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First Things First: Juvenile Justice Reform in Historical Context

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FIRST THINGS FIRST: JUVENILE JUSTICE REFORM IN HISTORICAL CONTEXT

David S. Tanenhaus*

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I. INTRODUCTION

Unlike my fellow panelists who are lawyers, I am a historian and have been professionally trained—in the past tense—to answer questions such as, “Do (or should) juveniles have more, less, the same, or different rights than adults?” In my remarks today, I will explain how conceptions of children’s rights have been used to shape the American juvenile justice system’s development. First, I will argue that we should take a long view of this history.¹ Next, I will focus on three specific eras of twentieth-century reform.² Finally, I will conclude with a call for more research on the prosecutor’s role in administering juvenile justice.³ This historical perspective, I believe, can help us to answer the challenging question of what children’s rights should be.

Before discussing the history of American juvenile justice in the twentieth century, I want to emphasize that the idea that children are different from adults predates the American Revolution and was inscribed by the nation’s founders into democratic theory.⁴ In theory and practice, children had a right to custody, not liberty.⁵ But, as the legal historian Holly Brewer has noted, the idea that children were incapable of

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1. See *infra* Part II and accompanying text.

2. See *infra* Part II.

3. See *infra* Part III.

4. See generally HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005) (analyzing the evolution of children’s rights, beginning in sixteenth-century England, through American colonization, and up to nineteenth-century America).

5. See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 8–9, 18–20 (2005); see generally BREWER, *supra* note 4, at 4 (explaining that children’s lack of the right to choose was explicit in the custody laws of the time).

participating in government presented a fundamental problem.⁶ “If they have no voice in the laws, how can they be bound by them? . . . [T]he dilemma[,]” she added, “would be directly addressed in 1899 with the creation of the first juvenile court in Illinois.”⁷

II. JUVENILE JUSTICE IN THE MAKING

Scholars present the history of American juvenile justice in the twentieth century as a three-part drama, beginning with Jane Addams and her fellow progressive reformers opening the world’s first juvenile court in Chicago, Illinois, on July 3, 1899.⁸ The juvenile court movement’s leaders emphasized that this new court should divert children from the criminal justice system and provide them with needed social services.⁹ For example, Timothy Hurley, the first chief probation officer and the author of the first history of the Cook County Juvenile Court, explained:

Instead of reformation, the thought and idea in the judge’s mind should always be formation. No child should be punished for the purpose of making an example of him, and he certainly can not be reformed by punishing him. The parental authority of the State should be exercised instead of the criminal power.¹⁰

Progressives such as Hurley and Judge Julian Mack published the juvenile court’s first political and legal histories before the paint on the first children’s court buildings had dried.¹¹ They did so to legitimize the new institution.¹²

6. See BREWER, *supra* note 4, at 228.

7. *Id.*

8. Steven Schlossman & David S. Tanenhaus, *Juvenile Court*, in THE CHILD: AN ENCYCLOPEDIA COMPANION 525–27 (Richard A. Shweder et al. eds., 2009).

“The history of juvenile court has proceeded in waves. The first wave encompassed its creation, development, and spread nationally and internationally; the second brought procedural safeguards and lawyers to juvenile court. The third wave, which crested in the mid-1990s, included a strong punitive current that washed away many of the court’s distinguishing features (e.g., closed hearings and confidential records) and made it much easier to prosecute children in the adult criminal justice system.”

Id. at 527; see generally DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 23 (2004) [hereinafter JUVENILE JUSTICE IN THE MAKING] (describing the court opening on July 3, 1899).

9. See JUVENILE JUSTICE IN THE MAKING, *supra* note 8, at 22–24.

10. *Id.* at 23 (quoting T.D. Hurley, *Development of the Juvenile Court Idea*, in CHILDREN’S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 8 (photo. reprint 1973) (1904) (internal quotation marks omitted).

