You Live, You Learn: A Comment on Oklahoma's Youthful Offender Act

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YOU LIVE, YOU LEARN: A COMMENT ON OKLAHOMA’S YOUTHFUL OFFENDER ACT

I. INTRODUCTION

Getting tough on crime and creating a catchy slogan to that effect has been both popular and effective in recent political campaigns. One example is the 1994 Congressional elections in which the Republicans gained control of both the House of Representatives and the Senate. Part of the nationwide Republican campaign, the so-called “Contract With America,” was aimed at the creation of stricter crime fighting measures. A year later, former California governor Pete Wilson began his bid for the 1996 Republican Presidential nomination by introducing all sorts of “get tough on crime” measures in California, including the famous “three strikes, you’re out” legislation. But the popularity of this trend precluded it from being merely a partisan strategy. Indeed, President Clinton introduced his own “get tough” crime bill back in 1994, which helped to diffuse any serious argument by the Republicans that the President was “soft” on crime. This trend toward punishment and retribution, or “just-desserts,” for criminals has been wildly popular with voters; a candidate who is seen by voters to be soft on crime most likely will have plenty of free time, come November.

One of the major areas of law which has been affected by get tough measures is juvenile delinquent law. In some variation or another, provisions allowing “children in the eyes of the law” to be punished as adults have been in effect since the first written code of laws. As noted by at least one author, however, the goals and effects of laws relating to juvenile crime have undergone a cyclical change. First, at a time when juvenile crime is seen by the public as being extremely high, the punishments imposed upon delinquents become more and more harsh. Second, reports about the harsh, but ineffective, treatment of juveniles may sway legislatures to adopt more flexible and lenient treatment measures, aimed at the rehabilitation of juvenile offenders. Third, when these rehabilitative measures are seen by the public

1. Journalist Edward Humes gave an account of Governor Wilson’s “get tough” strategy from the other side, so to speak. While Wilson was preparing for his run at the Republican presidential nomination, Humes was working in a juvenile detention facility in Los Angeles, teaching a writing class for those children in detention who volunteered to be in the class. See Edward Humes, NO MATIER HOW LOUD I SHOUT: A YEAR IN THE LIFE OF JUVENILE COURT (1990).
3. To avoid confusion, this paper uses the term “juvenile(s)” throughout, except when this term would conflict with statutorily prescribed language.
6. See id. at 3.
7. See id.
as failing to bring about a reduction in juvenile crime, pressure is placed on legislators to enact or reenact measures that will serve to punish juveniles for criminal activity and deter further crimes.8 "At every stage of the cycle, justice officials and the general public believe three ideas: that juvenile crime is at an exceptionally high level, that present juvenile justice policies make the problem worse, and that changing these policies will reduce juvenile crime."9

The Oklahoma legislature passed the Youthful Offender Act10 in 1994, partially in response to the local and nationwide views that the juvenile crime rate was exceptionally high.11 Implementation, however, was dependent upon funding. Then, in May of 1997, the Oklahoma legislature provided the necessary funding; the Act and accompanying changes in the Oklahoma Juvenile Code went into effect on January 1, 1998.12 Although several of the changes made to the Oklahoma juvenile justice system by this Act seem to mirror the national trend of providing harsher punishments for younger children, the Oklahoma legislation actually provides a framework through which rehabilitation may be emphasized.

This paper analyzes the historical development of juvenile law in Parts I through V, focusing on key developments that still are relevant today. Part VI gives an account of the current state of juvenile law in Oklahoma, based primarily on the new Youthful Offender Act. Part VII combines critical analysis of the new laws with suggestions for implementation. These suggestions combine ideas from legal commentators and social scientists to fit within the framework of the Youthful Offender Act. This paper concludes with the idea that the Youthful Offender Act and accompanying legislation provide a viable framework for breaking the cycle of juvenile justice, but only if the courts identify and respond to certain problem areas. A brief history of juvenile justice and how it has developed in America, and in Oklahoma specifically, will be a necessary background for the focus of this paper.

II. HISTORICAL SEPARATION BETWEEN ADULT AND JUVENILE OFFENSES

Research into the historical treatment of juveniles by the law has established as a relative constant the fact that juveniles who have been accused of criminal acts have been treated as separate from their adult counterparts.13 That is not to say, however, that juveniles were not subject to severe sanctions, including capital punishment, but only that separate laws existed to govern juvenile crimes.14 The Hammarabic Code, considered by most scholars to be the first written code of laws, circa 2270 BC,

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8. See id. at 4.
9. Id.
13. See SIMONSEN & GORDON, supra note 4, at 15. Although the definition a "juvenile" varied from culture to culture, and often within a culture over the course of time, the fact of having separate laws pertaining to those defined by law as "juveniles" remained a constant.
14. See id. at 6-7.
contained separate provisions for children who committed crimes.  

More recently, separate laws governing juvenile offenders developed in the English common law, from the Middle Ages, through the Industrial Revolution, to today.

The treatment of juveniles in colonial American courts mirrored the treatment by common law courts in England. In both systems, categories of crimes and punishments demonstrated the influence of religion upon law-making. The harsh penalties imposed pursuant to codes of law thousands of years old were still used, but were tailored to the prevailing religious beliefs. Imprisonment, corporal, even capital punishments for juveniles were not new, but the underlying rationales changed over the years. Although mandated under a separate set of rules which only pertained to persons under a certain age, punishment of juveniles was often as strict and harsh as punishment of adults. Indeed, "[o]ne scholar has documented 22 executions, between 1642 and 1899, for crimes committed [by persons] under the age of 16." Juveniles were governed by separate rules, but were not regarded as "requir[ing] any special protections or discrete legal status."

During the mid-1800s, the "Progressive" movement in America and the Western world began to call for social and political reform. As a reaction to the prior harsh treatment of juveniles and the lack of legal recognition of inherent differences between juveniles and adults, two related rationales for reform of the juvenile justice system became popular. The first was the basic idea that juveniles, by virtue of youth and inexperience, should not be held as culpable as adults in most circumstances. The second viewpoint embraced the idea that early influences upon juveniles may have been most responsible for later criminal behavior. "Progressives emphasized reforming the offender rather than punishing on the basis of the offense." However, when the legislature recognized that juveniles did require special protections and a discrete legal status, they would also have to recognize that those characteristics could not be provided by the then current justice system. Because the Progressive movement concluded that juveniles should not be held as culpable as adults, new methods for the treatment of juveniles by the American justice system would have to be developed. A necessary part of this determination was that a new method for

15. See id. at 4.
16. See id. at 6-10.
17. See id. at 18.
18. See id. In this section, the authors note, among others, a particularly nasty provision in the 1648 Massachusetts Code, "[i]f any child, or children, above sixteen years old, and of sufficient understanding, shall CURSE, or SMITE their natural FATHER, or MOTHER: he or they shall be put to death: unless [sic] it can be sufficiently testified that the parents have been unchristianly negligent." Id. at 18-19.
19. See SMONSEN & GORDON, supra note 4, at 18-21.
22. See id. at 9.
23. See id. at 10-11.
24. See id.
25. Id.
diagnosing and treating the cause of juvenile criminal behavior would be required.26

III. IMPACT OF THE SEPARATE COURT SYSTEM

"Current opinion place[d] the birth of our juvenile justice system in Cook County, Illinois, at around 1899 . . . . The ideological underpinnings of the early juvenile court movement centered on a concern for the welfare of children and an emphasis on specialized, noncriminal treatment of youths."27 This first separate juvenile court was established through the Illinois Juvenile Court Act of 1899.28 The Act created a system that ignored the privileges given to adult criminal defendants and focused specifically on rehabilitation.29 Even the language in the new court system was changed: "proceedings were initiated by a petition in the welfare of the child, rather than by criminal complaint or indictment"; "youths were found to be delinquent rather than guilty of an offense"; and instead of being sentenced, youths faced "disposition" upon a finding of delinquency.30 The result of these changes was a totally new justice system in which the state, through the judge and state welfare workers, became the de facto parents of juveniles, under the legal rationale of parens patriae.31 "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae."32

The system first established by Illinois in 1899 rapidly proliferated throughout the United States.33 Although the popularity of the new juvenile court system originally was based upon the rationale of the Progressives, other factors increased popularity as the system began to expand. One such factor was the fact that rehabilitation was not limited to traditionally criminal offenses. "Because the reformers eschewed punishment, they could regulate behavior such as smoking, sexual precocity, truancy, immorality, stubbornness, vagrancy, or living a wayward, idle, and dissolute life."34 Anything that was seen as possibly contributing to the delinquency of juveniles would be regulated. Although these "status offenses" would not be criminal if engaged in by adults, the state, as "parent" for all juveniles, had

