissance of rehabilitation. The New Rehabilitation is not the handiwork of legislators, however. Rather, local judges, lawyers, probation officers, and social workers—individuals we characterize as street-level bureaucrats—have created juvenile specialty courts from the ground up. Given that these courts have become so widespread, why have so many critics missed this burst of rehabilitative zeal?

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

Part I of this Article offers the standard progressive account of the "juvenile justice century."\(^\text{17}\) This traditional history describes the rise, decline, and fall of a unique rehabilitative system of juvenile justice. In this

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

I. THE STANDARD HISTORY OF JUVENILE JUSTICE

A. THE RISE OF JUVENILE COURTS AND THE PARENTING MODEL

According to most historians, the move to create special juvenile courts was the product of a broader movement within Western culture. In the late nineteenth century, criminologists touted a new science of crime. Challenging the notion of crime as grounded in “free-will choice,” they argued that criminal conduct was the result of “antecedent forces—biological, psychological, social, or environmental.” In 1892, for example, Elbridge T. Gerry, president of the New York Society for the Prevention of Cruelty to Children, cited poverty, inadequate housing, and neglect as causes of juvenile delinquency. If the consensus view was that crime could no longer be explained by free will, retributive punishment—imposition of a sentence based on an offender’s moral responsibility—made no sense. At the same time, scholars and Progressive activists, motivated by a growing

19. See id. at 335; see also DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA 50–61 (rev. ed. 2002).
20. See Feld, supra note 2, at 1457 n.25 (citing DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICAN 50–52 (1980)).
belief in science and rationality, became convinced that experts were capable of addressing the damage caused by these “antecedent forces,” thus solving the crime problem. As Barry Feld explains it, “[a] growing class of social science professionals fostered the ‘rehabilitative ideal,’ which requires a belief in human malleability and a consensus about the appropriate directions of personal change.”22 Since each individual would require a particular regime of treatment, a cornerstone of the new Progressive program was the individualization of punishment.23 If courts were to effectively rehabilitate offenders, they would need to tailor their punishment to the precise needs of that individual.

The juvenile court, in this view, was the culmination of efforts of the positivist criminologists and Progressive activists. It would be a special tribunal designed to address the individual needs of delinquent children, provide care and rehabilitation, and ensure that they could go on to live lawful, productive lives. The Illinois legislature moved first to turn this new view of crime into substantive policy.24 The Juvenile Justice Act of 1899 served as a model for juvenile justice policy across the nation. This legislation, designed to “regulate the treatment and control of dependent, neglected and delinquent children,”25 was the first attempt to create a specialized set of courts to deal with offenders under the age of sixteen.26 The Act “defined a rehabilitative rather than punitive function of a court of special jurisdiction for neglected, dependent and delinquent children under the age of sixteen.”27 Within twelve years, twenty-two states followed Illinois’ lead and created juvenile courts. By 1925, every state except Maine and Wyoming had created a criminal justice system specifically for juvenile offenders.28

These courts operated on a paternalistic or parens patriae model of justice.29 Most state statutes provided that juvenile courts would function as

22. Feld, supra note 18, at 336.
25. Id.
26. Id.
29. H. Ted Rubin, Juvenile Justice: Policy, Practice, and Law 54 (2d ed. 1985). Parens patriae is, quite literally, a paternalistic approach to juvenile rehabilitation. See id. at 52–56. The term, which means “father of the country,” was derived from English equity courts that used the term to refer to judicial protection of people who could not legally take care of themselves, such as “orphans, widows, and minors.” Janet Gilbert et al., Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency), 52 Ala. L. Rev. 1153, 1158 (2001) (citing Earl
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civil, rather than criminal, tribunals. The judge was to serve as a loving parent—in most cases, a father—providing the helpful discipline that would lead the child to a new, crime-free life. Legislators gave juvenile courts a broad range of powers. Judges could intervene in a child’s life with minimal instigation. If a child was charged with a crime, or a variety of pre-criminal acts such as vagrancy, truancy, and living an immoral life, the court’s jurisdiction attached. Courts offered children few standard procedural protections. The judge alone would hear the facts, witnesses were not required to appear in person, defendants were not entitled to juries, and in many jurisdictions, a judge could adjudicate a child delinquent—that is, find him guilty—on a mere preponderance of the evidence. If a judge found that a child had committed a legal transgression, he could impose a wide range of sanctions—some light, and others harsh—irrespective of the severity of the underlying offense. According to the accepted history of these courts, judges focused on the individual needs and capacities of the offender, not on the characteristics of the crime. They ordered offenders into any program that the judge thought would “cure the youth,” and left the disposition process open for as long as necessary to ensure that the child had indeed been rehabilitated.

Proponents of this approach took the parenting model very seriously. Judge Julian Mack, a leading advocate for the emerging juvenile justice system, described the process in painstaking detail in a 1909 Harvard Law Review article. Among other things, he argued that the layout of the room was essential to effective adjudication. He believed that the judge was to be “[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him.” Judge Mack wanted to take the juvenile into his charge “not so much to punish as to reform, not


31. See Platt, supra note 8, at 140. The Illinois Juvenile Court Act of 1899 specifically authorized courts to levy penalties for “pre-delinquent” behavior, giving judges the ability to intervene in a child’s life as a parent would be empowered to do. Id. at 138.

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

33. Ainsworth, supra note 14, at 1099.

34. Id. at 1099–1100.

to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."

In the standard account, this model of juvenile justice remained fairly static until the 1960s. Commentators typically gloss over the period from 1925—when these courts became ubiquitous—until 1966—when the Supreme Court began expanding criminal procedure protections to children. However, some scholars have questioned the efficacy and fairness of the juvenile courts between 1899 and the mid-1960s. In particular, a group of critics has long attacked the juvenile courts on the grounds of race disparities. On the whole, however, commentators treat this period with a sort of silent deference, as though the juvenile justice system was truly in its halcyon days.

36. Id. at 107. Judge Mack described the *parens patriae* movement in the juvenile courts as moving away from the idea "that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma." Id. at 109.

37. For example, it has been noted:

Notwithstanding the emphasis on "saving" children, Judge Richard S. Tuthill of the Chicago juvenile court sent thirty-seven juveniles to adult court in the first year of the new juvenile court's existence. The sentences imposed in juvenile court sometimes resulted in a longer period of incarceration than a child would have received if he had been prosecuted for the same offense in adult court.

Fedders et al., *supra* note 30, at 86; see also Zierdt, *supra* note 21, at 408 ("From time to time, the objection was raised that juvenile proceedings were actually criminal proceedings . . . . The consistent rebuttal to these constitutional concerns was that the juvenile court's decisions were the result of compassion . . . .").

38. See Feld, *supra* note 2, at 1484-85. Feld notes that a number of studies conducted in the early 1960s showed that juvenile courts were processing and harshly punishing a disproportionate number of minority children. Id. See generally PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 82 (1967); William R. Arnold, *Race and Ethnicity Relative to Other Factors in Juvenile Court Dispositions*, 77 AM. J. SOC. 211, 217-18 (1971); Sidney Axelrad, *Negro and White Male Institutionalized Delinquents*, 57 AM. J. SOC. 569, 574 (1952). Claims about disparate treatment of minorities within the juvenile justice system have continued even after the Court's extension of procedural rights to children. For example, there is some suggestion that African-Americans are transferred to adult court at rates greater than whites. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS* 59 (1995) (indicating that in states studied, African-American children charged with violent offenses are transferred at 1.8 to 3.1 times the rate of white children charged with these crimes). But see Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) (acknowledging racially disparate waiver rates but concluding that "race effects disappeared when other variables were controlled").

B. The Fall of Rehabilitation

By the 1960s, however, the Warren Court was increasingly interested in giving clearer shape to criminal procedural protections. In the 1967 landmark case, *In re Gault*, the Court held that juveniles prosecuted in juvenile courts were entitled to many procedural protections previously denied children. That case signaled the end of the unbridled discretion of juvenile court judges to conduct their hearings and trials in the manner described by Judge Mack at the beginning of the century. In *Gault*, a fifteen-year-old Arizona defendant charged with making a lewd phone call was taken into custody overnight without any notice to his parents. The probation officer filed a pro forma petition that never actually identified what offense Gault had committed. The judge never heard testimony from the victim; instead, he relied on the second-hand report of a juvenile probation officer. The offender received neither proper notice of the hearing, nor the assistance of counsel. His hearing was never transcribed, and Arizona law made no provision for an appeal. Gault was adjudicated delinquent and committed to an industrial school—the equivalent of a prison for children—until age 21 "unless sooner discharged by due process of law." For the same offense, an adult could have received a fifty-dollar fine or two months' imprisonment.

The Supreme Court rebelled. The majority held that juveniles facing delinquency proceedings in juvenile court were entitled to many of the same protections as adults. The protections include notice of the specific charges to be addressed at the delinquency hearing, the assistance of counsel, protection against self-incrimination, and the ability to appeal the

40. 387 U.S. 1 (1967).
41. *Id.* at 30. The Court actually addressed delinquency proceedings a term earlier, in *Kent v. United States*, 383 U.S. 541, 562 (1966). There, the Court held that children were entitled to certain procedural protections in the context of a juvenile transfer hearing. *Id.*
42. *See Gault*, 387 U.S. at 18–21.
43. *Id.* at 5.
44. *See id.*
45. *See id.* at 5–6.
46. *See id.* at 10.
48. *See id.* at 8. The testimony was conflicting as to whether the defendant placed the call or if he was with another boy who actually placed the call. *Id.* at 7. After the female on the other end of the phone answered, the caller asked: "Have you got big bombers?" *See Charles E. Springer, Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POLY 397, 405 n.36 (1991). The Supreme Court's opinion did not describe the actual words uttered by Gault or his friend.
50. *Id.* at 8.
order of the trial judge. If there was any remaining doubt that the juvenile justice system was moving quickly to replicate the adult criminal justice system, procedurally at least, the Court dismissed such questions in *In re Winship.* There, it held that a court could not adjudicate a child's delinquency on less than proof beyond a reasonable doubt, rejecting New York's use of the preponderance of the evidence standard.

