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### **Courting Justice In and Out of Court : A Socio-Legal Examination of Prosecutorial Commitment and Conflict in the United States**

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**Courting Justice In and Out of Court:**  
**A Socio-Legal Examination of Prosecutorial  
Commitment and Conflict in the United States**

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**Submitted for the Degree of PhD  
in Criminology and Criminal Justice**

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## ABSTRACT

This thesis is concerned with the prosecutorial decision-making process in the United States in cases involving juvenile offenders. As a result of prosecutorial sentiments of alterity and commitment owing to the largely elective status of their office and expectations which members of their respective communities have of them, prosecutors perceive their role as being that of administrators of moral and legal justice. They are expected, and indeed, they expect of themselves, to know instinctively the 'right thing' to 'do' in cases involving juvenile offenders.

Yet American criminal law makes only objective distinctions amongst individuals on the basis of the presence or absence of certain capacities which are presumed to render some individuals legally liable to punishment for their actions and others legally exempt, and this creates the risk for prosecutors that some juveniles will not receive their just deserts. Consequently, American prosecutors make subjective distinctions as they attempt to make moral sense of the juvenile offenders about whom they are expected to make legal decisions. In attempting to make moral sense of juvenile offenders, and simultaneously reconcile the intra-role conflict they may experience as they attempt to preserve the best interests of the juvenile in accordance with the philosophical underpinnings of the juvenile court system whilst protecting the best interests of the community, prosecutors exercise their discretion and construct juvenile offenders symbolically as certain 'kinds' of people.

According to the analysis of research data gathered over a nine-month period and involving the participation of twenty-three respondents in personal interviews and one hundred respondents by self-administered questionnaire, prosecutors may understand juveniles as being of good or bad moral character, as being child-like or adult-like, and as being salvageable or disposable. Accordingly, they construct what they believe to be the moral just deserts of these juvenile offenders, namely informal education, formal treatment, or formal punishment. In making moral sense of these juvenile offenders and of their moral just deserts, and in making subsequent legal decisions about them, prosecutors must act in ways which are consistent with both their shared instrumental prosecutorial values and with societal expectations of them. Both these professional and political sources of accountability have an indirect influence on the way in which prosecutors carry out their job in respect to their perception of role, and, in short, on what it means to truly 'be' a prosecutor.

Part One of this thesis establishes a discursive framework and draws upon existing literature in the fields of prosecution, criminal law, and juvenile justice in outlining the role conflicts which prosecutors may inevitably experience as they struggle with the realisation that there is never solely one 'right thing' to 'do' in cases involving juvenile offenders. Part Two develops these ideas further by depicting the prosecutorial process in prosecutors' own words and further entrenches the ideas introduced in Part One in an appropriate socio-legal context.

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**PREFACE**

Prior to launching into a discussion of the prosecutorial decision-making process in the United States in cases involving juvenile offenders, it may be useful to take the preliminary step of outlining the reasons behind the selection of the particular research topic. As noted throughout this thesis, the end of the twentieth century had proven to be an especially turbulent time in American juvenile justice administration. Whilst evidence does not suggest that juvenile crime was at an all-time high, the nature of the crimes being committed by juvenile offenders was such that the subject was receiving a tremendous amount of attention both in the media and in the political arena. This era saw the emergence of linguistic references to certain youths as 'juvenile super-predators,' malicious, unfeeling, and dangerous individuals who formed gangs, dealt drugs, and resorted to heavy artillery to carry out their illicit enterprises. Moreover, details of the school shooting incidents that had taken place in Paducah, Kentucky; Jonesboro, Arkansas; Pearl, Mississippi; and Columbine, Colorado were overtly troubling in that these cruel and sudden attacks had been perpetrated against relatively 'peaceful', middle American communities, as opposed to inner-city urban slums where such actions were expected if not tolerated. Furthermore, the juvenile offenders responsible for the attacks were not typical, 'hard-core' chronic offenders. On the contrary, without exception, they were teenagers who had never before been arrested for any lawbreaking behaviour, some who had been described as 'good kids' by the neighbours and relatives who had thought they knew them intimately, and others who had been 'good students,' marked for academic achievement and success in later life.

Unsurprisingly, then, questions soon began to circulate and inquiries began to be made as to the explanations behind these atrocities. It seemed inexplicable that such ‘good kids’ could wreak such havoc, and whilst legislators, parents, and educators called for drastic changes in everything from gun control legislation to school curricula to stricter classifications on various media of popular culture, another avenue of research remained largely unexplored: namely, what is thought to be the appropriate way to deal with ‘good kids’ who do ‘bad’ things? Indeed, how do such constructions of ‘good’ and ‘bad’ come to be formulated, and how do they impact upon the decision-making processes of those agents in the criminal justice system, like prosecutors, who hold a tremendous, yet relatively unchecked, amount of power over determining their fate? These initial questions prompted the selection of the research topic as one seeking to delve into the prosecutorial processes of making moral sense of juvenile offenders and, subsequently, of making legal decisions about their just deserts.

The aim of this research is to illuminate a process which has previously been relatively hidden. Much has been written about prosecutors acting *inside* a courtroom or collaborating with other agents of the criminal justice system, who may be referred to as insiders in their own unique way. Yet very little is known about what prosecutors contemplate and how they formulate their decisions and actions *outside* of a courtroom, especially from the perspective of an outsider to the profession. As will be demonstrated shortly, a sizeable proportion of American prosecutors are elected to office, yet the public knows little about them other than information about job performance and credentials that is routinely circulated to registered voters. There is tremendous faith and trust placed in the ability of prosecutors to not only ‘know’ the ‘right thing’ to ‘do’ in certain cases, but also to possess the certainty necessary to act

on that knowledge, yet there are few existing pieces of research which are able to demonstrate whether or not such conviction is warranted or whether it is, in fact, misplaced. Despite the rich body of research which exists to shed light on the ways in which discretion is exercised by other agents of the criminal and juvenile justice systems, *inter alia*, law enforcement officers, judges, probation officials, and parole boards, little has previously been uncovered with regard to the weight ascribed to various legal and extra-legal considerations by prosecutors and the reasons behind their decision-making processes. This study, then, is able to provide both a scholarly examination and understanding of the prosecutorial decision-making process in cases involving juvenile offenders and a form of external review of prosecutorial actions. It may be argued that such understanding is unattainable through the use of the qualitative methodology selected for this research (see Appendix for a detailed discussion of methodological considerations). Indeed, the veracity of prosecutors' own statements and rationales may sometimes be difficult if not impossible to confirm. Yet this research aims to be subjective, rather than objective, in its nature, and consequently, the truthfulness of prosecutorial claims and actions is regarded as secondary to the very way in which they make those claims and justify their actions. In other words, *what* they say is not believed to be as significant as the very fact that they say it, and the motivations and sentiments guiding their justifications.

It should be mentioned that originally, the research was intended to be comparative in nature, examining the prosecutorial process in both the United States and Great Britain. However, whereas American prosecutors are relatively easy to contact, amenable to being interviewed, and forthcoming with their responses, gaining access to British prosecutors is quite complicated. A particular formal process needs to be followed whereby the researcher first requests permission to engage in research

by contacting the appropriate agent of the Crown Prosecution Service, then letters must be sent out to individual Area Crown Prosecutors requesting their participation, whereupon individual arrangements can be made for in-person interviews. After this process had been followed in the initial stages of this research endeavour, only two Crown Prosecutors agreed to be interviewed, and what was determined was that the Code for Crown Prosecutors impacted to a much greater extent on their work than did the standards of prosecutorial ethics for American prosecutors. The idea of conducting such comparative research had to be abandoned, as there simply was not enough data available to draw any valid conclusions. Nonetheless, there are a number of preliminary comparisons and contrasts that could be made between American and British prosecutors.

Firstly, unlike American prosecutors, Crown Prosecutors have a clearly defined, formal organisational structure, with clearly defined norms and values set out in the Code. As a result, although Crown Prosecutors attempted to be helpful, often the only justification they could provide for their actions or decision-making was to assert that 'it's in the Code.' Consequently, no conclusions could be drawn as to their perception of role, other than that of prosecutor as civil servant or prosecutor as follower and applier of rules. Moreover, relating to the problem of gaining access, as members of an organisation, Crown Prosecutors tended to be more closed off and secretive about their work and decisions. Crown Prosecutors are appointed rather than elected, as the majority of American prosecutors are, and as such, they have no democratic motivation to be forthright about their work and decisions, what might be termed a lack of alterity. As they have no sense of elective accountability, they see themselves more as civil servants than public servants, and their only sense of commitment is to the upholding of the law in a way which is consistent with their



organisational mission and Code. Perhaps this reflects that they have organisational or professional accountability, but this would not be classed as alterity as this thesis defines it because it too closely resembles an actual obligation, and alterity has to derive from personal sentiment rather than expressed necessity to comply with the rules.

Instead, then, this thesis examines from a socio-legal perspective the process by which American prosecutors make moral sense of juvenile offenders, as well as the process by which they make subsequent legal decisions in a bid to secure what they perceive of as the moral just deserts of these offenders. The format of this thesis is structured into two parts, one conceptual and one more substantive. Part One establishes a theoretical foundation for such discussion. In Chapter One, the prosecutorial remit or job is introduced as an entity distinct from the prosecutorial perception of role. The origins of the prosecutorial profession in the United States are explored, and suggestions are made as to the linkage between the identity of American prosecutors as elected officials and the subsequent sense of commitment which they invariably experience toward the community that elected them to office. Ideals of community justice are highlighted, whereby prosecutors are expected (both by their constituents and by others in their professional circle) not only to partner with others in their jurisdiction to bring juvenile crime to a halt, but ultimately to lead the way to such an outcome. Chapter One further establishes the way in which prosecutors attempt to do their job by setting prosecutorial policy, which can be viewed as a 'bottom line' approach to those goals they deem desirable. Different prosecutors may opt to create and utilise diverse policies, and consequently, the subjective nature of such 'desirability' and the process by which prosecutors draw upon extra-legal, symbolic constructions of juvenile offenders in order to make moral

sense of them is subsequently discussed in the context of prosecutorial accountability. Whatever actions they may take and whatever justifications they may give for taking them, prosecutors must always remain cognisant of the various checks which exist to constrain their behaviour, and these are specified in Chapter One.

One of the types of accountability which exist to govern prosecutorial behaviour is described in Chapter One as *juridical accountability*, whereby the courts judge whether prosecutors have acted within the confines of the law in carrying out their professional imperative. Chapter Two expands upon the legal issues impacting upon the prosecutorial decision-making process in cases involving juvenile offenders by examining closely legal precepts of accountability, responsibility, and liability. Such concepts as *mens rea* and *parens patriae* are introduced to posit how the law decides who *can* be held responsible for their actions on the basis of the presence of certain necessary capacities determined through a reliance on legal presumptions. A discussion of the age of responsibility follows to highlight the socio-cultural specificity of such concepts and to demonstrate how legal views about the responsibility of juveniles has varied at different times and across different societies. Once the foundation for explaining the legal basis for responsibility has been laid, Chapter Two turns to elaborating upon differential degrees of accountability in order to assert that not all individuals who *can* be held legally responsible by the aforementioned criteria necessarily will be. Supreme Court precedents are cited in order to illustrate that juveniles may, as a result of their chronological age and maturity levels, be adjudged 'more' or 'less' responsible than others rather than simply accountable or excusable. The prosecutorial function, then, becomes more complex, as prosecutors are expected to apply not only legal rules to specific cases in order to bring about a legally just outcome, but also to exercise their own personal

sense of morality in ensuring that only those juveniles who truly *deserve* to be held legally accountable for their actions are ultimately prosecuted. The prosecutorial construction of just deserts is thereby presented as a theoretical concept.

Chapter Three, the final chapter in Part One, suggests the complex nature of such a subjective construction of juvenile offenders and their just deserts by outlining the fundamental principles underpinning the American juvenile court system. In deciding whether a juvenile offender is morally deserving of education, treatment, or punishment, prosecutors must always remain conscious of those ideals which ultimately led to the creation of the juvenile court. Chapter Three discusses the role of the 'Child Savers,' those social reformers and activists who advocated governmental intervention into the lives of children and their families where appropriate, and how their insistent protests that children are vulnerable, impressionable beings in need of the protection of the State were translated into action. The history of the juvenile court is traced from prior to its inception, through the tumultuous 'Due Process Revolution' of the 1960s, 1970s, and early 1980s, to the present day in order to note how the prosecutorial role has necessarily evolved to meet the changing standards of juvenile law. Through its scrutiny of juvenile court history, Chapter Three denotes the role conflict which prosecutors necessarily experience in operating as representatives of the community which they serve within a juvenile justice structure that regards its function as quasi-parental rather than adversarial.

Part Two then elevates the discourse about the prosecutorial process from a theoretical to a practical level by drawing upon responses and explanations in the words of actual prosecutors as they indicate not only *what* they do (make moral sense of juvenile offenders and subsequently legal decisions about them) and *how* they do it (by constructing juvenile offenders symbolically as being certain kinds of individuals

and by constructing their moral just deserts in order to ascertain what 'should' be done), but also *why* they do it, importing such notions as commitment, alterity, and expectations that others have of them and that they have of themselves in turn. Chapter Four applies Max Weber's notion of *verstehen* or understanding to the prosecutorial perception of role in order to explicate how such perceptions are formed, why prosecutors feel compelled to 'solve' the problem of juvenile crime, and what steps they take to make moral sense of juvenile offenders on an individualised basis in order to determine how culpable a juvenile offender truly is. In this chapter, the concept of the prosecutorial profession as a culture is expanded upon in order to assert that there are certain core instrumental values which are consistent in guiding prosecutorial actions, regarding of what those specific actions may be. Chapter Four is pivotal in its illumination of the often obscured realm of the extra-legal process by which prosecutors make moral sense of juvenile offenders as 'good kids' or 'bad guys,' as 'child-like' or 'adult-like,' and as 'salvageable' or 'disposable'. This typology has a uniquely symbolic meaning for prosecutors; prosecutorial labeling of a juvenile as a 'good kid,' for instance, connotes something far different than it would in a colloquial sense. The labels which prosecutors attach to juvenile offenders whom they have interpreted in these uniquely symbolic ways emerged through the fieldwork, were referred to almost flippantly by prosecutors, and have been borne out by existing literature on the subject of juvenile justice. Consistently throughout the juvenile court system, for example, some juvenile offenders may be referred to as 'adult-like' if they meet certain criteria, by prosecutors, judges, and juvenile intake officers alike. Yet to prosecutors, labeling a juvenile as 'adult-like' as opposed to as 'child-like' is imperative in that it indicates an appropriate course of action which they may take.

Chapter Five takes as its starting point the prosecutorial construction of juvenile offenders which was discussed in Chapter Four and carries it further in order to demonstrate subsequent prosecutorial actions. Once prosecutors make moral sense of juvenile offenders, they assign what they believe to be appropriate consequences based upon the principle of just deserts and the suitable degree or proportion of blameworthiness (or otherwise). Whereas Chapter Four explains why prosecutors believe such constructions of just deserts to be subsumed within their role set, Chapter Five concentrates instead on the actual assignation of just deserts and the instruments prosecutors utilise in order to bring about what they believe to be desirable outcomes, including pre-trial diversion, probation, and waiver or transfer mechanisms. The categories of *educability*, *treatability*, and *punishability* are presented in the context of prosecutorial constructions of just deserts, and specific aims and objectives of each are outlined and elaborated upon. Chapter Five concludes by revisiting issues of prosecutorial accountability and discussing how discrepancies in judgments between what prosecutors believe to be a juvenile offender's just desert and what others may believe are ultimately reconciled.

The overall intent of Part Two is to convey the fact that what it means to be an American prosecutor is a very subjective thing indeed, and that American prosecutors have very specific expectations of themselves and of what they believe their job entails with regard to juvenile offenders. It is this notion of expectations, the commitment which prosecutors feel toward them (and toward the individuals who express them) as well as the reconciliation of conflicting expectations (namely, the preservation of the best interests of the juvenile as opposed to the protection of the public welfare), which underpins this thesis. It is here that the originality of the thesis may be found. Whilst other research undertakings had shed light on the administrative

details surrounding the prosecutorial profession or conversely on the exercise of discretion by various agents of the criminal justice system in the United States, no other body of work has described the origins and the manifestation of this prosecutorial commitment and the role conflict which invariably follows as prosecutors attempt to secure moral justice by legal means in cases involving juvenile offenders.

# Part One

## CHAPTER ONE:

### **Understanding the Prosecutorial Job: Professional Priorities, Perceptions, and Policy**

It is the contention of this chapter and, indeed, of this thesis, that American prosecutors are highly influential in determining the outcomes of cases involving juvenile offenders in the United States. Former Attorney General Robert Jackson, who later became a Supreme Court Justice, stated in 1940 that

[t]he prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. (Cited in Walther 2000: 283)

More recently, Bennett L. Gershman has similarly written that

[t]he prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law. (Gershman 1993: 513)

This is equally true if not more so today. For this reason, this chapter will draw upon existing research on the prosecutorial profession, as well as upon qualitative interviews conducted with prosecutors in the course of the current research endeavour (which will be expanded upon in Part Two of this thesis), in examining the prosecutorial job, namely the legal and professional obligations and responsibilities of prosecutors, as well as the electoral and organisational norms and values which may inform their decision-making processes. The use of prosecutorial discretion will be considered, specifically in the context of the establishment and implementation of particular prosecutorial policies.

#### **1.1 Distinguishing Between What Prosecutors Do and Who They Think They Are**

It is imperative that the prosecutorial job and the tasks associated with it not be confounded or in any way misunderstood as the prosecutorial role. Part Two of this thesis will demonstrate that prosecutors perceive their role in a particular way and that this specific perception of the prosecutorial role is pivotal in formulating their



understanding of juvenile offenders and, indeed, of how they are expected to respond to the juvenile crime 'problem'. The notion of a prosecutorial role as a subjective phenomenon may be somewhat problematic in itself, as many individuals may equate a prosecutor's job with his or her role. Yet the two are highly and significantly dissimilar. A prosecutor's job involves the application of certain legal criteria, as will be discussed in a later section of this chapter and in Chapter Two, in deciding, *inter alia*, who should be prosecuted, what charges should be brought against the offender, and what sentence should be sought. According to the Judiciary Act of 1789, the statute which established the office of American prosecutors, a prosecutor's job is to be

a meet person learned in the law to act as attorney for the United States and [make] it his duty to 'prosecute in each district all delinquents for crimes and offenses cognizable under the authority of the United States'. (Jacoby 1980: 20)

It should be stated that although Jacoby refers to the American prosecutor in the masculine form, a significant proportion of American prosecutors are women.

Although the most recent National Surveys of Prosecutors conducted by the United States Bureau of Justice Statistics exclude particular statistics on the subject (see DeFrances 2001; DeFrances 2002; DeFrances 2003), the current research undertaking involves a sample of American prosecutors comprised of 51% females and 49% males (see Appendix for a discussion of the selection of research participants).

Professor Susanne Walther has written that the position of the American prosecutor is pivotal, that he or she is the

central figure vested with responsibility for the prosecution of crimes in the American criminal justice system. The functions of a prosecutor can only be exercised by licensed attorneys who have been admitted to practice law before the 'bar' of the local (state or federal) courts. (Walther 2000: 284)

This prosecutorial job, as will be demonstrated, entails the administration of certain particular legal duties or tasks and the exercise of a broad range of discretionary powers, which the prosecutor is presumed to undertake in a way which is consistent with standards of professional conduct and legal ethics. However, as Gershman qualifies:

This is not to say that the prosecutor's discretion is unbounded. Various legal, political, experiential, and ethical considerations inform and guide the charging decision. (Gershman 1993: 514)

*Legal considerations* may include an evaluation of the strength of the case, the credibility of complainants and witnesses, the existence and admissibility of corroborating proof, and the nature and strength of the defence. *Political considerations* may include an assessment of the harm caused by the offence, the availability of investigative and litigation resources, the existence of non-criminal alternatives, and an awareness of and alertness to relevant social and community concerns. *Experiential considerations* may include the prosecutor's own background, training, experience, intuition, judgment, and common sense. Lastly, *ethical considerations* involve a sensitive appreciation that, in the context of the aforementioned factors, the ends of justice would be served by criminal prosecution, and that neither personal, political, discriminatory, nor retaliatory motives have influenced the charging decision. Each of these considerations in the performance of the prosecutorial job will be explored further at a later point in this chapter and in Chapter Two.

The prosecutorial perception of role, on the other hand, is not dictated by certain legal mandates or professional standards, nor explicitly stated in any job description. Instead, it is the manifestation of a sense of commitment and responsibility that prosecutors have towards their position and towards the people

they serve, regardless of whether or not they ever encounter these individuals face to face. In their account of organisational behaviour, Newstrom and Davis (1993) define *role* as

the pattern of actions expected of a person in activities involving others. Role reflects a person's position in the social system, with its accompanying rights and obligations, power and responsibility. In order to interact with one another, people need some way of anticipating others' behavior. Role performs this function in the social system. (Newstrom and Davis 1993: 52)

Yet a person's understanding of his or her role is not an objective phenomenon.

Rather, Newstrom and Davis suggest that role perceptions indicate to individuals

how they think they are supposed to act in their own roles and how others should act in their roles. (Newstrom and Davis 1993: 52)

The prosecutorial perception of role refers to how prosecutors understand or make sense of what it is they should be doing, not in the sense of carrying out particular duties but rather along the lines of an over-arching sense of moral consciousness. The basis of the prosecutorial perception of role and its impact on the decision-making processes involving juvenile offenders are subjects best left for analysis in Part Two of this thesis. For now, what is important to recognise is that the job with which prosecutors have been entrusted and the specific duties which they are charged with carrying out must not be confused with the role they perceive themselves as having. It is the prosecutorial job which will be the focus of this chapter.

## **1.2 The Origins of the Prosecutorial Job**

Joan Jacoby, a social researcher who has been examining prosecutorial discretion and decision-making processes since the 1970s, asserts that the American prosecutor, being an amalgamation of the office of the French *procureur publique*, the English attorney general, and even the Dutch *schout*, is remarkably and distinctly unique. She writes that:

[t]he American prosecutor enjoys an independence and a wealth of discretionary power unmatched in the world. With few exceptions, he is a locally elected official and the chief law enforcement official of his community. He represents a local jurisdiction, is selected for the position by the voting public and his office is endowed with unreviewable discretionary authority. Nowhere else in the world does this combination of features define prosecution. (Jacoby 1997a: 33)

According to Jacoby, there is no single prosecutorial office to which a direct line of descent can be drawn. While American prosecutors may share some features with their counterparts in other countries, no other prosecuting body has an identical combination of powers, authority, and duties. Rather, it would appear that each of the aforementioned prototypes has influenced a particular aspect of the job and married with the newly touted American ideals of democracy and political representation to form the office. Consequently, Jacoby argues that

[t]he American prosecutor has the power, like the *procureur*, to initiate all public prosecutions; he is a local official of regional government like the *schout*; he has the power to terminate all criminal prosecutions like the attorney general. But as much as he has these features, his roots cannot be attributed to any single source. Rather, he reflects the same forces that fostered the American Revolution, conquered the vast open spaces of the west and espoused the principles of democracy, namely, the right of the people to have a voice in the governmental process and a belief in a system of checks and balances. (Jacoby 1997a: 33)

Jacoby suggests that the fundamental difference between the American prosecution system and those of its predecessors is the delineation between private and public prosecution. For example, the English system of prosecution is a predominantly private one, the underlying belief of which is that crime is a private concern between the perpetrator and the victim (see Douglass 1991; Kress 1979). This principle originated in medieval times and was designed to protect the Crown rather than the individual. Only in 1984 was a particular body designated as separate and distinct from the police force solely for the purpose of prosecution. The American system, on the other hand, is one of public prosecution: crime is perceived to be a public matter whereby society as a whole, rather than a particular individual, has been

victimised. In 1704, Connecticut became the first colony to abolish the system of private prosecution altogether by establishing public prosecutors as adjuncts to all county courts. It must be clarified, however, that the doctrine of public prosecution as enshrined in the American system does not afford the public the right or authority to make decisions in specific cases. Instead, the public largely elects the prosecutor whose job it is to ensure that the law is applied consistently and fairly and that appropriate policies are conceived of and utilised in dealing with offenders. As such, the community may serve as an *indirect* rather than direct influence on the exercise of the American prosecutor's discretionary authority.

### ***1.2.1 An Advocate for the Public: The Prosecutor as Elected Official***

The office of prosecutor in America has not always been an elected one. It was only during the presidency of Andrew Jackson in the 1820s that the American political process became increasingly democratic. The effect of this democratisation movement was to change the way political officials were viewed, and more public officials began to be popularly elected. With the increase in the number of local elections, elected officials were given greater independence and eventually afforded the use of discretionary powers to make decisions as they deemed appropriate. Jacoby argues that

[u]ltimately [these powers] became the foundation for [the American prosecutor's] independent discretionary authority which was to distinguish him forever from any other prosecutor in any country in the world. (Jacoby 1997b: 26)

An ironic feature of the history of the system of prosecution in the United States is that initially, prosecutors were seen as minor actors in the judicial system. It was judges who were seen as possessing the real power, and more often than not, prosecutors were regarded merely as individuals who rode their coat-tails to professional success. They were never listed as members of the executive branch nor

described as officers of local government. The office of prosecutor was an appointive one, either by the governor or by the judges. Yet as the democratisation movement swept through the country in the early nineteenth century, more judges began to be popularly elected and the local elections of prosecutors soon followed. State constitutions and statutes reflected these changes and an increasing number of provisions for the election of local prosecutors were created. The first of these was Mississippi, which in 1832 included in its constitution a provision for the public election of local district attorneys. States entering the Union after 1850 generally provided for the election of prosecutors, either through the state constitution or through state statutes. By 1912, when Arizona and New Mexico were admitted to the Union as the last of the forty-eight contiguous states, all forty-eight provided for local prosecutors either through constitutional provision or statute. In all but five states, prosecutors held elected office. Today, the majority of local prosecutors (over ninety-five per cent) still hold elected office (see Bureau of Justice Statistics 1992). Moreover, the only states in which local prosecutors are still appointed rather than popularly elected continue to appoint judges similarly, further demonstrating the link between the evolution of the prosecutorial and judicial offices.

Jacoby contends that by the time of the Civil War, the public's perception of the office of prosecutor and the responsibilities it was seen as entailing had changed in a fundamental way. She points to the American prosecutor's

new elective status and independence from the court [as] a major force in defining his executive function. The public began to recognize and ask for a clear and distinct separation between the duties and powers of the prosecutor as an advocate for the public and those of the courts. (Jacoby 1997b: 28)

This public perception of the prosecutor as a 'public advocate' has been instrumental in shaping prosecutors' understanding of their role and their decisions regarding which policies to implement in particular cases. This concept will be discussed in

greater detail in Part Two of this thesis; for the time being, it suffices to acknowledge that American prosecutors as locally elected officials may feel an obligation to reflect the values and norms of the community that elected them to office, and that this sense of responsibility may be perpetuated and intensified in turn by the public's expectations of prosecutors.

### **1.2.2 'Doing More': Ideals of Community Justice and Community Prosecution**

Jacoby has written that the unique position of the American prosecutor necessitates the

[s]traddling of many arenas, the political, legislative, executive, and judicial, [and as a result the prosecutor] often projects a confused image...that stubbornly defies easy solution or clarification. (Jacoby 1980: 274)

This is hardly surprising, considering many prosecutors' elected status and the expectation that society has that prosecutors may be the most appropriate individuals to deal with certain duties that may or may not be explicitly mentioned as part of their job description, but rather may comprise a part of their role. In keeping with this societal expectation that prosecutors will fulfill more than their expressed function, the National District Attorneys Association's Juvenile Justice Committee has revised its National Prosecution Standard 19.2, Juvenile Delinquency, originally adopted in 1977. According to the National District Attorneys Association,

[t]he revised standard is designed to guide prosecutors in redefining their role. Many years have passed since the Supreme Court rendered its landmark decision, *In re Gault*, 387 U.S. 1 (1967). The revised standard incorporates many of the lessons learned since then. The standard is aimed at promoting justice in juvenile delinquency cases. It emphasizes the prosecutor's duty to provide for the safety and welfare of the community and victims and, at the same time, consider the special interests and needs of juveniles to the extent possible without compromising that primary duty. The standard accepts the premise that a separate court for most juvenile delinquency cases continues to be an indispensable alternative to the adult court. (National District Attorneys Association 1991: 310)

The origins of such a separate court for juvenile offenders, as well as the legal, philosophical, and social changes which have transpired since the court's inception and throughout the 1960s, are discussed at length in Chapter Three of this thesis. It is imperative at this point to introduce the role ambivalence which prosecutors inevitably experience in dealing with juvenile offenders, that of providing for the welfare and safety of the community and simultaneously preserving the best interests of the juvenile offender in question. The National District Attorneys Association recognizes the existence of such a dilemma for juvenile prosecutors, and indeed, acknowledges it as a normal and routine part of the job:

The primary duty of the prosecutor is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special interests and needs of the juvenile to the extent they can do so without compromising that concern. (National District Attorneys Association 1991: 311)

In attempting to assist prosecutors in reconciling these two sometimes disparate priorities, the standard clarifies and emphasises three aspects of the role of the prosecutor:

First, the prosecutor is charged to seek justice just as he does in adult prosecutions. The prosecutor in the juvenile system, however, is further charged to give special attention to the interest and needs of the accused juvenile to the extent that it does not conflict with the duty to fully and faithfully represent the interests of the state. This call for special attention reflects the philosophy that the safety and welfare of the community is enhanced when juveniles, through counseling, restitution, or more extensive rehabilitative efforts and sanctions, are dissuaded from further criminal activity. Second, [the] standard emphasizes the desirability of having the prosecutor appear at all stages of the proceedings. In so doing, the prosecutor maintains a focus on the safety and well-being of the community at each decision-making level...The prosecutor's presence guarantees the opportunity to exercise continuous monitoring at each stage and broad discretion to ensure fair and just results. Finally, the standard emphasizes professionalism in juvenile court work. It provides that attorneys in juvenile court should be experienced, competent, and interested. It suggests that the practice of using the juvenile court as a mere training forum for new prosecuting attorneys should be abandoned, because continuity of involvement in the system creates professionalism. (National District Attorneys Association 1991: 313-4)



The prominence attributed to professionalism, consistency, and specialised attention largely indicates to prosecutors those values and priorities to which they should afford primacy. Moreover, the standard appears to extend the prosecutorial job further and encourage prosecutors to interpret their role as it relates to juvenile offenders in a very particular, community-oriented fashion:

This standard also suggests that the prosecutor should take a leadership role in the community in assuring [sic] that a wide range of appropriate dispositional alternatives are available for youth who are adjudicated delinquents. The prosecutor is challenged to assume his leadership role because he is in the unique position to help organize the community and because successful programs<sup>1</sup> should serve to actually reduce crime. (National District Attorneys Association 1991: 315)

The justification for such a policy initiative is the predominant belief that the problem of juvenile crime is a multi-faceted one, and therefore that responses to it must emanate from different sources and different avenues of expertise. Consequently,

[e]veryone in the community needs to be involved in these efforts, including parents, teachers, school administrators, faith communities, civic and business leaders, law enforcement officials, prosecutors, local elected officials and youth themselves. Coupled with effective enforcement and prosecution efforts, crime prevention initiatives are important and necessary. (National District Attorneys Association 1991: 17)

Prosecutors as representatives of the community, therefore, should seek to uphold 'community justice' and their goal should be, *inter alia*, to improve the community and enhance the welfare and safety of the members of that community by partnering with other stake-holders such as schools, businesses, or civic groups:

Community justice might be best described as an ethic that transforms the aim of the justice system into enhancing community life or sustaining community. To achieve that aim, the community partners with the justice system to share responsibility for social control. (Clear and Karp 2000a: 21)

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<sup>1</sup> In order to maintain the integrity of the original source from which various excerpts are directly derived, fidelity to the actual spelling utilised and, whenever appropriate, American nomenclature, will be upheld.

What necessitates the introduction of community justice coalitions so urgently at this time is the levels of juvenile violence and crime with which modern communities must cope. According to the Office of Juvenile Justice and Delinquency Prevention, juvenile offenders (defined as those individuals younger than eighteen years of age who are charged with the commission of a crime) account for nearly 2.4 million arrests each year, representing about one out of every six arrests in the United States (see Snyder 2002). About two-thirds of the juveniles who are arrested each year will find their way to juvenile court, but only about fifty-eight per cent of these will be formally petitioned, the juvenile court equivalent of being charged. Roughly two-thirds of those against whom delinquency petitions are filed will ultimately be adjudicated delinquent, meaning that a formal ruling will be made by a juvenile court judge, followed in most instances by a judicially-imposed disposition involving some form of supervised probation or correctional placement (see Office of Juvenile Justice and Delinquency Prevention 2003). The juvenile justice system which these juveniles will encounter is one which is markedly different from the system as it was originally conceived in Illinois in 1899 (see Chapter Three for a detailed account of the legal and philosophical origins of the juvenile court system, and for explications of its development). The spread of gang violence, a flurry of highly publicised school shootings, and widespread disillusionment with the rehabilitative ideology that was once the hallmark of juvenile justice have, in recent years, fostered ‘get-tough’ policies and a move away from the diversion-oriented practices of just a few years ago. Attention has shifted away from concern about the potentially harmful effects of juvenile court intervention to calls for harsher punishment, more aggressive responses to gang activity and school violence, and transfer of serious and violent offenders to

adult criminal courts, where they may face lengthy prison terms or even the death penalty (see Fagan 1990; Howell 1997).