26. See generally SIMONSEN & GORDON, supra note 4, at 26-29; FLD, supra note 21, at 12-14.
27. SIMONSEN & GORDON, supra note 4, at 27.
28. See id.
29. The purpose of the statutes creating juvenile courts was not to provide additional courts for the punishment of crime; rather, the purpose is to establish special tribunals having jurisdiction within prescribed limits, of cases relating to the moral, physical, and mental well-being of children to the end that they may be directed away from paths of crime.
30. FLD, supra note 21, at 16; see also HUMES, supra note 1, at 377.
31. See FLD, supra note 21, at 13. Feld defined this Latin phrase as, "the right and responsibility of the state to substitute its own control over children for that of the natural parents when the latter were unable or unwilling to meet their responsibilities or when the child posed a community crime problem." Id.
33. See SIMONSEN & GORDON, supra note 4, at 27. The authors noted that "[b]y 1917, juvenile court legislation was a reality in all but three states, and by 1932 there were estimated to be over 600 independent juvenile courts in the United States. By 1945, there were juvenile courts in every state in the country." Id.
34. FLD, supra note 21, at 14.
jurisdiction over these acts.\textsuperscript{35}

Another factor in the popularity of the juvenile court system was the increase in control over lower-class juveniles.\textsuperscript{36} Children of immigrants and of the poor often were raised in a different system of beliefs than the prevailing system. Juvenile laws, as all laws, were based upon systemic norms. To fulfill its function as the ultimate parent, the state would have to rehabilitate these juveniles so that they could function appropriately in society.\textsuperscript{37}

A final factor in the popularity of the new juvenile court was the ease by which its "informal" procedures could be implemented. The state could be made aware of possible juvenile delinquent behavior by victims, teachers, parents, or law-enforcement officers.\textsuperscript{38} Once one of these parties invoked the powers of the juvenile court, the state, through the juvenile court judge and state social workers, weighed delinquency, and imposed a disposition in the juvenile's "best interest."\textsuperscript{39} The system discouraged the presence of attorneys for the children in juvenile proceedings "as both irrelevant and an impediment to [the] 'child-saving' mission."\textsuperscript{40} Technicalities and formalities were largely abolished to facilitate understanding by juveniles, and "to enable the judge to best control and guide his or her wards."\textsuperscript{41} Consequently, proceedings in the new court system were faster, cheaper, and easier to understand.

However, these same factors which led to the rapid expansion of the juvenile court system in America also allowed a number of abuses to arise. Regulation of "status offenses," disproportionate impact on lower-class juveniles, and lack of procedural safeguards for juveniles all allowed inequitable results in juvenile proceedings. These abuses led to the landmark 1967 Supreme Court decision, In re Gault,\textsuperscript{42} which forced juvenile courts to abide by basic requirements of the Constitution.\textsuperscript{43}

The regulation of status offenses, while allowing the state to strike early against potential contributions to juvenile delinquency, also led to unfair results. First, while all juveniles were seen to require a supervised moral upbringing, female juveniles were believed to be especially at risk.\textsuperscript{44} Young girls, because of existing societal beliefs, needed more state protection.\textsuperscript{45} Therefore, a juvenile court would examine more closely the upbringing of an allegedly delinquent girl and assert its powers to rehabilitate a delinquent girl in many cases where a boy in the same situation would

\textsuperscript{35} Id. at 14-15.
\textsuperscript{36} See id. at 15.
\textsuperscript{37} See id.
\textsuperscript{38} See SMONSEN & GORDON, supra note 4, at 170.
\textsuperscript{39} FELD, supra note 21, at 15.
\textsuperscript{40} Id. at 17.
\textsuperscript{41} SMONSEN & GORDON, supra note 4, at 171.
\textsuperscript{42} 387 U.S. 1 (1967).
\textsuperscript{43} See id. at 5.
\textsuperscript{44} See FELD, supra note 21, at 15.
\textsuperscript{45} See id. Feld notes that young girls were believed to be more susceptible to immoral behavior, because greater pressures would be placed on girls than boys. See id.
be ignored.\textsuperscript{46} A second unfair result of state regulation of status offenses was the severity of the terms of rehabilitation for sometimes very minor infractions.\textsuperscript{47} In effect, there were no limitations on judges who imposed severe sanctions on status offenders in the “best interest” of the child.

An even more disturbing result of the new juvenile court proceedings was the disproportionate impact of rehabilitation on lower-class juveniles. Judges focused on these juveniles, like female status offenders, as requiring more “parental” supervision.\textsuperscript{48} Parents who were immigrants or who were poor “could not be expected to adequately Americanize their children, and state supervision was imposed to assure that the next generation adopted an acceptable middle-class way of life.”\textsuperscript{49} In a country largely composed of immigrants, those who arrived earliest established the requirements for being an “acceptable” American.

The final unfair result, which was the direct issue in \textit{In re Gault}, was the lack of procedural safeguards for juveniles.\textsuperscript{50} As stated earlier, status offenders often suffered from unduly harsh dispositions, said to be in their “best interest.”\textsuperscript{51} In the name of speed, flexibility, and increased understandability, the right to counsel and other basic rights of criminal defendants were denied in juvenile proceedings.\textsuperscript{52} The result was often that proceedings and dispositions were based upon the whims of a particular judge rather than upon knowledge derived from an increased understanding of the juveniles’ needs.\textsuperscript{53} However, as the Supreme Court stated in \textit{In re Gault}, “under our Constitution, the condition of being a [juvenile] does not justify a kangaroo court.”\textsuperscript{54}

\section*{IV. The "Due Process Revolution"\textsuperscript{55}}

Two prior decisions laid the groundwork for the Supreme Court’s decision in \textit{In re Gault}. First, the 1961 case \textit{Mapp v. Ohio},\textsuperscript{56} required the states to apply certain basic Constitutional protections to criminal defendants.\textsuperscript{57} At issue in this case was whether the procedural protections found in the Fourth Amendment of the Constitu-

\begin{thebibliography}{99}
\bibitem{46} For a detailed discussion on this point, see Anne Bowen Poulin, \textit{Female Delinquents: Defining Their Place in the Justice System}, 1996 Wis. L. Rev. 541.
\bibitem{47} \textit{See In re Gault}, 387 U.S. 1 (1967) (discussed in \textit{Humes}, supra note 1, at 24; \textit{Feld}, supra note 21, at 18). In this case, a 15 year old boy was found to be “habitually immoral” by a juvenile court and was sent to a state industrial school until he turned 21. \textit{See id} at 4. The boy’s crimes: making one obscene phone call and being a suspect in the theft of a baseball bat and glove two years earlier.
\bibitem{48} \textit{See Feld}, supra note 21, at 15.
\bibitem{49} \textit{Id}.
\bibitem{50} \textit{See In re Gault}, 387 U.S. 1 (1967).
\bibitem{51} \textit{See id}.
\bibitem{52} \textit{Simonsen}, supra note 4.
\bibitem{53} \textit{See Feld}, supra note 21, at 15-16.
\bibitem{54} \textit{In re Gault}, 387 U.S. at 28.
\bibitem{55} This term comes from Feld’s analysis of the changes brought about by the Warren Court’s decisions regarding the application of procedural protections to juvenile proceedings. \textit{See Feld}, supra note 21, at 17.
\bibitem{56} 367 U.S. 643 (1961).
\bibitem{57} \textit{See id} at 655.
\end{thebibliography}
tion applied to state criminal proceedings. The Court ruled that these protections did apply to the states, incorporated through the “due process” language of the Fourteenth Amendment. Then, in 1966, the Supreme Court ruled that the holding in Mapp would apply to all proceedings of a criminal nature. In Kent v. United States, the court held that juvenile proceedings which require the “certification” of a juvenile as an adult would involve the imposition of the same punishments as adult criminal defendants would face. The Supreme Court stated that a juvenile in this situation must be afforded due process rights, but only with respect to the certification proceeding. The stage was thus set for the application of due process rights to juvenile proceedings.

In response to the unavoidably arbitrary nature of the juvenile courts spawned by the Progressive movement in the mid-1800s, the Supreme Court, in a series of decisions between 1967 and 1975, created a new juvenile court system modeled after the adult system. The Court, in holding as it did, supported the primacy of procedural rights over the rationale of the Progressives underlying the rehabilitative juvenile court system. An analysis of these cases serves to highlight the Supreme Court’s rationale in holding as it did, and to forecast the soon to be realized future of the juvenile court system.