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

51. *Id.* at 10. Because juvenile judges neither advised offenders of their right to counsel nor appointed counsel for them, most children continued to be unrepresented by counsel at delinquency proceedings. See W. VAUGHN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 19–20 (1972). At the time that *Gault* was decided, attorneys represented about five percent of children appearing in delinquency proceedings. See BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 27 (1993). As of the early 1990s, at least half of the defendants in juvenile courts were still unrepresented by counsel. *Id.* at 28. There are many different reasons why children may continue to be unrepresented. For example, some parents may be reluctant to retain an attorney, public defenders may not be available, judges may downplay the importance of retaining counsel, and treatment-oriented judges may not want an attorney to limit their discretion. *Id.*

52. *In re Winship,* 397 U.S. 358, 360, 368 (1970). The Court extended the similarity between delinquency proceedings and adult criminal trials in *Breed v. Jones,* 421 U.S. 519 (1975). In *Breed,* the Court held that double jeopardy protected juveniles from the possibility of being tried in criminal court following a delinquency proceeding. *Id.* at 541.

53. *See Zierdt,* supra note 21, at 411. The number of total reported crimes increased from 1,861,261 in 1960 to 10,192,034 in 1974. NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960–1993 app. 1 (1994) (citing FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS (1960–1975)). This anxiety was fueled by a blend of reality and perception. Arrest rates for both juveniles and adults were indeed on the rise between 1960 and 1974. NAT'L ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS & GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION: REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION 1 (1976). According to one source, juvenile arrests for violent crimes increased 293.4% between 1960 and 1975, while adult crime increased only 130.1% during the same period. PAUL A. STRASBURG, VIOLENT DELINQUENTS 13–14 (1978). Some scholars believed that the "perceived increase in youthful violence in the United States today appears to stem from the recent interest by the mass media in the problems of crime rather than to reflect any real increase." Eugene Doleschal & Anne Newton, The Violent Juvenile, 10 CRIM. JUST. ABSTRACTS 539, 539–73 (1978). To try to counter the media reports, Judge Seymour Gelber stated that "[j]uvenile crime is not pervasive, not violent, not increasing, and not destined to destroy our society." Seymour Gelber, Treating Juvenile Crime, USA TODAY, Jan. 1983, at 26. At least one study found that the actual number of personal crimes committed by juveniles decreased during the 1970s by more than thirteen percent. M. JOAN MCDERMOTT & MICHAEL J. HINDELANG, OFFICE OF JUVENILE JUSTICE & DELINQUENCY, ANALYSIS OF NATIONAL
The standard description of this backlash identifies several ways in which states abandoned rehabilitation. First, legislatures narrowed the jurisdiction of the juvenile justice system by diverting some crimes to the adult system, making it easier to transfer individual defendants to adult court, and shifting the age at which juvenile court jurisdiction attaches. Most juvenile courts have long allowed prosecutors to transfer—or “waive”—particular child defendants to adult court upon consent of the judge. In recent years, many legislatures have relaxed the waiver process to make it easier to move children to adult court. In many jurisdictions, one change has shifted the burden of proof in these waiver hearings from the state to the defendant. Other states have adopted mandatory waiver provisions, which require judges to grant transfer requests if certain preconditions are met. In South Carolina, for example, a judge must transfer a case of any child over the age of thirteen, if he has been twice adjudicated delinquent and now faces charges on an offense carrying a maximum adult sentence of more than ten years’ imprisonment. Many states automatically transfer capital cases when the offender is over a certain age, such as fourteen. In other jurisdictions, the entire transfer decision has been left to the prosecutor’s discretion. Finally, some states have lowered the age at which

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**CRIME VICTIMIZATION SURVEY DATA TO STUDY SERIOUS DELINQUENT BEHAVIOR: MONOGRAPH ONE: JUVENILE CRIMINAL BEHAVIOR IN THE UNITED STATES: ITS TRENDS AND PATTERNS 11–12 (1981).**

54. See Howard N. Snyder & Melissa Sickmund, Office of Juvenile Justice & Delinquency Prevention, Juvenile Offenders and Victims: 1999 National Report 86 (1999), available at http://www.ncjrs.gov/html/ojdp/nationalreport1999/chapter4.pdf. In some states, prosecutors have the authority to decide whether children of a certain age will be tried as adults or remain within the juvenile justice system. For example, one author has expressed concern about the number of cases that Florida prosecutors have transferred to adult court and the current trend that seems to be increasing the number of states that allow prosecutors to decide the fate of juvenile offenders. Vincent Schiraldi & Jason Ziedenberg, The Florida Experiment: Transferring Power from Judges to Prosecutors, 15 CRIM. JUST. 46, 47 (Spring 2000).


56. Indeed, by 1997, fourteen states had adopted these laws. See Griffin et al., supra note 55, at 2.


58. See, e.g., Md. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (LexisNexis 2002) (requiring transfer at the age of sixteen); Minn. STAT. ANN. § 260B.015 subdiv. 5 (West 2000) (requiring transfer at the age of fourteen).

children automatically fall within the jurisdiction of adult criminal courts. For example, in New Mexico, offenders age fifteen and older charged with first-degree murder are excluded from entering the juvenile courts. The law simply prevents the offender from being defined as a "child."

Commentators point to a second way in which legislatures have derailed rehabilitation: by imposing statutory limits on the individualization of juvenile sentences. They have attempted to achieve this both by demanding that judges base their sanctions solely on the nature of the offense—rather than the juvenile’s circumstances—and by creating mandatory or suggested sentencing structures for particular crimes. According to one commentator, as of 1997, seventeen states and the District of Columbia had adopted some sort of mandatory minimum provision for certain juvenile offenders. In 1996, for example, Arizona enacted a law that required a juvenile age fourteen or older, who is adjudicated for a second felony in juvenile court, to serve mandatory juvenile detention time, be placed under judicial intensive supervision, or be tried as an adult. Utah, on the other hand, employs sentencing guidelines to assist the probation officer in preparing the juvenile’s dispositional report and sentencing recommendations to the court.

A final way in which states have substantially altered their commitment to rehabilitation, according to the standard account, is in the way that they articulate the purpose of juvenile justice. In recent years, several legislatures have adopted language that suggests that elected officials do not want juvenile sanctions to be rehabilitative. Since the Supreme Court handed down Gault, more than a quarter of the states have adopted statements of legislative purpose to "de-emphasize rehabilitation and the child’s ‘best interest’ and emphasize the importance of protecting public safety.

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60. LA. CHILD. CODE ANN. art. 305 (1995); MASS. ANN. LAWS ch. 119, § 54 (LexisNexis 1994); MICH. Comp. LAWS ANN. § 600.606 (West 1982); MONT. CODE ANN. § 41-5-206(1) (1997); NEB. REV. STAT. § 43-276 (1993); OKLA. STAT. ANN. tit. 10, § 7306-2.1, 2.12 (West 1998); VT. STAT. ANN. tit. 33, § 5505(c) (1991); VA. CODE ANN. § 16.1-269.1(A) (1996); WYO. STAT. ANN. § 14-6-203(c), (e)–(f) (1997).
61. See Griffin et al., supra note 55, at 8.
62. See Butts, supra note 55, at 54.
enforcing children's obligations to society, applying sanctions consistent with the seriousness of the offense, and rendering appropriate punishment to offenders."65 For example, in 1979, the Washington legislature adopted the Juvenile Justice Act, which "makes [it] clear that youngsters who are being sentenced—i.e., deprived of liberty—are being punished rather than 'treated.'"66 That Act does not allow judges to deviate from the statutory sentences based upon his perception of the juvenile.67 Prosecutors are also prevented from considering such factors as abuse, neglect, or whether the child would benefit from treatment.68 Washington is not alone. For example, the purpose provisions of the Texas Juvenile Justice Code and the Wyoming Juvenile Justice Act begin with explicit language that the laws are designed "to promote the concept of punishment for criminal acts," while Connecticut's legislature stated its goal as adequately protecting the community and holding children accountable for their behavior.69 The view

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69. TEX. FAM. CODE ANN. § 51.01 (Vernon 2004); WYO. STAT. ANN. § 14-6-201 (2004); see also CONN. GEN. STAT. ANN. § 46b-121h (West 2004) (stating that the purpose of the statute is to "[a]dequately protect the community" and to "[h]old juveniles accountable for their unlawful behavior"); HAW. REV. STAT. ANN. § 571-1 (LexisNexis 2004) (reiterating that the juvenile laws are "necessary [for the] protection of the community").


Some states have retained a version of the standard purpose clause of the Juvenile Justice Act of 1925. Such provisions usually refer to the care and guidance that the child must be provided by the state. Some trace of the Juvenile Justice Act remains in the states of Arkansas, California, Florida, Georgia, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Jersey, Rhode Island, and South Carolina. See, e.g., ARK. CODE ANN. § 9-27-302 (1975); CAL. WLF. & INST. CODE § 202 (West 1976); FLA. STAT. ANN. § 39.001 (West 1951); GA. CODE ANN. § 13-11-1 (1971); 705 ILL. COMP. STAT. ANN. 405/1-2 (West 2004); IOWA CODE ANN. § 292.1 (West 1904); MASS. GEN. LAWS ANN. ch. 119, § 53 (West 1906); MINN. STAT. ANN. § 260.011 (West 1959) (repealed 1999); MISS. CODE ANN. § 43-21-103 (1979);
of conservative critics of the juvenile justice system was captured well by Congressman Bill McCollum, who commented that "serious juvenile offenders 'should be thrown in jail, the key should be thrown away and there should be very little or no effort to rehabilitate them.'"70

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

MO. ANN. STAT. § 211.011 (West 1957); NEV. REV. STAT. § 62.031 (1949) (repealed 2004); N.J. STAT. ANN. § 2A:4A-21 (West 1929); R.I. GEN. LAWS § 141-1-2 (1944); S.C. CODE ANN. § 20-7-470 (1976).

