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THE STATE OF AMERICAN JUVENILE JUSTICE

BY MERRIL SOBIE



The year 2017 marked the golden anniversary of the landmark *In re Gault* decision. (387 U.S. 1 (1967).) In *Gault*, the US Supreme Court held that basic due process rights must be afforded to children accused of committing a “delinquent” act, the artful synonym of the word “crime” coined by the juvenile justice movement founders. Literally overnight, the right to counsel, effective notice, criminal law evidentiary standards, and the right to appellate review were incorporated into the historically informal, confidential, and largely unreviewable juvenile justice courts.

The 50-year post-*Gault* era may be characterized by three sequential chronological stages. The first, spanning approximately 20 years, witnessed the gradual incorporation of due process standards into an often recalcitrant juvenile justice system. The juvenile justice judiciary also wrestled with the difficult challenge of marrying basic *Gault* standards with the underlying philosophy of a highly discretionary, remedial, and individualized approach.

The second generational stage witnessed a virtually unrelenting attack on the perceived softness and ineffectiveness of the juvenile justice system. Corresponding with a “get tough” approach to adult criminal activity, juvenile court jurisdiction was compromised by adding “direct filing” or the automatic transfer of serious felony cases involving adolescents and even preadolescents to the adult criminal system. Most states also imposed restrictions on the former relatively discretionary and lenient juvenile court dispositional alternatives. Although the maximum age of delinquency jurisdiction was not formally altered, the result severely compromised the treatment of children who had committed any offense, from trespass to homicide.

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The current post-*Gault* stage commenced at the beginning of the twenty-first century and, as of 2018, represents an ongoing and as yet incomplete evolution to a more remedial approach. Reversing the “get tough” generation, legislatures and courts have been “raising the age,” thereby replacing adult prosecution and criminal incarceration with child-oriented procedures. Several states have also restricted or eliminated “direct file” or transfer to the adult system, substituting exclusive juvenile court jurisdiction. The reasons for the sharp U-turn are multiple. Perhaps the primary cause has been the proliferation of neurological studies proving that the human brain’s judgmental and impulse controlling mechanisms do not mature until we attain the relatively old age (for juvenile justice purposes) of early to mid-20s. A dramatically falling juvenile crime rate has further contributed to the momentum. Last, the series of United States Supreme Court cases, citing the neurological evidence, starting with *Roper v. Simmons*, 543 U.S. 551 (2005), has highlighted the fact that children and young adults are different and thus should qualify for less stringent sanctions.

This article will summarize the major twenty-first century state legislative and case law developments. It will also briefly note the expansion of state and local initiatives limiting the prosecution of youthful offenders, such as diversion and restorative justice programs.

RAISE THE AGE

Throughout most of the twentieth century, the 50 American states maintained, without change, different age limitations governing general juvenile delinquency jurisdiction. At the end of the century, the cutoff age in three states was 16, 11 additional states limited jurisdiction to children below the age of 17, and 36 states plus the District of Columbia and the federal Code (governing crimes that can be prosecuted federally) had an established “ceiling” of age 18.

In 2007, Connecticut initiated the movement to “raise the age” by enacting legislation granting the juvenile courts jurisdiction to age 18, a two-year expansion. In less than one decade, every “16-year-old” state has followed the Connecticut initiative. (New York recently raised the age by enacting a complex act, which is effective in 2018 and 2019.) Simultaneously, the number of states maintaining an age 17 ceiling has been reduced from 11 to five. In the near future, 45 of the 50 states will have adopted the national norm of age 18. Interestingly, raise the age legislation is pending in each of the five remaining “outliers.” We are close to achieving a universal age.

The proliferation of raise the age states has cut across geographic and political lines. The diversity includes Illinois, Massachusetts, Mississippi, and Louisiana. In several states, including Illinois, Massachusetts, Connecticut, and Vermont, bills have also been introduced to further raise the age to 20 or 21, at least for misdemeanor cases. No state has yet gone beyond age 18, but at least a few may break the age 18 barrier in the near future. (Meanwhile, San Francisco has established a “Young Adult Court” in the criminal system, where youths between the ages of 18 and 21 may be granted ameliorative dispositions in lieu of incarceration. (Tim Requarth, *A California Court for Young Adults Calls on Science*, N.Y. TIMES, Apr. 17, 2017, <https://tinyurl.com/ybyoo82h>.)

Oddly, very little consideration or advocacy has addressed the issue of minimum age. Most states have no minimum threshold, permitting the prosecution of 10- or 11-year-old children (in 2014, 36,854 children who were below the age of 12 were petitioned as juvenile delinquents), and at least theoretically sanctioning the prosecution of toddlers. (In New York, the governor’s commission on raise the age recommended raising the minimum age from seven to 12, but that recommendation was not approved by the legislature.)

DIRECT FILE AND TRANSFER

Juvenile court jurisdiction has never been absolute. The early courts in most states could “transfer,” after hearing, a case involving an older youth who had committed a specific violent felony to the adult criminal court for adjudication and sentencing. Until the late 1980s, transfer was a relatively rare event. However, toward the end of the twentieth century, state legislatures greatly expanded the number of “transfer eligible” cases. A majority of states also enacted “direct file” statutes, removing juvenile court jurisdiction entirely for a large subset of felony cases. Still others granted prosecutors the discretionary authority to file charges involving children in the adult criminal courts.