The Supreme Court, in In re Gault, held that juveniles were entitled to most of the procedural protections available to adult criminal defendants. These protections included the rights to assistance of counsel, a fair and impartial hearing, advanced notice of charges, an adversarial proceeding, and the privilege against self-incrimination. The two rationales enunciated by the Court for these fundamental changes were ensuring accurate and reliable fact-finding, which, then, would lead to more accurate decisions, and providing protection for the individual against the powers of the state. However, a point that must be made here is that if the

58. See id.
59. See id.
61. Id.
62. See id. at 553-54.
63. See id. at 554-55.
64. I examine the relevant text of the Constitutional Amendments, and the implications of that language in the discussion that follows.
65. Simonsen and Gordon note a study in 1966, conducted by the President’s Commission on Law Enforcement and Administration of Justice, which revealed significant differences between the desired and actual court practices, “[f]rom the time of their establishment, juvenile courts have been plagued with improperly defined goals, procedures and jurisdictional boundaries.” SIMONSEN & GORDON, supra note 4, at 174-76.
66. Feld makes an excellent examination of the decisions by the Supreme Court during this period, from which I borrow heavily. It would behoove the reader to read his more complete analysis if this period is of particular interest. See FELD, supra note 21, at 17-39.
68. See id.
69. See id. at 31-56; FELD, supra note 21, at 19.
70. See In re Gault, 387 U.S. at 51-52. The Constitutional basis for these rationales was the Fifth Amendment which provides, in the relevant portion, that “[n]o person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.” This provision was applied to state actions through the Fourteenth Amendment “due process” guarantees. See FELD, supra note 21, at 19-20.
Progressive juvenile courts had not failed, no such decision would have been made. 71 If the rehabilitative court system had been successful in administering justice without succumbing to abusive practices, there would have been no need for the In re Gault decision. 72

Two subsequent decisions handed down by the Supreme Court furthered the application of procedural protections to juveniles. First, In re Winship, 73 in 1970, required juvenile courts to establish proof of delinquency "beyond a reasonable doubt." 74 This decision further eroded the Progressive conception that, "[i]ntervention was premised on the need for rehabilitation and social uplift, not on the commission of an offense." 75 The second decision, Breed v. Jones, 76 in 1975, held that a juvenile could not be found delinquent in a juvenile court and then be tried for the same offense in an adult court. 77 To do so would violate the "double jeopardy" clause of the Fifth Amendment. 78 Both of these decisions applied formerly ignored procedural rules to juveniles and strengthened the decision by the Court in In re Gault to protect allegedly delinquent juveniles in much the same manner as adult criminal defendants were protected. "By emphasizing criminal procedural regularity in the determination of delinquency, the Supreme Court shifted the focus of the juvenile court from the Progressive emphasis on the 'real needs' of the child to proof of the commission of criminal acts, thereby effectively transferring juvenile proceedings into criminal prosecutions." 79

The systemic changes brought about by the decisions discussed above were dramatic. Legal commentators would not realize how dramatic until public outrage at juvenile crime in the mid-1970s and early 1980s forced the juvenile courts to get tough. 80

The first response by Congress to the decision in In re Gault and the other due process cases ignored the inherent transformation of juvenile justice proceedings that were required by these cases. In 1970, there were 2,662 juvenile courts in the United States. 81 In an attempt to provide a uniform system for the transition which In re Gault required, Congress enacted the Juvenile Justice and Delinquency Prevention Act of 1974. 82 Senator Birch Bayh, the chief architect of the legislation, said it was "designed specifically to prevent young people from entering our failing juvenile

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71. The Supreme Court shows obvious distaste when referring to the actual practices of the Progressive juvenile courts. See In re Gault, 387 U.S. at 27-28.
72. Bernard would probably characterize this change as spurred more by the failure of the Progressive system to "cure" the problem of juvenile crime; and, therefore, the cycle is returning toward more harsh punishment for juvenile offenders. See BERNARD, supra note 5.
74. See id. at 368.
75. FIELD, supra note 21, at 24.
77. See id. at 541.
78. "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb[,]" U.S. CONST., amend. V.
79. FIELD, supra note 21, at 24.
80. See IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 7 (1987).
81. SIMONSEN & GORDON, supra note 4, at 173.
justice system, and to assist communities in developing more sensible and economic approaches for youngsters already in the juvenile justice system." Congressional intent in this 1970s legislation seemed to be similar to that of the Progressives in the mid-1800s, in that rehabilitation was still the goal of juvenile courts. "Community-based programs" and an "Office of Juvenile Justice" would replace the role of the judge in the old system in setting the juveniles on a better, and non-delinquent, path. Since Congress had no enumerated power by which it could require the states to adopt the Juvenile Justice and Delinquency Prevention Act, the Act authorized the distribution of federal funds to states which achieved specific objectives set out in the Act.

The Juvenile Justice and Delinquency Prevention Act of 1974 could have required rehabilitative measures for status offenders and juveniles, by mandating certain objectives for both, coupled with the "carrot and stick" approach of providing federal funds for state implementation of the Act. Congressional intent appeared to be consistent with this possible result. However, while the Act mandated that status offenders could not be held in adult jails, detention centers, or training schools, it merely encouraged the development of community-based alternatives to the institutionalization of delinquents. The effect of this distinction could be seen when analyzed in conjunction with the Supreme Court's decision in In re Gault.

This decision, as stated earlier, effectively transformed juvenile proceedings into criminal prosecutions by applying to juvenile proceedings the Constitutional safeguards against biased fact-finding and governmental oppression. However, for the states to receive federal funding under the Juvenile Justice and Delinquency Prevention Act, state courts were required to prohibit any sanctions against status offenders that would result in that offender being incarcerated. Therefore, state action against status offenders necessarily would be limited to less severe, "rehabilitative" measures. Not only would the punishments be severely limited, but also, the heightened standards of proof imposed upon juvenile proceedings by In re Winship would make a finding that the accused did commit a status offense in these cases more difficult. There could be no effective punishment of status offenders, which

83. Schwartz, supra note 80, at 4.
85. Schwartz, supra note 80, at 4.
87. Schwartz, supra note 80, at 4.
88. See Breed, 421 U.S. 519 (1975).
89. See Schwartz, supra note 80, at 4.
90. See In re Gault, 387 U.S. at 51-52; see also Bernard, supra note 5, at 114-18.
91. The argument that a state would not have to follow the federal guidelines generally is moot. When federal funding has been made dependent upon some state action in the past, it was only a matter of time before the state took that action. See generally Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947); South Dakota v. Dole, 483 U.S. 203 (1987).
was at odds with the new "criminal" structure of the juvenile court.\textsuperscript{93} However, since there were no prohibitions against incarceration of delinquents in the Act, a finding of delinquency could result in the incarceration of the juvenile. In fact, punishing juvenile offenders for their actions, through incarceration in institutions or detention centers, would be a natural result of the newly "criminalized proceedings."\textsuperscript{94}

The Supreme Court decisions in \textit{Mapp, Kent, In re Gault, In re Winship}, and \textit{Breed}, began a "due process revolution," which fundamentally changed the nature of juvenile proceedings.\textsuperscript{95} When combined with Congress’ Juvenile Justice and Delinquency Prevention Act of 1974, the result was a growing criminalization of delinquency proceedings. Status offenses, however, could no longer be punished effectively because of the mandates of the Act. This resulted in a separation of status offenses from delinquency proceedings.\textsuperscript{96} The criminalization of delinquency proceedings enforced the rationale that juveniles found delinquent should be punished for their actions. Also, public pressure became a much more effective tool to force legislators to make punishments for juveniles more severe.\textsuperscript{97} This public pressure began to rise in the 1970s and early 1980s, based on "outrage over the juvenile crime problem."\textsuperscript{98}

\section*{V. Cycle Back To Get Tough}

"The Supreme Court’s idea was to give juveniles the best of both worlds—treatment with due process. Instead, the get-tough movement gave juveniles the worst of both worlds—punishment without due process."\textsuperscript{99} Why the get-tough movement occurred, beyond the basic reaction of a society to what was seen as soaring rates of criminal activity, is beyond the scope of this paper. An analysis of how get-tough measures were implemented in the juvenile justice system, however, will provide a meaningful background to the status of the current system. The changes to Oklahoma juvenile courts during the 1970s and 1980s serve as an accurate reflection of national trends.

As previously stated, the 1974 Juvenile Justice and Delinquency Prevention Act was passed to provide a uniform system that states could use in changing their juvenile courts to comply with the new due process requirements. A second purpose for this Act was to increase the attention given to the study of juvenile justice in

\textsuperscript{93} The general purpose of criminal proceedings is to punish the criminal and to deter further crimes. \textit{See Feld, supra} note 21, at 262.
\textsuperscript{94} \textit{Schwartz, supra} note 80, at 16-18.
\textsuperscript{95} \textit{See Bernard, supra} note 5, at 109.
\textsuperscript{96} Simonsen and Gordon note this change by examining legislation in the various states. \textit{See Simonsen \\& Gordon, supra} note 4, at 177. Table 9-1 lists the jurisdictions that have prohibited pre-adjudication detention and post-adjudication commitment of status offenders, by the effective year of the respective states' statutes. \textit{See id.} As shown in this table, post-adjudication commitment of status offenders was prohibited in all but one state by 1978. \textit{See id.}
\textsuperscript{97} \textit{See Bernard, supra} note 5, at 133.
\textsuperscript{98} \textit{Schwartz, supra} note 80, at 7.
\textsuperscript{99} \textit{Bernard, supra} note 5, at 151.
America.\textsuperscript{100} The idea behind the second purpose was that increased study would lead to greater knowledge, which, in turn, would lead to ideas for improvement.\textsuperscript{101} One such study, entitled \textit{Juvenile Justice and Delinquency Prevention}, was published by the National Advisory Committee on Criminal Justice Standards and Goals, in 1976. In the language of the Committee, the findings of this study relating to juvenile delinquency trends were “startling,” “frightening,” and “disturbing.”\textsuperscript{102}

From 1960 to 1974, the number of juveniles arrested increased 140\%.\textsuperscript{103} Nationwide, juveniles accounted for 31\% of all felony arrests in 1974.\textsuperscript{104} Numbers, alone, show a powerful reason why the get-tough movement began.

