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FOREWORD

A COMMON THEME

HELEN M. ALVARÉ*

Over the course of the history of the United States, the laws governing children have changed markedly, often in response to lawmakers' and experts' changing perceptions of children's characters, capacities, development, and roles in the family and society. Generally, if minors are perceived as "small adults," then debates about the law's basic stance will tend to speak about minors' responsibilities and rights. On the other hand, if minors are perceived more as "innocents," still largely products of their environments, and categorically incapable of mature decision making, then the legal debate tends to focus upon the scope of adults' and society's responsibilities toward them. In this Symposium, the contributing scholars and experts do not see minors' strictly through one lens or the other, but through both. They do so by refocusing the reader upon the notion of minors' intrinsic human dignity. After this, they pose questions about the legal process due to minors given this personal dignity, alongside minors' particular abilities and weaknesses, and their demonstrably incomplete development toward maturity. They ask in particular how the law ought to treat juvenile offenders, even when their delinquent acts shock the conscience, given that these juveniles are by definition a portion of society's future.

Not every article in this Symposium makes explicit use of the language of "dignity," but all rely upon the concept. Timothy Pillari's essay on Catholic Social Thought as a guide for reform of the juvenile justice system offers a most explicit description of the "dignity" of minors. They are persons with an "irreducible value,"¹ with "intelligence and free will," and with inalienable

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1. Timothy J. Pillari, note, *Rethinking Juvenile Justice: Catholic Social Thought as a Vehicle for Reform*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167, 182 (2008).

rights and duties. Further, they possess these qualities prior to any social contract.²

Other Symposium authors echo or further develop this notion of dignity. Rhonda Gay Hartman treats respect for “bodily integrity” as foundational to human dignity and calls attention to adolescents’ right to be heard on the question of organ donation, even when a sibling’s well-being is at stake. Authors James M. Frabutt, Kristen L. Di Luca, and Kelly N. Graves proffer North Carolina’s juvenile justice system as a series of interactions, processes, and institutions designed to awaken in juvenile offenders the realization that their lives are always “assets” meriting the help and attention of their families and of the community. They describe how this perspective is communicated concretely by all of those charged with the responsibility for juveniles’ rehabilitation, via procedures such as individualized assessments of each minor’s strengths and weaknesses, followed up with treatment and services responding to their educational, psychological, medical, and social needs.

The articles by William Hannan and Barry C. Feld call for consistency and fairness in the waiver processes and the sentences applied to juveniles. Each relies upon the principle that the capacities—including developmental limitations—of individual persons ought to be part of any culpability assessment. Finally, authors Linda J. Collier and Simon I. Singer maintain the importance of preserving both retributive and rehabilitative remedies within the juvenile justice system. Each remedy has the effect of reinforcing the moral authority of the other, as well as reinforcing the moral agency of the individual juvenile, so long as courts apply such remedies fairly across juveniles of all socio-economic backgrounds.

Every author also attempts to demonstrate that when juveniles receive treatment corresponding to their individual dignity, there are benefits to the community. In other words, treating them “as if” they are community resources can become a self-fulfilling prophecy to some degree. There is some empirical evidence to support this conclusion: recidivism rates and the degree of seriousness of later crimes appear responsive to improved “up-front” efforts by the juvenile justice system.

Proceeding then from the perspective of minors’ irreducible dignity, most of the articles in this Symposium attempt to steer a course in the area of juvenile justice between assuring public safety and providing every offender a practical opportunity to be rehabilitated to live again in society, freely and responsibly. A

2. *Id.* at 182–83.

final article makes the case for respecting adolescents' right to be heard during judicial proceedings concerning adolescent organ donation.

TIME FOR A CHANGE?

In addition to suggesting that the dignity of minors is a theme uniting the articles in this Symposium, this introduction will make and illustrate one further general point: this collection comes at an opportune time for achieving the goals articulated by our authors. In other words, it appears that the pendulum in the area of juvenile justice may be ready to swing away from the accountability-based model of the recent past toward the rehabilitation and accountability goals proposed in the articles to follow. There are a variety of reasons this might be so. First, there have been steady declines in the rates of juvenile crimes since about the mid 1990s. Second, additional empirical evidence confirms adolescents' still-incomplete emotional and intellectual development. Third, there is credible evidence of the undesirable outcomes correlated with existing retributive practices, particularly the practice of processing more and more juveniles through adult criminal courts. Fourth, there is a pressing need to grapple with some troubling questions about race, educational disparities, and family form, all of which are related to the way in which juvenile justice has been pursued over the last several decades.

