"The Worst of Both Worlds" Or Was the Therapeutic Mission of the Juvenile Court System A One-Way-Street? - The German Juvenile Court System Compared to the American Situation

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COMPARSED TO THE AMERICAN SITUATION

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For my mother.

Without her continuous and neverending support all this never would have been possible.
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"The Worst Of Both World

Or

Was The Therapeutic Mission Of The Juvenile Court System a One-Way-Street?

The German Juvenile Court System Compared To The American Situation.

Introduction.

"Juvenile Criminal Law is Criminal Law. It is not Social Law, it is not conditioned to automatically help the juvenile offender, but it serves the concept of social control. This simple fact gets much too easily out of focus in the euphoric debate about the youth’s welfare."

Certainly, this statement automatically triggers the question: if it is that simple, that Juvenile Criminal Law is Criminal Law, why is it, that so many international - as in Germany as well as in the United States - court systems have specific Juvenile Courts? In other words, why aren’t juvenile offenders thrown into adult criminal courts like all the other ordinary offenders?

It takes only these few sentences to reach the very core of the discussion about the reason behind juvenile courts or even their right to exist.

Is juvenile justice different to the general concept of justice, is there a need for separate juvenile institutions, does juvenile justice deserve to survive? Urgent questions, which are looking for utmost convincing answers if the Juvenile Courts want to have any chance to survive the fierce attacks of abolitionists. After all, due to a wide range between the extreme ideas about philosophical and psychological concepts behind punishment, the

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1 PETER-ALEXIS ALBRECHT, JUGENDSTRAFRECHT (Publishing House: Beck/Munich, 1987) at Foreword
decisive question is, "how can offenders be most constructively brought to justice and then redirected toward law abiding careers?"^2

In order to defend the current special judicial branch for juvenile justice, one better finds different answers for juvenile and adult offenders.

To find these answers, it will turn out to be helpful to look at the American roots for the particular concept of juvenile justice.

By the end of the 19th century, children increasingly were seen as vulnerable, innocent, passive, and dependent beings who needed extended preparation for life. Attributing criminal behavior to antecedent causes reduced offenders’ moral responsibility, focused efforts on reforming rather than punishing them and fostered the “rehabilitative ideal”. At the dawn of the 20th century, progressive reformers used the theories of social control and the new ideas about childhood to create a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youths.\(^3\)

In those days children in the United States of America were regarded as less responsible for their wrongdoings; in contrast to adult offenders, they were not lost to the underworld yet - they could still be pulled over to the right side of the road. However, society and in particular the judicial system went through a change of mind as far as their correctional principles for juveniles were concerned. They concluded that, in order to prevent juveniles from becoming recidivous offenders one had to respond to their needs rather than to punish them.

An American contemporary judge commented, “offenders should be protected by the state, acting as would “a wise and merciful father” when he learns that his child has erred. It is the duty of the state, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal, but a worthy citizen.”^4

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\(^3\) Barry C. Feld, Juvenile (In)Justice and the Criminal Court Alternative, 39 Crime & Delinquency 403, 404 (1993)

\(^4\) Gary B. Melton, Taking Gault Seriously: Toward a New Juvenile Court, 68 Nebraska L. Rev. 146, 151 (1989)
This new philosophical, penal approach at the turn of the century gave birth to the parens patriae\(^5\) concept, which reflected the image of the state being the caring father and the juvenile offender being the child which needed treatment instead of punishment. In a revolutionary change of attitude immaturity and vulnerability were taken into account “not only in the United States, but also throughout Europe”\(^6\), guided by the belief in the amenability of a misconducting child.

It was this very image which produced the new judicial institution of a juvenile court; the very first one was the American juvenile court of Cook County in Chicago which came out of the Illinois Juvenile Court Act of 1899. This court was regarded as affording the benefits of a diversionary system, anonymity, diminished stigma, shorter sentences, and recognition of rehabilitation as a viable goal.\(^7\)

All this is a century ago - next year the first juvenile court which began its immense efforts in Chicago will have its 100\(^{th}\) birthday. North - American as well as European societies went through numerous political changes and transformations in the course of the current century. By passing through these political and societal stages, such as industrialization and urbanization juvenile delinquency has also radically changed and moreover unfortunately also increased. Juvenile delinquency today is almost omnipresent, multi-faceted and much more serious and violent. In other words the group of juvenile offenders who produce fear, anger and frustration with the judicial system among society has substantially expanded and has provoked countless calls for getting tough on juvenile crime again. Moreover, today there is even a general tendency that challenges the judicial branch of juvenile justice itself and demands its abolition.

The omnipresence of serious juvenile delinquency has produced substantial concern about public safety and the aptitude of juvenile courts to successfully continue its mission

\(^5\) see Julian W. Mack, The Juvenile Court, 23 Harv. L. rev. 104, 109 (1909)

\(^6\) Id. at 104

\(^7\) Irene Merker Rosenberg, Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists, Wisconsin L. Rev. 1993 PT. 1, 163, 184/185
to control juvenile crime by rather trying to rehabilitate offenders than punish them. In consideration of this troublesome development of juvenile delinquency, the focus here shall be on the examination of the current German and American situation. After this examination the conclusion here will be that the mission of the juvenile courts was not and is not a one-way street. Substantial reforms, however, are crucial in order to make sure that German and American juvenile courts will survive the current institutional crisis. The concept of juvenile justice is too precious to be dumped that easily. It deserves a thought process which can come up with ideas how to take out the weak points and how to optimize the system. There is no panacea for punishing juvenile offenders most effectively or even to completely cure them from being criminally active. Therefore reformed juvenile courts deserve to continue their therapeutic mission.

This chapter will introduce this very problem of having to decide whether the current situation of juvenile delinquency is calling for changes or even abolition of juvenile courts. Some general historical aspects and German and American statistics material about juvenile delinquency will serve as the chapter’s basis.

In the second chapter the basic sentencing concepts on the extreme ends will be introduced. In addition to the characterization their differences will also be pointed out.

Chapter three will provide a general survey over the American and German juvenile court history of this century.

Chapter four will focus on the problem of juvenile courts in Germany and in the United States of America of defining the malleable juvenile. Moreover it will discuss the procedural responses of both systems, if a juvenile is found not to be malleable. The central problem of drawing such a line is that by doing so, the systems admit the invalidity of the general picture of the amenable juvenile offender. However, the conclusion will be that juvenile justice systems need such lines, and moreover also need to enforce them.
In chapter five the basic pillars of procedural juvenile justice will be presented, and moreover the ambiguous aspects will be carved out. In addition it will be shown that these ambiguous points should not be used to completely give up on juvenile courts. 

Finally, chapter six will conclude that juvenile courts in Germany and in the United States of America ought to survive. At last, a rough prognosis for both countries’ future developments within their juvenile justice systems will finish this thesis.

After having presented this roadmap of the thesis, a closer look on some recent statistical numbers in Germany and the United States of America illustrates the current situation of juvenile delinquency in these two countries.

First some German numbers for juvenile crime rates:

Numbers for juvenile delinquency in Germany (only within the former FRG without the former GDR) for 1996 present a gloomy picture; although the total number of convictions compared to 1995 kept stable, the number of convictions of juveniles shows an increase of 8.9% within the same time frame of 1996 for those between 14 and 18 years of age; this stands for a total number of juvenile convictions of 41.000. Even worse, bodily injuries increased by 19.5%. The group of robberies even rose by 29.7%. After all, numbers of convictions are not a very accurate indicator of delinquency, because police kept numerous offenses off the records through their unofficial intake diversionary system. “Police officers make up the first line in the control of street crime; [t]hey are vested with considerable discretionary powers. The intake procedure allows a police officer to unconditionally release the offender from the juvenile justice system or to simply give a verbal warning.”

In contrast to 1996, 1995 saw 37.660 juvenile convictions, roughly 3500 less compared to the following year; 1995 also presents the huge number of 64.880 adolescent convictions, of which a substantial part was dealt with in juvenile court; unfortunately

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8 DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM, (Christine Cardone ed., 1992), at 144/173
there is no equivalent number for 1996 yet, but tendencies must lead to the assumption that adolescent convictions of 1996 will even be more than in 1995.

German juvenile correctional facilities housed 521, 14 to 18 year-olds in 1994, 545 in 1995 and 583 in 1996; at the same time in 1994 2378, in 1995 2500 and in 1996 2737 adolescents from 18 to 21 years of age saw the detention correctional walls from the inside. Overall 4757 juveniles were imprisoned in 1994, whereas in 1996 this number already had gone up to 5253. caret

All statistical fields display a continuous and steady incline of the numbers which are relevant for examining the latest tendencies and the up to date situation in German juvenile delinquency; some subcategories even present drastic and frightening climbing figures among which one especially needs to pay attention to the columns of “second - class - violent - crimes” like bodily injuries and robberies.

Certainly, all these developments do not make people feel comfortable with a rehabilitative model in juvenile criminal law; before they can adopt such concepts, they have to feel safe in first place. By facing the presented numbers, many people’s response will be;”...but how can I feel safe in the current situation?”

Looking on statistical figures in the United States unfortunately does not look any better and therefore can not soften at all the philosophical crisis in independent juvenile law.

In 1992 juveniles under 18 years were responsible for 13 percent of all violent crimes in the United States; they committed 9% of all murders, 14% of all rapes and even 16% of all robberies. This absolutely points out that research not only has to concentrate on the

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9 all the statistical materials are taken from the homepage of the Federal Office for Statistics in Germany, http://www.statistik - bund.de
10 CQ RESEARCHER, March 15, 1996; Volume 6, Number 10 presenting the source: “Juvenile offenders and victims: A focus on violence”, Statistics Summary, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, may 1995
overall problem of widespread juvenile delinquency, but especially needs to focus on more and more serious and violent juvenile crime.\textsuperscript{11}

Although juvenile delinquency has dramatically changed, the public probably still could cope with status offenders and less serious, occasional offenders, and the notion of a separate juvenile justice system. However, how are they supposed to deal with this increasing violence wave in juvenile criminal behavior, moreover by considering the expected increase of the percentage of the under 18 years of age population in the years to come which threatens society with the production of a coming "crime - bomb"?

No wonder, after all, that only 1\% of the American population is keeping the faith that rehabilitation programs have been or even are very successful and effective. A quarter of the US population wants to see government fighting crime with punishment, only 12\% still think rehabilitation is the right concept for juvenile crime. In other words, can it surprise, that 36\% of the Americans want mandatory life sentences for 3 - time - felons, 30\% want an expansion of the death penalty, 19\% want 13 and 14 year - olds tried as adults.\textsuperscript{12}

All these numbers do not and of course can not display euphoria for the continuation of the concept of rehabilitative ideals in the field of juvenile crime.

The 19\% of supporters for waiving jurisdiction to criminal court even for the youngest juvenile offenders light the fire for juvenile court abolitionists; the ideals which gave rise to the juvenile courts obviously did not work, they say, so let us get rid of these

\textsuperscript{11} Edwin A. Risler/Tim Sweatman/Larry Nackerud, Deterring Juvenile Crime, School of Social Work, University of Georgia, unpublished running head: correspondence to Ed Risler, School of Social Work, UGA, Athens/GA 30602, at 4, 5: even if there presented numbers of juvenile crime don't look so serious on their face displaying only a small percentage of overall crime, they get very threatening when considering the drastic rise of juvenile crime in the US over the last few years. For example, the homicide rate between the ages of 15 to 19 increased 82\% from 1984 to 1994.

Likewise in Georgia the number of juveniles arrested for murder increased 49\% from 1989 to 1993. By 1991 there were 100.000 juveniles in correctional institutions nationwide, twice the number of juveniles incarcerated in 1965.

\textsuperscript{12} all the statistical materials are taken from the CQ Researcher, March 15, 1996; Volume 6, Number 10, at 222 presenting the source: Gallup/CNN/USA TODAY poll, Sept. 1994; Withlin Group, Sept. 1994; LOS ANGELES TIMES, April 1994
unnecessary judicial institutions and try young offenders as usual criminal offenders in
the courts which are supposed to take care of that, the criminal courts.

Admittedly, as well as societies, juvenile courts went through many significant
institutional changes in the course of their history of existence. What started out to be a
very informal procedural alternative, today is equipped with quite numerous procedural
formalities. However, it is unfair to state that “the juvenile court has been transformed
from an informal, welfare agency into a scaled - down, second - class criminal court as a
result of a series of reforms that divert status offenders, waive serious offenders to adult
criminal courts, punish delinquent offenders, and provide more formal procedures.”

Certainly, juvenile courts today are much more similar to criminal courts than the
progressive founders at the turn of the century probably would have predicted or would
have perceived as a future goal. However, the transformation process was always guided
by the belief to optimize the juvenile offender’s procedural needs, rather than by the
intent to produce a superfluous, second - class criminal court.

Moreover, is it really correct to accuse the juvenile court of having forgotten the ideals of
rehabilitation and its intended motive to serve the best interests of the child?

As Feld says,

The Supreme Court’s decision in In re Gault began transforming the juvenile court into a very different
institution than the Progressives contemplated. [1]In the past two decades, legislative, judicial, and
administrative responses to Gault have modified the court’s jurisdiction, purpose, and procedures. [A]s a
result juvenile courts now converge procedurally and substantially with adult criminal courts.

13 Feld, Juvenile (In)Justice, supra note 3, at 403
14 Mack, supra note 5, at 109: the progressive founders wanted “to get away from the notion that a 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.”
This picture is well represented in the Supreme Courts ruling in Commonwealth v. Fisher (213 Pa. St. 48, 62 (1905)): “to save a child from becoming a criminal, or from continuing in a career of crime, to
end in maturer years in public punishment and disgrace, the legislature surely may provide for the
salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into
one of the courts of the state without any process at all, for the purpose of subjecting it to the state’s
guardianship and protection.”
15 387 U.S. 1 (1967)
16 Barry C. Feld, the Transformation of the Juvenile Court, 75 Minn. L. Rev. 691, 692 (1991)
However, these modifications did not really lead to continuous disadvantages for children being tried in juvenile courts, and moreover they do not seem to be substantial enough for being the basis for giving up on the juvenile justice system.¹⁷

The abolition of a historical institution is the most extreme response and therefore at least, before deciding whether to abandon the juvenile courts, two basic questions must be addressed: (1) is the disparity in procedural and constitutional protection between the adult and juvenile courts significant enough to justify opting out of the juvenile justice system, and (2) if children are tried in the criminal courts, will their immaturity and vulnerability be taken into account adequately in assessing culpability determining sentences?¹⁸

Still, leaving alone these important questions, relying on the philosophical and criminological value of a parens patriae concept, even if it is concededly ambiguous, after all is preferable to throwing the whole rehabilitative concept overboard.

Certainly, “the juvenile court as an institution is at crossroads”¹⁹, but that does not mean that there were no other streets to turn in. Abolition stands for a one-way-street, which would mean, no options were left for effective and straight reformation steps. Such steps could turn the juvenile court into the judicial factor which at the same time satisfies the public and criminologists of each side of the argument and nevertheless still follows the basic ideas of the founding progressives a century ago.

Answering this very question has to be the center of all discussions dealing with juvenile justice of today.

Finally one must not forget that fighting juvenile crime and especially violence is also a highly political matter, which makes it even more controversial. People who follow the constant debate

know all too well how easy it is to make a case against the juvenile court. On the right hand, neoconservative critics will insist that the court is administered mainly by puddingheaded judges indifferent to the safety of the public. They will articulate devastating accounts of slovenly decision

¹⁷ see Rosenberg, Leaving Bad Enough Alone, supra note 7, at 166
¹⁸ Id.
¹⁹ Barry C. Feld, Legislative Policies toward the Serious Juvenile Offender, 27 Crime & Delinquency 497, 520 (1981)
making in which leniency is granted to those children who deserve it the least. On the left hand, some liberals and most radicals are just as certain that the indifference of the juvenile wing of the judiciary is toward the working-class values and concerns of the children appearing in court and of their families. Criminologists have to be careful of not getting caught in this political crossfire. After all juvenile justice should be dominated by criminological and social thinking.

Being aware of all the facts that have been pointed out so far, another additional factor needs to be pointed out: "there is a well established connection between age and crime, in which crime is found to follow a predictable path over the life course, reaching its high point in the late teen years." Considering that "dependency of youth means that there is a point before which people require the care and attention of responsible adults and after which they should be free to take care of themselves" should also weigh heavily in this discussion and be sufficient incentive not to decide hastily against a juvenile court. Instead one should cautiously think about how to carve out an efficient and constitutionally adequate judicial organ which can focus predominantly on the belief in a youthful offender’s amenability.

A juvenile court is not supposed to be a scaled down criminal court hidden behind a faked cloak with a rehabilitation - label, children do not deserve the risk of having to face "kangaroo courts" they do not deserve "to get the worst of both worlds", but one should not jump to the conclusion that the therapeutic mission of the juvenile court is at its end.

It is unbearable, when a juvenile ‘neither gets the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children’, and it is more than obvious that juvenile courts of today are calling for crucial reforms. On the one hand

20 Conrad, Can Juvenile Justice Survive?, supra note 2, at 544
22 Id. at 267
23 In re Gault, 387 U.S. 1, 28 (1967)
24 Feld, Legislative Policies, supra note 19, at 520
25 Kent v. United States, 383 U.S. 541, 556 (1966)
juvenile court procedure moves more and more toward criminal court procedure which
would make them kind of unnecessary, on the other hand these courts still afford almost
absolute discretion to the juvenile court judges in specific important procedural areas
where the offenders face the risk of being arbitrarily treated. Today the necessary degree
of procedural formality and the possible degree of a judge’s discretion need to go hand in
hand in order to represent a modern judicial alternative for juvenile offenders.

If the juvenile courts want to be led out of their institutional crisis, radical changes need
to be enforced so that the courts can survive constitutional scrutiny in the future. This
would be preferable to a complete abolition which by itself would only cause new and
only slightly different problems in dealing with a special category of delinquency which
would still ask for a specific judicial niche in the regular court(s).

26 Melton, Taking Gault Seriously, supra note 4, at 148
Chapter 2: Sentencing Concepts.

In order to be able to understand the institutional and philosophical crisis of the juvenile court of today, one must know its historical roots and development and also the different basic directions of the most extreme sentencing concepts. The latter are even more fundamental for carving out the ambiguous criteria in the current juvenile justice systems in Germany and the United States of America which even produced some calls for abolition. For this reason, the focus goes first to the introduction of the different sentencing concepts. After this, a rough outline of the German as well as of the American historical landmarks of this century will be presented.

The proper justification for criminal punishment always was and still is the most fundamental and most controversial subject in jurisprudence as well as in the criminal law itself. However, criminal law in general is clearly built on the concept of criminal punishment, even if the appropriate forms of punishment are widely discussed. Juvenile criminal law is different. In this field it is not clear at all that this special branch of criminal law is also clearly built on this concept of punishment. Punishment often is justified as best means to insure public safety, however, one has to keep in mind that the best and therefore ultimate insurance for public safety is to turn an offender into a law abiding person. On this basis the question arises, if juvenile offenders do not deserve more rehabilitative and educational judicial reactions rather than being punished like adult offenders. After all, due to their youth and inexperience it seems like they are more malleable than adult offenders. Therefore, it is often argued, the goal should rather be to educate them and not to punish them. Moreover, the state could serve as a caring father, hoping and at least trying to pull the juvenile over to the right side without punishment.
In order to answer this fundamental question about the right concept for juvenile justice, the basic, extreme ideas behind sentencing in general shall be explained. This is the first necessary step toward deciding which ideas should guide the juvenile justice branch.

1. Deterrence and Retribution.

Although guided by different motives and reasoning, deterrence as well as retribution have the same aim: they qualify criminal offenders as the target of punishment; both concepts stand for the belief that the only way to fight and prevent crime is to punish. Actually one thing leads to another; retribution is the final act of punishing which is supposed to prevent or better deter crime in first place and as well its commission in the future.

However, pure “retributionists” don’t pay attention to this connection, they strictly see retribution as retaliation, as avenging the victim and also the upset and scared public. Retribution is the justice of punishment, which here means,

it is better that one man should die than the who people should perish. For if justice and righteousness perish, human life would no longer have any value in the world. [E]ven if a civil society resolved to dissolve itself with the consent of all its members - as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves through the whole world - the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltyness may not remain upon the people; for otherwise they might all be regarded as participants in the murder as a public violation of justice.\(^27\)

It can not get any clearer than here, that pure retribution stands for punishing in the name of punishment; punishment is the moral duty of society to take revenge for the victim. Punishment is not taken into account as potentially leading to the prevention of further, similar crime and crime overall. “Retribution is a very straightforward theory of punishment: we are justified in punishing because and only because offenders deserve it.”\(^28\) This standpoint is very narrow minded and short sighted, because it totally fails to realize that pure retribution will only cause rebellion in the offender's mind. Instead of


\(^28\) Michael S. Moore, *The Moral Worth of Retribution*, in *Id.* note 27 Casebook, at 107
heading to a law abiding life this concept produces anger which will most likely provoke the offender's recidivism. For that reason such a system can not serve public safety.

On the other side, the concept of deterrence also promotes the absolute need for punishing criminal offenders; however, it does so in a more constructive way. In other words its supporting rational is more scientific than it is the case with a retaliation concept which punishes for punishment's sake. The goal instead is to deter the commission of future offenses through psychologically coercing potential criminal offenders to stay away from crime, because "the risk of discovery and punishment is outweighing the temptation to commit crime."^29

The concept of deterrence is divided into two subcategories:

deterrence theorists distinguish between the effect of punishment as a general deterrent and its effect as a special deterrent. Punishment acts as general deterrent in so far as the threat of punishment deters potential offenders in the general community. It acts as a specific deterrent in so far as the infliction of punishment on convicted defendants leaves them less likely to engage in the crime.30

This means nothing else than it is presumed that a society needs a threat of punishment to prevent crime in first place and needs the same threat to avoid recidivism of the single potential offender who was criminally active and even convicted before.

Again, for different reasons with different argumentative backgrounds, retribution as well as deterrence see the infliction of punishment as central factor, as central prerequisite in a society to prevent crime and avoid recidivism. These principles should not dominate a juvenile court or in general juvenile crime, no matter in front of what court. Moreover, a juvenile court actually would not be a necessary judicial branch, if it followed such concepts. These ideas should not play a role in the current set up of a juvenile court as well as in any specific juvenile justice institution in general.

In order to demonstrate the validity of such statements, the alternative potential judicial responses to juvenile crime and crime in general need to be examined.

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29 Johannes Andenaes, General Prevention - Illusion or Reality?, 43 J. Crim. L. Criminology & Political Science 176, 179/180 (1952)
30 KADISH/SCHULHOFER, supra note 27, at 115
2. Rehabilitation and Education.

Rehabilitation stands for education, education stands for treatment, treatment means not to punish; in other words, here a sanction against a convicted offender is not inflicted on him in order to punish him and thereby deterring future crime, but with the belief that by putting him into a facility where extensive therapy programs are undertaken, "not only a nondangerous offender, but also a flourishing, happy, and selfactualizing member of our society will be produced. [I]t seeks to rehabilitate offenders not just so they can be returned safely to the streets, but so they can lead flourishing and successful lives."^31 Supporters of the theory draw the analogy to medicine; "their growing belief in education and in the healing powers of medicine encourages them to suppose that the delinquent may be reeducated to become a useful member of society."^32 Certainly, this concept like every other concept is very optimistic about its general validity. Not every juvenile offender will find this way to a flourishing and successful life. However, there is no panacea for avoiding recidivism anyway. The decisive point for the adoption of a rehabilitative system is the notion that every juvenile offender due to his/her immaturity and the hope for amenability at least deserves a chance to be educated and not punished.

These rehabilitation ideals become especially relevant in the field of juvenile criminal law in the course of the 20th century. This has several reasons:

The establishment of the juvenile courts as a special institution for controlling deviance among juveniles was based on the obvious notion that young offenders are young as well as offenders.[A]ccordingly, the juvenile justice system with its underlying rationales of rehabilitation seeks to protect young offenders from the stigma of conviction through treatment and supervision, procedural informality, and confidentiality.^33

In addition, promoters of a juvenile justice system "presumed juvenile offenders to be particularly malleable and therefore, predictably responsive to treatment to prevent their future antisocial conduct."^34 Again it needs to be seen that this presumption certainly is a

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^31 Michael Moore, Law and Psychiatry, in Id. note 27, at 123, 124
^32 Morris R. Cohen, Moral Aspects of the Criminal Law, 49 Yale L. J. 987, 1012 - 1014 (1940)
^33 Feld, Legislative Policies, supra note 19, at 498
^34 Melton, Taking Gault Seriously, supra note 4, at 159
generalization, however, in this rehabilitative concept every juvenile offender simply deserves the chance to prove his/her amenability.

Moreover,

psychological research concerning legal socialization indicates that young people move through a developmental sequence of stages of cognitive functioning with respect to legal reasoning, internalization of social and legal expectations, and ethical decisionmaking. [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less disciplined than adults, [t]hey deserve less punishment because adolescents have less capacity to control their conduct and to think in long range terms than adults.\(^{35}\)

The fact that some juveniles better manage to stay out of trouble and reach a certain degree of maturity at an earlier point, should not keep the ones, who always find trouble easily, from a granted chance through which they could prove their will to improve. Moreover, to deny such a chance would almost be a discrimination of those juveniles who unfortunately did not enjoy an appropriate education due to disadvantageous social personal backgrounds.

After all, “juvenile courts have traditionally assigned primary importance to individualized treatment of juvenile offenders on the theory that the interests of both offenders and society are best served by regenerative intervention.”\(^{36}\)

The real needs, the best interests of the juvenile offender here are conceptually victorious over a “just deserts” approach.

These considerations were and are basis for the fact that Germany adheres to Juvenile Courts as specific and independent element of its court system and also even still bases this concept on the specific federal law for the field of Juvenile Criminal Law, the Juvenile Court Code (Jugendgerichtsgesetz - JGG). In Germany,

Jurisprudence in the field of research in its broad majority sees juvenile criminal law as specific criminal law for young offenders, who, at the time of commission of the offense, find themselves in the critical stadium of character development between childhood and adolescence. [D]ue to the specific purpose of juvenile criminal law there are considerable differences to adult criminal law. The major policy difference is reflected through the technical term “offender criminal law”. [T]he “offender criminal law” is used as being the opposed counterpart to “offense criminal law”. While the adult criminal law is determining

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\(^{35}\) Barry C. Feld, The Juvenile Court Meets The Principle Of The Offense: Legislative Changes In Juvenile Waiver Statutes , 78 J. Crim. L. & Criminology 471, 523/525 (1987)

\(^{36}\) Feld, Legislative Policies, supra note 19, at 498/499
sentencing strategies predominantly through type and severeness of the relevant deed. juvenile criminal law in Germany is approaching this theoretical procedure quite differently. Here sanctions in response to an offense compared to adult criminal law much more are determined through the offender’s personality and a prognosis to future criminal behavior/recidivism, rather than through the seriousness of the offense.  

Inseparably connected to these German ideas and principles is the term “diversion” which originally was born in the American discussion about juvenile justice in the 1960’s.

Diversion is a term, which is used in the United States for about 30 years now and which started to have major impact on the German discussion about political policies in juvenile criminal law in the mid 80’s as well. Diversion in a general sense means, any stop of the chain of events in the course of investigation/trial/execution of a sentence at a given point somewhere along the line. However, a majority defines it more precisely as stopping the described three - stage - procedure between the arrest by the police and the formal beginning of the trial, the so - called ‘pre - trial - diversion’.

Originally, diversion had three major goals: avoiding stigmatizing effects, reducing work load for the judiciary, making criminal law more humane through avoiding unnecessary social control. The concept of diversion as it was originally developed in the United States of America meant to reduce the juvenile court’s population “by shifting discretion from the core of the juvenile court where it is subject to a modicum of procedural formality, to its periphery.”