Two prosecutors writing about the changing nature of the prosecutorial role in juvenile justice have attributed the shift in emphasis to the juvenile crime ‘problem’ and argue that prosecutors today simply ‘must do more’:

The challenge for prosecutors dealing with juvenile crime is not merely a reflection of increasing caseloads. No longer does the prosecutor serve merely as the gatekeeper to the juvenile court system by determining which juveniles should be charged with crimes, who should be diverted from prosecution and whether or not efforts should be made to seek waiver or transfer to adult criminal court. While these basic, core functions remain for all prosecutors, to cope with the sharp rise in juvenile crime between 1980 and 1994 and the foreboding predictions for the future, today's juvenile prosecutor must do far more...today's juvenile prosecutor must go beyond the courthouse and become a community leader and teacher, working with civic and social groups, churches and schools, to prevent juvenile crime before it occurs. (Backstrom and Walker 1999: 3)

The aim of the community prosecution proponents seems to be the encouragement of a shift in role for prosecutors from that of upholder of law and order to something resembling a human resource for the community. The prosecutor would conceivably become the one who helps the victim, the community, and the offender by designing and managing a process in which everyone in the community can become involved. A prosecutor would assume the mantles of protector of the community, restorer of victims, and punisher of the guilty, all in addition to that of community advocate or representative. He or she would seek to be seen as more than an individual who is ‘tough on crime,’ but also, as Walther describes, as a

‘problem-solver’ and as political leader in education, prevention and treatment efforts. (Walther 2000: 289)

The extent to which this ideal is realised in prosecutors’ own perceptions of the prosecutorial role is assessed in Part Two of this thesis. What is of interest now is the premise that these policy-driven, community-based ideals may impact upon a prosecutor’s working rules; in other words, knowing about community priorities in

prosecution may affect the way a prosecutor does the tasks that are part of his or her job.

### 1.2.3 *'Do Your Job and Let Us Do Ours': The Prosecutor-Police Relationship*

One thing which may be influenced by prosecutors' sense of community priorities as they seek to carry out the tasks of their job is the relationship they enjoy with the local (and possibly federal) law enforcement agencies. The extent to which prosecutors work with and rely on police officers and vice versa may vary from jurisdiction to jurisdiction, and will depend on the mission and actual goals of an organisation.

Walther has written that the

relationship between the prosecutors and the police is characterized by organizational separation and independence. (Walther 2000: 288)

However, due to the fact that prosecutors draw most of their information on cases from evidence collected and gathered by the police, as well as the fact that police officers rely on prosecutors to bring cases against individuals that they have arrested and charged, it can be assumed that there is always some element of *interdependence* present between the two agencies.

According to David Parry,

police officers represent the primary gatekeepers of the juvenile justice system. (Parry 2004: 125)

It has been previously mentioned in this chapter that nearly one out of every six arrests in the United States involves a person under the age of eighteen. Untold numbers of additional youth are stopped and questioned, then dealt with by some method short of arrest. Usually, a police or other state-based investigation (or an investigation by a federal agency, such as the Drug Enforcement Agency or the Federal Bureau of Investigation) precedes the prosecutor's first appearance in the case. The investigation may include anything from interviewing victims, witnesses, or suspects, to collecting evidence, to identifying a suspect through line-ups. The

methods the police employ in their interactions with juveniles in many ways resemble those used with adults, although there are necessary differences in a number of important aspects (see Piliavin and Briar 1964; Bazemore and Senjo 1997). This chapter will not go into great detail about the investigatory powers of the police, as these are not directly relevant to the research at hand. What is important, however, is that one must recognise the value of evidence collected by the police (and the way in which it was obtained) to the job responsibilities of the prosecutor.

It is the responsibility of the prosecutor to present a set of facts (or a 'case') to a judge or jury in a court of law (the 'trier of fact') and attempt to prove that an individual or group of individuals has committed a crime. In order to achieve this end, prosecutors rely to a great extent on evidence obtained by the police. Indeed, it could be said that prosecutors know what they do about the accused and the case at hand largely from the material they have been presented with by the police (see Chapter Four for a discussion of the function of juvenile intake officers in particular). Under the American criminal justice system, the burden of proof in criminal cases is always on the prosecution. Due to the presumption of innocence inherent in the laws and statutes governing jurisprudence in the country, the prosecution must prove its case beyond a reasonable doubt (see Chapter Three for a discussion of the landmark 1970 case of *In re Winship*, in which the Supreme Court altered the standard of proof to be used in juvenile proceedings from 'a preponderance of the evidence' to 'beyond a reasonable doubt'). This is part and parcel of the basic tenet which holds that a society may willingly suffer the acquittal of many guilty defendants rather than endure the conviction of one innocent man. As Columbia Law School Professor H. Richard Uviller explains, the prosecution's case, therefore, must be grounded in strong evidence:

Lawyers talk a lot about *the facts*. Good lawyers can be found who will tell you that facts are the whole story. All the rest is rationalization, window dressing to make the fact-driven outcome seem like the product of reasoned, principled choice. But what are 'facts'? To courtroom lawyers, facts are the relics of past events, things that actually happened out there in the real world. Today the events are gone, vanished into the elusive, misty realms of memory and cause. Now, in court, we must produce some evidence of those vanished events...The law postulates that most events, so far as our senses inform us, have some impact on the physical world or on the perception of human witnesses. These traces - often blurred, light, or ambiguous - are the evidence we seek. (Uviller 1996: 13)

The source of this evidence the prosecution requires to build its case is the police, and the quality and quantity of this evidence would suggest to the prosecutor whether or not a conviction is probable. A further discussion of prosecutors' assessment of the elements of a case with a view to charging will be addressed later in this chapter. One criterion upon which such prosecutorial decisions as whether or not to charge an individual with a crime must rely is the legality of the evidence at hand. The Fourth Amendment to the United States Constitution holds that people shall be protected in their persons, places, and possessions against unreasonable intrusions by the government. For this reason, the police may only search a crime scene in one of two lawful ways. One is to proceed by a warrant signed by a judge, and the other is to satisfy the court after the fact that the search was reasonable without a warrant. For example, if a police officer is in a place where he or she is legally allowed to be, then that officer can seize as evidence any contraband in plain view (see *Arizona v. Hicks* 1987). Another exception is a search incident to lawful arrest. When arresting a suspect, law enforcement agents can search the person and the area in the immediate control of that person without a warrant (see *Chimel v. California* 1969). Other exceptions include emergencies, stop-and-frisk situations, concern for public safety, vehicle searches, and consensual searches. The United States Supreme Court has ruled that even in cases of homicide,

no intrusion may ever be justified by its success and that the criminal, surrounded by evidence of his misdeeds, has the same protection against invasion as any innocent homeowner. (Uviller 1996: 20)

Consequently, a prosecutor could be expected to pursue a case against a suspect if the evidence obtained by the police is sufficient and will more likely than not be admissible in court. Whether or not a prosecutor will proceed depends upon his or her perception of the prosecutorial role and the implementation of a particular policy, as will be demonstrated in a later section of this chapter. If, on the other hand, the evidence seems to have been obtained illegally (for example, if the police had not obtained a proper warrant or had not met any of the criteria necessary for a warrantless search), or if the police have been unsuccessful in identifying a suspect, then a prosecutor's involvement will necessarily be reduced. Uviller has stated that

[m]any cases are thrown out at the outset for a variety of reasons: bad police work, weak evidence, reluctant witnesses. (Uviller 1996: 3)

The prosecutor does, however, have the option of asking the police to continue the investigation in an attempt to uncover more evidence. The two agencies, the prosecution and the police, although separate in name and function, are therefore interdependent and intertwined in practice. Moreover, it must be recognised that the interdependence entertained by the police and prosecutors is not unilateral in nature. The prosecutor relies upon the police for 'good evidence,' as mentioned, and the police turn to the prosecutor for legal training and advice, which increases the prosecutor's powers over the police's investigative function. This is particularly true in those jurisdictions which advocate a coalition-building, community justice approach to dealing with crime. As Walther explains,

the ever increasing complexities of substantive and procedural law make...the police routinely depend on...the prosecutor for legal advice, a fact which in many jurisdictions has evolved into forms of cooperation that provide the prosecutor with considerable influence in the investigation process itself. Moreover, cooperation between the Prosecutors' Offices and police agencies in police training and legal

education programs provide for mutual information and regular coordination in criminal matters that are important to the local community. (Walther 2000: 288)

It must be noted that the closeness of the prosecutor-police relationship has to do largely with organisational aims and priorities and indeed with a prosecutor's perception of his or her role. Some prosecutors might actively seek to build and maintain a positive and healthy relationship with the police organisation and, indeed, with individual police officers. They might enjoy an almost symbiotic relationship between the two organisations, and both parties may be more co-operative and more inclined to assist one another in any way possible. More rarely, other prosecutors may either head or be members of an organisation whose mission and goals might preclude them from reaching out to members of other organisations and either asking for or offering assistance. In these situations, follow-up work or other forms of support might not be very forthcoming. This type of relationship would be very rare indeed. For the most part, prosecutors and police officers recognise that they have different functions to fulfil, different jobs to carry out, and that these functions and jobs could best be fulfilled and carried out by working together. Yet however interdependent the two organisations may be, members of those organisations will always do their job according to the policy and working rules of their own organisation first and foremost. In other words, prosecutors will follow the policy implemented by their own office. They are under no obligation to comply with police policies or working rules, just as the police are under no obligation to operate consistently with prosecutorial policy.

### **1.3 'Doing the Job': Prosecutorial Interpretations of the Rules**

Prosecutors have particular rules by which they must abide, legal criteria which have been established in order to lend some structure to the prosecutorial decision-making



process. Prosecutors cannot bring a case against anyone simply because they wish it. However, as previously stated, they have at their disposal a tremendous amount of discretion, and this means that conversely, not every case that can be prosecuted necessarily will be. How prosecutors interpret and apply the legal rules which govern their ability to do their job depends in large part upon the values which guide them and the particular prosecutorial policy they have implemented in accordance with those values. In other words, how prosecutors do their job has to do with what they understand that job to be. The next section of this chapter will demonstrate the fundamental ways in which prosecutorial values impact upon the prosecutorial decision-making process.

### ***1.3.1 In a Group of Their Own: Interpreting and Subscribing to Prosecutorial Values***

Steven Barkan and George Bryjak describe *discretion* as characterising

every event in the criminal justice system...prosecutors decide whether to prosecute a case and which charges to file...The criminal justice system could not operate without all this discretion. No two cases are alike, and no two defendants are alike. Criminal justice officials recognize this, and they also recognize the need for a smooth and efficient process. Thus, discretion in the criminal justice system is necessary. (Barkan and Bryjak 2004: 13)

Discretion is crucial for prosecutors as they carry out their job in that it presents them with options. It creates opportunities for prosecutors to put their unique stamp on the cases that come before them, and on the decisions involved in those cases. While discretion does not enable prosecutors to break or circumvent the law in any way, it does allow them to interpret the law, which may often be vague or necessarily broad, more freely and in ways which they determine to be the most appropriate. However, prosecutors do not enjoy unfettered freedom in determining the appropriate use of discretion. They are bound by their own values and by those values of the

prosecutorial culture - henceforth referred to as *prosecutorial values* - and they will not act in ways which contravene or in any way violate those values.

Although prosecutors are described as individuals, they are in fact individuals within a prosecutorial framework, a concept which is far removed from that of an autonomous individual. As they are encouraged to do by both the National District Attorneys Association and, indeed, by the very ethos of the juvenile court system within which they operate, prosecutors can and do work to pursue individualised justice for juvenile offenders (as demonstrated later in this chapter and in Part Two of this thesis) by way of exercising their discretion. However, it must be recognised that this discretion is not a licence to act freely or arbitrarily, and consequently any prosecutorial notions of individualised justice for juvenile offenders are only individualised insofar as prosecutorial discretion is exercised according to the norms of the prosecutorial culture, or prosecutorial values. Prosecutors as a group have certain values (as will be outlined in Chapter Four) which set them apart from other lawyers and indeed from other criminal justice practitioners and law enforcement officials and, at least to some extent, all prosecutors share these prosecutorial values. Consequently, despite the lack of a formal organisational structure, even the lone prosecutor working singularly and unaided in a rural community feels a part of something larger which connects him or her to other prosecutors.

This connection arises from being motivated by largely similar feelings and beliefs about the role prosecutors should fulfill, despite possible differences of opinion about the best prosecutorial policy to implement in order to fulfill that role most appropriately. Prosecutors may have different definitions for what justice entails. Some may determine that justice is swift and sure, involving the expeditious processing of someone accused of committing a crime. Other prosecutors may believe

that justice should be case-specific, that in seeking it they should consider the individual circumstances of the offence and determine the best way of dealing with the specific offender. Still others may argue that justice is about maintaining consistency and fairness, applying the rules in an even-handed manner to all individuals and consequently prosecuting anyone who meets the necessary criteria. None of these approaches are incorrect and, as will be demonstrated shortly and in Chapter Four through the introduction of anecdotal evidence gathered from interviews conducted with prosecutors, all are valid prosecutorial values, comprising legitimate prosecutorial policies and involving the use of particular strategies. Yet what all of the aforementioned approaches and beliefs have in common is that prosecutors implement them because they believe they are seeking justice, which is a core prosecutorial value. Herein lies a fundamental point: prosecutorial values influence how prosecutors make sense of juvenile offenders, which outcome should be sought, and which strategies may be utilised in order to achieve that desired outcome. These prosecutorial values are largely drawn from certain codes of professional practice governing prosecutorial behaviour.

Just as the legal rules which govern the actions of American prosecutors may be derived from either the federal or state level (or indeed, both), so too are the codes and professional rules which dictate what is ethical and appropriate behaviour drawn from a multitude of sources. One of these codes is the Model Code of Professional Responsibility, which was approved by the American Bar Association in 1969 and adopted as binding law by every state except California by the mid-1970s. The Model Code includes Disciplinary Rules and Ethical Considerations. The Disciplinary Rules are mandatory in that they

state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. (Fisher 2000: 4)

In other words, the Disciplinary Rules are the ‘must do’ directives for the legal profession. The Ethical Considerations, on the other hand, are more aspirational in nature. They are the ‘should do’ directives and

represent the objectives toward which every member of the profession should strive. (Fisher 2000: 4)

Ethical Consideration 7-13 is particularly relevant to prosecutors in that it sets prosecutors as a group apart from other lawyers and describes the special duties with which prosecutors are entrusted:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts...(American Bar Association 1969: 49-50)

It could be understood, then, that this is where the prosecutorial perception of role as *administrators of justice* originates, as prosecutors are clearly designated as that specific sub-group of lawyers whose duty it is to represent the people, use discretion, and seek justice above all else.

By the early 1980s, the American Bar Association’s Model Code had become the target of persistent criticism within the legal profession, and as a result, the Model Rules of Professional Conduct were adopted in 1983. Although many states have adopted the Model Rules as law, many others have adhered to the Model Code. The Model Rules generally employ the word ‘shall’ and are intended to be mandatory rather than normative. The comments that follow each rule include aspirational guidelines, marrying together the ‘must do’ and the ‘should do’ directives for the profession. Like the Model Code, the Model Rules apply to all lawyers, not merely

prosecutors, but they include several provisions particularly relevant to prosecutorial conduct.

In 1979, the American Bar Association adopted the Standards Relating to the Administration of Criminal Justice. Amended in 1993, they include mandatory provisions and aspirational guidelines; however, the amendments replace virtually all of the mandatory clauses with the word 'should.' Chapter Three of the Standards Relating to the Administration of Criminal Justice specifically discusses the function of the prosecution. Standard 3-1.2 describes the prosecutor's duties and once again reinforces the prosecutorial values of *seeking justice* and *representing the public*:

(b) The prosecutor is both an administrator of justice, and an advocate, and an officer of the court; the prosecutor must exercise discretion in the performance of his or her functions. (c) The duty of the prosecutor is to seek justice, not merely to convict. (American Bar Association 1993: 40)

Furthermore, the standards state unequivocally that in pursuing and upholding these values, prosecutors should not be in any way coerced or manipulated by their supervisors to prosecute a case in which they have a reasonable doubt about the guilt of the accused. The atmosphere in the office should be one in which prosecutors feel free to discuss their feelings and doubts openly, and supervising prosecutors should respect the views of their subordinates even if they do not agree with them. From this the prosecutorial values of *openness* and *collaboration*, a prosecutor's freedom to express an opinion or consider that of others, may have originated. Moreover, the standards also mention that in making the decision to prosecute, a prosecutor should give no weight to the personal or political advantages (or disadvantages) which might be incurred, nor to a desire to further the prosecutor's own career by enhancing the record of convictions. This suggests the importance of other prosecutorial values, namely *impartiality* and *consistency*, applying the rules fairly and in an even-handed

manner so that no offender is unduly advantaged or disadvantaged in the prosecutorial decision-making process on the basis of his or her background or social standing.

The exercise of discretion is, expectedly so, a core prosecutorial value and the standards discuss the concept of *prosecutorial discretion* within a very pragmatic, practical framework. Simply put, discretion is imperative in order to prioritise prosecutors' cases. Prosecutorial policy may determine which cases a prosecutor will pursue, why, and how, but at an even more basic level, it must be recognised that for feasibility reasons, not all crimes could be prosecuted. Discretion, therefore, is a useful sorting tool for prosecutors:

It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs. Moreover, some violations occur in circumstances in which there is no significant impact on the community or on any of its members. A prosecutor should adopt a "first things first" policy, giving greatest attention to those areas of criminal activity that pose the most serious threat to the security and order of the community...Differences in the circumstances under which a crime took place, the motives behind or pressures upon the defendant, mitigating factors in the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence. In exercising discretion in this way, the prosecutor is not neglecting his or her public duty or discriminating among offenders. The public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the "letter of the law," but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion. (Fisher 2000: 7)

*Thoughtfulness or deliberation*, then, is established as another prosecutorial value, suggesting that in making any decision, a prosecutor should first weigh all the facts, assess all the possible 'instruments' or strategies, and then make the determination as to the most 'proper' way to proceed. These Codes and Rules of practice seemingly reflect a belief in justice, fairness, openness, and impartiality, and suggest to prosecutors that these values ought to underpin their thoughts and actions.

#### 1.4 Abiding by Their Own Rules: Exercising Discretion in Setting Prosecutorial Policy

Prosecutors derive their discretion from the syntax of the law. The general and often vague language used in legislation, necessary insofar as the law must apply to a large number of individuals, crimes, and sets of circumstances, means that prosecutors must exercise discretion in determining what legal repercussions a particular word or phrase has for them in a specific situation. As former United States Attorney General and later Supreme Court Justice Jackson has stated,

[o]ne of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can ever investigate all of the cases in which he receives complaints...What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offence is most flagrant, the public harm the greatest, and the proof the most certain." (Fisher 2000: 1)

As explained above, not all prosecutors would focus on the same points of law or, indeed, interpret the same points of law in the same way. A prosecutor's particular interpretation of the law and indeed of the prosecutorial job affects his or her choice of policy and subsequent strategies. However, it must be recognised that for reasons having to do with accountability (which is addressed in a later section of this chapter) and public expectations (which are described and assessed in Part Two of this thesis), this use of prosecutorial discretion must be exercised in a way which is consistent with the core prosecutorial values. In other words, prosecutors can only exercise their discretion in a way which does not diverge from what they (and others) expect of themselves in their capacity as prosecutors. In reaching a decision to prosecute, or indeed to divert, argue for change in jurisdiction, or discontinue criminal proceedings of any kind against any individual, all of which fall under the general heading of prosecutorial policy, prosecutors must act firstly in accordance with certain *legal rules*. These legal rules take many different forms, as will be discussed in greater detail below. Secondly, prosecutors must act in accordance with *formal rules* of their

profession or organization, such as codes or guidelines setting out appropriate forms of conduct for prosecutors. These, too, will be discussed below. Finally, prosecutors will inevitably also take *extra-legal factors* into account, such as the public's expectations and their own personal understanding of their role in the community and in the criminal justice system (which perceptions are elaborated upon and explained in Chapter Three, within a contextual discussion of the evolution of the juvenile court system, and in Part Two of this thesis).

There are a variety of ways in which the prosecutorial job can be understood (depending largely upon prosecutors' interpretation of their role), and a number of policy options and strategies available to prosecutors (as demonstrated in Chapter Five). The way in which prosecutors understand their role and their job will shape any decisions they make about prosecutorial policy and the appropriateness of certain strategies over others. Prosecutorial values suggest to prosecutors which courses of action are most appropriate, both generally and in specific instances. Prosecutors prioritise the various prosecutorial values differently, which accounts partially for the differing approaches to the prosecutorial job. The general course of action considered most appropriate and implemented by a prosecutor can be called the *prosecutorial policy*. Jacoby has written that

[n]o matter what the external environment or a prosecutor's perception of his discretionary authority, the prosecutor operates with a policy (usually either the one for which he was elected or the one inherited) and implements the policy by various strategies. (Jacoby 1980: 201)

Moreover, Jacoby suggests that the choice of prosecutorial policy

establishes a bottom line for each case (Jacoby 1980: 287),

the 'bottom line' for the purposes of this thesis being taken to mean the prosecutorial designation of a desirable outcome. Furthermore, this desirable outcome or bottom line as indicated by the prosecutorial policy guides prosecutors as they choose the



most appropriate strategies (i.e. diversion, probation, or transfer to adult criminal court, all discussed in the context of their utility as end-furthering strategies in Chapter Five) through which to achieve their desired outcome.

The writings of organisational theorist Edgar Schein suggest that the fact that all prosecutors belong to a common prosecutorial community or culture and yet have differing views as to what goals they should pursue or which approaches are most appropriate is not a contradictory phenomenon. He has written that although individuals may be bound by certain organisationally or institutionally shared values or ideals, the ways in which they carry out those ideals may differ so long as their actions are consistent with the spirit of the organisation's mission. In other words, as long as a prosecutor's choice of policy is consistent with the prosecutorial values, it is not in direct contravention of those values if a prosecutor's choice of policy differs from that of another prosecutor:

The mission is often understood but not well articulated. In order to achieve consensus on goals, the group needs a common language and shared assumptions about the basic logical operations by which one moves from something as abstract or general as a sense of mission to the concrete goals of...[providing] an actual...service within specified and agreed-upon cost and time constraints...Formal studies of organizational goals have revealed that these are sometimes hard to specify, partly because they get confused with the mission or primary task and partly because they reflect compromises among the powerful members or coalitions with the organization...[T]here can be complete agreement on core mission, yet different groups in the organization can derive quite different goals from the mission. (Schein 1985: 55-6)

Jacoby discusses a typology of four prosecutorial policies (see Jacoby 1980), all of which must be understood as deriving from a prosecutor's perception of his or her role and a particular understanding of the job that he or she is charged with fulfilling. Prosecutorial values play a crucial part in the selection of a particular policy over another, as will be explained. Prosecutors will not select and implement a

prosecutorial policy which contravenes their personal and professional beliefs about their role and their level of responsibility.

#### ***1.4.1 Legal Sufficiency Policy: If the Evidence Fits, Prosecute***

The first type of prosecutorial policy is what Jacoby refers to as the *legal sufficiency policy*. Prosecutors who subscribe to this approach seek to carry out their job by prosecuting anyone and everyone who is eligible. If the offender is of a sufficient age to be deemed legally liable for his or her actions (see Chapter Two for an explanation of the legal construction of responsibility) and if the elements of the crime are present and the case is legally sufficient, charges should be brought. A number of prosecutorial values may motivate a prosecutor to opt for this particular policy. These include, *inter alia*, *consistency* and *fairness*, the application of the law equally to all persons. Other motivating values are those of *efficiency* and *expeditiousness*, as a determination of ‘can we prosecute’ is sometimes faster to make than one of ‘should we prosecute’ (which will be discussed in a later section of this chapter). Finally, prosecutors may be driven by the desire to maintain law and order, as they may presume that by proceeding against all persons who meet the necessary legal criteria, they are in fact upholding and *enforcing the law*. These values combine to motivate prosecutors to seek this particular type of policy and consequently to utilise particular strategies over others in attaining their goal.

#### ***1.4.2 System Efficiency Policy: Choosing How Best to Achieve the Goal***

Another prevalent prosecutorial policy as described by Jacoby is the *system efficiency policy*. Prosecutors who implement this type of policy do so because they believe that justice is best served by swift and sure action. The emphasis in this policy is on the pretrial screening process, as prosecutors draw upon all the information and resources available to them and determine the best way in which they could achieve a speedy

and early disposition. In an attempt to plea bargain on as many cases as possible, systemically efficient prosecutors may overcharge some offenders. They may also attempt to maximise use of community resources and diversion programmes in order to keep those offenders that they determine to be 'salvageable' (a term which will be described in a later section of this chapter and analysed at greater length in Chapter Four) out of the criminal justice system. This is the policy whereby prosecutors ask themselves whether the outcome that they are seeking can be achieved by means other than the criminal justice system or, in other words, whether the goal can be achieved without prosecution and conviction.

### ***1.4.3 Defendant Rehabilitation Policy: Stigma Minimisation and Moral Entrepreneurship***

Jacoby's third prosecutorial policy (and it must be recognised that she describes these policies as ideals or models, ones which are not exhaustive nor mutually exclusive) is the *defendant rehabilitation policy*. This policy shares certain features with the previous policy of system efficiency yet is fundamentally different. Prosecutors who implement this policy are primarily concerned with the rehabilitation of the defendant and believe that the best way to prevent the offence from being repeated in the future and to teach the offender a lesson is to use any means necessary rather than subjecting the offender to the criminal justice system.

Prosecutors who subscribe to the defendant rehabilitation policy may be largely swayed by labelling theorists (see Tannenbaum 1938; Becker 1963), who posit that society's response to known or suspected offenders is important not only because it determines the individual futures of those who are labeled as criminals, but also because it may contribute to a heightened incidence of criminality by reducing the behavioural options available to labeled offenders. Once a person has been defined as bad, few legitimate opportunities remain open to him or her (see Chapter Two and

Chapter Four for the prosecutorial interpretation of a construction of a juvenile offender as 'bad,' and Chapter Five for a discussion of the few legitimate opportunities that consequently remain for prosecutors in dealing with him or her following such a construction). As a consequence, the offender finds that only other people who have been similarly defined by society as bad are available to associate with him or her. This continued association with negatively defined others is believed to lead to continued crime. In this way, deviance finally becomes a self-fulfilling prophecy and labelling is perceived as a cause of crime insofar as the actions of society in defining the rule-breaker as deviant push the person further in the direction of continued deviance and criminality.

In developing labelling theory, Howard Becker (1963) attempted to explain how some rules come to carry the force of law, while others have less weight or apply only within the context of marginal subcultures. His explanation centred on the concept of *moral enterprise*, a term which he used to encompass all the efforts a particular interest group makes to have its sense of propriety embodied in law:

Rules are the products of someone's initiative and we can think of the people who exhibit such enterprise as moral entrepreneurs. (Becker 1963: 147)

The extent to which prosecutors operate as moral entrepreneurs in designating accordingly those juvenile offenders whom they perceive as morally blameworthy or morally blameless will be explored further in Chapter Two and in Chapter Four of this thesis. Yet it is crucial to recognise that some prosecutors may implement this particular prosecutorial policy in keeping with their perceived responsibility of moral entrepreneurship. Those prosecutors who regard their role as one of minimising stigma and acting, wherever appropriate (in other words, in those instances where community safety or public order is not threatened), will seek to take those actions

which will keep a juvenile from being labeled as ‘deviant’ or ‘delinquent’ in the hopes of reducing the likelihood that the juvenile in question will embark on a criminal career. There is a heavy reliance once again on community resources as these prosecutors attempt to divert less serious first-time offenders whilst prosecuting repeat or violent offenders for their crimes. There is also a close co-operation with the court and with social and probationary agencies in order to ensure that the diversionary or sentence recommendation made by the prosecutor is upheld and that the offender receives the necessary treatment. Chapter Three will demonstrate the extent to which this view of defendant rehabilitation and the perceived appropriateness of less restrictive and less punitive treatment alternatives for juveniles is consistent with the original goals of the juvenile court system.

#### ***1.4.4 Trial Sufficiency Policy: Selection with a View Towards Conviction***

Lastly, Jacoby describes the *trial sufficiency policy*. This policy is less commonly used by prosecutors, she argues, and is based upon the belief that prosecutors assess a case on its merits and should only pursue those cases which are most likely to result in a conviction. Due to the emphasis in this policy on the charging decision, prosecutors who subscribe to it rely heavily on a good relationship with the police and high-quality, legally obtained evidence to substantiate their case. There is also a need to create alternatives to prosecution for those cases which the prosecutor assesses and finds unsuitable for prosecution, which means that there will be some close relationships with treatment or social agencies.

As mentioned earlier, the policy or policies that prosecutors choose and implement form the basis for their working rules and the ways in which they go about doing their job. Policy establishes the ‘bottom line’. Just as the choice of prosecutorial policy draws heavily upon prosecutors’ prioritisation of the core prosecutorial values,

so too does their choice of policy in turn affect the prioritisation of certain strategies, such as waivers from juvenile to criminal court, dispositional recommendations, or diversion. Prosecutorial policy establishes the framework for prosecutors in terms of appropriate outcomes from which to choose and the appropriate strategies to use to achieve those outcomes. However, how a desired outcome is decided upon and which strategies are selected for implementation depend heavily upon how a prosecutor constructs a juvenile offender and how that offender is perceived or made sense of.

### **1.5 'Should We or Shouldn't We'? Making Sense of Juvenile Offenders and the Decision to Charge**

As indicated earlier, the decision to charge is not a straightforward one. Many prosecutors have indicated that once an individual is brought formally into the criminal justice system, it is virtually impossible to withdraw him or her from it. Therefore, it is of paramount importance to prosecutors to ensure that only those persons who are truly morally and legally *deserving* (a concept which will be explored in greater detail in Chapter Two) are charged and formally introduced into the justice system. As indicated in earlier sections of this chapter, how prosecutors view the charging decision and what they do once the decision to charge has been made will hinge largely on their interpretation of the prosecutorial value system and their perceptions of the 'bottom line'. The intermediate stage, however, that of making the charging decision, must also be recognised as one which reflects prosecutorial values.

Although there are certain legal criteria which must be adhered to, the charging decision for prosecutors revolves around notions of goals and outcomes, and the very rules which seek to guide prosecutorial decision-making in this matter recognise that this is the case. Chapter Three of the American Bar Association

Standards Relating to the Administration of Criminal Justice sets out explicitly the criteria which must be considered by prosecutors in making the decision to charge, and discusses in great detail the exercise of prosecutorial discretion in making that decision:

A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and *for good cause consistent with the public interest* decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. (Fisher 2000: 6)

It is the latter clause which is of the utmost importance for the purpose of this section, acknowledging that regardless of evidential sufficiency and probable cause, prosecutors may, *for other reasons*, make the decision to prosecute or to decline prosecution. This extra-legal influence on the decision-making process is particularly relevant with regard to the prosecutorial construction of juvenile offenders and notions of blameworthiness, blamelessness, and just deserts. This notion of prosecutorial construction should not be confused with the process of case construction, whereby prosecutors piece together their policy and choice of strategies, drawing upon their prosecutorial values and perception of role, and even evidence that they have received from the police. Rather, prosecutorial construction refers specifically to the way in which, theoretically, prosecutors understand the juvenile offenders with which they are confronted. Whereas the case construction might reveal *how* prosecutors put together their cases in preparing for trial, prosecutorial construction would account for *why* prosecutors choose a particular policy or strategy over another. Both of these types of prosecutorial construction will be explored in greater detail in Part Two of this thesis. For the purposes of the present chapter,

however, it suffices to introduce the notion of prosecutorial construction of juvenile offenders as fundamental to the prosecutorial decision-making process and to suggest possible ways in which prosecutors may make sense of these offenders. Furthermore, the prosecutorial decision to charge is entirely premised upon the idea that there is a particular outcome they want to reach or accomplish, and that that outcome can best be achieved by charging an individual offender. This is the *prosecutorial motive*, a fundamental component of the prosecutorial decision-making process. Weber defines 'motive' as:

a complex of subjective meaning which seems to the actor himself or to the observer an adequate ground for the conduct in question.  
(Weber 1964: 98)

This 'complex of subjective meaning' includes, as will be discussed shortly, the influences of those professional and political sources of prosecutorial accountability. Upon their initial review of cases, prosecutors develop an immediate sense of who the juvenile offender is and which outcome would be most desirable in a given situation. In other words, they determine which legal outcome a juvenile offender morally deserves on the basis of the subjective meanings they have attributed to certain symbols. As will be demonstrated in Chapter Two, the criminal law makes no moral distinctions between offenders, and this creates the risk that those juvenile offenders which prosecutors have constructed as either deserving or undeserving of punishment will not receive their just deserts. For this reason, prosecutorial constructions of juvenile offenders as deserving or undeserving of punishment intend to secure moral justice by legal means. This prosecutorial construction of juvenile offenders draws largely upon their prosecutorial values and their perceived role (which will be elaborated upon in Part Two of this thesis) and determines the choice of policy and strategies that they will make, what Weber refers to as the 'conduct in question'.



However, for reasons of organisational and political accountability (which are discussed in a later section of this chapter and in greater detail in Part Two of this thesis), any determinations that prosecutors make as to the blameworthiness or blamelessness of a juvenile offender, as well as regarding the subsequent outcomes that should be sought, must be made consistently with either prosecutors' own perceptions of their role or the perceptions of others, namely the public. It must not be inferred that the public dictates which outcomes a prosecutor will choose and whether or not the decision to charge should be made. Rather, a prosecutor is influenced by both internal and external factors in constructing his or her perception of the prosecutorial role and this role perception influences prosecutors in making both general policy decisions and specific decisions regarding the suitability of outcomes and strategies.

In reviewing each case, prosecutors identify those aspects of the case that they deem the most important. They are obligated to determine the appropriate rules of law and procedure that must be invoked in cases involving juvenile offenders and to act in accordance with the formal rules of substantive and procedural law which regulates prosecutorial dealings with juvenile offenders. Similarly, however, they are, under a professional imperative to make sense of situations involving juvenile offenders and to determine whether these offenders fall within the jurisdiction of the criminal law and the criminal justice system.

Prosecutorial actions, therefore, specifically those which govern their decisions regarding juvenile offenders, are the product of a particularly and uniquely subjective view of those offenders. It may be useful at this juncture to introduce briefly the symbolic interactionist perspective in order to appreciate more fully the prosecutorial process of 'making sense' of juvenile offenders and constructing them as either

blameworthy or blameless, and subsequently, as designating their moral and legal just deserts.