11. See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104–22 (1909). Mack’s article had a longer shelf life than T.D. Hurley’s ORIGIN OF THE ILLINOIS JUVENILE COURT LAW: JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED (1907). Mack’s article has been widely cited. See Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1497 (2012). Mack’s article was once among the top ten most cited articles, but now is ranked 605. *Id.*

12. See JUVENILE JUSTICE IN THE MAKING, *supra* note 8, at 82–110.

And they succeeded. For example, in *Commonwealth v. Fisher*, the leading case about the constitutionality of juvenile courts in the first half of the twentieth century, the Pennsylvania Supreme Court brushed aside the argument that the juvenile court deprived children of the due process that they would have received if they had been prosecuted in criminal court.¹³ As the court explained:

The objection that “the act offends against a constitutional provision in creating, by its terms, different punishments for the same offense by a classification of individuals,” overlooks the fact, hereafter to be noticed, that it is not for the punishment of offenders but for the salvation of children, and points out the way by which the state undertakes to save, not particular children of a special class, but all children under a certain age, whose salvation may become the duty of the state, in the absence of proper parental care or disregard of it by wayward children. *No child under the age of 16 years is excluded from its beneficent provisions.*¹⁴

Within a generation, “the American juvenile court ideal—that children’s cases should be diverted from the criminal justice system and handled in a separate system that emphasized rehabilitation over punishment—had quickly spread,” nationally and internationally.¹⁵

Herbert Lou’s *Juvenile Courts in the United States*, which was published in 1927 and remained the standard text in the field through the 1950s, emphasized the benevolence of this approach. Until a “better and finer agency may be evolved,” he concluded, “the juvenile court will remain to serve as a fountain of mercy, truth, and justice to our handicapped children.”¹⁶

Significantly, as Jane Addams reported near the end of her life in a tribute to her friend Julia Lathrop:

There was almost a change in *mores* when the Juvenile Court was established. *The child was brought before the judge with no one to prosecute him* and with no one to defend him—the judge and all concerned were merely trying to find out what could be done on his behalf. The element of conflict was absolutely eliminated and with it, all notion of punishment as such with its curiously belated connotation.¹⁷

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

14. *Id.* at 199 (emphasis added).

15. DAVID S. TANENHAUS, *THE CONSTITUTIONAL RIGHTS OF CHILDREN: IN RE GAULT AND JUVENILE JUSTICE* 4 (2011) [hereinafter *CONSTITUTIONAL RIGHTS OF CHILDREN*].

16. *Id.* (quoting HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 220 (1927)).

17. JANE ADDAMS, *MY FRIEND, JULIA LATHROP* 96 (1935) (emphasis added).

Judges and probation officers, not prosecutors and defense attorneys, ran the juvenile court.¹⁸ Probation officers made the all-important decisions about when to file delinquent petitions and which children required pre-trial detention.¹⁹ Juvenile court judges also determined which accused adolescent offenders should have their cases transferred to the criminal justice system for prosecution as adults—a decision the United States Supreme Court later labeled “critically important” in *Kent v. United States*.²⁰

Whereas the first act in this drama falls squarely within the field of American legal history, Act II is a constitutional story, starring the American Civil Liberties Union (ACLU) and the Warren Court.²¹ In 1966, informed by scathing critiques of juvenile courts in action and mounting criticism of the legitimating concept of *parens patriae* (the State as a father or parent), in 1966 the ACLU sued to free Gerald Gault, a fifteen-year-old Arizona teenager who had received the equivalent of a six-year prison sentence for allegedly making an obscene phone call to a neighbor.²² The ACLU argued that the United States Constitution requires juvenile courts to follow due process requirements, instead of relying on paternalism as a cover story for arbitrary decision-making.²³ As the criminologist Norval Morris stated at the time:

Though we keep on prating *parens patriae*, we might as well burn incense. Historical idiosyncrasies gave us a doubtful assumption of power over children. . . . Being somewhat facetious about it, the juvenile court is thus the product of paternal error and maternal generosity, which is a not unusual genesis of illegitimacy.²⁴

18. See LOU, *supra* note 16, at 100–01.

19. *Id.*

20. See *Kent v. United States*, 383 U.S. 541, 553–54 (1966). Justice Fortas wrote:

We do not consider whether, on the merits, *Kent* should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society’s special concern for children, as reflected in the District of Columbia’s Juvenile Court Act, permitted this procedure. We hold that it does not.