Public outrage over this apparent increase in juvenile crime focused not on underlying social and economic trends to explain the changes, but rather on the perceived failure of the juvenile justice system.\textsuperscript{105} A politically expedient solution was to focus on the treatment of juvenile delinquents by juvenile courts. “Juvenile court was portrayed as a ‘kiddie court’” which could not punish these young criminals effectively.\textsuperscript{106} This public sentiment created a political advantage for those law-makers who would punish a juvenile based solely on the crime committed.\textsuperscript{107} The newly criminalized structure of the juvenile court proved to be easily adaptable; rehabilitation gave way to punishment.

State legislatures enacted several types of get-tough measures during the mid 1970s and early 1980s. Laws describing the purpose of the juvenile courts were changed to include the punishment of offenders, not just treatment and the best interests of the juvenile. Various mandatory sentences were passed for particular kinds of crimes. The number of ways to transfer juveniles to criminal court was increased, where juveniles presumably would be treated more harshly. Some of those waivers were made mandatory. Jurisdiction over some offenses was transferred out of the juvenile court all together and placed in criminal court, and some states provided the death penalty for juveniles.\textsuperscript{108} Oklahoma law-makers followed the get-tough trend.

The original purpose for creating a separate juvenile court system in Oklahoma was to treat and rehabilitate juveniles, consistent with the ideals of the Progressive movement.\textsuperscript{109} Laws passed following the Supreme Court decision in \textit{In re Gault}, applied the due process requirements imposed by that decision but still included

\begin{itemize}
  \item \textsuperscript{100} \textit{Task Force on Juvenile Justice and Delinquency Prevention, National Advisory Comm. on Criminal Justice Standards and Goals, Report of a Task Force on Juvenile Justice and Delinquency Prevention I} (1976).
  \item \textsuperscript{101} See id.
  \item \textsuperscript{102} Id. at 1.
  \item \textsuperscript{103} See id. at 3.
  \item \textsuperscript{104} See id. at 2.
  \item \textsuperscript{105} See BERNARD, supra note 5, at 150.
  \item \textsuperscript{106} See id. at 147.
  \item \textsuperscript{107} See id.
  \item \textsuperscript{108} See id.
  \item \textsuperscript{109} See Okla. Comp. Laws ch. 13, art. I, § 603 (1909). “As far as practicable, any delinquent child shall be treated, not as a criminal, but as misdirected and misguided, and needing aid, encouragement, help and assistance.” \textit{Id}.
\end{itemize}
rehabilitation as the purpose of Oklahoma juvenile courts.\textsuperscript{110} The language from 1968 is still in the Oklahoma Statutes.\textsuperscript{111} However, in 1982 the legislature added another section to the Juvenile Code, demonstrating a changed intent.\textsuperscript{112} Legislative intent now placed emphasis on the prevention of delinquency, along with rehabilitation.\textsuperscript{113} Later, the legislature added protection of the public as a third purpose of juvenile courts.\textsuperscript{114} After 80 years of legislative intent that the juvenile courts work solely to rehabilitate juveniles, suddenly prevention of delinquency and protection of the public were added.

Complementing the shifting legislative intent toward punishment of juvenile offenders, Oklahoma law-makers effectively increased the number of ways to transfer juveniles to criminal court. Procedures for the certification of juveniles as adults have been in effect since Oklahoma’s first laws establishing the separate juvenile court.\textsuperscript{115} This procedure remained the same until the due process requirements for juvenile courts pushed the legislature to make this process more definite.\textsuperscript{116} These guidelines suggested factors the court should weigh during the certification hearing, including: seriousness of the offense, aggressive, or premeditated nature of the offense, whether the offense was against person or property, sophistication and maturity of the juvenile, and prospects for rehabilitation.\textsuperscript{117} At this time, the legislature did not list any specific crimes for which certification should or must be considered.

In 1978, that changed. Eleven crimes were listed for which juvenile courts were required to weigh certification.\textsuperscript{118} Also included in this new legislation was the requirement that all sixteen and seventeen year olds charged with any of these eleven

\begin{enumerate}
  \item See 1968 Okla. Sess. Laws ch. 282, § 129. "As far as practicable, any delinquent child shall not be treated as a criminal." \textit{Id.}
  \item See 1982 Okla. Sess. Laws ch. 312, § 29. "It is the intent of the Legislature of this state to provide for the creation of all reasonable means and methods that can be established by a state for the prevention of delinquency and for the care and rehabilitation of delinquent children" (emphasis added). \textit{Id.}
  \item See id.
  \item See 1991 Okla. Sess. Laws ch. 296, § 15. "It is the intent of the Legislature of this state to provide for the creation of all reasonable means and methods that can be established by a state for: 1. the prevention of delinquency; 2. the care and rehabilitation of delinquent children; and 3. the protection of the public." \textit{Id.} (emphasis added).
  \item Two interesting precursors to this changed legislative intent may be seen in the 1968 Session Laws and the 1975 Session Laws. In 1968, the Oklahoma legislature added a provision to the Juvenile Code which mandated review of court ordered placement of those juveniles adjudicated delinquent. In this provision, the reasons given for the mandated review were "to determine the type of placement best suited to the child and, in the case of children who have violated state law, to the protection of the public." 1968 Okla. Sess. Laws ch. 282, § 135(a) (emphasis added). In 1975, the Oklahoma legislature passed Resolution No. 15, entitled Juvenile Delinquency-Prevention Program. 1975 Okla. Sess. Laws S. J. Res. No.15, p. 760. The findings of this resolution highlight the growing rate of juvenile crime, and the purpose for the resolution was for prevention and protection along with rehabilitation. See id.
  \item See Okla. Comp. Laws ch. 13, art. I, § 601 (1909). "The court may, however, in its discretion cause such child to be proceeded against in accordance with the laws that may be in force governing the commission of crime." \textit{Id.}
  \item 1978 Okla. Sess. Laws ch. 231, § 2. The eleven crimes were: "murder, kidnaping for purposes of extortion, robbery with a dangerous weapon, rape in the second degree, use of firearm or other offensive weapon while committing a felony, arson in the first degree, burglary in the first degree, burglary with explosives, shooting with intent to kill, manslaughter or nonconsensual sodomy." \textit{Id.}
\end{enumerate}
crimes were to be held in adult jail and be afforded "all the statutory and constitutional rights and protections of an adult accused of a crime." 119 Procedural changes requiring juvenile courts to hold certification hearings for certain crimes, along with treating those juveniles accused of such crimes as criminal defendants had two effects. First, more juveniles faced mandatory certifications, and, therefore, criminal punishment. Second, the treatment of juveniles as criminal defendants continued the criminalization of juvenile proceedings, reinforcing the goal of criminal courts to punish offenders.

Creating mandatory certification hearing requirements was not the end of get-tough measures in Oklahoma. Indeed, the next step taken created a new category of juveniles who would be charged as adults, while at the same time, it limited the jurisdiction of juvenile courts.

In 1980, the jurisdiction of Oklahoma juvenile courts was limited by a new statutory definition of the term "child." 120 Persons sixteen or seventeen years old who committed any of ten specified offenses became adults in the eyes of the law and were automatically tried in criminal courts. 122 There existed provisions for "reverse certification," through which these adults could again become children. 123 However, the purpose and outcome of this new definition of "child" was an increased jurisdiction of criminal courts over juveniles, and punishment at the expense of rehabilitation. This strategy has been popular for those who would take what may be seen as the worst offenders from the jurisdiction of the juvenile court. 124 Juvenile courts would be free to deal with the less serious offenders, who would be, in this view, more amenable to treatment.

In response to rising juvenile crime rates, with at least one report showing disturbing increases, 125 legislators in the 1970s and 1980s found get-tough on crime measures to be popular with the public. Tougher measures included transferring more juveniles to criminal court to face criminal punishment, through both certification of juveniles as adults and changing the definition of juvenile to broaden the jurisdiction of criminal courts. The new juvenile justice system, which implemented the due process requirements imposed by the Supreme Court, was

119. Id. § 1.
121. The ten specified offenses were: "murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter or nonconsensual sodomy" - the same which previously would have resulted in an automatic certification hearing, except burglary in the first degree. Id.
122. See id.
123. See Tom R. Cornish, Where Have All The Children Gone?—Reverse Certification, 35 Okla. L. Rev. 373 (1982), for a discussion on the history and implementation of reverse certification in Oklahoma. Mr. Cornish notes that the original provisions, passed in 1978, were void for vagueness; and, that the Oklahoma legislature responded with new provisions in 1979. See id. at 382. And although Mr. Cornish concluded with the fear that reverse certification in any form may pose serious constitutional issues, these provisions have become increasingly popular in Oklahoma and nationwide. See id. at 400.
124. As quoted in Cornish, the Daily Oklahoman ran an editorial in 1982 stating, "The time has come for the Oklahoma Legislature to recognize the reality of so much violent crime being committed by persons under 18. The clearly indicated remedy: for felony offenses, lower the age for trial as an adult from 18 to 16." Id. at 374, n.6.
125. See TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, supra note 100.
transformed from "the best of both worlds" to the "worst of both worlds." Treating juvenile offenders as adult criminal defendants with procedural protections became a rationale for punishing juveniles as adult criminal defendants. As will be seen, the get-tough movement in Oklahoma and nationwide continues, as public fears about the crime problem and lack of effective solutions grow.