Still other states retain some portion of the Legislative Guide for Drafting Family and Juvenile Court Acts issued by the Children's Bureau in the 1960s. The Guide sets forth four purposes of state juvenile courts:

(a) "to provide for the care, protection, and wholesome mental and physical development of children" . . . ; (b) "to remove from children committing delinquent acts the consequences of criminal behavior, and to substitute therefore a program of supervision, care and rehabilitation;" (c) to remove the child from their homes "only when necessary for [their] welfare or in the interests of public safety;" and (d) to assure all parties "their constitutional and other legal rights."


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

actual sentences. For whatever reason, this broadened view of policy has not yet been incorporated into the punishment literature.

Whatever the strengths of these claims about the demise of rehabilitation, they have become dogma. Commentators now debate whether a future remains for the rehabilitative juvenile justice system. Several leading scholars have called for an end to a separate juvenile justice system because, they argue, it provides an incomplete basket of rights, while failing to offer substantial benefits to child offenders. Indeed, these arguments gained such serious traction that the American Bar Association dedicated a panel to the doomsday proposals during its 1992 meeting. Even those commentators who argue for maintaining the existing juvenile justice regime lament the demise of rehabilitation. For many progressives, the popular rejection of rehabilitation is best understood as a backlash to the liberalism of the Warren Court. As Barry Feld, the leading scholar of juvenile justice, put it:

By adopting some criminal procedures to determine delinquency, the Court shifted the focus of the juvenile court from the Progressive emphasis on “real needs” to proof of criminal acts; it formalized the connection between criminal conduct and coercive intervention and effectively transformed juvenile proceedings into criminal prosecutions. Although the Court did not intend its “Due


72. See, e.g., Arthur L. Burnett, Sr., What of the Future? Envisioning an Effective Juvenile Court, CRIMINAL JUSTICE, Spring 2000, at 6, 7 (noting the shift from rehabilitation and treatment to punishment); Batts, supra note 55, at 50; Wallance J. Mlyniec, The Special Issues of Juvenile Justice: An Introduction, CRIMINAL JUSTICE, Spring 2000, at 4 (noting that in the past decade, state and federal legislators have begun to abandon individualized, rehabilitative juvenile justice and asking what will happen in the next century).

73. See, e.g., Ainsworth, supra note 14, at 1085 (calling “for the abolition of the juvenile court”); Katherine Hunt Federle, The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights, 16 J. CONTEMP. L. 23, 25 (1990); Feld, supra note 14, at 69 (“[S]tates should abolish juvenile courts’ delinquency jurisdiction.”). It should be noted that there have long been critics calling for the elimination of juvenile courts—either because they were seen as underprotective or overprotective of child defendants’ rights. See, e.g., Frances Barry McCarthy, Should Juvenile Delinquency Be Abolished?, 23 CRIME & DELINQ. 196, 196 (1977) (“Delinquency jurisdiction should be removed from the juvenile court and be allowed to revert to the criminal courts.”); Stephen Wizner & Mary F. Keller, The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?, 52 N.Y.U. L. REV. 1120, 1121 (1977) (“It is now commonly agreed that the juvenile court has failed to achieve its objectives.”). The Feld and Ainsworth proposals are so notable, however, because they were a direct response to the authors’ perception that juvenile courts were no longer providing rehabilitative justice.


75. See, e.g., id. at 165–66 (“I agree with Barry Feld that the juvenile courts impose punishment in the name of treatment . . . . [I] do not share his belief in the abolitionist solution.”).
Process” decisions to obviate the juvenile court’s rehabilitative agenda, in the aftermath of *Gault*, judicial, legislative, and administrative changes have fostered a procedural and substantive convergence with criminal courts.76

In this respect, Feld’s critique resonates with a growing chorus of progressive commentators who sound a singular theme: the Warren Court’s civil rights revolution seemed like a good idea, but it has turned out to be bad for juvenile defendants in the long term.77

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

II. JUVENILE SPECIALTY COURTS

A. THE CREATION OF JUVENILE SPECIALTY COURTS

The first significant experimentation with specialty courts occurred less than two decades ago in the adult criminal justice system. In 1989, the chief judge of Florida’s eleventh judicial district in Miami issued an administrative order creating a new drug court.78 The Dade County drug court took a new—or more accurately, old—approach to drug crime: rehabilitation. Offenders who would otherwise have been prosecuted in a traditional state criminal court were diverted to a special court that handled drug-related matters exclusively. To qualify for the Miami drug court, the defendant must have been charged with possessing or purchasing drugs, tampering with evidence, solicitation for purchase, or obtaining a prescription by fraud, and the defendant must not have had more than two previous non-drug-related felony convictions, a history of violent crime, or an arrest for sale or trafficking.79 Once in drug court, offenders underwent a rehabilitative regime. They were routinely required to complete a treatment program, such as Alcoholics Anonymous or Narcotics Anonymous, as well as attend


counseling sessions and submit to random drug testing. The defendant was expected to engage in "direct, regular, and frequent conversation" with the judge to assist the rehabilitative process. The system was built on both punishments and rewards. Offenders who stuck to the program were offered rewards such as such as T-shirts, mugs, and key chains. Those who repeatedly used drugs were subject to tiered sanctions.

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

82. See NOLAN, supra note 80, at 40.
83. The National Association of Drug Court Professionals provided the following drug court statistics as of September 8, 2003: 1,078 drug courts were in operation (693 for adults and 285 for juveniles, 86 family, and 52 tribal courts); more than 300,000 adults and 12,500 juveniles had enrolled in drug courts; 73,000 adults and 4,000 juveniles had graduated; there had been a 70% retention rate; and 1,000 drug-free babies and 3,500 parents regained custody because of drug court efforts. See Nat'l Ass'n of Drug Court Prof'l's, Drug Courts Today (2003), http://www.nadc.org/whatis/drucrmtoday.html. According to American University's Justice Programs Office, there were 1,481 drug courts in operation nationwide as of September 29, 2005. See JUSTICE PROGRAMS OFFICE, AM. UNIV., BJA DRUG COURT CLEARINGHOUSE PROJECT: SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY 100 (2005), available at http://spa.american.edu/justice/publications/us_drugcourts.pdf.
84. See, e.g., JUDICIAL COUNCIL OF CAL., DRUG COURTS: PROGRAM BENEFITS (2006), www.courtinfo.ca.gov/programs/collab/drug.hum#benefits (noting average treatment costs between $900 and $1,600, compared to $5,000 for the minimum period of incarceration); Daniel T. Eismann, Drug Courts: Changing Peoples' Lives, ADVOCATE (Idaho), Sept. 2003, at 16, 17 (claiming that only 43% were employed prior to entering this court but that 96% were employed full-time by graduation); David Reichert, Drug Courts Have Low Recidivism Rate, 87 JUDICATURE 87, 87 (2003) (claiming a rearrest rate of 27.5% over two years for drug court participants compared to a rearrest rate of 68% over three years); Ohio Report Demonstrates Positive Outcomes from Drug Courts, BEHAV. HEALTH ACCREDITATION & ACCOUNTABILITY ALERT (Manisses Commc'ns Group, Inc., Providence, R.I.), Sept. 2002, at 2 (stating that "drug court graduates on average were 15% less likely to be re-arrested than a comparison group that did not receive drug court services"); Report Gives National Figure on Drug Court Recidivism Rates, BROWN UNIV. DIG. OF ADDICTION THEORY & APPLICATION (Manisses Commc'ns Group, Inc., Providence, R.I.), Sept. 2003, at 6 (stating that a recent report noted that within one year of graduation, 16.4% of drug court graduates were rearrested for serious offenses, while it was 27.5% within two years).

Cf. Todd Hutlock, Addressing Concerns About Drug Courts, BEHAV. HEALTH MGMT., Mar. 2003, at 20. Despite the overwhelming number of proponents of drug courts, it is not without its critics. Some critics claim that drug courts tend to focus on white, middle-class offenders, and that the drug court judges overreach their boundaries. Id. Another criticism is that drug
Other specialty courts have surfaced in the succeeding years since the Dade County experiment. These include habitual offender, mental health, domestic violence, and gun courts. In Florida, repeat-offender courts enjoy a smaller caseload, which allows prosecutors to offer tougher plea bargains. By processing fewer cases, the court can hold more trials, allowing the prosecutor to decline most plea offers that do not include enhanced penalties for habitual offenders. King County, Washington, officials created a mental-health court to keep mentally ill offenders from spending unnecessary time in jail, where they do not receive the mental-health-treatment services that they desperately need. The New York domestic violence court provides a quick response to the victims’ needs and judicial supervision of cases from arraignment through post-disposition. It also sets up a system of accountability for those agencies responsible for monitoring the defendant’s actions. While gun courts have also started to gain popularity, they do not focus on the rehabilitation of the offender. Rather, they center on heightened sentencing for those convicted of crimes involving firearms.

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

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86. Id.


89. For example, in a New York City gun court, “one judge presides over all qualifying cases from beginning to end.” Herbert Lowe & Glenn Thrush, Gun Court to Expand into Queens, Bronx, NEWSDAY, Dec. 17, 2003, at A17. That same judge makes all rulings, presides over all hearings and trials, and imposes sentences on all offenders. Id. In New York City, in the first six months of the gun court, the median jail sentence rose from ninety days to one year, those receiving jail sentences rose as well from fourteen percent to forty-four percent, and probation has become virtually extinct for those who are found guilty of an offense involving carrying a concealed weapon. Id.
creating the first juvenile drug court in 1995. In this early, rudimentary juvenile drug court, the judge presided over both the regular family court docket as well as the separate family drug court cases. To enter the court, Judge Parnham required participants to plead guilty to contempt of court, accept a six-month suspended sentence, and comply with any additional conditions from the drug court sentence.