However, in the past few years direct or automatic filing has been reversed, frequently on a wholesale basis. For example, in 2016, Illinois eliminated the direct or automatic transfer of all children below the age of 16, regardless of the crime charged, limiting the practice to juveniles ages 16 or 17 who are charged with first-degree murder, aggravated criminal sexual assault, or aggravated battery with a firearm. The same year, California voters approved a proposition that repealed direct filing completely, regardless of the youth’s age or the crime charged. Other states that have eliminated or severely restricted

direct filing include Vermont, New Jersey, and Indiana. Recent legislation will accordingly significantly diminish, though not abolish, the criminal prosecution of adolescents.

CONFIDENTIALITY, SEALING, AND EXPUNGEMENT

Juvenile court records are generally confidential, with only limited access by nonparties. A delinquency finding may nevertheless harm the child, perhaps years or decades after the fact. Collateral consequences may include employment restrictions, public housing eligibility, or predicate criminal sentencing. A youthful indiscretion may carry deleterious ramifications well into adulthood.

For this reason, many states provide for the sealing or expungement of records. The relevant statutes and court rules, enacted over several decades, vary significantly, but provide a partial albeit incomplete level of protection. In 2015, the American Bar Association (ABA) adopted a far-reaching resolution recommending the expungement of most juvenile records: the Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records. The resolution has generated proposals, bills, and in a few states laws broadening the protection umbrella. In California, for example, juvenile “found” delinquency records are now sealed and the charges are dismissed when the youth has satisfactorily completed a period of probation supervision or a diversion program, and meets other specified criteria. (Cal. Stats. of 2016, ch. 858 (amending CAL. WELF. & INST. CODE §§ 786, 827, 827.9, 828) (sealed records are nevertheless available for very limited purposes).) Other states have restricted or prohibited the solicitation of juvenile court history by employers. The trend to seal or expunge has barely commenced, but will likely expand. Further, the move to limit or eliminate the adult prosecution of children by raising the age and limiting direct file will, in itself, minimize collateral harm (juvenile courts records are almost always afforded greater confidentiality than criminal records).

SOLITARY CONFINEMENT AND ADULT PRISONS

The solitary confinement of children who have been placed in juvenile or adult facilities represents an egregious threat to their well-being. Isolating an adolescent in a small cell or locked room for weeks or months should be unthinkable, though it has been a common practice in many jurisdictions. Contemporary neurological and psychological studies have, in fact, proven the obvious: Solitary confinement beyond a very brief period causes serious psychological harm. The ABA has adopted a resolution prohibiting the solitary confinement of persons under the age of 18 “for any reason other than as a temporary response to behavior that threatens immediate harm to the youth or others and ends when the threat is over and, in no case, more than 4 hours.” In furtherance of the ABA policy, several states and localities have prohibited or severely limited the solitary confinement of juveniles. In other states, litigation has succeeded in prohibiting or restricting the practice. Again, the trend is clear.

The practice of confining children in adult jail or prisons, a consequence of direct file or transfer, has also been limited.

For example, New Jersey has prohibited the incarceration of any person under the age of 18 in adult facilities. The New York “raise the age” legislation will prohibit the incarceration of any person under the age of 18 in Rikers Island, the notoriously abusive New York City jail. The movement to bar the incarceration of children in any adult facility has gained considerable support.

OTHER DEVELOPMENTS

One reform that has virtually overnight been implemented in several jurisdictions is the prohibition or restriction of shackling children in court. The sordid practice, addressed in a recent ABA resolution, appears to be destined for oblivion. Another practice, seeking and obtaining confessions from young children during custodial questioning, has been reformed in Illinois and California with the enactment of statutes mandating that children under the age of 15 obtain the advice of legal counsel before executing a confession during custodial interrogations. (Ill. Pub. Act No. 099-0882 (2016).) The Illinois and California laws may be the first measures precluding or at least limiting the admissibility of confessions by the very young, an age group in which confessions or admissions have proven extraordinarily unreliable.

Last, the past few years has seen the proliferation of diversionary and restorative justice programs. (See, e.g., H. Ted Rubin, *Moving the Money: Using Institutional Savings to Expand Investment in Local Interventions*, 23 JUV. JUST. UPDATE, no. 2, 2017.) The policy of diverting and treating the nonviolent child (and in some cases the violent child) in lieu of judicial adjudication is beneficial to both the youngster and society. It is also far more cost-effective than the alternative prosecution model.

OTHER NEEDED REFORMS

The progress toward a child-friendly juvenile justice paradigm has been impressive, but at least a few counterproductive policies remain largely untouched. The Adam Walsh Act, which requires children who have committed nonviolent sexual offenses to register as sex offenders, often for life, has yet to be ameliorated. (Nicole I. Pitman & Riya Saha Shah, *Cruel and Unusual: The Case against Registering Kids as Sex Offenders*, 32 CRIM. JUST., no. 2, Summer 2017, at 32.) In several states, the prosecution of the very young accused of criminal conduct remains unabated. Last, the level of representation afforded juveniles is inconsistent nationally, ranging from meaningless to excellent.

CONCLUSION

The state of American juvenile justice has improved significantly in the past several years. However, the reforms are best viewed as a work in progress. Much has been accomplished, but much remains to be accomplished. Crucially, after a generation of “tough on kids” measures, we are on the road toward a true “justice” system for children. ■