Id. at 553–54.

21. The best introduction to American legal history is THE CAMBRIDGE HISTORY OF LAW IN AMERICA (Michael Grossberg & Christopher Tomlins eds., 2008). During the 1990s, many graduate students, including my cohort at the University of Chicago, wrote their doctoral dissertations on the policing of urban areas during the late nineteenth and early twentieth centuries. See RICHARD C. CORTNER & CLIFFORD M. LYTLE, CONSTITUTIONAL LAW AND POLITICS: THREE ARIZONA CASES (1971); CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE (1998); CONSTITUTIONAL RIGHTS OF CHILDREN, *supra* note 15, *passim*.

22. See CORTNER & LYTLE, *supra* note 21, at 57–62.

23. See *id.* at 69.

24. CONSTITUTIONAL RIGHTS OF CHILDREN, *supra* note 15, at 104.

The most dramatic moment in Act II occurred on May 15, 1967, when Associate Justice Abe Fortas read selections from *In re Gault*, including his declaration, “Under our Constitution, the condition of being a boy does not justify a kangaroo court.”²⁵ The Court’s 8–1 decision held that juveniles are entitled to the privilege against self-incrimination and the right to notice, counsel, confrontation, and cross-examination of witnesses during adjudicatory hearings.²⁶ In a memo to Fortas, Chief Justice Earl Warren predicted that *Gault* would be “known as the Magna Carta for juveniles.”²⁷

The “[c]onstitutional [d]omestication” of the American juvenile court ensured that lawyers would play a more prominent role in the years to come.²⁸ Although advocates for juvenile reform primarily thought about an influx of defense counsel into juvenile court, it turns out that the decision ultimately brought more prosecutors than defense attorneys.²⁹ Perhaps the most important and overlooked moment in Act II was when Arizona Assistant Attorney Frank Parks—who had the unenviable task of defending the theory of *parens patriae* before the Warren Court during the height of the due process revolution—observed that if states such as Arizona had to provide defense counsel for juveniles during adjudicatory hearings, then these states would presumably also send *prosecutors* to juvenile court.³⁰ Parks made this observation in passing while being drilled during oral argument; he did not elaborate on what turned out to be a prescient point.³¹

25. See *In re Gault*, 387 U.S. 1, 28 (1967).

26. *Id.* at 36, 55–56.

27. CONSTITUTIONAL RIGHTS OF CHILDREN, *supra* note 15, at 85 (internal quotation marks omitted).

28. See MANFREDI, *supra* note 21, at 156–77.

29. See Barry C. Feld, *Procedural Rights in Juvenile Courts: Competence and Consequences*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 674 (Barry C. Feld & Donna M. Bishop eds., 2012).

30. Oral Argument at 102:36, *Gault*, 387 U.S. 1, available at http://www.oyez.org/cases/1960-1969/1966/1966_116.

31. *Id.* Legal academics have long raised concerns about the expansion of prosecutorial power and discretion in the criminal justice system, which has led to plea-bargaining becoming the norm. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) (describing the prosecutor’s power in the criminal justice system); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224–25 (2006) (noting that some scholars believe plea bargaining allows prosecutors to adjudicate in the criminal justice system); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1533 (1981) (noting that new prosecutors are encouraged to seek plea bargains). Concerns about prosecutors acting as adjudicators are now a staple of scholarship on federal and state criminal justice. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869–70 (2009) for a good introduction to this literature. Barkow highlights the role that the Burger Court played in encouraging the use of plea-bargaining in decisions such as *Santobello v. New York*, 404 U.S. 257 (1971). Barkow, *supra*, at 879 n.41. In the 1970s, as I will demonstrate in my case study of Florida, circuit courts issued separation-of-powers decisions that contributed to the legislature constructing a direct file regime and the expansion of prosecutorial power in cases involving juveniles. See *infra* note 43 and accompanying text.