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

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


92. Id. at 26.

93. In 1998, one of the first studies to look at the early juvenile drug court programs claimed that early “evaluations suggest that juvenile drug courts are providing a positive impact on the recidivism and retention rates of substance abusing juvenile offenders.” Michelle Shaw & Kenneth Robinson, Summary and Analysis of the First Juvenile Drug Court Evaluations: The Santa Clara County Drug Treatment Court and the Delaware Juvenile Drug Court Diversion Program, 1 NAT’L DRUG CT. INST. REV. 73, 74 (1998). One excellent source on juvenile drug courts is the American University Justice Programs Office. Its Web site provides an interactive map, for example, which allows a reader to identify all drug courts—juvenile and adult—by state and county, in many cases with date of initiation. See Am. Univ. Justic Programs Office, Drug Court Clearinghouse: Drug Court Activity by State, http://spa.american.edu/justice/map.php (last visited Jan. 19, 2006).

94. See, e.g., Innovative Drug Court Program Offers Early Intervention, Reunites Families, ALCOHOLISM & DRUG ABUSE WRLY., July 15, 2002, at 1. The Article describes the Sacramento County Dependency Drug Court, part of the Juvenile Court, which sends parents to treatment within a short time of taking the children into protective custody. Id. at 4. In the first six months of the program, thirty-seven families were reunited after successful completion of the program by the parents. Id. at 5.

95. See infra notes 151–60 and accompanying text.

96. See infra notes 168–69 and accompanying text.

97. In Yolo County, California, the Juvenile Violence Court and Intervention program targets juveniles between the ages of twelve and seventeen who have committed offenses that involve violence or otherwise appear to be in need of anger management skills. See Yolo County Prob. Dept.’s Juvenile Services, http://www.yolocounty.org/org/probation/juvenile.htm (last visited Jan. 19, 2006). In addition to intensive monitoring, court appearances, anger management counseling, and alcohol and drug treatment for the juvenile offenders, the program also provides the parents with classes to help them deal with their children. Id.

98. For descriptions of various teen courts throughout the country, see Katiann M. Kowalski, Courtroom Justice For Teens—By Teens, CURRENT HEALTH 2, April/May 1999, at 29;
While the general jurisdiction of courts is usually authorized by a state legislature, these specialty courts are typically homegrown creations. Local courts carve out specialty docket from their general court business. The impetus for forming these new courts often comes from a local judge. The idea of a specialty court may surface for a variety of reasons, including particular local case management issues (such as court overloading), the concerns of juvenile court judges or other players in the juvenile court system seeking better outcomes in particular cases, or the growing notoriety of such courts in other jurisdictions. In many cases, the availability of federal grant money to fund such projects may focus attention on these types of courts and help motivate players to organize them.

Whatever the triggering event, the typical history of these courts begins with a judge who reaches out to primary stakeholders in the judicial system, including prosecutors, probation officers, and defense attorneys, as well as other professionals routinely involved in—if not necessarily integral parts of—the juvenile justice system. Such professionals may include police officers, school officials, social workers, therapists, and others. At this point,


99. See Gilbert et al., supra note 29, at 1197–98 (describing specialized courts as resulting from “judicial frustrations” and suggesting that the creation of specialty courts was the fruit of judicial work).


101. This presumably motivated the Santa Clara County Superior Court in California, if its press releases are to be believed. See, e.g., Press Release, Superior Court of Cal., County of Santa Clara, Santa Clara County Superior Court Commences Juvenile Mental Health Court (Mar. 19, 2001), available at www.sccsuperiorcourt.org/news/news_juvment.htm.


104. See, e.g., David E. Arredondo et al., Juvenile Mental Health Court: Rationale and Protocols, 52 JUV. & FAM. CT. J. 1 (Fall 2001) (describing the creation of Santa Clara’s juvenile mental health courts as “the culmination of nine months of judicially convened meetings to establish ground rules and develop relationships”); Sheppard & Kelly, supra note 102, at 7 (describing how the Jefferson County Alabama judge created a juvenile gun court after holding a town meeting with key representatives from the criminal justice system); id. at 5 (providing similar guidelines to judges considering starting a new gun court).
state legislatures do not seem to be considered significant players. Although these new courts may, in practice, substantially alter the sorts of punishment imposed on delinquent children, they are typically seen as new procedural moves well within the power of local officials. In addition, the local officials do not necessarily seek to share the limelight for these efforts. Judges and the judiciary are quick to take credit for specialty courts,\textsuperscript{105} and other professionals have similarly gained stature from the courts’ successes.\textsuperscript{106}

The Jefferson County, Alabama, Juvenile Gun Court provides a good example of how a specialty court comes into being. In the mid-1990s, Birmingham, Alabama, was suffering from high rates of juvenile gun violence. Judge Sandra Storm, a juvenile court judge in Jefferson County, home to Birmingham, read an article in the Birmingham News discussing an adult gun court in Providence, Rhode Island.\textsuperscript{107} She convened a town-hall meeting to discuss the possibility of establishing such a court in Jefferson County,\textsuperscript{108} inviting law enforcement officials, prosecutors, criminal defense attorneys, the Alabama Department of Youth Services (the operator of the state’s detention facilities), and various social service agencies such as IMPACT, a local family counseling provider.\textsuperscript{109} After building connections between these groups and gaining their support, the family court reallocated funds and other resources to support the program.\textsuperscript{110} The new court began to hear cases on a specialty gun court docket. Unlike any move requiring legislative action, this process was relatively simple and quick. The new court obtained funding beyond the standard family court line through grants.\textsuperscript{111} Without a single vote in the Alabama legislature, a new court—with a new agenda—was created.

\textsuperscript{105} See, e.g., Press Release, Superior Court of Cal., County of Santa Clara, supra note 101 (boasting that “Santa Clara County Superior Court has assumed a national leadership role in addressing the issues of juvenile mental health by holding the nation’s first Juvenile Mental Health Court and that “Judge Davilla’s JMHC will effect a more humane treatment of juveniles with serious mental illness, help relieve the overcrowding of detention facilities, and decrease recidivism among youth”).

\textsuperscript{106} See, e.g., Arredondo et al., supra note 104 (touting the success of the Santa Clara mental health court authored by various professionals involved in the court, including judges, a prosecutor, a public defender, a psychiatrist, a probation officer, and an employee of the state’s office of family and children’s services).


\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} The Jefferson County gun court was able to operate because of funding from various grants, including one from the U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration, which provided funding “for psychiatric and other mental health services.” See Sheppard \& Kelly, supra note 102, at 10.
The same story surfaces elsewhere. In San Juan County, New Mexico, the Juvenile Probation and Parole Office officials presented the idea of creating a juvenile drug court to provide intensive treatment for children with substance-abuse problems.\textsuperscript{112} District Judge Byron Caton joined other members of the District Court, the Public Defender's Office, the District Attorney, Juvenile Probation, local law enforcement agencies, school districts, and others to plan a new juvenile drug court.\textsuperscript{113} The court accepted its first participants in September of 2000.\textsuperscript{114}

Just as the state legislature plays a minor role in the creation of these courts, it typically is not involved in their initial funding.\textsuperscript{115} Instead, local officials cobble together resources to support their new project. The state already may satisfy some of the costs, such as judicial and secretarial salaries. Other costs, such as salary of additional staff and the costs of particular rehabilitative programs, may need new funding sources. In many cases, local officials have sought out either private or federal funding for their new initiatives. The San Juan County Drug Court, for example, was originally funded with a grant from the Federal Office of Justice Programs.\textsuperscript{116} Typically, state money comes later, but even state money commonly took the form of grants from federally funded state pass-through grants, state supreme courts, and state agencies, rather than legislatively authorized direct funding.\textsuperscript{117}


\textsuperscript{113} Id.

\textsuperscript{114} Id.

\textsuperscript{115} Initial funding is often sought from the U.S. Department of Justice. For example, the Volusia County, Florida juvenile drug court was created with a $28,751 juvenile-planning grant from the Department of Justice. Bryant, supra note 90. The Clackamas County, Oregon, juvenile drug court is also wholly financed by federal grant money, in the amount of approximately $500,000. Noelle Crombie, Juvenile Court Shows No Mercy, More Results, THE OREGONIAN, Feb. 27, 2003, at South Zoner 1. Baltimore, Maryland, opened the doors of its juvenile drug court in March of 2003 with federal grant money that it received in 2001. Julie Bykowicz, Drug Court's Success Seen in Graduates, Officials Say: Ceremony Held for First 3 to Complete the Program, THE BALT. SUN, Mar. 5, 2003, at 1B.

\textsuperscript{116} Although initial funding came from the federal government, the state legislature later ratified the work of local bureaucrats by funding the courts through the statewide Juvenile Accountability Incentive Block Grant, which was administered by the Children, Youth and Families Department. See Bykowicz, supra note 115, at 1B.