However, on the long run it unfortunately caused an effect in the United States of America as well as in Germany later on, which is described as “Net Widening”. This expression stands for the phenomenon that diversion programs now transfer a lot of rather harmless juvenile offenders to official therapy courses or some sort of social work. In earlier pre - diversion days the juvenile offender simply would have gotten away with what he was caught for. Such diversion programs today are certainly under judicial scrutiny. Such a system on the one hand led and leads to a reduction of the number of juveniles in correctional facilities, on the other hand, however, the total number of

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37 FRIEDRICH SCHAFFSTEIN/WERNER BEULKE, JUGENDSTRAFRECHT, (W. Kohlhammer ed., 12. ed. 1995) at 1
38 ALBRECHT, supra note 1, at 22
39 Id. at 23
40 Feld, Transformation of the Juvenile Court, supra note 16, at 698
juveniles being treated judicially at least to some extent did and does increase.\textsuperscript{41} This very phenomenon is described as the widening of the net.

Originally, diversion as developed in the United States of America meant diverting youths from criminal courts to informal services; today it stands for "shifting otherwise eligible youths away from juvenile court to provide services on an informal basis.\textsuperscript{42} Juveniles who previously would have been released now are subject to informal intervention."\textsuperscript{42} These informal services of today\textsuperscript{43} actually are only semi-informal, after all they are somewhat connected to the court and its supervision, because all those programs are judicially scrutinized, sometimes even controlled. Again, all this rather leads to an increase of the court's population in the average. Moreover, all the service agencies are engaging in competition with each other for success rates in producing cured, law abiding juveniles. For this reason they are sometimes over-vigorous in enforcing their services; these interrelations actually lead to an expansion of the at least somewhat judicial responses, hence the widening of the net. Nevertheless, diversion still represents the ideas of treatment and it negates the need of punishment for avoiding recidivism.

The absolute theoretical pronunciation of treating instead of punishing, educating instead of taking revenge in the German Juvenile Criminal Law is also reflected in the sentencing system of the Juvenile Court Law (JGG) which presents numerous diversion ideas:

\textsection \textsection 5 (2), 17 92) JGG describe the imprisonment of a juvenile as the \textit{ultima ratio} within the sentencing system. \textsection \textsection 9, 10, 11, 12 JGG describe the most common sentencing type for juveniles: the so-called educational disciplining, among which are directives and instructions. Some of the most significant possibilities of \textsection 10 JGG are the instruction to

\begin{footnotesize}
\textsuperscript{41} see ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 24, 25
\textsuperscript{42} Feld, Juvenile(In)Justice, supra note 3, at 407
\textsuperscript{43} CHAMPION, THE JUVENILE JUSTICE SYSTEM, supra note 8, at 341, 342: models for informal intervention for instance are cooperating agencies providing social work or social therapy courses, street control models providing similar help and official response in neighborhood centers or similar
\end{footnotesize}
start an apprenticeship, to agree to having to see a supervising person on a regular basis, to participate in a social training course or to try to achieve reparation or restitution agreements and understandings with the victim(s) of the offense.

The next step on the sentencing ladder leads to stricter disciplinary measures. § 13 JGG divides them into formal warnings, the imposition of specific conditions and as a last resort within this category juvenile detention; juvenile detention has a maximum of four weeks in a correctional juvenile facility as § 16 (4) JGG states.

Finally, § 18 (2) JGG reads, the length of juvenile imprisonment has to be measured by sentencing to the minimum which is considered a sufficient basis to achieve the intended educational effect on the treated young offender.

At last it is also possible to pursue rehabilitative ideals through specific programs for an offender after his/her conviction through correctional treatments, instead of earlier diverting him and preventing a formal sentencing process.

Through correctional treatment, the offender goes through a regular formal sentencing process, however, the sentence itself is supposed to be a rehabilitative treatment, rather than a punishment in itself. This does not mean the offender had probably not to go through a lot of pain, but again, this is pain which is supposed to stand for treatment, not punishment. Among multiple correctional treatment options, a lot of times the applied "sentences" are therapeutic integrity programs, family and community intervention programs, biomedical assistance, cure for drug addiction/alcoholism programs such as the methadone programs, sexual deviation treatment programs and numerous other approaches with similar correctional background reasoning.44

Given all this information, these ideas, these aspects, these different levels and approaches to the sentencing concept of rehabilitation and education, the remaining

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44 Paul Gendreau/Bob Ross, Effective Correctional Treatment: Bibliography for Cynics, 25 Crime & Delinquency 463, 467 - 484 introduce these options
baseline still is: such principles should rule over and dominate juvenile courts. Such juvenile courts in the United States and Germany are necessary judicial institutions which should promote and live up to rehabilitative ideals.

The views of rehabilitation, especially in the field of juvenile criminal law happened and still happen to be more and more pessimistic and critical over the last decade. Promoters and supporters had to stand up against numerous and growing multilateral attacks over the last years. Despite all the criticism they still should fight all these attacks back. After all there is one indisputable fact, everybody should keep in mind:

If we persist in the negative view of correctional treatment, we are encouraging the correctional system to escape its own responsibility. By labeling the offender as untreatable, we make it apparent to one and all that we cannot be held accountable for his improvement or his deterioration.

3. Restitution and Reparation.

Although it draws on ancient concepts and practices which were abandoned late in the Middle Ages as formal justice systems emerged and began to define the obligation of offenders as a debt to the king or lord rather than to victims, modern interest in restorative justice has been influenced by several developments in the 1970s and 1980s. Notably, the reemergence of restorative philosophy and practice grew out of experience with reparative sanctions and processes, the victim’s movement, the rise of informal neighborhood justice and dispute resolution processes, and new thinking on equity and human relationships influenced in part by the women’s movement and the peace and social justice movements.

One of the reasons why this concept, which individualizes and anthropologically pronounces the idea of justice, stepped back out of the darkness had to be that a significant group of criminological scholars realized that the concern for the victims’ interests had to grow again in the context of a modern social society.

Retributionists punish for taking revenge in the name of and for society in second place, but for avenging the victim in first place without even trying to find out, if this actually is the kind of reaction the victim is longing or at least asking for. Therefore, whether seen as punishing or rehabilitating the offender, restitution seeks, at a minimum, to give some

45 Id. at 488/489
46 Gordon Bazemore/Mark Umbreit, Rethinking the Sanctioning Function in Juvenile Court: Retributive and Restorative Responses to Youth Crime, 41 Crime & Delinquency 296, 301/302 (1995)
recognition to the claims of the victim: it also restores the moral balance by making the offender part of the victimization experience."

However, the concept of restitution and reparation focuses on the involved individuals in a crime plot through treating them as the ones who need to be helped on the one side and as the ones who need to be educated and taught a lesson on the other side. Therefore it has to be regarded as an alternative method to sentence in comparison to the theories of deterrence and retribution which are guided by their punishment motives.

Here the focus is on problem solving instead of establishing blame or guilt, it emphasizes dialogue and negotiation as of parties around the round table instead concentrating on the adversarial relationship.

In the United States, this alternative sentencing concept almost exclusively plays a role in the juvenile criminal law field as far as criminal law is concerned (the biggest field of application in the United States actually is the field of Civil Law, in particular torts). Even there it is only in an experimental phase up to this point. In contrast to this, in Germany it became a factor as well in the juvenile criminal law as also in the field of adult criminal law.

However, the German system focuses only on one particular model in this wide field of restitution and reparation which is the so-called “offender - victim - mediation.”

This model was inserted into the Juvenile Court Law in 1990 as a new alternative in the list of possible imposed instructions by a judge as § 10 I Sentence 3 No. 7 JGG. After six years it is still regarded as being in the stadium of experimenting and some scholars warn not to label it as the originally announced “wonderweapon” in the political part of the field of Juvenile Criminal Law.

\[\text{References}\]

William G. Staples, Restitution as a Sanction in Juvenile Court, 32 Crime & Delinquency 177, 179/180 (1986)

see Bazemore/Umbreit, Rethinking the Sentencing Function, supra note 46 at 303

SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 91
Comparable, but even older sections of the JGG are § 15 I Sentence 1 No. 1 and 2 JGG, which are part of the chapter on disciplinary means; they are dealing with apologizing to the victim and compensation of the damage. Experiences, as far as success within § 15 JGG is concerned, have been rather negative and so numerous scholars therefore also perceived the “offender - victim - mediation” rather skeptically. However, over the first two years 75% of the model cases successfully were settled\textsuperscript{50}, which shows that the lack of success of apologies within § 15 JGG was not a valid point of criticism of the offender - victim - mediation.\textsuperscript{51} Some critics still argue, to insert the “offender - victim - mediation” into the chapter of disciplinary is not the best solution, because it serves the process to overcome the consequences of a criminal act, not to correct educational deficiencies which result out of inadequate parental upbringing\textsuperscript{52} or other disadvantageous social circumstances such as unemployment or bad peer pressure influences. Nonetheless, this kind of criticism doesn’t attack the relatively new and surprisingly efficient model of mediation in itself.

In the field of adult criminal law § 46 a StGB (Federal German Penal Code = Strafgesetzbuch) was inserted into the Code as part of the Crimefighting Law which was ratified in 1994. It gives discretion to a judge in so far as he can reduce the normally due sentence after a successful pre- trial “offender - victim - mediation”. In extreme cases with overwhelmingly positive outcomes the judge even can choose not to impose any sentence at all, which actually is a second - class acquittal.

Moreover, some countries adopt a restitutive/reparative sentencing model as a nationwide overall solution to prevent and even to respond to increasing crime rates and as general criminal justice concept. A remarkable example for that is Tasmania, a small

\textsuperscript{50} \textbf{see} Kawamura, Bilsky, Kuhn, Hartmann, Brochure on TOA (=Taeter - Opfer - Ausgleich <> offender - victim - mediation) of the BMJ (+ Bundesministerium der Justiz <> Federal Department of Justice) 1992, p. 71

\textsuperscript{51} \textbf{see} ALEXANDER BOEHM, EINFUEHRUNG IN DAS JUGENDSTRAFECHT, (Publishing House: Beck/Munich, 3rd ed., 1996) at 174

\textsuperscript{52} \textit{Ibid.}
island state located off the southeastern coast of Australia. “Tasmanian crime rates reflect the lower overall crime rates found in two nonurban states of the United States (Montana and New Hampshire). Of course, there are numerous socio-economic, demographic and even climate-related reasons for this. Further studies established, however, that without question, leading politicians and public servants perceived a very high level of fear of crime in the state.”

The so-called Tasmanian enhancement approach consists of three key-strands:

The first strand are restorative results and arrangements negotiated fundamentally between victims and offenders, and at this point these do not have a community component. The second strand of activity consists of offender/community restorative programs, which provide options for both pre- and posttrial offenders to provide restorative service to the community. The third strand of activity consists of community enhancement programs that provide for a range of community development activities; it is anticipated that such programs may provide one of the explicit vehicles for community residents to address matters that impinge upon both the crime and fear of crime problems.

The additional factor in this system is the community itself: this inclusion also makes those cases reachable under the system, where crimes were “victimless” or where the community itself is the victim or where the victim does not want to be directly involved, but still wishes that some restorative work/action is undertaken. This concept can be pictured as a triangle offender - victim - community, where all three corners are at least indirectly connected.

What this system teaches and what the Tasmanian experience proves, is that criminal justice policy needs to pay attention to these community level concerns and to the concept of restitution and reparation, after all Tasmania and its people obviously adopted these interactive principles. The adoption of such a concept in Tasmania has led to and still shows the island’s lowest crime rates and incarceration rates in a very long time which also are far below the equivalent Australian numbers.

54 Id., at 409/410
55 Id., at 419
Nevertheless, one has to keep in mind, that Tasmania is a place with almost no crimes in the really serious categories. It is very questionable, if the same system could cause the same willingness to embrace such a system, if adopted somewhere, where crime rates demonstrate that most - serious felonies due to social pressure and urban anonymity are widespread and high in numbers. Moreover this concept seems to neglect one factor, which seems to be relatively crucial in an individualizing model and this is the specific offender’s personality. After all, the offender first needs to have the will to participate in such programs. moreover, some offenders might be cold blooded enough to only exploit such a system which then wouldn’t leave any educational marks on the offender. This would represent a partial failure of the ideas of such a concept.

On this basis there has always been the awareness that a restorative/restitutive model actually only can be a dependent subconcept or annex of a broader sentencing approach which is dominated by the belief in the possible education of offenders, no matter what age. The restitutive model can only be the little sister of the general rehabilitation model. Restitution and reparation cannot cover all the criminal constellations that are asking for some sort of judicial response. It is hard to believe that this model can solve all the problems in the aftermath of a real serious crime plot with tragic outcome. First it seems unlikely that in such a case an offender really could feel with the victim and go through the same pain. Second, the produced harm might be so severe that there is no potential option for just mediation. At last such a narrow concept is condemned to fail, if parties reject to cooperate. However, it can be an important part of an overall treatment concept which can perfectly embody the idea of the approach as a whole. Being more realistic, one can also conclude, that “the goals and values of restorative justice are idealistic and utopian. At the same time, however, in the current climate of chaos and reaction in

56 see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 92
juvenile justice. such idealistic goals may be critical to ensure that balanced reform proceeds in a positive direction."\(^{57}\)


"The study of human behavior and behavior modification is barely in its infancy. It is perhaps the least advanced and most imprecise of the sciences. \([A]nd the empirical investigation of how human behavior can be modified in real - life settings has only begun.\(^{58}\) However, it is this punchline, which should lead to utmost flexibility in research work and in the related creation of concepts that try to explain, if not prevent, criminal behavior.

Being aware of that background it does not seem to be too reasonable to focus especially and exclusively on narrow - minded explanations for crime roots or crime reactions. Even knowing and understanding some roots of crime in general, such knowledge could only help to prevent the crimes within this concentrated area. However, the goal is and must be not to reduce the numbers of particular crime types, but to reduce and eventually control juvenile crime in general. Moreover, crime hardly originates in one particular root anyway. Crime is the outcome of a whole system of numerous root branches To learn more about the incredible and infinite range of human behavior processes, the awareness of the fact that there is no black or white explanation or even approach should turn out to be very helpful.

On the basis of these reflections studies should use a combination of several tools to treat delinquent behavior; past studies focusing on single treatment methods have had notably unconvincing, inconsequent results which couldn’t corroborate the original underlying theories.\(^{59}\)

\(^{57}\) Bazemore/Umbreit, Rethinking the Sentencing Function, supra note 46, at 312

\(^{58}\) Gendreau/Ross, Effective Correctional Treatment, supra note 44, at 465

\(^{59}\) see Id. at 485
Moreover, not only studies, but also real-life “experiments” should present broader and more flexible bases, should apply multiple modality approaches and in addition to that for the different should refer more to the needs of the individual, should emphasize more the individual differences in order to get more useful, more meaningful and significant reliable results.

A first important step into that direction would be, if studies and programs defined offender subgroups that comprise the overall target sample and separated outcome analyses subgroups leading to “differentiated analyses”.

To be effective with individual offenders, intervention should be broadly based, it should involve simultaneous or successive combinations of such program components as vocational or academic training as individual or group counseling. [A] program’s full range of resources should not automatically be applied to every type of offender. Instead, sometimes only some components or combinations should be used.

Innovative, rather than stencil treatment programs need to be the basis for achieving rehabilitation success for an offender. Every offender is a distinctive character which is exactly the reason why there is no panacea for fighting crime. Therefore a successful system needs to attack crime from different directions. The accompanying motives and the goals of all studies, theories and programs must be to develop more meaningful and appropriate sanctioning options in order to prevent or at least reduce human criminal behavior and to experience some sort of positive outcome as far as the general effectiveness of intervening authority is concerned. To get to this point mixtures, compromises and flexible approaches need to be promoted, because “both punishment and treatment responses are practically and conceptually incomplete. Taking a one-dimensional view of the offender, each model operates from a “closed system” logic that

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61 Id.
targets only offenders for service, punishment, or both and fails to include other parties critical to the resolution of crime.\textsuperscript{62}

After all there seems to be a strong need for filling out the vacuum gap between several extreme, narrow minded concepts on all sides with new alternative, interrelating ideas. In other words criminal justice research needs an “alternative lens for viewing the problem and a new framework to guide rational movement toward new solutions.”\textsuperscript{63}

This seems to be especially difficult in the very two folded field of juvenile criminal justice, meaning on the one hand, to serve the principles of justice, and on the other hand, to educate and not to punish a juvenile offender. However, after all it really is possible to unite “just deserts” and “real needs” principles, to set up real - life programs, which try to fight, prevent or reduce juvenile delinquency by combining treatment and punishment concepts in an effective, successful way.

Jacksonville, Florida, has set up a system that at least provides one potential possibility of such a combination. Numerous law enforcement officers view Jacksonville’s system as one of the most innovative and comprehensive in the country.\textsuperscript{64}

The system is dominated by a program that was set up by Harry Shorstein, the State Attorney for the judicial district that encompasses the city of Jacksonville.\textsuperscript{65} “The centerpiece of the program is the aggressive use of the state law that gives prosecutors in Florida the most sweeping discretion of any state to try juveniles in adult criminal court.”\textsuperscript{66} Whenever Shorstein applies that law by waiving juvenile court jurisdiction on the basis of a prosecutorial decision, he almost seems to do this as a pretext to keep the convicted in Jacksonville at the County Jail, where those young offenders are all housed on a separate floor, separate from adult inmates. It is here, where juvenile offenders find a

\textsuperscript{62} Bazemore/Umbreit, Rethinking the Sanctioning, supra note 46, at 301
\textsuperscript{63} Id. at 301
\textsuperscript{64} see Fox Butterfield, System in Florida Intervenes To Ward Off Juvenile Crime, NEW YORK TIMES, Oct. 9, 1997 at p.1
\textsuperscript{65} Id. at p. A7
\textsuperscript{66} Id.
prison world, which provides a well functioning school, drug and sex education courses and counseling for returning to the outside world. Those who behave properly will be awarded with a blank criminal record once they will leave after having served their time, which leave them without any stigmatizing disadvantages in the professional world. This Jacksonville example is proof of the feasibility of setting up flexible programs by combining punitive and rehabilitative elements. Actually, this system even shows a very special potential link between punishment and rehabilitation. This system punishes for the sake of getting control over the juvenile which here is used for the institutional attempt to rehabilitate and educate the juvenile delinquent. In other words, punishment here is only the pretext label rehabilitation efforts.

Another proof of flexibility is the application of “neat legal tricks” in order to pursue the goals of the program. One example is the actually invalid forcing of parents to sign contracts, in which they have to agree to enroll and keep their children in school, after they have broken the Florida law requiring parents to keep their children in school. Actually, the state attorney does not even have the legal authority to force parents to sign such a contract, but here this legal trick is only applied in the best interests of the juvenile offender. Surely, breaking the law for reaching the explained administrative goal is a very controversial aspect here, however, it at least shows the possible success of innovative alternative concepts, although they certainly should preferably be based on legal ideas.

The success of this program is proven by the fact that between 1993 and 1996 this unique program managed to bring down serious crime rates (i.e. for murder, rape, robbery) in a substantial and impressive way, and in doing so prevented more than 7200 crimes. A professor of Economics at Florida State University concludes, “the secret of the success is the interrelatedness of the program, the whole is much greater than the sum of its parts.”

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67 Id.
68 Id.
Finally, the economic costs of incarceration come into play. It costs $25,000 to incarcerate a juvenile for one year (with a relative chance of having “produced” a law abiding person). In contrast, it costs $600,000 or more to lock away a 25 year-old for the rest of his/her life.\(^6\) One cannot hardly imagine, what an astronomical sum of money could be saved by every single program similarly inventive as the one in Jacksonville.

The Jacksonville program is the perfect example how much more effective intervention or sanctioning can be, if it is reigned by creative, flexible and maybe even risky ideas. Jacksonville’s State Attorney stretches, sometimes, controversial as it is, even overstretches his authority or at least acts on the edge of legality. However, in this particular example the juvenile offenders really take the benefit from it. Considering this benefit, it at least seems to be debatable, if bureaucracy in such circumstances should not give way for informal, but successful routes which actually do not hurt anybody. Nevertheless, the general alternative policy must be that inventiveness still needs to respect the legal limits and only plays with the legal leeway. The unavoidable exception might actually only prove the general rule.

In any event, these are not the times anymore to see only black or white when it comes to answering questions about the potentially successful concepts to fight crime or prevent recidivism. As mentioned earlier, the study of human behavior is still in its infancy. An upbringing and educational process requires flexibility and the courage to check out new and risky approaches. This awareness is especially crucial in juvenile criminal law. Again, it seems to be safe to state, that a big percentage of first time or less serious juvenile offenders are more amenable to treatment than adults. Moreover, the connection between juvenile delinquency and adult crime is, that crime continuously declines with age throughout life.\(^7\) Adolescence is the favorite time to check out societal tolerance limits. Taking these two aspects together means preventing juvenile crime by appealing

\(^6\) Id.
\(^7\) see Hirschi/Gottfredson, Juvenile Justice, supra note 21, at 264
to a youth's amenability through inventive and offender - integrating models. Such a combination seems to be potentially capable of relieving or at least substantially reducing society's fear of a threat called "crime - bomb".

It does so by educationally pulling those juvenile offenders, who are not pushed into the crime scene due to economical or environmental reasons or reasons related to an uncontrollable personality, over to the right side. This does not only reduce juvenile delinquency, but also adult crime through diverting countless young offenders from the crime scene before they can start life lasting criminal careers.

Being aware of all these potential alternatives in fighting juvenile delinquency, which on this liberal side almost exclusively include educational and rehabilitative motives and ideas, one should ask, if it is not better to reform juvenile courts by equipping them with combinations of flexibility and procedural protection concepts, before attacking the traditional juvenile justice idea and following the pale solution of abolition.

If progressives ought to win over revisionists, a reform, rather than the end of juvenile courts seems to be the appropriate answer to the current institutional crisis.
Chapter 3: The 20th century’s history of the Juvenile Court System.

Before comparing the German and the American Juvenile Justice System of today, and after having pointed out the different sentencing concepts on which a juvenile justice system can be built, it is helpful to explore the origins and developments of both systems. Having that background knowledge, it will be easier and clearer to evaluate their current character.

Identification and special marks are carved out in a long process of ups and downs in a continuous context of steady societal changes.

If one wants to understand the concepts of today, it is a must and prerequisite to explore the institutional roots and developments.

1. German landmarks.

Juvenile Criminal Law doesn’t have a long history, it is a creation of this century.\(^1\)

However, this doesn’t mean that there wouldn’t have been any kind of special treatments for juvenile delinquents in earlier history; in those old times the most relevant point was to do without punishment for juveniles and children due to their infancy and lack of culpability.

The first penal code of the German Empire was ratified in 1532 and called “Carolina”; the only relevant section to Juvenile Criminal Law was Article 164, which regulated to leave capital punishment for young thieves less than fourteen years old out of consideration and instead only punish them by using corporal punishment as disciplinary answer.\(^2\)

In the course of the 18th century within the period of the development of a common law, which was influenced by medieval Italian and common law, it was first decided to pay

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\(^1\) SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 22

\(^2\) Id.
attention to the question of culpability. On this basis of this new tendency, juvenile criminal delinquents were separated into three different age categories: infants up to seven years of age, immature offenders from seven to fourteen years and minors from fourteen to twenty-five.

The age of enlightenment in the 19th century brought general tendencies along to make criminal law more humane, to push back the significance of the capital punishment and to abolish corporal punishment for juvenile delinquents as well.

In 1871 the RStGB, the penal code of the German Empire was codified. It was influenced by the French Code Penal from 1810 as far as juvenile treatment is concerned. Its sections 55–57 regulated, that the starting age for legal responsibility and culpability was twelve. Twelve to eighteen year-olds were “relatively culpable”, which means they had to be acquitted, if they did not perceive the wrongfulness of their deed due to intellectual immaturity.

The decisive split of juvenile and adult criminal law took place around the edge of the 20th century and had its origins in new intellectual and social movements which started to shift away from punishment principles.

Beginning with the 1880’s Franz von Liszt had founded the “modern school of the transformation of criminal law”. Retaliation and retribution were set aside for pushing reforms to concentrate on offender-oriented treatment in the criminal law sector.

This "modern school of the transformation of criminal law" was the intellectual basis for the juvenile court movement which for the first time in 1909 in Berlin articulated its demand for specific juvenile courts. It was here, where the “German Discussion” about

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73 *Id.* at 23, exploring the Italian concept of culpability: doli capacitas
74 *Id.* at 24
75 *Id.*, pointing out, however, that the German Code did not adopt the French element of completely doing without any age group to which criminal irresponsibility was afforded.
76 *Id.*
77 Doerner, Erziehung durch Strafe, Monatschrift fuer Kriminologie und Strafrechtsreform, 1991 pp. 236 following
reforming juvenile criminal law started out, which produced the two divergent movements, which are still debating today, whether to follow punishment or rehabilitation principles.

One movement is focusing only on the educational system of disciplinary measures. The other one wants to continue to have punishment as the center of a retributive and deterring sanctioning system which sees educational aspects only as additional, but not dominating criteria.

In 1912 the first particular juvenile detention home was introduced by the German government which eventually realized the benefits of separated incarceration.

The year 1923 brought the reforming movements to a temporary legal conclusion: the pursued goal of dealing with juvenile offenders within a special juvenile judicial branch, concentrating on education rather than on punishment became reality. On the 16th of February the first German Juvenile Court Law was ratified. 78

This law is significantly striking in adopting the crucial political development of those days. The transformation of Germany from having been a civil state under the rule of law into becoming a the social state of a modern and industrialized society is the law's core. 79

The law of 1923 already makes this development visible. Children until 13 years of age remained exempted from punishment. 14 to 18-year-olds were confronted with a system of disciplinary measures imposed by a juvenile court judge. Moreover it also introduced a probation system.

In 1943 the Reichsjugendgerichtsgesetz (The Reich’s Juvenile Court Law) rearranged the structure of the law of 1923. 80 It introduced the system of the three sanctioning types, educational measures, disciplinary measures and detention home imprisonment. Although

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78 Id. at 27
79 Id., for the first time the judiciary has not only to protect the law, but also to consider the relevant aspects of social education. For deciding cases, a judge quite often needs the help of experts now. A judge's field of work now also includes educational questions. The broad of range of discretion is intended to lead to criminological understanding and away from formal inflexibility.
80 Id. at 28
it was originally intended to include adolescents for the first time, this idea was/had to be dropped because of the second world war to be able generally to draft adolescents into the army. It might be surprising, but the third Reich pushed the continuous development of the juvenile criminal law and was no impediment to the promotion of its independence.

In 1953 a new, modified Juvenile Court Law took the place of the 1943 law. Analyzing it, especially two conceptual changes have to be mentioned: first, a temporarily submerged system of probation was reinserted in an optimized design and second, even more important, for the first time adolescents from age 18 to 21 under certain circumstances came within the regulative range of juvenile law.