VI. THE CURRENT STATE OF JUVENILE LAW IN OKLAHOMA

According to one Oklahoma commentator, "[f]rom 1983 to 1992, violent crimes committed by Oklahoma’s juveniles skyrocketed 262%." Media coverage of violent crimes, often portraying juvenile offenders as sophisticated and hardened criminals, has been prevalent over the past several years. Again and again, the problem has been defined as an inadequate juvenile justice system; the answer has been getting tough on crime. The most recent solution proposed by the Oklahoma legislature is the Youthful Offender Act. Passed in 1994, and funded in 1997, this Act became effective January 1, 1998. So, what is the current state of juvenile delinquent law in Oklahoma?

Since January 1, 1998, three separate definitions exist for persons under eighteen years of age who are accused of violating Oklahoma state statutes or municipal ordinances: juveniles, youthful offenders, and adults. Categorizing an accused into one of the three definitions initially will depend upon the law the accused has been charged with violating. Final categorization, however, will depend upon the exercise of judicial discretion in granting or denying motions to certify the accused to a different category. Discussing how an accused may fit into each particular definition serves to demonstrate the important differences between each. Next, a general analysis of the process of certification will illuminate that important part of Oklahoma juvenile law. Then, with this background, a discussion of the intricacies of juvenile, youthful offender, and adult proceedings with respect to persons under eighteen will follow. In that way, the general concepts and specific processes of the Youthful Offender Act can be seen in an understandable fashion.

126. See SCHWARTZ, supra note 80, at 151.
128. See generally SCHWARTZ, supra note 80, at 23-34.
132. See id. § 7301-1.3(4) (defining who may be charged as a juvenile); id. § 7306-2.2(A)(1) (defining who may be charged as a youthful offender); id. § 7306-2.4(A) (defining who may be charged as an adult).
133. See id. §§ 7301-1.3(4), 7306-2.2(A)(1), 7306-2.4(A).
134. See id. § 7303-4.3(B) (certifying a juvenile as an adult); id. § 7306-2.6(B) (certifying a juvenile as a youthful offender); id. § 7306-2.5(A) (adult certified as either a juvenile or youthful offender).
A. Three Separate Definitions

Oklahoma juvenile courts have jurisdiction over those persons defined as juveniles.\(^{135}\) The actual definition of a juvenile given in Title 10 of the Oklahoma Statutes is phrased in negative terms; that is, a juvenile is any person under eighteen years of age who is not a youthful offender and not an adult.\(^{136}\) So, a person may be categorized as a juvenile in several different ways. First, a person under eighteen may be charged with having violated any state statute or municipal ordinance other than those which automatically result in being charged as a youthful offender or an adult.\(^{137}\) Second, a person may be categorized a juvenile purely by virtue of age. If young enough, an accused cannot be charged automatically as a youthful offender or an adult.\(^{138}\) However, in either of these first two scenarios if the juvenile has been accused of committing a felony, the district attorney and the court have discretion to make a motion for certification of such juveniles as adults.\(^{139}\)

Also qualifying as juveniles are those persons under eighteen who initially fit the definition of youthful offenders or adults, but who, because of prosecutorial or judicial discretion, come into the definition of juvenile. First, a person old enough and charged with any of the twenty crimes which would normally result in being defined as a youthful offender,\(^{140}\) may be a juvenile nevertheless. That is so, in most cases, because "the district attorney may file a petition alleging the person to be a delinquent or may file an information against the accused person charging the person as a youthful offender."\(^{141}\) As discussed later, the exercise of this discretion is to be based on the preliminary investigation performed upon all alleged youthful offenders.\(^{142}\) Second, a person under eighteen charged as a youthful offender or as an adult may fall under the definition of juvenile through the certification procedure.\(^{143}\) Through certification, the court has discretion as to the final definition of juvenile.

\(^{135}\) See id. § 7303-4.3(A).

\(^{136}\) See id. § 7301-1.3(4). This subsection provides: "[c]hild' or 'juvenile' means any person under eighteen (18) years of age, except for any person . . . thirteen (13), fourteen (14) or fifteen (15) [or sixteen or seventeen] years of age who is charged with murder in the first degree pursuant to . . . Section 7306-1.1 of this title, or any individual who has been certified as an adult pursuant to Section 7303-4.3 of this title . . . or any person fifteen (15) years of age or older and charged or certified as a youthful offender pursuant to the Youthful Offender Act; provided that any person under eighteen years of age . . . who is not convicted after certification as an adult pursuant to Section 7303-4.3 of this title, or any individual who is not convicted as a youthful offender pursuant to the Youthful Offender Act, shall continue to be subject to the jurisdiction of the juvenile court.


\(^{138}\) See id. A person under fifteen years of age cannot be charged as a youthful offender. A person under thirteen cannot be charged automatically as an adult for murder in the first degree. See id.

\(^{139}\) See id. § 7303-4.3(B). "[I]f a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court . . . shall conduct a preliminary hearing . . . to determine if the child should be held accountable for his acts as if he were an adult." Id.

\(^{140}\) See id. § 7306-2.6(A)-(C).

\(^{141}\) Id. § 7306-2.6(C) (emphasis added).

\(^{142}\) See id.

\(^{143}\) See Okla. Stat. tit. 10, § 7306-2.6(E) (Supp. 1997) (certifying a youthful offender as a juvenile); id. § 7306-2.5(C) ( certifying a person charged automatically as an adult as a juvenile).
The Youthful Offender Act provides a positive definition of who may be charged as a youthful offender. In most cases to be so charged, a person need only fit the age requirements and be accused of committing one of the specified offenses. Specifically, any person fifteen, sixteen, or seventeen years of age who is charged with any of twelve listed felonies "shall be held accountable for his acts as a youthful offender." Likewise, any person sixteen or seventeen years of age who is charged with any of eight listed felonies "shall be held accountable for his acts as a youthful offender." Although the language appears to be mandatory, through use of the word shall, the following subsection goes on to qualify that the decision to charge the accused as a juvenile or youthful offender is at the discretion of the district attorney. This is true "[except as provided in subsection G of Section 7306-2.4 of this title]." So, a district attorney has discretion in all cases, unless the person charged with committing one of the listed felonies previously has been prosecuted and sentenced as a youthful offender. In that case, the district attorney must charge the accused as a youthful offender.

If the district attorney decides to or is required to charge a person as a youthful offender, that person, or the court, may motion for certification as a juvenile. So, a person is not defined as a youthful offender unless that person: (1) fits the age requirement and is accused of committing one of the listed felonies; (2) is charged as a youthful offender by the district attorney; and, (3) is not certified by the court as a juvenile.

Finally, a person under eighteen may be defined as an adult under certain circumstances. In two separate ways, one who has not reached the age of majority can be tried as an adult criminal defendant. First, any person thirteen, fourteen, fifteen, sixteen, or seventeen who is charged with first degree murder "shall be held accountable for his acts as if he were an adult." However, as stated earlier, such

144. See id. § 7306-2.6(A)-(B).
145. See id.
146. Id. § 7306-2.6(A). The twelve listed felonies are: murder in the second degree, kidnapping for the purpose of extortion, manslaughter in the first degree, robbery with a dangerous weapon or attempt thereof, robbery with a firearm or attempt thereof, rape in the first degree or attempt thereof, rape by instrumentation or attempt thereof, forcible sodomy, lewd molestation, arson in the first degree or attempt thereof, shooting with intent to kill, and discharging a firearm, crossbow, or other weapon from a vehicle. See id.
147. Id. § 7306-2.6(B). The eight felonies listed in this subsection are: burglary in the first degree or attempt thereof, aggravated assault and battery of a police officer, intimidating a witness, trafficking in or manufacturing illegal drugs, assault or assault and battery with a deadly weapon, mailing, residential burglary in the second degree after two or more delinquent adjudications for committing burglary in the first degree or residential burglary in the second degree, and rape in the second degree. See id.
148. See id. 7306-2.6(C).
149. Id. See OKLA. STAT. tit. 10, § 7306-2.6(C) (Supp. 1997).
150. See id. § 7306-2.4(G).
151. See id.
152. See id. § 7306-2.6(E).
153. See id. § 7303-4.3(B) (juvenile certified as an adult); see id. § 7306-2.5(A) (person automatically charged as an adult certified as a juvenile).
154. See id. §§ 7303-4.3(B), 7306-2.5(A).
a person may be certified by the court as a juvenile or youthful offender.\textsuperscript{156} Second, any person against whom a petition of delinquency is filed for an “offense which would be a felony if committed by an adult,” may be certified to stand trial as an adult.\textsuperscript{157} The district attorney and the juvenile court judge have the option of requesting such a certification hearing.\textsuperscript{158} Because of its importance in determining the final definition in which an accused may fit, the certification process in the Oklahoma Juvenile Code will be the next topic addressed.