\textsuperscript{117} There is even evidence that the state judiciary itself is covering some, or most of the expenses of juvenile and adult drug courts. For example, the Louisiana Supreme Court approved a grant out of its own expense fund to help cover the costs of the juvenile drug courts in St. Tammany Parish. Meghan Gordon, Courts to Increase Spending in 2005: Budget for Treating Drug Offenders Rises, TIMES-PICAYUNE, Dec. 21, 2004, at Metro 1. The total amount of funds available to juvenile drug courts still did not reach $400,000 for 2005, about one-quarter of the amount spent on adult drug courts in the same parish. Id.
State legislative funding has begun to surface, but is relatively new.\textsuperscript{118} Prior to receiving financial support from the state legislature in 2003, Nevada's specialty courts were supported by local government allocations and the State General Fund.\textsuperscript{119} Arizona has at least eighty-four different problem-solving courts, including nineteen drug courts, and according to the National Drug Court Institute, the state legislature does not appropriate one dollar for the support of these courts.\textsuperscript{120}

One of the most significant funding sources for juvenile courts is federal grants. Notwithstanding state legislative hostility to rehabilitation and alleged federal hostility to meddling in state criminal law, the Department of Justice appears committed to the creation of these courts. Title V of the Violent Crime Control and Law Enforcement Act of 1994 specifically sets aside federal funds to be used for drug court support.\textsuperscript{121} This support takes the form of Juvenile Accountability Incentive Block Grants; the Department of Justice identified the establishment of juvenile drug court programs and juvenile gun court programs as among its twelve purpose areas.\textsuperscript{122}

\textbf{B. Profiles of Juvenile Specialty Courts}

Juvenile specialty courts appear, at first, anachronistic. Juvenile courts were designed, originally, to provide individualized rehabilitative justice for children. Specialty courts are supposed to provide the same thing.\textsuperscript{123} Why, then, are they necessary? Because legislatures have worked diligently to undermine rehabilitative juvenile courts, existing court structures have difficulty delivering rehabilitative services. Specialty courts create new

\textsuperscript{118} According to the National Drug Court Institute, there are more than 1,667 problem-solving courts in operation across the country, including at least 1,183 drug courts. See NAT’L DRUG COURT INST., DRUG COURT BENEFITS, http://www.ndci.org/courtfacts_benefits.html (last visited Feb. 12, 2006) (including the following types of courts: adult drug courts, juvenile drug courts, family drug courts, D.W.I. and D.U.I. courts, reentry drug courts, tribal drug courts, reentry courts, community courts, mental health courts, teen courts, domestic violence courts, and others). Currently, twenty-one states have no legislation at all relating to drug courts (whether juvenile or adult), much less appropriations for them. \textit{Id.} At least sixteen states that currently have specialty courts provide no state funding for drug courts. New Jersey leads the states by providing $18.5 million in state money to drug courts, and California is in second place with between $15 million and $18 million in state funding. \textit{Id.}


\textsuperscript{120} See NAT’L DRUG COURT INST., \textit{supra} note 118. Illinois provides no monetary support to its twenty-one drug court programs. \textit{Id.}


\textsuperscript{123} See \textit{infra} note 154 and accompanying text.
forums where delinquency cases can be funneled to receive the individualized attention once dedicated to all children charged with delinquency. One purpose of specialty courts is to “abandon[] conventional adversarial roles in the interest of providing a more therapeutic and less contentious environment for the resolution of issues.”

Specialty courts pull cases out of the general delinquency docket and subject them to special, intensive handling on a smaller docket. Frequently, a defendant must enter a guilty plea—or its juvenile court equivalent—to become eligible for the special jurisdiction. Depending on the jurisdiction, it may be more or less difficult to divert the most serious cases from a punitive to a rehabilitative docket. In many states, the decision of whether to prosecute a child in adult court belongs to either a judge or district attorney. In these cases, judges and prosecutors committed to specialty courts retain the power to divert suitable children to a rehabilitative regime. Even in states with juvenile sentencing guidelines, it may be possible for children to enter conditional pleas that may be withdrawn later if they successfully complete a treatment program. In these ways, specialty courts may remain open even to offenders explicitly targeted by legislators for tough sentences.

Once in these tribunals, offenders are subject to a unique sanction and reward regime that often bears little resemblance to the main line of delinquency cases. Instead of a hands-off probation, or a bid at the state “industrial school,” children are brought back to court regularly so that judges can check on their progress. The offenders receive stepped sanctions to punish small transgressions and rewards to affirm small successes. They often undergo intensive, self-conscious treatment and therapeutic counseling programs. The roles of actors within the juvenile justice process have been fluid over the past quarter century. Until the civil-rights revolution in the Supreme Court, juvenile courts were driven primarily by judges, their professional staff (such as probation officers and social workers), and prosecutors. Lawyers, if they were present at all, had a


125. See HARRELL & GOODMAN, supra note 91, at 26 (noting that for family drug court eligibility, respondents must plead guilty to contempt of court). In Utah, drug court participants enter a “plea in abeyance,” which is a guilty plea that is put on hold while the offender is in a drug court program. See Utah State Courts, Utah Drug Courts, http://www.utcourts.gov/drugcourts/ (last visited Feb. 12, 2006). Once the offender has completed the program, “the guilty plea is withdrawn and the charges are dismissed.” Id.

126. In one of our own experiences, Bronx County district attorneys routinely circumvented legislatively imposed minimum sentences through use of conditional pleas. Thus, for example, a defendant pleads guilty to felony sale of a controlled substance, which carries a mandatory minimum, but sentencing is deferred. In the interim, the defendant enters a drug program. If she completes it successfully, the district attorney allows her to withdraw her plea, and enter a plea to possession, a charge that does not carry a mandatory minimum sentence.
peripheral role. With *Gault* and its progeny, juvenile courts began to more closely resemble adult criminal courts. They became adversarial, with a more clearly defined role for the defense attorney, and the judge became more of a fact-finder and sentencer than a parent. The advent of specialty courts has, to a significant extent, turned back the clocks, and it has done so while remaining consistent with the procedural safeguards of *Gault*.

Specialty courts have “all but abandoned conventional adversarial roles in the interest of providing a more therapeutic and less contentious environment for the resolution of issues.” Juvenile specialty courts have once again redefined the roles of court personnel, expert witnesses, defense attorneys, prosecutors, juvenile probation officers, and a host of others. The nonadversarial, treatment-based approach of most specialty courts has shifted the power structure by placing the decision-making in the hands of a few key participants, while reducing the roles of those who are accustomed to actively participating in criminal and juvenile court proceedings.

**Figure 1: Juvenile Drug Court Growth 1995–2004**

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127. See supra notes 40–52 and accompanying text (discussing the Court’s change in approach to juvenile justice).

128. Of course, the degree to which the judge truly acted like a parent is very much in doubt. Class and race differences between judges and their juvenile charges are likely to have transformed both the judge, and the child’s perception of their relationship. See Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 Wis. L. Rev. 375, 384.

129. Thompson, supra note 124, at 64.

130. One author has stated that “[t]his shift from a conventional framework to one in which prosecutors and defense counsel assume a more collaborative posture has ‘altered the dynamics of the courtroom, including at times, traditional features of the adversarial process.’” *Id.* at 77 (quoting John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 Fordham Urb. L.J. 277, 292 (2000)). The shift was also described as one from a “lawyer-driven” process to one that is “judge-driven.” *Id.*
Juvenile specialty courts come in a variety of forms. The most common variation is the juvenile drug court. As of January 2005, there were 334 different juvenile drug court programs across the country, including at least one in every state, as well as another 162 in the planning stage.\textsuperscript{131} They serve tens of thousands of children.\textsuperscript{132} Figure 1 shows the national growth of these courts in the past decade.\textsuperscript{133}

Juvenile drug courts provide participants with “intensive and continuous judicial supervision,” and they deliver an “array of support services necessary to address the problems that contribute to juvenile involvement in the justice system.”\textsuperscript{134} One juvenile drug court has been described as diverting “non-violent juvenile offenders exhibiting alcohol or substance abuse behavior from the traditional juvenile court process to an intensive individualized treatment process.”\textsuperscript{135} Drug courts are available to more than just children charged with drug crimes. The majority of such courts are also open to children facing theft and other property charges, and a sizable minority even accepts children charged with assault.\textsuperscript{136} Most of them share the same fundamental goals:

- Much earlier and much more comprehensive intake assessments.
- Much greater focus on the functioning of the juvenile and the family throughout the juvenile court process.
- Much closer integration of the information obtained during the assessment process as it relates to the juvenile and the family.
- Much greater coordination among the court, the treatment community, the school system, and other community agencies in responding to the needs of the juvenile and the court.
- Much more active and continuous judicial supervision of the juvenile’s case and treatment process.


\textsuperscript{132} See generally OJP Drug Court Clearinghouse & Technical Assistance Project, Am. Univ., Drug Court Activity Update: Summary Information: July 1, 2001, available at http://spa.american.edu/justice/resources/juvenilecourtactivity.pdf. This report, issued in 2001, when only 167 juvenile courts were in existence—many of which had been started within the year—found that 12,500 children had already participated. Although we have not found precise data since this time, this number has likely soared.

\textsuperscript{133} See OJP Drug Court Clearinghouse, Am. Univ., supra note 131, at 2.

\textsuperscript{134} See Cooper, supra note 122, at 1.

\textsuperscript{135} Warren R. McGraw, Cabell County Juvenile Drug Court Serves as a Model, W.V. LAW., Aug. 2001, at *8.

\textsuperscript{136} See OJP Drug Court Clearinghouse & Technical Assistance Project, Am. Univ., supra note 132, at 8–15.
- Increased use of immediate sanctions for noncompliance and incentives for progress for both the juvenile and the family.137

To implement these goals, drug courts employ a team approach. The judge typically heads up the team, but she coordinates a communal effort that includes the prosecutor, defense attorney, treatment providers, evaluators, probation officers, school representatives, and others.138 As opposed to the adult model, under which the offender may start the process in drug court, juveniles are usually adjudicated delinquent first, followed by placement in a drug court.139 In essence, a juvenile is required to both concede guilt and waive a panoply of rights—including a robust version of the right to counsel—in order to benefit from this “nonadversarial” procedure. It is this process that understandably makes defense attorneys uncomfortable. After all, they are in essence conceding not only a client’s guilt, but they also are relinquishing the attorney’s ability to help the child

137. ROBERTS ET AL., supra note 103, at 1. However, “all juvenile drug courts are not cut from the same cloth.” John J. Sloan, III & John Ortiz Smykla, Juvenile Drug Courts: Understanding the Importance of Dimensional Variability, 14 CRIM. JUST. POL’Y REV. 339, 358 (2003). Sloan and Smykla did find that most courts provided “reasonable costs to their clients”; focused on a “core group of offenders”; involved outside agencies; maintained “contact among the offender, the family, and the court”; and employed different forms of “incentives and sanctions to insure client compliance with.” Id.