Like many landmark Supreme Court decisions, *Gault* was only the beginning. As Norman Dorsen and Daniel Reznick explained in a 1967 article on the future of family law, “[s]o far-reaching a decision [as *In re Gault*] will initiate a lengthy process of constitutional adjudication, accompanied by legislative change and alteration of administrative and judicial practices.”³² “They emphasized that change would most likely take place at the state level and added that the ‘Supreme Court can be expected to participate only sporadically in this process of change, through the review of cases carefully selected to focus on critical problems of the juvenile system.’”³³ They were right about the Supreme Court and juvenile justice. The Court did hear four juvenile justice procedural cases in the 1970s and 1980s, but only since 2005 have the Justices revisited some of the key questions raised by the *Gault* litigation nearly a half century ago.³⁴

The key point about Act II, which Dorsen and Reznick highlighted in 1967, is that legislatures would command center stage.³⁵ Journalists and scholars have explored only part of the legislative history of the 1970s and 1980s. The best work includes studies of New York lowering the eligible age for criminal responsibility to thirteen years old for murder and fourteen years old for other violent crimes in 1978.³⁶ New York made the only major change to a juvenile justice system in the 1970s, although other states began to rewrite the purpose clauses of their juvenile justice legislation to emphasize public safety.³⁷ The moral of the New York story, as some have argued, is that juvenile justice systems require a transfer mechanism to serve as a safety valve.³⁸ Otherwise, there will be a punishment gap between what the juvenile court can deliver and what the public may demand.³⁹

32. Norman Dorsen & Daniel A. Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAM. L.Q., no. 4, 1967 at 1.

33. CONSTITUTIONAL RIGHTS OF CHILDREN, *supra* note 15, at 98.

34. The first wave of procedural due process cases began in the 1970s. *Schall v. Martin*, 467 U.S. 253, 281 (1984) (establishing preventive detention in juvenile cases); *Breed v. Jones*, 421 U.S. 519, 541 (1975) (establishing the double-jeopardy standard in juvenile cases); *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (holding that “accurate factfinding” did not require jury trials in juvenile cases); *In re Winship*, 397 U.S. 358, 368 (1970) (establishing the beyond a reasonable doubt standard in juvenile cases). More recently, the Court abolished the juvenile death penalty in *Roper v. Simmons*, eliminated life without the possibility of parole sentences for crimes excluding murder in *Graham v. Florida*, revised *Miranda* warnings for juveniles in *J.B.D. v. North Carolina*, and eliminated mandatory life without the possibility of parole sentences for juvenile offenders in *Miller v. Alabama*. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399 (2011); *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010); *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

35. Dorsen & Reznick, *supra* note 32, at 6 n.25.

36. See FOX BUTTERFIELD, *ALL GOD’S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* (1995); SIMON I. SINGER, *RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM* (1996).

37. See MANFREDI, *supra* note 21, at 169–77.

38. See ZIMRING, *AMERICAN JUVENILE JUSTICE*, *supra* note 5, at 149.

39. See *id.* at 143.

The truly significant historical fact about the period from the aftermath of *Gault* to the moral panic of the 1990s is that, by diverting adolescents from the criminal justice system, juvenile justice systems spared them from the destructive punishments of the criminal justice system in the age of mass incarceration.⁴⁰ In 1971, the incarceration rates for adolescents (fourteen- to seventeen-year-olds) and young adults (eighteen- to twenty-four-year-olds) were similar, but these rates diverged dramatically by the 1990s.⁴¹ In 1991, for example, the incarceration rate for young adults was approximately twice the rate for adolescents.⁴²

My new book project, *The Prosecution Never Rests*, examines the major legislative story from the early 1980s: the creation and implementation of a direct file regime in Florida. This new regime made it possible for Florida's prosecutors to transfer more adolescents to criminal court than juvenile court judges did in the entire country during the 1990s.⁴³ Although I have not completed my empirical research, my initial findings suggest that Florida's incarceration rate for adolescents was similar to the national average for young adults, whereas the incarceration rate for adolescents in Georgia, which maintained a traditional juvenile justice system, was similar to the national average for adolescents.