A little background helps to contextualize these four points. In the late 1980s and early 1990s, there was a much-publicized juvenile "crime wave" that led to the now-famous notion of the existence of a class of juvenile "super-predators."³ Reacting to this, the vast majority of states altered their laws to facilitate the transfer of more and more juveniles to adult criminal courts, a development which led, of course, to a greater number of juveniles being sentenced to adult prisons. The opportunity cost of this outcome was fewer juveniles receiving the benefits of the rehabilitation programs offered in the juvenile justice system. Additionally, in adult prisons—dubbed by some as "crime schools" for juveniles⁴—minors were more likely to be abused, and even to commit suicide, than were minors sent to juvenile programs.

Prior to the early 1990s, "transfer" decisions—to move minors from the juvenile to the criminal system—had been com-

3. John J. DiIulio Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23, cited in Pillari, *supra* note 1, at 168 n.8.

4. See, e.g., Robert E. Shepard, Jr., *Evidence Mounts on Wisdom of Trying Juveniles as Adults*, CRIM. JUST., Winter 2008, at 42, 43.

mitted for the most part to the discretion of judges. Over approximately the last seventeen years, however, transfers by judicial waiver have more and more been overtaken by those occurring as a result of legislative “offense exclusion” or “prosecutorial direct file.” In fact, author William Hannan reports that prosecutors’ decisions far outnumber any other means by which juveniles are transferred to the criminal system, even though prosecutors by definition represent the opposing party in the case, and even though their decisions are not subject to judicial review.⁵ (On the other hand, prosecutors pursuing a case in adult criminal court will also have to respect all of the rights accorded to defendants there, which are not necessarily a factor in juvenile court).

On their face, these developments have troubling characteristics. The authors in this Symposium propose various means to ameliorate the situation. Relatively recent developments indicate that lawmakers and citizens might be ready for their ideas.

The first development is the Supreme Court’s decision in *Roper v. Simmons*, which abolished the death penalty for offenders under the age of eighteen.⁶ The *Roper* Court relied significantly upon the conclusion that minors’ culpability is categorically, intrinsically diminished by virtue of their ages and corresponding levels of emotional and intellectual development. Were this reasoning be taken to its logical conclusion, legislators, and eventually the Court, might be receptive to Barry Feld’s proposal that juveniles ought to be additionally categorically exempted from a sentence of life without parole, or even that some type of “youth discount”⁷ might fairly be applied to all juvenile sentences.

Second, rates of violent juvenile crime decreased every year from 1994 to 2004.⁸ Between 1997 and 2006, arrests for murder and non-negligent manslaughter declined 42% (although between 2005 and 2006, the total number of arrests for violent crime increased by about 5%, led by an increase primarily in robbery arrests).⁹ These are the crimes tending to elicit the strongest

5. William Hannan, note, *Judicial Waiver as the Only Equitable Method to Transfer Juvenile Offenders to Criminal Court*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 193, 208–10 (2008).

6. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

7. Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 9, 55–64 (2008).

8. Howard N. Snyder, *Juvenile Arrest 2004*, JUVENILE JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.) Dec. 2006, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/214563.pdf>.

9. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK (2007), <http://ojjdp.ncjrs.gov/ojstatbb/>

reaction from the media and the public. These declines may tend to reduce fears that modern society has spawned, in a permanent way, some newly pernicious kind of juvenile offender against whom we can defend ourselves only via the harshest processes and penalties. The juvenile “crime wave” having receded, courts, legislators, and the public may be able to again see adolescent offenders as individual persons, often with troubled histories. They may be more responsive to studies like the November 2007 Centers for Disease Control survey indicating that the practice of treating juvenile offenders like adults—during both trial and punishment phases—appears to harm juveniles and society more than does the use of the juvenile system.¹⁰ In particular, this report claimed that transferring juveniles to the adult criminal system had an overall effect of *increasing* rates of violence among youth.

Third, over the last decade, the weight of the research evidence has increased, not decreased, which indicates that adolescents are not the equal of adults in the areas of judgment, impulse control, risk assessment, and the ability to resist negative peer and community influences.¹¹ That youths’ incomplete development mitigates their culpability was acknowledged as common sense by the U.S. Supreme Court’s *Thompson v. Oklahoma*¹² and *Roper v. Simmons*¹³ opinions. Furthermore, those who support lawmakers’ giving greater weight to this type of research are not asking for the moon: author Barry Feld, for example, makes it clear that he is not proposing reliance on such research to establish a “biological deterministic *excuse*” for crime, but only to suggest a rationale for *mitigating* the punishments doled out to juveniles.¹⁴

A fourth reason for the timeliness of this Symposium is the relatively high level of public awareness and concern about several matters closely correlated with juvenile delinquency: education and family form. It is known that juvenile offenders are

crime/qa05101.asp?qaDate=2006 (use drop list of “available versions” to view statistics between 2000–2006).

10. Robert Hahn, et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, MORBIDITY & MORALITY WKLY. REP., Nov. 30, 2007, at 1, 10 (adjusting numbers in order to erase the selection effect that could occur due to judges sending to adult prisons those juveniles convicted of the more serious crimes), available at <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>.