138. Cooper, supra note 122, at 4. This team approach is a far cry from what one would expect to observe in a juvenile or adult criminal proceeding. It is hard to imagine a judge, prosecutor, and defense attorney, who consider themselves part of a team, working to place an offender in a treatment program and not arguing over the intricacies of the law of evidence or the finer points of the criminal law. See Sloan & Smykla, supra note 137, at 340 (describing the team approach used in juvenile courts). The ultimate decision authority rests with a judge, but in Delaware, Ohio, for example, “many of the decisions are made jointly by the drug court team.” DEBORAH KOETZLE SHAFFER & EDWARD J. LATESSA, CTR. FOR CRIMINAL JUSTICE RESEARCH, UNIV. OF CINCINNATI, DELAWARE COUNTY JUVENILE DRUG COURT PROCESS EVALUATION 2 (2002), available at http://www.uc.edu/criminaljustice/ProjectReports/Delaware_process_eval.pdf.

This new role of a judge as part of the treatment “team” is not without controversy. In Oklahoma, a drug-court participant was not allowed to continue the treatment program when he tested positive for cocaine use on at least five different occasions. Alexander v. State, 48 P.3d 110, 112 (Okla. Crim. App. 2002). He argued that the trial judge’s participation in the case as a member of the defendant’s Drug Court team necessarily led to bias on the part of the judge. Id. However, the state statute creating the drug court program allows participants of the team to serve in their regular capacity on the case at hand. OKLA. STAT. tit. 22, § 471.1 (2003). Unless a defendant can show facts that prove that the judge was biased against the defendant when he terminated the defendant’s participation in the program, the court held that an appeal based upon the bias of the trial judge will not be successful. Alexander, 48 P.3d at 115. One author has stated that this case poses the question of whether it is “appropriate for drug courts to undertake these activities that they do when the activities could be, perhaps more appropriately, located in the executive branch of government?” Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. REV. 875, 944 (2003).

139. See Cooper, supra note 122, at 6. In Delaware County, Ohio, for example, almost ninety-five percent of all participants in juvenile court had been adjudicated delinquent (in other words, had pleaded, or been found guilty) of their current charges. SHAFFER & LATESSA, supra note 138, at 11.
navigate the consequences of his plea. The "collaborative nature of treatment courts" cuts against the grain of what defense attorneys are trained to do. The drug court continues to exercise control over the case to ensure that the juvenile completes his prescribed treatment program.

From drug court, the juvenile is often directed to a substance-abuse or drug-treatment program. In addition to the intensive treatment and counseling, participants usually submit to frequent random drug tests and are often required to re-appear before the judge presiding over the case. They may also receive family support services, mentoring, and tutoring, and they may participate in recreational activities and community service.

Judges use both carrots and sticks to encourage compliance by the juvenile. In Delaware County, Ohio, juveniles who successfully avoid drug use are rewarded, for example, with "reduced community service hours, decreased drug testing, fewer court appearances, and extended curfew." In exceptional cases, their progress may be rewarded with "tickets to sporting events and gift certificates." In Mendocino County, California, participants may receive "[t]ickets for movies, athletic events and food" when they complete phases of the program. In the Juvenile Drug Court of Jefferson Parish, Louisiana, "clients" are offered incentives—such as extended curfew, movie passes, sports or concert tickets, reduction of community service hours, and food coupons—to reach certain goals.

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140. During an interview with an Oakland County Circuit Court judge, the interviewer asked, "Why should a defense lawyer recommend that his or her client plead guilty?" Kevin M. Oeffner, Juvenile Drug Treatment Court: An Interview with Circuit Judge Edward Sosnick, LACHES, Nov. 2001, at 28, available at http://www.co.oakland.mi.us/circuit/assets/docs/laches/ juvenile-drug-treatment-court.pdf. The judge answered that juvenile drug treatment court keeps the child from being incarcerated, and it allows the child to enter into a treatment program that is "family-focused." Id.


142. McGraw, supra note 135, at *8. Of course, the requirements for graduation from some programs are quite extensive. For example, the drug court administered by the Monroe County, New York, Family Court requires that a participant meet the following graduation requirements: (1) be in drug court for at least twenty weeks after admission; (2) twenty consecutive weeks of clean urine tests; (3) proof of optimum school performance; (4) no unexcused absences at court appearances for sixteen weeks; (5) no unexcused school tardiness or absence for twelve weeks; and (6) a recommendation for graduation by the treatment provider, case manager, school representative, family, and court. See Anthony J. Sciolino, Juvenile Drug Treatment Court Uses "Outside the Box" Thinking to Recover Lives of Youngsters, N.Y. ST. B. ASS’N J., May 2002, at 37.

143. See, e.g., SHAFFER & LATESSA, supra note 138, at 5.

144. See id.

145. See id.


On the other hand, judges sometimes impose sanctions when the offender does not succeed. These sanctions range from assigning an essay or subjecting the juvenile to greater drug testing, to house arrest, or a period in boot camp. A participant's total failure—often in the form of a new offense, unauthorized departure from a drug facility, or other egregious violations—may result in her expulsion from the drug-court program. In most cases, juvenile drug courts attempt to involve parents and other family members in the offender's treatment. As one juvenile court judge put it, juvenile drug court is "family-focused." 148 "Young people need the support structure that the family provides." 149

The key attribute of juvenile drug courts is that the overseers seek to transform the child's behavior. They work to break the child's dependence on drugs, and as a consequence, reduce the likelihood that he will commit future crimes of any sort. While the efficacy of such courts remains in doubt, there is no question about the nature of the project: treatment and rehabilitation. 150

Another form of specialized juvenile court is the gun court. Judges have developed significant gun-court programs in Detroit; Indianapolis; New York City; Washington, D.C.; Baltimore; and other major U.S. cities. 151 The Birmingham, Alabama, juvenile gun court has received particular attention. 152 That program has been described as having "successfully reduced recidivism rates" and violent crime in the community as a whole. 155 Juvenile gun courts are, by and large, treatment-based courts designed to teach children how to be responsible and how to shy away from carrying weapons, using drugs, and committing crime. Much like drug courts, the

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148. Oeffner, supra note 140, at 28.
149. Id. In response to a question asking why defense lawyers should recommend that their clients plead guilty so that they may enter drug treatment court, Judge Sosnick replied: "You should not underestimate the importance of the family support structure in overcoming substance abuse." Id. Of course, parents are not always eager to participate in the rehabilitation of their children. Courts sometimes use persuasion, or even coercion—the threat of jail—to encourage parental involvement. See Cooper, supra note 122, at 10.
150. As the University of Cincinnati's review of the Delaware County, Ohio, drug court put it, "[t]reatment is an essential component of the . . . Drug Court." Shaffer & Latessa, supra note 138, at 4. For a review of the literature on the efficacy of juvenile drug courts, see Sloan & Smykla, supra note 137, at 345–47.
151. Some juvenile gun courts were created to increase the level of sanction on children. In some jurisdictions, officers routinely declined to arrest children with guns, releasing them instead to their parents. See id.
153. See Sheppard & Kelly, supra note 102, at 7.
great majority of children within the gun court will first plead guilty to the offense. While the judge coordinates the juvenile gun court, probation officers play a central role, having the authority to provide both sanctions and services to offenders. In the Jefferson County Juvenile Gun Court, the Juvenile Probation Officer has the ability to recommend to the judge the type of treatment program that is appropriate to the individual and the extent of sanctions that should be imposed. Probation officers, with the assistance of others, develop treatment plans that become part of the child’s probation.

Treatment of offenders in the Jefferson County program includes a twenty-eight-day boot camp, parental education, a substance abuse program, intensive follow-up, and community service. All juveniles who are arrested for gun-related offenses are retained, and the special court holds a hearing within seventy-two hours. It is at this hearing that the offender is given the opportunity to either request a trial or plead “true,” which will cause him to enter into the gun-court program. At this point, the juveniles are sent to the High Intensive Training program in Prattville, Alabama, a twenty-eight-day boot camp where instructors instill self-discipline, respect for authority, and problem-solving skills. Jefferson County also requires parents to attend a seven-week workshop; failure to attend can result in the incarceration of the parent.

Local officials have also created juvenile mental-health courts. The first such tribunal was created in Santa Clara County (San Jose), California in 2001. Since then, juvenile mental-health courts have opened in Los Angeles, Miami, and Cincinnati, among other places. Much like the

154. *Id.* at 8.
155. *See* Jeffco InTouch, Juvenile Probation, http://www.jeffcointouch.com/jeffcointouch/index.asp (follow “Departments and Agencies” hyperlink; then follow “Family Court” hyperlink; then follow “Get Information” about “Administration” hyperlink; then follow “Get Information” about “Juvenile Intake and Probation Services” hyperlink; then follow “Get Information” about “Juvenile Probation” hyperlink) (last visited Feb. 12, 2006).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
161. *See* David E. Arredondo et al., *Juvenile Mental Health Court: Rationale and Protocols,* JUV. & FAM. CT. J., Fall 2001, at 1. As a result of resistance to the use of the label “mental health,” the court changed its name to the Court for the Individualized Treatment of Adolescents, or CITAM. *Id.* at 2.
Birmingham drug court, the Santa Clara mental-health court was the result of the efforts of a local judge, Raymond Davilla, who spent nine months designing ground rules and developing the necessary professional connections and relationships. Professionals from many different disciplines were instrumental in designing the court and making it function. The court team connects defendants and their families with mental health service providers in the county, insuring that the children receive essential treatment services. As in drug court, cases are closely supervised and reviewed frequently by the judge. Although children fourteen and over who have committed serious violent offenses are not eligible for the program, those under fourteen who commit these offenses, and those over fourteen who commit other serious offenses may participate. The court thus diverts children that might otherwise receive non-rehabilitative sanctions.

In addition to drug, gun, and mental-health courts, juvenile courts are also creating specialized programs for issues such as truancy and other lesser offenses. Truancy courts attempt to intervene with children in elementary and middle schools who display a recurring pattern of absenteeism before they are referred to a family court for juvenile adjudications. These courts


163. See Press Release, Superior Court of Cal., County of Santa Clara, supra note 101; Arredondo et al., supra note 161, at 1.

164. One way to understand the collaborative nature of this court is to consider the number of authors attached to a professional journal Article touting the court—eight different people are listed. The Article was written by three judges in Santa Clara County, a public defender, a prosecutor, a probation officer, an employee with the county’s mental health department, and a physician serving as a consultant to the project. See generally Arredondo et al., supra note 161. The inclusion of these authors can presumably be seen as part of the general buy-in process for the different participants.