The past decade also saw changes in German Juvenile Criminal Law. In 1990 a partial reform of the juvenile law took effect with the 1. Gesetz zur Aenderung des Jugendgerichtsgesetzes (First Law of Modification of the Juvenile Court Law). The two important additions are the adoption of the instruction of mandatory official, court - ordered judicially surveyed custody and social training courses for the catalogue of educational instructions/court orders. The educational instruction catalogue is regulated in § 10 JGG and includes the following options. The listed instructions are regulating the living conditions of the juvenile delinquent. They are supposed to support and secure the education and rehabilitation process:

1. instructions, not to leave a certain area;
2. to live/stay with a certain family or in a certain home;
3. to accept/to start an apprenticeship;
4. to fulfill certain work instructions/orders;
5. to accept and respect the supervision of a custodian;
6. to participate in a social training course such as group activities organized by the Youth Welfare Department: i.e. activities in environmental protection or offender group - meetings officially conducted by Youth Welfare Department officials in which the offenders are supposed to exchange their experiences;
7. victim - offender - mediation;
8. to avoid contact to certain persons or certain places;
9. to participate in traffic education classes.
Even more significant are the new modified versions of sections §§ 45, 47 JGG, which now regulate alternative pre - trial procedures of diversion, which are not to be found in the equivalent sections of the Procedural Code for adults in the §§ 153 following StPO. Finally, it formulates the right to counsel for the time of detention while awaiting the trial expressively in the right to counsel catalogue of § 140 JGG.
In the context of the ratification of this law. the Parliament forced the Government to present a concept for a second modifying law. which is supposed to bring some necessary changes in other unclear passages of the law. For instance. Parliament requested more exact regulations for the categorization of adolescents. more exact definitions within the description of the prerequisites for juvenile imprisonment and a more elaborate regulations on juveniles' sentence executions.\footnote{Id. at 32, source: BT - Drucksammlung (= collection of federal Parliament documents) 11/7421, p. 3}
Because of the struggling, continuous political debate about these matters. this second modification law still, six years later, has yet to come into existence. Meanwhile the real juvenile court world created its own discretionary rules within these insufficiently regulated procedural areas. Most important § 105 JGG originally was supposed to regulate that juveniles were to be tried in adult court. A trial in juvenile court on the basis of evaluating the adolescent to be rather on a juvenile than on an adult stage would have been the exceptional case. Today, however, the ambiguously formulated § 105 is
interpreted to the contrary by jurisprudence and the judiciary. The rule is to try an adolescent in juvenile court without really going deeply into examining his/her maturity. To try an adolescent in criminal court today is the exception on the basis of particular circumstances that are serious enough to justify such a decision.\(^{82}\)

This is underlining the call of the majority of the DVJJ (German Union for juvenile courts and juvenile court help) to continue to adhere to the principles of education, treatment and rehabilitation in juvenile law, although some voices within the DVJJ are demanding a stronger tendency back to punishment.\(^{83}\)

Generally speaking, a majority of all the professionally involved participants in the discussion about the road, juvenile law in Germany should follow still is in favor of the direction which leads to rehabilitative pursuits.\(^{84}\)

Again, the discussion, how to exactly design the new second Law of Modification of the Juvenile Court Law continues; the two most important demands of the "rehabilitative group" are the abolition of juvenile detention and juvenile imprisonment on the basis of so-called "damaging tendencies with respect to society", meaning that substantial educational deficiencies make it likely that the offender would endanger the safety of the community, if he/she was not incarcerated for a longer time.\(^{85}\) The expression "damaging tendencies is often criticized and seems to be confusing, unclear and badly chosen anyway.\(^{86}\) This would leave juvenile imprisonment only for those juveniles with an extreme degree of culpability and mens rea.

\(^{82}\) BOEHM, JUGENDSTRAFRECHT, supra note 51, at 49; see also Friedrich Schaffstein, Die Behandlung der Heranwachsenden im künftigen Strafrecht, ZStW 74 (1962)

\(^{83}\) Werner Beulke/Horst Mayerhofer, Jugendstrafrecht und Kriminologie: Die Vergewaltigung im Stadtpark, JuS 1988, at 136, 137

\(^{84}\) Ellen Schluechter, Wider der Entwurzelung des Jugendstrafrechts, ZRP 1992, pp. 390, 391/392

\(^{85}\) BGHSt (Federal Supreme Court for criminal cases) 11, 169 following

BGHSt 15, 224 following

BGHSt 16, 261 following

\(^{86}\) BOEHM, JUGENDSTRAFRECHT, supra note 50, at 202, 203
The current discussion in Germany sees a majority believing in the possible coexistence of punishment and education in juvenile criminal law. by keeping a distance from educational euphoria, but says no to a shift over to a punishment centered system. Juvenile courts in Germany, though constantly criticized and the subject of fundamental discussions, are not - and will not be within a reasonably predictable time frame - an endangered species within the judicial scenery.


In the United States, the movement toward separate treatment for the youth is widely believed to have begun in 1824, with the formation in New York of the so-called House of Refuge. Other states followed suit, creating reformatory settings for children who might otherwise have been incarcerated with adults. Legislatures undertook statutory changes which liberalized the impact of the law upon children, while urban reformers extended efforts to rescue destitute street urchins. In sum, the nineteenth century was represented by the development of the notion that children should not be subjected to the harsh realities and punitive nature of the adult criminal justice system.

This is, to put the theory of separating juvenile criminal law from adult criminal law in a nutshell, what established the intellectual basis for specific juvenile law in the 19th century. The most remarkable result of this widespread theory was the establishment of a cornerstone of American judicial evolution, the first U.S. juvenile court in Chicago in 1899, which was built upon the idea of rehabilitation.

The Illinois Juvenile court Act of 1899 was unique in that it: 1) created a special court or new jurisdiction for neglected, dependent or delinquent children under sixteen; 2) defined a rehabilitative rather than a punishment purpose for the court; 3) established the confidentiality of court records; 4) required the separation of juveniles from adults when incarcerated (a)nd 5) provided for procedural informality.

"By 1917, all but three states had enacted some type of statutory provision which mandated the institution of separate court systems for the young" and by that time it seemed to be unimaginable that juvenile law one day could be questioned again; it

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seemed like the benevolent reform movement already had made its mark on the complete 20th century, because "the juvenile court was regarded as dispensing a higher form of justice than obtainable in the criminal courts."93 "The effort to expand the juvenile court movement beyond urban areas", however, "was somewhat slower than the initial burst of legislative action in the first two decades of the 20th century."94

In 1925 the Standard Juvenile Court Act recommended handling juveniles even accused of serious crimes outside the adult court system. A significant example of the efforts of those times to educate juvenile delinquents and to prevent them from becoming criminal in first place is the foundation of the Police Athletic League (PAL) eleven years later in 1936. It started out in New York and was viewed as an alternative to gangs and criminal activity. By 1995, after an incredibly successful expansion over the course of several decades, 3 million children were participating in those chapters of the PAL nationwide.

Through World War II and the 1950's only little changes in the juvenile law policies could be observed, and these remained oriented toward rehabilitative, nonpunitive treatments.

During the following two decades, juvenile law went through substantial modifications and became the subject of a new fundamental discussion about its values, advantages and general judicial appropriateness. Today, looking back on those roots of modification and abolitionist voices, it can be said, that

"the seeds of change were planted in a series of Supreme Court decisions in the 1960's and 1970's which, in an effort to ensure fairness, made juvenile proceedings increasingly legalized and adversarial. Almost simultaneous with these procedural changes came changes in philosophy that ushered in the current willingness to transfer juveniles in greater numbers. Crime rates soared in the 1960's and 1970's and influential voices proclaimed the vacuousness of rehabilitative methodologies. Rising juvenile crime encouraged widespread sentiment that the juvenile justice system had failed its mission.95

94 Robert E. Shepard, Jr., One Hundred Years, supra note 91, at 16
The two landmark cases in this context are *Kent v. United States*96 and *In re Gault*.97 “They pierced the veil of rehabilitation”98 without realizing that their well-intended motives to provide more procedural safeguards for a juvenile in court were sawing the wood of the rehabilitative juvenile justice model.

In *Kent v. United States* the Supreme Court concluded that Morris Kent was denied his due process rights by the trial judge’s failure to hold a hearing prior to transferring the sixteen year-old to the adult court for trial. Moreover the juvenile court judge had not expressed the reasons for which he had waived jurisdiction over to criminal court.

In *In re Gault* the Supreme Court held that the juvenile had to receive notice of the charges against him, that he must be advised of his right to counsel, that he had the right of confrontation with the witnesses against him, and that he was as privileged as an adult against self incrimination. The Supreme Court concluded by providing the juvenile with all these procedural safeguards, “that the condition of being a boy does not justify a kangaroo court.”99 What followed, was a continuous and growing reduction of the emphasis on rehabilitation and education in juvenile criminal law. Increasing crime rates and great concern about public safety have led to a shift away from the policies of the juvenile justice movements to “getting tough on juveniles - rationales”.

Although the

Supreme Court was concerned with extending due process rights to protect children in delinquency proceedings, state legislatures have been moving in a politically conservative manner. [T]he Court took pains to point out that such requirements would not destroy flexibility. However, the trend has been away from the informality which was thought necessary for regenerative care.100

More than 40 states until today have responded to this crucial policy change by adopting statutes that facilitate the waiving of jurisdiction from juvenile court over to adult

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96 383 U.S. 541 (1966)
97 387 U.S. 1 (1967)
98 Charles A. Ross, Post Conviction Proceedings, *supra* note 89, at 779
99 387 U.S. 1, 27/28 (1967)
100 Charles A. Ross, Post Conviction Proceedings, *supra* note 89, at 780/781
Moreover, "recent legislative changes mandating fixed sentences in adult prisons for youths meeting minimum age requirements in Georgia, Florida, Tennessee, and Oregon challenge the viability of a separate court and justice system for young persons." The juvenile court of today is under the most severe attack since its birth in 1899 and therefore "as the juvenile court approaches its 100th anniversary there is more uncertainty about its future than at perhaps any other time [a]nd some are calling for a funeral pyre rather than a birthday cake." Can the Juvenile Court of the United States survive? The answer will depend on the possibility of a compromise court of necessary formality and feasible informality; such a basis would seem to justify a separate juvenile judicial branch.

The American juvenile courts of today during the last three decades have been transformed into an institution that is hardly distinguishable from the criminal courts. However, the road is still clear to turn back into the direction that would lead to a meaningful, additional judicial branch for juvenile offenders. Nonetheless, the reformed juvenile courts have to be more formal than the envisioned version of the progressive founders. They have to find the possible compromise of necessary procedure on the one side and the possible informality and discretion on the other side. After all, even in the current situation, there is one aspect everyone has to face: "As bad as the juvenile courts are, the adult criminal courts are worse."

However, before actually reaching such a conclusion that American and German juvenile courts of today resemble the adult judicial counterparts too much to still be needed as a particular judicial branch, if they are not going to be substantially reformed, one ought to

101 see Donna M. Bishop et al., Transfer of Juveniles, supra note 95, at 173
102 Bazemore/Umbreit, Rethinking The Sanctioning, supra note 46, at 296
103 Id.
104 Robert E. Shepard, Jr., One Hundred Years, supra note 91, at 12
105 Rosenberg, Leaving Bad Enough Alone, supra note 7, at 174
take a close look on some crucial procedural details and on how the juvenile courts' procedure today actually looks like as a whole in these two countries. Chapter four and Chapter five will take this close look on the current American as well as on the current German juvenile justice system and will also examine if the juvenile justice idea can and in what form it deserved to be saved for the next millennium.
Chapter 4: The Transfer Of Juveniles To Criminal Courts or
Parens Patriae vs. Just Deserts.

Even being in favor of juvenile courts as a necessary branch of a complete judicial system, this certainly does not mean that every single juvenile delinquent is and should be tried in juvenile court facing a benevolent juvenile court judge. Despite the existence of juvenile courts, there certainly is also the statutory possibility of excluding certain categories of juvenile offenders from the juvenile court's jurisdiction. For this alternative of exclusion potential criteria need to define the categories of juvenile delinquents who should not pass through the adult criminal justice sieve, who do not enter a special juvenile justice system. In view of the different categories of committed crime, some youths need to be held more accountable than others. Some youths deserve stricter treatment or even punishment than others. A line needs to be drawn that determines who should receive criminal penalties and who should not receive them.106

Reaching the conclusion that a young offender deserves criminal punishment, a juvenile court judge would have to take pains to sentence him/her without contradicting the court's special sentencing policies. On this basis the judge therefore hands the delinquent over to criminal court. This procedure is called jurisdiction waiver. "Waivers, also known in some jurisdictions as transfers or certifications, are transferrals or shifts of jurisdiction over certain types of cases from juvenile courts to criminal courts."107

"The Office of Juvenile Justice and Delinquency Prevention (OJJDP) suggests that juveniles charged with serious offenses, with lengthy records, or those considered unreceptive to treatment should be the ones transferred to criminal courts."108

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106 CHAMPION, THE JUVENILE JUSTICE SYSTEM, supra note 8, at 212
107 Id.
108 Risler/Sweatman/Nackerud, Deterring Juvenile Crime, supra note 11, at 5 referring to H. Snyder/M.
In any event, whether persistent or violent young offenders should be sentenced as juveniles or adults also poses difficult theoretical and practical problems. Relinquishing juvenile court jurisdiction over a youth represents a choice between sentencing in nominally rehabilitative juvenile courts or in punitive adult criminal courts. The decision implicates both juvenile court sentencing practices and the relationship between juvenile and adult court sentencing practices.\textsuperscript{109}

In addition to the mentioned criteria, age certainly is also a heavy weight on the scale for juvenile and adult courts. The older the juvenile offender, the more likely it will be judicially decided not to treat him/her as an amenable young offender. As already mentioned earlier, a juvenile offender is not a child one day and an adult on the next. In so far even most of the late - teens rather have to be placed in the juvenile category, because they simply have not reached complete maturity yet. However, these old late - teen juveniles like 17 year -, 18 year -, or 19 year - olds by societal standards in the United States often are automatically treated as adults in the state statutes and are excluded from juvenile jurisdiction. "Already back in 1978, eight states had limited juvenile court jurisdiction to seventeen, and four had a maximum of sixteen. [I]n all those states where the maximum age was and still is less than eighteen, the jurisdiction of the juvenile court has been legislatively waived in a very broad sense."\textsuperscript{110} The relevance of age is also reflected in the German legislative distinction between juveniles and adolescents. The latter are much more likely tried in juvenile courts, but in contrast to juveniles they at least run the risk of having to face trial in criminal court.

"Little attention has been given to the question of whether a separate juvenile court can be justified at all, when juvenile respondents are entitled to most of the procedural rights owed criminal defendants."\textsuperscript{111} However, this actually only seems to be the second question about the juvenile court's right to survive. Even more important, if a juvenile


\textsuperscript{109} Feld, Transformation of the Juvenile Court, supra note 16, at 701

\textsuperscript{110} Conrad, Can Juvenile Justice Survive?, supra note 2, at 552

\textsuperscript{111} Melton, Taking Gault Seriously, supra note 4, at 149
court system does not see those young criminals who are already taken away by the intake procedure of the police, diverts all the harmless delinquents and moreover hands all the serious offenders over to the criminal court system. is to support a separate juvenile justice system that only becomes relevant for the little jurisdictional window that is left in first place. After all, under such institutional responsibility policies the need for a juvenile court admittedly becomes doubtful and the voices that announce the superfluousness of juvenile courts become at least understandable. If these voices shall fall silent, a juvenile justice system has to demonstrate courage and responsibility and readiness to accept its jurisdictional responsibilities to the broadest degree possible, while at the same time showing a distinguishable and determinate face of procedural and sentencing principles. The following subchapters will examine, if the American and the German system reflect that responsibility and that readiness.

1. The situation in Germany.

Here it needs to be examined where the German line is to find that divides juvenile criminal law from adult criminal law. On a marginal note it needs to be mentioned that there are German scholars, who have a new specific vision of an independent German adolescence criminal law. They claim:

The thought of having 18 to 24 - year - olds as a special in - between - category in an adolescence criminal law field seems to open very interesting doors. This vision is corroborated by sections like §§ 92 II 3, 110 II 2 JGG, which already exclusively deal with this age group. Not being a minor anymore implicates the need of being treated differently by the law, on the other hand problems and behavior schemes still do not reflect adult attitude and maturity. [T]his is also reflected by adolescent reactions to imprisonment which are totally dissimilar to the ones of adult, mature inmates. [H]owever, such a concept has to be developed carefully and profoundly, due to the fact that it has to cope with a group that is responsible for a substantial percentage of the most serious crimes. [N]onetheless, it seems to be more of a vision than a realizable goal, considering legislative focus and policies of the Federal Republic of Germany.112

By now neglecting this interesting alternative concept, the focus is on the actual situation in the juvenile criminal law in Germany.

112 BOEHM, JUGENDSTRAFRECHT, supra note 51, at 58, 59
a. The legal basis for a transfer.

The juvenile criminal law expressively included adolescents for the first time in the Juvenile Court Law version that was ratified in 1953. However, until today a trial for an indicted adolescent on the basis of juvenile criminal law is not a matter of fact. The only certainty for the adolescent is that the trial falls within the juvenile court's jurisdiction and that therefore he/she will face a juvenile judge instead of a criminal court judge or even panel of judges. This procedural situation is regulated in §§ 107, 108, 112 JGG. However, the way § 109 JGG is interpreted today, it triggers the procedural consequence that all the JGG sections that exclusively refer to minors can not be applied to adolescents.

§ 1 II JGG defines juveniles as persons from 14 to 17 years of age and adolescents as 18 to 20 - year - olds. The law literally refers to persons being under 21 years of age. Besides this clear age - category - definition, the concept of the Juvenile Court Law actually can be evaluated as being rather confusing and irritating.\(^\text{113}\) The explanation of the law's whole set up seems to be necessary in order to get a feeling for the important, but unfortunately sometimes also confusing role the differentiation between adolescents and juveniles plays in the Juvenile Court Law. The first three chapters of the total of five chapters of the law are set up in a way that the first one generally describes its application to juveniles as well as adolescents. However, the following significant second chapter only focuses on juveniles. Within this chapter it merges into an annex that defines some circumstances under which juvenile law is also applicable to adolescents. Unfortunately, it does so by giving the reader only a list of the sections dealing with juveniles that also can be applied to adolescents in a corresponding way. It better should present a list that names the sections to be omitted to apply to adolescents. This would be less confusing.

Moreover one has to be aware of the fact that the criminal responsibility and culpability of juveniles is to be determined within the Juvenile Court Law's section § 3 JGG. A

\(^{\text{113}}\) SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 49
juvenile, in order to be criminally responsible, has to be mature enough to be able to recognize the wrongfulness of his/her deed. This is indicated by his/her moral and mental stage of development. The only relevant law for reaching such a conclusion about the juvenile's culpability is the Juvenile Court Law.

In contrast to this, § 105 JGG as the central section of the law on adolescents prohibits the application of § 3 JGG to adolescents. Even if an adolescents mental and moral stage of development corresponds to the one of a juvenile his/her criminal responsibility still needs to be determined through the relevant sections §§ 20, 21 of the adult federal penal code (StGB) that set much stricter standards for finding lack of culpability. The two options here for concluding that an offender could not have acted in a culpable way are either a showing of diminished capacity or even insanity or imbecility. It seems to be a contradiction in itself not to use the juvenile but the adult criminal law when trying to define an adolescents culpability, if he/she was found to be juvenile in first place. This gets even more contradictory when considering the direct connection of intellectual maturity and a person's state of mind.

As mentioned earlier, the core of the gist in "juvenile - adolescent - criminal - law" is § 105 JGG. Its vague and abstract phrasing today causes numerous potential misinterpretations. The reason for that section’s vagueness is obvious, though: the legislative branch at the time thought to create a juvenile law that was supposed to only also deal with adolescents in the most exceptional cases. However, therefore the law needed to leave room for discretionary decisions. This very room was meant to enable a judge to defend a decision that evaluated an adolescent as still being juvenile. Today this vagueness of the law certainly has led to the opposite application. Today it is the exception not to judicially deal with an adolescent within the juvenile criminal law.

114 see Id.
115 Id. at 50
116 see ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 83
This is perfectly supported by the following numbers: In 1991 in the old states of the Federal Republic of Germany and West - Berlin 9066 out of 36404 young male adolescents were convicted on the basis of general criminal law, whereas all the others faced juvenile criminal charges. Among 8803 male adolescents who were convicted and sentenced to imprisonment of six months or more 8357 went to juvenile detention facilities, whereas only 446 served their time in adult prisons. Finally, among 3366 probation sentences 3260 remained under juvenile supervision, 106 fell within the regular adult probation system. In 1995 juvenile courts convicted and sentenced adolescents and juveniles in a relation of 3 : 2. In other words, the absolute number of convicted adolescents in juvenile courts was higher than the number for convicted juveniles. It is quite interesting that a court that is named juvenile court, because it is particularly supposed to deal with juvenile offenders in reality convicts more delinquents that legally belong to an other age - group, namely the ones of adolescents. On the other hand this really shows the current huge overlap of juvenile and adolescent criminal law in Germany. However, it also needs to be underlined that, when comparing the figures of 1991 and 1995, it seems that juvenile court judges are not as much inclined anymore to deal with adolescents as juveniles automatically, and one has to ask, if this is connected to an increase of serious juvenile crimes and therefore to a new policy of getting tough on crime that falls within the range of German juvenile law.

In any event, all these presented numbers, after all, prove the incredibly important role, adolescents play in the whole German scheme of Juvenile Criminal Law. This, on the other hand, is not easily to be realized by the described structure of the relevant law, the JGG. Nonetheless, “the trend of treating adolescents as juveniles can be observed since 1953, when the JGG was substantially reformed in the described way, and the fact that 1974 brought along a lowering of the age of majority from 21 to 18 years of age by

117 see BOEHM, JUGENDSTRAFRECHT, supra note 51, at 54
118 see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 50
rephrasing § 2 BGB (=Federal Civil Code) could not stop, not even change such policy.”  

Having said that, it gets even clearer, how significant § 105 JGG for juvenile criminal law is.

However, one has to be even more aware of the fact that the way this section uses the term “juvenile” does not correspond to § 111 JGG that simply states, it would be the condition of being between 14 and 17 years old. Here, the term “juvenile” rather stands for a much broader concept, one that is not simply defined by age limits, but by the notion that a “juvenile” is someone who is in a phase of life that stands for development, education and amenability.

In other words, § 105 JGG does not define, who a “juvenile” is, it only describes the fact that there are adolescents who still have to be treated like “juveniles”. In dealing with § 105 JGG, one has to find out, if an adolescent appears to be an old juvenile or a young adult. Therefore, it provides two alternatives that certainly can, but do not have to be cumulatively true. § 105 I No. 1 JGG establishes the need to examine the overall stage of maturity of an adolescent, in which the “juvenile” concept of this section, and not the narrow version of § 1 II JGG is the relevant one. § 105 II No. 2 JGG asks, if the delinquent act rather reflects a typical juvenile or adult crime.

At this point, one principle can not be pointed out and stressed sufficiently enough: Under the German criminal law system, a person under 21 years of age never ever will face criminal court judges. Jurisdiction will always be with the juvenile court that can not waive its procedural responsibility. In so far, as far as the German system is concerned, the title of this chapter on the one hand seems to be confusing, because there is no such procedure as a jurisdictional transfer in Germany. On the other hand, though, it seems to be really necessary in order to be able to underline the crucial difference between the German and the American system (which is to be focused on later in the thesis) in this central point of jurisdictional responsibility within a juvenile justice system.

The question that needs to be answered by the German juvenile court judges is not the one about jurisdiction, but the one about applying juvenile criminal law or adult criminal

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119 BOEHM, JUGENDSTRAFRECHT, supra note 51, at 54
120 Id. at 49, 50
law for the trial that will take place in juvenile court in any event. However, even if the judge decides to apply adult criminal law, the JGG provides some sections that still have to come into play that modify the adult criminal law rules. A good and important example therefore is §106 JGG that regulates that a mandatory life imprisonment sentence for an adult can be reduced for an adolescent to a maximum of 10 to 15 years.

As a final point it should be mentioned shortly that sometimes a judge has to be aware of the fact that much time has passed by between the commission of the crime and the actual conviction and sentencing process. If, under such circumstances it is difficult to determine, whether the offender at the time of the commission of the offense was to be regarded as a “juvenile” or an “adolescent adult”, the rule “in dubio pro reo” comes into play. If there is only a reasonable doubt about the fact that the offender had to be regarded as an adolescent at the time of the offense, juvenile criminal law will decide the case on the basis of the presumption that the offender was a juvenile when the offense was committed.

Finally, one interesting remark shall be quoted that emphasizes the trend of today:

“During the last 10 years, there was not single Supreme Court decision that reversed a conviction of an adolescent on the basis that he/she was wrongfully characterized as being a “juvenile”. This underlines the practice to find adolescents as deserving to fall under adult criminal law only in the most exceptional cases, and moreover, that this practice is sustained by the top of the German jurisdictional system.

b. Criteria for waiving.

§ 105 I JGG provides two alternative platforms for adolescents to face a juvenile court trial, guided exclusively by the rules and policies of juvenile criminal law. § 105 I No. 1 JGG triggers an examination of the level of maturity of the adolescent in order to

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121 see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 49
122 see BOEHM, JUGENDSTRAFRECHT, supra note 51, at 62
123 Id. at 50
determine, if he/she needs to be treated as juvenile or adult. § 105 I No. 2 JGG. on the other hand examines the type of offense in connection with the question, if the offense is a typical "juvenile" one.

Both alternatives exist independently beside each other, however, their regulated areas also can overlap. Due to the fact that alternative No.2 is much easier to bring in as convincing evidence, it always needs to be examined first before one should focus on the second alternative No.1. No. 2 is offense related and takes care of typical juvenile offenses on the one hand, and moreover also of offenses that originate in juvenile driving forces and development - deviation on the other hand. No. 2 is much easier to prove, because instead of having to do a very complex personality study as it is the case for the No. 1 alternative, here it is only asked, if the offense and motive display a juvenile character. The seriousness degree of the crime does not necessarily lead to the negation of a typical juvenile offense. Moreover, the fact that a crime is also common among adult offenders does not automatically contradict a typical juvenile crime.  

Some examples for typical juvenile offenses are driving without a license, car theft, arson or fist fights with bodily injuries. A typical juvenile motive for example would be to react to peer pressure. Nonetheless, one really has to keep in mind that there is the other option within § 105 I No. 2 JGG. Juvenile driving forces and development deviations can also speak for the juvenile character of an offense. The decisive question here is, whether the offense and its commission result out of personal difficulties that typically occur during the age of puberty.

Shifting over to alternative No. 1 of § 105 I JGG it can be stated that in contrast to No. 2 the orientation here is pointed at the offender rather than the offense. No. 1 reads "the adolescent’s maturity has to correspond to a juvenile’s mental and moral development.

For quite a while it has been accepted now that this legislative phrasing is wrong and does not express correctly what the legislative goal was. Therefore it has to be read "either on the mental or moral stage of a juvenile." This means that an adolescent who mentally appears to be adolescent, still has to be treated as a juvenile by the law when only his moral internalization process is on a rather juvenile than on an adolescent stage.

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124 Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 136, 137, 138
125 see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 54, 55
126 see Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 138
127 see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 5
128 BOEHM, JUGENDSTRAFRECHT, supra note 51, at 49
It again should be remembered that the term “juvenile” of § 105 JGG is broader than the raw definition in § 1 JGG. Here it goes beyond pure age limits and explores the whole character of the offender. Nonetheless, this broad and vague concept needs to be filled at least with some guiding factors. Therefore, to fill this practical gap, in 1954, the convention of the German union for youth - psychiatry created a directive in the city of Marburg. It listed the potential juvenile characteristics. Today this list is known and applied as the “Marburger Richtlinien” (=Marburg Guidelines).  

Signs for being juvenile here are hardly planned action, action based on spontaneous mood changes, playful attitude toward work, being overemotional, being dominated by immature driving forces, being resistant to education (particularly in relation to parents), rebellion attitude, lust for adventure, feeling insecure when confronted with the adult world and its values, being easily influenced by peer pressure.

This, of course, is not a complete list, but it is what it claims to be: a guideline. Even, if not covering every possible pattern of a juvenile character, this list at least provides numerous factors that can be very helpful in cases that are more uncommon than the big majority of similar cases. Theoretical transfers and comparisons with the aspects of the guideline usually now make it much easier for a juvenile court judge to decide whether an adolescent should be tried as juvenile or adult. However, there are still the unique cases for which even the guidelines of Marburg can not be of support, but such cases will always occur from time to time and they can hardly be covered by any system.

In the context of personality studies, doubts about either adolescence or the stage of being juvenile also need to be responded to by the general German principle of “in dubio pro reo”. If there is only a slight chance that an adolescent could be regarded as rather being juvenile than adolescent, he/she needs to be treated like a juvenile by the law. This, as pointed out earlier means that the trial in the juvenile court will be procedurally and substantively exclusively based on juvenile criminal law.

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129 see Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 138
130 BOEHM, JUGENDSTRAFRECHT, supra note 51, at 50
131 see Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 138
After all, one procedural safeguard is absolutely guaranteed: If a juvenile court judge should eventually rule that an adolescent can not be characterized as juvenile, but needs to be seen as young adult, this needs to be explained in the written opinion in detail and with easily verifiable conclusions so that it can withstand higher jurisdictional scrutiny.\footnote{BOEHM, JUGENDSTRAFRECHT, supra note 51, at 51}

c. **Discretion vs. Arbitrariness or the limits and problems of judicial leeway.**

The way the Juvenile Court Law is dealing with adolescents since the reform in 1953 potentially is open to harsh criticism from all sides. Not only its wording, especially § 105 JGG that today is even interpreted in a way that almost contradicts the actual phrasing, but also the whole concept of the law can be attacked for not being concrete enough and for having fuzzy guiding factors. Such a concept leaves too much room for legal uncertainty and arbitrariness. Due to an overstretched discretion range and overbroad judicial leeway it needs to be realized that today there is a great risk of making a juvenile court judge’s decisions judicially unreviewable. Being afforded so much power, a judge - not less than any other person - sometimes might be seduced to decide cases on personal opinion rather than on sober and analytical conclusions. This certainly would rather smell like arbitrary decisionmaking of a despot than the realization of fundamental procedural fairness that is unconditionally connected to reviewable and neutral judicial decisionmaking. However of course the latter has to be the institutional goal of the juvenile court branch. Sovereign behavior on the other hand would be an institutional own goal that gives oil into the fire of abolition.