### ***1.5.1 The Interactionist Perspective: Attributing Meaning to Juvenile Offenders and Constructing Reality***

The prosecutorial decision-making process and the reasons behind prosecutors' actions (or likewise, inactions) relating to juvenile offenders cannot be examined outside of a sociological context, for it is only in understanding the theoretical framework established by sociology that that the process of attributing subjective meaning to human behaviour can be fully appreciated. Sociology falls somewhere between the methodology of the natural sciences and of literary interpretation. It is not a 'hard' science, although it respects the need for systematic study and empirical analysis in order to arrive at generalisations. Yet because sociology deals with human behaviour, it is obliged to inquire into the subjective meaning of action. Max Weber's *verstehende* sociology (which will be addressed further in Chapter Four) meets this need by supplementing the more objective methodologies with an interpretive one in which the sociologist attempts a deeper understanding by probing subjective meaning structures. Weber has written that:

Sociology...is a science which attempts the interpretive understanding of social action in order thereby to arrive at a causal explanation of its course and effects. In 'action' is included all human behaviour when and in so far as the acting individual attaches a subjective meaning to it. Action in this sense may either be overt or purely inward or subjective; it may consist of positive intervention in a situation, or of deliberately refraining from such intervention or passively acquiescing in the situation. Action is social in so far as, by virtue of the subjective meaning attached to it by the acting individual (or individuals), it takes account of the behaviour of others and is thereby oriented in its course. (Weber 1964: 88)

While structural functionalism and conflict theory may be characterised as top-down approaches to the study of social life and social organisation, symbolic interactionism may be viewed as a bottom-up approach. In other words, symbolic interactionists

begin with the assumption that culture, organisations, and social structures are created through daily communications and interactions among people. As people interact with one another over time, *patterns* of interaction emerge and *rules* governing interaction develop. These ritualised interactions become so much a part of people's lives that they do them almost automatically, like actors playing a well-rehearsed part. It is only when the patterns or rules are broken that social actors become consciously aware of the rules' very existence, and their importance in everyday life. Social reality, then, is constructed. What is recognised as social life is largely a product of a multitude of social interactions that have taken place over an extended period of time. From a symbolic interactionist perspective, there can be no society without a group of individuals who routinely interact with one another. Moreover, interacting generates *symbols* that have a shared meaning among the members of the group. David Downes and Paul Rock have described the interactionist perspective as follows:

Interactionists hold that life is patterned by *symbolic* indications. People continuously interpret themselves, their settings, and their partners. They must make sense of the past, make plans, and infer intentions. Indications are predominantly linguistic, although gestures, expression, clothing, and context also convey meaning. Language permits the identification and stabilization of social affairs. It allows one to assume persistence and similarity so that responses become available. It is the common medium which integrates public activity. (Downes and Rock 1996: 193-4)

A *symbol* is anything that stands for something else. Symbols can assume many forms, such as words, sounds, gestures, or objects, but no symbol has intrinsic meaning. Instead, the *meaning* of a symbol is attributed to it by the people who decide that the word, sound, gesture, or object has significance. As Weber has posited,

'Meaning' may be of two kinds. The term may refer first to the actual existing meaning in the given concrete case of a particular actor, or to the average or approximate meaning attributable to a given plurality of actors; or secondly to the theoretically conceived *pure type*<sup>2</sup> of subjective meaning attributed to the hypothetical actor or actors in a

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<sup>2</sup> Weber means by 'pure type' what he himself generally called and what has come to be known in the literature about his methodology as the 'ideal type,' which will be discussed later in this chapter.

given type of action. In no case does it refer to an objectively 'correct' meaning or one which is 'true' in some metaphysical sense. It is this which distinguishes the empirical sciences of action, such as sociology and history, from the dogmatic disciplines in that area, such as jurisprudence, logic, ethics, and aesthetics, which seek to ascertain the 'true' and 'valid' meanings associated with the objects of their investigation. (Weber 1964: 89)

The argument Weber makes is pivotal for two reasons. Firstly, it establishes the idea that meaning is *subjective*, that individuals construct social reality and that that unique symbolic construction informs their subsequent decision-making processes (as will be demonstrated shortly). Secondly, and perhaps more fundamentally, it outlines the prosecutorial dilemma succinctly. By describing jurisprudence as dogmatic, Weber highlights the very point which will be made in Chapter Two of this thesis, namely that the law only makes distinctions amongst individuals on an *objective* basis. In other words, individuals either are liable to punishment for their actions by virtue of their chronological age, or they are not so liable. Yet it is this very objective distinction, combined with the subjective meanings which prosecutors attribute to particular juvenile offenders on the basis of certain interpretive symbols, that creates the risk for prosecutors that a juvenile offender which they have constructed in a specific way will not receive his or her just deserts.

George Herbert Mead was the first to emphasise the importance of symbolic communication for understanding human interaction (see Mead 1934), yet it was Herbert Blumer who developed Mead's ideas into the theory of symbolic interactionism (see Blumer 1969). Blumer suggested that people's actions derive from their interpretation of what goes on around them, and much of this interpretation is learned through interacting with others:

The term 'symbolic interaction' refers, of course, to the peculiar and distinctive character of interaction as it takes place between human beings. The peculiarity consists in the fact that human beings *interpret* or 'define' each other's actions instead of merely *reacting* to each other's actions. Their 'response' is not made directly to the actions of

one another but instead is based on the *meaning* which they attach to such actions. Thus, human interaction is mediated by the use of symbols, by interpretation, or by ascertaining the meaning of one another's actions. (Blumer 1962: 232)

New interpretive meanings are not created on a daily basis, otherwise daily life would become burdensome at best or chaotic at worst. Instead, as individuals live in a society, they learn the meanings that have been assigned to particular symbols. Likewise, prosecutors, through the informal process of socialisation into their professional and organisational life and through exposure to more experienced prosecutors who transmit core prosecutorial cultural values (as described in Chapter Four), learn the *meanings* that have been assigned to particular *symbols* relating to juvenile offenders, such as their previous criminal record, their various attitudinal displays, their maturity levels, and their family supports. As suggested by Blumer's work, it is the very interpretation of these symbols that indicates to prosecutors what something relating to a juvenile offender (whether an event or a spoken statement) actually means in the context of their professional life, and informs the legal decisions they may make regarding that juvenile offender on the basis of that very symbolic interpretation:

Anything of which a human being is conscious is something which he is indicating to himself – the ticking of a clock, a knock at the door, the appearance of a friend, the remark made by a companion, a recognition that he has a cold...To indicate something is to extricate it from its setting, to hold it apart, to give it a meaning...In any of his countless acts – whether minor, like dressing himself, or major, like organizing himself for a professional career – the individual is designating different objects to himself, giving them meaning, judging their suitability to his action, and making decisions on the basis of the judgment. This is what is meant by interpretation or acting on the basis of symbols. (Blumer 1969: 80)

Consequently, in making sense of juvenile offenders, indeed in formulating their construction of these individuals, prosecutors refer to such factors as, *inter alia*, the *individual circumstances* of the offender, such as age, previous criminal history, family background, school record, attitude about the offence, or perceived future

dangerousness; the *specific circumstances* of the crime, specifically the level of violence that has been inflicted, the seriousness of the offence, or the number of victims that have been affected; and the *rehabilitative prospects* of the offender, namely whether or not diversion or treatment programmes have anything to offer or whether prosecutors believe the juvenile offender to be beyond redemption. Each of these symbols holds unique meaning for prosecutors in their moral assessment of an individual juvenile offender and their determination of his or her just deserts. In his account of prosecutors' own experiences of their profession, Mark Baker discusses this individualised attention to each case in some detail:

Although more and more of their decision making powers are being taken away by statute in many states and the political and media pressure to be "tough on crime" is extremely intense, prosecutors still have the power and the obligation to look at each individual case and decide for themselves if this particular defendant deserves some consideration, some compassion. It is part of their responsibility to see that people don't get trampled unnecessarily by the law. Are there extenuating circumstances in the case? Is crime an anomaly in this person's life? Is the community better served by giving this defendant another chance?...[One young prosecutor said that decision making] shouldn't be done capriciously just because you're swept away with the power or your own self-righteousness. I know I have power and discretion, but I hope that I always approach people with the knowledge that individuals are not perfect, that people make mistakes, and that I am not perfect either. (Baker 1999: 48)

As will be demonstrated in Chapter Three, the very ethos of the juvenile court system encourages an individualised approach to justice for juveniles who are charged with the commission of a crime. Indeed, it is not surprising that prosecutors consider cases on an individualised basis if one assumes that their own personal ethical code and notions of compassion, justice, and fairness, along with those instrumental values shared by all prosecutors, will influence their perception of their role and subsequently their decisions about juvenile offenders. It is conceivable then that, as suggested earlier, prosecutors' sense of moral justice (as determined by their own perceptions of their role, by society's expectations of them, and by prosecutorial and

personal values) and their pursuit of legal justice are very closely intertwined. The way in which they regard a particular case and a particular juvenile offender will almost certainly affect the way in which they attempt to see that legal justice is done. This idea will be revisited in Part Two of this thesis. However, an important point to reiterate at this point is that prosecutors may not act to secure their desired outcome if this conflicts in any way with the substantive law, and with the determination of legal justice. However much a prosecutor might sympathise with (or, likewise, be repulsed by) a particular juvenile offender whose case he or she is reviewing, any and all actions decided upon by that prosecutor must be legal.

In some respects, this idea that prosecutorial constructions of juvenile offenders affect prosecutors' job performance and their decision-making processes is rooted in the discourse of general concepts, as described by Rickert and elaborated upon by Max Weber. Rickert has written extensively on the problems individuals may face when trying to make sense of a world comprised of infinite multiplicities of disparate phenomena. The human mind, in Rickert's estimation, is simply not equipped to handle so many divergent possibilities of interpreting the sensory or physical material before it. He contends that in trying to achieve any knowledge, the primary aim therefore ought to be the elimination or reduction of these infinite multiplicities, and as he suggests,

[t]his is accomplished by concepts. They reduce the mass of facts representing the empirical world to proportions which the mind is equipped to handle. (Rickert 1986: 2)

In Rickert's view, phenomena are grouped together and designated as particular concepts depending upon the observer's or social actor's individual point of view. The standards of selection appropriate or logical in one person's perspective may be wholly nonsensical to another individual. Nonetheless, in one way or another, there

will be some shared aspect of a number of different phenomena, one feature which will link seemingly unrelated things or people together by virtue of the fact that to the individual in question, those common features are crucial. Therefore the formulation of most concepts hinges upon

the selection of those empirical elements which are *common to many* concrete phenomena...(Rickert 1986: 4)

In other words,

a general concept is the short, but vague, holistic version of what a person has in mind when he asserts, one after another, the occurrence of several things in a certain combination...[it] is equivalent to a set of statements. (Rickert 1986: 5)

Concepts are formed, according to Rickert, initially

as a clarification of the meaning of the terms occurring in everyday discourse, i.e., as a precise specification of the mental image evoked by the use of such a term. (Rickert 1986: 5)

This particular way of understanding concepts as constructs which are grouped or defined in a particular way so as to help individuals make sense of and interpret commonly used everyday language is especially relevant in appreciating prosecutorial constructions of, and conceptualising about, juvenile offenders. Prosecutors may use everyday vernacular to describe juvenile offenders, such as 'evil,' 'sophisticated,' 'just a kid,' or 'serious'. To them, however, those words and phrases are indicative of particular concepts within a particular conceptual framework they have created to assist them in making sense of juvenile offenders. As previously explained, they are symbolic. In other words, prosecutors may say that a juvenile offender is 'sophisticated,' but they may mean something else, something which is crucial to their understanding and construction of that offender and subsequently to the decisions they make about that offender.

In theorising about prosecutorial formulations of concepts and the attribution of meaning to symbols, it may be helpful to consider Max Weber's notions of an ideal



type. By 'ideal type,' Weber was not referring to some moral ideal or to something which could be considered 'the best'. Indeed, he claimed that there could be an ideal type dictatorship or an ideal type religious sect, neither one of which would be 'ideal' in the colloquial sense of the word. The ideal type, then, is a particular kind of abstraction, stating the case where a normative or ideal pattern is perfectly complied with, consistent with the perception of what is 'ideal' from the point of view of the actor, not that of a casual observer. Consequently,

It does not describe a concrete course of action, but a normatively ideal course, assuming certain ends and modes of normative orientation as 'binding' on the actors. It does not describe an individual course of action, but a 'typical' one – it is a generalized rubric within which an indefinite number of particular cases may be classified. But it does describe...an 'objectively possible' course of action. It contains, within the logical requirements of the relevant frame of reference, all the necessary properties or features of a concrete act or complex of action. (Weber 1964: 13)

Likewise, prosecutors as both individuals and as members of the prosecutorial groups may construct a pre-conceived ideal type of crime, or an ideal type of offender, and this 'ideal type' may indicate to them a 'normatively ideal course, or those 'objectively possible' courses of action from which they may choose without risking censure. Indeed, it is the contention of this thesis that, based upon the meanings that they attribute to the symbols proposed above, prosecutors may identify juvenile offenders as one (or more) of six ideal types (or, to use Rickert's terminology, six concepts) and that this specific prosecutorial construction of the offender will impact upon prosecutorial perceptions of and decisions about an offender's just deserts. The six prosecutorial ideal types (or conceptions) of juvenile offenders which have been uncovered through the current research endeavour and which will be explicated further in Part Two of this thesis by drawing upon prosecutors' own words and explanations may have to do with the offender's past history ('goodness' or 'badness'), his or her maturity level (being designated as 'child-like' or 'adult-like'),

and rehabilitative prospects (salvageability or disposability). Part Two of this thesis will explore in greater detail these prosecutorial concepts in the context of the way prosecutors symbolically describe juvenile offenders and the ramifications which these particular descriptions and the designation of particular levels of moral and legal culpability may have for prosecutorial decision-making.

Before introducing these prosecutorial ideal types or concepts in any detail, these moral assessments about juvenile offenders must be understood within their uniquely prosecutorial context. In other words, concepts such as ‘good’ or ‘bad’ may appear to have a generally agreed upon meaning, what Rickert referred to as the everyday discourse. However, when utilised in the context of prosecutorial constructions of juvenile offenders, they are designated in a very specific way in order to convey particular prosecutorial notions and meanings of what constitutes ‘good’ or ‘bad’ characteristics and what the legal and moral implications of these meanings may be. What one person may view as indicative of a label of ‘good’ or ‘bad’ may not coincide with a prosecutorial understanding of ‘good’ or ‘bad’ with regard to decision-making about juvenile offenders, not least because the symbols upon which such conceptual constructions will be based will not be interpreted in the same way by those outside the prosecutorial profession.

### ***1.5.2 Understanding Prosecutorial Constructions of ‘Goodness’ and ‘Badness’***

A prosecutorial construction of a ‘good’ or ‘bad’ juvenile offender revolves around that offender’s previously exhibited behaviour. As will be explained in Part Two of this thesis, prosecutors can only glean what they know about juvenile offenders from information they are given about those offenders from such sources as law enforcement (which, as demonstrated earlier in this chapter, necessitates a good working relationship between prosecutors and the police), juvenile intake officers

(who gather information about juvenile offenders upon arrest in the case of the former and subsequently make assessments and recommendations as they deem appropriate), school and education officials, relatives, other members of the community, and, in the case of prosecutors operating in a small jurisdiction, their own personal acquaintanceship with the offenders. In addition to these sources which suggest to the prosecutor what the juvenile offender may have been like in the past, prosecutors may also have the opportunity to observe offenders and to make determinations based not upon other people's descriptions of them but upon their own assessments of such symbolic factors as attitude, remorse, or maturity level. Exactly what constitutes a 'good kid' or a 'bad kid' for prosecutors will be presented in Part Two of this thesis. For the purposes of the present section, however, three things must be understood with regard to these notions.

Firstly, a prosecutorial construction of a juvenile offender as 'good' or 'bad' will influence how that prosecutor constructs the just deserts of the offender in question, and how decisions about that offender will be made in order to bring about the outcome which a prosecutor has determined as being morally desirable. For example, a juvenile offender who is constructed as 'good,' namely one that has been perceived as such symbolically by a prosecutor as a result of his or her demonstrated degree of remorse for the offence, strong and stable familial support, and absence of a criminal history, may be expected to be considered for diversion or other informal means of resolving the case more so than a juvenile who has been constructed conceptually as 'bad'. Conversely, a juvenile who has been interpreted as being 'bad' may be more likely to be charged as a result of the very belligerent or hostile attitude displayed, the lack of familial resources, and previous violations of the law which prompted a prosecutor to construct him or her symbolically as 'bad'. Secondly, these

prosecutorial constructions of 'good' or 'bad' are largely informed by the information with which prosecutors are presented. Prosecutors can only make sense of a juvenile offender based upon what they know about them. Thirdly, prosecutorial constructions of 'good' or 'bad' are unique, specific, and largely motivated by prosecutorial interpretations of certain symbols. If the father of a juvenile offender describes his son as a 'good kid,' this does not necessarily mean that the individual will meet the prosecutorial criteria for what constitutes a 'good kid'.

### ***1.5.3 Understanding Prosecutorial Constructions of 'Child-Like' and 'Adult-Like' Status***

The second distinction between ideal types that a prosecutor may make in constructing a juvenile offender as deserving or undeserving of punishment (and consequently of being charged) relates to emotional and chronological maturity. Thomas Szasz, an American psychiatrist who has written extensively on law and mental illness, argues that modern propensities to treat children as if they are adults has resulted in a heightened maturity level for children of younger ages:

In the United States today there is a pervasive tendency to treat children like adults, and adults like children...We should recognize the counterparts of this pattern: causing children to behave in an adult-like fashion. (Szasz 1974: 87)

Some juvenile offenders can therefore be interpreted by prosecutors as exhibiting *adult-like* behaviour, suggesting an elevated or enhanced maturity level. The prosecutorial construction of these juveniles as being adult-like presumes that their behaviour indicates that they are 'older than their years'. Prosecutorial assessments of adult-like status, like their evaluations of 'goodness' or 'badness,' are informed by what they know about juvenile offenders and the symbolic meanings which are attributed to those known characteristics. Older juveniles may be viewed as more adult-like than younger offenders, as may those who hold down a job, who have visible responsibilities, or who have left the formal schooling system. Moreover, those

juvenile offenders who are constructed as adult-like by prosecutors may be deemed more deserving of punishment since their demonstrably mature behaviour suggests that they 'know better' and are therefore more accountable for their actions. As Vito et al. noted,

if they commit adult acts, they will be treated like adults. (Vito et al. 1998: 10-1)

Consequently, adult-like juvenile offenders are more likely to be charged than those juvenile offenders who are not constructed as adult-like.

The opposite of adult-like behaviour, then, is that behaviour which implies that a juvenile offender is 'younger than their years,' that he or she is immature and incapable of making rational decisions about the consequences of 'bad' behaviour and therefore undeserving of punishment. That type of behaviour, and indeed the juvenile offender who displays that type of behaviour, may be constructed as *child-like*.

Prosecutorial notions of child-like status may be tied in to the philosophy of *parens patriae* which is enshrined in the juvenile justice system and literally means 'the State is the father' (see Chapter Three for a comprehensive discussion of the doctrine of *parens patriae* and its embodiment in the legal and structural framework of the juvenile justice system). As Vito et al. explain in their overview of the American juvenile justice system,

[t]he concept of *parens patriae* views children as easily impressed and influenced by others - they engage in criminal acts because they have been in some way negatively affected by others through inadequate care, custody, or treatment. Criminal behavior is interpreted as a sign or symptom of some problem in the child's family relationships or environment...According to this philosophy, the state acts with the best interests of the child as the primary consideration. The objective of the parental role is to care for and treat the child, rather than to punish, and thus change the child's behaviour. The philosophy of *parens patriae* encompasses the sociocultural belief that children are more innocent and impressionable than adults. It assumes that children are less responsible for their acts. (Vito et al. 1998: 8-9)

In keeping with the paternalistic notion of *parens patriae*, then, it is more likely that prosecutors will seek to deal with juvenile offenders who they construct as child-like in informal ways, rather than by charging them for their actions. Conversely, those juvenile offenders who are constructed as adult-like may be prosecuted, possibly in the adult criminal court system. As Chapter Three will demonstrate, with the establishment of the first formally organised juvenile court in Illinois in 1899 and the spread of juvenile courts to other states, jurisdiction over juveniles charged with law violations shifted from the criminal courts to the juvenile courts. However, many states recognised that in certain circumstances, some juveniles, such as those who committed serious offences, might be more appropriately dealt with by the criminal (or adult) courts. Consequently, most early juvenile codes contained provisions for transferring some types of juvenile cases to criminal courts, although the criteria used to make such decisions were often vague and subjective (see Forst 1995). It is the contention of this thesis that a prosecutor's construction of a juvenile offender as adult-like or child-like will figure prominently in his or her decision to seek a transfer to criminal court for a particular juvenile offender. The various mechanisms for the transfer of juveniles to criminal court will be discussed in Chapter Five, but generally, transfer occurs when jurisdiction over a juvenile case is turned over to a criminal court. The waiver or transfer of jurisdiction from juvenile court to criminal court is predicated upon the assumption that some juveniles (namely, those constructed by prosecutors as adult-like) are not appropriate for processing in juvenile court and may be more effectively dealt with by criminal courts. Fundamentally, it is believed that while juveniles, as a class, are treatable and therefore appropriate for juvenile court handling, particular juveniles, by virtue of their actions, do not merit the protected status given to youths in the juvenile court. Instead, protection of the community from

such youths demands that they be identified and transferred to the adult criminal justice system (see Gardner 1973; Gasper and Katkin 1980). Once a juvenile is transferred to a criminal court for trial, the juvenile legally becomes an adult and is subject to the same types of correctional responses as any other adult, including the death penalty in those jurisdictions with capital punishment statutes. Therefore, a prosecutor's moral construction of a juvenile offender as adult-like will have very real legal repercussions for the outcome of that juvenile's case. Conversely, child-like offenders will be constructed so by prosecutors who believe that because they know no better, they are undeserving of punishment as adults and instead should be treated informally. Specific criteria for constructing juvenile offenders as adult-like or child-like will be discussed in Chapter Four of this thesis, while particular strategies for the transfer of adult-like juveniles to criminal court and such means which may be sought as alternatives to prosecution for those offenders constructed as child-like and therefore undeserving of formal punishment will be explored in Chapter Five.

#### ***1.5.4 Understanding Prosecutorial Constructions of Salvageability and Disposability***

The final aspect of juvenile offenders which prosecutors must make sense of before they can make particular decisions about policy and strategy has to do with the rehabilitative prospects of the offender. When the first juvenile court in the United States was established in Cook County, Illinois in 1899, its proponents, subscribing to the doctrine of *parens patriae* described above and drawing upon the tremendous influence of a group of social reformers known collectively as the child-savers, believed that it should have a different objective than that of the criminal court. Whereas the criminal justice system may seek to punish, the juvenile court would seek to treat and to rehabilitate:

The objective was to find out why the child was misbehaving and then to use the information of the behavioral and medical sciences to assist the child in changing his or her ways. (Vito et al. 1998: 53)

Yet judges and lawmakers recognised that not all juvenile offenders would be amenable to treatment and to rehabilitation, and this recognition resulted in the creation of the aforementioned waiver provisions to have some juvenile offenders transferred to adult criminal court (as will be discussed in detail in Chapter Five). In making sense of juvenile offenders and in making decisions about their just deserts, then, prosecutors consider whether or not they will be likely to be rehabilitated and whether they will be amenable to treatment, or whether they will simply revert back to their unlawful behaviour if and when released by weighing such factors as failures at previous rehabilitative efforts, chronological age, and the expressed desire or inclination to improve.

In keeping with the terminology of the early child-saving movement, those juveniles which are constructed as *salvageable* may be deemed undeserving of punishment and prosecutors may attempt to deal with them informally through diversion programmes. Such language is far from arcane. On the contrary, agents of the juvenile court system and individuals who come into contact with and make decisions about juvenile offenders on a regular basis still use concepts of salvageability to describe the most appropriate (or likewise, inappropriate) course of action for particular offenders. Judge William J. Hibbler of the Cook County Juvenile Court, the very first juvenile court ever established in the United States under the ideal of *parens patriae*, attempts to remain faithful to the philosophy of helping children and their families while protecting the public and uses the concept of salvageability to refer to those offenders that he believes to be not yet beyond redemption:



There are some I would agree we're not able to *salvage*. But the number of kids who fit that description is so small, we'll make a mistake if we gear our whole system toward them. (Kiernan 1997: 3)

Regardless of their possible minority status, those juvenile offenders whom prosecutors construct as *disposable* may be perceived as being beyond redemption or salvation. Prosecutors may believe that there is nothing the juvenile justice system or informal means such as diversion may offer them in the way of rehabilitation, and they may be charged and, in due course, waivers may be sought to have them tried as adults for their crimes. In determining whether juvenile offenders have strong rehabilitative prospects or whether sending them to treatment or rehabilitation programmes would be nothing short of a waste of time and resources, prosecutors may consider such factors as the offenders' ages (perhaps believing that younger offenders have a better likelihood of rehabilitation) and their prior records (arguing that if opportunities for rehabilitation afforded them in the past have failed, this time should prove no different). The extent to which these factors influence prosecutorial constructions of juvenile offenders as salvageable or disposable, and the extent to which these and other prosecutorial constructions affect the prosecutorial decision-making process, will be analysed in Part Two of this thesis. In the meantime, it is sufficient to recognise that prosecutorial constructions of juvenile offenders as bad or good, adult-like or child-like, and disposable or salvageable, and therefore respectively deserving or undeserving of punishment, are uniquely subjective. Moreover, as will be demonstrated in Part Two of this thesis, the way that prosecutors understand and make sense of these juvenile offenders will determine what they decide upon as the most desirable outcome and how they will work to secure that outcome, both in terms of general prosecutorial policy and specific strategies.

## **1.6 Playing by the Rules: Prosecutorial Accountability and Checks on 'the Job'**

It is a natural expectation that given the amount of moral decisions prosecutors make about the most appropriate legal actions to seek in cases involving juvenile offenders, and given the subjective and relatively personal nature of that process, there might be some concern expressed about the propriety of prosecutorial decision-making. Jacoby has written that

[t]he public, through the elective process, created the prosecutor, and the courts endowed him with great power. (Jacoby 1980: 295)

Indeed, in the post-war years in the early part of the twentieth century, there were concerns that this power was too great, and prosecutors were subjected to criticisms about a lack of professionalism and inappropriate abuses of power. Government commissions and legal scholars writing in the 1920s and 1930s investigated the absolute powers of discretion which were available to local prosecutors and the lack of professionalism in the office of the prosecutor which was believed to be running rampant. In response to the mounting anxiety over the appropriateness of prosecutorial behaviour, the United States federal government created in 1931 the Wickersham National Commission on Law Observance and Enforcement (henceforth referred to simply as the Wickersham Commission) to study the state of criminal justice in the country. Findings by the Commission revealed that the elected nature of the office of the prosecutor often meant that prosecutors were subject to undue pressure by politicians, and that this largely influenced their decision-making capabilities. The Wickersham Commission also noted that there were inadequate checks on prosecutors to preclude abuses of power or inappropriate uses of discretion, and that the office seemed to attract, at least in general, candidates who were not

entirely qualified for the job. Specifically, the Wickersham Commission's report stated that the office of Prosecuting Attorney was generally filled by

ambitious beginners as a stepping-stone to practice [and that the insufficient checks on prosecutorial powers were] ideally adapted to misgovernment. (National Commission on Law Observance and Enforcement 1931: 65)

These criticisms failed to lead to any significant changes in the criminal justice system, yet this great prosecutorial power and the exercise of a tremendous amount of discretion is not unfettered. At this time, the decisions that prosecutors make about juvenile offenders do not go unchecked. Indeed, the very visible and democratic nature of the office of prosecutor means that prosecutors are subjected to scrutiny and their actions and decisions reviewed by a number of sources. This chapter (and indeed this thesis) suggests that there are four types of accountability of which prosecutors must be aware. These are juridical accountability, political accountability, professional accountability, and personal accountability. Not all of these may be formal sources of accountability yet they are ones which prosecutors recognise and consider nonetheless. Moreover, the type of accountability of which a prosecutor is most conscious at any given time will determine how that prosecutor chooses to justify his or her actions and decisions. This notion of *justification* is crucial to understanding the way prosecutors do their job. In setting general prosecutorial policy or in assessing the individual merits of a particular case involving a juvenile offender, prosecutors must utilise strategies or means which must be, or at the very least must appear to be, in accordance with and successfully justified with reference to some recognisable legal rule or prosecutorial value. Only through successful justification of their actions can prosecutors avoid censure from individuals or groups either within or without the prosecutorial community.

The first two types of accountability can be understood as *external* forms of answerability in that the individuals or groups of individuals who are reviewing the work of prosecutors are located outside of the prosecutorial group or community. As ‘outsiders,’ they may not necessarily share prosecutors’ interpretations of the core prosecutorial values or indeed understand the integral part that these values play in how prosecutors do their job, yet they seek to assess whether prosecutors have acted appropriately in doing their job. *Juridical accountability* refers very simply to accountability to the courts, whereby through the legal process and the remedy of appeals, the courts judge whether or not prosecutors have done their job within the bounds of the law. For the purposes of juridical accountability, prosecutors often justify their choice of policy or strategy, or indeed their construction of juvenile offenders, by highlighting the fact that they were acting lawfully and applying legal criteria during the decision-making process.

*Political accountability*, whilst also externally proscribed, does not refer to whether or not prosecutors acted appropriately according to any specific criteria. Rather, the notions of appropriateness are subjective and somewhat inscrutable, relating to whether or not the public believes that the prosecutor acted in the way that a prosecutor is expected to act in doing his or her job. This can be understood as accountability to the public. Subsequently, the public expresses their pleasure or displeasure with a prosecutor’s job performance through the voting process, and this is something of which prosecutors as elected officials must be cognisant. The members of the public whose best interests the prosecutor purports to represent have a right and to some extent an obligation to assess and determine whether or not elected officials are doing their job. For this reason, prosecutors may justify their decisions to the public by pointing to the benefits they have provided for the community, either by,

*inter alia*, incarcerating and thereby incapacitating a dangerous offender or by respectfully heeding a victim's wishes not to prosecute. The public may not agree with a prosecutor's individual decision, but insofar as a prosecutor is perceived as acting 'the way a prosecutor should act,' the public will be satisfied. Jacoby has written about this distinction between direct and indirect public involvement in prosecutorial considerations, namely that

[t]he local environment, especially the population size and demographic characteristics of the jurisdiction, affects prosecutorial policy. It shapes and colors the policy of the prosecutor and his perception of his role and influences the extent to which he selects policies not acceptable to the community he represents. It does not, however, appear to dictate the policy adopted. (Jacoby 1980: 291)

What can be inferred from Jacoby's argument, then, is that a prosecutor is conscious of the political nature of his or her office and of the political accountability to which he or she may be subjected. Yet these concerns of political answerability only influence the prosecutorial decision-making processes indirectly. A prosecutor will not allow himself or herself to be dictated to by the public on decision-making matters, yet he or she is attentive to the fact that the public is constantly monitoring the actions taken by his or her office.

A final point needs to be made about external sources of prosecutorial accountability with regard to other criminal justice or social agencies, namely that prosecutors are not accountable to these groups. They may consult the police or the probation service or turn to social services for advice on a particular juvenile offender, but they are not obligated to make decisions at these groups' request, however urgent it might be. The sharing of information between prosecutors and other groups of practitioners within the juvenile or criminal justice systems, whilst hugely beneficial at times, may be understood simply as a courtesy and not as a requirement of the job.

The latter two types of prosecutorial accountability are *internally* imposed, and the very people reviewing prosecutors' actions and decisions are prosecutors themselves. They are 'insiders,' members of the prosecutorial culture or group who presumably share, at least to some extent, an understanding of the core prosecutorial values. Therefore, the concern here is whether or not prosecutors are seen as fulfilling their role, rather than merely whether or not they are doing their job correctly.

*Professional accountability* refers to answerability to other prosecutors, where what is being judged is whether or not a prosecutor has acted in a way which is consistent with the core prosecutorial values or whether a particular decision or action flagrantly contravenes the informal prosecutorial code of ethics. Consequently, in justifying their decisions or actions to members of the same profession (be they in the same office geographically or merely collegially), prosecutors will emphasise that they have acted in the interests of justice or upheld the law. What is being expressed is that they have done their job appropriately, with the simultaneous implication that they have a full understanding of their role and of the values that attach to the fulfillment of that role.

The final type of accountability of which prosecutors must be mindful is *personal accountability*, or accountability to themselves. This type of accountability ascertains whether the decisions and the actions that a prosecutor has taken are ones that he or she can live with. Moreover, the criteria for judging these decisions are whether the actions or decisions that have been taken are consistent not just with a personal sense of morality or ethics but with that individual prosecutor's perception of the role he or she must play as prosecutor. To that end, a prosecutor may justify his or her actions to himself or herself by arguing that he or she was only 'doing the job,' that the decision was not a personal one. Yet the decisions prosecutors make are

clearly personal ones. As there is no single correct course of action for a prosecutor to take, no single correct construction of a juvenile offender, no single interpretation of the prosecutorial role, no single correct prosecutorial policy or subsequent single correct strategies upon which to rely, personal interpretations of all of the above are crucial. Legal criteria or professional standards of ethics may guide the prosecutorial decision-making process and may suggest to prosecutors which particular options they have available at their disposal in a given case, but the decisions prosecutors take are ultimately highly personal ones in that the process is wholly subjective and different priorities necessarily come into play.

The next chapter will illustrate this point more fully. Criteria for the legal assignation of responsibility of juvenile offenders will be discussed along with prosecutors' moral assignation of varying degrees of accountability. It is in considering the latter, the determinations which prosecutors make about just deserts, that it is imperative to remember that prosecutors may act in a variety of ways and that most, if not all, of these possible courses of action are technically correct or appropriate under one criterion or another. Moreover, it is in closely scrutinising not what prosecutors can do but what they believe they should do that one can hope to understand how prosecutors see themselves and what they perceive as their role.