Florida, which changed its laws before the moral panic over juvenile crime in the late 1980s and early 1990s, serves as the rehearsal for the third act of American juvenile justice reform in the twentieth century—popularly known as the “get-tough” era.⁴⁴ Like the progressives who wrote the first histories of the juvenile court to legitimize the new institution, crime control advocates in the 1990s also used “history.”⁴⁵ They argued that juvenile courts were never intended to hear the cases of today's youth (i.e., super-predators) because the circumstances present during this era were truly unprecedented.⁴⁶ Several scholars even went one step further and

40. See Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in *A CENTURY OF JUVENILE JUSTICE* 142, 152–55 (Margaret K. Rosenheim et al. eds., 2002). Heather Ann Thompson has called for historians to study mass incarceration as a major transformative force in modern American history. See Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 734 (2010).

41. ZIMRING, *AMERICAN JUVENILE JUSTICE*, *supra* note 5, at 46.

42. *Id.*

43. See Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, in *THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 801, 821 (Barry C. Feld & Donna M. Bishop eds., 2012).

44. See *id.* at 825–26.

45. See David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 (2002).

46. See *id.*

predicted that a tidal wave of juvenile crime would soon flood the nation.⁴⁷ They were, as it turned out, wrong.⁴⁸

Yet public concerns about serious and violent juvenile offending paved the way for almost every state to make it easier to prosecute adolescents as adults.⁴⁹ The story of the 1990s, however, differs from what happened in New York in the 1970s and Florida in the 1980s. Instead of legislating ways to prosecute mass numbers of adolescents as adults (e.g., lowering the upper jurisdictional age of the juvenile court or developing a direct file regime), states enacted legislation that transferred decision-making within the juvenile court from judges and probation officers to prosecutors. By examining the debates in the mid to late 1990s over “blended sentencing” or what the late Texas law professor Robert Dawson called the “[t]hird [j]ustice [s]ystem,” I argue that we can better understand the political struggles over ownership of the juvenile court during Act III.⁵⁰

State legislatures considered and adopted a variety of approaches to blended sentencing in the mid to late 1990s.⁵¹ Although the approaches differed, supporters of blended sentencing argued that making juvenile courts more like criminal courts was absolutely necessary to save the juvenile court.⁵² The child welfare proponents of blended sentencing, for example, contended that they were trying to keep as many adolescents as possible from being transferred out of the juvenile court, while simultaneously providing them with more due process protections and one last chance to reform before they turned eighteen or twenty-one.⁵³ They argued that this third system could shield the juvenile court from its critics.⁵⁴ But what if, as our keynote speaker Frank Zimring argued, the jurisdiction of the juvenile court was not actually under attack? What if

47. See Fox Butterfield, *Experts on Crime Warn of a 'Ticking Time Bomb'*, N.Y. TIMES (Jan. 6, 1996), <http://www.nytimes.com/1996/01/06/us/experts-on-crime-warn-of-a-ticking-time-bomb.html>.