165. See id.

166. See id.

167. See id. at 9–11.

168. For example, the Rhode Island Truancy Court was developed to reduce truancy rates by bringing schools, health providers, and families together to address the causes of and find the solutions to fight truancy. See Rhode Island Family Court Truancy Court Program, http://www.courts.state.ri.us/truancycourt/default.htm (last visited Feb. 12, 2006). The description of the St. Louis Truancy Court, staffed by volunteer judges, states: “Recognizing that truancy is a significant predictor of juvenile delinquent behavior and long-term economic hardship, the Truancy Court intervenes with elementary and middle school students displaying a pattern of absenteeism before the students need to be referred to the Family Court for truancy.” St. Louis County Truancy Court, Schools, Family and Courts Working Together to Improve Student Attendance, http://www.co.st-louis.mo.us/circuitcourt/truancy.html (last visited Feb. 12, 2006).
are often staffed with volunteer judges who want to address truancy issues before they develop into more serious delinquent behavior.¹⁶⁹ Teen courts, also called youth or peer courts, are emerging as a popular alternative for juveniles charged with status offenses and misdemeanors, such as shoplifting and possession of alcohol.¹⁷⁰ The idea behind such courts is that jury sentences by a teen’s peers will have an immediate effect and will cause him to learn from his mistakes.¹⁷¹ It is thought that if the rehabilitative system reaches adolescent offenders when they are “developing skills, habits, and attitudes that will prepare them” for adulthood, then it can prevent them from committing more serious offenses in the future.¹⁷² Teen courts are structured much like a high school mock trial—the defendant is represented and prosecuted by teen attorneys who are assisted by adult attorney volunteers.¹⁷³ The most common disposition in teen courts is community service, but victim apologies, letters, essays, teen court jury duty, and monetary restitution are also popular.¹⁷⁴ The end result is intended to be that “pride and ownership” will translate into lower recidivism rates and that teens who commit these minor offenses will not graduate to more serious crimes in the future.¹⁷⁵

III. UNDERSTANDING THE NEW REHABILITATION

Thus far, this Article has documented the prevailing progressive narrative about juvenile justice and contrasted that story with the facts on the ground. This Part attempts to make sense of the developments that were documented in Part II. First, it applies political science literature on street-level bureaucrats to explain why local officials have established tribunals that fly in the face of the prevailing legislative agenda. Second, it considers the implications of our research for issues beyond juvenile justice jurisprudence.

¹⁶⁹. St. Louis County Truancy Court, supra note 168.
¹⁷⁰. For descriptions of various teen courts throughout the country, see Kowalski, supra note 98, at 29; Coles, supra note 98, at 5; Khoury, supra note 98, at 1; and White, supra note 98, at 26.
¹⁷¹. See Jeffco InTouch, Teen Court, http://www.jeffcointouch.com/jeffcointouch/ieindex.asp (follow “Departments and Agencies” hyperlink; then follow “Family Court” hyperlink; then follow “Get Information” about “Programs Department” hyperlink; then follow “Get Information” about “Teen Court” hyperlink) (last visited Feb. 12, 2006).
¹⁷³. See Jeffco InTouch, supra note 171.
¹⁷⁴. Burnett, supra note 72, at 9.
¹⁷⁵. For a discussion of the success of one teen-court program in Kentucky in terms of recidivism rates and sentence completion, see Kevin I. Minor et al., Sentence Completion and Recidivism Among Juveniles Referred to Teen Courts, 45 CRIME & DELINQ. 467, 470–75 (1999). The authors state that more than two-thirds of the participants did not recidivate, and that there was a completion rate of more than seventy percent. Id. at 467.
A. Why Specialty Courts?

Legislatures want tough, non-rehabilitative responses to juvenile crime.\(^{176}\) Why, then, have local officials worked so hard to establish juvenile courts that run contrary to popular will? These efforts can be best explained by considering the particular place of trial judges, public service lawyers, probation officers, and other juvenile court regulars within the criminal justice policy apparatus. As this Article has shown, most criminal law commentators judge public policy by reference to legislatures and legislative actions. An important strand of political science literature, pioneered by MIT political scientist Michael Lipsky, shows that legislative preferences are an incomplete basis for evaluating actual, applied public policy.\(^{177}\) Because local officials must implement most legislative action in the area of criminal law, the decisions of these individuals substantially affects the actual criminal justice policies that take effect. Lipsky focuses primarily on officials who he terms "street-level bureaucrats."\(^{178}\)

Street-level bureaucrats are "public service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work."\(^{179}\) These include "teachers, police officers and other law enforcement personnel, social workers, judges, public lawyers and other court officers . . . who grant access to government programs and provide services within them."\(^{180}\) They are hired to execute broad public policy objectives, but they are often driven by their own personal priorities. As public service workers, they may be motivated by altruistic desires.\(^{181}\) In many cases, people who choose to work with child offenders do so out of a genuine desire to help children and resolve vexing social issues. At the same time, because of bureaucratic pressures to process cases, they are also driven by the desire to find ways of dealing with what can be overwhelming workloads.\(^{182}\) Finally, they may also act in ways consistent with their own interest in maintaining and expanding their autonomy.\(^{183}\)

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

\(^{176}\) See supra notes 62–70 and accompanying text.

\(^{177}\) See generally Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services (1980).

\(^{178}\) See generally id.

\(^{179}\) Id. at 5.

\(^{180}\) Id.

\(^{181}\) See id. at 72.


\(^{183}\) See Lipsky, supra note 177, at 19.
individuals who populate local courts, and particularly trial judges, are classic examples of street-level bureaucrats. In his analysis, Lipsky describes street-level bureaucrats as having considerable discretion, relative autonomy from institutional authority, a shortage of available resources with which to do their jobs, and conflicting messages about the goals they are supposed to achieve.\footnote{184}

Street-level bureaucrats tend to deliver policy in a manner that is "immediate and personal."\footnote{185} They are often expected to act as advocates, using their skills "to secure for clients the best treatment or position consistent with the constraints of the service."\footnote{186} Lipsky identifies the professionals that populate local courts as prototypical street-level bureaucrats. Writing in 1981, even before the rise of either adult or juvenile specialty courts, he pointed out that judges used their discretion over individual cases, as well as their relationships to court staff and social service providers, to "refer presumptive offenders to social programs, the successful completion of which will result in obviating their sentences."\footnote{187} Other scholars have focused on the "interdependence of judges, prosecutors, and defense counsel" and asserted that those individuals have created a kind of bureaucracy out of the social settings in which they find themselves operating.\footnote{188} The individuals responsible for creating juvenile specialty courts are prototypical street-level bureaucrats, and it appears that they behave in ways consistent with that classification.

This Article posits six reasons why local juvenile courts have created these tribunals. Using Lipsky's analysis as a lens, it suggests that local officials may be (1) acting on their personal beliefs and values, (2) managing scarce resources, and (3) working to preserve their jobs and autonomy. The final three explanations are not grounded in the street-level bureaucracy literature. Local courts may have created specialty courts (4) as a quick response to a new, and under-appreciated problem, (5) acting on the will of the local community, even if it conflicts with the desires of the state as a whole, or (6) for the most basic reason of all: they are effective.

\footnote{184. See id. at 13–40.}
\footnote{185. Id. at 8.}
\footnote{186. Id. at 72.}
\footnote{187. Id. at 19.}
\footnote{188. Herbert Jacob, The Governance of Trial Judges, 31 LAW & SOC'Y REV. 3, 5 (1997) (citing generally ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE (1967)). Other scholars have focused on the "routinization of the courts' work, increasing division of labor and specialization, and the perceived transformation of judges from professionals to 'technocrats.'" Id. (citing generally WOLF HEDUREND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS (1990)); see also Deon Brock et al., Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender, 28 AM. J. CRIM. L. 43, 44 (2000) (arguing that courts have become a "quasi-bureaucratic" organization by displaying "attributes similar to those found in bureaucratic structures in an attempt to perform their duties").}
First, in creating special rehabilitative tribunals for children, many officials are acting in accord with their own beliefs about the proper role of juvenile justice. Research focused on teachers shows that, among those accorded significant discretion and control over their work, “their individual theories of justice have an important effect on the final implementation of public policies.”\footnote{189} Many juvenile court employees appear to have a strong commitment to rehabilitation. Anecdotal evidence, at least, suggests that many judges do not share legislators’ sense that rehabilitation is either undesirable or pointless. For example, in a 1999 article, Judge Gary L. Crippen argued that “the juvenile justice system can and does succeed with the great majority of adolescent offenders without the threat of punishment.”\footnote{190} Judge Arthur L. Burnett, Sr., argued for individualized, medicalized treatment of children.\footnote{191} Using language reminiscent of Julian Mack’s 1909 article touting the juvenile courts, he argued:

[Judges] must fully understand and appreciate the stages of child development, the educational needs of children at various stages in their development, and child behavioral issues. To that purpose, the juvenile court judge and judicial officer must be sufficiently immersed and gain a depth of understanding that equals the substantive knowledge expected of social workers and psychologists who deal with children and their behaviors. They should receive specialized training, which is comprehensive and multidisciplinary. They also must become culturally sensitive so as to appropriately evaluate each child who comes before the juvenile court on the basis of his or her own character and individual value system . . . .\footnote{192}

In his account of the Los Angeles juvenile court, Edward Humes found similar views among judges and probation officers.\footnote{193} And in his book, one observer points out that it “is the simple reality that programs that punish are far more popular than those that prevent.”\footnote{194}

One of us worked as a public defender for five years, in both Philadelphia and New York City. Our own experience was consistent with these published comments. Many juvenile judges, probation officers, defense lawyers, and even prosecutors shared the view that children were less culpable than adults, deserved more individualized treatment, and were

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  \item \footnote{189} Marisa Kelly, \textit{Theories of Justice and Street-Level Discretion}, 4 J. PUB. ADMIN. RES. & THEORY 119, 138 (1994).
  \item \footnote{191} See Burnett, supra note 72, at 8.
  \item \footnote{192} \textit{Id}.
  \item \footnote{193} See \textit{Edward Humes, No Matter How Loud I Shout} 176–78 (1996).
  \item \footnote{194} Id. at 178.
\end{itemize}


more capable of rehabilitation. This is not to say that these views were universal. Others within the system were more dubious about the efficacy of juvenile rehabilitation. Compared with the views of adult-court bureaucrats, however, employees in the juvenile court were far more likely to imagine that court intervention could improve offenders' lives. The social pressure within the communities of juvenile justice professionals—communities that are often physically separated from their adult counterparts, working in different offices or courthouses—may lead to co-optation of those employees who might otherwise prefer a harsher approach to child crime.