## CHAPTER TWO:

### The Legal and Moral Assignment of Juveniles' Responsibility and Accountability

#### 2.1 Introduction

A central tenet of American criminal law is that only those individuals who are legally responsible for their actions can be legally and formally punished. Formal punishment, in other words, may only be imposed following a legal finding of guilt and responsibility. Consequently, the law makes distinctions amongst individuals on the basis of the presence or absence of certain capacities, thereby seeking to establish who is legally eligible for formal punishment. However, the law makes no moral distinctions as to who *should* be punished. Legal responsibility is, for all intents and purposes, a straightforward objective designation: an individual either is or is not presumed to be legally responsible and therefore either is or is not liable to formal punishment, respectively.

Yet within the realm of legal responsibility, there exist varying degrees of accountability which prosecutors may believe attach to an individual's actions. In other words, not all legally responsible individuals may be perceived by prosecutors as being equally morally accountable for their actions. Similarly, not all legally irresponsible individuals may be viewed by prosecutors as wholly morally unaccountable. Some offenders, by virtue of, *inter alia*, their age, their lack of life experience, or their supposed impressionability and vulnerable status, may be symbolically constructed by prosecutors as being more or less morally accountable for their actions than others. Prosecutors may make moral distinctions amongst legally responsible juvenile offenders as to who *should* be held accountable and who *should* be punished in some way. Legal liability does not automatically nor necessarily correspond to moral blameworthiness.



Professor Alf Ross, in his treatise on responsibility and guilt, has asserted that moral censure fulfills the same pragmatic function as formal (or legal) punishment and that the two means may be similarly justified by the fact that the act committed by the individual in question is deemed to be (either morally or legally) objectionable. Both legal punishment and moral censure are characterised by an expression of disapproval that a (moral or legal) rule has been breached and subsequently of disapprobation or reproach directed at the rule-breaker. This reproach, as Ross describes,

is therefore not merely a moral judgment that is passed on someone, it is at the same time itself a sanction; reproach brings suffering, or at least a measure of unpleasantness, to the person at whom it is directed. (Ross 1975: 37)

However, in keeping with the doctrine underpinning the criminal law, moral censure or reproach may not be termed formal punishment since the individuals in question are presumed by law to be ineligible for any such formal punishment. Prosecutors may make these moral distinctions on extra-legal grounds, and they may subsequently make moral determinations as to what they believe to be the appropriate levels of accountability which should attach to particular juvenile offenders. These prosecutorial moral assignments of accountability may be based in part on prosecutors' own perceptions of their role and on the criteria introduced in Chapter One, namely the prosecutorial construction of a juvenile offender as good or bad, child-like or adult-like, and salvageable or disposable. The levels of accountability prosecutors may develop in order to apply to juvenile offenders, and the ways in which they may interpret their perceived just deserts, such as educability, treatability, and punishability, serve to reflect and reinforce prosecutorial notions of (moral) just deserts and ultimately represent prosecutors' desired outcomes. Ross acknowledges that punishment is in fact a form of treatment in its own right, yet he argues that the

word 'treatment' can be used in a narrower sense to distinguish it from the 'imposition of penalties' (Ross 1975: 38). This philosophical and ideological distinction between the 'imposition of penalties,' which is believed to be most suitable for adult offenders and 'treatment,' which is viewed as the most compassionate and appropriate course of action in cases involving juveniles, is inherent in the creation of a separate system of justice for juveniles (see Chapter Three for a comprehensive discussion of the origins of the juvenile court). Yet, as will be demonstrated, such distinctions in the abstract do not preclude the existence of practical similarities between the two, and in many instances (as will be exhibited in Chapter Three), certain methods of processing juveniles in the name of 'treatment,' such as committing them to a house of refuge, may closely resemble those modes of 'punishment' meted out to adults. Nonetheless, the very fact that such tactics are utilized in the name of 'treatment,' that that is how their use and existence are justified, suggests that juveniles are amenable to, and in fact deserving of, treatment rather than punishment. Therefore, in constructing a juvenile offender as treatable rather than punishable, a prosecutor is making the determination that what is appropriate is the bringing about of some desirable change in the individual's behaviour rather than the moral condemnation of his or her actions. The irony lies in the fact that similar measures may be utilised by prosecutors in order to ensure that a juvenile offender is treated as might otherwise be used to punish another individual.

As Ross highlights,

the forms of treatment available today involve restrictions upon the "patient's" freedom or other kinds of interference, and are therefore experienced as suffering or unpleasantness - which, as we know, may assume proportions in excess of that of regular punishment. (Ross 1975: 38)

A juvenile offender whom a prosecutor has come to construct as treatable may be enrolled in a substance abuse programme or other rehabilitation facility, thereby

removing that individual from his or her home and placing him or her in what amounts to a detainment facility. That offender may consider such an action to be a form of punishment, yet to the prosecutor charged with making the decision, the distinction between punishment and treatment, as Ross asserts,

must be based on whether or not an element of disapproval is involved. (Ross 1975: 38)

In other words, whilst legal justice requires that formal punishment only be imposed after an individual's guilt and responsibility have been determined through a formal trial in a court of law, prosecutors may in fact make determinations about the punishability (or otherwise) of a juvenile offender on the basis of extra-legal factors, such as their own (and their organisational) symbolic and value-laden constructions of and beliefs about juvenile offenders. Yet as the law requires that guilt be established singularly on legal grounds, rather than potentially arbitrarily assumed on moral ones, prosecutors' justifications for the punishability (or likewise, educability or treatability) of a juvenile offender, and any consequent actions taken on the basis of such judgments (which will be the subject of Chapter Five), must be framed according to known rules in order to avoid presenting the appearance of capriciousness and subjectivity.

This chapter will therefore explore the concepts of responsibility, accountability, and punishment in the context of legal and moral presumptions made by prosecutors about juvenile offenders. Legal principles about the perceived necessity and appropriateness of differential treatment of younger offenders (albeit on the basis of capacity, not age) will be discussed. In addition to the bright-line separation of adults and juveniles, the varying levels of accountability which may attach to juvenile offenders by virtue of both their status as juveniles and the specific circumstances of their cases will also be presented. As previously alluded to, the

actual forms of accountability which may attach to juvenile offenders may appear similar at first glance (i.e. treatability may closely resemble punishability), yet they differ on the basis of the presence (to varying degrees) or absence of moral disapproval on the part of the prosecutors making these decisions. These differences and similarities will be explicated. Particular attention will be paid to societal notions about childhood and innocence and the ways in which these ideals are reflected in the criminal law, and indeed in the creation of a separate system of justice for juveniles (as continued in Chapter Three). It is crucial to recognise that such societal notions of morality not only contribute to the morality of the law, but may also serve to guide prosecutors as they make their extra-legal determinations about the relative accountability of juvenile offenders.

## **2.2 The Societal Basis of Legal Concepts: The Emergence of Legal Understandings about Childhood from Social Mores**

Prosecutorial constructions of juvenile offenders, prosecutors' own understandings of these offenders and the ways in which they make sense of them as children or otherwise, inform prosecutorial constructions of just deserts for these young offenders. These prosecutorial constructions or understandings of children and young people draw upon moral conceptions of childhood and legal conceptions of responsibility. These two closely interrelated subjects of sociological inquiry can only be thoroughly and successfully investigated in the context of one another. The German conservative statesman Friedrich Karl von Savigny asserts that

law is an expression...of the 'spirit of a people' (*Volksgeist*). This deeply mystical idea at least involves the notion that law is much more than a collection of rules or judicial precedents. It reflects and expresses a whole cultural outlook. (Cotterrell 1992: 21)

Indeed, some of the most fundamental concepts in criminal law must be considered in the context of their cultural specificity, as they are far from universal. What may be

regarded as reasonable in one society, for instance, may be deemed wholly unreasonable in other. Likewise, what may be expected of some individuals by virtue of their age in a given society may be anathema in another (for example, what may be viewed as an appropriate age of responsibility in one American state may be considered outrageously high by Britons, or indeed by residents of another American state). Roger Cotterrell, a professor of legal theory, writes that if such cultural differences are considered in the context of the different laws to which they give rise, then

[a]ll of this should warn against treating anything in legal language or institutions as self-justifying or natural. Everything about law's institutional and conceptual character needs to be understood in relation to the social conditions that have given rise to it. In this sense law is indeed an expression of culture...Law embodies important cultural assumptions and an important aspect of its influence in society depends on this. (Cotterrell 1992: 24)

Such cultural assumptions and their contribution to the creation of a particular law may perhaps best be demonstrated in an illustration of the social construction of childhood and the subsequent formation of a separate system of justice for juveniles. In order to avoid any confusion or ambiguity, it must be clarified that the terms 'child' and 'children' refer to those persons who are presumed by law to be legally irresponsible, a concept which will be elaborated upon later in this chapter. Those persons who are presumed by law to be legally responsible but who are not yet adults will be referred to as juveniles. Jocelyn Pollock (1994), who has written extensively on ethical dilemmas in the practice of criminal justice, has suggested that

[g]uilt is not assigned to persons who are not sufficiently aware of the world around them to be able to decide rationally what is good or bad...We do not judge the morality of [children's] behavior. Although we may punish a two-year-old for hitting a baby, we do so to educate or socialize, not to punish as we would an older child or adult...This is true even if their actual behavior is indistinguishable from that of other individuals we do punish (Pollock 1994: 2)

Yet any assertion that society, or a prosecutor as a member of society, does not judge the morality of children's behaviour, is erroneous. Moral judgments about children and about the meanings and predicates of childhood form the basis for social constructions of childhood and the subsequent legal constructions of responsibility and innocence. In ascribing the label of 'children' to a specific group of persons, a moral judgment is being made that certain qualities and characteristics should be attributed to that particular groups which might not be attributed to others. It is significant to understand that children are not inherently fundamentally different from other persons. Rather, they are presumed by society to be different and therefore are socially constructed accordingly. Notions about children and the nature of childhood are the products of social, cultural and political judgments about the morality of youth and those characteristics which are perceived to distinguish this particular stage of life from all others. They therefore reveal as much about the society from which they emerge as they do about the individuals they purport to describe. As James and Prout have written:

childhood is socially constructed...(I)t is conceived and articulated in particular societies into culturally specific sets of ideas and philosophies, attitudes and practices which combine to define the 'nature of childhood'. (James and Prout 1990: 1)

In other words, a society's notions of what it means to be a child and what predicates ought to be associated with children and with childhood form the social constructions of childhood for that particular society. There are no right or wrong ways to construct children or childhood. Gennaro F. Vito and his colleagues at the University of Louisville concur with this social constructionist view of the nature of childhood:

Childhood and our beliefs about children are sociocultural constructs. That is, they are generated by a group of people at a given period in history. They are not absolutes. They change as people, societies, and the experiences and circumstances of members of societies change. These conceptions of what children are, how they should act,

and how they should be treated have gone through a series of changes throughout history. (Vito et al. 1998: 4)

What is conceivable, then, is that the periodic shifts in the social construction and reconstruction of childhood are reflected, at least in some measure, in changes made to the criminal law, as well as in prosecutors' personal (and organisational) sense of morality.

### ***2.2.1 The Principle of *Parrens Patriae* and the Societal (and Legal) Urge to Protect***

In different historical contexts and to differing ends, American society has constructed children in different ways. During colonial times, the handling of children was dominated by the belief that a child was a creature whose tendency to mischief and sin must be repressed by careful moral training, education, and discipline (see Empey 1982). Children and servants were viewed in the same manner in this regard. The family had the responsibility for ensuring that they conformed to social norms. If the family failed, the church or the community intervened through the use of publicly applied punishments and sanctions. The Massachusetts Stubborn Child Law, enacted in 1646, detailed severe punishments for youths who were disobedient towards their parents, for rude or disorderly children, and for children who profaned the Sabbath (see Powers 1970: 9). Whipping was the most commonly applied punishment, and parents could be fined if their children were found guilty of stealing (see Thornton et al. 1982: 8). Incurribility was viewed as a capital offence for certain children. The Connecticut Blue Laws of 1650 contained the following legal remedy for such behaviour:

If any man have a stubborne and rebellious sonne of sufficient years and understanding which will not obey the voice of his father or the voice of his mother, and that when they have chastened him will not harken unto them, then may his father and mother lay hold of him and bring him to the Magistrates assembled in Courte, and testifie unto them that their sonne is stuborne and rebellious and will not obey

their voice and Chastisement, but lives in sundry notorious Crimes, such a sonne shall bee put to death. (Cole 1974: 13)

Work was the chief activity of Puritan children, and they were introduced to it early in life. The Puritans brought the apprenticeship system with them from England, but gradually the more affluent families abandoned its use for their own children in favour of schooling. There were few dependent or homeless children as social control of *all* children was handled within the family or the local community. Methods of controlling children throughout the American colonies were similar to those used in New England, although the other colonies had no special punishments or laws that applied only to children. Youths involved in serious offences received the same penalties as adults and children could be put to death for certain offences.

Disobedience to parents was regarded as evidence that a child was on the path to a life of waywardness and sin. Benjamin Wadsworth, author of a popular treatise on child rearing published in 1712 entitled *The Well Ordered Family*, noted:

When children are disobedient to parents, God is often provoked to leave them to those sins which bring them to the greatest shame and misery...When persons have been brought to die at the gallows, how often have they confessed that disobedience to parents led them to those crimes. (Rothman 1971: 16)

Execution sermons were used as a powerful warning to all citizens of the consequences of sin, and executions of children had particular significance for the young. On one such occasion in Connecticut, the minister stated the message clearly:

Let all children...beware of disobedience...Appetites and passions unrestricted in childhood become furious in youth; and ensure dishonor, disease, and an untimely death. (Rothman 1971: 17)

During the Colonial period, the emphasis on a strong family life, religion, and the work ethic fostered a climate of rigid social control of children. Beginning in the mid-nineteenth century, however, changes in American life created new conditions, needs, and problems.



During the nineteenth century, the United States experienced an expansion in population that made the closely knit family life of small towns and communities during the Colonial period difficult to maintain (see Empey 1982; Rothman 1971). After the American Revolution, waves of immigrants from Europe came to the new country and settled predominantly in the urban centres of the Northeast and the Midwest. Between 1850 and 1900, the urban population increased by seven hundred per cent (see U.S. Bureau of the Census 1999). Those in positions of control viewed the resulting overcrowding, poverty, and crime with alarm, feeling that the ideals of stable family and community life were threatened (see Chapter Three for a more detailed discussion of life and social sentiment in nineteenth-century urban Chicago). Children who lived in crowded city tenements could not be assigned the types of daily work so readily available in rural settings. Their idleness, lack of ambition, and neglected moral training alarmed those in power. Juvenile lawbreakers were arrested, housed, tried, and imprisoned with adult criminals, creating conditions of sexual exploitation of these youths and fostering their schooling in crime. As the number of homeless children increased, the need to provide for their care and supervision promoted one of the key movements in the history of the control of juvenile offenders, the creation of houses of refuge (see Chapter Three for a discussion of houses of refuge). The movement towards compulsory education was also important in differentiating childhood and adolescence as distinct life stages. Massachusetts and New York passed compulsory education laws early in the nineteenth century, and by the century's end, compulsory public education for those between the ages of six and sixteen years was the law in many states (see Bakan 1982: 30-1). Public school officials enforced attendance laws and had the right to suspend, expel, or punish students for improper behaviour. Compulsory schooling removed young people from

their homes and the influence of their parents for long daily periods and brought them under the authority of the State. Laws prohibiting child labour, promoted by the newly organised labour unions, were ineffective at first, but gradually resulted in a substantial reduction in the number of children used in factories and mines, reaffirming the notion that childhood should be devoted to activities different from those of adult life.

Although the creation of houses of refuge and orphan asylums resulted in the removal of many homeless and 'uncontrolled' children from the public eye, these institutions were incapable of handling the growing number of youths in the crowded cities who, in the eyes of the middle class, presented a serious threat to the public welfare by their idleness, poverty, and criminal activity:

The low level of 'morality' of the new occupants of the burgeoning cities was a matter of frequent comment. Drinking, sexual immorality, vagrancy, and crime were not only intrinsically threatening to orderliness, but were also particularly distressing influences on the young. The rapid breeding, the continuing threat of 'street Arabs,' evoked a cry that the State intercede in restraining and training the young. (Bakan 1982: 29)

At the same time, social forces were set in motion to separate and differentiate juvenile offenders from adults (see Chapter Three for more detailed information on the child saving movement and on its contribution to the creation of a separate system of justice for juveniles). The concept of a 'juvenile delinquent' as a distinct entity began to emerge. In the latter years of the nineteenth century and the early part of the twentieth century, children were constructed anew as innocent young beings who were ignorant of evil and who only ever acted inappropriately as a result of undeveloped (or underdeveloped) judgment or manipulation by an adult. Childhood was regarded as a time of innocence and vulnerability, a time when children needed to be protected from their own inability to reason, naïveté, and potential impressionability. These conceptions of childhood gave rise to the principle of *parens*

*patriae*, which proceeded to underpin the very foundation of the juvenile justice system (see Chapter Three for an analysis of the legal origins of the doctrine of *parens patriae* and its subsequent interpretations by the courts). *Parens patriae* literally means ‘the State is the father’ and highlights the belief that children, as previously described, are in need of quasi-parental intervention (and something resembling paternalistic protection) on the part of the State:

According to this philosophy, the State acts with the best interests of the child as the primary consideration. The objective of the parental role is to care for and treat the child, rather than to punish, and thus change the child's behavior. The philosophy of *parens patriae* encompasses the sociocultural belief that children are more innocent and impressionable than adults. It assumes that children are less responsible for their acts. (Vito et al. 1998: 9)

The doctrine of *parens patriae* and the societal notion that the State has not only the right but an obligation to protect and care for delinquent children was ultimately embodied in the creation of the first juvenile court in 1899 following the contributions of the highly vocal and persuasive child savers. The belief was that

[r]ather than seeking to punish and control juveniles...juvenile courts should and could provide the means by which the State could truly fulfill the mission of *parens patriae*, and take “the role of a wise and loving parent”...In lieu of the punitive concept, proponents believed that “the care, custody, and the discipline of the child should approximate as nearly as possible that which should be given by his parents”. The objective was to find out why the child was misbehaving and then to use the information of the behavioral and medical sciences to assist the child in changing his or her ways. (Vito et al. 1998: 53)

Upon its creation, the juvenile court exercised jurisdiction over children who were younger than sixteen years and who were found to be dependent, neglected, and delinquent, conditions which were all believed to be brought on by the undue negative influence of adults. Although the jurisdictional boundaries have shifted somewhat over the years, the juvenile justice system continues to incorporate a distinctly different terminology from that of the criminal justice system (see Chapter Three for a more detailed discussion of the differences between the juvenile and adult justice

systems). The belief that children are different has translated into the practice of adjudicating and imposing disposition upon them, rather than trying and sentencing them. Additionally, juvenile records are sealed in many jurisdictions in an attempt to protect the innocence of young delinquents. There is also in some jurisdictions an aggressive drive to divert as many juvenile offenders as possible in order to preclude their possible stigmatisation and the potential serious consequences such labelling may have in the future. As Vito et al. describe:

Diversion is the process of limiting the amount of involvement a juvenile has with the formal organization and procedures of the criminal and juvenile justice systems. Diversion is based on the belief that if a juvenile is labeled as "delinquent" or "bad" he or she will be permanently stigmatized. In order to avoid long-term negative consequences for juveniles, diversion programs seek to avoid labeling and to work with juveniles to rehabilitate them. (Vito et al. 1998: 12-13)

Once again, the emphasis of this aspect of the juvenile justice system appears to be the treatment and rehabilitation of children and juveniles rather than their punishment. However, the juvenile court has recognised that not all young offenders should be diverted, that they are not all innocent and treatable, and that some may have committed certain acts or exhibited certain tendencies which may render their 'special' status obsolete. In more serious cases, consequently, juveniles may be tried as adults in criminal court. The particular circumstances which would be called for will be investigated more closely in Chapter Five as part of an overview of the juvenile justice system and the options available to prosecutors. What is important for the purposes of this chapter, however, is the over-arching recognition that, unless rebutted by something strongly resembling incontrovertible evidence, children and consequently juvenile offenders are considered by the majority of society, and subsequently possibly by prosecutors as well, to be morally innocent and in need of protection rather than punishment.

### ***2.2.2 The Age of Responsibility: An Amalgamation of Social Conceptions of Childhood and Legal Conceptions of Capacity***

A later section of this chapter will delve into principles of legal liability and explore the justifications behind imposing formal punishment only on those individuals who are presumed to be capable of forming criminal intent. What must be recognised at this preliminary stage, however, is the close interrelationship between such legal presumptions and societal conceptions of childhood. As demonstrated in the brief overview of the origins of the juvenile court, legal rules involving juveniles and children may be a culturally specific reflection of a society's beliefs about this group at a given point in time. The intermingling of law and morality is prevalent in issues of age and responsibility. Social mores and perceptions of moral right and wrong inform to a great extent legal, and subsequently prosecutorial, understandings of responsibility and justice. Consequently, it is imperative to consider how and why social mores have contributed to the drawing of a bright-line distinction between this group and others, and why such a generalisation may be detrimental to the prosecutors entrusted with dealing with juvenile offenders.

The law is far-reaching. The people it affects are simply too numerous to count. Many cases go through the court system in the United States each year, and an even higher number of cases never proceed further than the police station. With such a formidable throughput of cases to contend with, prosecutors cannot possibly be expected to assess whether each specific offender possesses the mental conditions necessary to be deemed capable and therefore legally liable for his or her actions (these concepts will be elaborated upon in a later section of this chapter). The law recognises this particular shortcoming and has attempted to solve the 'problem' using generalisations about particular groups of people and particular issues:

(T)though the law approximates in its doctrine of the mental conditions of responsibility to what the moralist requires for moral blame, it is an approximation only and not a complete convergence. One reason why this is so is that the law has to compromise with a number of different claims, besides the claim that liability to punishment must be dependent on a voluntary responsible act. Proof of mental elements – especially to juries – is a difficult matter, and the law has often abandoned the attempt to discover whether a person charged with crime actually intended to do it, and has used instead certain presumptions, such as that a man intends the natural consequences of his action, or has used what are called objective tests, so that it is enough for conviction that an ordinary man who behaved as the accused did, would have foreseen certain consequences. (Hart 1968: 174-5)

One such presumption is the age of responsibility. In order to be able to conduct the practice and enforcement of criminal law more efficiently and with less uncertainty, legislators in the United States have drawn a line at which legal liability becomes an issue. This line is unambiguous in that it unequivocally states the age at which persons can be held legally liable for their actions. The presumption behind this age of responsibility is that *all* persons below that particular age (for instance, younger than ten years) lack the necessary mental elements to form *mens rea* and therefore cannot be held legally liable for their actions. Likewise, the concurrent presumption is that *all* persons who have reached that particular age (for instance, ten years or older) do possess the necessary mental conditions to form *mens rea* and may therefore be held legally liable. As eminent legal theorist H.L.A. Hart posits:

Such exemption by general category is a technique long known...for in the case of very young children it has made no attempt to determine, as a condition of liability, the question whether on account of their immaturity they could have understood what the law required and could have conformed to its requirements, or whether their responsibility on account of their immaturity was ‘substantially impaired’, but exempts them from liability for punishment if under a specified age. (Hart 1968: 229)

It must be reiterated at this point that not all persons who have reached the age of responsibility *will* necessarily be held legally liable for their actions. The fact that they have attained that age only signifies that they *may*, if deemed morally

accountable, be held legally liable. If they have attained that age of responsibility then they are not automatically exempted from legal liability. The age of responsibility, then, functions primarily as a type of *eligibility criteria*: only those persons who have reached that particular age may be eligible to be held legally liable to formal punishment. The age of responsibility answers the questions of who *can* or *cannot* be held legally responsible, while determinations of moral culpability attempt to answer those questions of who *should* or *should not* be held legally (or morally) responsible. As Philip Selznick asserts in his account of the nature of community,

[i]t is not that law and justice *must* coincide in any specific case. Clearly they often do not. (Selznick 1992: 444)

In other words, those children who have not yet reached the age of responsibility may not be put on trial for their actions, and may not be formally punished by law (for reasons articulated in a later section of this chapter). Those juveniles who have attained the age of responsibility will be symbolically constructed and interpreted by prosecutors as their just deserts are assessed, as determinations are made as to what consequences for their actions they morally and legally deserve. As introduced in Chapter One, and as will be explored further in Chapter Four, prosecutors are both entitled and encouraged by law to exercise their discretion in determining the best course of action in a given case involving a juvenile offender. This ‘best course of action’, which may otherwise be viewed as their perception or interpretation of the ‘right’ thing to do, is arrived at after considering not only what might be in the best interest of the offender in question but also the needs of the community they serve.

The subjective nature of community is particularly significant in this context since the drawing of the seemingly arbitrary line of responsibility at a specific age reflects, at least to some extent, that society’s notions of justice and morality. In the United States, the age of responsibility varies from state to state. Clearly, then, the

decision surrounding the age at which the line is drawn is a moral one which draws upon the sense of morality of the particular community being represented. In other words, while the age of responsibility does not give a formal indication of who should be considered morally culpable and who should not, it does so in an informal way. It is, at least in part, a reflection of society's sense of morality and who, according to society, should be held morally culpable. The implication is that *legal responsibility is a social construction*: an individual is deemed to be responsible at a particular chronological point in a given society because that society has decided upon that chronological point at that period in time.

Not all societies will have the same beliefs and notions regarding childhood, innocence and responsibility. A state with an age of responsibility as low as ten years may be expected to possess certain beliefs about the maturity levels of children's behaviour and of the perceived need to deal with even relative youngsters harshly if they break the law, as these very young individuals are presumed to 'know better'. On the other hand, a community with an age of responsibility as high as eighteen years may have quite contrary views as to the maturity levels of teenagers. Members of this latter community may believe that adolescents are still too young to be held formally accountable for actions which they may be ill-equipped to have thought through 'properly'. Those societies with an age of responsibility drawn somewhere in between these two extremes can be expected to have a view of childhood which is partially favourable to leniency and tolerant treatment of juveniles and partially retributivist in its orientation. Similarly, the period raising or lowering of the age of responsibility may signal a shift in the public's opinion of juveniles, either towards greater forbearance or towards increased punitiveness. It stands to reason, then, that a prosecutor as a member and representative of a given community will be informed at



least in part by that community's views on the nature of childhood (see Chapter Four for further debate on communitarian influences on the prosecutorial decision-making process).

### ***2.2.3 The Paradox of Contemporary Childhood: Are They or Are They Not (Morally) Innocent?***

As suggested previously, that children have been constructed as helpless, guiltless creatures, and that the criminal law has been laid down in such a way that the legal construction of responsibility reflects at least in part this social construction of childhood, reveals as much about the society holding these beliefs as it does about the nature of children. Children are not faultless, nor incapable of evil; they are not morally innocent. They are capable of malice, of deception, of premeditation. They set fires, shoot classmates, batter playmates. Seven widely publicised school shootings occurred within a nineteen-month period in 1998 and 1999, including incidents at Columbine High School in Littleton, Colorado (leaving thirteen dead and twenty-three wounded) and Jonesboro, Arkansas (leaving five dead and ten wounded). Granted, these actions comprise a relatively small proportion of the total crimes committed in the United States and, indeed, are committed by a relatively small proportion of all children. Nonetheless the unlawful activity that has been committed by children has served to rebut the societal and legal presumptions that they are morally innocent. It is this contradiction which prosecutors must reconcile. They must determine how best to deal appropriately with children and juveniles whom society and the law would like to see as innocent, but who clearly are not. It is the contention of this thesis that they, like the rest of society, make moral judgments about children. They respond to such a predicament by making moral evaluations about their just deserts, about what would constitute an appropriate legal outcome, and then proceed to apply legal principles so as to bring about that desired outcome.

What makes such moral designations somewhat problematic for prosecutors is the notion that at the heart of prosecutorial constructions of childhood and of juvenile offenders is the belief that children are in some way or another different from adults, the very belief which, as previously mentioned, gave rise to the inception of the juvenile court (further discussed in Chapter Three). This is evidenced by the very fact that there is a separate label attached to such a group of younger persons than there is to a group of older persons. Age is a criterion for making not only moral judgments about members of society but legal judgments as well, and as such, persons of different ages are presumed by society to be distinct from one another. The drawing of a line at which the law presumes people become endowed with all the necessary capacities to be legally responsible for their actions suggests that chronological age is a basis for legal responsibility. Yet not all persons of the same chronological age are at the same stage of mental, physical, or psychological development. The law presumes that there is a cut-off point at which individuals cease to be incapable and become capable, and therein lies the contradiction. Chronological age may be completely unrelated to the gaining of these capacities. It is naïve to presume that an individual one day shy of his or her tenth birthday is incapable of reasoning, of weighing the benefits and drawbacks of particular actions and of acting upon a rational decision, whilst an individual who is one day older and who has reached his or her tenth birthday is automatically endowed with these capabilities. The law can therefore be seen as making seemingly arbitrary links between chronological age and legal responsibility. Selznick argues that this is somewhat inescapable, that

[b]ecause all law is based in part on convention and political will it always contains an arbitrary element...this arbitrary element, although necessary and inevitable, is repugnant to the sense of justice.  
(Selznick 1992: 445)

What results, then, is a discrepancy, because not all persons who have reached the age of responsibility will possess the necessary capacities that the law presumes them to possess, and some persons who are still shy of the age of legal responsibility will appear to possess the necessary capacities yet will not be legally liable to punishment. Some adults will be incapable of making their own decisions and of forming proper mental elements to be held legally liable for their actions, whilst some young children will behave in such a precocious manner that it might be assumed of them that they are able to reason through their actions. The age of responsibility is a generalisation, and where most if not all generalisations fall short is that not all persons neatly fit within the categories into which they are universally located. In other words, not all children are incapable of reasoning and decision-making skills and not all adults are capable of them. There are those children who act 'older than their years' and those adults that act 'like children' (what has been referred to in Chapter One as *being adult-like* and *child-like*, respectively). The very existence of such colloquial phrases suggests that generalising certain behaviours based on chronological ages is a common phenomenon, and it is. Anthropologists, in fact, utilise the term 'age grade' to refer to a particular range of chronological ages of which certain behaviours or actions signifying rites of passage are expected (see Whiting and Whiting 1975). Likewise, it is expected, at least by modern Anglo-American standards, that persons of certain ages will conform to certain 'age-appropriate' behaviours. However, those 'age-appropriate' behaviours are social constructs, not universal or biological imperatives, and consequently it is not always true that people will necessarily 'act their age'. Some persons do not conform to society's expectations or notions of 'age-appropriate' behaviour. There are those children, for instance, who hold down jobs, look after their siblings, and undertake the

necessary housekeeping chores in their parents' absence, where typically those behaviours might be expected of adults. Similarly, there are those adults who are child-like, who need to have simple chores done for them, who need help making simple decisions, and who are unable to secure and maintain gainful employment.

Clearly, childhood is not a matter of chronology. Any assumption that persons' abilities can be classified according to their chronological ages is flawed. Statements about twenty-eight-year-old individuals being more capable of rational thought or having greater knowledge or depth of perception than twenty-seven-year-olds would be dismissed as absurd, yet there is equal absurdity in stating that ten-year-olds are similarly more capable than nine-year-olds (or indeed, that ten-year-olds are capable whilst nine-year-olds are not). What makes these statements so incongruous is that chronological age does not bring with it certain qualities or characteristics. Birthdays do not carry certain new skills or new abilities. Rather, these new skills and abilities are learned through a combination of time, experience, making mistakes, observing others, and finally stumbling forward. These are where societal notions about childhood originate. It is assumed that because they are so young, children have not yet had the time nor the experience to sufficiently observe others, nor to glean from their own mistakes what needs to be remedied for the future. Yet society does not call children *incapable* because they lack these features; it calls them *innocent*. Moreover, it presumes that with time, experience and all the rest will fall into place. The law, on the other hand, which refrains from labelling them as innocent and chooses instead to refer to them as incapable, assumes that 'it' (namely the capacity to form the necessary mental elements) will all fall into place simultaneously when a particular birthday is reached. This creates a problem for prosecutors.

The problem is that the legal presumption of responsibility (or otherwise) and therefore of punishability (or otherwise) may be incompatible with prosecutorial moral presumptions of accountability and prosecutorial constructions of just deserts. These just deserts may be either legal or moral in nature, and indeed, Ross asserts that legal concepts and moral views may be closely intertwined. Both, in fact, serve to establish some sort of norms for human behaviour:

[o]n the one hand, moral attitudes and ideas are built into law and legal concepts; and on the other, ...elements of legal structure enter into morality: morality too has its accusations, trials, judgments and sanctions. Indeed, when all is said and done, morality is, just like law, a means of guiding human behaviour. (Ross 1975: 1)

Yet despite the close interrelationship between morality and the law, between moral and legal assignments of responsibility and accountability, prosecutors must consistently operate within the confines of the law. They may not seek to punish formally those who are not presumed by law to be legally punishable, and they may not legally excuse those who are presumed by law to be legally liable for their actions. Any formal punishment may only be applied following a finding of guilt in a court of law, and as will be discussed shortly, certain individuals presumed by law to be incapable of committing offences are exempted from being tried in a court of law. However, there are informal options available to prosecutors should they opt to hold an under-age offender (one who is younger than the age of responsibility and therefore not presumed by law to be legally liable and formally punishable) accountable. Similarly, there are alternatives available to prosecutors which would allow them to hold those juvenile offenders who are legally liable accountable through means other than formal punishment, to otherwise express their moral disapproval without the imposition of sanctions. The decisions to employ one or more of these alternatives, it must be recognised, must be justified along legal lines rather than for their extra-legal merit. The decisions prosecutors make about the just deserts

of a particular juvenile offender rest upon prosecutorial constructions of accountability, and these are in turn informed by legal principles of responsibility and moral assignations of culpability

### **2.3 Ascertaining Who *Can* Be Held Responsible: Principles of Legal Liability**

Principles of legal liability which indicate to prosecutors who can and who cannot be held legally responsible for their actions serve a key function in criminal law.