48. See Tanenhaus & Drizin, *supra* note 45, at 642.

49. See Jeffrey Fagan & Franklin E. Zimring, *Editors' Introduction*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 1, 1 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

50. See generally Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943 (1988) (discussing issues and changes in juvenile sentencing). Professor Dawson drafted the 1987 Texas legislation that allowed for his state to address the cases of serious and violent offenses by children under the state's minimum transfer age of fifteen. *Id.* at 943-46. He did so to prevent Texas from following in the footsteps of Florida. See Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 49, at 45, 77. Yet, as Dawson later noted, “As originally enacted, these provisions permitted a sentence of up to thirty years (later increased to forty) for a superserious short list of offenses (capital murder, murder, attempted capital murder, aggravated kidnapping, and aggravated sexual assault) committed by a juvenile ten or older. . . . The system was changed in 1995 to increase greatly the number of offenses covered from five to almost thirty.” *Id.* at 77.

51. See Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 49, at 145, 145-46.

52. See *id.* at 146-80.

53. See *id.* at 147-51.

54. *Id.*

control over the court itself was the real agenda? He argues “that misreading the real agenda of the 1990s created a catastrophic error in response from many in juvenile justice. . . . Those who hoped to hold on to a few cases otherwise headed for criminal court by sacrificing judicial power and limited punishment system-wide,” he concludes, “would celebrate a victory only General Pyrrhus could fully appreciate.”⁵⁵ He may be right.

But Act III did end.⁵⁶ When and why did the get-tough era become part of history? Some argue that the massacre at Columbine High School was a turning point in thinking about youth policy.⁵⁷ Others point to the dramatic and sustained decline in the nation’s crime rate since the early 1990s, successful youth advocacy, and the Supreme Court’s decision in *Roper v. Simmons*, which abolished the juvenile death penalty.⁵⁸ I am currently searching for answers to this question in state legislative histories.

III. CONCLUSION

Once my research is complete, I plan to address the role of the prosecutor in the future of juvenile justice. The literature on policing prosecutors in the criminal justice system, as Rachel Barkow has pointed out, “while strong in theory,” has fallen “short in reality.”⁵⁹ She highlights how promising ideas such as increasing judicial oversight, limiting plea-bargaining or charging discretion, expanding legislative or public oversight, or crafting prosecutorial guidelines and open processes, have either been non-starters or have produced unintended consequences.⁶⁰ Proponents of juvenile justice reform, thus, should be cautious about recommending similar solutions to address prosecutorial power in the context of juvenile justice. Unfortunately, Barkow’s recommendation for internally restructuring federal prosecutors’ offices to separate investigative work from adjudicative decision-making (e.g., charging and offering plea deals) may not be well-suited for juvenile justice because the majority of juvenile prosecutors’ offices are too lightly staffed.

The promise of reform, I believe, must begin first with an emphatic rejection of the National District Attorneys Association’s proposals for a dramatic expansion of the role of the prosecutor in the administration of

55. Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 14 (2010).

56. Jeffrey A. Butts & Daniel P. Mears, *Reviving Juvenile Justice in a Get-Tough Era*, 33 YOUTH & SOCIETY, Dec. 2001, at 169, 169–71.

57. See Daniel M. Filler, *Random Violence and the Transformation of the Juvenile Justice Debate*, 86 VA. L. REV. 1095, 1095–96 (2000) (reviewing JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* (1999)).

58. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005); Feld & Bishop, *supra* note 43, at 907–10.

59. Barkow, *supra* note 31, at 907.

60. *Id.* at 871–74.

juvenile justice.⁶¹ Instead, prosecutors need to learn to identify with the distinctive features of juvenile justice. These include investing in and facilitating the development of youth and avoiding destructive levels of punishment.⁶² The literature on courtroom workgroups, including studies of how criminal court judges sentence adolescents, suggests that identifying with the juvenile court ideal can and does happen in unexpected places.⁶³ Studying the history and jurisprudence of juvenile justice, as I have argued elsewhere, is a good place to start.⁶⁴

61. See James C. Backstrom & Gary L. Walker, *The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 32 WM. MITCHELL L. REV. 963, 986 (2006).

62. See AARON KUPCHIK, *JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS* 109–30 (2006).

63. *Id.*

64. See *JUVENILE JUSTICE IN THE MAKING*, *supra* note 8, at 159–66.