On the other hand, § 105 I No. 1 JGG applies a concept of being juvenile that often times turns out to be too exact when having to deal with the real world. Between being a juvenile and being an adolescent, there is also a transitional stage. This stage by its characteristics as well as its length can vary substantially depending on the very particular personality of every single offender.\footnote{see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 56} The statement “offenders are not irresponsible
children one day and responsible adults on the next"\textsuperscript{134} can be presumed to be true all over the world. It also does not lose its validity, if it is slightly changed into "adolescents are not still juveniles one day and adults on the next." Also § 105 I No. 2 JGG seems to leave a lot of judicial leeway for determining when an offense is atypical juvenile crime. After all, it almost seems impossible to put crime types into certain drawers only labeled by age. Moreover, the concept of juvenile maturity of No. 1 and the concept of typical juvenile offenses of No. 2 also seem to present some inconsistencies when regarded as one combined concept. Only the fact that the No. 2 concept is rather interpreted broadly and the No. 1 concept in comparison to the first one rather narrowly leaves behind confusion and legal uncertainty. "The result of this is an amazing disparity within the question of the application of juvenile law to adolescents, because the law leaves way too much leeway for the personal, subjective opinion of a juvenile court judge."\textsuperscript{135}

In any event, a lot of studies demonstrate that during the last twenty years, there was a continuously growing widespread tendency to apply juvenile criminal law to adolescent offenders. However, the numbers that support this tendency interestingly seem to present that this tendency is even bigger for the more serious than the less serious crimes. The delinquents of the latter group indeed are more often transferred to criminal courts.\textsuperscript{136} The reason behind this phenomenon is difficult to grasp. The idea might be that serious offenders often times are not persistent offenders and that they acted on the basis of emotional disturbance. Under such circumstances it seems valid to say that those offenders despite the seriousness of the offense are very likely to be amenable.

In addition to those disparities, it can also be observed that § 105 JGG is applied differently as far as regional aspects are concerned. This is not only true for different

\textsuperscript{134} Feld, Juvenile (In)Justice, \textit{supra} note 3, at 408

\textsuperscript{135} \textsc{Schauffstein/Beulke}, \textsc{jugendstrafrecht}, \textit{supra} note 37, at 56

\textsuperscript{136} \textit{Id.} at 56, 57
states, but also even for different court districts within one state.\textsuperscript{137} Unfortunately it has to be said anyway that the application of § 105 JGG lacks any common pattern today:

§ 105 JGG is interpreted by jurisprudence as well as jurisdiction in a way that hardly is oriented to its actual phrasing anymore. Real reliable legal criteria for judging maturity and development that could be examined through social analysis and prognosis are missing. The applied aspects often seem to be subjective and biased or even prejudiced. The evaluations or opinions of two judges or two experts on the basis that is provided by the law can vary substantially. This certainly points to the potential risk that the application of the law might be very unstable. In so far, it seems to be questionable, if the constitutional right of being equally treated (Article 3 of the German Constitution) still can be guaranteed at all.\textsuperscript{138}

After all, in such a system it exclusively remains with the judge’s decision that is based rather on personal opinion than on law, if an adolescent offender plays the role of the defendant on a juvenile or adult criminal law court stage. Supporters of such a system would call this procedure discretionary decisionmaking that is necessary for upholding the juvenile courts’ policies of informality. Critics rather reach the conclusion that such a system is built on pure arbitration which can not serve the law and justice. The line between these two standpoints is thin, but it seems that the German system of today needs to be reformed in the field of adolescent criminal law. Otherwise it really runs the great risk of ending up in an arbitrary system where the judge will almost be a sovereign. It always seems to be more than doubtful, if it can add to a fair and just and unbiased system, if too much power is laid into the hands of one person.

\textbf{d. Conclusion.}

Two aspects of the German jurisdictional transfer system in juvenile criminal law need to be pronounced. First it actually hardly can be labeled as a transfer system, because it is only the field of law that is transferred. In other words, if an adolescent is found to be rather adult than juvenile the juvenile criminal law is thrown out of the juvenile court. Instead adult criminal law enters the court’s stage and is the basis for the adolescent's trial in juvenile court. This actually can be better described as the transformation, and not the transfer of the law. Even this is not a totally valid statement, because juvenile criminal

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} BOEHM, JUGENDSTRAFRECHT, \textit{supra} note 51, at 57
law is completely waived, and juvenile courts under these circumstances actually do the job of regular criminal courts. The juvenile criminal court now, after having decided that an adolescent offender needs to be treated by the court as an adult, on the basis of §§ 108, 109 JGG does adopt most of the criminal courts' procedure, and most importantly does apply substantive criminal law instead of juvenile criminal law.

Second, it amounts to the exclusive discretion of the juvenile court judge, whether an offender being at least 18 years old or younger than 21 years faces regular or juvenile criminal charges. As mentioned earlier, so much discretion always potentially opens the door for arbitration. Moreover, such a system causes huge systematic disparities and legal uncertainty that are certainly not the goals of a legislative system in a democratic country. "To move into a conceptual direction that generally would cover all adolescents under adult criminal law as response to those critical points, however, would be a step into the wrong direction."139 "The general application of adult criminal law would not produce any advantages, moreover, studies prove that the maximum sentence of imprisonment of 10 years is generally perceived as being sufficient anyway."140 The overwhelming majority of scholars, therefore rightly is in favor of a system that takes the legal uncertainty factor away by generally applying juvenile criminal law to adolescents and it constantly encourages the legislative branch to ratify this suggestion as a law.141

After all, adolescents are still youthful persons. Keeping this in mind, one should read § 11 of part VIII of the Federal Social Law Code (SGB: Sozialgesetzbuch). It gives a youthful person the absolute right of support in the development and education toward the goal of being a self - responsible and community - supportive personality.142 This statement of the law substantially overlaps with the ideals behind a separate judicial

139 Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 138
140 BOEHM, JUGENDSTRAFRECHT, supra note 51, at 59
141 see Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 138, referring to other scholars who support that notion
142 see Schuechter, Entwurzelung des Jugendstrafrechts, supra note 84, at 393
juvenile system and rather contradicts the harsh punishment and retaliation policies of German adult criminal law. After all, the fact that an adolescent physically has entered the adult world does not say anything about his/her intellectual development. Most usually, an adolescent person has not completed this transition phase, and normally therefore rather shows a juvenile than an adult mind.

2. The situation in the United States.

In contrast to the German system, the American system really matches the title of this chapter. If an American juvenile court judge decides that a particular juvenile offender does not fit into the rehabilitative, treatment-oriented judicial juvenile justice system, he/she does not just switch over to the application of adult criminal law. Here the judge actually waives jurisdiction of the juvenile court and transfers the juvenile offender over to criminal court, where he/she is going to be tried as an adult.

Although juveniles due to their inexperience and young age have traditionally been depicted as less culpable than adult offenders, less committed to criminal life-style, [a]ll states have established procedures for remanding juveniles to adult court for prosecution. Is an extremely consequential and controversial action, if one strips individuals of the allegedly protective status of "juvenile" and subjects them to the punitive forces of the adult criminal justice system. [T]he question of whether juveniles should be prosecuted and punished as adults and, if so, which juveniles should be still treated reflects growing discontent with the traditional treatment orientation of the juvenile system.\textsuperscript{143}

Two questions are arising out of this fundamental cut through the separate juvenile justice system at some point: first, who are the juvenile delinquents who do not deserve the educational efforts to cure them from the criminal tendencies and instead rather ought to be exposed to the harsh and punitive adult criminal court, and second and even more important, is a waiver system a first step toward the general questioning of the institutional right to exist of the juvenile court? These questions shall not be left unanswered by this subchapter.

The most distinct dividing line between juvenile and adult criminal court certainly is age. Although there are the obligatory exceptions, the most common American rule adopted

\textsuperscript{143} M.A. Bortner, Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court, 32 Crime & Delinquency 53, 54 (1986)
by the most state statutes is. that all juveniles 17 years of age or younger usually fall under the jurisdiction of the juvenile justice system.144

However, in addition to demarcation by age, all states provide for the consideration of other factors in determining jurisdiction in some cases. While age is the initial criterion used to decide a youth's eligibility for juvenile court, other factors (such as seriousness of the alleged offense, past record, dangerousness, and suitability for the treatment within the juvenile system) also may enter into the jurisdictional decision. The additional criteria specified and the legal mechanisms for making this decision to waive juvenile court jurisdiction vary tremendously from state to state.145

After all, juvenile delinquency is a multi - faceted field and it covers typical, rather harmless juvenile offenses as well as the most appalling adult world crime scenarios with juveniles as their main characters. Especially the latter group of crimes increased in numbers and severity in the course of the last two decades what triggered a public reaction with fear. As if it was under shock, the society restarted to call for politicians to get tough on juvenile crime again. These calls especially were directed toward the dangerous and intractable juveniles, "the ones who are viewed as beyond the rehabilitative scope and treatment capacity of juvenile justice."146 However, "the assumption that juvenile justice personnel can identify the most dangerous and intractable delinquents is subject to major criticism that has plagued the entire juvenile justice system, namely, that the ability to predict juvenile behavior and effectively rehabilitate is unproven."147 It seems more than doubtful that the juvenile justice system is really capable of sorting out the hopeless from the malleable. After all, this jurisdictional discussion takes place on a thin rope that is high above the ground, because "the issue of transfer of juveniles to adult criminal court reflects on the very heart and philosophy of the juvenile justice system."148 Being willing to accept that there are juvenile delinquents who can not be handled by a juvenile court does not only mean to give up on them, it also

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144 see Lee Ann Osbun/ Peter A. Rode, Prosecuting Juveniles as Adults: Waiver: Purpose, history, And Major Trends, 22 Criminology 187 (1984)
145 Id. at 187, 188
146 Bortner, Remand of Juveniles to Adult Court, supra note 143, at 59
147 Id.
148 Tammy Meredith Poulos/Stan Orchowsky, Serious juvenile Offenders: Predicting the Probability of Transfer to Criminal Court, 40 Crime & Delinquency 3 (1994)
questions the general right of young people to take all the judicial efforts to avoid stigmatizing them, and even more important to perceive them as someone who has not found the right path through life yet, and who therefore needs a guiding hand. The disbelief in this thesis and in the general amenability of young people, and also the frustration with the growing crime rates might start the breeze that potentially could turn into a storm blowing away the separate juvenile court system.

Finally, on a comparative note, it is noteworthy that the American juvenile justice system does completely without a particular consideration of the problematic age of adolescence. As explained earlier, the German system legally determines this stage of adolescence as being at least 18 years old or younger than 21 years. Even more significant, this stage of adolescence is the only potential age frame for young people for being judicially dealt with as adults. Judicially speaking, the American system simply skips that age stage. The offender is either juvenile or adult, which means that being 18 years old is synonymous for automatic and exclusive jurisdiction of the regular criminal court. This is already indicative for the idea of both systems, about for how long a person should be regarded as being a not fully developed and matured character. This illustrates the different attitudes of both countries toward the length of the period of potential amenability of a young person and his/her responsiveness to educational efforts and treatment.

a. Types of transferring.

The question remains, how and on what basis can a serious juvenile offender be transferred from juvenile to criminal court? "Specifically, three basic methods of transfer were adopted by the states":¹⁴⁹ the legislative waiver -, the judicial waiver -, and the prosecutorial waiver process.

¹⁴⁹ see Poulos/Orchowsky, Id., at 4
aa. The legislative waiver.

With the specific introduction of the potential options of a juvenile court, it should be emphasized again that the fundamental political basis for these procedure is built by a public that is getting more and more nervous due to heavily growing numbers of serious juvenile crime. The general concern about public safety produces frustration with the rehabilitative juvenile justice system and triggers a public outcry for getting tough on criminal juveniles. Getting tough here stands for throwing juveniles into criminal courts which consequently means throwing them into a sentencing system that guarantees longer incapacitation through longer incarceration periods. In other words, "the primary justification for a waiver decision is the need for minimum lengths of confinement substantially in excess of the maximum sanctions available in juvenile court."  

One option for waiving jurisdiction is to focus on the charges themselves, meaning to analyze the offense itself. In doing so, two aspects dominate this evaluation process. One is the seriousness of the offense, the other is the prior criminal record of the juvenile offender. This technique of identifying juveniles who do not deserve judicially rehabilitative responses provokes constitutional challenges. However, interestingly "despite both due process and equal protection challenges to statutes that exclude youths who committed certain offenses from juvenile jurisdiction, appellate courts have consistently sustained these legislative classifications." After all, "legislative exclusion of offenses simply excludes from the juvenile court jurisdiction youths charged with certain offenses. Because legislatures create juvenile courts, they may modify their jurisdiction as they please."  

Again, legislative waiver processes try to sort out the serious and dangerous juveniles in looking for the violent and chronic ones, who then are transferred to criminal courts. However, "some states specify that only serious offenses

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150 Feld, Changes in Juvenile Waiver Statutes, supra note 35, at 494
151 see Feld, Transformation of the Juvenile Court, supra note 16, at 707
152 Feld, Changes in Juvenile Waiver Statutes, supra note 35, at 494
153 Feld, Juvenile (In)Justice, supra note 3, at 408
such as murder, rape, or robbery may be waived.  

In contrast to this, there are voices that claim, that the criminal history is the far better indicator of a dangerousness degree.  

As far as the legislative exclusion of offenses is concerned, it is argued that juveniles waived pursuant to this strategy are waived not on the basis of a prediction regarding the future, but rather because of their past conduct. [O]ffenders who are both persistent and violent are legislatively distinguishable from their less criminally active peers on the basis of chronic criminal activity. [T]he number of contacts a young offender has had with the juvenile justice system is the most reliable indicator of the likelihood of future criminality. [S]erious offenders are best identified by their persistence rather than by the nature of their initial offense.  

In any event, no matter if jurisdiction is waived on the basis of the nature of the offense or the criminal history, the decision of a juvenile judge is bound by objective criteria. There is almost no room for judicial discretionary decisionmaking. This is the big advantage of such a system compared to the judicial waiver process that shall be described now.  

**bb. The judicial waiver.**  
The judicial waiver process as well as the legislative waiver system pursues the goal of sorting out the serious and dangerous juvenile offenders who should be judicially treated in a system of sentencing philosophies determined by "just desserts" and retributive principles rather than rehabilitative and educational ideas. What is very different though, is the theoretical foundation for the waiver decision. In contrast to the objective criteria of the evaluation of the juvenile, here the juvenile court judge assesses the dangerousness of the juvenile offender by taking into consideration how likely it is that he/she will return to court for an other future offense. This means, the judge decides on the basis of personal, subjective assessment, if a juvenile offender would be responsive to rehabilitative treatment.  

In other words, a judge may waive juvenile court jurisdiction on a discretionary basis after a hearing on the youth's amenability to treatment or threat to public safety. The juvenile court judge's case - by - case  

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154 Feld, Transformation of the Juvenile Court, *supra* note 16, at 707  
155 *see* Feld, Changes in Juvenile Waiver Statutes, *supra* note 35, at 496  
156 *Id.*
criminal evaluation of a youth's amenability to treatment or his dangerousness reflects the individualized, discretionary sentencing practices that have been the hallmark of the juvenile court.\textsuperscript{157}

It is exactly this two edged concept of rehabilitative informality and the resulting risk of too much judicial discretion that bears the danger of banging on the door of arbitration. This system certainly can provoke the attitude that a juvenile offender through the abolition of the juvenile court would only lose a judicial organ that tramples on constitutional rights and does not use the informality to consider carefully the individual best interests of the juvenile offender. This problem really became obvious in \textit{Kent v. United States}\textsuperscript{158}, where the judge after the waiver hearing based his waiver decision rather on his broad subjective evaluation than on comprehensible, objective criteria. Moreover, he did not sufficiently formalize and formulate his sentencing decision. Being aware of the highly personal influential role the juvenile judge plays in this concept, it becomes understandable, when critics argue that if a judge has "no scientific bases by which accurately to predict future dangerousness, then judicial waiver statutes are simply broad grants of standardless discretion."\textsuperscript{159} To take it one step further:

The critical assessment of individualized sentencing practices in adult courts raises troubling questions about the validity of the clinical diagnoses or predictions relied upon in waiver decisions and the propriety of delegating fundamental issues of sentencing policy to the discretionary judgments of social service personnel and judges. Proponents of just deserts in sentencing contend that there is no valid or reliable clinical basis upon which juvenile court judges can make accurate amenability to dangerousness determinations and that the standardless discretion afforded to judges results in inconsistent and discriminatory application.\textsuperscript{160}

Whereas it seems to be valid that there has to be a concern about standardless decisionmaking under judicial waiver processes, it does not seem to be right to contend that there are absolutely no helpful clinical factors that can assist the judge in the evaluation process and decision. However, it seems that these indicative factors for dangerousness and seriousness are exactly the ones that are also taken into consideration

\textsuperscript{157} Feld, \textit{Id}. at 488  
\textsuperscript{158} 383 U.S. 541 (1966)  
\textsuperscript{159} Feld, Juvenile (In)Justice, \textit{supra} note 3, at 408  
\textsuperscript{160} Feld, Changes in Juvenile Waiver Statutes, \textit{supra} note 35, at 489
in the legislative waiver process. Due to this big overlap, if not identity, it almost seems like there is no need for a judicial waiver process anyway. Therefore it seems, that standardless discretion needs to make room for objective transfer decisions like the ones that are the outcome of legislative waiver processes. A legislative waiver system therefore is more likely to increase survival chances of a separate juvenile justice system than the concept of a judicial waiver procedure.

**cc. The prosecutorial waiver.**

A different approach to determine, whether a juvenile offender should face a juvenile court or criminal court is, to lay responsibility for this decision in the hands of the prosecutor, rather than giving all that power to decide to the judge. “This third alternative gives the prosecuting attorney the authority to decide in which court the case should be filed. If the prosecutor files a juvenile petition, the case proceeds in juvenile court. If the prosecutor files a criminal information or obtains a grand jury indictment, the case proceeds in criminal court.”\(^{161}\) One problem in addition to defining who the serious offenders are is omnipresent in all jurisdiction waiver systems: how old must the juvenile offender, in order to reach a conclusion that he/she despite of the very age is dangerous enough, so that he/she needs to be handed over to a criminal court? In other words, “in addition to defining offense categories or histories, the legislature also needs to prescribe a minimum age of criminal liability for excluded offenders - sixteen, fifteen or fourteen. At what age is it appropriate to hold a youth who commits a serious crime as responsible for that offense as an eighteen year old adult?”\(^{162}\) Again, it becomes important to keep in mind that juvenile offenders are not still children on one day and adult criminals on the following day, although in legislative reality this is exactly what it comes down to. It is as hard for a prosecutor to answer that question as it would be for a juvenile judge. This fact

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\(^{162}\) Feld, Changes in Juvenile Waiver Statutes, *supra* note 35, at 498
can only mean that avoiding standardless discretion has to be the same important goal under a prosecutorial system as it is under a concept that sees the judge as the decisionmaker. Therefore it can only be seen as consequent to demand for prosecutorial waiver systems to favor legislative exclusion systems rather than judicial waiver processes, because as shown before this much rather closes the door for arbitrary decisionmaking and extremely subjective ruling.

On a marginal note, in three states, Arkansas, Nebraska, and Wyoming, juvenile and criminal courts have concurrent jurisdiction over all offenses and the prosecutor’s charging decision determines the forum in which the case the heard. Because jurisdiction is determined by the prosecutor’s filing of criminal charges rather than by a judicial waiver sentencing hearing, these concurrent jurisdiction statutes are tabulated with excluded offense legislation. The Nebraska and Wyoming statutes, however, include Kent criteria, which purport to guide the prosecutor’s discretion.\(^\text{163}\)

Such prosecutorial waiver systems like the ones who follow the same concepts than the Nebraska and Wyoming ones are very aware of the fact that waiver systems, in order not to endanger the existence of the judicial species of juvenile courts, must strive for the greatest possible reduction of discretionary decisionmaking. Discretion, in order to guarantee procedural protection of the defendant needs checkable standards. Otherwise, the risk that the trial gets too informal and therefore out of control would be too big. However, statutes as Arkansas’ and Wyoming’s actually are mislabeled under prosecutorial waiver systems anyway, because here “it is the legislature, and not the prosecutor, which makes the policy choice”.\(^\text{164}\) Finally, the same conclusion needs to be reached here as well as the one that was reached within the question whether to follow a legislative or a judicial waiver system. In order to avoid or at least reduce standardless discretion, a prosecutor should rather be bound to a system that gives him objective criteria like seriousness of the offense or prior criminal significance for a waiver decision.

\(^{163}\) Id. at 511
\(^{164}\) Id. at 515
On this basis it again certainly will much rather lead to such a goal to adhere to a prosecutorial legislative exclusion decisionmaking process than to follow the principles of judicially evaluating in a subjective manner whether to waive jurisdiction or not.

b. The general trend.

To get an understanding for the whole picture of American juvenile justice of today, it again proves to be helpful to first focus on the traditional roots of American juvenile law:

The establishment of the juvenile court as a special institution for controlling deviance among juveniles was based on the obvious notion that young offenders are young as well as offenders; [t]he juvenile justice system with its underlying rational of rehabilitation sought to protect young offenders from stigma of conviction through treatment and supervision, procedural informality, and confidentiality.\(^{165}\)

Today, the juvenile court system fundamentally still, as pointed out earlier, is founded and reflected in the common law’s infancy defense, meaning young offenders deserve the recognition of their immaturity that is connected to rehabilitative principles. However, as pointed out in the introduction chapter, in the course of the 20\(^{th}\) century society as well as juvenile delinquency have gone through a tremendous metamorphosis. Juvenile crime increased incredibly in numbers and seriousness. Beginning with the early 1970’s criminologists came to grips with the fact that there is no such phenomenon as the typical juvenile offender character. The differentiation process combined with the public outcry for getting tough on society - threatening juvenile crime led to a new criminological dividing line between serious juvenile crime and normal juvenile crime, between malleable juvenile offenders and hopeless criminal career starts. In other words, the borderline is defined by the distinction between juvenile offenders who deserve treatment and those juveniles who ought to face retribution and incapacitation instead of regenerative intervention in an effort to guarantee their best interests. In other words:

During the past twenty years, public sentiments and views of the juvenile court have changed. The increase in juvenile crime in the 1970's, especially violent juvenile crime, coupled with the perceived failure of rehabilitation, led to a more skeptical view of the juvenile justice system. As a result, the traditional concern of the juvenile justice system for the best interest of the child has shifted to a more punitive viewpoint, emphasizing community protection and retribution.\(^{166}\)

\(^{165}\) Feld, Legislative Policies, supra note 19, at 498

\(^{166}\) Poulos/Orchowsky, Probability of Transfer, supra note 148, at 4
As a consequence of this more punitive viewpoint, "despite the rehabilitative orientation, all states have established procedures for remanding juveniles to adult court for prosecution."\textsuperscript{167} This remanding process experiences several labeling attempts. Among those are expressions like "transfer", "certification", unfitness hearing" and most commonly "waiver of jurisdiction" which shall also be the applied term here. As already described, the two main branches of that procedure are the judicial waiver, in which the judge’s discretion will dominate the process, and the legislative waiver, where objectively excluded offenses will lead to judicial automatic adulthood within this transferring process. "Virtually every state has a mechanism for prosecuting some chronological juveniles as adults."\textsuperscript{168} By 1994, "46 states and the District of Columbia had judicial waiver statutes."\textsuperscript{169} However, recently more and more states ratify statute provisions which adopt legislative waiver systems. Today, as a response to public security worries and the triggered calls for getting tough on juvenile crime, and moreover, to growing criminological criticism toward the tremendous discretion range for a juvenile court judge, "18 states have this type of legislative waiver policy."\textsuperscript{170} Taking a closer look on such waiver policy shows that

legislative waiver policies usually set a minimum age of 14 to 16 years for automatic transfer to criminal court. The offenses covered by legislative waiver policies are typically violent crimes or other felonies. Most states include murder and forcible rape in their legislative waiver statutes. Other offenses covered by automatic waiver statutes in several states are kidnapping, armed robbery or robbery, and burglary. The proponents of those measures argued that the public would be better protected from serious juvenile offenders because of the deterrent effect posed by the threat of being tried and sentenced in the adult criminal court and by longer sentences available under the criminal law.\textsuperscript{171}

The recent tendencies on this basis, moreover are, by shifting over to retribution principles in juvenile justice to additionally lower the statutory minimum ages. For

\textsuperscript{167} Bortner, Remand of Juveniles to Adult Court, supra note 143, at 53; also mentioning the different formulations for the waiving process

\textsuperscript{168} Feld, Transformation of the Juvenile Court, supra note 16, at 701


\textsuperscript{170} Id.

\textsuperscript{171} Id. at 97, 98
illustrating this growing punishment-prone movement, the focus shall now go to the introduction of some of the representative states:

In Virginia, the statutory age minimum under section 16.1 - 269 of the Code of Virginia for being a candidate for getting transferred to criminal court is 15. Virginia's relevant section of its statute names the relevant aspects for such a transfer decision as the nature of the present offense, prior delinquency record, earlier responses to treatment efforts and the likelihood of amenability through the juvenile justice system. However, "for certain offenses and circumstances, such as murder, these factors do nor have to be considered or the case to be transferred."^{172}

In Maryland, the right to transfer cases from juvenile to criminal court also exists in the statute.

"With the passage of the House Bill 1122 in 1994 (Laws of Maryland, Chapter 641), advocates for criminalization of juvenile offenders succeeded in excluding a substantial number of offenses from the exclusive, original jurisdiction of the juvenile court. The list of automatically excluded offenses here is noteworthy long and also includes crimes which are rather not in the first row of serious offenses such as a variety of firearm charges, use of a firearm in relation to drug trafficking and carjacking. Also, as originally written, the bill would have even excluded individuals from age 14 to 17, however, later it was amended to apply only to 16 - and 17 - year olds."^{173}

Also, relatively early in 1980, Minnesota became one of those states that moved into the establishment of more objective and easier legislative options of jurisdictional transfer. Prior to this, the Minnesota Juvenile Court Act provided that "a juvenile 14 years of age or older could be transferred to adult court if the juvenile court judge found that the child is not suitable to treatment or that the public safety is not served by handling the child within the juvenile court."^{174} The policy break in 1980 was reigned by a "classification scheme that defined a class of juvenile offender presumed to be unfit for juvenile court treatment. these juveniles are identified on the basis of their age, alleged offense, and record of prior felony offenses."^{175} Due to the fact of the earliness of ratification within...

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^{172} Poulos/Orchowsky, Probability of Transfer, supra note 148, at 4
^{173} Shepard, Jr., One Hundred years, supra note 91, at 32
^{174} Osbun/Rode, Prosecuting Juveniles, supra note 144, at 191
^{175} Id.
the getting tough on juvenile delinquency movement, the shape of this legislative waiver model is rather lenient. The only offense that leads to automatic adulthood without any prior record here is murder combined with a statutory minimum age of 16. However, Minnesota proves that today’s strictness in juvenile justice did not come overnight. The harsh philosophical u-turn in juvenile justice in the 1990’s already began slightly to emerge two decades ago.

This is underlined by Idaho’s statutory face of juvenile justice. Idaho also already ratified a legislative waiver statute in 1981 (16 - 1806A Code of Idaho). Compared to Minnesota, its potential bases for legislative transfer are even broader. “This law mandated the automatic waiver of juvenile court jurisdiction for youths aged 14 to 18 years who were accused of any one of five offenses: murder of any degree or attempted murder, robbery, forcible rape, mayhem, and assault or battery with the intent to commit any of the above crimes.”  