Whichever cultural specific differences may exist amongst various states and communities, American society has a normative system of rules and laws in place to govern individuals' behaviour. This normative system of acceptable and unacceptable forms of action

means that its commands are in fact obeyed by and large by the members of that society, and that the members of the society fulfill the demands because they feel *bound*, or *obliged*, to do so...It is therefore part of the binding nature of a normative system that to brand an act as a breach of that system, as an offence, is not simply to make a statement about something that has happened, but also to demand that this act be met with disapproval and ill will. It would simply be a contradiction to say: you have acted immorally, but I do not disapprove of what you have done, nor do I expect others to do so...someone incurs guilt through his offence. It is that he has thereby brought himself into the situation where, by virtue of the normative system that he has violated, he is to be shown ill will in the form of disapproval or more tangible reactions. He owes it to society, one might say, and especially to the injured party, to be subjected to their ill will and to afford them an outlet for their anger. (Ross 1975: 5-6)

What is meant by an individual 'owing it to society' when he violates the normative system of rules and laws is that when an offence is committed, the person who has committed the offence must be held legally responsible and therefore legally liable to punishment:

When someone is held responsible it is always on the grounds that someone has contravened a certain normative system, one something reprehensible or prohibited, and which therefore prompts the reaction in which being held morally or legally responsible consists. The first step in this reaction is to call the person responsible to account, to

demand a more detailed explanation from him of what has taken place. If this leads to the assumption that *a number of conditions*, the *conditions of responsibility*, are fulfilled, the accused is found guilty and liability established: he receives censure or, in the legal context, is sentenced to some kind of punishment, compensation, or other form of sanction. (Ross 1975: 13)

By specifying certain conditions that must be met in order to be considered legally responsible or legally liable, the law seeks to ensure that only those persons who *should* be punished will be punished. H.L.A. Hart has written that

if punishment is to be justified at all, the criminal's act must be that of a responsible agent: that is, it must be the act of one who *could have* kept the law which he has broken. (Hart 1968: 160)

This idea of punishing only those persons who could have exercised rational thought and free will before acting seems to suggest that a sense of justice hinges on some mutually agreed upon set of circumstances between members of a society. Pollock, indeed, defines *justice* as being

only concerned with rights and interests in public interactions and in the interface between the individual and the government. Justice does not dictate a perfect world, but one in which people live up to agreements and are treated fairly. (Pollock 1994: 50)

The corollary to this definition is that a just outcome is a legal outcome which is proportional to the offence (although prosecutorial constructions of fairness and their understanding of moral justice will be explored in greater detail in Part Two of this thesis). Consequently, it is legally just that only those persons who truly deserve to be punished under the law should be formally punished. As Pollock writes,

justice concerns...offenders getting what they deserve...The difficulty, of course, is in determining what are 'just deserts'. (Pollock 1994: 50)

It must not be assumed that persons who are innocent in the sense that they did not willingly bring about an action are also innocent in the sense that legal liability cannot attach to them. Both Hart and Ross are cautious in highlighting this distinction. Hart states that a 'responsible' agent and one who is 'legally liable' are not one and the same:

(T)hough the abstract expressions 'responsibility' and 'liability' are virtually equivalent in many contexts, the statement that a man is responsible for his actions, or for some act or some harm, is usually not identical in meaning with the statement that he is liable to be punished or to be made to pay compensation for the act or the harm. (Hart 1968: 216-7)

The word 'responsibility' may mean a number of different things. Hart discusses four different senses of the word, one of which he calls *causal responsibility*. Causal responsibility, according to Hart, can be used to describe a person whose actions or omissions have brought about or resulted in a certain outcome. Ross refers to this concept as 'bearing responsibility,' which he defines as referring to the individual who can be *rightfully brought to account* for doing the 'wrong' deed, the *actus reus*. A nine-year-old boy, for instance, who has broken a neighbour's window, could be said to be responsible in the *causal* sense or to bear the responsibility; by throwing a rock through the neighbour's window, he has caused it to break. However, legal sanctions could not and should not, according to Hart, be imposed on the boy because according to principles of legal liability, he is not responsible in the *legal* sense (what Ross refers to as 'being responsible,' or being the person who can be *rightfully sentenced* for it). Based on criteria which will be discussed below, the law has determined that the child described is presumed to be exempt from formal legal punishment. This does not preclude the use of alternative informal means in which prosecutors could hold the boy accountable for his actions and express their moral disapproval or censure his actions. The boy might be made to compensate his neighbour for the damages by doing odd jobs. However, any form of penalty or reparation involving this young boy would be handled informally, as only those persons that meet certain legal criteria may be held legally liable and may be formally punished for their actions. These criteria are set out by certain legal rules.



Hart explains that unlike causal responsibility, *legal responsibility* or *legal liability* is something to which individuals are subjected only because the legal rules so provide:

To say that someone is legally responsible for something often means only that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities. The expression 'he'll pay for it' covers both these things. In this the primary sense of the word, though a man is normally only responsible for his own actions or the harm he has done, he may be also responsible for the actions of other persons if legal rules so provide. Indeed in this sense a baby in arms or a totally insane person might be legally responsible – again, if the rules so provide; for the word simply means liable to be made to account or pay and we might call this sense of the word 'legal accountability'. (Hart 1968: 196-7)

In other words, legal responsibility, as previously suggested, is not an inherent quality in individuals but rather the product of a social construction. Six-year-old children (or similarly, others younger than the age of responsibility) may not be considered legally liable, not because they are by their very nature or because of some innate quality not legally liable, but because legal rules provide that they may not be held legally liable. These legal rules may be a reflection of society's expectations of these particular persons, as discussed above, as well as of certain cultural notions of justice. Nonetheless, it is only because these expectations of what is right or what is just, or indeed who is innocent, have been codified in law that they are legally binding.

### ***2.3.1 The Principle of Mens Rea and Issues of Capacity: Legal Rules Rooted in Moral Ideals***

It has been argued throughout the earlier sections of this chapter that children younger than the age of responsibility in a given society could not be held legally liable for their actions, and that this decision to designate (or otherwise) legal liability is, at least to some extent, a reflection of society's expectations of particular persons (as 'children' and 'adults') and specific ideas about the meaning of justice. However, the law does not frame legal principles in such a way. It does not distinguish between

those who can be held legally liable and those who cannot on the grounds that such rules meet with society's approval, nor does it refer to the law as a normative system which it would be morally reprehensible to breach. Instead, legal rules very clearly establish that only those persons with certain capacities may be held legally responsible, and it is these capacities or the absence of them that include or exempt certain persons from legal liability.

These capacities are not physical or biological. Very young children are not excluded from legal liability on the basis of their height, weight, size, physical frailty, or any similar criteria. The capacities in question are mental or psychological, and have to do with a person's state of mind and those things which a person's mind may or may not be able to reason through. Hart describes these capacities as 'mental elements' and explains the role they play in legal liability as follows:

In all advanced legal systems liability to conviction for serious crimes is made dependent, not only on the offender having done those outward acts which the law forbids, but on his having done them in a certain frame of mind or with a certain will. These are the mental conditions or 'mental elements' in criminal responsibility and, in spite of much variation in detail and terminology, they are broadly similar in most legal systems. Even if you kill a man, this is not punishable as murder in most civilised jurisdictions if you do it unintentionally, accidentally or by mistake, or while suffering from certain forms of mental abnormality. Lawyers of the Anglo-American tradition use the Latin phrase *mens rea* (a guilty mind) as a comprehensive name for these necessary mental elements; and according to conventional ideas *mens rea* is a necessary element in liability to be established *before* a verdict. It is not something which is merely to be taken into consideration in determining the sentence or disposal of the convicted person, though it may also be considered for that purpose as well. (Hart 1968: 187)

If the physical commission of an action which is prohibited by law could be called the *actus reus*, or guilty act, then *mens rea* speaks to the state of mind of the person who committed that action at the time the action was committed. *Mens rea*, as Hart states, describes a guilty mind, and the law presumes that only those persons with certain mental conditions or 'mental elements' are capable of forming a guilty mind, or more

specifically, criminal intent. Hart asserts that the law only holds those persons legally liable who have 'normal capacities of control' (Hart 1968: 197), which seems to suggest that those persons who may not be held legally liable either lack these capacities of control altogether or have them in a diminished sense.

It is evident that it would be worthwhile to expand upon what specifically these capacities are and to what skills or abilities the law is referring. Hart elaborates on the subject and writes that:

(t)hese...capacities in question are those of understanding, reasoning, and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made. Because 'responsible for his actions' in this sense refers not to a legal status but to *certain complex psychological characteristics* of persons, a person's responsibility for his actions may intelligibly be said to be 'diminished' or 'impaired' as well as altogether absent. (Hart 1968: 227-8)

It may be understood, then, that when the law refers to a capable person or to someone who is presumed to possess the necessary capacities, what is meant is more than that that individual is cognisant of the law, of what is legally (and Hart also adds, morally) permitted and what is legally prohibited. The law also refers to that individual's ability to reason, to deliberate between two or more possible courses of action, to select that which he or she believes to be the most appropriate, and to act on that decision. If any of those aspects are lacking, if it could be argued, for instance, that that individual knew an action was against the law but did not fully appreciate the reasons behind it or the potential consequences, such as the harm that could be caused to another person, then it might be said that such an individual was incapable of forming all the necessary mental elements needed for *mens rea* to be satisfied. Legal liability is conditioned upon the presence of *all* the necessary mental elements. If any of these elements or capacities are absent, that individual cannot, according to legal

rules, be held legally liable for his or her actions, and cannot be formally punished for them.

In 'normal' adults (and it must be noted that the law's perception of what constitutes normalcy may be a reflection at least in part of that society's morality), these capacities or mental elements are believed to be present. However, in some instances, these mental elements may be absent by reason of chronological (or indeed mental or developmental) immaturity. Hart writes:

(T)he law of most countries requires that the person liable to be punished should at the time of his crime have had the capacity to understand what he is required by law to do or not to do, to deliberate and to decide what to do, and to control his conduct in the light of such decisions. Normal adults are generally assumed to have these capacities, but they may be lacking where there is...immaturity, and the possession of these normal capacities is very often signified by the expression 'responsible for his actions'. (Hart 1968: 218)

This is the very crux of the principle of legal liability: only those persons who truly are 'responsible for their actions', which is to say who possess the necessary mental elements to be able to understand their actions and to exercise self-control over those actions, should be held legally responsible and either be formally punished or in some other way be made to make compensation. Children, by virtue of the fact that they have not yet reached the age of responsibility, are presumed to be *doli incapax*, or incapable of forming criminal intent. This inability to form such a critical element of a criminal action renders them exempt from legal liability. This legal principle is grounded in morality and reflects a society's moral desire to punish only those who *truly deserve* it. The presumption of *doli incapax* derives from a societal moral judgment or recognition that children do not have a complete understanding of right and wrong. As Pollock has argued,

[r]etributive justice is not a simple equation...[f]or instance, *mens rea* (intent) has long been considered a necessary element in determining culpability. Those who are incapable of rational thought - [including] the very young - are said to be incapable of committing wrong morally

or legally; therefore, to punish them would be an injustice under a retributive framework (Pollock 1994: 59)

Consequently, while American criminal law does not differentiate between children and adults or children and adolescents on the basis of age, it does so on the basis of (the absence or presence of) capacities. Some groups are presumed to be capable of such things as reasoning, appreciating the long- and short-term consequences of one's actions, and making deliberate decisions after weighing the costs and benefits of an action, whilst others are not. It is on this basis which the law makes the distinction between children and other persons: children are presumed to lack those capacities which other groups possess. Therefore, children may not be held legally liable for their actions, not because of their age but because a lack of certain reasoning and analytical capacities is believed to attach to their age (largely as a result of societal mores, as previously suggested). Once a certain age has been reached, they may be held legally liable, although, as previously stated, this eligibility does not necessarily mean that formal legal or criminal proceedings will be brought against them.

For someone to be considered legally liable, it is not sufficient, as stated above, for that person to have outwardly committed the offence. Consider the well-publicised cases in the United States of small children who have played around with their parents' firearms and, in the process of playing with them, shot a playmate. They are unquestionably guilty of physically brandishing the firearm and actually shooting another person. There is no disputing their *causal responsibility*. However, it has been argued that as they were merely young, immature children, it is highly likely that they were incapable of realising that what they were doing was something other than a game or that someone could potentially be injured. The law clearly states that if that capacity, that understanding or full appreciation of the consequences of their actions, is absent, then those persons cannot be held legally liable for their actions. For that

reason, children are presumed to be legally innocent. They cannot be legally prosecuted for their actions if they are sufficiently young because the law does not believe them to be legally liable. As Hart argues, this notion of legally 'deserving' punishment only if one is truly 'responsible for his or her actions' in the sense that all of the necessary capacities are present, is enshrined in morality:

(W)hat the law has done here is to reflect, albeit imperfectly, a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it...Blackstone at the beginning of modern legal history looked at the various excuses which the law accepted. He said they were accepted because 'the concurrence of the will when it has its choice either to do or avoid the act in question, [is] the only thing that renders human actions praiseworthy or culpable'. (Hart 1968: 174)

Therefore, it can be understood that very young children should not be held legally liable for their actions because in some way or another, they cannot help what they do. What is meant by that is that one or more of the mental elements which contributes to a full cognitive appreciation of one's own actions and the consequences of one's own actions, as well as the ability to exercise control over one's own actions, must be missing. If that is indeed the case, then, as Hart writes:

(t)his lack of capacity...must be the fundamental point in any intelligible doctrine of responsibility. The point just is that in a civilized system only those who *could have* kept the law should be punished. (Hart 1968: 189)

In other words, if persons are mentally incapable in some way, if they lack the ability to reason, to evaluate, or to exercise self-control, then they cannot by law be expected to keep the law. If they could not have kept the law by reason of these absent capacities, then they are not legally liable, indeed, they do not legally deserve to be punished. Once again, the reason behind this fundamental principle of legal liability is a moral one:

(A) system or practice which did not regard the possession of these capacities as a necessary condition of liability, and so treated blame as appropriate even in the case of those who lacked them, would not, as morality is at present understood, be a morality. (Hart 1968: 230)

What is apparent, then, is that legal principles of liability and the ways in which prosecutors adhere to them are rooted in the very essence of morality, of justice, and of what a given society has determined to be 'right' and 'wrong'. In other words,

some legal decisions are moral decisions...this means, of course...that certain legal controversies involve moral factors which influence the final decision. (Davis 1966: 4-5)

This is the very crux of the prosecutorial process: the resolution of a legal controversy or dispute on the grounds of moral factors. The decision to hold a juvenile offender legally responsible is therefore not a straightforward one, as it clearly involves moral judgments to be made by the prosecutor as to the exact level of accountability which should attach to the juvenile's behaviour. Similar 'legal controversies' involving the relative accountability status of juvenile offenders have been settled by the Supreme Court, the final decisions of which expressly involved the consideration of such 'moral factors'. It may be worthwhile to pay particular attention to these, as they could be seen as informing, at least in part, prosecutorial constructions of juveniles' accountability and just deserts, which will be theorised in a latter section of this chapter.

#### **2.4 Differential Degrees of Accountability: No Longer 'Children,' Not Yet 'Adults'**

It has been theorised earlier in this chapter that following their symbolic construction of juvenile offenders as any of a number of possible criteria introduced in Chapter One (such as good or bad, child-like or adult-like, and salvageable or disposable), prosecutors may attach different levels of moral accountability to the behaviour of these offenders. The specific degrees or levels of accountability prosecutors may construct as a result of moral considerations, specifically the absence or presence of

their moral disapproval, will be discussed in a later section of this chapter. What is important to recognise is that the legal liability principles set out previously do not mean of necessity that all juvenile offenders (those who have attained the age of responsibility) will be dealt with in the same way as adults would be dealt with, simply on the basis of the legal presumption of shared capacities. Likewise, all juvenile offenders will not be dealt with in identical ways. Rather, individual circumstances and moral considerations, as well as the weight which should be given to each of these, are all integral in determining what sets an individual juvenile offender apart from his or her contemporaries, as well as from the adult population. These differential degrees of accountability can perhaps best be introduced via a discussion of a number of note-worthy Supreme Court decisions and landmark rulings, all of which attempt to shed some light on the issue of the 'unique status' of juvenile offenders and the question of whether or not the level of juveniles' accountability can be seen to be different from that of adults.

Juvenile offenders are regarded as minors under the law, and their age distinguishes them from the presumed legal and moral standing of adults. The United States Supreme Court has long recognised that the status of minors under the law is unique in many respects. Justice Powell, writing for the majority in *Eddings v. Oklahoma*, has asserted that

youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults. Even the normal 16-year-old customarily lacks the maturity of an adult. (*Eddings v. Oklahoma* 1982: 115-116)

Furthermore, Justice Frankfurter has written that



[c]hildren have a very special place in life which law should reflect.  
(*Bellotti v. Baird* 1979: 633)

In *Stanford v. Kentucky* (1989), Justice Brennan expands upon the meaning of this 'special place'. He has written that

the simple truth derived from communal experience [is] that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life. (*Stanford v. Kentucky* 1989: 395)

He cites the case of *Thompson v. Oklahoma* (1988), wherein the Court had stated that

[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. (*Thompson v. Oklahoma* 1988: 835)

This distinction in the levels of moral culpability and accountability which may attach to juvenile offenders is crucial in understanding prosecutorial constructions of just deserts for juveniles. For although a juvenile (by reason of having attained the age of responsibility) and an adult may be similarly held to be legally liable, prosecutors may clearly be swayed in their decision-making process by such notions that juveniles 'as a class' are characterised by a diminished moral culpability. As previously suggested, and as will be demonstrated at length in Chapter Three, such differential expectations of juveniles as a group have given rise to a separate system of justice for juveniles. Under this system, juveniles may be held legally liable for their actions, but the spirit of *parens patriae* lingers and there remains the belief that juveniles still require the protection of the State. This amalgamation of a rehabilitative ideal and a sense of accountability is embodied in the primary purpose of the juvenile justice system, which is to treat juvenile offenders rather than punishing them. The very existence of a separate system of justice for juveniles assumes that juvenile offenders may and will be treated differently than adult offenders in a way marked by notions of paternalism and protection rather than

punitiveness. As stated in *Bellotti v. Baird*, the government needs to be prepared to take steps to deal with juvenile offenders in a different way than it would deal with adults in order to accommodate their unique status:

[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern,...sympathy, and...paternal attention.' (*Bellotti v. Baird* 1979: 635)

This perceived need to accommodate for the vulnerability and immaturity of juvenile offenders serves as a common thread which runs throughout much of American Supreme Court case law. In sharp contrast, there is no apparent need to protect adults in the same way. It would seem that it is only

during the formative years of childhood and adolescence, [that] minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. (*Bellotti v. Baird* 1979: 635)

Or at the very least, it may be more appropriate to suggest that during these juveniles' crucial formative years, prosecutors are more cognisant of these traits and are more concerned about making potentially detrimental choices and what might be referred to as 'unerasable mistakes' (see Chapter Five for a discussion of prosecutors' consideration in keeping mistakes made by juvenile offenders, as evidenced by their actions, from becoming 'unerasable' ones in the context of their differential assignments of accountability). In the dissent to *Stanford v. Kentucky* (1989), Justice Brennan has written that

the very paternalism that our society shows toward youths and the dependency it forces upon them mean that society bears a responsibility for the actions of juveniles that it does not for the actions of adults who are at least theoretically free to make their own choices...youth crime...is not exclusively the offender's fault; offenses by the young represent a failure of family, school, and the social system, which share responsibility for the development of America's youth. (*Stanford v. Kentucky* 1989: 396)

The Court's remark about sharing responsibility for juveniles, along with its concern over the

inability of children to make mature choices (*Bellotti v. Baird* 1979: 636),

seems to suggest that it is not only appropriate but encouraged that the State should intervene in controlling children's behaviours. This may serve to send a very strong message to prosecutors, practically demanding that the prosecutor should accept some measure of responsibility and take proper action (however 'proper' may be morally interpreted, both personally and professionally, by the prosecutor) to reduce and prevent juveniles' offending behaviour. It is conceivable then that such an implicit charge or call would inform prosecutorial constructions of just deserts for these juvenile offenders. In the case of *Ginsberg v. New York*, the Court went further in highlighting the parental role of the State towards juveniles and ruled that

even where there is an invasion of protected freedoms the power of the State to control the conduct of children reaches beyond the scope of its authority over adults. (*Ginsberg v. New York* 1968: 638)

Once again, the notion of differential levels of accountability for juvenile offenders appears to be reinforced, the implication being that moral disapprobation or censure should perhaps take a backseat in juvenile cases to issues of care and control.

#### ***2.4.1 United States Supreme Court Rulings and the Matter of Juveniles' Diminished Moral Culpability***

Cases which consider the constitutionality of the death penalty as it pertains to juveniles are particularly rife with comments by Justices as to the degrees of moral culpability and legal liability that juveniles can be presumed to possess, and the differences which set them apart as a group from adults. These rulings and the opinions contained therein may be particularly influential in shaping prosecutorial understandings and perceptions of the different levels of accountability which may attach to the behaviour of a juvenile offender. The case of *Eddings v. Oklahoma*

(1982) is one such case which calls into question the issue of youth as a mitigating circumstance in sentencing. In this landmark ruling, the Court has determined that age, specifically minority status,

does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing. (*Eddings v. Oklahoma* 1982: 116)

The reason given for this decision was that there is a requirement that capital punishment be imposed fairly and with reasonable consistency or not at all, and the Court has recognised that

a consistency produced by ignoring individual differences is a false consistency. (*Eddings v. Oklahoma* 1982: 104)

The Court has specifically stated that it was not advocating the wholesale

absence of legal responsibility where crime is committed by a minor. (*Eddings v. Oklahoma* 1982: 116)

Instead, it is concerned with the particular sentence which was being carried out, a death sentence,

imposed for the crime of murder upon an emotionally disturbed youth with a disturbed child's immaturity. (*Eddings v. Oklahoma* 1982: 116)

The implication contained within the ruling is a crucial one for prosecutors. The Supreme Court is not urging that all juvenile offenders be exempted from legal liability for their actions. On the contrary, it argues that they should be held legally liable *where appropriate*. However, mitigating circumstances such as emotional development, a troubled family history, and indeed, age, should be considered before passing sentence. Age, then, is to be considered a mitigating circumstance for the purposes of sentencing, and not the key to exemption from legal liability. Legal liability and formal accountability should attach where prosecutors deem appropriate,

regardless of how many (or otherwise) years older than the age of responsibility a juvenile offender may be.

Another watershed case which considers the relative accountability of juvenile offenders is *Thompson v. Oklahoma* (1988). Throughout this decision several important comments are made by the Justices regarding the perceived unique status of juveniles and those qualities which are presumed to distinguish them from adults.

Justice Powell is cited as remarking in a 1975 case about the importance of

recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office. (*Goss v. Lopez* 1975: 590-591)

The Court observes that

[l]egislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults. (*Thompson v. Oklahoma* 1988: 853)

This 'qualitative difference' is presumably a principal factor in the prosecutorial construction of different levels of accountability for juvenile offenders. If juveniles are believed to be qualitatively different from adults, then it follows that there must be diminished levels of (moral and legal) accountability which may attach to their behaviour which would not be expected to attach to the behaviour of adults. The

Court further remarks that, as stated earlier in this chapter,

[t]he line between childhood and adulthood is drawn in different ways by various States...Most relevant, however, is the fact that all States have enacted legislation designating the maximum age for juvenile court jurisdiction at no less than 16. All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult. (*Thompson v. Oklahoma* 1988: 825)

The implication contained in the aforementioned paragraph is that a 'normal 15-year-old' (see Chapter One for a discussion of Weber's *ideal type* and its application in this

context) is unprepared to 'assume the full responsibilities of an adult' not because he is fifteen years old, but because as a 'normal' fifteen-year-old, he, like other members of his age group, lacks certain fundamental capacities which must be present in order for full legal responsibility (and possibly moral culpability) to attach to him. The Court proceeds to cite a 1987 ruling which had held

that punishment should be directly related to the personal culpability of the criminal defendant, (*California v. Brown* 1987: 545

and asserts that

adolescents as a class are less mature and responsible than adults. (*Thompson v. Oklahoma* 1988: 834)

The insinuation is that the Court refers to diminished moral responsibility on account of diminished maturity. This notion will be explored in a later section of this chapter, where it will be theorised that prosecutorial constructions of maturity, namely of juvenile offenders as child-like or adult-like, are integral in shaping the prosecutorial construction of just deserts.

Justice Powell has elaborated on this idea of the diminished culpability of juveniles and has quoted a passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. (*Thompson v. Oklahoma* 1988: 834)

Once again, this notion of juvenile offenders' diminished culpability could be seen as influential in shaping prosecutorial understandings of just deserts for juveniles. The Court has

endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult (*Thompson v. Oklahoma* 1988: 835)

and further adds that

[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. (*Thompson v. Oklahoma* 1988: 835)

Consequently, the Court ruled that it is unconstitutional for persons younger than sixteen to be sentenced to death because their blamelessness, or diminished moral culpability, renders the punishment excessive:

The juvenile's reduced culpability...also support[s] the conclusion that the imposition of the penalty on persons under the age of 16 constitutes unconstitutional punishment. This Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult, since inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. Given this lesser culpability, as well as the teenager's capacity for growth and society's fiduciary obligations to its children, the retributive purpose underlying the death penalty is simply inapplicable to the execution of a 15-year-old offender. (*Thompson v. Oklahoma* 1988: 816)

This excerpt reflects the Court's belief that some juvenile offenders, specifically fifteen-year-olds and younger persons, should be, by virtue of their diminished moral culpability, held to be less accountable formally for their actions than adults.

Moreover, the Court also seems to imply that society has a duty towards these children, which should be considered in the context of the doctrine of *parens patriae* that underpins the very foundation of the juvenile court and the juvenile justice system. However, some Justices have been reluctant to make such sweeping generalisations as the claim that *all* persons fifteen years old and younger are morally inculpable, or at least less morally culpable than adults. Justice O'Connor argues that

granting the premise that adolescents are *generally* less blameworthy than adults who commit similar crimes, it does not necessarily follow that *all* 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment. (*Thompson v. Oklahoma* 1988: 817)

This appears to be consistent with suggestions made earlier in this chapter which proposed that age-based generalisations may often be problematic in their failure to account for individual differences in maturity levels. In the dissenting opinion, Justice Scalia broaches this issue and further argues that to draw such an arbitrary line is illogical. He states that

the plurality pronounces it to be a fundamental principle of our society that no one who is as little as one day short of his 16<sup>th</sup> birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution. (*Thompson v. Oklahoma* 1988: 864)

He refers to Blackstone's Commentaries on the Laws of England, published in 1769, and posits that

not only was 15 above the age (viz., 7) at which capital punishment could theoretically be imposed; it was even above the age (14) up to which there was a rebuttable presumption of incapacity to commit a capital (or any other) felony. The historical practice in this country conformed with the common-law understanding that 15-year-olds were not categorically immune from commission of capital crimes. (*Thompson v. Oklahoma* 1988: 864)

Having referred to the culturally specific understanding of the responsibility of juveniles in the Anglo-American legal tradition, Justice Scalia also contests the plurality's consensus that the juvenile's

punishment as an adult is contrary to the 'evolving standards of decency that mark the progress of a maturing society' (*Thompson v. Oklahoma* 1988: 865)

and argues that

[t]he most reliable objective signs (of how a society views a particular punishment) consist of the legislation that the society has enacted...It is thus significant that...in the Comprehensive Crime Control Act of 1984, Congress expressly addressed the effect of youth upon the imposition of criminal punishment, and changed the law in precisely the opposite direction from that which the plurality's perceived evolution in social attitudes would suggest: It lowered from 16 to 15 the age at which a juvenile's case can, 'in the interest of justice,' be transferred from juvenile court to Federal Court, enabling him to be tried and punished as an adult. This legislation was passed in light of Justice Department testimony that many juvenile delinquents were



'cynical, street-wise, repeat offenders, indistinguishable, except for their age, from their adult criminal counterparts.' (*Thompson v. Oklahoma* 1988: 865)

Clearly, then, as previously asserted, not *all* juveniles can be considered innocent and devoid of all moral culpability. On the contrary, some juvenile offenders are similar enough to adult criminals that it begs the question of how a line can be drawn so arbitrarily and, as previously suggested, in such a way as to be repugnant to prosecutors' sense of moral justice, to separate the two groups. Justice Scalia concedes that

[d]oubtless at some age a line does exist - as it has always existed in the common law - below which a juvenile can never be considered fully responsible for murder. [However, any] evidence that the views of our society, so steadfast and so uniform that they have become part of the agreed-upon laws that we live by, regard that absolute age to be 16 is nonexistent. (*Thompson v. Oklahoma* 1988: 872)

In summary, the preceding cases appear to demonstrate three main points.

Firstly, juvenile offenders are considered (at least in the view of the Supreme Court) to be *qualitatively different* from adults. Secondly, juvenile offenders are considered by the Supreme Court to be *less morally culpable* than adults, despite any possible similarities in their actions and in the results of their actions. Thirdly, generalising about a universal or otherwise uniform level of culpability that should attach to all juvenile offenders is a *practical and moral impossibility*. Consequently, whilst prosecutors may construct juvenile offenders as different from adults, specifically as less culpable or morally accountable for their actions than adults, they must allow for the eventuality that different juvenile offenders will be morally accountable to lesser and greater degrees than one another. It is this prosecutorial construction of juvenile offenders' just deserts which ultimately shapes prosecutors' decision-making processes. Therefore, it is imperative to introduce the various degrees of moral

accountability which prosecutors may seek to attach to a juvenile's offending behaviour.

#### ***2.4.2 Prosecutorial Constructions of Accountability: Not 'Are They or Are They Not?' But 'To What Extent Are They?'***

Although, as previously contended, the law may be a reflection of social morality and societal notions of moral justice, it nonetheless sets forth very clear-cut rules which must be adhered to regarding who may and who may not be held legally liable.

Children, presumed by law to be incapable and therefore legally innocent, may not be held legally liable and consequently may not be formally punished. This does not, however, preclude the possibility of prosecutors resorting to informal methods to resolve such cases. Moreover, those persons whom the law presumes to be capable *may* be held legally liable and formally punished, although if prosecutors deem them to be morally blameless, they too may be dealt with informally.

The same assumptions and expectations that have played a part in the law making these distinctions in the way that it has have also translated into prosecutors constructing some groups as being 'less' accountable on moral grounds than others. Prosecutors may draw upon their understanding of (moral and legal) justice, their knowledge of the law, their personal (and organisational) sense of morality, the expectations others have of them to 'do' the 'right' thing (see Chapter Four for a discussion of these expectations and their origins), and their construction of a juvenile offender as any of the criteria described in the previous chapter, and they may subsequently determine that a particular level of moral accountability or blameworthiness (or likewise, blamelessness) should attach to the behaviour of that individual. This assignation of accountability (or otherwise) then indicates to prosecutors how best to proceed in order to secure their desired just deserts.

Prosecutors may construct a juvenile offender as *educable* if they believe that he or she ‘did not know any better,’ and further believe that at this point in time, either that the offence is not significantly indicative of any future dangerousness; or that the offence is not significantly indicative that the juvenile in question has no cognisance of social and legal rules governing the appropriateness of certain behaviours, nor that the juvenile is cognisant of these rules and has chosen to violate them flagrantly. Generally, the educable offender is a first-time, relatively trivial lawbreaker who is perceived as needing to be taught that there are social and legal norms of acceptable and unacceptable behaviour, and furthermore that there are consequences for breaching these norms. In other words, prosecutors may believe the educable offender deserves to be *taught a lesson*. Those juvenile offenders who are designated as educable may likely be *diverted* away from the formal juvenile court system as prosecutors attempt to teach them a lesson using alternative means.

Prosecutors may recognise that educating some juveniles past a certain point in time may prove futile. A juvenile whose offending behaviour is quite serious but who is viewed by prosecutors as relatively young and constructed by them as salvageable may be considered *treatable* for the purposes of assigning just deserts. Prosecutors may construct a juvenile offender as treatable if he or she is adult-like in that he or she is ‘old enough to know better,’ that is, past the point of educability, yet child-like in that there is an expectation that the juvenile will be susceptible or amenable to treatment which will seek to actively modify the problematic behaviour. The treatable offender, in prosecutors’ opinion, deserves to be *treated and rehabilitated* and is a likely candidate for success at such reformatory efforts. Consequently, those juvenile offenders designated as treatable are likely to be

formally processed through the juvenile court system and given probation or some other form of community correctional programme as their disposition.

The final degree of accountability which prosecutors may attach to the behaviour of a juvenile offender would apply to those individuals whom prosecutors have determined to be past the appropriate point of education or treatment. The behaviour of these select individuals is deemed to be so serious or dangerous that prosecutors may believe themselves to be left with no recourse other than the imposition of penalties. Where the juvenile offender is older (quite close to the age of majority) and, following a review of his or her academic, criminal or legal, and family histories and assessment of his or her actions as serious or violent (drawing upon reports compiled by juvenile intake officers and through processing encounters involving prosecutors, as discussed in Chapter Four), deemed by prosecutors to be disposable, *punishability* may be decided upon. Prosecutors may construct a juvenile offender as punishable if they believe that he or she must be made not to learn that there are consequences to certain actions but rather to *suffer* the consequences of those actions. Punishability may attach either by reason of a juvenile's advanced chronological age and relative adult-like status, as well as because either the juvenile has unsuccessfully been given the opportunity at treatment or rehabilitation in the past or because the offence that has been committed is too serious for prosecutors to consider treatment as a viable option out of public protection considerations. The punishable offender, in other words, deserves to be *punished*. Those juvenile offenders who are designated as punishable are those for whom prosecutors will seek custodial dispositions or, in more extreme situations, waiver and transfer to the criminal justice system where they will be held legally liable to the same forms of punishment meted out to adults.

These prosecutorial constructions of a juvenile offender's level of accountability and subsequently just deserts may be made on moral grounds but must be justified or framed according to their legal merit. How prosecutors achieve their desired outcomes, as well as how they justify their actions in order to avoid censure, will be addressed in Chapter Five.