Second, juvenile court employees, particularly judges, may create juvenile specialty courts as a way of managing limited resources. Judges are responsible for rationing the resources at their disposal. As Lipsky points out, “[l]ower-court judges are typically inundated with cases, often causing delays of several months in providing defendants their day in court.”

Judges may see juvenile specialty courts as a way to use their sentencing options to preserve resources—allowing them to be more creative to dispense justice and alleviate some of the stress on both juvenile detention facilities and the regular juvenile courts. Specialty courts employ the process of “creaming,” whereby the judges or district attorneys determine which individuals are most likely to succeed in a treatment program. They seek out children likely to benefit from a rehabilitative regime. Many courts require the participation of parents. Without parental participation, they reason, the child will not be able to successfully complete some drug treatment programs. Because of these qualifying criteria, judges determine who must enter the regular juvenile court system without the benefit of the treatment programs that specialty courts often provide.

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

A third explanation for the creation of these courts is that individuals are acting out of self-preservation. They may be hoping to protect their

195. See Lipsky, supra note 177, at 105.
196. Id. at 30.
197. See Smith & Donovan, supra note 182, at 543.
198. See supra notes 148–49 and accompanying text.
existing positions. Alternatively, they may seek to guard and expand existing levels of discretion and authority in the face of legislative efforts to dictate punishment policy. We know that individuals employed in other areas of the criminal justice field advocate for public policies consistent with their own economic interest. For example, prison guards in California have consistently lobbied for tougher drug-sentencing laws.\textsuperscript{199} In the same way, the battles between federal trial judges and Congress over sentencing guidelines—implicated, if not directly addressed, in \textit{United States v. Booker}\textsuperscript{200}—reflect the desire of local judges to make proper and just decisions, notwithstanding legislative diktat to the contrary.

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

Perhaps an even more potent self-preservation motivation has been the availability of federal money to develop juvenile specialty courts. Local courts are funded by states, and as a result, they often operate under tight budgetary constraints. When the federal government presents an opportunity to fortify local budgets with grant money, everyone in the court benefits. Over the past decade, the federal government, through the Department of Justice, has actively assisted local officials in creating drug and gun courts through provision of both funding and technical expertise.\textsuperscript{201} This move is particularly intriguing because it has had the effect of empowering local officials to undermine state legislative objectives. Indeed, Congress itself has appeared relatively hostile to individualized sentencing and rehabilitation.\textsuperscript{202} Nonetheless, by directing money to local courts attempting these creative approaches to rehabilitation, the federal

\textsuperscript{199} See, e.g., Daniel Macallair & Chuck Terry, \textit{Drug Policy and Prison Population}, SAN DIEGO UNION-TRIB., July 28, 2000, at B11. By advocating longer sentences, the prison guards union hopes to create a need for more prisons in an effort to protect the employment of its members. \textit{Id.} California’s three-strikes law is also seen as a “lucrative” law for prison guards. See Joe Domanick, \textit{They Changed Their Minds on Three Strikes; Can They Change the Voters?}, L.A. TIMES MAG., Sept. 19, 2004, at 1-10.


\textsuperscript{201} See supra notes 121–22 and accompanying text.

\textsuperscript{202} This hostility is well represented by the federal sentencing guidelines, which lack substantial individualization and carry heavy sentences.
government has, in effect, encouraged an end-around of similar state legislative objectives. From the point of view of local bureaucrats seeking to preserve their jobs, new federal money has proven to be an exceptional opportunity to maintain funding for their own positions, while at the same time allowing them to shape policy to match their own policy preferences.

While these explanations offer substantial promise, we believe a few other factors might also be at play. The fourth explanation is that specialty courts are a new solution to new problems identified at the local level. State legislatures move at a relatively slow pace to address social problems both because action is inherently difficult—many different individuals must agree—and because lawmakers often learn of new developments slowly. Local officials, in contrast, are likely to identify new challenges very quickly. A trial judge will notice when she is suddenly seeing a rash of methamphetamine cases. Thus, the rise of specialty courts might simply reflect the fact that local officials have responded quickly and flexibly to new problems. On the other hand, it does seem that juvenile drug use, mental illness, and gun possession predate 1995. It seems more likely that local courts were simply frustrated with the non-rehabilitative solutions offered by state legislatures.

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

A sixth, and related, reason for the rise of these courts at the local level is perhaps most heartening of all—they work. Local officials seeking to impress voters are likely to seek out effective justice policy. While legislatures have condemned rehabilitation categorically, there is every reason to believe that it is effective, at least with respect to selected children. Specialty courts may function as a triage mechanism. Children not amenable to treatment

203. "When court business grows and additional courts or new judicial structures are required, city interests must go to the state legislature or to Congress with their request." HERBERT JACOB, CRIME AND JUSTICE IN URBAN AMERICA 73 (1980). "Although the urban courts make many decisions affecting city life, lawmakers from all over the state or nation decide on court structure and organization." Id.
will be punished as the legislature desires; those identified early on as good candidates, however, can be diverted from the legislatively created courts of general jurisdiction, and rehabilitated in the locally created specialty courts.

B. IMPLICATIONS

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

Specialty courts may also introduce trouble of their own. For years, juvenile courts have been accused of treating children differently on the basis of race. For example, one study concluded that African-American children were being transferred to adult courts in greatly higher numbers than white children.\(^{204}\) Juvenile specialty courts introduce the possibility of similar disparate treatment. We know that in early reporting of juvenile drug court numbers, white children constituted the largest racial group receiving this sort of rehabilitative treatment.\(^{205}\) Because specialty courts individualize justice, they are highly discretionary. This discretion should be monitored to assure that it is not used inappropriately. On a macroscopic level, the very structure of these courts—designed to include some offenses, and exclude others—introduces the risk that they will treat different racial groups differently. For example, a drug court that excludes offenses committed disproportionately by one racial group might produce a seriously disparate impact. It is critical that rehabilitation—essentially, the judgment that a

\(^{204}\) See U.S. GEN. ACCOUNTING OFFICE, supra note 38, at 59 (finding that in the states surveyed, African-American children charged with violent offenses were transferred at 1.8 to 3.1 times the rate of white children charged with the same crimes); cf. Fagan et al., supra note 38, at 276 (noting that race could only help explain the disparities with respect to children charged with murder).

\(^{205}\) See OJP DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT, AM. UNIV., supra note 132, at 2. We do not know whether this number is disproportionate to the number of white children within the broader juvenile justice system.
child can be saved—be available on a truly race-neutral basis. Researchers should evaluate these tribunals to assure that this is the case.

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

Finally, and perhaps most importantly, this research offers progressives cause for hope. Many have grown worried that the Warren Court’s civil rights advances are not only fading, but were in effect self-defeating. Liberals—demoralized by electoral losses—have come to question the value of what once were great victories. But this Article shows that, notwithstanding national and state hostility to criminal procedural rights, the policymakers closest to social problems—in this case, judges and other participants in the juvenile justice process—will make decisions based on what is effective. And progressives should be heartened to learn that their ideals, and the experienced reality of street-level bureaucrats, turn out to be the same.

CONCLUSION

There is big news in the juvenile justice system, but it is not yet appearing in the literature. Juvenile specialty courts have reinvigorated rehabilitation, offering tens of thousands of children a chance to reconstruct

206. For example, recent research suggests that there are more than 1,250 drug courts within the United States. See OJP DRUG COURT CLEARINGHOUSE, AM. UNIV., supra note 131, at 1.

207. There are, of course, democratic concerns implicated by the devolution of power from legislatures to local officials, particularly if they are unelected. We have long understood that citizens, through their elected representatives, have the right to adopt criminal-justice policy. Indeed, the modern rejection of common-law crimes reflects, to some extent, a desire that decisions about criminal law lay in the hands of legislators, and not judges. Certainly, the rise of sentencing guidelines reflects a desire by legislators to retain control over the punishment function. Our research suggests that, despite these efforts, sufficient room remains for street-level bureaucrats to exert significant control over concrete matters of criminal-justice policy. In some cases, we suspect, these local decisions are not even motivated by honestly held punishment preference. Rather, they were motivated by concerns of self-interest. While we are less concerned about locally elected officials usurping the will of statewide legislative bodies, we do believe that the ability of unelected local officials to undermine policies adopted democratically gives some basis for pause.
their lives. The mere existence of these courts undermines the dominant theme of progressive juvenile justice scholarship: that the rehabilitative agenda of juvenile courts began a slow death in the aftermath of the Warren Court's criminal procedure revolution. At the same time, the fact that these courts have developed locally exposes a primary reason for the gap in legal scholarship. Critics have been looking in the wrong place to determine punishment policy. While legislators have a role in developing a juvenile justice agenda, street-level bureaucrats play a major part in determining how the court system will address childhood crime. The implications of this research are varied. First, it suggests that rehabilitation maintains an important place in juvenile justice. Second, it calls into question a growing anxiety among progressive scholars that the Warren Court's extension of procedural rights to children has undermined the viability of a rehabilitative regime. Finally, it raises broader questions about the assumptions of all criminal punishment scholars that legislatures determine punishment policy, and that as a result, rehabilitation has been abandoned. At minimum, the tearful eulogies for rehabilitation must be called off, for it appears that its death has been greatly exaggerated.