After this illustration of the general situation through the introduction of some of the representative state systems, it can not be overlooked anymore that the general trend in juvenile justice philosophy is, to leave the ideals of leniency, rehabilitation and procedural informality behind. Instead, the nationwide movement displays a growing convergence of substantive as well as procedural juvenile and adult criminal law. Again, it seems appropriate to state that actually only a couple of cases, in particular In re Gaul 

laid the foundation for juvenile courts to partly waive their conceptual roots.

In other words, the post Gaul era has witnessed a fundamental change in the jurisprudence of sentencing as considerations of the offense, rather than the offender, now dominate the decision. A shift in sentencing philosophy from rehabilitation to retribution is evident both in the response to serious juvenile offenders and in the routine sentencing of delinquent offenders.

Responding to public safety concerns and pursuing reduction of the width of juvenile court judges’ discretion, juvenile courts have been transformed into institutions that

176 Jensen/Metsger, Effect of Legislative Waiver, supra note 169, at 98
177 387 U.S. 1 (1967)
178 Feld, Transformation of the Juvenile Court, supra note 16, at 700, 701
today tremendously resemble adult courts and “as the juvenile court shifts away from a parens patriae to an increasingly legalistic basis and considers the adoption of dispositional practices common to adult courts. the logic of its continued existence as a separate institution is being questioned.”*179 These facts and this very view of the juvenile courts of today, certainly is the current nutrition for abolitionists calling for the end of the specific judicial branch for juvenile justice.

c. The situation in Georgia.

Due to the importance of and the particular interest in the local situation of juvenile crime and its connection to possible legal responses, it now shall be examined how serious juvenile crime in the state of Georgia actually is. Moreover, in case such seriousness in juvenile crime needs to be recognized in Georgia, it shall be investigated, if it already in fact has produced legal changes in the O.C.G.A..

The state of Georgia finds itself right in the middle of that stream that is leading to systems that make it much easier to try juveniles as adults on the basis of these new political tendencies to pursue getting tough on juvenile crime policies. Again, the trend in this decade is clearly towards objective standards that give waiver processes a broad basis. Between 1992 and 1995, five states established such exclusion provisions, following the majority of all the states, 24 states expanded their list for crimes that are eligible to transfer, and six states even lowered their age - limits for exclusion.180 that perfectly demonstrates how the American nation is sliding into a drastic philosophical u-turn in juvenile justice. This certainly is undermining the system that wanted to pave a rehabilitative road from the start throughout the whole 20th century. “One of the factors that contributed to the widespread criticism of the juvenile court was the rising youth crime rates of the 1960’s and the 1970’s”181, a tendency that made its way all the way up

179 Osbun/Rode, Prosecuting Juveniles, supra note 144, at 190
180 Risler/Sweatman/Nackerud, Deterring Juvenile Crime - in their Appendix to this unpublished running head, supra note 11, correspondence to supra note 11
181 Jensen/Metsger, Effect of Legislative Waiver, supra note 169, at 96
into the 90’s where this process eventually came to its logical conclusion with numerous states responding to this with the ratification of legislative waiver systems. The year 1994 perfectly illustrates the rise of juvenile crime nationwide as well as in the state of Georgia. In this year, youth were responsible for 19% of the nationwide arrest rate\(^{182}\). Moreover, the national homicide rate among males from 1984 to 1994 experienced an explosion with an increase rate of 82%. Georgia had its share in those numbers and due to the consequential concerns about public safety Georgia also followed the general trend of getting tough on juveniles. Some Georgian numbers prove the validity of these concern. The number of juveniles arrested in Georgia for murder increased 40% from 1989 to 1993. In 1995, the nation’s estimated 2300 known juvenile murderers were geographically concentrated. 25% of all known juvenile offenders were reported in five counties: Los Angeles, Chicago, Houston, Detroit and New York. However, the metropolitan area of Atlanta finds itself among those areas that closely follow the top five crime areas, having a substantial share of the nationwide numbers in serious juvenile crime. Moreover, the nationwide number of counties having ten or more reported annual juvenile murderers is small, but unfortunately, the metropolitan Atlanta counties are among those which again proves the relevancy of the problem for the state of Georgia. Also, Georgia in 1995 had a relatively high juvenile violent crime arrest rate. Fortunately, it at least does not rank among the leading areas in this regard. However, developing a system of four different levels of violent crime indexes, Georgia find itself in the second highest level. In 1995, out of 100.000 juvenile arrests in Georgia, 10 were based on murder, 17 on rape, 117 on robbery, and 252 on aggravated assault. Between an index area of 0 up to 500 or above, Georgia displayed a violent crime index of 396 in 1995

\(^{182}\) all the statistical figures about the US and Georgia in this paragraph taken from Risler/Sweatman/Nackerud, unpublished running head: Deterring Juvenile Crime, see also supra note 11 and note 108 and the there mentioned additional references on p. 4, 5 + appendix material
which puts it in the statistical neighborhood of states like Texas, Michigan, and Washington.

The legislative consequence of this increasing crisis in juvenile crime and the judicial system under which this crisis developed, was the ratification of the act officially known under the full name of School Safety And Juvenile Justice Reform Act Of 1994. The core of this act went into the Georgian law as Section 11 - 5(b)(2)(A) of Title 15 of the O.C.G.A.. It mandates that any child between the age of 13 and 17, who commits one of the here listed offenses will fall under the exclusive jurisdiction of the superior court and be tried as an adult. these seven listed offenses, also referred to by lawyers and prosecutors as the seven deadly sins, are murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and armed robbery, if committed with a firearm.

This Juvenile Justice Reform Act of 1994 represents the Georgian version of at least partly giving up on the rehabilitative, educational, and stigma - avoiding principles that brought juvenile courts into existence at the turn of the last into the current century. It waved good - bye to the former exclusive discretionary judicial waiver system in Georgia, in which solely the juvenile court judge self - responsively determined whether a teenager deserved a treatment attempt or needed punitive response of an adult court.

under the new system, even a 13 - year - old (which even in the national comparison is a rather low statutory minimum age) automatically goes to the criminal court, if the charge is based on one of the seven deadly sins. Proponents argue that deterrence and retribution, the leading policy points of superior courts, can not be accomplished sufficiently in juvenile court due to its comparatively lenient sentencing system. In the adult court, the response is meant to be punishment that that ought to be measured in relation to the crime and that sends out a message to the community that serious crime can not be tolerated, even if committed by juveniles. In other words, “the decision to transfer a youth to the adult process must ultimately be defensible on the grounds of either retribution,
incapacitation or general prevention. Incarceration necessarily is a last resort, but some of the offenders deserve it, and the community needs a respite from their depredation.\textsuperscript{183}

Exactly these strict sentencing concepts that are grounded on such objective standards represent the end of the judicial waiver system and the introduction of the legislative jurisdictional exclusion of certain offenses, like the ones named in the catalogue of the Juvenile Justice Reform Act of Georgia. Public safety concerns lead to the conclusion that there are juveniles who need to be seen as serious felons and therefore juvenile courts have no way to deal with them. Moreover, such circumstances can provoke the attitude that juveniles who commit adult crimes deserve and even ought to be treated like adult offenders in superior courts. Through June 30\textsuperscript{th} of 1997, nearly 2000 juveniles had been charged under the 1994 Georgia law, according to figures compiled by the Georgia Indigent Defense Council. In Clarke County, 21 juveniles have been charged under this law between May of 1994 and June of 1996.\textsuperscript{184}

The question remains, did and does the Juvenile Justice Reform Act have a deterrent effect, reduce juvenile crime as well as arrest numbers? Studies of that kind usually need a relevant examination time frame of more than ten years. That means, it is too early at the moment for being able to come up with valid and representative results to that question for Georgia. However, up to this point “Georgian findings do provide tentative evidence that the legislative waiver in Georgia is so far ineffective at deterring juvenile crime and that there were no significant reductions the mean arrest rates for the offenses specified by the law.”\textsuperscript{185}

\textbf{d. The situation in New York.}

The state of New York deserves its own particular subchapter when investigating the “getting tough on juvenile crime” - rationale, because it already felt the strong need to

\textsuperscript{183} Feld, Legislative Policies, \textit{supra} note 19, at 514
\textsuperscript{184} Risler/Sweatman/Nackerud, Deterring Juvenile Crime/Appendix, \textit{supra} note 11 and note 108
\textsuperscript{185} \textit{supra id.} note 182, at 2, 15
fight continuously growing serious juvenile crime in the late 1970's. New York was the first state that really stopped to generally accept the rehabilitative principles on which juvenile law originally was completely based. It did so in being the first state that ratified an extensive automatic adulthood provision that consequently was inserted into New York's state statute.

In so far the state of New York was the national policy - forerunner for emphasizing formal and punitive sentencing aspects toward young people, in particular those who potentially could be regarded as the upcoming serious criminal careers. Already in 1978, the state of New York therefore ratified the New York Juvenile Offender Law (1978 N.Y. Laws § 481). Although, ten years later, numerous other states by that time allowed at least for particular constellations that juveniles automatically could be judicially tried as adults in superior courts (Minnesota and Idaho infra have been mentioned as examples), ”New York’s law still is unique in the wide range of offenses it excludes from juvenile court jurisdiction.” On that basis, it has been characterized as the most punitive delinquency law in the nation.” Not that it only already had "the broad scope of covering 15 offenses" , it also substantially - this law already will have its 20th anniversary this year - "lowered the age of criminological responsibility, [w]hich precludes Family Court jurisdiction and thus automatically subjects accused juvenile offenders to adult prosecution." Being charged with murder, a teenager of 13 years of age in New York automatically is confronted with criminal court jurisdiction. The statutory minimum age within that process is only one year higher for assault, arson, burglary, kidnapping, and rape. Crimes that seem to be relatively unusual to be excluded, but that make the legislative waiver range so wide are arson, simple sodomy, and attempted kidnapping.

187 Jensen/Metsger, Effect of Legislative Waiver, supra note 169, at 98
188 Id.
189 Singer/McDowell, Criminalizing Delinquency, supra note 186, at 523
The last mentioned crime here even puts inchoate crimes in the category of mandatory, judicial automatic adulthood. The philosophical harshness of the current legislative waiver system in New York gets even clearer and extreme, when considering how the legal situation of juvenile justice before 1978 in the state of New York looked like:

Before the law was enacted, the age of criminal responsibility in New York was sixteen for all crimes, and New York was alone among large states in lacking any sort of waiver mechanism. All persons younger than sixteen were tried in the state’s Family court, where they were subject only to the rehabilitative programs characteristic of juvenile justice systems.\(^{190}\)

The juvenile offender law goes even one additional step further into a direction of a predominantly punitive juvenile justice system: usually, as pointed out earlier in referring to several other state waiver systems, a typical American waiver system allows to waive a serious juvenile offender upwardly, meaning from juvenile to criminal court. The New York system, however, works the other way around. Here, the law provides a downward waiver, meaning “that the juvenile offender, in case he/she is not charged with an automatic adulthood offense, can be handed over to the juvenile court. This certainly means that the system is creating a presumption that accused juvenile offenders should be tried as adults.”\(^{191}\) This simply means, the system first sees a young offender purely as a usual criminal felon. The state of being young only becomes relevant in a second step which is taken by the criminal court judge. Offense type, personality, and the likelihood of amenability are the guiding criteria for the judge’s decision whether to keep the offender in the jurisdiction of the criminal court or to transfer the juvenile delinquent downward to the juvenile court. In the more common upward waiver system, a juvenile offender who is not charged with an excluded offense is more likely to be confronted with a juvenile court trial. In a downward waiver system, however, it seems that the same offender, unless extraordinary circumstances force the judge to consider the youthfulness and the amenability of the young offender, is more likely to be exposed to the process of

\(^{190}\) Id.\(^{191}\) Id. at 524
being treated as an adult in superior court. This is so, because in a downward system, it always takes the extra step to waive jurisdiction, whereas in an upward system the young offender originally is supposed to find himself in the middle of a juvenile court trial. A judicial apparatus is stiff and rigid, and therefore it is always more likely that it applies the more common procedures in order to avoid confusing the system, and not to make things more complicated than necessary. Therefore, necessary extra action always makes it more unlikely for procedures to actually happen which, again, is exactly the reason why a juvenile much rather ends up in adult court in a downward waiver than an upward waiver system. Assuming these consequences, the jurisdictional range of the juvenile courts in the state of New York gets even more narrow, and therefore makes it here even more difficult for supporters of the judicial branch of juvenile courts to argue in favor of the future existence of the judicial species of juvenile courts.

"New York’s Juvenile offender Law is among the first legislative products that came out of a shift away from the separate treatment of juveniles and adults in the legal system."\(^{192}\) Although being ten years old, this statement has neither lost significance nor validity, and a system like this one jeopardizes the traditional juvenile justice system. A system, in which a majority of juvenile offenders is more likely to be treated as adults on a punitive, retribution - oriented basis impossibly can advocate the need for the attempt to rehabilitate youthful offenders who potentially would deserve such an educational approach.

\(\text{e. Criteria for waiving.}\)

In contrast to a judicial waiver decision, the procedure for giving up jurisdiction on a legislative waiver basis is leaving almost no space for discretionary decisionmaking. Is the juvenile charged with an offense excluded by the statute, the juvenile court judge has to hand him/her over to the criminal court branch. The widespread adoption of such a

\(^{192}\) Id. at 533
system has made the problem of broad discretion of a juvenile court judge in the decision to waive jurisdiction on a judicial basis less significant and important. However, such a judicial waiver decision is still the second possibility in most state systems to send a juvenile delinquent over to criminal court. This procedure remains relevant for the serious or repeated offenses that are not automatically excluded. Therefore it is still important enough to, once again, carve out exactly what the relevant criteria for such a decision are. First, at the very beginning the state statutes necessarily need to determine what the relevant age - limits are, so that a clear line is drawn between the state of being a juvenile and the state of being an adult. This necessity was realized unequivocally by the Supreme Court in applying the double jeopardy clause of the Constitution, because an offender can not be tried as adult and as juvenile.\textsuperscript{193} State statutes also commonly require that a background investigation of the child is made, meaning at least investigating his/her prior criminal record and the family circumstances. In addition to the seriousness of the offense, it is the content of such an investigation report that provides the factual basis for the waiver decision.\textsuperscript{194} Also state courts have held that due process requires expressive personal findings and a statement of reasons by the deciding judge.\textsuperscript{195} Moreover, it has been held by the courts that “this requirement is not satisfied by a waiver order which simply recites the language of the statute as a statement of reasons.”\textsuperscript{196} The most complex list of potential waiving aspects can be found in the appendix of the Supreme Court’s decision in Kent v. United States.\textsuperscript{197} Although it was decided on other procedural grounds, the appendix’s list indicates the following waiving factors as being potentially relevant: the seriousness of the alleged offense, the aggressiveness and violence of the

\textsuperscript{193} Breed v. Jones, 421 U.S. 519 (1975)
\textsuperscript{194} see SANFORD J. FOX, JUVENILE COURTS IN A NUTSHELL, (Nutshell Series of West Publishing Company, 3\textsuperscript{rd} ed., 1984) at 263
\textsuperscript{195} see Mathews v. Commonwealth, 218 S.E. 2d 538 (1975)
\textsuperscript{196} FOX, JUVENILE COURTS IN A NUTSHELL, supra note 194, at 262
\textsuperscript{197} 383 U.S. 541 (1966); primarily this decision of the Supreme Court generally entitled a juvenile that was thought about to be transferred to a criminal court to a hearing on the question of waiver. Moreover, the Court held that any waiver order must be accompanied by an exact statement of reasons for the transfer.
offense, whether the offense was directed toward a person or property, the sophistication and maturity of the juvenile, and the criminal record and previous history of the juvenile. This is not a complete list of factors, but only a guideline for juvenile judges to cross-check, if there are identical or similar aspects in their special case that they can use either directly or through some transfer. The existence of a complete list would contradict the notion that every single offender deserves that a judge deals with his/her unique personality. Therefore, a waiver pattern needs to be avoided anyway. Consequently, despite these numerous aspects for waiving, it eventually has to be the "juvenile court judge’s assessment of a youth’s amenability to treatment, the dangerousness partly based on the consideration of age, the treatment prognosis, and the threat to others" which then, however, is largely based on discretionary decisionmaking.

After all, it is the judicial waiver for adult prosecution that is the most significant dispositional decision of the juvenile courts. Again, in other words, more aggressive words, "judicial waiver statutes that are couched in terms of amenability to treatment or dangerousness are simply broad, standardless grants of sentencing discretion characteristic of the individualized, offender-oriented dispositional statutes of the juvenile courts." If the juvenile courts want to survive their institutional crisis, they ought to respect their judicial responsibility for all juvenile offenders who do not belong to the most serious category of young delinquents. The latter do not get to see juvenile courts in most states anyway, if they have committed a legislatively excluded offense that automatically puts them in this category. Discretion within the trial procedure is one thing, too much discretion in deciding whether to be the appropriate court is an other. Due to its vagueness, the judicial waiver procedure is one of the most weak and critical points of the juvenile courts of today and the continuous constitutional challenges on

198 Feld, Changes in the Juvenile Waiver Statutes, supra note 35, at 490
199 Feld, Legislative Policies, supra note 19, at 501
200 Feld, Changes in the Juvenile Waiver Statutes, supra note 35, at 491
juvenile courts are substantially based on attacks on this very procedure. Therefore, the juvenile justice branch should eventually decide to completely give up on this procedure, if it wants to increase its survival chances.

f. The effectiveness of automatic adulthood.

In theory, legislative waiver legislation is supposed to identify the most serious juvenile offenders, after that subject them to harsher sentences, and thereby generally producing fear in those juveniles who potentially consider to get criminally active. In so far, this consequently then serves as a deterrent and is supposed to bring juvenile crime rates down. Today, it is well established that often times there is a great gap between theory and practice. For that reason, it shall be examined, if the legislative waiver concept is really apt to deter juvenile offenders from committing crimes and thereby, in fact, brings down juvenile crime rates. Unfortunately, there are numerous studies on several issues of the judicial transfer procedure, but so far, due to the fact that such concepts are relatively new legislative fashion, there were only few examinations that concentrated on the evaluation of the effectiveness of legislative waiver concepts and the closely linked question, if such concepts actually are successful in deterring juvenile crime. However, the majority of these few studies produced unambiguous results that proved that it is absolutely justified to question the effectiveness of legislative automatic adulthood in deterring potential and former juvenile delinquents from committing crimes.

Some of this research work shall be introduced at this point.

One study evaluated the effects of the New York State Juvenile Offender Law of 1978, a law that established an almost uniquely strict legislative waiver concept for American standards of today, and even more for those in the late 1970's.

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201 Risler/Sweatman/Nackerud, Deterring Juvenile Crime - unpublished running head, supra note 11, at 5
202 see Feld, Changes in the Juvenile Waiver Statutes, supra note 35, at 501, 502
203 see Singer/McDowell, Criminalizing Delinquency, supra note 186
After the ratification of the law in New York City, about 14% of the eligible juveniles of 1983 were sentenced to periods of confinement, whereas before the JO Law was enacted only three to nine percent were incarcerated. However, a law’s success certainly depends on the extent to which it is implemented. In contrast to New York City, “an upstate juvenile has less than half the chance of being charged with the law as does a City juvenile” which points to the problem of insufficient application of the law. This already is even one factor which makes the JO law largely ineffective.

Moreover, even in New York City, the law was not able to lead to a decrease in juvenile crime, although “substantial efforts had been made in the news media to alert juveniles to the existence of the JO Law and its provisions.”

The evidence strongly indicates that there was no effect of the law on either homicides or assaults and overall the analysis most strongly supports the conclusion that the JO law did not affect juvenile crime. The results of the analysis are complex, but they are clearly inconsistent with a model in which juvenile arrests uniformly declined following the introduction of the law.

Another study used a time series design to evaluate the effect of the Idaho legislative waiver statute on violent juvenile crime. The years included in the time series were the five year periods 1976 - 80 and 1982 - 86. The result of this research study was “that the 1981 Idaho legislative waiver statute did not deter violent juvenile crime as measured by arrests for homicide, forcible rape, robbery, and aggravated assault.” One possible explanation for the failure of legislative waiver systems in deterring crime is the potential risk, that after violent juvenile offenders are remanded to criminal courts, their youthful age influences the way they are sentenced there, too. If juveniles are sentenced much less severe in criminal court than adults are, then any deterrent effect vanishes anyway.

\[204\] Id. at 526
\[205\] Id. at 524
\[206\] Id. at 530, 531
\[207\] Jensen/Metsger, Effect of Legislative Waiver, supra note 169, at 99
\[208\] Id. at 100
One study on the effectiveness of legislative exclusion of serious offenses reached this very conclusion.\textsuperscript{209} If the transfer to criminal court is supposed to result in a greater degree of public safety, one would assume that therefore incarceration rates for violent juvenile offenders had to increase. However, this study had to conclude as follows:

If protection of the public is defined as incarceration, these data demonstrate that remand does not, in fact, provide extensive protection. Nor does remanding juveniles culminate in a higher percentage of incarceration or long periods of incarceration. In the present sample, in only 61.7\% of the cases did any post - conviction incarceration occur. And this statistic is misleadingly high, for only 30.8\% of the remanded juveniles received prison as their primary disposition. [T]he most common disposition was probation with 63.1\% out of the 61.7\% total number of “incarcerated” juveniles.\textsuperscript{210}

The same result was revealed by a study project in Utah.\textsuperscript{211} The majority of juveniles convicted as adults in Utah between 1967 and 1980 were not imprisoned.

Finally, it also seems that the Juvenile Justice reform Act of Georgia which was ratified in 1994, will not be able to substantially reduce juvenile crime in Georgia on the basis of a legislative waiver statute. This has to be stated more cautiously though, because the law is only about three years old and it usually takes a longer time series to be able to come up with meaningful statistical results. One reason for this is that it takes quite a while to alert the public to the existence of a new law. However, by looking at current figures, it can be expected “that the Georgia legislative waiver statute will have no significant impact on serious juvenile crime.”\textsuperscript{212} Looking on pre - statute (1992 & 1993) and post - statute numbers 91994 & 1995) of juvenile arrest rates, one sees 83 post - instead of 82 pre - arrests for murder, 118 post - instead of 121 pre - arrests for rape, and 1726 post - instead of 1833 pre - arrests for aggravated assault. Moreover, in general the pre - statute arrest number for violent juvenile offenses was 3179, the post - statute number is even higher with 3211 arrests.\textsuperscript{213} Those numbers will frustrate even the biggest optimist with

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{209}Bortner, Remand of Juveniles to Adult Court, \textit{supra} note 143.
\item \textsuperscript{210} Id. at 56, 57
\item \textsuperscript{211}K. Gillespie/M. Norman, Does certification mean prison: some preliminary findings from Utah, 35 Juvenile \& Family Court Journal 23, 24 (1984)
\item \textsuperscript{212}Risler/Sweatman/Nackerud, Deterring Juvenile Crime, \textit{supra} note 11, at 9
\item \textsuperscript{213}Id. at 19, 20
\end{itemize}
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regard to the effectiveness of legislative waivers as far as deterring crime is concerned. These presented projects are only some research examples, and it is certainly very likely that other studies indeed revealed the effectiveness of legislative waivers, however, these shown research works should at least warn overoptimistic supporters of believing such systems could be the panacea for reducing juvenile crime rates overall, and in particular those numbers of the serious juvenile crimes.

After all, it is certainly crucial for the success of such laws that they are indeed accepted and implemented, and that criminal courts are not too lenient in sentencing juveniles in comparison to adults. However, even if sentenced to imprisonment, there is still one concern, as far as success of a legislative waiver concept overall is to be achieved. This concern shall be explained now.

**g. The sentence vs. “time served”**.

Easily underestimated, a "second dimension of sanction severity is the actual time served, which is critical in addressing the effectiveness of a waiver system, because time served may be less than sentences available in juvenile court."\(^{214}\) One critical factor for the deterring effect of a legislative waiver system is to demonstrate to the juvenile offender that the sentence which is imposed on him or her in criminal court is much harsher than the one he/she would have to face in a juvenile court. However, even if the sentences in criminal court, in fact, were usually harsher, the deterrent effect still would lose a great deal of this very effect, if the juvenile knew that in all likelihood he/she is going to serve only a smaller portion of the actual sentence in prison. In other words, "with waived offenders typically serving only a fraction of their original sentence, it is possible that time served in prison is within the realm of what is available in juvenile court."\(^{215}\)

\(^{214}\) Eric J. Fritsch/Tory J. Caeti/Craig Hemmens, Spare the Needle but not the Punishment: The Incarceration of Waived Youth in Texas Prisons, 42 Crime & Delinquency 593, 603 (1996)

\(^{215}\) Id. at 603
If studies generally illustrated that sentences served by waived youth in adult prison are in practice very similar to those available in juvenile court, one had to be worried that due to this leniency in the sentence execution the deterrent effect of having to face harsher penalties would be wasted. Unfortunately, there were already studies which resulted in the showing of this exact connection of the actual sentence and the actual time served, when juveniles are tried and sentenced in criminal courts.\textsuperscript{216} the Utah study showed an average time served of 2.74 years, the Texas study resulted in the finding that the average sentence length for the group of tested offenders 12.8 years, the actual time served, however, was only 3.5 years. On the basis of such results, the question at this point must be, "if waivers are not resulting in more severe penalties, what are they accomplishing?"\textsuperscript{217} Unless the factor of actual time served will not be taken into more serious consideration, "modifying waiver statutes in an effort to get tough on juvenile crime will be more rhetoric than reality."\textsuperscript{218} Nevertheless, having pointed out the aspects of sentence severity and actual time served and their connection to the possible effectiveness of automatic adulthood, there is also a third dimension which needs to be examined in this context. This third dimension explores the recidivism rates for those juveniles who really were sentenced harsher in criminal court and who at least served a substantial portion of that sentence. These recidivism rates under legislative waiver systems shall be the concern of the following subchapter.

\textbf{h. Research on recidivism under legislative waiver systems.}  
As examined earlier, several research projects showed that it is at least very doubtful, if legislative waiver systems really have a deterrent effect on potential juvenile delinquents making juvenile crime rates going down. To complete this discussion, as a next step it has to be examined, if the transfer to criminal courts at least has a deterrent effect on those

\textsuperscript{216} Gillespie/Norman, Does certification mean prison, \textit{supra} note 211  
Fritsch/Caeti/Hemmens, Spare the needle but not the punishment, \textit{supra} note 214  
\textsuperscript{217} Fritsch/Caeti/Hemmens, \textit{supra} note 214, at 598  
\textsuperscript{218} \textit{Id.} at 606, 607
young offenders who had to go through this procedure and moreover maybe even had to serve their sentence or at least a substantial part of it in an adult correctional facility.

The question which has to be answered therefore is, are transfer procedure and the procedural and sentence consequences apt to lower recidivism rates among juvenile offenders? Advocates of the transfer procedure clearly think it should make the intended difference, and therefore lead to a decrease in recidivism rates.

However, at this point two studies need to be introduced which resulted in contrary findings. Both projects ended up, getting results which indicated that there was at least no convincing or promising decrease of juvenile crime on the basis of transfer systems that are guided by a getting tough on juvenile crime rationale. Certainly, this is only a couple of studies, moreover, even dealing with the same state Florida, and therefore their results impossibly can demonstrate general validity. However, they show that advocates of transfer should rather be realistic than being overoptimistic about and convinced of the effectiveness of such waiver systems.

The first study compared recidivism of youths transferred to criminal courts with that of those retained in the juvenile justice system. At this point it seems to be necessary, in order to not take the findings out of their context, to mention that recidivism rates here were not only examined for the most serious crimes like the ones which are usually the excluded offenses by statutes. This project compared recidivism rates in general, no matter on what basis the offender had been transferred to criminal court.

In any event, overall, the results suggest that transfer in Florida has had little deterrent value. [A]though transferred youths were more likely to be incarcerated and to be incarcerated for longer periods than those retained in the juvenile justice system, they quickly reoffended at a higher rate than the nontransferred controls, thereby negating any incapacitative benefits that might have been achieved in the short run.219

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219 Bishop et al., Transfer of Juveniles, supra note 95, at 183
Whereas this study focused only on short-term recidivism rates for rearrest numbers within a one-year period which was 1987, another study for Florida analyzed the extended follow-up period for the former examined cases through November 1994.220 Actually, to state that the transfer system in Florida had only little effect, is still an understatement. Comparing a group of transferred youths to a group of nontransferred youths who committed the same crime types in identical numbers, the overall rearrest numbers for that one year time frame revealed that of the transferred youths, 30% were rearrested, compared to 19% of the nontransfer matches. Reading these numbers, the obvious conclusion is that the transfer procedure simply did not deter the juveniles.