## **2.5 Conclusion**

It has been asserted throughout this chapter that as a result of the prosecutorial presumption that juveniles are qualitatively different from adults and therefore should not, as a class, be subjected to identical expectations of maturity and responsibility levels (a presumption largely influenced by legal and social considerations and events), what prosecutors attempt to do is reconcile their views of what would constitute legal justice for juvenile offenders with what would satisfy their personal and professional notions of moral justice. The point was made that in handling juvenile offenders, the primary aim is generally to treat them with compassion, care, and mercy, whilst concerns of punishment and public welfare and secondary and reserved only for those juvenile offenders who are designated as more serious and more dangerous to the social order. Such socio-legal understandings of juveniles, as introduced in this chapter, gave rise at the close of the nineteenth century to the creation of a separate system of justice for juveniles, and the development of this new juvenile court system, as well as the philosophical, social, and political factors that provided the impetus for its creation, must consequently be examined. Moreover, the sense of goal conflict which prosecutors experience in attempting to reconcile issues of primacy regarding the best interests of the juvenile and the best interests of the

community whose members they purport to represent should also be discussed. These topics will be addressed in the following chapter.

## CHAPTER THREE:

### Protecting the Interests of the Child or Preserving the Interests of the Public? Issues of Role Conflict and Primacy in the Juvenile Court System

#### 3.1 Introduction

At its core, a crime is a violation of the law, a dispute between an individual and the State that must be resolved through legal channels by legal authorities. It is the contention of this thesis that making legal decisions about crimes committed by juveniles and about the moral just deserts of the juvenile offenders is a complicated and difficult process, one which is influenced by many personal and professional factors. Anyone in a position of legal authority, in dealing with juvenile offenders, encounters inherent ambivalence in deciding whether to seek actions that may be in the best interests of the juvenile offender and which may be perceived as benevolent and paternalistic (for instance, such options as pretrial diversion and informal methods of resolving the dispute), or whether to seek those actions that may be in the best interests of the community and which may be regarded as adversarial and punitive (for instance, such options as formal resolution, bringing appropriate charges against juvenile offenders and holding them legally liable for their actions). For example, Professors Larry Siegel of the University of Massachusetts-Lowell and Joseph Senna of Northeastern University have highlighted the fundamental difference between handling adult and juvenile offenders and described the role of the police in handling juvenile offenders, including the internal struggle between conflicting desires and needs that police officers inevitably encounter in the process:

Handling juvenile offenders can produce major *role conflicts* for the police. They may find what they consider their primary duty, *law enforcement*, undercut by the need to aid in the rehabilitation of youthful offenders. A police officer's actions in cases involving adults are usually controlled by the rule of criminal law and his or her own personal judgment, or *discretion*. In contrast, a case involving a juvenile often demands that the officer consider "the best interests of the child" and how the officer's actions will influence the child's future

life and well-being...What role should the police take in mediating problems with youths – hardline law enforcement or social service-oriented delinquency prevention? The International Association of Chiefs of Police sees the solution as lying somewhere in between...operate juvenile programs that combine the law enforcement and delinquency prevention roles, and...work with the juvenile court to determine a role that is most suitable for the community. (Siegel and Senna 1994: 477-8)

Like juvenile officers, prosecutors may also experience role conflict in handling and making decisions about juvenile offenders. Drawing upon the work of sociologist Robert Merton, it may be understood that part of the problem lies in the multiplicity of occasionally discrepant roles involved in dealing with juvenile offenders.

Merton suggests that *roles* operate as concepts, connecting socially defined expectations with patterns of conduct and behaviour, thereby indicating that which others expect *should* be done. Chapter Four will explain this link between prosecutorial perceptions of role and the ways in which expectations that others (namely, members of their communities) have of them shape their perception of role and influence the ways in which they attempt to carry out that role. What is important to understand at this point, however, is the nature of both the internal and external forms of conflict that prosecutors may experience as a result of their role perception. Merton argues that this may be due to the fact that the notion of role is actually not a singular one; that is, individuals such as prosecutors do not occupy a solitary role. They occupy instead a *role-set*, and within that role-set may exist a broad range of different visions and beliefs, driven by divergent expectations held by others. As Merton writes:

Each social status involves not a single associated role, but an array of roles. This basic feature of social structure can be registered by the distinctive but not formidable term, role-set. To repeat, then, by role-set I mean that complement of role-relationships in which persons are involved by virtue of occupying a particular social status...a single status in society involves, not a single role, but an array of associated roles, relating the status-occupant to diverse others...The basic problem is concerned with social arrangements integrating the expectations of those in the role-set...there is always a potential for



differing and sometimes conflicting expectations of the conduct appropriate to a status-occupant among those in the role-set. (Merton 1957: 370)

Prosecutors, then, may experience role conflict as a result of the diverse roles included in their role-set. On the one hand, they are entrusted with the enforcement and application of the criminal law, and consequently they may perceive one part of their role to be that of public protectors. Yet simultaneously, as agents working within the juvenile court system, they are inevitably influenced by the ideological underpinnings of the legal and social structure within which they operate, and so may envision another part of their role to be that of paternalistic nurturer of wayward or at-risk juveniles. This conflict amongst the prosecutorial role-set, then, needs to be examined more closely.

### **3.2 Prosecutorial Role Conflict**

Prosecutors may experience two distinct types of role conflict. The first of these, *prosecutorial intra-role conflict*, involves the experience of conflicting feelings of responsibility on the part of a prosecutor towards a juvenile offender and the community. As introduced in Chapter One, in the course of carrying out their job, prosecutors may perceive their role to be that of administrators of justice, individuals who are charged (both by society and by themselves) with ensuring that justice is achieved, that juvenile offenders receive their just deserts. However, notions of justice are closely intertwined with constructs of morality and fairness, and as such, may produce prosecutorial role ambivalence. Consequently, within that over-arching heading of 'administrators of justice' are subsumed a number of different sub-roles. Some of these prosecutorial sub-roles may be community-oriented, like that of a 'public defender,' in the abstract as opposed to legal sense of the phrase, referring to

one who protects the public from harm and works to end crime; ‘lawman,’ meaning one who works with other agents of the legal system to apply and enforce the law; or ‘community advocate,’ signifying one who represents the shared interests of the community which elected or appointed him or her to office. Other prosecutorial sub-roles may be more offender-oriented, such as that of ‘punisher,’ alluding to one who makes assessments regarding the culpability of various individual juvenile offenders and seeks to punish those that are deemed to be morally and legally guilty (and therefore liable to punishment); ‘carer,’ indicating one who seeks treatment and individualised rehabilitative alternatives for those deemed to be less culpable; or ‘educator,’ suggesting one who strives to teach juvenile offenders valuable lessons about responsibility and inevitable, often necessary, consequences of specific actions. When these divergent perceptions of roles clash, that is, when what is held to be in the best interest of defense of the public or advocacy of the community (for instance, the long-term confinement of a serious juvenile offender in an appropriate detention facility) is seen as inconsistent with what the prosecutor believes to be in the best interest of the particular juvenile offender in question (for instance, keeping the juvenile in the community and working with social service-based agents to make necessary behaviour modifications), a prosecutor may experience prosecutorial intra-role conflict.

Prosecutors may resolve this prosecutorial intra-role conflict in one of two ways. Firstly, prosecutors may choose to acknowledge that their primary responsibility is to the state as a legal and social institution, and specifically, to the local community. As discussed in Chapter One, the majority of prosecutors are elected officials, and consequently, part of this sense of obligation may be the result of electoral accountability. Prosecutors may naturally perceive themselves to be

responsible for the community that elected them to office, not so much out of explicit contractual duty but rather because the prosecutors themselves feel answerable to the voting public. In other words, voters' priorities and demands may influence the prosecutorial decision-making process indirectly, as opposed to directly. Therefore, prosecutors may opt to emphasise the primacy of those actions that seem (to them and to others) to further the interests of the community above those which prioritise the needs of the individual juvenile offender.

A second and alternative option which prosecutors may exercise in attempting to resolve their internal prosecutorial intra-role conflict is to utilise an individualised approach to decision-making and assign primacy to the interests of the individual offender or those of the community on a case-by-case basis. In other words, prosecutors review the evidence gathered and presented to them by law enforcement officers, make legal determinations about the quality and sufficiency of the evidence and moral determinations about the just deserts of the juvenile offender (by considering such factors as, *inter alia*, the seriousness of the offence, the juvenile's previous record, and their inclination and susceptibility to rehabilitation efforts), and conclude which outcome would be most satisfactory to them in the particular case in question and which end-furthering strategies would be most useful to them in achieving their desired outcome. As addressed in Chapter One, prosecutors may be guided in making such determinations by the selection and implementation of a general prosecutorial policy, such as those described by Jacoby as the legal sufficiency policy, system efficiency policy, defendant rehabilitation policy, or trial sufficiency policy. These policies are not mutually exclusive, but they do form the basis for prosecutorial working rules and provide a 'bottom line,' a general agenda

prioritising certain outcomes for specific offenders and certain strategies for the attainment of those office-appropriate outcomes.

Prosecutorial policies are to be regarded as guidelines rather than bright-line rules that must be followed, but as the creation of prosecutors' own perceptions of their role and consequently, reflective of their own values and morals, it would not be expected that a particular prosecutorial policy would clash to any significant degree with what prosecutors would like to do in a given instance. In other words, the establishment and implementation of a particular prosecutorial policy in no way precludes individualised case consideration by prosecutors. Prosecutors who are guided by the legal sufficiency policy, for instance, may seek to bring charges against anyone who is legally liable for their actions, so long as the elements of the crime are present and the case is legally sufficient on its face. However, in making the kinds of legal and moral determinations briefly cited above (which will be discussed further in Part Two of this thesis), prosecutors may decide to justify legal action (or likewise, inaction) as a result of their individualised assessment of the legal and moral merits of prosecution. A legal sufficiency-driven prosecutor may review the details of a case involving a first-time, twelve-year-old shoplifter and decide that morally, the juvenile offender in question deserves to be 'taught a lesson' rather than punished, diverted from the court system and instructed to make restitution to the commercial establishment from which he has stolen merchandise as opposed to formally processed, adjudicated, and sentenced. In this particular case, the prosecutor determines that the best interests of the juvenile offender should take priority over the interests of the community (especially since he or she has decided that the juvenile in question poses no serious or credible threat to the safety of the community). Furthermore, the individualised resolution of the prosecutorial intra-role conflict in

this instance can be viewed as consistent with the prosecutor's legal sufficiency policy as long as the reason given for the pre-trial diversion (the informal method of resolution rather than formal legal action) is couched in terms of evidential insufficiency and descriptions of the lack of legal merit of proceeding with a prosecution.

Whereas prosecutorial intra-role conflict concerns the internal struggle confronted by prosecutors in the course of making decisions about juvenile offenders, a second type of role conflict which prosecutors may experience is external in nature. *Prosecutorial inter-role conflict* relates not to prosecutorial ambivalence about the appropriateness of certain actions (or inactions) which may be seen (by the prosecutor and by others) as being consistent (or likewise, inconsistent) with a particular perceived prosecutorial role, but rather to interpersonal ambivalence about same. Inter-role conflict manifests itself in those instances where a prosecutor has specific ideas about what a desired outcome would be in a particular case and that desired outcome clashes with the outcome desired by another individual or group of individuals, such as law enforcement officers, social service agencies, or parents. For instance, police officers may push for certain charges to be brought against the aforementioned first-time, twelve-year-old juvenile shoplifter, yet a prosecutor may feel that legally, the evidence in question does not support such charges, or morally, the juvenile in question does not deserve to be formally charged and processed. Conversely, a prosecutor may decide that legally, the evidence in question does support charges of shoplifting and, morally, that the juvenile in question deserves to be formally charged and processed, yet he or she may encounter vehement resistance in the form of the juvenile's parents, who feel strongly that their son is 'a good kid' who deserves informal handling and a 'second chance' as opposed to formal judicial

processing. This external inter-role conflict is resolved through information sharing and steadfastness. Prosecutors may exchange information with other agents of the legal system and may even venture so far as to seek the opinions and advice of law enforcement or social services personnel or, indeed, the juvenile offender's parents. Nonetheless, the decision of whether or not to proceed legally against a juvenile offender is ultimately the prosecutor's and the prosecutor's alone and, as mentioned in Chapter One, is part and parcel of the enormity of prosecutorial power and authority. How prosecutors choose to deal with a given situation may be informed by the wishes, desires, and suggestions of external parties to the decision-making process, but eventually, when the decision is made, it depends solely on prosecutors' own perceptions of role, the set of values inherent in the policy they have implemented, and the outcome they – both legally and morally – want to attain.

Such conflict between representing, upholding, and protecting the needs of the community and those of the individual juvenile offender is ongoing. Throughout the course of American history, experts and laypersons alike have attempted to devise the best strategies for dealing effectively with the contemporary wave of juvenile delinquency and with what are inevitably viewed as 'new breeds' of juvenile offenders. In order, then, to understand this continual struggle for the 'right' course of action and the role which prosecutors must play in it, it is perhaps most important to examine the historical roots of the legal apparatus within which prosecutors must operate in dealing with juvenile offenders. Some prosecutors may work officially in the adult criminal justice system while others work in the juvenile justice system, but the evolving standards and emphases of the juvenile court successfully permeate their moral and legal decision-making processes regardless of the physical arena in which they find themselves. It has been argued in Chapter Two that childhood is a social

construction, that as a society's dominant perspectives regarding the age-appropriateness of certain behaviours (such as education, labor, and various forms of socialising) evolve, so too do the legal ramifications for individuals who engage in (or likewise, who refrain from engaging in) those behaviours. Perhaps no conjoined shift of philosophical, sociological, and jurisprudential understandings of childhood has had as profound an impact on the ways in which juveniles are handled and processed by the American system of justice as the child-saving movement which culminated in the creation of the juvenile court in the state of Illinois in 1899.

### **3.3 The Origins of the Juvenile Court: The Child Savers**

In 1889, Jane Addams and Ellen Gates Starr opened Hull-House in Chicago, Illinois, and three years later, the University of Chicago was founded. Throughout the following three decades, both of these organisations defined what sociology and criminology in the United States were to become. Both the men at the University of Chicago and the women at Hull-House recognised the effect macro-social forces had on individual behaviour. However, many also acknowledged the relationship between the individual and the community. The Progressive Era, as the period from 1880 to 1920 is referred to by historians, was a time of monumental and rapid change within the United States, encompassing such social trends and movements as industrialization, urbanization, and large-scale immigration, and Chicago in particular was experiencing tremendous changes. In 1860, Chicago was

at the center of a web of [railroad] lines, the jumping off point for the western part of the country, and for the commercial and business center of the Middle West. (Bulmer 1984: 13)

The population of the city of Chicago grew exponentially, and in 1890, it was the second largest city behind New York City (see Bulmer 1984). Mary Jo Deegan notes that:

Between 1880 and 1890 it [Chicago] had doubled its size from one half a million to over a million...by 1900 over a million and a half people lived in Chicago and by 1910, two million. (Deegan 1988: 290)

Within these same time periods, the foreign-born population in Cook County, Illinois, grew from almost 205,000 to more than 780,000, a two hundred and eighty per cent increase (see U.S. Bureau of the Census 1999). Across the United States, people were moving from rural areas to urban ones such as Chicago to find jobs created by the industrial revolution. This was also a time when family size was decreasing, more and more poor and foreign-born women were entering the paid workforce, and the women's movement was actively campaigning for the right to vote, to be educated, and to work. There were an increasing number of divorces and a reduction in the number of hours in a work week, which resulted in an increase in leisure time and with it, and emergence of mass recreation (see Park, Burgess, and McKenzie 1925). Chicago was not ready for this kind of rapid change. Great extremes of poverty and wealth, privilege and oppression, and defences and critiques of capitalism characterised Chicago. It was a place of dirt, disease, exhaustion, crowding, confusion, hopelessness, and pain (see Sinclair 1906). Periodic economic depressions made life particularly difficult for the poorer segments of the population who found it difficult (if not impossible) to secure gainful employment. Unsurprisingly, the Chicago metropolitan area faced a number of social problems, including not only poverty and unemployment, but alcohol abuse, disease, racial and ethnic prejudice, and crime. Members of the middle and upper classes felt threatened by the conditions they perceived as being imposed upon them by the underclass, the mass of



immigrants, paupers, and criminals, and subsequently began attempting to devise better mechanisms of control through which their interests might be protected and through which the worst of these social ills might be alleviated.

One problem of particular concern to the wealthier elements of urban society was that of crime committed by youthful offenders. Thousands of penniless children roamed the streets in some of the larger cities (see Clement 1985 for a detailed description of youthful indigence in Philadelphia in the late nineteenth century), and many of these children engaged in the kinds of activities that were perceived by influential members of society as immoral, detrimental, or outright illegal. Criminal laws could be used to prosecute those youths who were regarded as particularly serious or violent offenders, but the majority of these wayward youths committed infractions or violations that were more of an irritation than a blatant danger to society and, as such, courts were often reluctant to take any further action than a stern lecture or reprimand. Prominent members of the middle and upper classes grew infuriated at what they viewed as arbitrary leniency and worked to implement reforms to make the courts, and the laws in general, more effective at curtailing juvenile crime and misbehaviour. Penologist Enoch Wines wrote:

The children of poverty, of crime, and of brutality are born to crime, brought up for it. They must be saved. (Platt 1999: 30)

Consequently, these activists who viewed it as their responsibility to protect these children from the later consequences of their more serious actions, from themselves, became known collectively as the child savers. Prominent individuals such as Wines, Judge Richard Tuthill, and Sara Cooper of the National Conference of Charities and Corrections

believed that poor children presented a threat to the moral fabric of American society and should be controlled because their behavior could lead to the destruction of the nation's economic system. (Siegel and Senna 1994: 424)

In other words, although these social activists described themselves as the child savers, it was the salvation of their society that they viewed as being of primary importance.

The child savers were informed by the latest thinking on adolescence and youth crime. According to Anthony Platt,

the child-saving movement, like most moral crusades, was characterized by a 'rhetoric of legitimization,' built on traditional values and imagery. From the medical profession, the child-savers borrowed the imagery of pathology, infection, and treatment; from the tenets of Social Darwinism, they derived their pessimistic views about the intractability of human nature and the innate moral defects of the working class; finally, their ideas about the biological and environmental origins of crime may be attributed to the positivist tradition in European criminology and to anti-urban sentiments associated with the rural, Protestant ethic. (Platt 1969: 21)

Adolescence in particular was regarded as a developmental 'problem period,' a time during which youths would be curious, mischievous, highly susceptible to peer influences, and therefore difficult to control. Granville Stanley Hall (1846-1924), for example, developed an evolutionary explanation of delinquent behaviour based on the notion that adolescence was a period of savagery in which the forces of good and evil constantly do battle with one another for the possession of the child's soul. Hall categorized juveniles in trouble as victims of circumstances who deserved pity, understanding, and love. When the forces of good had 'won' the child, he was considered 'born again.' Thus, this theory came to be known as the recapitulation theory, signifying that through proper guidance and influence, social reformers could transform evil youths into 'angels of virtue' (see Cole 1972; Menell 1972, 1973). Those children who broke the law and engaged in criminal acts were believed to be beyond the control of their parents and consequently in dire need of control by the state:

In short, the child savers felt that intrusion into the lives of children was necessary in order to prevent them from leading immoral and criminal lives – and, equally important to protect the state and the interests of the wealthy. (Elrod and Ryder 1999: 112)

In the United States, more than a few child saving organisations sought to impose their class, ethnic, and racial biases on the poor, immigrants, and minority women. A middle-class gender ideology of maternal care was foisted upon working-class and lower-class mothers. Many of these mothers were declared as unfit and in need of state control, since they did not conform to the cultural ideal of ‘proper mothers’ espoused by the middle- and upper-class child savers (see Kasinsky 1994: 97-129). Some historians argue that the child savers sought to control and resocialise the children of the so-called dangerous classes for the benefit of capitalistic enterprise, thereby protecting the interests of the dominant segments of the community (see Salerno 1991), whilst others contend that the child saving movement emphasised education rather than work and was driven predominantly by altruistic and humanitarian ideals, thereby attempting to preserve and act in the best interests of the children themselves. Regardless of the purity (or otherwise) of the child savers’ motives, what has proven to be the pivotal issue is that state intervention into children’s lives was regarded by the social activists (and unsurprisingly, is regarded by agents of the juvenile justice system today, prosecutors included) as crucial for the preservation of the interests of society and for those of the children themselves.

### ***3.3.1 Chancery Courts and the Roots of *Parens Patriae*: The Ideal of Governmental Guardianship of Youths***

Common nineteenth-century conceptions of children as impressionable, naïve, dependent beings who need nurturing, guidance, understanding, and protection until they are ready to enter the adult world are central to the underlying philosophy of the juvenile justice system. The legal justification for state intervention into the lives of children was based on the doctrine of *parens patriae*, Latin for ‘the state as parent’ (or

‘father’). The concept of *parens patriae* views children as easily impressed and influenced by others, suggesting that youths engage in criminal acts because they have been in some way negatively affected by others through inadequate care, custody, or treatment. Criminal behaviour by children is interpreted as a sign or symptom of some problem in the child’s family relationship or environment. The state intervenes like a parent, to exercise control over the youth before more serious consequences result. According to this philosophy, the state acts with the best interests of the child as the primary consideration. The objective of the parental role is to care for and treat the child, rather than to punish, and thus change the child’s behaviour for the better.

The doctrine of *parens patriae* was introduced into American society through the adoption of English common law. This body of law was viewed by many to be quite harsh and oppressive, and in an attempt to minimise the severity of the law, a Council of Chancery was created. This council was established as a dispute settlement body and was given the ‘prerogative of grace.’ Through this mechanism, the council could use its discretion and apply the law less strictly to those individuals who might unduly suffer under a strict application of the legal code. One group of individuals to which the prerogative of grace was extended was children. This council eventually developed into a court with extensive discretion, and the prerogative of grace came to be known as the principle of *parens patriae*, referring to the role of the king as the father of his country. Douglas Besharov has asserted that:

The concept apparently was first used by English kings to justify their intervention in the lives of the children of their vassals – children whose position and property were of direct concern to the monarch. (Besharov 1974: 2)

In the famous 1827 English case *Wellesley v. Wellesley*, a duke’s children were taken away from him in the name and interest of *parens patriae* because of his scandalous

behaviour. Subsequently, the concept of *parens patriae* became the theoretical basis for the protective jurisdiction of the chancery courts acting as part of the crown's power. As time passed, the monarchy used *parens patriae* increasingly to justify its intervention in the lives of families and children by its interest in their general welfare. However, as Douglas Rendleman argues:

The idea of *parens patriae* was actually used to maintain the power of the crown and the structure of control over families known as feudalism. (Rendleman 1971: 209)

The chancery council (otherwise known as the chancery court) dealt with the property and custody problems of the wealthier classes. It did not have jurisdiction over children charged with criminal conduct. Juveniles who violated the law were handled within the framework of the regular criminal court system. Nonetheless, the concept of *parens patriae*, which was established within the English chancery court system, grew to refer primarily to the responsibility of the courts and the state to act in the best interests of the child. The idea that the state, and particularly the juvenile court, in the twentieth century should act to protect the young, the incompetent, the neglected, and the delinquent subsequently became a major influence on the development of the American juvenile justice system. It must be stated that the concept of *parens patriae* did not take hold immediately in the United States, and was only formally given legal standing in the landmark case of *Ex parte Crouse* in 1838.

### ***3.3.2 Parens Patriae and its Legal Challenges: The Appropriateness of Governmental Intervention in the Lives of Children and their Parents***

*Crouse* was a case involving a father who attempted to secure the release of his daughter, Mary Ann Crouse, from the Philadelphia House of Refuge, an institution largely devoted to managing status offenders, such as runaways or incorrigible children who had acted in a way that would not be labeled as criminal if committed by

an adult, but was deemed unlawful if engaged in by a minor. David L. Parry describes houses of refuge as

the vanguard of a burgeoning movement among wealthy philanthropists to extend their largesse in yet another direction via charitable efforts to rescue and reform youth growing up in the squalid slums of the young nation's largest cities and thereby to relieve a major source of disorder and social upheaval among immigrants and the poor. (Parry 2004: 41)

Houses of refuge in general followed strict, prison-like regimens where compulsory education and other forms of training and assistance were provided to children who, predominantly, were the offspring of the poor and immigrants. Children often rebelled when exposed to the harsh disciplinary measures employed in these institutions, and many of the children housed in them eventually pursued criminal careers as a consequence (see Hess and Clement 1993).

Mary Ann Crouse, a twelve-year-old girl, had been committed to the Philadelphia facility by the court because she was considered unmanageable. She was not given a trial by jury. Instead, her commitment was made arbitrarily by a presiding judge and confirmed by the Pennsylvania Supreme Court which rejected the father's claim that parental control of children is exclusive, natural, and proper and upheld the power of the state to exercise the necessary reforms and restraints to protect children from themselves and their environments. According to Chief Justice Gibson,

the object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right the business of education belongs to it. That parents are ordinarily entrusted with it, is because it can seldom be put in better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held as they obviously are, at its sufferance? The right of parental control is a natural, but not an

inalienable one. It is not excepted by the declaration of rights out of the subject of ordinary legislation. (*Ex parte Crouse* 1839: 11-12)

Aside from ruling that Mary Ann's placement was legal because the purpose of the house of refuge was to reform youths, not punish them, and, consequently, that formal due process protections afforded to adults in criminal trials were not necessary because Mary Ann was not being punished, *Crouse* established the principle that when parents were unwilling or unable to protect their children, the state had a legal obligation to do so. As a result, children in Pennsylvania were temporarily deprived of any legal standing to challenge decisions made by the state on their behalf.

The right of the state to intervene in the lives of children did not go unchallenged, however. In another landmark case, *People ex rel. O'Connell v. Turner* in 1870, the Illinois Supreme Court heard and decided a case that ultimately prohibited the commission of a juvenile to an institution of reform against the wishes of his parents. Daniel O'Connell was a youth who had been declared vagrant and in need of supervision, and was committed to the Chicago Reform School for an unspecified period of time. O'Connell's parents challenged the court action, claiming that his confinement for vagrancy was unjust and untenable. Existing Illinois law vested state authorities with the power to commit any juvenile to a state reform school as long as a 'reasonable justification' could be provided. In this instance, vagrancy was offered as the reasonable justification. In a highly influential move, the Illinois Supreme Court distinguished between vagrancy (or 'misfortune') and criminality in arriving at its decision to reverse Daniel O'Connell's commitment. As Justice Thornton noted in the case:

The warrant of commitment does not indicate that the arrest was made for a criminal offense. Hence, we conclude that it was made under the general grant of power to arrest and confine for misfortune. (*People ex rel. O'Connell v. Turner* 1870: 283)

In effect, the court nullified the law by declaring that reform school commitments of youths could not be made by the state if the offence was a simple misfortune as opposed to a criminal act. They reasoned that state's interests would be better served if commitments of juveniles to reform schools were limited to those committing more serious criminal offences rather than those who were victims of misfortune. The Illinois Supreme Court further held that it was unconstitutional to confine youths who had not been convicted of criminal conduct or afforded legal due process to be confined in the Chicago Reform School because placement was actually a harmful form of punishment, not a helpful form of treatment.

*O'Connell* was seen as an obstacle to the efforts of reformers to help and control youths, and the court's ruling, along with the increasing concern over the unwillingness of the criminal courts to sentence youths, led reformers in Chicago to consider other mechanisms by which their aims might be achieved (Shepherd 2002). What they finally did was create the first juvenile court, which was established in Chicago in 1899 (Platt 1977; Bernard 1992). The juvenile court allowed reformers to achieve their goals of assisting and controlling youth without undue interference from the adult courts and without undue concern for the due process protections that were afforded to adults. The court was set up as a civil court, a non-legalistic social service agency, intended to serve the 'best interests of children' (as opposed to a criminal court, which focuses on the conviction and punishment of offenders). As this new court was not a criminal court and its goal was not to punish but to help children, the need for formal due process protections and all the 'trappings' associated with the adult criminal justice system was obviated.



### **3.4 Establishment of the Juvenile Court: Translating the Child-Saving Ideal into Action**

The culmination of the child-saving movement was the Illinois Juvenile Court Act of 1899. The intention of the Act was to create a special statewide court for pre-delinquent and delinquent youths. In such a setting, children were to be segregated from adults, and individual treatment programmes to prevent future delinquency were to be adopted. The Act was only one of a number of social and legal trends that sought to enhance the welfare of children, such as child labor regulation, expanding public education, and special services for disabled children (see Caldwell 1961). In Chicago, welfare and civic organizations (specifically, the Chicago Woman's Club, the Catholic Visitation and Aid Society, the State Board of Charities, and the Chicago Bar Association) campaigned for the juvenile court (see Caldwell 1961; Clapp 1994). Finally, in 1899, they reached their goal. The Act establishing the court called for the creation of a juvenile court in every county with a population of more than 500,000. This applied only to Cook County, so it became the first jurisdiction to have a juvenile court. Yet the Cook County Juvenile Court was not the only model for early juvenile courts. Beginning in 1901, a second model was established in Denver, Colorado, by Judge Ben B. Lindsey. The Denver court was not legislatively mandated, but nonetheless operated in an unofficial capacity for the purposes of providing a completely independent court that sought to rescue juveniles from what was perceived as their plight. Rather than seeking to punish and control juveniles, Judge Lindsey believed that juvenile courts should and could provide the means by which the state could truly fulfill the mission of *parens patriae* and take

the role of a wise and loving parent. (Colomy and Kretzmann 1995: 202)

In this respect, the Denver juvenile court is generally recognised by historians as exceeding the goals and purposes of the Chicago juvenile court.

These early reformers and proponents of the juvenile court were disenchanted with the criminal court and the concept of deterrence. They believed that the criminal court was harsh and oppressive, especially when a child was involved as the defendant, and that this punitive stance had not resulted in any reduction in crime through deterrence. In fact, the proponents felt that the treatment of children as if they had free will, when they really were less responsible than adults, unduly harmed them. They believed that the stigmas, family separation, institutionalisation, and association with adult criminals only injured children, possibly creating more crime. In lieu of the punitive concept, proponents of the early juvenile court believed that

the care, custody, and discipline of the child should approximate as nearly as possible that which should be given by his parents.  
(Caldwell 1961: 495)

The objective was to find out why the child was misbehaving and then to use the information garnered by the behavioural and medical sciences to assist the child in changing his or her ways. As Gennaro Vito and Clifford Simonsen have demonstrated,

The emphasis was on the child's need and not the deed. (Vito and Simonsen 2004: 131)

The nascent juvenile courts in both Denver and Chicago were to have jurisdiction over children who were under the age of sixteen years and found to be dependents, neglected, or delinquent. The court was to be a special jurisdiction within the circuit court, presided over by separate judges. The children were to have a separate court, separate hearings, and separate records. Programmes were to be administered by a juvenile court judge and other staff, such as probation and social service personnel, using individual and group rehabilitation techniques. This juvenile

court was intended as a non-legalistic, social service agency providing care for delinquent and neglected children. The concept of the juvenile court caught on quickly and by 1920, all but three states had such courts. Some states modeled their juvenile courts after the original Chicago model, others used the Denver model, and still others drew from both approaches. Along with this rapid geographical expansion, the jurisdiction of the juvenile court was increased in many states to include those acts in which an adult contributed to the delinquency of a child and to include status offenses. Along with the geographic and jurisdictional growth, the court acquired a greater influence on the welfare of children the family, and family relationships (see Caldwell 1961).

In addition, the court and its personnel were to act under the concept of *parens patriae*, namely, in the child's best interest. The court's approach was to be paternalistic rather than adversarial in nature. As a reflection of this ideology, the terminology that was to be used was different. Charges were not filed against the child; instead, a petition was filed in his or her interest. The procedures were to be informal, and as such, various formal components of criminal court procedure, including indictments, pleadings, and juries (unless required by an interested party or judge) were eliminated. Indeed, as Preston Elrod and R. Scott Ryder have contended,

Procedural informality has been a hallmark of juvenile courts for their entire history. (Elrod and Ryder 1999: 114)

Instead, the probation officers and the judge, through informal hearings, were to determine the causes of the problem and recommend and oversee the treatment. The goal of the early reform movement, in theory, was to create a juvenile justice system geared to treatment, not punishment, one whose purpose was to keep children from criminal behaviour by rehabilitating instead of punishing them.

In practice, however, the informality meant that complaints against children could be made by anyone. It also meant that juvenile court hearings were held in offices rather than traditional courtrooms, and, unlike adult trials, were closed to the public. In a typical juvenile court hearing, the only individuals present were the judge, the child, the parents, and the probation officer. The informality also meant that judges were expected to exercise wide discretion regarding the actions they took, which could include anything from a stern warning to placement of a child in an institution (see Bartollas and Miller 1994). Lastly, few if any records were kept of hearings, proof of guilt was not necessary for the court to intervene in children's lives, and little or no concern for due process protections existed. From its inception, the juvenile court system denied children procedural rights normally afforded to adult offenders. Due process rights such as representation by counsel, a jury trial, freedom from self-incrimination, and freedom from unreasonable search and seizure were not considered essential for the juvenile court system because the primary purpose of the system was not punishment but rehabilitation (see Feld 1990).

In contrast to these early juvenile courts, today's juvenile courts are evolving to resemble adult criminal courts increasingly. The ideals of rehabilitating and shielding children from the damaging influences of being processed and labeled as criminal are being replaced with 'get-tough' policies and a movement towards retribution. In short,

the orientation of the juvenile court is converging with that of the adult criminal courts; the juvenile court is becoming more punitive and no longer is preoccupied with serving juveniles' best interests. (Minor, Hartmann, and Terry 1997: 328)

Since the 'Due Process Revolution' of the 1960s, procedural guarantees have been extended to juveniles at virtually every level of the juvenile justice system by the Supreme Court, and the juvenile justice system as a whole is very much a legal

system. Nonetheless, The courts have neither repudiated the goal of rehabilitating juveniles nor subjected children totally to the procedures and philosophy of the adult criminal justice system. There still remains an ambiguity between adolescence and adulthood, a desire to hold juveniles less accountable than their adult counterparts for crimes and 'misbehaviours,' to treat rather than punish as a consequence, and simultaneously there exists the desire to protect society from those juvenile offenders who appear to be violent, remorseless, chronic lawbreakers.

It has been suggested that juvenile courts were successfully implemented, to a large extent, because they served a variety of interests. They served the interests of reformers who sought to help children on humanitarian grounds, and the interests of those who were concerned primarily with the control of lower-class, immigrant children whose behaviours threatened urban tranquility (see Platt 1977: 139). They served the interests of the criminal courts, because they removed children from criminal court jurisdiction, freeing up time and resources for the trying of adult offenders. Finally, they served the interests of the economically and politically powerful, because they did not require the alteration of existing political and economic arrangements (see Bernard 1992). In other words, they were designed to be not instruments of change, but rather instruments of containment.