B. Certification as Juvenile, Youthful Offender, or Adult

As mentioned earlier, a person under eighteen who has been categorized as a juvenile, a youthful offender, or an adult on the basis of the alleged offense may be certified by the court to a different category. Certification, therefore, may mean the difference between mandatory release by the age of nineteen, required in the juvenile system,\textsuperscript{159} limited prison time, available when sentenced as a youthful offender,\textsuperscript{160} or life imprisonment or even the death penalty, both of which are available when sentenced as an adult.\textsuperscript{161} Additionally, under the provisions of the Youthful Offender Act, a youthful offender may be certified as eligible for the imposition of an adult criminal sentence.\textsuperscript{162} Because all certification provisions in the Oklahoma Juvenile Code require a court hearing at which substantially the same seven factors are to be weighed by the court in ruling on certification, the process may be discussed generally. Then it will be useful to highlight the few differences that a particular motion for certification will involve.

When ruling on a certification motion, the court shall give consideration to seven guidelines provided by the Oklahoma legislature.\textsuperscript{163} These seven guidelines were codified virtually verbatim from eight criteria suggested by the United States Supreme Court in the appendix to the holding in \textit{Kent v. United States}.\textsuperscript{164} What is puzzling, however, and will be discussed later, are the slight, but possibly important,

\textsuperscript{156} See id. However, the statute does not allow certification as a juvenile if previously:
1. The child or youthful offender has been certified to stand trial as an adult pursuant to any certification procedure provided by law; or,
2. The youthful offender has been certified for the imposition of an adult sentence... and is subsequently convicted of the alleged offense or against whom the imposition of judgment and sentencing has been deferred.

\textit{Id.} \textsection 7306-2.4(F).
\texttextsuperscript{157} \textit{Id.} \textsection 7303-4.3(B).
\texttextsuperscript{158} See \textit{id}.
\texttextsuperscript{159} See \textit{id.} \textsection 7302-5.4(B).
\texttextsuperscript{160} See \textit{id.} \textsection 7306-2.9(B).
\texttextsuperscript{161} \textit{FIELD}, supra note 21. In these cases, the person “shall be held accountable for his acts as if he were an adult.” \textit{OKLA. STAT. tit. 10, § 7306-2.5(A)} (Supp. 1997).
\textsuperscript{162} See \textit{OKLA. STAT. tit. 10, § 7306-2.8(A)-(D)} (Supp. 1997).
\textsuperscript{163} See \textit{id.} \textsection 7303-4.3(B) (certifying a juvenile as an adult); \textit{id.} \textsection 7306-2.5(D) (certifying an adult as either a juvenile or youthful offender); \textit{id.} \textsection 7306-2.6(E)(3) (certifying a youthful offender as a juvenile); \textit{id.} \textsection 7306-2.8(C)(2) (certifying a youthful offender for the imposition of an adult criminal sentence).
\textsuperscript{164} 383 U.S. 541 (1966). As mentioned previously, the Supreme Court held in this case that the certification process, because it involved the possibility of a person having to face criminal punishment, must comply with due process requirements. \textit{See id.} at 553-54.
textual differences between the seven guidelines listed at several points throughout the Oklahoma Juvenile Code.165 Finally, although consideration of the seven guidelines is mandatory, the court, in its decision on the certification motion, need not detail responses to each consideration; the court only must state that it has considered each.166

The guidelines for certification focus on three main areas: the nature of the offense committed, the prospects for rehabilitation of the accused, and protection of the public.167 Generally, the court will hold a certification hearing in conjunction with a preliminary determination of the prosecutive merit of the claim. If the certification hearing is in juvenile court, this preliminary inquiry is called a prosecutive merit hearing;168 if it is in criminal court, it is called a preliminary hearing.169 In either case, the state presents evidence that the accused committed the crime in question.170 The accused then must offer evidence in favor of certification as a juvenile or youthful offender, or against certification as an adult.171 Following the evidence presented by the defense at a prosecutive merit hearing, the juvenile court judge will rule on whether there is prosecutive merit before ruling on certification.172 The converse is true in criminal court. Following the evidence presented by the defense at a preliminary hearing, the judge "shall rule on the certification motion of the accused person before ruling on whether to bind the accused over for trial."173 These different approaches are employed so as to limit the exposure a juvenile will have with criminal court in the event that the court either does not find prosecutive merit or certifies the accused as a juvenile.

165. See OKLA. STAT. tit. 10, §§ 7303-4.3(B), 7306-2.5(D), 7306-2.6(E)(3), 7306-2.8(C)(2) (Supp. 1997).
166. See, e.g., id. § 7303-4.3(B).
167. See id. Although there are minor textual differences between each of the provisions which list the seven factors, the following quote is representative of each:

a. the seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner,
b. whether the offense was against persons or property, greater weight being given to offenses against persons, and if personal injury resulted, the degree of personal injury,
c. the sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living,
d. the record and previous history of the accused person, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions,
e. the prospects for adequate protection of the public,
f. the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court, and g. whether the offense occurred while the accused person was escaping or in an escape status from an institution for delinquent children.

Id. § 7306-2.6(E)(3)(a)-(g).
168. See id. § 7303-4.3(B).
169. See, e.g., § 7306-2.5(C)(1)-(2). Recall that the reason for the difference in language stems from the original separation of juvenile proceedings from criminal proceedings.
170. See, e.g., OKLA. STAT. tit. 10, §§ 7303-4.3(B) (Supp. 1997).
171. See, e.g., § 7306-2.5(C)(2).
172. See id. § 7303-4.3(B). "If the court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an investigation and further hearing to determine if the child should be held accountable for his acts as if he were an adult . . . ." Id.
173. Id. § 7306-2.5(D).
The question remains as to which party must prove what to prevail at a certification hearing. In answering this question, the Oklahoma legislature has provided two separate responses. In the first response, the legislature provided relatively clear burdens of persuasion and proof imposed upon the process of certifying an accused to the status of an adult criminal defendant.\textsuperscript{174} To certify a person under eighteen as an adult or eligible to receive an adult sentence, the district attorney must convince the court why that person must receive an adult sentence, and must do so by clear and convincing evidence.\textsuperscript{175} In the converse situation, certifying a person under eighteen as ineligible for adult criminal punishment, the Oklahoma legislature has not provided such a clear allocation of burdens.\textsuperscript{176} In this second situation, the burden to produce evidence initially rests upon the state, that much is clear.\textsuperscript{177} However, the only provision in the statute which tells what the court must be persuaded of is by inference through the seven guidelines listed above.\textsuperscript{178} Additionally, no standard of proof has been provided to establish how much proof is required.\textsuperscript{179} A simple explanation for these differences is the level of due process required in the juvenile and adult system. A court may be free to exercise greater discretion in deciding to transfer a person to a less punitive proceeding; whereas, a decision to transfer a person to a more punitive proceeding must not be arbitrary or influenced by the coercive power of the state. That is why the procedures are more structured for the latter form of certification.\textsuperscript{180}

Certification of a person under eighteen is the final stage in categorizing that person as a juvenile, a youthful offender, or an adult. In all cases, when ruling on certification, the court is required to consider seven guidelines. These guidelines hold important the nature of the alleged offense, the prospects for rehabilitation of the accused, and protection of the public. In conjunction with the certification hearing, the state must present evidence that the accused committed the crime in question. If

\textsuperscript{174} See id. § 7303-4.3(B) (certifying a juvenile as an adult); id. § 7306-2.8(D) (certifying a youthful offender as eligible for the imposition of an adult criminal sentence). Recall that the burden of persuasion refers to what the court must be convinced of by evidence produced. The burden of proof, then, refers to the standard by which the court must be convinced of something.

\textsuperscript{175} See id. § 7303-4.3(B) (providing "the court may in its discretion proceed with the juvenile proceeding, or it shall state its reasons in writing and shall certify, based on clear and convincing evidence, that such child shall be held accountable for his acts as if he were an adult"). Similarly, § 7306-2.8(D) provides: the court shall certify the person as eligible for the imposition of an adult sentence only if it finds by clear and convincing evidence that there is good cause to believe that the accused person would not reasonably complete a plan of rehabilitation or that the public would not be adequately protected if the person were to be sentenced as a youthful offender.

\textsuperscript{176} See Okla Stat. tit. 10, § 7306-2.5(C)-(D) (Supp. 1997) (certifying an adult as a youthful offender or juvenile); id. § 7306-2.6(E) (certifying a youthful offender as a juvenile).

\textsuperscript{177} See id. §§ 7306-2.5(C)-(D), 7306-2.6(E). In both cases, the state is required to produce evidence of the crime committed. Then, "at the conclusion of the state’s case...the accused person may offer evidence to support the motion for certification as a [youthful offender or juvenile]." Id. §§ 7306-2.5(C)-(D), 7306-2.6(E) (emphasis added).

\textsuperscript{178} See id. § 7303-4.3(B) (certifying a juvenile as an adult); id. § 7306-2.5(D) (certifying an adult as either a juvenile or youthful offender); id. § 7306-2.6(E)(3) (certifying a youthful offender as a juvenile); id. § 7306-2.8(C)(2) (certifying a youthful offender for the imposition of an adult criminal sentence).

\textsuperscript{179} See id. §§ 7303-4.3(B), 7306-2.5(B), 7306-2.6(E)(3), 7306-2.8(C)(2).

\textsuperscript{180} But see Cornish, supra note 123 (arguing that both forms of certification should be structured to formally comply with due process requirements).
the state is moving to transfer the accused to a more punitive proceeding, it must convince the court why that is necessary by clear and convincing evidence. If the certification hearing involves transferring the accused to a potentially less punitive proceeding, the court has greater discretion in ruling on the motion. A discussion of what happens once the categorization is final will conclude the analysis of the current state of juvenile law in Oklahoma.