The second long-term study series still showed consistent results. "Transferred youths reoffended more quickly than did their nontransferred counterparts. However, the second analysis showed that the nontransfers eventually caught up with the transfers. Still, it can hardly be regarded as a victory of the system as far as its effectiveness in deterring crime is concerned, when this study produced the following numbers: for the relevant time period 42% out of 2,700 transfers were rearrested, whereas 43% out of the same number of nontransfers had to face the experience of rearrest.222

Certainly, there are potential explanations for the lack of success of transfer systems in getting crime rates going down. First, the transfer to the adult system could heighten the law enforcement vigilance and thereby increase the risk of rearrest. Second, transfer to criminal court might send the negative message to a juvenile that he/she is an outcast. Moreover, juvenile offenses are rather forgiven by society than adult convictions which supports the identification as being an outcast. Finally, adult criminal procedure is more

221 see Bishop et al., supra note 95, at 182
222 see Winner et al., Transfer of Juveniles, supra note 220, at 551
likely to alienate the juvenile offender from society and thereby produces angry pride which then provokes defiance and results in repeating the sanctioned conduct.\textsuperscript{223} Despite these potential explanations for the missing success of transfer systems as far as a decrease in recidivism rates is concerned, "the results also should not be explained away."\textsuperscript{224} "Policy makers should rather come to grips that the transfer of juveniles to adult jurisdiction is no panacea"\textsuperscript{225}, and that it is only one prong on the list of factors which need to redefine the concept of juvenile justice.

i. The punishment gap.

The punishment gap describes the gap in the harshness of the sentences of the criminal courts on the one, and the juvenile courts on the other hand. The problem of the punishment gap is related to the practical problems of a transfer system like the actual time served and the actual criminal court sentence concern. Both the punishment gap and the actual time served problem stand for the failure to realize a getting tough concept on juveniles, meaning to turn theory into practice. These connections shall be explained now.

The rationale for a legislative waiver is the incapacitation of a serious or chronic juvenile offender. For this reason, such an offender is handed over to the criminal court system, where longer imprisonment sentences are available as within the juvenile process. However, one has to ask what this procedure accomplishes, if, in fact, those harsher sentence ranges are not used by the judges. this looks like the question, already being asked earlier, what it does accomplish to impose long sentences of imprisonment on juveniles, if their average actual time served is far less. If a system really wants to get tough on juveniles, this theoretical concept also needs the crucial transition into practice.

\textsuperscript{223} see Bishop et al., supra note 95, at 184, 185
\textsuperscript{224} Id. at 184
\textsuperscript{225} Winner et al., supra note 219, at 561
However, "when persistent and serious juvenile offenders appear in adult criminal court for the first time as adult first offenders, they are all too frequently treated as instant virgins, and entitled to all the leniency typically accorded adult offenders with short criminal records." In so far, the punishment gap could be rather reduced, if it was also possible for a criminal court to include the juvenile's prior criminal record in its applied sentencing aspects. It seems that a legislative waiver much rather could lead to adequate sentences than a judicially motivated transfer, because "offense seriousness and criminal history would bring the courts in a better position to respond to chronic juvenile violators than amorphous clinical considerations."

After all, although one of the reasons for the waiver method is that juveniles will receive harsher punishments than they would in the juvenile justice system, [t]his absolutely does not mean that they actually will receive their just deserts. [I]n deed, once minors are in the criminal system, every effort is made to see that they do not receive their just deserts. [A]ppellate courts have reduced sentences on the ground that the retributive punishment imposed failed to reflect the young defendant's potential for rehabilitation. And trial courts generally treat minors more leniently than older offenders.

It again needs to be stressed that it is absolutely crucial for deterring juvenile crime with waiver systems that they are no joke, but serious reality. Criminal courts need to understand that the juveniles who show up in front of their benches were regarded by juvenile courts as serious criminals who need to be sentenced like they were adult offenders. As long as this message does not reach the criminal court rooms and from there leaves to the outside world to spread the news among juveniles, waiver systems can not have significant deterring effects. On a pure theoretical basis that is not applied in practice, the picture of serious juvenile crime will not change.

In this context, a concept of youth discount can not convince either. This would be a more modest and less discretionary rationale to treat young people differently from adults in criminal courts. Such a youth discount for example could mean, "a 14 - year - old

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226 Feld, Legislative Policies, supra note 19, at 513
227 Feld, Changes in Juvenile Waiver Statutes, supra note 35, at 503
229 see Feld, Juvenile (In)Justice, supra note 3, at 418
might receive 33% of the adult penalty, a 16-year-old 66%, and an 18-year-old the adult penalty, as is presently the case. However, such a concept again would fail to send out the message that serious juveniles better believe that being caught, they will not be treated like amenable juveniles, but instead will simply face adult consequences. after all, it is this very idea which gave birth to waiver systems.

One must not forget that such leniency afforded to juveniles in criminal courts has to smell like procedural injustice to adult offenders. It is this argument which plays a major role in the reasoning of some critics of a separate juvenile justice system. As long as offenders are tried in different courts with different theoretical policies, sentencing disparities among similar offenders are justifiable on that basis. If the juvenile court would not exist, there would not be any youth privilege in adult courts in first place. Every offender would have to be sentenced on the basis of the same sentencing concept.

In other words, the existence of juvenile courts spoils the adult court judges, when they have to sentence a juvenile in their court, because they still can not ignore the existing sentencing ideas on the basis of youth. To put it in a nutshell, their argument is, in order to assure similar consequences for similar offenders, the criminal court system needs to be based on one type of court which would mean the end of juvenile courts.

**j. The death penalty for juveniles?**

It has been pointed out several times up to this point, how crucial it is for the success of waiver systems in indeed reducing juvenile crime by effectively deterring delinquency, to really transform the theoretical concept into practical consequences. In other words, if transferred to criminal court a serious juvenile offender, in fact, should be sentenced like an adult counterpart, and moreover as a second step the imposed sentence ought to be served completely without any unwarranted youth bonus.

230 *Id.*

231 *see Id.* at 419
However, does this rationale stop when there is the potential possibility to impose the death penalty on a juvenile? This difficult question shall first be discussed and then certainly be answered as well.

Certainly, the first question already is the constitutionality of the death penalty in general. The baseline of the discussion certainly must be, whether the death penalty today is still consistent with the constitution, in particular with the Eighth and Fourteenth Amendment. The Fourteenth Amendment adopts that no state shall deprive any person of life without due process of the law which implies that it could be the basis for the imposition of a death penalty as long as the process is due.

On the other hand, the Eighth Amendment prohibits cruel and unusual punishment. Opponents to capital punishment argue that it can not be in accordance with the Cruel and Unusual Punishment Clause of the Constitution anymore, to still execute criminals today, because this clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Moral concepts are not invariable commandments, they change in the course of the civilization process of a society and "moral concepts require us to hold that the law has progressed to the point where [p]unishments on the rack, the screw, and the wheel are no longer morally tolerable in our society." The Eighth Amendment was ratified in 1791, the Fourteenth Amendment in 1868. Making the transition into modern times, this means

that the primary moral principle of a state when sentencing today has to be to treat its citizens in a manner consistent with the intrinsic worth of a human being - a punishment must not be so severe as to be degrading to human dignity. [D]eliberate extinguishment of human life by state, however, is uniquely degrading to human dignity. [A]n executed person has indeed lost the right to have rights. the fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded.

A less emotional, more scientific approach to declare the death penalty unconstitutional, is to simply point out that this fatal punishment does not serve the two purposes of

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233 Id. at 229
234 Id. at 230
deterrence and retribution on which it is theoretically founded.\textsuperscript{235} The most quoted study of supporters of capital punishment which found that capital punishment has a deterrent effect \textsuperscript{236} was harshly criticized for a couple of reasons.\textsuperscript{237} First, the fact that his studies were carried out nationwide, rather than on a state - by - state basis made his results defective. Second, he applied his study only to one time period which moreover was problematic in so far that the used figures had to be readjusted, because the first applied FBI statistics were rather unreliable material.

On the other hand, the most quoted study of opponents of the death penalty seems to be more reliable, because it does not show these explained weak points of Ehrlich's studies. The statistics used in this study clearly indicated that capital punishment has no deterrent effect.\textsuperscript{238}

As far as retribution is concerned, the most significant justification for capital punishment of the Supreme Court was that:

the instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves as an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then they are sown the seeds of anarchy, of self help, vigilante justice and lynch law.\textsuperscript{239}

This argument, however, is not even a pure retributive one. The reasoning that the imposition of the death penalty keeps society from taking the law into its own hands is rather utalitarian, because it only refers to the beneficial results of capital punishment.\textsuperscript{240} Moreover, how come that nearly all countries in western Europe including Germany which formally abolished the death penalty still are not about to drown in anarchy? Even

\textsuperscript{235} Greenwald, Capital Punishment For Minors, \textit{supra} note 228, at 1506, 1510
\textsuperscript{236} see Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life or Death, 65 Am. Econ. Rev. 397 (1975)
\textsuperscript{238} see Thorsten Sellin, Capital Punishment, 25 Fed. Probation 3 (1961); being analyzed in \textit{supra} note 237, at 185
\textsuperscript{239} Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)
\textsuperscript{240} see Stanford v. Kentucky, 492 U.S. 361, 389 (1988) (Brennan, J., dissenting)
the purely retributive argument, the taking of a murderer's life was morally good can not
convince, after all, "to be sustained under the Eighth Amendment, the death penalty must
comport with the basic concept of human dignity at the core of the Amendment."241
However, "the lingering question about the constitutionality of capital punishment
seemed to have been answered by the Supreme Court in 1975 in Gregg v. Georgia242. in
which a majority of the Court found that the death penalty does not per se violate the
Eighth Amendment243, because

whatever the argument may be against capital punishment, both on moral grounds and in terms of
accomplishing the purposes of punishment. [t]he death penalty has been employed throughout our history,
and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of
cruelty.244

Nevertheless, does that automatically mean that it is also constitutional to impose the
death penalty on juvenile offenders? After all, "of the nations that retain capital
punishment, a majority of 65 : 61 prohibit the execution of juveniles."245 In the United
States of the 37 states whose laws permit capital punishment, 15 decline to impose it
upon 16 - year - olds and 12 decline to impose it on 17 - year - olds.246 In 1983, already
"24 capital punishment states specifically had designated an offender's youth as a
mitigating factor in their death penalty statutes."247

Nonetheless, the fact that the young age of an offender can be proffered as a reason for a
sentence less than death does not mean at all that juveniles could not and would not be
sentenced to death in extreme cases. Youth is only one factor within the mitigating
aspects which altogether need to be balanced with the aggravating factors, when judges

242 Id.
243 see Streib, Capital Punishment, supra note 160, at 54, 55
244 Gregg v. Georgia, 428 U.S. 153, 178 (1975)
246 see Stanford v Kentucky, 492 U.S. 361, 370 (opinion of the Court)
example for under 16 statutes: NEV. REV §176.025 (1973 & 1977 Supp.)
247 Greenwald, Capital Punishment For Minors, supra note 228, at 1481 in Footnote 71
go through the sentencing process. Certainly, "the youth of a juvenile in itself is a mitigating factor of great weight"\(^\text{248}\) but sometimes it can be outweighed by the aggravating factors. "When the scale so tips, the minor is sentenced to death."\(^\text{249}\) The last execution of a person who committed a crime under 17 years of age occurred in 1959. Interestingly, before that, Georgia was the leading state in executing minors with 40 executions.\(^\text{250}\) However, today 'at least thirty - eight persons now await execution for crimes committed while under age eighteen.'\(^\text{251}\)

"Incomprehensibly, although due to less developed cognitive skills of minors, the death penalty fails to deter them, and despite its failure to justify retribution, because juveniles are less morally blameworthy than adults,"\(^\text{252}\) "the court seems poised on the brink of finding no constitutional prohibition to capital punishment for crimes committed under age eighteen."\(^\text{253}\) This, in fact, means that serious juvenile offenders waived to criminal court, in states where statutes allow the imposition of the death penalty on juveniles could be send to the chair. This most extreme consequence of a legislative waiver system seems to run a great risk to exceed the constitutional limits, and therefore it is another point besides others which is questioning the reasonableness of such an automatic adulthood.

**k. Conclusion.**

Due to the alarming figures in juvenile crime statistics, the political and legislative as well as the general judicial trend clearly head into a getting tough on juvenile offenders rationale. "Leading the charge are conservative politicians who have passed laws in all 50 states allowing juveniles to be tried in adult court and sent to adult prison."\(^\text{254}\) "The nation's juvenile courts, a long troubled backwater of the criminal justice system, have

\(^{249}\) Greenwald, Capital Punishment For Minors, *supra* note 228, at 1482  
\(^{251}\) Streib, Capital Punishment, *supra* note 161, at 61  
\(^{253}\) Streib, * supra* note 161, at 56  
\(^{254}\) Fox Butterfield, With Juvenile Courts In Chaos, Critics Propose Their Demise, NEW YORK TIMES, July 21\(^{\text{st}}\), 1997, at page A 13
been so overwhelmed by the increase in violent teenage crime [t]hat judges and politicians are even debating a solution that was once unthinkable"255. namely the abolition of the special judicial branch of juvenile courts.

However, before abolishing the juvenile courts, there is first the less drastic step of getting tough on juveniles through waiver systems. The possibility of getting exposed to the normal procedure, an adult has to face in criminal court might make them stop "laughing at the juvenile system and the experience in criminal court will give those serious juvenile offenders a good shaking up. From this perspective, transfer sends an important message to youths - a message that they are now in the big leagues instead of being coddled by the juvenile justice system."256

However, for the success of such transfer systems there are two crucial factors which absolutely need to be respected. First, juvenile courts should have a clear jurisdictional line beyond which they are the exclusive responsible judicial institution. It is one thing to have the necessary discretion within a less formal trial procedure which is guided by the concept of less formality, but it is an other thing to have too much or even standardless grants of discretion when it comes to decisions about the own jurisdictional authority. For this very reason, the only waiver system, a state arguably could adopt therefore, in order to have this clearly defined jurisdictional range, is the legislative waiver system which is leading to the so - called automatic adulthood. Judicial waiver systems, on the other hand, allow too much room for discretionary decisionmaking within the decision about jurisdiction, and therefore endanger the juvenile courts, because such a system bears the great risk of being too rash in negating the own jurisdictional responsibility. By 1994, 18 states therefore had adopted legislative waiver systems.257 More states need to follow that example to increase the chances for the juvenile court system to survive its

255 Id. on front page
256 Bishop et al., Transfer of Juveniles, supra note 95, at 173
257 see Jensen/Metsger, Deterrent Effect of Legislative Waiver, supra note 169, at 96, 97
serious crisis. Nonetheless, one should still be very aware of the doubtfulness of the intended deterrent effect of such legislative waiver systems. However, due to the fact that there is not sufficient research evidence yet that would prove their practical failure, these relatively new concepts deserve the chance to present their potential aptitude to get juvenile crime under better control.

Second, in order to get this message out, the criminal courts must demonstrate that they are not a first class juvenile court and therefore ready to impose harsh just-desert-sentences instead of treatment-oriented, lenient sentences which are based on the inability of judges to actually get tough on minors out of human motives which produces this problematic so-called leniency gap.\(^{258}\)

However, if the research projects continue to show that even such legislative waiver systems can not effectively deter juveniles from committing serious crimes, they also should be left alone. after all, it is also possible to get tough on juveniles within the juvenile justice system. The first demonstrative step in this direction would be to expand the potential sentencing ranges, so that juveniles already can face big league punishment in the juvenile courts. But again, up to this point, it is too early to already state that legislative waiver systems generally fail to get their message across.

As a last point, it should be emphasized again that, although the Supreme Court has held that the death penalty is not unconstitutional per se, it at least, in order to make such waiver concepts a reasonable alternative, ought to rule that capital punishment when applied to minors is unconstitutional. "Juveniles have a lack of maturity and an inability to control conduct and understand the consequences of their actions."\(^{259}\) On this basis, neither deterrence, nor retribution can justify the most extreme punishment, because due to these juvenile characteristics, the likelihood to deter them and the reason behind retaliation here are even more insignificant as this is already the case for adults anyway.

\(^{258}\) see Feld, Changes in Juvenile Waiver Statutes, \textit{supra} note 35, at 518

\(^{259}\) Greenwald, Capital Punishment For Minors, \textit{supra} note 228, at 1501
Moreover, the possible loss of life would simply overstretch the getting tough rationale, not to mention again the fact that all this would not serve any purpose. A legislative transfer, that generally deserves a chance to prove its qualities, should not trigger the possibility to sentence a less responsible minor to death.
Chapter 5: Juvenile Court Procedure.

One of the most important arguments, abolitionists stress continuously, when they keep calling for the end of the judicial branch of juvenile courts is, that juvenile court procedure has gotten more and more formal, and therefore, more and more resembles trials in criminal courts. In the United States, scholars have argued that cases like *In re Gaul*\textsuperscript{260} "precipitated a procedural revolution that has transformed the juvenile court into a very different legal institution than that envisioned by its progressive creators."\textsuperscript{261} In other words, they contend that "it has been transformed into a scaled-down, second-class criminal court."\textsuperscript{262}

In Germany, the situation is different. The current legal situation of juvenile criminal law that experienced its last substantial reforms in 1953 with the ratification of the Second Juvenile Court Reform Law is founded on a different philosophical concept as the American system. Here, the juvenile law is not seen as a subcategory of family law, but as a specific subchapter of "the real criminal law."\textsuperscript{263} Therefore, § 2 JGG determines that, as long as there are no specific and contradictory (as far as the rules of the StPO are concerned) sections in the JGG, the general rules of the Federal Criminal Procedure Code/StPO also dominate the procedure in the juvenile courts. In other words, with the exceptions that are expressively regulated in the JGG, juvenile court and criminal court procedure are identical. However, these exceptions are quite numerous. On this basis it was argued by German scholars that "it should be the first goal of the juvenile court trial to simply investigate the offense the delinquent is charged with and, if necessary, then

\textsuperscript{260} 387 U.S. 1 (1967)
\textsuperscript{261} Feld, Changes in Juvenile Waiver Statutes, *supra* note 35, at 471
\textsuperscript{262} Feld, Juvenile (In)Justice, *supra* note 3, at 403
\textsuperscript{263} SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, *supra* note 37, at 163
convict the juvenile offender on the basis of the evidence that was found in the course of
the trial and that proves the offender’s culpability.”

Founded on this notion of partial procedural identity of juvenile with criminal courts, critics of the juvenile court system in Germany were worried that the partial informality of juvenile courts on the other hand could be rather disadvantageous for the juvenile defendants. They argued, that “the pronunciation of educational principles would rather question the guaranteed right of procedural fairness than underline it.”

This, certainly, as well as the mentioned American observations, leads to the questioning of a real necessity for juvenile courts, if most of the substantial parts of their procedure today are hardly distinguishable from the ones that dominate the procedure in adult criminal courts. Moreover, it seems that, although on the basis of different political and jurisdictional arguments, German as well as American supporters of the abolition of juvenile courts argue that the rehabilitative principles of juvenile law rather hurt than help a juvenile delinquent who faces a trial in a juvenile court today. In other words, the rehabilitative mission of the juvenile court, seen from this angle, was a one-way street.

This chapter will examine, if juvenile court procedure in the United States and in Germany today really is rather disadvantageous for a young offender, and if its (in)formality really is so similar to the one of adult courts that this renders juvenile courts as a superfluous judicial branch.

1. **German principles and pillars.**

Although § 2 JGG generates the rule that all the sections of the StPO are also applicable for the juvenile court procedure, as long as they are not in contradiction or have different counterparts in the JGG, this does not automatically mean that there were not sufficient areas in the JGG that contradict or deviate from the general procedural rules of adult courts that would and can justify a special juvenile court law. These contradictions and

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264 ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 254
deviations certainly are mainly dominated by and founded on the principles of rehabilitation and education in German juvenile law in general. In other words, the differences are guided by the idea of having an offender - rather than an offense - oriented procedure and founded on the notion of punishment as a social purpose instead of a retaliation act.\textsuperscript{266} The question remains, if those rehabilitative principles are dominant enough in the JGG to turn the German juvenile court in a significantly less formal judicial institution that at the same time is also predominantly advantageous for the juvenile offender who is tried in juvenile court. The following analysis will examine these correlations, in order to find out, if the German juvenile court deserves to continue its therapeutic mission.

\textbf{a. The right to a fair trial.}

The Federal Constitutional Court of Germany (Bundesverfassungsgericht) time and again has ruled that the right to a fair trial is one of the most fundamental principles of a trial in a criminal court, no matter, if the trial proceeds in adult or juvenile court.\textsuperscript{267} It says, this fundamental right is founded on Art. 2 I GG and Art. 20 III GG (German Constitution) that describe the basic right of free development of one's personality and the principle that the Federal Republic of Germany is a state that is under the rule of law. The Court also adopts the international rule that mandates the right to a fair trial, Art. 6 of the Human Rights Convention.\textsuperscript{268}

However, the right to a fair trial, some critics of the German juvenile court state, unfortunately is partially neglected in the juvenile courts compared to the extent of that right in adult courts.\textsuperscript{269} Some weak points that perfectly corroborate this criticism shall be presented now:

\begin{itemize}
  \item \textsuperscript{265} \textit{Id.}
  \item \textsuperscript{266} see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 163
  \item \textsuperscript{267} BVerfGE (Decisions of the Federal Constitutional Court): 26, 71; 38, 111; 40, 99; 46, 210
  \item \textsuperscript{268} Id.
  \item \textsuperscript{269} ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 253
\end{itemize}
First, the general right to counsel of the StPO is defined by two constellations that are described in two separate sections. One is the so-called optional counseling, § 137 StPO, where the defendant has the option to ask for a counsel leading to the right of getting counseling assistance. The other section regulates the so-called mandatory or necessary counseling, § 140 StPO, where the judge or the prosecutor automatically has to appoint a counsel for the defendant, if he/she does not already have one of own choice. Due to the fact that there are no special regulations about this area in the JGG, these sections §§ 137, 140 StPO in connection with § 2 JGG are also the applicable ones for the juvenile court trial. They determine the right to counsel of a juvenile delinquent in juvenile court that is identical with the counseling rights of an adult offender in criminal court. Counseling rights of a juvenile are not regarded as more crucial as for an adult. Due to the reduced competence of a juvenile to speak for himself/herself, especially in a courtroom, one would assume that the counseling of a juvenile offender falls into the category of necessary/mandatory counseling on the basis of §140 StPO. However, the law does not accept that necessity and therefore only provides optional counseling for a juvenile delinquent on the basis of § 137 StPO. It is exactly this regulation that produces numerous unrepresented juvenile delinquents in juvenile adjudication procedures who are not aware of or do not know how to enforce their right to counsel. This insufficient protection casts first doubts on the fair-trial-maxime that is supposed to be the procedural guardian for the delinquent in the juvenile court trial.

Second, § 51 I JGG regulates that the judge has to exclude the juvenile delinquent from the trial which means he/she actually literally has to leave the courtroom as long as matters are discussed that could cause educational and self esteem related disadvantages. Such disadvantages often are assumed, when experts or social agents of the juvenile court

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270 see Id.  
271 see Id.
help (an organization that will be introduced in detail in one of the following subchapters) will talk about the social background of the juvenile.\(^{272}\) First, "particularly experts and social workers should be able to talk about the juvenile’s personal background in a way that there has to be no fear of causing educational difficulties for the juvenile."\(^{273}\) Second, this represents a significantly disadvantageous treatment of the juvenile offender compared to how an adult offender is treated in criminal court, and "the limitation of most fundamental procedural rights, like the one of the right of steady presence in the courtroom of a defendant, defined in § 230 StPO, on the basis of educational argumentation, like it is formulated by § 51 I JGG, must sound rather cynical to the juvenile."\(^{274}\) After all, the juvenile defendant also is supposedly innocent as long as he/she is not convicted on the charge. "Educational deficiencies without conviction are not a sufficient basis for a disciplinary response of the juvenile court. In dubio pro reo invenali, and not in dubio pro educatione has to be the dominating principle in the juvenile as well as in the adult criminal courts."\(^{275}\)

At last, it needs to be concluded that, in order to fully guarantee the right to a fair trial to a juvenile delinquent, the procedural rules of juvenile courts need to be reconsidered and then restructured in some details as well as in some significant points.

After all, it is crucial for the justification and the survival of the particular judicial branch of juvenile courts that the juvenile offender appreciates them as a supportive and advantageous institution from which he/she gets especially rehabilitative and fair treatment and which therefore is very distinguishable from the adult criminal courts.

\[\textbf{b. Imprisonment as "ultima ratio".}\]

Juvenile imprisonment plays a totally different role within juvenile criminal law than adult imprisonment does within the adult criminal law.

\(^{272}\) BOEHM, JUGENDSTRAFRECHT, supra note 51, at 71
\(^{273}\) Id. at 72
\(^{274}\) ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 254
\(^{275}\) Id. at 255
Juvenile imprisonment is the only real criminal punishment within the juvenile law and in so far it is the last sentencing resort and only is imposed when nothing else seems to be apt to rehabilitate the juvenile offender. Therefore juvenile imprisonment is the ultima ratio of the sentencing system in German juvenile law. A juvenile can only be sentenced to imprisonment, if disciplinary responses or educational instructions seem not to suffice for effectively fighting the criminal tendencies of the young offender. This means that there is an absolute preference for educational judicial response.276

§ 17 II JGG provides two potential bases on which juvenile imprisonment can be imposed on a juvenile delinquent. First, imprisonment can be imposed on the basis of an extreme degree of culpability. It is exactly here, where the rehabilitative principles of juvenile law are defeated by the aspects of retaliation in adult criminal law.277 In other words, if it seems like an offender is not going to respond positively to educational efforts, because his culpability degree in committing the relevant serious offense is to extreme for still assuming his/her amenability, the juvenile court punishes the juvenile delinquent, instead of desperately trying to rehabilitate him/her. Second, imprisonment can be imposed on a juvenile, if he/she displays “damaging tendencies to society”.278 The core of the meaning of the term stands for the assumption that personality deficiencies make it very likely that the young offender will commit further crimes in the future. However, the term of “damaging tendencies” is problematically unclear and leaves numerous questions. Moreover, such a punishment basis bears the great risk of stigmatizing a juvenile as a deficient personality which on the long run psychologically can really force him/her into a criminal career. Due to these problems the term was and is often criticized by criminologists.279 The application of the term by the judiciary shows that it actually stands for a negative - recidivism - prognosis, meaning it is very likely that the offender will recidive, as far as serious crimes are concerned280 that in itself is quite

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276 SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 114
277 see ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 203
278 this technical term was discussed and explained in detail earlier; infra relevant passages to footnotes 85,
279 see ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 204
280 see SCHAFFSTEIN/BEULKE, supra note 37, at 121
280 ALBRECHT, Id., at 205
hypothesical and therefore questionable as a basis for the ultimate juvenile sentencing means of imprisonment.

Defining juvenile imprisonment as ultima ratio also implies that it is supposed to be applied rarely by juvenile court judges. Some numbers prove this to be true. In 1975, 15983 juveniles were sentenced to imprisonment.\(^{281}\) This represents a 16.6 percentage of all juvenile sentences. This has almost not changed until 1991, where 12938 juveniles were imprisoned which stands for a percentage of 17.8.. Moreover, whenever juvenile imprisonment is imposed the sentence rarely gets close to the possible maximum length. § 18 JGG sets an imprisonment time range from six months up to ten years. In 1975, only 1.1% of the convicted juvenile offenders were sentenced to imprisonment longer than two years. In 1991 the same number was only slightly higher with a 1.8 percentage. This shows that German juvenile judges even when it is indicated to get tough on juvenile offenders have a hard time to leave educational aspects and amenability hopes aside. This seems to make it a fair statement to say that, although retaliation here even for juvenile justice comes into play, juvenile imprisonment still as far as the judges’ attitude is concerned is philosophically dominated by educational ideals. For example, terms like prison and custody are replaced by less harsh expressions like detention home and detention.\(^{282}\) Moreover, in contrast to adult imprisonment, juvenile imprisonment expressively on the basis of § 91 I, II JGG is supposed to educate, and therefore the law mentions cleanness, work, classes, religious exercise, therapeutic treatment, and sports as the educational pillars of juvenile imprisonment in detention homes.