Despite the popularity of the juvenile courts, they did not go unchallenged. In another landmark court case, *Commonwealth v. Fisher* in 1905, the juvenile court's mission, its right to intervene in family life, and the lack of due process protections afforded children were examined by the Pennsylvania Supreme Court. Frank Fisher, a fourteen-year-old male, was indicted for larceny and committed to a house of refuge (incidentally, the same house of refuge to which Mary Ann Crouse had been committed over sixty years earlier) until his twenty-first birthday. Frank's father

objected to his placement and filed a suit that alleged that Frank's seven-year sentence for a minor offence was more severe than he would have received in a criminal court. In its ruling, the Pennsylvania Supreme Court upheld the idea of a juvenile court and, in many respects, repeated the arguments made by the court in the *Crouse* decision. The court found that the state may intervene in families when the parents are unable or unwilling to prevent their children from engaging in crime, and that Frank was being helped, rather than harmed, by his placement in the house of refuge. Furthermore, it ruled that due process protections were unnecessary when the state acts under its *parens patriae* powers. As Justice Brown argued:

[T]he constitutional guaranty is that no one charged with a criminal offense shall be deprived of life, liberty, or property without due process of law. 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 for 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. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness; nor is the state, when compelled, as *parens patriae*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there, and the court, with power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. (*Commonwealth v. Fisher* 1905: 62)

With its holding that due process protections were unnecessary for juveniles charged with the commission of crimes, and with its objectifying use of language whereby a child could be referred to as 'it,' *Fisher* set the legal tone for the juvenile court from its beginnings until the mid-1960s, when new legal challenges to the courts began to be mounted. These legal challenges primarily concerned expansion of juveniles' due process protections.

### **3.5 The Due Process Revolution: Securing Legal Protections for Children under the 'Protection' of the State**

Until the mid-1960s, juvenile courts had considerable latitude in regulating the affairs of children. As previously mentioned, this freedom to act on a child's behalf was rooted in the largely unchallenged doctrine of *parens patriae*. Whenever juveniles were apprehended by police officers for alleged crimes, they were eventually turned over to juvenile authorities or taken to a juvenile hall for further processing. They were not advised of their right to an attorney, to have an attorney present during an interrogation, or to remain silent. They could be questioned by police at length, without parental notification or legal contact. In short, they had little, if any protection against adult constitutional rights violations on the part of law enforcement officers and other agents of the justice system. They had no access to due process because of their standing as juveniles. In the early years of the juvenile courts, when juveniles appeared before juvenile court judges, they almost never had the opportunity to rebut evidence presented against them or to test the veracity of witnesses' statements through cross-examination. This was rationalised at the time by asserting that juveniles did not understand the law and had to have it interpreted for them by others, principally juvenile court judges (see Feld 2000). Subsequent investigations of the knowledge juveniles have of their rights seems to confirm this assertion. These early adjudicatory proceedings were very informal. They were also conducted without defence counsel being present to advise their clients and in these often one-sided affairs, facts were alleged by various accusers (often persons such as probation officers or police officers), and youthful defendants were not permitted to give testimony on their own behalf or cross-examine those giving testimony. Prosecutors were seldom present in juvenile proceedings, since they were largely intended to be non-adversarial, and juvenile court judges handled most cases informally,

independently, and subjectively, depending upon the youth's needs and the seriousness of the offence. If judges decided that secure confinement would best serve the interests of justice and the welfare of the juvenile, then the youth would be placed in a secure confinement facility (the equivalent of a prison for juveniles) for an indeterminate period. These decisions were seldom questioned or challenged, and in the rare instances where they were challenged, higher courts would dismiss the challenges as frivolous or without merit.

The tumultuous era beginning in the 1950s and continuing throughout the 1970s marked a period of great social upheaval in the United States, one in which numerous social norms and existing legal and political principles were challenged and questioned. Nobel Peace Prize-winner Martin Luther King, Jr., has written of the events and pressures that propelled the civil rights movement from lunch counter sit-ins and prayer marches to the forefront of American consciousness:

For the first time in the long and turbulent history of the nation, almost one thousand cities were engulfed in civil turmoil, with violence trembling just below the surface. Reminiscent of the French Revolution of 1789, the streets had become a battleground, just as they had become the battleground, in the 1830s, of England's tumultuous Chartist movement. As in these two revolutions, a submerged social group, propelled by a burning need for justice, lifting itself with sudden swiftness, moving with determination and a majestic scorn for risk and danger, created an uprising so powerful that it shook a huge society from its comfortable base. (King 1963: 1)

The civil rights movement which sought to secure full equality for African-Americans was propelled by a combination of momentum, civil disobedience, and, when inevitable, violence. It counted amongst its triumphs both *de jure* and *de facto* segregation, achieved through such landmark Supreme Court cases as *Brown v. Board of Education of Topeka* in 1954. Simultaneously, other previously marginalised social groups drew together and fought for their own unique brand of justice. Women, for instance, fought for the ratification of the Equal Rights Amendment, which had been



first introduced in Congress in 1923 and was ultimately passed in 1972. The historic Supreme Court decision in the case of *Roe v. Wade* in 1973 legalised a woman's right to terminate her pregnancy by abortion, thereby cementing women's legal control over their own bodies and effectively ending the period of their objectification and subjugation by a male-dominated society. Unsurprisingly, then, similarly significant legal, social, and political achievements were made during this period in the area of juvenile justice.

Although the *parens patriae* philosophy continues to permeate juvenile proceedings, the United States Supreme Court has vested youths with certain constitutional rights. These rights do not encompass all of the rights extended to adults who are charged with crimes, but those rights conveyed to juveniles so far have had far-reaching implications for how juveniles are processed. The general result of these Supreme Court decisions has been to bring the juvenile court system under constitutional control (see Manfredi 1998). It is therefore pertinent at this point to address a number of landmark cases involving juvenile rights. Several important rights were bestowed upon juveniles by the United States Supreme Court during the 1960s and 1970s, and describing these rights will make clear those rights juveniles did *not* have until the landmark cases associated with them were decided. Moreover, despite sweeping juvenile reforms and major legal gains, it will be emphasised that there are still several important differences between the rights of juveniles and adults when both are charged with crimes (see Feld 2000). Currently, juvenile courts are largely punishment-centred, with the justice and just-deserts models influencing court decision-making. Interests of youths are secondary, while community interests are seemingly served by juvenile court actions (see Feld 2000). Juveniles are being given greater responsibility for their actions, and they are increasingly expected to be held

accountable for their lawbreaking behaviour. Each of the cases presented below represents attempts by juveniles to secure rights ordinarily extended to adults.

### ***3.5.1 Kent v. United States: Opening the Door for Juvenile Legal Reform***

Generally regarded as the first major juvenile rights case to preface further juvenile court reforms, *Kent v. United States* (1966) established the universal precedents of, firstly, requiring waiver hearings before juveniles can be transferred to the jurisdiction of a criminal court (excepting automatic waivers), and secondly, that juveniles are entitled to consult with counsel prior to and during such hearings (see Grisso 1980). Morris Kent, a fourteen-year-old, was accused of committing a number of break-ins and robberies in the District of Columbia. One robbery victim was raped, but the principal evidence against Kent was a latent fingerprint left at the scene of the robbery and rape. Kent was on probation at the time of these crimes, and after his apprehension, he was interrogated over a seven-hour period and confessed to several house break-ins. Without a hearing or any formal notice, Kent's case was transferred to the local criminal court. His attorney tried to get the case dismissed from the adult court and moved for a psychiatric evaluation on the grounds that because Kent was a 'victim of severe psychopathology,' it would be in his best interests to remain within juvenile court jurisdiction where he could receive adequate treatment in a hospital and would be a suitable subject for rehabilitation. He also requested receipt of all social reports in the juvenile court's possession. All motions were denied, Kent was convicted by a jury in the adult court of robbery and housebreaking, and he was sentenced to thirty to ninety years in prison (see *Kent v. United States* 1966).

The matter was appealed on the jurisdictional issue of the waiver from juvenile court to adult court. It was contended that the waiver was defective on the following grounds: firstly, that no waiver hearing was held; secondly, that there was

no indication given as to why the waiver was ordered; and thirdly, that counsel was denied access to the social file and social reports reportedly used by the judge to determine the waiver. In this case, the Supreme Court ruled that juveniles had rights in such proceedings in accordance with the due process clause of the Fourteenth Amendment. Since waiver to adult court is a 'critically important' stage in the juvenile court (Del Carmen et al. 1998: 137), juveniles are entitled to the following: a hearing; to be represented by counsel at such a hearing; to be given access to records considered by the juvenile court; and a statement of the reasons in support of the waiver order. The fundamental principle underpinning the Supreme Court's ruling in this matter was that

A juvenile must be given due process before being transferred from a juvenile court to an adult court. (*Kent v. United States* 1966: 542)

*Kent* was an important case for several reasons. It resulted in the first major ruling by the United States Supreme Court that scrutinised the operation of the juvenile courts. After over sixty years of informal *parens patriae* procedures, the appropriateness of these procedures was being questioned, even if only narrowly, in the limited area of waivers to adult court. *Kent* also made explicit the need for due process protections for juveniles who were being transferred to adult courts for trial. The Court noted that, even though a hearing to consider transfer to adult court is far less formal than a trial, juveniles are still entitled to some due process protections, as cited above. In its decision, the Court made numerous references to the need for due process protections, stating that within a juvenile court, a child may receive

the worst of both worlds: that he gets neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children. (Bernard 1992: 113)

Once the Court began to examine juvenile court processes and procedures more closely, subsequent cases like *Gault* and *Winship* became inevitable.

### 3.5.2 *In re Gault: Abolishing Notions of a 'Kangaroo Court'*

Having given notice that it would review the operation of the juvenile courts, within a year of the *Kent* decision, the Supreme Court heard another landmark case. This case, *In re Gault* (1967), reached far beyond *Kent* in its examination of juvenile court practice and extended a variety of due process protections to juveniles. The facts of the case clearly demonstrate the potential for abuse found in the informal procedures of the traditional juvenile court, and consequently this case is discussed in detail. Gerald Gault was fifteen years old when he and a friend were taken into custody by the Gila County (Arizona) Sheriff's Department for allegedly making an obscene telephone call to a neighbour, Ms. Cook. At the time of his arrest, Gault was on six months' probation, the result of his being with another friend who had stolen a wallet from a lady's purse. Gault was taken into custody on the verbal complaint of Ms. Cook and was taken to the local detention unit. His mother was not notified of his detention by the police but rather learned about it later that day, when she returned home and, not finding Gerald present, sent a sibling to search for him (see *In re Gault* 1967).

Upon learning that Gerald was in custody, Ms. Gault went to the detention facility and was told by the superintendent that a juvenile court hearing would be held the next day. On the following day, Gerald's mother, the police officer who had taken Gault into custody and filed a petition alleging that Gault was delinquent, and Gault himself appeared before the juvenile court judge in chambers. Ms. Cook, the complainant, was not present. Gault was questioned about the telephone call and was sent back to detention. No record was made of this hearing, no one was sworn to tell the truth, nor was any specific charge made, other than an allegation that Gault was delinquent. At the conclusion of the hearing, the judge said he would 'think about it.'

Gault was released a few days later, although no reasons were given for his detention or release. On the day of Gault's release, his mother received a letter indicating another hearing would be held regarding Gerald's delinquency a few days later. A hearing was held, with the complainant noticeably absent once again, and no transcript or recording of the proceedings was made. Neither Gerald nor his mother was advised of any right to remain silent, or Gerald's right to be represented by counsel, or of any other constitutional rights. At the conclusion of the hearing, Gerald was found to be a delinquent and was committed to the state industrial school until the age of twenty-one, unless released earlier by the court. This meant that Gault received a six-year sentence for an offence that, if committed by an adult, could be punished by no more than two months in jail and a fifty dollar fine (see Senna and Siegel 1992).

The case of Gerald Gault prompted the Supreme Court to reevaluate the practical logic and constitutional sensibility of the doctrine of *parens patriae*. Justice Fortas, writing for the majority opinion, summarised the previously predominant view of the child-savers and demonstrated that perhaps such an outlook, emphasising the primacy of the juvenile court as a non-legalistic social service agency, was no longer appropriate:

The early reformers...believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child – essentially good, as they saw it – was to be made 'to feel that he is the subject of [the state's] care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive...Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this particular system is – to say the least – debatable. And in practice,

as we remarked in the *Kent* case, the results have not been entirely satisfactory. (*In re Gault* 1967: 6-7)

Signaling a shift in jurisprudential policy, in *Gault*, the Supreme Court ruled that a child alleged to be a juvenile delinquent had at least the following rights: firstly, that notice must be given in advance of proceedings against a juvenile so that he or she has reasonable time to prepare a defence; secondly, that if the proceedings may result in the institutionalisation of the juvenile, then both the juvenile and the parents must be informed of their right to have counsel and be provided with one if they cannot afford to obtain one on their own; thirdly, that juveniles have the protection against self-incrimination, meaning that the juvenile and his or her parents or guardians must be advised of the right to remain silent; and lastly, that juveniles have the right to hear sworn testimony and to confront the witnesses against them for cross-examination (see *In re Gault* 1967; Neigher 1996). The *Gault* decision ended the presumption that the juvenile courts and the juvenile justice system were beyond the scope or purview of due process protection. As stated in the majority opinion,

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedures...The absence of substantive standards had not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness...Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom...Under our Constitution, the condition of being a boy does not justify a kangaroo court. (*In re Gault* 1967: 7)

As a direct result of the *Gault* ruling, a number of fundamental changes were subsequently required in juvenile courts. Many of them carried high costs. For instance, the right to appointed counsel has become a major budget concern for juvenile courts, especially because this right has been expanded several times in

successive court decisions. The right to appellate review is meaningless without court transcripts, and these demand an investment in court recorders and recording equipment. The right to confrontation requires the processing of subpoenas and the costs of service. Finally, due process requirements have resulted in more adversarial hearings, which take longer to complete and thus raise costs further. Yet although *Gault* was a landmark juvenile law case, it was not the last Supreme Court decision that influenced juvenile court procedures. The Court further expanded protections for juveniles three years later.

### ***3.5.3 In re Winship: Changing the Standard of Proof to Reflect Potential Liability***

In the 1970 case of *In re Winship*, the Supreme Court addressed the issue of the standard of proof needed for a finding (the juvenile court equivalent of a conviction) of delinquency. As stated by Justice Brennan,

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused [in an adult criminal court] against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child. (*In re Winship* 1970: 365)

The Court held that, to justify a court finding of delinquency against a juvenile, there must be proof beyond a reasonable doubt that the juvenile committed the alleged delinquent act. Twelve-year-old Samuel Winship was adjudicated delinquent as the result of a theft of \$112 from a woman's purse. Consequently, he was committed to a training school for one and a half years, subject to annual extensions of commitment, until his eighteenth birthday. The case was appealed to the New York Court of Appeals and was upheld by that court. The Supreme Court, however, ultimately

reversed that decision, contending that the loss of liberty is no less significant for a juvenile than for an adult:

We do not find convincing the contrary arguments of the New York Court of Appeals. *Gault* rendered untenable much of the reasoning replied upon by that court to sustain the constitutionality of [Section 744 of the New York Family Court Act]. The Court of Appeals indicated that a delinquency adjudication 'is not a "conviction"; that it affects no right or privilege, including the right to hold public office or to obtain a license; and a cloak of protective confidentiality is thrown around all the proceedings.' The court said further: 'The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision [challenged by appellant]...' In effect the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the 'civil' "label of convenience which has been attached to juvenile proceedings." But *Gault* expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. The Court of Appeals also attempted to justify the preponderance standard on the related ground that juvenile proceedings are designed 'not to punish, but to save the child.' Again, however, *Gault* expressly rejected this justification. We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.' Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process. (*In re Winship* 1970: 366)

Therefore, no juvenile may be deprived of his or her individual liberty on evidence less precise than that required prior to depriving an adult of his or her individual liberty. A statement by Justice Brennan succinctly states further the case for the use of the standard of proof beyond a reasonable doubt in juvenile matters:

In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* – notice of charges, right to counsel, the rights of confrontation and examination, and the privilege of self-incrimination. We therefore hold, in agreement with Chief Justice Fuld in dissent in the Court of Appeals, that where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process, the case against him must be proved beyond a reasonable doubt. (*In re Winship* 1970: 368)



With this ruling, the Court mandated that the criminal law burden, rather than the traditionally less stringent civil law standard of the mere preponderance of all evidence, is applicable in juvenile cases. Before this case, the requirement seemed to be that the judge be influenced only by a preponderance of evidence against the accused delinquent. As in *Gault*, the implications of this decision were limited to cases where juveniles were charged with crimes and therefore faced the possibility of incarceration and curtailment of freedom (Del Carmen et al. 1998: 179).

Yet despite the due process protections extended to juveniles through the *Kent*, *Gault*, and *Winship* decisions, in practice much of the informality of the juvenile court remains intact. Indeed, one complaint heard is that changes in the legal procedures that supposedly govern the juvenile courts have not always resulted in fundamental changes in the daily operation of juvenile justice (see Bernard 1992). Many critics contend that juveniles are often denied basic protections within the juvenile justice process and that the continued informality of the juvenile courts fails to serve either the juveniles' best interests or the best interests of the community. It is one thing to be afforded various rights through Supreme Court or state court rulings and state statutes; it is another matter entirely to ensure that those involved in the juvenile justice process know all of their rights and that they feel comfortable exercising those rights. For example, a study cited by eminent scholar Barry Feld examined statewide data in six states (California, Minnesota, Nebraska, New York, North Dakota, and Pennsylvania) and found that in three of these states (Minnesota, Nebraska, and North Dakota), in only about half of the cases where a petition of delinquency was filed was the defendant represented by counsel (see Feld 1988). Moreover, this study found that youths who received assistance from counsel were more likely to receive a more severe disposition, even when the seriousness of the charges and the juveniles' prior

delinquent histories were taken into account (see Feld 1988). Such findings suggest that not only is representation absent in many instances in the juvenile court but that the quality of the representation provided to juveniles may, in many cases, be less than adequate, possibly because of the attorneys' adhering more closely to the traditional *parens patriae* role of 'helper' than to the role of legal advocate.

The continued informality of the juvenile court may also explain why very few juveniles contest the charges brought against them. The vast majority of juveniles who appear before a juvenile court admit to the charges against them (see Bernard 1992). Furthermore, many others who are not petitioned and a sizeable number who go on to adjudications but are not found guilty are still placed on some form of probation. Data collected by researchers at the National Center for Juvenile Justice indicates that in 1994, twenty-eight per cent of juveniles who were referred to juvenile court but were not petitioned were still placed on some form of probation, while twenty-two per cent of juveniles who went to an adjudication but were not adjudicated (that is, not found guilty) were placed on probation (see Butts et al. 1996).

To date, juveniles have been granted many, but not all, of the due process rights afforded to adults in criminal trials. However, the extent to which court-mandated changes in juvenile justice procedures have actually influenced the traditional informality of the juvenile courts is open to question. Juvenile court procedures in many jurisdictions are still characterised by an informality that would be considered unacceptable for adults brought before a criminal court (see Jacobs 1990). Some supporters of the traditional juvenile court procedures argue that this informality is necessary for the juvenile court to be able to carry out its mandate to serve the best interests of children and protect the community. Critics of traditional juvenile court procedures assert that the courts' failure to adhere to more strict due

process standards lead to abuses and harm more children than they help. These issues continue to be the focus of an important policy debate within the field of juvenile justice and, unsurprisingly, may permeate prosecutorial perceptions of their role and their interpretations of the most appropriate course of action to take.

### **3.6 Changing Standards in Juvenile Justice: Revisiting Issues of Primacy**

As previously mentioned, the juvenile justice system as a whole (and the juvenile prosecutor as a specific agent) is entrusted with a variety of often conflicting tasks, *inter alia*, upholding the law, protecting the victim, meting out justice, evaluating the best interests of the child, rehabilitating wayward youths, acting as a conduit to social agencies, and preserving the interests of the community. The multiplicity of goals and priorities and the interrelationships between the juvenile justice system and other institutions make it difficult to assess whether the system is meeting the needs of both the community and those children in trouble. Experts continue to debate which goals should be given primacy. Some claim that the most important goal is to protect potential and actual victims and deter children from committing crimes. Others argue that social reform, legislative progress, and programmes leading to education, recreation, and employment are the most practical methods of reducing youth crime. To some experts, the threat of stigma and labelling by the justice system is an overriding problem, and these experts emphasise diverting children before the formal trial. Still others spend considerable time engaging in discourse about how best to respond to children with special needs, such as the uneducated, the mentally ill, and the mentally retarded (see Feld 1992: 59).

Since the 'Due Process Revolution' of the 1960s, a number of major efforts have been funded by the government to identify the goals of juvenile justice and

delinquency reform. Firstly, in 1967, the President's Commission on Law Enforcement and the Administration of Justice, a product of the Johnson administration's concern for social welfare, issued its well thought-out and documented report on juvenile delinquency and its control. Influenced by Cloward and Ohlin's then-popular opportunity theory, the commission suggested that the juvenile justice system must provide underprivileged youths with opportunities for success, including jobs and education. The commission also recognized the need to develop effective law enforcement procedures to control hard-core juvenile offenders and simultaneously grant them due process of law when they came before the courts. It recommended that the underlying philosophy and goals of the juvenile court system be revisited to include rehabilitative and treatment as only one of a multitude of possible options for dealing with serious juvenile offenders, as opposed to the sole options regarded as appropriate:

The limitations, both in theory and in execution, of strictly rehabilitative treatment methods, combined with public anxiety over the seemingly irresistible rise in juvenile criminality, have produced a rupture between the theory and the practice of juvenile court dispositions...What is required is rather a revised philosophy of the juvenile court, based on recognition that in the past our reach exceeded our grasp. The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment. But neither should it be allowed to outrun reality. The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct...the guiding consideration for a court of law that deals with threatening conduct is nevertheless protection of the community. The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from criminal courts is their greater emphasis on rehabilitation, not their exclusive preoccupation with it. (The President's Commission on Law Enforcement and Administration of Justice 1967: 35)

Yet the main thrust of the commission's report was that the juvenile justice system must become sensitive to the needs of juvenile offenders:

Rehabilitation of offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. There should be a response to the special needs of youths with special problems. They may be delinquent, they may be law abiding but alienated and uncooperative, they may be behavior or academic problems in school or misfits among their peers or disruptive in recreation groups. For such youths, it is imperative to furnish help that is particularized enough to deal with their individual needs but not separate them from their peers and label them for life. (President's Commission on Law Enforcement and the Administration of Justice 1967: 88)

During the 1960s, the concern was primarily for individual treatment and the rights of juvenile offenders. Child advocates and federal lawmakers were interested in merging the rehabilitation model with due process of law. The Presidential commission report of 1967 served as a catalyst for the passage of federal legislation, the Juvenile Delinquency Prevention and Control (JDP) Act of 1968, which created a Youth Development and Delinquency Prevention Administration, concentrating on helping states develop new juvenile justice programmes involving diversion and decriminalisation of juveniles. In 1968, Congress also passed the Omnibus Safe Streets and Crime Control Act (see Bernard 1992), and state and local governments were required to develop and implement comprehensive plans to obtain federal assistance for juvenile crime prevention efforts.

As a result of juvenile crime continuing to receive a great deal of publicity among the media, a second effort called the National Advisory Commission on Criminal Justice Standards and Goals was established in 1973 by the more conservative Nixon administration. Its report on juvenile justice and delinquency prevention identified such major goals as developing programmes for young people to prevent delinquent behaviour before it occurs; developing diversion activities whereby juveniles are processed out of the juvenile justice system; establishing

dispositional alternatives so that institutionalisation can be used only as a last resort; providing due process for all juveniles; and controlling the violent and chronic delinquent (see National Advisory Commission on Criminal Justice Standards and Goals 1976: 11-14). This commission's recommendations formed the basis for additional legislation, the Juvenile Justice and Delinquency Prevention Act of 1974. This important Act eliminated the old Youth Development and Delinquency Prevention Administration and replaced it with the Office of Juvenile Justice and Delinquency Prevention (otherwise referred to as the OJJDP). The role of the OJJDP was to develop and implement worthwhile programmes that prevent and reduce juvenile crimes. Throughout the 1970s, the two most pivotal goals of the OJJDP were to remove juveniles from detention in adult jails and to eliminate the incarceration together of juvenile and status offenders. During this period, the OJJDP stressed the creation of formal diversion and restitution programmes around the United States. These goals reflected the influence of labelling theory during this period, a movement that sparked the federal agency's effort to reduce stigma whenever possible (for a review of this position, see Mahoney 1974; Matza 1974). In the 1980s, the OJJDP shifted its priorities from stigma reduction to the identification and control of chronic, violent juvenile offenders, a goal consistent with the more conservative views of the Reagan and Bush administrations. The federal government expended millions of dollars on research designed to study chronic offenders, predict their behaviour, and evaluate programmes created to control their activities.

Since 1974, the Juvenile Justice and Delinquency Prevention Act has had a significant impact on juvenile justice policy. It has been an important instrument for removing status offenders from jails and detention centres, as well as providing funds for innovative and effective programmes. Most experts believe that the Act has been a

meaningful federal response to the problem of juvenile delinquency (see American Bar Association 1992). Examples of new approaches in juvenile justice abound. Ira Schwartz, a noted juvenile justice professional, has suggested that the juvenile justice system must adopt a different goal orientation. Some of Schwartz's most significant recommendations deal with changes in juvenile corrections, such as closing training schools, prohibiting the confinement of juveniles in jails, and restructuring detention services. Other recommendations are grouped around reforming the juvenile court and include raising the age of juvenile court jurisdiction to eighteen years and eliminating minor juvenile crime and status offenses from the court's responsibility. Guaranteeing due process rights to children, upgrading the judiciary and probation services, and replacing the *parens patriae* model with a 'justice' model are also part of Schwartz's 1990 action agenda (see Schwartz 1990: 164).

In reviewing proposed goals for the juvenile justice system, from both government and private sources, the ebb and flow of justice policy can be easily observed. Forty years ago, the focus was on the treatment of unfortunate juveniles who had fallen into criminal behaviour patterns through no fault of their own. Twenty-five years ago, the main concern was avoiding criminal labels. In contemporary American society, many experts are concerned with the control of serious juvenile offenders, the creation of firm but fair sentencing options in the juvenile court system, and the reform of juvenile correctional institutions. These cycles represent the shifting philosophies of juvenile justice and the theoretical models of juvenile justice upon which the goals are based (see Bernard 1992; Forst and Blomquist 1992), and pose, at least to some extent, an influence on the prosecutorial decision-making process in dealing with juvenile offenders. It would be ludicrous to assume that the ways in which prosecutors approach the 'problem' of

juvenile crime and the moral determination of the culpability of juvenile offenders (and the subsequent legal means used to secure their desired moral outcome) exist in a vacuum, untouched and unaffected by legal, political, or social forces shaping the contemporary judicial climate.

### **3.7 The Changing Prosecutorial Role in Juvenile Matters**

The juvenile court has gradually transformed over the last several decades and, consequently, juvenile court prosecutors have had to make several adjustments in their orientation towards and treatment of juvenile defendants during the last several decades (see DeFrances and Steadman 1998). As juveniles acquire more legal rights, prosecutors must be increasingly sensitive to these rights and constitutional safeguards and ensure that they are not violated. According to James Q. Wilson and Joan Petersilia, Constitutional rights violations can and will be challenged in the event of unfavourable juvenile court adjudications and/or sentences (see Wilson and Petersilia 2002). For example, the standard of proof in juvenile proceedings, as well as the introduction of evidence against juveniles, is currently different compared with the pre-*Gault* and *Winship* years. Defence counsel may now aggressively challenge the quality of evidence against juveniles and how it was obtained, the accuracy of confessions or other incriminating utterances made by juveniles while in custody and under interrogation, the veracity of witnesses' statements, and whether juveniles understand the rights they are asked to waive by law enforcement officers and others (see Del Carmen et al. 1998).

#### ***3.7.1 The Impact of Changing the Standard of Proof in Juvenile Proceedings on the Prosecutorial Role***

As mentioned earlier in this chapter regarding the standard of proof in juvenile courts prior to 1970, it was customary to use the preponderance of the evidence standard in



determining whether a juvenile was delinquent. This was a far less stringent standard compared with criminal court proceedings, where the standard of proof used to determine a defendant's guilt is 'proof beyond a reasonable doubt.' On the basis of using the preponderance of the evidence standard, juvenile court judges could find juveniles delinquent and order them incarcerated in industrial schools or detention facilities for longer periods, so consequently, the loss of a juvenile's liberty rested on a finding by the juvenile court judge based upon a relatively weak civil evidentiary standard. However, the 1970 case of *In re Winship* resulted in the U.S. Supreme Court's decision to require the 'beyond a reasonable doubt' standard in all juvenile court cases where the juvenile was in danger of losing his or her liberty. Although every juvenile court jurisdiction continues to use the preponderance of the evidence standard for certain juvenile proceedings, these jurisdictions are required to use the criminal standard of 'beyond a reasonable doubt' whenever an adjudication of delinquency can result in confinement or a loss of liberty (see Del Carmen et al. 1998).

Juveniles have benefited in at least one respect as the result of these new rights and standards of proof. These changed conditions have forced law enforcement officers, prosecutors, and judges to be more careful and discriminating when charging juveniles with certain offences. However, changing the technical ground rules for proceeding against juveniles has not necessarily resulted in substantial changes in police officer discretion, prosecutorial discretion, or judicial discretion (see Goldkamp et al. 1999). Juveniles remain second-class citizens, in a sense, since they continue to be subject to street-level justice by some police officers. Yet despite the increased bureaucratisation of juvenile courts, they do continue to exhibit some of the traditionalism of the pre-*Gault* years (see Johnston and Secret 1995). This means that

relatively little change has occurred in the nature of juvenile adjudications. Juvenile court judges, with the exception of those few jurisdictions that provide jury trials for serious juvenile cases, continue to make adjudicatory decisions as they did prior to *In re Winship* (see Secret and Johnston 1996). Regardless of new evidentiary standards and proof of guilt requirements, these judges continue to exercise their individual discretion and decide whether a juvenile's guilt or delinquency has been established beyond a reasonable doubt. In actuality, nearly eighty per cent of all states do not provide jury trials for juveniles in juvenile courts (see Champion 2004). Therefore, bench trials, where the judge decides each case, are used. It is unknown how many judges are or are not complying with the 'beyond a reasonable doubt' standard, since these judges are exclusively the finders of fact. In this respect, the *In re Winship* case was a somewhat hollow victory for juveniles in jeopardy of losing their liberty. The 'beyond a reasonable doubt' standard was established, but its use is dependent upon the subjective judgments of juvenile court judges.

For juvenile court prosecutors, changing the standard of proof to 'beyond a reasonable doubt' made their cases harder to prove, even under bench trial conditions compared with jury trial conditions. Consequently, the stage was set for greater use of plea bargaining (otherwise referred to as informal adjustment) in juvenile cases, especially when the evidence was weak and not particularly compelling. One important reason for weak evidence in juvenile cases is that, in many jurisdictions, police officers do not regard juvenile offending as seriously as adult offending. Siegel and Senna assert that

Many officers dislike getting involved in juvenile matters, probably because most juvenile crimes are held in low regard by fellow police officers. Juvenile detectives are sometimes referred to as the 'Lollipop Squad' or 'Diaper Dicks.' The field of juvenile law is often referred to as 'Kiddie Court.' Arresting a 12-year-old girl for shoplifting and bringing her in tears to the police station is not considered the way to win respect from one's peers...Most police-juvenile encounters involve

confrontations brought about by loitering, disturbing the peace, and rowdiness, rather than by serious law violations. Dealing with youth problems brings little of the rewards or job satisfaction desired by police officers. (Siegel and Senna 1994: 477)

Samuel Walker attributes this disdain for juvenile police work to the thankless, often complex, nature of police encounters with juvenile offenders:

Police intervention in these disorder situations is difficult and frustrating. The officer often encounters hostile or belligerent behavior. Overreaction by the officer creates the possibility of a major violent incident. Even if the officer succeeds in quieting or dispersing the crowd, the problem will probably reappear the next day, often in the same place. (Walker 1983: 133)

As a result of the poor repute which police officers may attribute to juvenile work, evidence-gathering procedures relating to delinquent acts may not be as aggressive as evidence-gathering procedures relating to what are perceived as more serious adult crimes. This undistinguished evidence-gathering by police in juvenile delinquency cases may be explained by the fact that juvenile courts have exhibited at times extraordinary leniency towards juveniles, even where serious crimes were alleged and the evidence was strong (see Champion 2004). It may be discouraging for police officers to see their best evidence-gathering efforts wasted when a juvenile court judge disposes an adjudicated juvenile delinquent to probation or some other comparatively lenient option. For the most part, however, juvenile court prosecutors have adapted well to their changing roles as the juvenile court has gradually transformed (see Massachusetts Statistical Analysis Center 2001).

The due process emphasis has prompted many prosecutors to prioritise their prosecutorial discretion according to a juvenile's offence history and the seriousness of the crime (see Snyder, Sickmund, and Poe-Yamagata 2000), a point which will be expanded upon further in Part Two of this thesis. Nonetheless, this priority shift has not caused prosecutors to ignore potentially mitigating factors in individual juvenile cases, such as undue exposure to violence and domestic abuse (see Jacobson 2000).

The subsequent chapter of this thesis, Chapter Four, will explore and demonstrate the extent to which prosecutors consider both aggravating and mitigating factors in reaching a moral determination of an individual juvenile offender's just deserts and in designating a specific outcome or end goal with which they would feel morally satisfied, whilst Chapter Five will illustrate the legal strategies prosecutors then employ to attain their desired outcome.