C. Impact of Categorization as Juvenile, Youthful Offender, or Adult

Once the final categorization of a person under eighteen charged with violating a state statute or municipal ordinance has been determined, that person either will face juvenile proceedings or criminal proceedings. A discussion of the technicalities of each is beyond the scope of this paper; rather, the following analysis will focus on the disposition of juveniles adjudicated delinquent and the sentencing of youthful offenders and adults found guilty. The vast differences in punitive and rehabilitative measures available will fuel the following critical examination and suggestions for change.

As stated earlier, Oklahoma juvenile courts have jurisdiction over those persons who have been categorized as juveniles.¹⁸¹ Oklahoma law, following a national trend in the 1970s, has separated juveniles alleged to be status offenders from those found to be delinquent.¹⁸² This distinction, however, is only important in the disposition phase. Before being tried in a juvenile court, a juvenile will undergo a “mandatory, preadjudicatory interview,” generally referred to as intake, through which an officer of the court will make a preliminary determination of what action the court should take next.¹⁸³ Then, depending greatly upon the recommendations of the intake officer, the court may hold an adjudicatory hearing to determine whether the allegations against the juvenile are supported by the evidence.¹⁸⁴ If a juvenile is found to be delinquent, or “in need of supervision” for status offenses, that child will become a ward of the court.¹⁸⁵ Juvenile court officers must then formulate a disposition plan through which the goals of prevention, rehabilitation, and protection of the public will be integrated.¹⁸⁶ Finally, at the disposition hearing, the court will impose a disposition plan upon the juvenile who formerly was made a ward of the court, based to a great extent upon the recommendations of the officers preparing the report.¹⁸⁷

¹⁸¹ See Okla. Stat. tit. 10, § 7306-2.3(A) (Supp. 1997); supra note 135 and accompanying text.
¹⁸⁴ Id. § 7301-1.3(1). Recall that proof of delinquency must be beyond a reasonable doubt after the Supreme Court case In re Winship, 397 U.S. 358 (1970).
¹⁸⁵ Okla. Stat. tit. 10, § 7301-1.3(1) (Supp. 1997). The language supporting the notion of a separate juvenile court with the state as ultimate parent still exists, even if the punishment rationale now predominates. See supra note 31 and accompanying text.
¹⁸⁶ See id. § 7302-5.3(A).
¹⁸⁷ See id. § 7301-1.3(14) (defining dispositional hearing); id. § 7302-5.3 (providing disposition options, to be employed by the Department of Juvenile Justice, a part of the Office of Juvenile Affairs).
Oklahoma juvenile courts may impose any of seven options for the disposition of a juvenile made a ward of the court. The least severe option allows the juvenile to return home, with periodic appearances in front of the court until the court is satisfied that the three requirements of prevention, rehabilitation, and protection have been fulfilled. The most severe option which may be imposed is locking up a juvenile in a maximum security facility for juvenile delinquents until that person has reached age nineteen. Most options contemplate temporary out-of-home placement for the "ward" in a rehabilitative setting. The rationale of the state as ultimate parent cannot be applied to those persons under eighteen prosecuted in criminal court. The parent, so-to-speak, has given up.

Oklahoma criminal courts have jurisdiction over those charged as youthful offenders or adults. As such, the accused in both cases is provided all of the "statutory and constitutional rights and protections of an adult accused of a crime." Procedurally, the accused is charged by information, subjected to a preliminary hearing and trial, if bound over for trial, and sentenced as an adult and incarcerated with the adult population in jail, if found guilty. The main distinction between being tried as a youthful offender and an adult are the increased options a court has in the event a youthful offender is found to be guilty, but not eligible for the imposition of an adult sentence.

As discussed in the earlier section on certification, the district attorney "shall file a motion for consideration of the imposition of the sentence as for an adult" in certain circumstances. That is so if the district attorney "believes there is good cause to believe" that in the absence of such punishment the accused will not be rehabilitated or the public will not be adequately protected. If the court denies the motion, the youthful offender may still face adult punishment, but subject to a ten year maximum sentence; however, the youthful offender still may benefit from being eligible for a rehabilitation plan.

The Youthful Offender Act provides that the court, upon a finding of guilt, must

188. See id. § 7302-5.3(B)(1)-(7). These options are explained more definitely in § 7303-5.3(A).
189. See id. § 7302-5.3.
190. See id. § 7302-5.3(B)(1). Jurisdiction may be extended until age nineteen according to section 7302-5.4(B). However, a child under ten may not be placed in a facility for delinquent children. See id. § 7302-5.4(C). Nor may a juvenile adjudicated to be "in need of supervision" be placed in such a facility. See id. § 7303-5.3(B). Finally, no juvenile adjudicated as delinquent for offenses which would constitute misdemeanors if adult, may be placed in a secure facility upon disposition. See id. § 7303-5.4(C).
191. See OKLA. STAT. tit. 10, § 7302-5.3(B) (Supp. 1997).
192. See id. § 7306-2.4.
193. Id. § 7306-2.4(B).
194. See id. § 7306-2.4(A).
195. See id. § 7306-2.4(B).
196. See id. § 7306-2.4(E).
198. Id.
199. See id. § 7306-2.9(B). Language in this provision also allows the court to impose a sentence "with regard to the youthful offender as provided by law for the disposition of a child adjudicated delinquent." Id. This seems to be inconsistent with the court's discretion in previously ruling on a motion for certification as a juvenile; that is, if the court thought it was in the best interest that the person receive juvenile disposition, the court would certify the person as a juvenile before the person was exposed to the time and inconvenience of criminal court.
200. See id. § 7306-2.10.
again weigh the seven guidelines, but this time to determine whether the youthful offender should be placed in the custody of Juvenile Affairs or merely under its supervision.\textsuperscript{201} Although this Office is required to formulate a rehabilitation plan "whenever a youthful offender is placed in the custody of or under the supervision of the Office of Juvenile Affairs," a juvenile placed in the custody of the Office will be placed in juvenile facilities after being sentenced.\textsuperscript{202} However, a juvenile who is merely under the supervision of the Office is still subject to incarceration in an adult jail.\textsuperscript{203} The rehabilitation plan requires that the convicted youthful offender be brought before the court on a semiannual basis, so that the court may monitor "the youth's conduct, progress, and condition."\textsuperscript{204} During these hearings, the court has the option of discharging the youthful offender, maintaining the status quo, changing the offender's placement, or placing the offender permanently with the Department of Corrections.\textsuperscript{205} Regardless of the court's determination, "[i]n no event shall the sentence exceed the amount of time of a possible sentence for an adult convicted of the same offense or ten (10) years, whichever is less."\textsuperscript{205} There are no such limitations upon the sentencing of a person under eighteen certified as an adult or who is otherwise eligible for the imposition of an adult sentence.

A person under eighteen who is categorized as an adult, or eligible for the imposition of an adult sentence, will be treated as an adult in all proceedings subsequent to a finding of guilt.\textsuperscript{207} Sentencing will be to adult jails with adult inmates. In these cases, there is no rehabilitation plan through which the guilty person will be monitored and forgiven, if rehabilitated. The Department of Corrections does have some supervisory requirements, but has neither the facilities nor the underlying rationale to provide for rehabilitation.

In concluding this statement of the current state of juvenile law in Oklahoma, the purpose for the Youthful Offender Act offers an accurate overview of the continuing progression of get-tough measures: "[i]t is the purpose of the Youthful Offender Act to better ensure the public safety by holding youths accountable for the commission of serious crimes, while affording courts methods of rehabilitation for those youths the courts determine, at their discretion, may be amenable to such methods."\textsuperscript{208} Both the juvenile courts and the Office of Juvenile Affairs, the state agency in charge of rehabilitation of persons under eighteen, have been given the flexibility to promote rehabilitation. However, in light of the get-tough trend, is it legitimate to expect such action by these actors?

\textsuperscript{201} See id. § 7306-2.9(A).
\textsuperscript{202} See id. § 7306-2.11.
\textsuperscript{203} See OKLA. STAT. tit. 10, § 7306-2.6(F) (Supp. 1997) (youthful offender may be incarcerated with the adult population); id. § 7306-2.9(B) (stating that "the court may impose sentence as a youthful offender in the manner provided by law for an adult for punishment of the offense committed"). Reading these two together, it is clear that jail time is not limited to those youthful offenders who are certified as eligible for the imposition of adult punishment.
\textsuperscript{204} Id. § 7306-2.10(B).
\textsuperscript{205} See id. § 7306-2.10(f).
\textsuperscript{206} Id. § 7306-2.9(B).
\textsuperscript{207} See id. § 7306-2.4(E)-(F); see also id. § 7306-2.8(E) (stating that "the person shall be treated as an adult for purposes of supervision, incarceration and in all subsequent criminal proceedings").
\textsuperscript{208} Id. § 7306-2.2(B).
VII. SOME CRITICISM, SOME SUGGESTIONS

The Juvenile Offender Act and accompanying changes to the Oklahoma Juvenile Code are substantially different from former provisions relating to delinquency and criminal behavior by persons under eighteen. One obvious change was the creation of the "youthful offender" status. Instead of classifying most of the persons under eighteen accused of serious offenses automatically as adults, the new laws include youthful offender as an intermediate level between juvenile and adult. The idea is that these youthful offenders may be punished as adults, but also rehabilitated as juveniles. A second change is the adoption of nearly identical lists of seven guidelines for the court to consider in making five different determinations throughout juvenile, youthful offender, and adult proceedings. This change seems to demonstrate a greater reliance upon the discretion of the court in determining what is in the best interest of the accused. Finally, the Office of Juvenile Affairs has been removed from the mammoth Department of Human Services. Instead of remaining a part of that larger agency, the Office was made separate and provided with direct funding to be spent on rehabilitation of persons in its custody or under its supervision. Along with discussing these changes, this paper will make suggestions for implementation of the new laws.