Finally, because of these educational policies which are so different from the ideas behind adult imprisonment that is purely meant to be punitive, it certainly needs to be pointed out that the juvenile serves his/her time in specific juvenile detention homes instead of

\(^{281}\) this one and all the following statistical figures in this paragraph are taken from SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 115

\(^{282}\) see Id. at 116
spending this time of imprisonment in regular adult rightly called prisons.\textsuperscript{283} The reasoning behind this separate imprisonment, or better detention, is that it needs to be avoided that a juvenile gets sucked into adult prison subculture. Such process would very likely turn him/her into a criminal career.\textsuperscript{284}

In general, the reasoning behind imprisonment, the frequency of application, its average length, and its role in the whole juvenile sentencing scheme make it a factor of distinguishableness to the adult criminal court procedure and its reasoning that supports the necessity of a special judicial branch for juvenile offenders. However, so far the juvenile imprisonment is insufficiently regulated in the Juvenile Court Law in several regards. Therefore scholars demand a complete independent law on the federal rules of juvenile sentence execution.\textsuperscript{285} Such an additional and specific law on sentence execution for juvenile offenders would certainly also underline the important role of juvenile courts in the overall German judicial concept.

c. Alternative Diversion Procedures.

It would certainly also help to argue in favor of specific criminal courts for juveniles, if their procedural rules provided additional options that would keep a juvenile from going to the ultimate procedural stage of trial, and that would therefore sanction the juvenile alternatively on a pre-trial stage on the basis of a procedural diversion concept. Indeed, the JGG provides such options, in particular the new judicial diversion options of §§ 45, 47 JGG since the ratification of the first modification law in 1990 and they shall be roughly introduced at this point.

§§ 45, 47 JGG supply the juvenile court prosecution and the juvenile court judge with procedural possibilities to divert a juvenile delinquent before he would have to go through formal juvenile court adjudication. § 45 JGG is the relevant section for the

\textsuperscript{283} Id. at 232

\textsuperscript{284} see Id. at 116; see also BOEHM, JUGENDSTRAFRECHT, supra note 51, at 241, 242

\textsuperscript{285} see Id. at 229
prosecution. § 45 I JGG is not so important in the context of this chapter. On the basis of this provision the prosecutor, with the agreement of the judge, can stop judicial procedure before the case goes to trial, if the prerequisites of § 153 StPO are fulfilled. § 153 StPO deals only with the petty - offenses. Moreover, it is a way to stop a case from going to trial that apparently is also available for adults. In so far it is not a meaningful factor as far as significance and distinguishableness is concerned. For this very reason this procedural option is not going to be a big help for arguing in favor of the need for a particular judicial branch of juvenile courts.

In that regard, § 45 II JGG is much more interesting and helpful. In this alternative the prosecutor can keep the case from going to trial, if the juvenile already was ordered by the judge in a pre - trial hearing to follow an educational instruction. The character of the offense is irrelevant in this alternative which means the alleged offense can even be a felony. This procedural diversion rule is again justified with the rehabilitative principles of possible diversion in juvenile law.

Finally, on the basis of § 45 III JGG the prosecutor can try to persuade the judge to only impose an educational instruction on the juvenile where are more severe judicial response could be easily justified as well, if he/she feels that this will sufficiently serve as institutional warning to the juvenile which will keep him/her from the commission of future crimes. The second alternative within this alternative of § 45 III JGG goes even one step further. The prosecutor can, if the judge agrees, even do without any formal indictment which is the most informal alternative diversion procedure. However, the additional prerequisite for the application of this procedure is the confession of the juvenile delinquent.

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286 see ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 96
287 see Id. at 97
288 see BOEHM, JUGENDSTRAFRECHT, supra note 51, at 101
289 Id.
Finally, after having presented the prosecutorial options, § 47 JGG needs to be brought to attention. It equips the juvenile court judge with the privilege to stop the case from going to trial, although the prosecution already has indicted the juvenile offender. However, the judge needs the prosecution's consent for taking such procedural steps.\footnote{See ALBRECHT, JUGENDSTRAFRECHT, supra note 1, at 103} Without going into detail, it can be said at this point that the options for the judge to stop adjudication procedure in court are almost identical with the ones of the prosecution within § 45 JGG.

In a nutshell, it can be concluded that the basic source for these informal procedures is the general concept of diversion. However, even these procedures ought to halt sometimes and leave the field to absolute nonintervention. In other words, “the system, despite all the euphoria to educate, needs to realize that sometimes it is better not to react at all than react on an educational basis to insignificant criminal behavior, if it wants to lead young offenders back to noncriminal lives.”\footnote{Schluechter, Entwurzelung des Jugendstrafrechts, supra note 84, at 394}

At last, it also needs to be shortly mentioned that there is an other juvenile court procedure that, even if it does not stand for diversion, underlines that imprisonment in juvenile law is the ultima ratio and illustrates the potential profit juveniles can take from a particular rehabilitation - oriented juvenile law. § 21 II JGG regulates, a juvenile who is sentenced to juvenile imprisonment of more than one but less than two years does not have to actually serve his/her time in a detention home, if the judge is convinced that it will sufficiently serve the purpose of education not to make the juvenile serve his/her time but to simply put the juvenile delinquent on probation for the relevant sentence time frame.\footnote{Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 140} Moreover, it needs to be pointed out that the offense type here is again irrelevant for this procedural alternative. Even an offender who committed a felony is eligible for this probation alternative which will keep him/her out of any form of detention, if the
probation condition will not be broken.\textsuperscript{293} The decisive aspect for eligibility for this procedure is a positive social prognosis by the judge who thinks of imprisonment of being an unnecessary judicial response, because being on probation will also keep the juvenile delinquent from criminal recidivism.\textsuperscript{294}

At this point, it certainly needs to be mentioned that adolescents are also eligible for all these alternative diversion and rehabilitation-oriented procedures on the basis of § 105 II JGG.

In any event, these additional diversion and rehabilitation-oriented procedural alternatives indeed can be used as strong argumentative support when demanding the survival of the particular judicial branch for juvenile justice. Supporters of that notion might very well put these procedural arguments on their side of the scales which might be an important factor that tips the scales eventually over to their side in the current German discussion about the judicial direction the juvenile justice system should head to.

\textbf{d. The judge.}

The substantially crucial criteria of the role the German juvenile court judge plays in the general procedural concept as well as the problematic situation of having the strong need for institutional discretion on the one side and the risk of the thereto related power abuse on the other side already have been described within several contexts of this thesis. The wide discretionarv range of juvenile court judges when it comes to making most crucial decisions provides huge grounds for discussion and is certainly one of the argumentative weapons and targets of abolitionists.

However, this certainly shows the omnipresence of the decisive and problematic key role the juvenile court judge plays in the German judicial juvenile justice system. Nonetheless, in order to avoid repetition, this subchapter will be kept short and therefore

\textsuperscript{293} \textit{see Id.}

\textsuperscript{294} \textit{see Id.}
only focus on the essential difficulty to keep the right power balance, if one is so powerful like the juvenile court judge is.

At this point it is necessary again to stress how big the procedural discretion range of a German juvenile court judge is. In particular procedural points this discretion range is even too big. However, in order to change that one does not necessarily have to change the judge’s role in the general concept. The problem seems to be at least as effectively addressable by changing some or even throwing overboard some of the procedural options that provide the judge with a degree of discretion that is beyond the point of possible tolerance. In this context, it again needs to be stressed that the evaluation procedure of adolescents and the decision whether to rather see them as juveniles or adults is the perfect example of such a procedural point that needs to be removed from the procedural concept of the juvenile courts.

In any event, this huge amount of discretion that is afforded to juvenile court judges gets especially clear when comparing the judicial leeway he/she is afforded to the one an adult criminal court judge has. The difference is best described as follows:

The rigid sentencing time frames in adult criminal court that are only modifiable by mitigating and aggravating factors have no significance in juvenile law. Also the juvenile judge is not bound to the rules of determining the exact and indicated sentence like a criminal court judge is on the basis of § 46 StGB (Federal German Penal Code). It is up to the juvenile court judge which conclusions he/she draws from the mitigating or aggravating factors of a case and how this influences the imposed sentence. The general clauses of § 5 JGG how to find the correct sentence for a particular offense committed by a particular offender out of a certain relevant sentence range leave a lot of judicial leeway to the juvenile court judge. Moreover, the law’s list of educational instructions is not even interpreted to be complete, so that the judge as far as this sentencing type is concerned can therefore create his/her own inventive educational judicial responses.295

The flip - side of so much discretion in the sentencing process certainly is not to use it in the productive and reasonable manner but to be seduced to abuse the procedural power.

Most of the juvenile court judges are able to deal with so much discretion decently. However, they need to practice to use their power in the most effective way. Judges who have just started often times are afraid to use the whole range of discretion, and therefore spoil the interesting options of rehabilitative sanctioning. However, the other extreme is much more dangerous. Judges with all the experience can abuse the discretionary power they have and turn the sentencing process in a procedure that rather resembles the rules in arbitration courts than the ones that should be applied in criminal courts. Even worse, they get to

295 BOEHM, JUGENDSTRAFRECHT, supra note 51, at 89
the point where they only see their subjective standards. To keep the right balance seems to be extremely difficult.\textsuperscript{296}

e. The counsel.

The main point of this subchapter was also already covered before as a factor that needs to be reformed when a juvenile delinquent should get an absolute right to a fair trial in juvenile courts. As mentioned in that subchapter, the main concern here is, if the current situation as far as the right to counsel is concerned will still be a tolerable one in the future. The answer must be a clear no. Juveniles due to their immaturity need mandatory representation in a courtroom to be fully protected against procedural unfairness. That can only be achieved by adding the counseling of a juvenile to the list of the criminal procedure law that is regulating the constellations of mandatory counseling that is to be found in § 140 StPO. In connection with § 2 JGG this would produce the absolute right of a juvenile to be mandatorily represented by a counsel in the juvenile court room. Again, due to the immaturity of juvenile offenders it is legally unsatisfactory not to give the juvenile a mandatory but only an optional right to counsel. The actual situation is still that counseling of a juvenile in the juvenile court trial is only optional and therefore legally covered by § 137 StPO, § 2 JGG. This legal situation goes back to the parens patriae concept that sees the judge as caring father who takes care of his/her child. A third person, like a consultant for the child in this concept could certainly disturb this picture. Consequently, the problem is, how to effectively include a counsel in this educational concept in a reasonable way.\textsuperscript{297}

One problem already is that a counsel always would have to argue one-sided in favor of his/her juvenile client and to try to achieve acquittal for him/her. This would even be the case, if the counsel knew the juvenile client is actually guilty and deserves at least

\textsuperscript{296} \textit{Id.} at 95
\textsuperscript{297} see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, \textit{supra} note 37, at 167
educational response. After all, it is the counsel's job to avoid any kind of punishment or form of disciplinary response for the client.

However, the atmosphere in the juvenile courtroom has become distinctively more hostile today than that was the case in the days when progressives created a parens patriae concept. Today the mission of the juvenile court must be to effectively combine necessary informality with respect for procedural rights. The father figure therefore has become much more strict than this was originally the case. Due to this changed picture of therapeutic efforts the juvenile delinquent always needs to be represented by a counsel.

However, § 140 II StPO lists one constellation though that also arguably could be relevant for possibly getting a mandatory right to counsel for a juvenile on the basis of the legal situation of today. This clause reads, the incapability to defend oneself triggers the absolute need for mandatory counseling. However, the general formulation of this clause always potentially leaves a lot of room for arguing that the particular juvenile does not need a counsel on the basis of being incapable to defend his-/herself. In so far it is still not only preferable but necessary to add juvenile court trials to the list of mandatory counseling that is to be found in the Juvenile Court Law's section 140 II JGG.

Certainly, at least every juvenile has the optional right to be counseled for any adjudication procedure, however, a substantial number of juveniles do not know that they have such a right. "Between 1971 and 1983 the quote of juveniles who had been counseled was 21.5%"299, a number that speaks for itself.

It is admittedly difficult to combine rehabilitative principles with a right of being mandatorily counseled in juvenile law. However, due to the pointed out atmosphere in the juvenile courts of today that is quite different from the intended one of the progressives' parens patriae concept, it seems it really would be irresponsible to expose a juvenile delinquent to the risk of having to deal without any counseling help with a juvenile court

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298 see Id.
299 Id. at 171
judge who is seduced to abuse his/her discretionary power. An immature juvenile needs the procedural protection against unfairness which he most effectively gets from a counsel who in such unfair treatment situations can warn or admonish the juvenile or in extreme cases even can step in or remind the judge of his limits of discretion.

Again, in order to prolong the existence of the juvenile court branch and to save it from abolition, the German law has to add juvenile court trials to the law's list of mandatory counseling that is to be found in § 140 II StPO.

f. The “Juvenile Court Help”.

One, so far not mentioned procedural pillar of German juvenile criminal law is the so-called “Juvenile Court Help”.

The “Juvenile Court Help” is “a special organ that represents the educational, social, and custodial interests of the juvenile delinquent in the course of the whole juvenile court procedure.”300 In 1923, § 38 JGG was inserted into the JGG which legally made the Juvenile Court Help a factor in juvenile court procedure that could not be ignored by any means anymore. This organ consists of departments of the youth welfare administration and sections of associations for juvenile help. On this legal basis, “the cooperation of judges and social workers today has become a trademark of German juvenile law.”301

After the start of the pre - trial procedure it is the Juvenile Court Help’s task to investigate the juvenile offender’s living conditions, the family structure, and the development of his/her character and personality in general. This investigative work is necessary, because the way the juvenile court judge will treat the delinquent and the judge’s reasoning in the decisionmaking process - especially when it comes to sentencing the juvenile - are predominantly based on the judge’s evaluation of the offender rather than the offense.302

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300 Id. at 173
301 BOEHM, JUGENDSTRAFRECHT, supra note 51, at 120
302 see Id.
The Juvenile Court Help looks after the juvenile during the pre-trial stage, supplies the prosecution and the judge with written reports on the social evaluation of the delinquent, and is present during court procedure without any interruptions. However, "the responsible social worker can not function as an expert or an expert witness, because every statement would be founded on hearsay, and therefore would be potential basis for appeal." This role automatically causes a role conflict for the agent of the Juvenile Court Help, because he/she is supposed to be an investigator for the juvenile court on the one hand, on the other hand he/she is also in a position that, in the course of the work, will very likely lead to a close relation to the juvenile offender, in extreme cases the juvenile and the social worker might even get friends. It is this very conflict that can lead to personal dilemmas that causes the most and the harshest criticism of the role of the Juvenile Court Help in the juvenile court procedure and the procedural function of the agencies' social workers. The extreme way to state this is, to argue "that confidentiality is abused and turned into denunciation." The potential flip-side of the mentioned worries also can be that, because of the friendship between the social worker and the juvenile delinquent the social worker intentionally omits to report about points that would have a negative effect on the positive picture the juvenile court judge has of the juvenile without such unreported information. In so far, the Juvenile Court Help indirectly has substantial influence on the sentencing process itself that also bears the risk of abuse for the explained personal reasons.

Although, as shown, the described role conflict is a critical point, the participation of the Juvenile Court Help in juvenile criminal law procedure is definitely a criterion that again underlines the educational and rehabilitative policies of juvenile courts. Although it

\footnotesize{\begin{itemize}
\item[303] see SCHAFFSTEIN/BEULKE, JUGENDSTRAFRECHT, supra note 37, at 173, 174
\item[304] BOEHM, JUGENDSTRAFRECHT, supra note 51, at 123
\item[305] see Id. at 124
\item[306] Id.
\end{itemize}}
sometimes might leave juveniles behind with feelings of anger based on assumed betrayal by the social workers of the Juvenile Court Help. In general, the Juvenile Court Help represents juvenile law as offender- and not offense- oriented criminal law which makes it very distinguishable from the purely offense- oriented adult criminal law. Therefore this institution is very helpful in underlining the need for a special juvenile justice branch.

The clear distinction to adult criminal law, its procedures, and its policies consequently can also be proven by the existence of the special institution of the Juvenile Court Help. Although its procedural role can certainly be improved in the future, it again shows how different juvenile justice is from adult justice. German juvenile courts are needed.

**g. Conclusion.**

Juvenile criminal law is founded on the belief in the amenability of the majority of young offenders. The nonmalleable juvenile delinquent is rather seen as the exception that proves the rule. This means that the attempt to educate and to avoid recidivism must be the guiding star of juvenile criminal law procedure. In other words, what needs to be produced in the juvenile delinquents mind is the future willingness to accept the set rules of the law, to internalize these norms, and to build up a crime resisting personality. Again, social science and psychological research say, to cause such a norm- internalizing process in a juvenile's mind through legal authority and judicial influence is much easier than try to do the same with an adult criminal. To take it one step further, because of this great likelihood that juveniles due to their unfinished character development respond positively to the judicial attempts to educate them, the German law even expressively says that they have the right to be judicially and administratively supported by all the possible educational efforts on the basis of development promotion. ³⁰⁷

§ 1 I SGB VIII (Federal Social Law Code of Germany, Part Eight) gives young people the right of being supported in their character development and of being educated in order to become a self- responsible and community- oriented personality. The decisive question for the justification of the existence of juvenile courts therefore is, if they really stand for this educational concept of § 1 I SGB VIII, and if this concept makes its mark

³⁰⁷ Schluechter, Entwurzelung der Jugendstrafrechts, *supra* note 84, at 393
on the juvenile courts to a degree that they become substantially distinguishable from the criminal courts.

Having analyzed this general concept and some of its crucial procedural pillars in this chapter has produced substantial evidence that the German juvenile court shows that it fills this educational concept with life as no other judicial alternative could. Its different sentencing system that is reigned by educational and rehabilitative aspects, its alternative diversion procedures that are dominated by social and educational prognoses\(^{308}\), and the important assistance of the Juvenile Court Help represent substantial factors that underline the courts' right to exist on the fundamental legal basis of § 11 SGB VIII.

However, in order to secure the survival of the juvenile court branch, urgent reforms need to be pursued. The right to a fair trial, the right to counsel, and the right to face a juvenile judge who can not legally act like an uncontrolled sovereign are particularly calling for improvement through restructure. Reforms in those procedural fields will be decisive for not only improving but also saving the juvenile court of today. After all, there is no judicial alternative for juvenile courts that could realize their therapeutic mission.

2. American principles and pillars.

In order to find out about the right to exist of American juvenile courts, the same aspects need to be checked as the ones that were examined in the German discussion. Does the American juvenile court of today really represent the educational and rehabilitative concept of its progressive founders? Abolitionists argue, the juvenile court of today "is not the intended informal welfare agency anymore, but rather a scaled-down, second-class criminal court."\(^{309}\) Moreover, it is held among abolitionists that jurisdictional changes led to criminalizing serious juvenile offenders, and in so far also provoked the idea of just deserts, because due to this change it became more important to punish the juvenile delinquent than to find out about his/her real needs. In other words, "although

\(^{308}\) see Beulke/Mayerhofer, Die Vergewaltigung im Stadtpark, supra note 83, at 140

\(^{309}\) Feld, Juvenile (In)Justice, supra note 3, at 403
juvenile courts would still apply rehabilitative rhetoric, the way they treat the juveniles today would closely resemble punishing adults.\textsuperscript{310} to sum it up, "the purposes of the juvenile process have become more punitive, its procedures formalistic, adversarial and public, and the consequences of conviction much more harsh."\textsuperscript{311} to take it to the extreme, the Supreme Court stated three decades ago, "the child receives the worst of both words: [h]e gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."\textsuperscript{312} If this is really the picture, juvenile courts in the United States still present in 1998, then they are in big trouble, because such a picture would strongly suggest that the concept of a necessary judicial branch for juvenile justice today is out - dated, and that such a superfluous branch due to its undistinguishableness to adult criminal courts can be abolished. However, before taking this extreme step, it certainly needs to be examined first if such a picture of undistinguishableness is a reality. If the examination produces such a result, the next step of course must be to think about possible reforms that might be able to produce at least a brighter picture. In a last step one then has to think about a complete program for restructure that eventually should be able to save the current judicial branch of juvenile courts from its abolition. The following subchapters shall examine the situation of today, the problematic points of current American juvenile procedure, and finally make some suggestions for crucial reforms that indeed should be able to guarantee the survival of the American juvenile courts as a special rehabilitation - oriented judicial institution.

\textbf{a. Due process for juveniles.}

As explained earlier, the deepest procedural trouble the original concept of the juvenile court procedure produces is, to effectively combine the principles of informality and the

\begin{flushright}
\textsuperscript{310} \textit{Id.} at 409  \\
\textsuperscript{311} Feld, Transformation of the Juvenile Court, \textit{supra} note 16, at 717, 718  \\
\textsuperscript{312} Kent v. United States, 383 U.S. 541, 596 (1966)
\end{flushright}
importance of respecting the constitutional rights, in particular the due process rights, of juvenile offenders that are defined in the 5th and 14th Amendment of the Constitution. Certainly, the informal procedure is supposed to enable the judge to make flexible decisions and to provide him with more judicial leeway than the adult criminal procedure affords to a criminal court judge. However, the key to the distinguishableness of juvenile courts from the rest of the judicial system is their informality. It must be possible to uphold this informality without violating constitutional rights of juvenile delinquents. It would be a pathetic picture of the juvenile judiciary, if it had to be procedurally forced to respect the due process rights of juveniles. One would think, it should be a certainty that there need not be additional legal procedural protection against a judge's power abuse.

In any event, this needs to be the ultimate goal, to produce self-responsible judges who are aware of their crucial role in the process and their professional duties they owe to the juveniles as moral debts. If this goal is reached, Justice Fortas' institutional worries as he stated them in Kent v. United States313 would be obsolete:

while there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.314

In other words, even if the informal procedure leaves ethical blanks on the basis of judicial flexibility, "the preservation of due process in juvenile court would be important in order to socialize respect for the law as an institution. The appearance of fairness is at least as important in juvenile court as in other legal contexts."315 If this goal is reached, critics can not say anymore that the "crucial gap between juvenile justice theory and practice is the space between its rhetoric and its reality, in other words, the theory versus practice of rehabilitation."316 Admittedly.

312 383 U.S. 541 (1966)
313 Id. at 555
314 Id. at 555
315 Melton, Taking Gault Seriously, supra note 4, at 169
316 Feld, Juvenile (In)Justice, supra note 3, at 405
the ideal of individualized justice is powerfully seductive, both in its [h]umanitarian concern with the individual and its promise of mercy tailored to each person and each life circumstance. It portends a vision of transcendent justice, one not confined to the average or established, but a superior justice finely tuned to restore harmony between the individual and the collective.\textsuperscript{317}

However, today juvenile courts and their judges can be expected to be aware of the crucial importance of effectively combining informal procedure and the protection of the due process rights of juvenile offenders, if they want to keep their branch from turning into a one-way street.

In the past, the juvenile court has been

"indicted for its failure to meet the needs of juveniles. Increasing numbers of observers suggested that the distinction between the juvenile and criminal courts were merely rhetoric homage to an ideal which had never been realized. More serious, they suggested that the juvenile court had served as a rationale for the denial of legal and human rights."\textsuperscript{318}

Such accusations, even if stated in the most relevant decade of the 1960's, when cases like \textit{Kent v. United States} and \textit{In re Gault} were decided, have to be evaluated as provocative exaggerations. However, if juvenile courts of today want to survive as a judicial branch, they need to demonstrate that they have this criticism in mind and that benevolent adjudication is no disguise for disregarding constitutional rights, but the informal basis for being concerned about the real needs of the juvenile and acting in his/her best interests at the same time. Again, procedural informality and protection of due process rights do not contradict each other automatically. Juvenile court judges of today should be aware of the fact that their judicial branch is in a critical phase that will become even more critical if they abuse their power of flexible and discretionary decisionmaking.

If self-responsible juvenile court judges use their leeway to act and rule in the best interests of the child while they at the same time respect its fundamental procedural rights, the juvenile court is most distinguishable from a criminal court and therefore


\textsuperscript{318} \textit{Id.} at 6
needs to survive as necessary element of the American judiciary system that is the judicial parens patriae for the juvenile offenders and not a scaled-down criminal court.

b. The right to jury trial.

As shown, informality must not stand in the way of fundamental fairness. However, fundamental fairness can still be achieved, even if not all the relevant constitutional rights are afforded to juvenile delinquents in the juvenile court adjudication procedure. Some rights might be incompatible with the fundamental picture of the juvenile court that needs to be maintained in order to underline the important distinguishableness. Moreover, the potential disadvantage of not being conceded a particular procedural right for a juvenile might also be outweighed by the general advantage of facing a rehabilitation-dominated court rather than a retribution-dominated court, if that particular discussed right contradicts to the general but distinct procedural picture of a juvenile court.

To put it in a nutshell, juvenile court procedure should be as informal as possible, but only as formal as necessary. This should give the young offender the feeling of getting an informal, but fair trial. In other words, the juvenile delinquent needs to have all the fundamental fairness rights in order to guarantee the constitutionally demanded due process, as long as a particular right does not directly contradict the rehabilitative concept of the juvenile court and the procedural roles of its personal pillars.

Consequently, "in a series of decisions during the sixties and early seventies the Supreme Court changed the complexion of American juvenile justice, granting some procedural rights during the adjudicatory portion of delinquency proceedings."319 However, having

319 Id. at 8 pointing out the following cases in particular:
- In re Gault, 387 U.S. 1 (1967):
The Supreme Court noted the specific rights of getting written notice of the charges, the right to counsel, the right to remain silent, and the right to confront and cross-examine witnesses
The Supreme Court established the standard of proof beyond a reasonable doubt
The Supreme Court held that a hearing for waiver of a juvenile's case to an adult criminal court must be prior to the adjudication in juvenile court
- source: PETER C. KRATCOSKI/LUCILLE DUNN KRATCOSKI, JUVENILE DELINQUENCY
described the limits of due process in juvenile court, it was as consequent as the other decisions, when the Supreme Court in *McKeiver v. Pennsylvania*\(^{320}\) denied juveniles the constitutional right to jury trials and halted the extension of full procedural parity with adult criminal prosecution.\(^{321}\) "The Court feared that jury trials would adversely affect traditional informality, render juvenile courts procedurally indistinguishable from criminal courts, and call into question the need for a separate juvenile court."\(^{322}\) The Court was right in this decision to be concerned about the distinguishableness of juvenile courts from criminal courts. After all, this is the fundamental basis for their right to exist. Moreover, jury trials in juvenile court would be beyond the possible and reasonable range of formality, because they stand in sharp contrast to a parens patriae concept that sees the judge as representative of the state being the merciful and caring father, and not being an institution of punishment that needs to be scrutinized by a jury panel and even replaced by such a panel as the ultimate decisionmaker in the juvenile courtroom.

Again, the goal must be to create a juvenile court procedure that is only as formal as necessary and that is compatible with the original distinctive rehabilitation concept of the special judicial branch of juvenile courts. Besides that, a juvenile court therefore certainly still needs to be as informal as possible. A jury trial in juvenile court would not be compatible with these original fundamental ideas of juvenile court procedure that sees the judge as the ultimate decisionmaker.

**c. Transfer Hearings.**

As explained in detail in chapter one and chapter four, serious juvenile delinquency is almost omnipresent and therefore has produced substantial concern about public safety. The legislative answer was to get tough on juvenile crime and therefore to come up with

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\(^{320}\) 403 U.S. 528 (1970)

\(^{321}\) *see* Feld, Juvenile (In)Justice, *supra* note 3, at 405

\(^{322}\) *see* Feld, Transformation of the Juvenile Court, *supra* note 16, at 696; *see also* note 320 at 550,551
waiver system provisions in the state statutes that allow to transfer serious juvenile offenders to criminal court. This crucial procedural partial reform/ procedural addition most certainly asks for procedural safeguards to protect the young waived offender. after all, it is most likely that a transfer to criminal court will have some sort of influence on the delinquent's entire life.