11. See Feld, *supra* note 7, Part II; Hannan, *supra* note 5, Part IV.A.

12. *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988) (plurality opinion).

13. *Roper v. Simmons*, 543 U.S. 551, 556 (2005).

14. Feld, *supra* note 7, at 40 (emphasis added).

regularly several academic grades behind their peers in age. It is also known that there is a robust correlation between juvenile delinquency and membership in a family lacking the presence of second parent, usually the father. Single parent families are also far more likely to fall at or below the poverty line. For more than a decade, the federal government has taken a greater interest and assumed a higher profile in the areas of both education and the family. Federal sources are offering incentives to the states to do the same, and states are responding. Disputes persist about means of strengthening both schools and families, but the will to do better is clearly present.

There is one additional aspect of the present juvenile justice system which is cause for alarm and an impetus for near-term action. The percentage of African-Americans who enter the juvenile system, the percentage who are transferred to the criminal justice system, and the percentage who receive sentences without rehabilitation, are all disproportionately high. In all likelihood, this outcome is not unrelated to the phenomena described in the prior paragraph, e.g., the educational prospects of the poorest African-Americans, and the high rate of out-of-wedlock births in this group. Clearly these statistics add up to a tremendous waste of human and community potential. They contradict the ideals of the nation. Discussions highlighting these disparate outcomes within the juvenile justice system are likely to get attention today because they touch upon so many currently salient issues at one and the same time—education, family form, juvenile crime, and race.

CONCLUSION

The authors in this Symposium have offered myriad proposals for improving the juvenile justice system in order to accomplish juveniles' rehabilitation as well as the public's safety. The reader may notice that many of the articles harken back to the original intentions of the juvenile justice system's creators, which are described as virtually completely rehabilitative. At first blush, it may appear that the authors are uncritically nostalgic for a "simpler day"—a day when judges sat beside the offenders brought into their courtrooms; a day when a juvenile judge could make time to visit a juvenile detention center to see how his charges were faring. A careful reading of the authors' treatment of the early juvenile justice system, however, shows that their purpose is not at all "nostalgia." Nor do they believe that kind words and manners from juvenile officials can solve the problem of recidivism. Rather, our authors are pointing to the past in order

to affirm the wisdom of the state's assuming a stance of "paternal" care for minors, a stance which includes treating them as individuals with individual hardships and abilities that merit attention.¹⁵ One author even insightfully cautions that excessive or exclusive focus upon the degree of due process offered minors—as mandated by the Supreme Court's *In re Gault*¹⁶ decision—can lead indirectly to draining the personal and the "parental" from juvenile proceedings.¹⁷

Our authors do not stop at the suggestion that courts assume a particular tone or relationship with the juveniles brought before them. Rather, they provide concrete suggestions about processes that might communicate to adolescents the state's respect for their dignity and belief in their future.

Authors James M. Frabutt, Kristen L. Di Luca, and Kelly N. Graves, for example, discuss North Carolina's "youth development centers" for rehabilitation. The centers are marked by familial involvement (made possible by locating more centers nearer offending populations), educational services to help close the gap somewhat between juvenile offenders and their peers, and reintegration planning beginning from the day a juvenile first arrives. Throughout their time at such centers, every interaction with staff is designed to affirm the particular strengths of the minor, and convey hope for their future reintegration as a capable adult in society. Such interactions can really only be described as "parent like."

Likewise, Rhonda Gay Hartman's description of the process due to adolescents from whom parents are seeking organ donations (often for a sibling), appears designed to model parental best-practices. Adolescents would receive full informed consent, as well as highly individualized attention, and a full opportunity to dialogue with a judge in a way that the adolescent and the legal system could judge as impartial, orderly, and fair.

Taken as a whole, the articles in this Symposium invite us to see minors—especially those arrested for juvenile crimes—as human beings with individual dignity that cannot be destroyed or eliminated by their behavior, even while some of the most heinous offenders need to be removed from the general population for a relatively lengthy time. Our authors invite us to this perspective at the level of morality, but also with the assistance of empirical evidence tending to support the notion of minors' reduced capacities for judgment and the benefits of rehabilitation versus

15. See Pillari, *supra* note 1; Hannan, *supra* note 5.

16. *In re Gault*, 387 U.S. 1, 33 (1967).

17. Pillari, *supra* note 1, at 172–73.

adult punishment. They insist that the law not only respect due process imperatives regarding minors, but also go further in order to meaningfully reflect this perspective about minors—further in the areas of delinquency prevention, opportunities for minors to be heard during judicial proceedings, and rehabilitation services which really address the many hurdles faced by juveniles on the path to becoming contributing, and respected, members of society. Were our legal system to adopt many of our authors' proposals, it would better conform to our nation's ideals of respect for the dignity of every person.