The greatest problem that may arise from the recognition of youthful offenders is the severity of punishment at the expense of rehabilitation. This new category, however, may represent the biggest break, so far, from the "cycle of juvenile justice" in Oklahoma. Although, the Juvenile Offender Act was passed amid public pressure to get tough, it does not fit easily within the cycle discussed at the beginning of this paper. Punishment of a youthful offender will often be more strict than any punishment available for juveniles; however, both the sentencing of youthful offenders and the disposition of delinquent juveniles will be monitored by the Office of Juvenile Affairs. This Office, through its Department of Juvenile Justice, will plan, effect, and monitor the rehabilitation of both youthful offenders and delinquent juveniles, albeit with approval of the plan by the court prior to implementation. The level of punishment increased, but so did the options for rehabilitation. In theory, the cycle of juvenile justice will not continue.

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209. See supra notes 31-32 and surrounding text, for the underlying rationale of the separate system with the state acting as the parent of the juvenile.
211. See BERNARD, supra note 5, at 3. The Oklahoma laws will change the portion of the cycle stating that when the rehabilitative measures are seen by the public as failing to bring about a reduction in juvenile crime, pressure is placed on legislators to re-enact measures that will serve to punish juveniles for criminal activity. Then, the cycle continues to require that punishments become increasingly harsh. See id. at 3-4.
212. See supra notes 188 & 192 and surrounding text.
213. See OKLA. STAT. tit. 10, § 7303-5.3(6) (Supp. 1997) (placing the Office in charge of a delinquent juvenile); id. § 7306-2.9(B)(1) (placing the Office in charge of youthful offenders).
214. See id. §§ 7303-5.3(6), 7306-2.9(B)(1).
215. See BERNARD, supra note 5. Although Bernard recommended the cycle be broken by halting the movement "toward greater toughness," he stresses the need for flexible and well-funded treatment. Id. at 177-81.
In practice, courts must be allowed to retain flexibility in the sentencing of youthful offenders and the disposition of delinquent juveniles. And a necessary part of being flexible is having the funds to provide alternatives.216 First, how much discretion will courts have under the new provisions of the Oklahoma Juvenile Code? At first glance, the answer appears to be that courts will have greater discretion than ever before. This is so because of the five separate provisions for hearings to be ruled on by the court regarding issues of certification and sentencing.217 Discretion comes in the five lists of guidelines which accompany each statutory provision regarding such hearings.218 The court’s decision in each type of hearing must give consideration to the seven guidelines, which are general enough to allow a wide range of latitude.219 There are, however, three limitations which must be examined to clarify the extent of judicial discretion.

One limitation comes from the very purpose given for the Youthful Offender Act. The purpose for the Act contemplates “affording courts methods of rehabilitation for those youths the courts determine, at their discretion, may be amenable to such methods.”220 However, the new and pervasive rationales of protection and punishment are mentioned in the purpose first: “[i]t is the purpose of the Youthful Offender Act to better ensure the public safety by holding youths accountable for the commission of serious crimes.”221 The idea is that courts may be less willing to exercise discretion in favor of rehabilitation if they must adhere to the twin aims of protection and punishment.

A second limitation may be found in the seemingly mandatory language accompanying three “discretionary” hearing provisions in the Youthful Offender Act. Specifically, the Oklahoma legislature provided that any person thirteen to seventeen years of age who is charged with first degree murder “shall be held accountable for his acts as if he were an adult.”222 Additionally, a person of the appropriate age and charged with any of the felonies listed in subsection A or B of Section 7306-2.6 of the Youthful Offender Act “shall be held accountable for his acts as a youthful offender.”223 The problem is that immediately following this mandatory language, the legislature provided methods through which the court could certify the accused to less punitive proceedings. This mandate also might limit the discretion a judge would be willing to exercise, especially in light of the twin goals of protection and punishment.

216. In fact, Edward Humes, after spending a year working in a juvenile detention facility in Los Angeles, endorsed three ways to improve the juvenile court system: (1) provide stricter punishment for first time offenders; (2) increase the funding available for agencies and the court in dealing with juvenile delinquents; and, (3) allow juvenile judges greater discretion in correcting juvenile behavior (a la, Judge Roosevelt Dorn, whose effective, but often extra-legal methods were discussed at length). See Humes, supra note 1, at 363.


218. See id. §§ 7303-4.3(B), 7306-2.5(D), 7306-2.6(E)(3), 7306-2.8(C)(2).

219. See id. §§ 7303-4.3(B), 7306-2.5(D), 7306-2.6(E)(3), 7306-2.8(C)(2).

220. Id. § 7306-2.2(B).

221. Id.

222. Id. § 7306-2.5(A) (emphasis added).

discussed above.

Finally, a third limitation on the exercise of judicial discretion in certifying and sentencing an accused is the existence of absolute limits. Three such limits have been provided by the Oklahoma legislature. If a juvenile or youthful offender has been certified as an adult, or if a youthful offender has been certified as eligible for the imposition of an adult sentence and is convicted or receives a delayed or deferred sentence, that person “shall be tried as an adult in all subsequent criminal proceedings, and shall not be subject to the jurisdiction of the juvenile court or youthful offender process.” Additionally, a person prosecuted and sentenced as a youthful offender shall not be subject to the jurisdiction of the juvenile court in subsequent proceedings of a criminal nature. Any of these three conditions, if fulfilled, will eliminate judicial discretion regarding certification and sentencing.

The effects of these limitations on the seemingly broad grant of judicial discretion in the new Youthful Offender Act cannot be known at this time. However, if courts are constrained by these limits to a great enough degree, their flexibility in providing varying sentencing and disposition will be substantially limited.

A second requirement for flexibility is adequate funding. In May of 1997, the Oklahoma legislature provided the newly independent Office of Juvenile Affairs with over seven million dollars. The money is to be used for a variety of programs and facilities. The more money this Office receives, the greater the variety and number of options it can offer. The point must be noted, however, that although the Youthful Offender Act was passed in 1994, it was not funded until 1997. The statutorily mandated time for implementation was delayed twice because funding had not been provided. So, just because the Act has been passed by the legislature mandating certain functions be performed by the Office, that does not ensure the funding will be provided in the future. And without adequate funding, the “procedures and facilities currently available to the juvenile court” will be extremely limited. If there is no funding for rehabilitation and too much constraint on judicial discretion, perhaps the courts only will be able to accomplish two of the three purposes for the Youthful Offender Act: punishment and protection of the public.

VIII. CONCLUSION

The development of juvenile law continues in Oklahoma with the implementation of the Youthful Offender Act and accompanying changes to the Juvenile Code.

224. Id. § 7306-2.4(F).
225. See id. § 7306-2.4(G).
226. See supra note 130 and surrounding text.
228. OKLA. STAT. tit. 10, § 7306-2.5(D) (Supp. 1997). This comes from one of the guidelines discussed above. The particular guideline it comes from states that the likelihood of reasonable rehabilitation should be measured in conjunction with services actually available. Although this seems to be practical, it also ensures that a court will not be able to consider the likelihood of rehabilitation if very limited rehabilitative resources have been provided for by the legislature. This is particularly relevant in mitigating against a nasty crime or bad past record when weighing certification or sentencing at one of the discretionary hearings.
Although at least one author has commented on the negative, cyclical nature of juvenile justice, Oklahoma has a chance to break this trend.

By providing for increased flexibility in treatment and sentencing, the Act supports the proper rehabilitative character for juvenile disposition. Mechanisms for punishment, however, are not sacrificed. The Act gets tough with those juveniles who fail to respond to rehabilitative measures prescribed by the court, as well as those who commit the most serious crimes. But most importantly, even those youthful offenders who have been sentenced to prison are not abandoned; rather, the rehabilitative effort continues because the Office of Juvenile Affairs must continue to monitor their cases. Only those juveniles who are certified as adults, or who fail the reverse certification procedure upon being charged as adults, or who previously have served time in prison, are abandoned by the Office of Juvenile Affairs.

So, although the merits of the different mechanisms used in various “get tough” campaigns may be argued about well into the future, it is clear that Oklahoma has a system that could be used to emphasize rehabilitation for most juveniles. Provided that there is adequate funding for the Office of Juvenile Affairs, juveniles in Oklahoma will get the chance to learn from their mistakes—the chance to continue being the children that they are.

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