The decisive case on this issue of needed additional procedural protection for the juvenile who is about to be transferred to criminal court was Kent v. United States.\(^{(323)}\)

In *Kent* the Court was confronted with a challenge to the process by which a juvenile court makes the decision whether to waive its jurisdiction and transfer a particular case for criminal prosecution as in the case of an adult. Specifically the Court held (1) juveniles are entitled to a hearing on the question of waiver, (2) counsel is entitled to access to the social records that the court considers in making the waiver determination, and (3) any waiver order must be accompanied by a statement of reasons explaining the courts decision to waive its jurisdiction.\(^{(324)}\)

Moreover, in *Breed v. Jones*\(^{(325)}\) the Court held that such a transfer hearing must be held prior to adjudication in juvenile court which means nothing else than a ban of double jeopardy in the field of juvenile law. Such cases show the willingness of the judiciary to even afford additional due process rights to juveniles, when it seems necessary to protect them from the risk of experiencing procedural unfairness in particular parts of juvenile court procedure that are unknown or irrelevant in adult criminal procedure.

However, it again needs to be stressed that this is only possible, if such additional formality does not render juvenile courts to be indistinguishable from criminal courts and if such steps toward more formality do not stand in sharp contrast to the fundamental rehabilitative principles of the original procedural concept for juvenile courts.

In so far, it was possible and necessary to grant these additional procedural rights in the context of transfer hearings that are a product of the getting tough on juvenile crime rationale that brought out the possibility for juvenile courts to waive their jurisdiction.

\(^{(323)}\) 383 U.S. 541 (1966)

\(^{(324)}\) SAMUEL M. DAVIS et al., CHILDREN IN THE LEGAL SYSTEM (University Casebook Series, David L. Shapiro et al. ed. board, 2\(^{nd}\) ed., New York, 1997) at 746

\(^{(325)}\) 421 U.S. 519 (1975)
Moreover, this was possible without making juvenile courts less distinguishable from criminal courts, because it does not change any part of the courtroom procedure. Again, the judiciary certainly had to react to this new legislative alternative for juvenile courts to waive their jurisdiction and at least had to give the delinquents the necessary procedural shelter, so that they were guaranteed a complete fair process including a just transfer procedure. seen in this context, it is certainly unfair to see transfer hearings and the additional rights they produced as additional evidence for the transformation of juvenile courts into second-class scaled-down criminal courts. As debatable as the waiver procedure itself is, the additional rights they produced are compatible with the concept of individualized justice and therefore can not be used to argue toward abolition.

**d. The benevolent judge.**

Up to this point it was already pronounced several times that the supposedly benevolent judge plays the procedural key role in juvenile court adjudication and is the major personal factor of distinguishableness when juvenile courts are compared to adult criminal courts. The judge represents the fundamental idea of rehabilitation, responds to the juvenile needs, makes the decisions in the best interests of the child. In other words, “the juvenile court judge is the ultimate decisionmaker, the most important person in the juvenile court.” Juvenile court judges not only have an extremely important job but also due to the role they play in the procedural concept extreme power.

An especially illustrative example for that power is the discretion range they have in the judicial waiver procedure. As mentioned earlier, the wide scope of discretion the judge has for deciding whether to transfer a juvenile to criminal court on the basis of his/her personal “judicial” evaluation could reasonably be described as being “simply standardless and virtually unreviewable.”

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326 see Feld, Juvenile (In)Justice, *supra* note 3, at 403
327 CLEMENS BARTOLLAS, JUVENILE DELINQUENCY (Allyn and Bacon/Boston, Karen Hanson ed. 4\*th ed., 1997) at 430
328 Feld, Changes in Juvenile Waiver Statutes, *supra* note 35, at 491
Therefore, it must be the central concern of the highest jurisprudence to judicially make clear to the juvenile court judges through consistent jurisdiction that any form of abuse of such power destroys the ideal of individualized justice and endangers the judicial species of juvenile courts. One would think juvenile court judges were aware of their crucial responsibilities and moral duties, however, unfortunately power sometimes corrupts, and occasionally a judge becomes a despot or dictator in the court. Some scholars already referred to the justice of some judges as kadi justice. The kadi is a Moslem judge who sits in the marketplace and makes decisions without any apparent reference to rules or norms; he or she seems to make a completely free evaluation of the merits of each case. Such justice of these judges has caused considerable criticism of the juvenile courts.\textsuperscript{329}

Again, it needs to be made very clear to juvenile court judges that they are not kadis and that such behavior will ruin the concept of individualized justice for juvenile delinquents. Nonetheless, it would be a step into the wrong direction to change the general role of the judge on the juvenile courtroom stage and to shorten the general wide range of discretion he or she enjoys in the original and in the current concept. After all, as far as the distinguishableness from the adult courts and the realization of the parens patriae concept is concerned, the benevolent but powerful juvenile court judge is the king on the juvenile justice chessboard. However, too much power is too seductive, and therefore the current system needs to get rid of the judges’ procedural options that overstretch the discretion range. It can only be stressed again at this point that in so far the end of the judicial waiver system needs to be decided as the most urgent juvenile court reform.

\textbf{e. The right to counsel.}

\textit{In re Gaul}\textsuperscript{330} established the right to counsel for juveniles in juvenile courts. "Despite this formal legal change, the actual delivery of legal services in juvenile courts lags behind. It appears that in many states\textsuperscript{331}, half or less of all juveniles receive the assistance

\textsuperscript{329} BARTOLLAS, JUVENILE DELINQUENCY, \textit{supra} note 327, at 431, 432
\textsuperscript{330} 387 U.S. 1 (1967)
\textsuperscript{331} author's comment: in particular research projects examined by Feld in his articles \textit{see supra} note 3 and 16; he especially focuses on Minnesota, Nebraska and North Dakota
of counsel." However, since In re Gault at least "the number of juveniles who are represented by counsel has been gradually increasing. Juveniles in more serious cases are especially likely to be represented by counsel." Nevertheless.

even though more juveniles are now being represented by counsel, considerable confusion still exists among defense attorneys concerning their proper role in the courtroom, and many questions have been raised about their effectiveness in court. Defense attorneys have at least three roles to choose from: (1) assist the court with its responsibilities to children, (2) serve as a legal advocate for the child, and (3) be a guardian or parent surrogate to the child.

Once afforded as a procedural right to the juvenile, there seems to be no space for experiments with that right. Therefore it should be realized in juvenile courts as in all other courts. This means not to make any unreasonable exceptions and to underline the attorneys task of representing and protecting the client. An attorney has to serve as a legal advocate, any other role would blur the original intended professional picture. This counseling role gets even more important, when a counsel's client is immature and easily deceptable like this is the case for a minor. representation is the guarantee for a juvenile offender that all his/her due process rights are respected by the court and the can be sure to experience a fair trial. In so far the right to counsel of the Sixth Amendment can arguably be seen as the most important procedural right of the juvenile, because it is the general key to all the other rights that are based on the concept of fundamental fairness.

The most common explanation for why so many juveniles are unrepresented is that they waive their right to counsel. Courts use the adult standard - "knowing, intelligent and voluntary under the totality of the circumstances" - to assess the validity of juveniles' waivers of constitutional rights. The crucial issue for juveniles, as for adults, is whether waiver of counsel can be knowing, intelligent and voluntary when it is made by a child alone without consulting with an attorney.

Juveniles are less mature and not as competent as adults and in so far it puts them at an important disadvantage when their waiver - validity - test has to take the same hurdles as the one for adults. It should be generally and judicially accepted that juveniles due to their

332 Feld, Juvenile (In)Justice, supra note 3, at 412
333 BARTOLLAS, JUVENILE DELINQUENCY, supra note 327, at 433
334 Id.
335 Fare v Michael C., 442 U.S. 707 (1979) produced this standard
336 Feld, Juvenile (In)Justice, supra note 3, at 412
immaturity are not capable of independently waiving their right to counsel without the presence of a counsel, because they should have the benefit of that general assumption that their own decision to waive the right of being represented is not sufficiently thought through as to regard it as a knowing, intelligent and voluntary waiver.

It appears to be a cheap argument upholding such a waiver - validity - test for minors on the simple statement that "nationwide approximately 90% of the adult defendants plead guilty and in so far waive such right to counsel protection anyway in order to secure the purported benefit of a reduced sentence" which implies the argument that children would be also very likely to join their adult counterparts in waiving the right to counsel and therefore staying unrepresented in the criminal courts as well. First, this assumption is purely speculative. Second, one should not try to justify procedural unfairness in the juvenile courts with the procedural unfairness that is omnipresent in criminal courts, because one unfairness can not be justified by an other. Third, why should it not be possible to create other waiver - validity - tests for juveniles than the applicable ones for adults when they are transferred to criminal court.

Finally, private counsels in juvenile courts are often accused of "being too unexperienced, listening too much to parents, not taking juvenile courts seriously enough, not fighting for their clients, and not being prepared to represent a client." However, the quality of the counsels acting in juvenile courts impossibly can be an argument in the discussion about the questioning of the necessity of the juvenile courts, because this critical criterion could be brought into play for any other court - type meaning the potential possibility to attack any court form. Moreover, the juvenile court system itself can not be made responsible for the failure of many defense attorneys to represents clients adequately.

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337 Rosenberg, Response to Juvenile Court Abolitionists, supra note 7, at 172, 173
However, the juvenile courtroom particularly is not the place to show such insufficient professional performances, because this could lead to the most tragic outcomes for young clients. In contrast to criminal courts the juvenile court deals with amenable minors and the great chance of saving a juvenile from becoming a criminal career and lead him back to a flourishing life can be wasted by pathetic performances of defense attorneys that produce much worse results for the juvenile delinquent than the ones that are achievable. In the extreme case, a juvenile might unnecessarily go to prison and be exposed to criminal subculture eventually making him a criminal due to inmate peer pressure. Nonetheless, a specialized counseling branch for juvenile justice will remain a wish that is unlikely to come true, maybe it even needs to be regarded as an illusion. However, a juvenile courtroom in particular needs zealous and well-prepared attorneys. That certainly would make the juvenile justice system work much more effectively, and in so far it would help the branch to survive.

Moreover, it also would help the branch to survive, if it accepted the counsel's role being purely one of representing and protecting. This would substantially add to the realization of a juvenile justice concept that guarantees an unlimited procedural right of fundamental fairness to the minor delinquents that are tried in the juvenile courts. The right to counsel today simply needs to be extremely respected by every single juvenile court judge as necessary formality on the way to bring the concept of individualized justice to its complete realization.

"There was some evidence in the past that children who had counsel may have gotten more severe dispositions than did those without counsel. A possible explanation for this appeared to be that juvenile judges were punishing the youths who had chosen to be represented by counsel." Today, everything needs to be done to get rid of such judges and to make clear to all others in the field of juvenile justice that such behavior would be

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339 BARTOLLAS, JUVENILE DELINQUENCY, supra note 327, at 433
an own goal and would kill the pursued juvenile justice concept of individualized jurisdiction and fairness.

**f. General disadvantages.**

After having focused on some problematic or at least ambiguous procedural points in the current set-up of a juvenile court, it finally and unfortunately needs to be shown that there are also some general disadvantages for juvenile offenders when they are going through the adjudication procedure of the juvenile courts of today that can not and should not be ignored. As already pointed out, it seems to be a harsh exaggeration to state that the juvenile courts of today are only scaled-down second-class criminal courts. However, it is certainly true that juvenile court procedure has become much more formal, in other words that the juvenile courts arguably "have been more criminalized". Despite this transformation, juvenile courts did not realize the need for procedural adaptation. "The juvenile court has been transformed but remains unreformed" and on this basis juvenile offenders today suffer from unnecessary additional procedural disadvantages that unfortunately only underline the weak points that already have been presented in detail.

It is again the incredibly big general discretion range of a juvenile court judge that causes these additional procedural irregularities. One research project in particular in which procedural fairness in juvenile courts was tested, according to the perspectives of various juvenile court workers, produced results that indicated that some judges do not dismiss petitions despite a lack of evidence, that some judges permit numerous irrelevant evidence, that some judges adjudicate juvenile delinquents even when there is no proof beyond a reasonable doubt, that some judges force prosecution and defense to trial, even when both parties were not ready to proceed. Interestingly, the judges apparently

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340 Feld, Transformation of the Juvenile Court, *supra* note 16, at 696
341 Feld, Juvenile (In)Justice, *supra* note 3, at 413
342 see Sanborn, Jr., Remnants of Parens Patriae, *supra* note 338, at 603, 604 for all the presented examples
exceeded their power constantly, as the workers interpreted it, in the effort to realize their therapeutic role. The strong desire to educate made them forgetting the procedural rules.

As far as the waiver procedure is concerned, the results indicated that there are judges that preside over both transfer and adjudicatory hearings, even though prejudicial evidence not admissable at trial had been revealed during the certification attempt, some judges even virtually demand a guilty plea in exchange for denying a transfer.  

Judges have tremendous power in the judicial juvenile forum which unfortunately also leads to the dreadful state that there is no really meaningful right to appeal a juvenile court adjudication. Numerous defense counsels feel to have no adequate means to effectively take assertive action against a juvenile judge with despot - like power. This causes sloppiness and a cavalier - like attitude among the defense attorneys who represent clients in the juvenile courts. The flip - side is that judges themselves feel to be powerful enough to also act rather sloppy behind the juvenile courtroom bench, because they feel the unlikeliness of being judicially scrutinized due to the fact that their wide discretion range makes it so difficult for appellate courts to review their performances.

Again, juvenile court judges do symbolize the therapeutic mission of the juvenile court. Therefore it needs to be made very clear to them by the higher judicial instances that their judicial branch today is an endangered species and that it is in particular them who are most responsible for the institutional survival of the juvenile courts. The key to that goal is to consistently bring outstanding work behind the juvenile court bench and thereby demonstrating that the concept of rehabilitation and individualized justice is not an utopia but a concept that can become reality, if the involved personal pillars realize their tasks.

Any form of power abuse in the juvenile courts, although it also occurs in other judicial

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343 see Id. at 608, 609  
344 see Id. at 608/611  
345 see Id.
branches as well, due to the critical general situation here might be fatal. On this basis all the constitutional rights, as long as they do not stand in contrast to the general procedural juvenile justice concept need to be guaranteed to juvenile delinquents and respected by the juvenile court judges and prosecutors.

The judge must remain the dominant figure in the adjudication process, but his/her role must not take the form of that of a despot. This would kill individualized justice. Therefore in particular counsels but also prosecutors have to play a more significant procedural role in the future. However, the mentioned additional disadvantages again throw a negative light on waiver systems, because they bear the risk of affording forms of power to the judges that exceed the limits of reasonableness. It seems waiver systems almost necessarily provoke the abuse of power. Nonetheless, as pointed out, legislative automatic adulthood leaves relatively small room for discretion or even judicially blackmailing minor delinquents in the context of the promised benefits of a guilty plea. Therefore they at least deserve the chance to prove their effectiveness on the long run.

**g. "The worst of both worlds" or is there still a systematic need for juvenile courts?**

Up to this point it was demonstrated on several stages that it is not accurate today anymore to describe juvenile courts the way the Supreme Court did when it concluded in 1966 in *Kent v. United States* 346 "that the child receives the worst of both worlds: he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children." 347

Due to the political policies of getting tough on juvenile crime the legislature in virtually all states in the 1970's ratified waiver of jurisdiction provisions and inserted them in their state statutes. On this very basis a series of decisions during the sixties and seventies demonstrated the awareness of the Supreme Court that juvenile offenders needed more

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346 383 U.S. 541 (1966)
347 see Feld, Juvenile (In)Justice, *supra* note 3, at 413 quoting the Supreme Court in the *Kent* decision
procedural protection in an increasingly formalized juvenile court procedure and therefore afforded them the most fundamental fairness rights as judicial guarantee. However, this transformation process that started out in the sixties still is not completed. As demonstrated before, there are still numerous procedural disadvantages for juvenile delinquents in juvenile courts that cast a negative light on the concept of individualized justice. These currently left disadvantages are avoidable and call for additional reforms. Nevertheless, with this background that shows that the juvenile court is not immaculate but certainly can be effectively reformed it is unfair to say that a separate juvenile court system today would not be justified anymore, because "its only distinction to criminal courts is that it uses procedures under which no adult would consent to be tried."^348
Juvenile courts and their concept still are very distinguishable from the criminal courts for numerous presented reasons and an increased procedural formality does not automatically turn them into scaled-down criminal courts. As long as formality is compatible with the therapeutic and rehabilitative concept, and moreover is based on the motive of procedural protection for the juveniles it is hard to comprehend why such development should render them superfluous.
However, for the explained reasons juvenile courts need to be restructured to completely fit their original purpose. The most important step in so far is to throw judicial waiver systems unexceptionally overboard. Certainly, the same is true for prosecutorial waiver systems, because they are based on the same concept, only that there the prosecution instead of the judge is the big decisionmaker.
Legislative waiver systems on the other side are a very ambiguous matter and therefore much harder when it comes to reaching definite conclusions. They certainly do not equip juvenile court judges with despot-like discretion, because here the judges they are bound to the automatic adulthood lists of the law that do not leave much room for flexibility.

348 Id.
However, for the various explained reasons it at least seems to be doubtful, if such a punitive alternative in the juvenile justice concept actually can effectively fight the threat of a juvenile crime bomb. Moreover, it at least seems to be questionable, if such a system that could be interpreted by abolitionists as a partial escape from judicial responsibility - maybe even as a partial surrender - is the right signpost for the current juvenile justice in a time of institutional crisis.

Nevertheless, there are juvenile delinquents for whom it in fact must be doubted, if a juvenile courtroom that is built on a rehabilitative foundation is the appropriate judicial stage for them. Even juvenile characters can be so seriously dangerous and so criminal that rehabilitation would be the wrong technique when the judiciary tries to internalize its reasoning into the offender's mind so that he/she would not recidive in the future. The American numbers of most serious crimes in recent years committed by juveniles that were presented in the first chapter make this very clear. Being aware of that, one has to accept that legislative waiver systems deserve a fair chance over a longer time period to prove that they are capable of bringing juvenile crime numbers down, especially those numbers in the field of serious juvenile crime that recently produced the general outcry for public safety. In other words, automatic adulthood deserves the chance to prove that it indeed deters numerous serious juvenile offenders from committing serious crimes on the basis that the potential harms outweigh the expected benefits of the crime.

Only if such a longer time period with legislative waiver systems as a part of the juvenile justice system will not produce significant decrease in juvenile crime in general and in in serious juvenile crime in particular, then such automatic adulthood systems finally also should be excluded again and for good from the current general juvenile justice concept. Again, as long as legislative waivers are a part of the system, judges must not abuse the power they get out of this special procedure, otherwise they are indeed getting close to turning the juvenile courts into criminal courts which would make the gates wide open for abolitionists.
American juvenile courts need procedural reforms. More formality for the benefit of stronger procedural protection for the juvenile delinquents will be compatible with the original therapeutic and rehabilitative mission. "Juvenile courts as a separate branch for individualized justice are desirable, but only if they are truly new juvenile courts fully consistent with the spirit of Gault. Such a new court would have psychological understanding of children's and adolescents' comprehension of fundamental rights."349

After all,

before deciding whether to abandon the juvenile courts, two basic questions must be addressed: (1) is the disparity in procedural and constitutional protection between the adult and juvenile courts significant enough to justify opting out of the juvenile justice system; and (2) if children are tried in the criminal courts, will their immaturity and vulnerability be taken into account adequately in assessing culpability and determining sentences? [T]he answers to these questions are no and no.350

Although the juvenile court of today admittedly needs crucial procedural reforms in order to save the American juvenile justice system from abolition, it is not appropriate today anymore to state that a juvenile offender in the course of juvenile court adjudication experiences the worst of both the juvenile and adult judicial world. The reformed juvenile court of today is still an important addition to the general American judicial system and is therefore still needed. However, its optimized version that would have adopted all the crucial newly proposed reforms would even make it irreplaceable and would leave behind silent abolitionists.

349 Melton, Taking Gault Seriously, supra note 4, at 167
350 Rosenberg, Response to Juvenile Court Abolitionists, supra note 7, at 166
Final Conclusion and Prognosis for the German and the American Juvenile Court.

Both the German and the American Juvenile Court ought to survive as necessary element of the national judiciary branches, because they symbolize the ideal of individualized justice.\(^{351}\) Such individualized justice that is based on rehabilitation ideals is crucial when the judiciary deals with juvenile offenders who are less blameworthy, less mature, and less competent than an adult offender which makes them much more likely to be amenable meaning bringing them back to a flourishing life. The judiciary needs to appeal to this amenability, and it has been shown throughout this work that such an institutional approach on the basis of education instead of punishment is much more likely to keep juvenile offenders from recidiving. After all, on the long run keeping juvenile delinquents from starting criminal careers also means to avoid the production of numerous potential adult career criminals.

However, both the German as well as the American juvenile court urgently need procedural restructure in order to avoid to continuously be the target of abolitionists. Besides all the suggested reform factors there is one particular part of the juvenile justice concept in each country that quickly and completely needs to be set aside. In Germany, the judicial and legislative decision needs to be made to either put adolescents totally under the juvenile or criminal court jurisdiction. The current concept of leaving the decision completely up to the judge's personal evaluation of the juvenile's maturity whether to try him/her in the juvenile or adult system clearly gives the judge way too

\(^{351}\) see BORTNER, INSIDE A JUVENILE COURT, supra note 317, at 8
much discretionary power. As seen, such concentration of power in one procedural personal pillar of the system has to provoke abuse due to its seductiveness. The American juvenile justice system also has a high priority concern in reforming its current juvenile justice set-up: it needs to get rid of the judicial waiver systems. It is not by chance that the reason for the urgent give-up on judicial waiver systems is the same as the one that is responsible for the German high priority reform. Although a judge is the central pillar of juvenile justice, to give him/her too much power that potentially makes him/her acting like a sovereign would be fatal for the rehabilitative juvenile court. A fair system needs the balance of power. Concentration of too much power carries the huge risk of perverting the system into one that easily confuses education and highhandedness. After these first crucial steps, both systems need to continue to create a new and truly restructured juvenile court with the one big goal of realizing real fundamental fairness. However, in Germany these steps will not have to be taken as soon as and will not have to be as remarkable as the ones to be taken in the United States, because the German juvenile court of today is already a good bit closer to realizing the ideal of most effectively combining the possible informality with the necessary informality in its procedure. Moreover does the German sentencing system of today in the field of juvenile justice much better reflect the rehabilitative ideals of the therapeutic concept. Such rehabilitative sentencing catalogues of educational and disciplinary measures like the ones to be found in §§10, 13 of the German Juvenile Court Law so far miss in the American juvenile justice system. A comparable American sentencing system in juvenile law could be an important factor in helping to demonstrate the particularity and the need for an American special judicial branch of juvenile courts. In any event, even today it can not be seen as reasonable alternative to try young offenders in criminal courts with certain substantive and procedural modifications\textsuperscript{352}.

\textsuperscript{352} see Feld, Juvenile (In)Justice, supra note 3, at 413
because "let us face it: as bad as the juvenile courts are, the adult criminal courts are worse." This is underlined in so far that

the reality of adult criminal proceedings is crowded courtrooms in which justice is dispensed through waivers and pleas negotiated by defense attorneys who are often less than zealous and well-prepared advocates, and in which racism is at least as much a fact of life as in juvenile court. For the most part, the typical criminal court is a harsh, tough, mean institution cranking out pleas, with few pauses for individualized attention. It is no place for an adult defendant to be, much less a child. In the discussion about the necessity of juvenile courts for a complete judicial system, adult courts should not be idealized or romanticized. Compared to this negative but not unrealistic picture of criminal courts, imperfect juvenile courts even today would need to survive despite all their procedural insufficiencies. Moreover, there can be no question that once even being optimized through the suggested crucial landmark reforms, the juvenile courts of Germany and the United States of America will be not only necessary, but also important, significant and irreplaceable additions to either national judicial branch. By then, juvenile courts will be immune to any abolition tendencies.

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353 Rosenberg, Response to Juvenile Court Abolitionists, supra note 7, at 174
354 Id. at 173, 174
BIBLIOGRAPHY

(Different categories arranged in order of reference)

I. BOOKS

PETER - ALEXIS ALBRECHT, JUGENDSTRAFRECHT (Publishing House: Beck/Munich, 1987)


II. ARTICLES


Barry C. Feld, Juvenile (In)Justice and the Criminal Court Alternative, 39 Crime & Delinquency 403 (1993)

Gary B. Melton, Taking Gault Seriously: Toward a New Juvenile Court, 68 Nebraska L. Rev. 146 (1989)
Irene Merker Rosenberg, Leaving Bad Enough Alone: A Response To The Juvenile Court Abolitionists, Wisconsin L. Rev. 1993 PT. 1, p. 163 - 185

Barry C. Feld, The Transformation of the Juvenile Court. 75 Minn. L. Rev. 691 (1991)

Barry C. Feld, Legislative Policies toward the Serious Juvenile Offender. 27 Crime & Delinquency 497 (1981)

Travis Hirschi/Michael Gottfredson, Rethinking the Juvenile Justice System, 39 Crime & Delinquency 262 (1993)

Paul Gendreau/Bob Ross, Effective Correctional Treatment: Bibliotherapy for Cynics. 25 Crime & Delinquency 463 (1979)


Johannes Andernaes, General Prevention - Illusion Or Reality?, 43 J. Crim. L., Criminology & Political Science 176 (1952)

Morris R. Cohen, Moral Aspects of the Criminal Law, 49 Yale L. J. 987 (1940)

Gordon Bazemore/Mark Umbreit. Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime. 41 Crime & Delinquency 296 (1995)

William G. Staples, Restitution as a Sanction in Juvenile Court. 32 Crime & Delinquency 177 (1986)


D. Doerner, Erziehung durch Strafe, Monatsschrift fuer Kriminologie und Strafrechtsreform, 1991, pp. 236 following

Werner Beulke/Horst Mayerhofer, Jugendstrafrecht und Kriminologie: Die Vergewaltigung im Stadtpark, JuS 1988, pp. 136 - 142


Robert E. Shepard, Jr., One Hundred Years of Juvenile Justice, The Maryland Bar Journal, Volume XXX, Number 6, 1997, pp. 12 following

M.A. Bortner, Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court, 32 Crime & Delinquency 53 (1986)


Tammy Meredith Poulos/Stan Orchowsky, Serious Juvenile Offenders: Predicting the Possibility of Transfer to Criminal Court, 40 Crime & Delinquency 3 (1994)

Victor C. Streib, Capital Punishment of Children in Ohio: "They'd Never Send A Boy Of Seventeen To The Chair In Ohio, Would They?", 18 Akron L. Rev. 51 91984)


Joseph B. Sanborn, Jr., Remnants of Parens Patriae in the Adjudicatory Hearing: Is a Fair Trial Possible in Juvenile Court?, 40 Crime & Delinquency 599 (1994)
III. CASES

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

Kent v. United States, 383 U.S. 541 (1966)

BGH St (German Supreme Court for Criminal Law) 11, 169; 15, 224; 16, 261


Mathews v. Commonwealth, 218 S.E. 2d 538 (1975)


Furman v. Georgia, 408 U.S. 238 (1972)


BVerfGE (Collection of Decisions of German Constitutional Court)
26, 71; 38, 111; 40, 99; 46, 210

In re Winship, 397 U.S. 358 (1970)

Fare v. Michael C., 442 U.S. 707 (1979)

IV. PERIODICALS, NEWSPAPERS, REPORTS, HOMEPAGES
UNPUBLISHED MATERIAL


CQ Researcher, March 15/1996, Volume 6, No. 10, pp. 217 - 240

Brochures of the BMJ (Federal Department of Justice/Germany) TOA (Taeter - Opfer - Ausgleich = Offender - Victim - Mediation, Issue of 1992

Fox Butterfield, System In Florida Intervenes To Ward Off Juvenile Crime in NEW YORK TIMES, Oct. 9, 1997, front-page

Edwin A. Risler, Tim Sweatman, Larry Nackerud, Deterring Juvenile Crime, unpublished running head, School of Social Work, University of Georgia, Athens/GA 30602

Fox Butterfield, With Juvenile Courts In Chaos: Critics Propose Their Demise in NEW YORK TIMES, July 21, 1997, front - page