### 3.8 Conclusion

Concern about juvenile offenders has always been a part of American society. However, the amount of attention devoted to the issue, and what members of American society believe to be the appropriate response, has changed many times over. In fact, current concerns about a 'juvenile crime wave' are believed to be part of just one stage of an ongoing 'cycle of juvenile justice' (see Bernard 1992). This cycle pertains to the social and legal responses that are enacted whenever juvenile crime is depicted or represented as 'highly worrisome' or 'sufficiently problematic.' Bernard suggests that the phenomenon of juvenile crime continues steadily through time, not necessarily rising or diminishing in significance or seriousness to any great extent, until some prominent public figure or group of public figures transform the issue by, as sociologist Stanley Cohen describes, 'folk devilling' juvenile offenders and creating a *moral panic* (see Cohen 2002). In his introduction to the most recent edition of his book, Cohen posits that the school shootings which took place between 1998 and 1999 served to create this type of moral panic:

There have been sporadic outcries about this backdrop of school violence and related problems such as truancy, large-scale social exclusion into special classes or units and more recently the neighbourhood pusher selling drugs at the school gate. Fully-fledged moral panics need an extreme or especially dramatic case to get going. The age-old rituals of bullying in classroom and playground...are usually normalized until serious injury or the victim's

suicide. A recent example is the run of high school massacres and shooting sprees. The first images – from the USA in the mid-nineties – were quite unfamiliar: school grounds taped off by police; paramedics rushing to wheel off adolescent bodies; parents gasping in horror; kids with arms around each other; then the flowers and messages at the school gates. In the late nineties, when these events were still rare, each new case was already described as 'an all-too-familiar story'. The slide towards moral panic rhetoric depends less on the sheer volume of cases, than a cognitive shift from 'how could it happen in a place like this?' to 'it could happen anywhere.' (Cohen 2002: xii)

It is significant to appreciate the role that the media play in the creation of moral panics. Cohen argues that

The media have long operated as agents of moral indignation in their own right: even if they are not self-consciously engaging in crusading or muck-raking, their very reporting of certain 'facts' can be sufficient to generate concern, anxiety, indignation or panic. When such feelings coincide with a perception that particular feelings need to be protected, the preconditions for new rule creation or social problem definition are present...Less concretely, the media might leave behind a diffuse feeling of anxiety about the situation: 'something should be done about it'...Such vague feelings are crucial in laying the ground for further enterprise. (Cohen 2002: 7-8)

Chapter Four will illustrate further the extent to which such moral panics influence indirectly the prosecutorial decision-making process by engendering certain reactions amongst various segments of the population, *inter alia*, parents, school administrators, and law enforcement officials, such as sentiments of 'something should be done' and the expectations that prosecutors will be the ones to act as moral entrepreneurs and 'do something.' Ordinarily, Cohen contends, when such moral panics are created, those moral entrepreneurs in positions of legal and political power strive to 'do something,' to enact 'appropriate responses,' by changing existing laws or policies in some way to reflect the 'seriousness' of the problem. As Cohen suggests,

As these stories unfold, experts such as sociologists, psychologists and criminologists are wheeled in to comment, react and supply a causal narrative. (Cohen 2002: xiii)

These perspectives and the responses generated by the supposed causal narrative are afforded a certain period of time in which they are expected to 'work,' to 'solve the

problem,' and when they are perceived as having failed, as policies and programmes fueled by unrealistic expectations inevitably are, the generation of the moral panic begins anew, accompanied by a new host of possible 'solutions.'

As discussed in Chapter Two, throughout history, lawmakers have repeatedly made use of one such 'solution' by raising and lowering the age at which juveniles may be held legally accountable for their actions, sometimes emphasising punishment and other times treatment, and have perceived juvenile crime as either increasing or decreasing accordingly. The creation of the first juvenile court was merely an outgrowth of one era's increasing concerns about juvenile crime and a belief in treatment, rather than punishment. Nonetheless, the ramifications of such concerns and such beliefs have been far-reaching, and prosecutors making decisions in cases involving juvenile offenders today are confronted with the same conflicting desires to preserve the best interests of the child and simultaneously preserve the best interests of the public. Therefore, in order to resolve these conflicts, prosecutors must make moral decisions about what they feel the particular juvenile offender deserves (taking into account a variety of legal and extra-legal factors), and then progress to making legal decisions about the best tactics and strategies which they could use to satisfy their moral determinations of just deserts. The subsequent two chapters of this thesis will illustrate the process by which prosecutors make moral sense of juvenile offenders and subsequently make legal decisions about them.

# Part Two

## CHAPTER FOUR:

### **Making (Moral) Sense of Juvenile Offenders: Prosecutorial Constructions of Role and Culpability**

#### **4.1 Introduction**

It was the aim of the first part of this thesis to establish a framework within which an investigation into the prosecutorial decision-making process regarding juvenile offenders could be successfully undertaken. A fundamental aspect of creating that framework is ensuring the understanding that the prosecutorial decision-making process is not a straightforward one. There is no single way to 'do' the prosecutorial job, to be a prosecutor in the American context. As described in Chapter One, the tasks which American prosecutors are charged with carrying out, specifically with regard to juvenile offenders, are more value-laden than they may appear at first glance. How prosecutors make legal decisions about juvenile offenders is heavily contingent upon how they make moral sense of them, how they understand them.

Chapter One suggested that symbolic interactionists emphasise how symbols and meanings emerge to provide a more concrete reality to things that are abstract and elusive. This leads symbolic interactionists to argue that, to understand social life, they must understand what people actually say and do from the perspective of the people themselves. In other words, sociologists must 'get inside people's heads' and view the subjective world as it is seen, interpreted, acted upon, and shaped by the people themselves. This orientation is strongly influenced by Max Weber's concept of *verstehen*, meaning 'understanding' or 'insight.' Weber has written extensively on the importance of this moral understanding and attribution of meaning, as derived from individuals' motivations and sentiments, to the process of deciding about subsequent courses of action. He argued that it is only in examining individuals' drives and



internal desires (both those of which they are conscious and those to which they may be oblivious) that one can truly understand how they attribute meaning to certain actions and behaviours:

Every interpretation attempts to attain clarity and certainty, but no matter how clear an interpretation as such appears to be from the point of view of meaning, it cannot on this account alone claim to be the causally valid interpretation. On this level it must remain only a peculiarly plausible hypothesis. In the first place the 'conscious motives' may well, even to the actor himself, conceal the various 'motives' and 'repressions' which constitute the real driving force of his action. Thus in such cases even subjectively honest self-analysis has only a relative value. Then it is the task of the sociologist to be aware of this motivational situation and to describe and analyse it, even though it has not actually been concretely part of the conscious 'intention' of the actor; possibly not at all, at least not fully. This is a borderline case of the interpretation of meaning. (Weber 1964: 96)

Consequently, in order to understand how prosecutors make legal decisions about the most appropriate ways to handle juvenile offenders, and indeed why they make those decisions from a moral standpoint, prosecutors' very inner states, their motives, plans, affects, and emotions, must be appreciated. As theorised in Chapter Two, drawing upon the work of Max Weber, whilst the law makes *objective* distinctions amongst individuals solely on the basis of the presence or absence of certain capacities, prosecutors are not limited to making such distinctions. They construct juvenile offenders in uniquely symbolic, *subjective*, prosecutorial ways. They attribute uniquely symbolic prosecutorial meanings to certain actions or characteristics and subsequently designate certain types of juvenile offenders as subsumed within a particular concept categorisation. They then distinguish between these offenders' varying degrees of moral culpability by drawing upon their internalisation of certain instrumental organisational values, their feelings of responsibility towards their community as a whole and towards specific offenders in particular, and primarily their perception of the prosecutorial role.

It must be reiterated that the prosecutorial perception of *role* is a separate and distinct concept from that of an understanding of the prosecutorial *job*. While the prosecutorial job can be described as *substantive*, in that it relates to actual modes of conduct and concrete daily tasks which prosecutors must perform, the prosecutorial role is more *normative* in nature. Erving Goffman has described the concept of role as that which

consists of the activity the incumbent would engage in were he to act solely in terms of the normative demands upon someone in his position. (Goffman 1961: 85)

The prosecutorial role has to do with what individual prosecutors believe their function to be within the larger context of the community which they were elected to serve, as well as within the context of the greater criminal justice system. In order to appreciate fully how prosecutors make moral sense of and legal decisions about juvenile offenders, it is pivotal firstly to comprehend *why* prosecutors perceive that process of assessing aspects of a juvenile offender's character (and subsequently making determinations as to his or her just deserts) to be part of their function. As will be demonstrated, the reason prosecutors concern themselves with understanding or making moral sense of a particular juvenile or under-age offender before applying any legal criteria in the decision-making process is that first and foremost, they see their role as that of *administrators of justice*. They feel that their function is to pursue justice, to do 'the right thing,' regardless of how they interpret what 'the right thing' might be. This prosecutorial sentiment and its relationship to both internally (namely personally and organisationally) and externally (or socially) imposed expectations (what will be described as *commitment*) will be the subject of a subsequent section in this chapter. It is important to assert at this point that the justice which prosecutors believe they are entrusted with pursuing is not confined to legal justice. Whilst they

may seek legal justice and apply legal rules in the context of 'doing their job,' what they simultaneously pursue with professional vigour can be called *moral justice*. The substantive criminal law establishes specific criteria which outline which groups of people under which circumstances may be held legally liable to punishment for their actions. However, by depending upon such absolute rules for guidance, prosecutors perceive that the risk is created that certain juvenile offenders will not attain their just deserts. Consequently, they rely upon symbols and conceptual constructs to determine what these moral just deserts may be, and they then use legal mechanisms as instruments towards achieving their desired ends.

In pursuing this moral justice, prosecutors draw upon their own understandings of morality, as informed by their occupational and organisational culture. As Stanley Hauerwas has contended,

Our morality is more than adherence to universalizable rules; it also encompasses our experiences, fables, beliefs, images, concepts and inner monologues. (Hauerwas 1981: 35)

Prosecutorial beliefs and concepts (and indeed, their shared experiences) contribute to prosecutors' knowledge and understanding of certain instrumental prosecutorial values, which inform and guide them as to how to 'do' moral justice in a way which is organisationally (and socially) acceptable. Prosecutors recognise that moral justice may assume different forms in different situations, and that what may be the right thing to do when dealing with one juvenile offender may not be the right thing in a case involving a significantly dissimilarly situated juvenile. Prosecutors appreciate that the public need to be protected (and in some instances instructed), the morally culpable need to be appropriately punished, the sick need to be treated, the victims need to be restored, and in any given situation, prosecutors may believe that they are the ones responsible for meeting these diverse needs. These varying constructions of

justice will be explored in a later section of this chapter, and can all be collectively grouped under the general heading of prosecutorial visions, or modes of carrying out the over-arching function of administration of justice. They are, in other words, all legitimate forms of pursuing moral justice and thereby accomplishing the perceived prosecutorial goal of administering justice.

In order to seek this moral justice, prosecutors must first make sense of the juvenile offenders with which they are confronted. As they construct these juvenile offenders as being of a particular type and attach uniquely symbolic prosecutorial meanings to each individual case, they once again draw upon their internalised organisational values and upon their perception of the prosecutorial role. Before prosecutors can proceed with formally punishing those constructed as morally culpable or informally treating those constructed as sick, they need to be satisfied that they have distinguished between those juvenile offenders who meet the moral criteria for being guilty (or significantly punishable) and those offenders who deserve, in prosecutors' moral judgment, to be treated, educated, or otherwise excused from punishment. It is at this point that prosecutors make moral decisions about the moral nature of the juvenile offenders (i.e. their degree of 'goodness' or 'badness'), about their maturity levels (i.e. child-like or adult-like status), and about their prospects for successful behaviour modification or other rehabilitative options (i.e. salvageability or disposability).

It seems a natural progression to prosecutors to make next a moral designation as to the juvenile offender's just deserts. In making such an assessment prosecutors consider the degree of accountability based upon, *inter alia*, the three aforementioned factors, which they believe should attach to the behaviour of the juvenile offender in question. In fact, what prosecutors thereby accomplish is what symbolic

interactionists refer to as the construction of reality, the development of a theory of an appropriate or desirable outcome in their minds: they consider what they would like to see happen in the particular case, what their goal is. One prosecutor describes the moral assignation of just deserts as a somewhat narrowly focused process:

We review the report and then, sometimes when I look at the report, I tend to be a little tunnel-visioned and I know what I want. You're supposed to learn how, in law school, to get a theory of the case, carry your theory all the way through to the end. So you know what you're looking for. (Respondent 5)

Logically, prosecutors must then consider whether that moral goal is a viable one, whether they can actually bring about or otherwise secure their desired outcome, as well as whether they can attempt to do so whilst avoiding censure from the very internal and external sources which inform their internalisation of certain core values and feelings of responsibility towards others. This chapter will concern itself with the detailed explication of this specific prosecutorial process, beginning with an explanation of prosecutorial sentiments of responsibility and commitment towards others and concluding with prosecutorial constructions of juvenile offenders and the determination of just deserts. If prosecutors determine that such a goal as they have settled upon is both morally appropriate and organisationally or legally justifiable, then they will make specific legal decisions and utilise particular legal strategies or instruments in order to pursue that desired outcome. As one prosecutor illustrates,

I do have some idea of what outcome I'm looking for. And that sometimes will affect my discretionary judgment and either how I charge the case or file the case. It's all about, what are we looking for here? What do we want to have happen? (Respondent 11)

This latter process involving prosecutorial decisions to use specific strategies to secure their desired outcome will be the subject of the next chapter.

## 4.2 Applying Verstehen to the Prosecutorial Role: Appreciating Prosecutorial Views on Doing the ‘Right Thing’ versus Doing ‘the Job’

As outlined in Chapter One, the job which prosecutors are charged with carrying out is a complex one. How they carry out their duties and particular tasks, as well as how they apply certain legal and moral criteria and rules, depends largely on what they understand as their role or function. Therefore, in order to understand *how* prosecutors make sense of and create policies to deal with juvenile offenders, it is imperative first to appreciate *why* they believe such moral determinations and legal designations are their responsibility to make. It is crucial, therefore, to examine the complexities involved in how prosecutors understand their role in relation to these offenders.

Jacoby defines prosecutorial policy as

a course of action adopted by the district attorney in enforcing the law and performing his or her duties (Jacoby 1980: 196),

and suggests that any thorough analysis of the prosecutorial process and function must consider, *inter alia*,

the prosecutor’s perception of his role and his selection of a policy to follow for dealing with crime and prosecution. (Jacoby 1980: 197)

As previously suggested, the prosecutorial perception of role is very different from an understanding of the prosecutorial job. A prosecutor’s job is to apply certain legal criteria and to carry out particular tasks, such as bringing charges against an individual, deciding which charges are the most appropriate, or filing for a waiver to have a juvenile offender certified as an adult and tried in criminal court. A prosecutor’s role perception, on the other hand, is more subjective and hinges on how a prosecutor views his or her function and what he or she believes members of the public (as well as fellow prosecutors) expect. In his discussion of the morality of lawyers, Thomas Shaffer suggests that this perception of function may be related to the profession of law itself:

[A] lawyer has a choice in defining his function to himself. He can define it with criteria that come from within the profession itself, arguing that the function of the profession is useful to the state which licenses lawyers and that his behavior in any circumstance can be determined by reference to this function. (Shaffer 1981: 218)

This perceived role and moral interpretation of their function guides prosecutors as they make decisions on a day-to-day basis by acting as a *moral compass* against which they can compare their actions and their feelings. Jack and Jack describe the unique dualistic position of lawyers with regard to morality:

To varying degrees, attorneys occupy two moral worlds - the complex, multifaceted world of *personal morality* and the more rarefied, eccentric domain of the practicing attorney. Like all of us, lawyers in their nonprofessional life must use their personal morality to deal with family and friends, poverty, suffering, and inequality. However, lawyers also have a special moral province reserved only for them. In an *attorney's moral world*, there are peculiar procedural rules and normative principles that may contradict ways of thinking and acting generally approved as morally correct. (Jack and Jack 1989: 49-50)

The position of prosecutors could be said to be even more specialised than that of attorneys on the whole as prosecutors have no one particular client: their client is the community they serve and the people whose interests they purport to represent. Their role perception, therefore, sets the guidelines for them in terms of how they should act and with what they should be concerned. It suggests to them which ways of thinking and acting are indeed morally correct (according to standards of personal and organisational morality) and which ones would be construed as morally reprehensible. The prosecutorial role at its most basic level is perceived (due to both internal feelings of alterity and to external commitments to the electoral and prosecutorial community, both of which will be discussed at length later in this chapter), and subsequently described by many prosecutors, as the *administration of justice*:

I try to see *justice* done. (Respondent 27)

*Justice* is the primary goal of a prosecutor. (Respondent 24)

This is really the only job I know of within that universe of jobs I'm at all interested in where at the end of the day I can go home, look at

myself in the mirror, and say yeah, you did the *right thing* today.  
(Respondent 13)

To prosecutors, justice is about more than applying the law and deriving a legally satisfactory result. The justice they seek is not solely legal justice. They are concerned with, and indeed believe themselves to be responsible for, determining what is in the best interests of *moral justice* and subsequently seeing that moral justice is done. One prosecutor indirectly describes his position on the meaning of justice by alluding to what he knows justice *not* to be about:

I don't know what justice is, it's sort of a nebulous thing. But I think a guy pumping gas at a gas station knows just as much about justice as a judge does. A judge knows the rules, lawyers know the rules, but justice is not about the law. It's not about the rules, it's about what's *fair* in society. (Respondent 2)

More could be understood about the prosecutorial perception of justice by marrying this notion of *social fairness* with a complementary ideal of *individualised justice*. As one prosecutor describes,

Our job is to look at the individual, look at what they did, and do what we believe justice requires. (Respondent 1)

Doing 'what justice requires' means that prosecutors must assess a situation and a particular juvenile offender and decide immediately upon his or her just deserts. Some offenders may need, according to the prosecutorial perception, to be treated (i.e. treatable offenders) whilst others may be perceived as deserving of punishment (i.e. punishable offenders). The requirements of justice must be considered by prosecutors on an individualised basis. What is just in one case may be perceived as unjust in another, and as one prosecutor described his perception of his role, serving the interests of justice means doing the right thing in a particular instance:

I don't represent a single individual with whom I might disagree about what the right thing is. For prosecutors there are even more rules than there are for all other attorneys. There's a separate set of rules that only apply to prosecutors because prosecutors are not supposed to be so much advocating on behalf of a specific client as servicing the



interests of justice. My goal is not to get a conviction, it's to do the right thing. It's to serve justice. (Respondent 13)

This notion of individualised justice is consistent with the philosophical origins of the juvenile court system which, as has been demonstrated in Chapter Three, inevitably influences prosecutors (albeit indirectly) in their dealings with juvenile offenders. Since juveniles were presumed by the child savers and subsequently by the founders of the juvenile court to be qualitatively different from adults, and significantly less responsible for their actions than adults, the aim of the original juvenile court was to function as a paternalistic (rather than adversarial), non-legalistic social service agency. In other words, the objective of the juvenile court was to protect and treat juveniles, to assume the role of a caring parent under the doctrine of *parens patriae* and to assess and consequently address those reasons or factors that were responsible for a child's violation of the law. Inherent in such an ideal of treatment and protection, then, is the very essence of individualised justice, for it is only in recognising that different juveniles will have different needs and different motivations for committing crimes that those divergent needs and motivations can truly be addressed and the law-breaking behaviour curtailed.

Other prosecutors concur that their primary role is to seek justice, to do the right thing where the 'right thing' is not necessary that which would satisfy the requirements of legal justice (namely a conviction or a satisfactorily lengthy sentence):

The great thing about working here is it's not just about the number of convictions you get or you've got them sent away for the longest possible time they could ever be sent away for. It's that you've done something that is *really fair* and you've demonstrated that our justice system here in the States works. So that's the great thing about working here. It's not just about stats or how many convictions we have and we never lose, it's about doing the right thing. (Respondent 5)

The discussion of such features as ‘stats’ or ‘convictions,’ indeed of a prosecutor’s ‘batting average,’ is at the very heart of prosecutors’ concerns that the way the substantive criminal law is phrased may create the risk that some juvenile offenders will not receive their just deserts. In other words, a legal system which is set up both ideologically and structurally in order to punish the guilty and excuse the innocent is not equipped to make moral determinations about degrees of moral guilt or moral innocence, blameworthiness or blamelessness. A juvenile offender may be legally guilty of a crime and therefore legally deserving of a conviction and punishment, but a prosecutor may believe that morally, that juvenile is undeserving of a conviction of punishment, that convicting and punishing that particular juvenile will not be, in the given instance, the ‘right thing.’ This sentiment is echoed in the words of another prosecutor, who confirms that justice to a prosecutor is more moral than legal in nature and that that legal justice is not necessarily the same as moral justice. He suggests that often the most desirable moral outcomes are completely unrelated to the expectantly desirable legal outcomes, and asserts that the requirements of justice must be considered on a case-by case basis:

Our unofficial office philosophy is to seek ‘justice’. If that means filing criminal charges in a certain case, then that is what should be done. If that means seeking alternative means of handling a case, then that is the direction to go. Sometimes a conviction is not the ‘answer’ to the problem. (Respondent 30)

As will be demonstrated shortly, the very fact that a prosecutor perceives part of his or her role to be the analysis of a problematic situation and the determination of an ‘answer’ or a ‘solution,’ indeed that he or she perceives part of the prosecutorial role to be that of a *problem-solver*, is highly illuminating in the context of societal expectations and internal feelings of responsibility for others. Yet prosecutors are cognisant of the fact that their job performance is constantly being scrutinised by

members of the public and of their profession who seek to evaluate whether or not the particular role which prosecutors are expected to fulfil is in fact being carried out appropriately (those forms of accountability identified in Section 1.6 of Chapter One as political and professional accountability, respectively). Moreover, they recognise that despite the beneficial information that can be collected from members of the public on a given case, this external inspection should not factor into determinations of justice and that ultimately, the decisions about what comprises justice in a particular case are entirely at their discretion:

Our job is to look at the individual, look at what they did, and do what we believe justice requires. So sometimes it looks like we're being, at least to the public's eye, too soft on somebody. But what we've tried to do is treat them equally, like we would treat anyone else that was similarly situated. So in some respects, we have to be very careful not to let public interest influence, unduly influence, our decisions.  
(Respondent 1)

This prosecutorial perception through which prosecutors envisage themselves in the role of administrators of justice may give rise in particular situations to additional prosecutorial interpretations of the 'best' way of carrying out such a function. For instance, prosecutors may see themselves as acting as, *inter alia*, 'restorers of victims,' 'enforcers of law,' 'punishers of the guilty,' 'carers for the salvageable or excusable,' 'advocates of community and public opinion,' and 'protectors of the community' (the latter two becoming especially popularly accepted with the advent of the community prosecution movement described in Chapter One). As will be discussed in a later section of this chapter, this notion could be understood as different yet equally legitimate *visions* of prosecuting. These embody prosecutors' interpretations of appropriate modes in which they can successfully fulfill their chief function of administering justice, different forms that 'doing the right thing' may assume. Like the over-arching role perception of prosecutor as administrator of justice, so too are these visions a reflection of prosecutors' feelings of obligation and

commitment, both internally and externally imposed. Consequently, in order to understand how prosecutors make moral sense of juvenile offenders and, subsequently, how they make legal decisions about them, it is necessary to delve deeper into the matter of *why* prosecutors perceive their role as being one encompassing these types of tasks; in other words, to develop a sense of *verstehen*. If the answer to such a question lies in their perception of their function as administrators of moral justice, then the next issue to investigate must surely be the origins of such a particular role perception.

#### **4.3 Communitarian Morality, Commitment and the Assumption of Responsibility for the Other**

Internal *commitments*, such as non-reflexive feelings of responsibility for the well-being or protection of others (consistent with the theory of *alterity* advanced by Emmanuel Levinas)<sup>1</sup> may influence the way a prosecutor perceives his or her role in relation to particular individuals (what this thesis will term *specific alterity*) or to the community as a whole (what will be called *elective alterity*). Goffman has written that an individual becomes *committed* to something or someone when

because of the fixed and interdependent character of many institutional arrangements, his doing or being this something irrevocably conditions other important possibilities in his life, forcing him to take courses of actions, causing other persons to build up their activity on the basis of his continuing in his current undertakings, and rendering him vulnerable to unanticipated consequences of these undertakings. He thus becomes locked into a position and coerced into living up to the promises and sacrifices built into it. Typically, a person will become deeply committed only to a role he regularly performs. (Goffman 1961: 89)

One prosecutor readily acknowledged his deeply-rooted belief in

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<sup>1</sup> References to the work of Emmanuel Levinas are provided in the bibliography to this thesis, particularly Levinas 1969 and Levinas 1996. Levinas is cited elsewhere in this chapter indirectly from essays by Zygmunt Bauman (1995), due to the latter's uniquely illuminating discussion of the subject of responsibility as it pertains to the assertions and contentions of the former.

my responsibility to the juveniles, the public, and the system to make sure that I am fair, reasonable, and responsible at every level of my job. (Respondent 31),

seemingly confirming Goffman's assertion that individuals who feel deeply committed to their role may become 'coerced into living up' to certain promises, in this particular instance, the implicit promises to be fair, reasonable, and responsible. The very vulnerability that prosecutors experience to 'unanticipated consequences' of their decision-making processes will be examined shortly in the context of community expectations of them, and the difficulties involved in incurring such responsibilities. Such notions that the activities and decision-making processes of individuals should be examined within a particular community-oriented context are hardly novel. Writers such as Philip Selznick argue that the community offers a framework for examining social life:

[C]ommunities are, ideally, settings within which mediated participation takes place. The individual is bound into a community by way of participation in more limited, more person-centered groups. The community is a locus of commitment, to be sure, but within it is preserved a substantial degree of autonomy and rationality. (Selznick 1987a: 36)

Prosecutorial autonomy, with respect to the moral and legal decision-making processes, must be examined within an organisational context, as it will be in a later section of this chapter. The community and interrelationships between individuals as sources of commitment are central to the ideas of Emmanuel Levinas, whose notions about responsibility for others are inspired by Fyodor Dostoyevsky's assertion that:

we are all responsible for all and for all men before all, and I more than all the others. (Dostoyevsky cited in Bauman 1995: 182)

According to Levinas, the most important aspect of any interpersonal relationship is the element of *responsibility*, a feeling of commitment towards another human being that does not derive from any sense of religious obligation or fear of legal repercussions. As Levinas explains, it is not 'the threat of hell' nor 'the threat of

prison' (Levinas cited in Bauman 195: 183) that motivates such a sentiment of responsibility, and consequently, it is not borne as a burden but rather as a personal choice:

Because of what my responsibility is not, I do not bear it as a burden. I become responsible while I constitute myself into a subject. Becoming responsible *is* the constitution of me as a subject. Hence it is my affair, and mine only. (Levinas cited in Bauman 1995: 183)

Likewise, this feeling of responsibility towards another individual does not stem from any particular obligation that might be associated with a duty or a contractual commitment. On the contrary, Levinas posits that

[s]ince the other looks at me, I am responsible for him, without even having taken on responsibilities in his regard...the Other is not simply close to me in space, or close like a parent, but he approaches me essentially insofar as I feel myself - insofar as I am - responsible for him. It is a structure that in no wise resembles the intentional relation which in knowledge attaches us to the object - to no matter what object, be it a human object. Proximity does not revert to this intentionality; in particular it does not revert to the fact that the Other is known to me. (Levinas cited in Bauman 1995: 182)

This notion of proximity Levinas mentions is a particularly ironic one. As will be demonstrated shortly, although prosecutors feel responsible for members of their community (whether society as a whole or individual members, such as juvenile offenders or victims) partly because of this feeling of closeness, what is paradoxical is that those members of the community in turn expect prosecutors to handle certain matters relating to juvenile offenders which they may, in fact, not be directly responsible for, in order to facilitate the creation of psychic or *moral distance* between the community members and the juvenile in question. In other words, members of society encourage and reinforce prosecutorial notions of alterity and proximity in order that they themselves may continue pursuing their attempts at the creation of moral distance. There are those individuals in American society (as will be discussed in a later section of this chapter, dealing with societal expectations of prosecutors)

who become morally panic-stricken (as a result of the process of folk devilling described in Section 3.8 of Chapter Three) by the extent and nature of contemporary juvenile crime and would like to see it brought to an abrupt halt. However, they neither know how to bring that abrupt halt about, nor do they have the inclination to put forth any significant emotional, physical, or financial effort themselves. They want to see what they perceive as a fundamental 'problem' solved, yet they see their problem-solving role as being one of pointing the accusatory finger at some other group in society and expecting that group to assume responsibility and ownership over that problem. The specific group which many individuals may target is that of prosecutors. By handing over ownership of the problem of juvenile crime to prosecutors, members of society who want to feel as though they are contributing to the solution and, in fact, being tremendously helpful, are assuaging themselves of any feelings of responsibility and creating moral distance. The reasoning is that if prosecutors fail in curbing the problem of juvenile crime, then the fault must clearly lie with them, for they were the most closely tied to the problem at hand. Surely the fault must not lie with those members of society who had no obligation of any kind to deal with the troublesome situation. Such a situation was predicted by Max Weber, who argued that just because one party to a relationship may feel a certain way, or may interpret a specific subjective meaning, does not necessarily mean that the other party will reciprocate. Indeed, he warned that social relationships may often assume a unilateral form:

The subjective meaning need not necessarily be the same for all the parties who are mutually oriented in a given social relationship; there need not in this sense be 'reciprocity.' 'Friendship,' 'love,' 'loyalty,' 'fidelity to contracts,' 'patriotism,' on one side, may well be faced with an entirely different attitude on the other. In such cases the parties associate different meanings with their actions and the social relationship is in so far objectively 'asymmetrical' from the points of view of the two parties. It may nevertheless be a case of mutual orientation in so far as, even though partly or wholly erroneously, one

party presumes a particular attitude toward him on the part of the other and orients his action to this expectation. This can, and usually will, have consequences for the course of action and the form of the relationship. (Weber 1964: 118)

Therefore, it is crucial to understand that prosecutors' intentionality of responsibility is not necessarily reflexive in nature. He who feels responsible for another has no expectation of a reciprocity of responsibility, nor of a 'mutuality of intentions' (Levinas cited in Bauman 1995: 183). As Levinas has written:

Intersubjective relation is a non-symmetrical relation...I am responsible for the Other without waiting for reciprocity, were I to die for it. Reciprocity is *his* affair. (Levinas cited in Bauman 1995: 183)

Prosecutors, then, may assume this sense of alterity or responsibility, in a sense assuming ownership over the 'problem' of juvenile crime. Yet they do not expect other members of the community (or even other members of the criminal justice system) to assume ownership over those issues from which they would like to be morally distanced. In his discussion of communitarian morality, Philip Selznick similarly asserts that

[a] morality of the implicated self builds on the understanding that our deepest and most important obligations flow from identity and relatedness, not from consent. Consent suggests agreement, bargaining, reciprocity, specificity. But the obligations I have in mind are characteristically open-ended and unspecific; they are often unilateral; and they are largely involuntary, at least in detail. (Selznick 1987a: 38)

Consequently, this sense of responsibility that prosecutors may feel towards the 'Other,' be it a juvenile offender or a citizen of the community, must be understood as *unconditional* in its intention. Therefore it exists irrespectively of how much knowledge the 'I' (namely the prosecutor) has of the 'Other' and indeed of any personal interests or intentions that the 'I' might have. The only interest the 'I' has as regards the 'Other' is that of a benevolent obeisance of the driving sense of responsibility, the need to give and to do for the 'Other':



The tie with the Other is knotted only as responsibility...whether accepted or refused, whether knowing or not knowing how to assume it, whether able or unable to do something concrete for the Other. To say: *me voici*. To do something for the Other. To give. (Levinas cited in Bauman 1995: 182)<sup>2</sup>

If the assertions of Levinas and Selznick, namely that some individuals may feel that they are responsible for one another without expecting any reciprocity of responsibility, may be assumed as a point of departure, then indeed it is comprehensible that prosecutors may feel (either by virtue of the elected nature of their office, their ethical commitment to public service, the priorities and shared values of the organization of which they are a part; or any combination of these three factors) that *they are more responsible for others than others*. This sense of responsibility towards their community as a whole (to be referred to as *elective alterity*) and towards specific individuals in particular, namely juvenile offenders (what will be called *specific alterity*) has a tremendous impact on prosecutors' perception of their role and consequently on their establishment and implementation of certain policies. It is this sense of responsibility for others which exposes prosecutors to the influence of societal expectations (which in turn serve to reinforce prosecutorial feelings of alterity) and which informs their perception of their role as administrators of moral justice. They are both expected to 'do the right thing' by others and they expect it of themselves; therefore, their role must be interpreted as that of administrators of moral justice.

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<sup>2</sup> The reference continues: 'To be the human spirit, that's it...I analyze the inter-human relationship as if, in proximity with the Other - beyond the image I myself make of the other man - his face, the expressive of the Other (and the whole human body is in this sense more or less face) were what *ordains* me to serve him...The face orders and ordains me. Its signification is an order signified. To be precise, if the face signifies an order in my regard, this is not in the manner in which an ordinary sign signifies it's signified; this order is the very signifyingness of the face.' (Levinas cited in Bauman 1995: 183)

#### **4.4 Prosecutors' Elected Status and the Importance of Community to the Prosecutorial Perception of Role**

As the internal motivators and feelings of responsibility may influence prosecutors' perceptions of their role, likewise may external factors such as societal expectations serve to constrain some prosecutorial decisions and indeed a prosecutor's perception of the most appropriate way to fulfill his or her perceived function. Jacoby was cited in Chapter One as writing that the local environment will inevitably affect prosecutorial policy. Donald Landon, writing about the practice of law within particular community contexts, concurs:

The community context in which the practice of law occurs can have significant effects on the nature of that practice and on the professional orientation of practitioners. (Landon 1982a: 459)

This powerful influence of the external environment on the way prosecutors construct their role and in turn understand their job is largely due to the elected nature of the office of prosecutor in most American jurisdictions. As Jacoby argues,

the single most powerful influence on the prosecutor, his role, and the operations of his office is the nature of the population he represents, its resources, and the consequent social and cultural patterns it develops. The primary reason for this profound effect stems from the elective status of the prosecutor's office. In most instances, the prosecutor is a locally elected official and, as such, must reflect the values and norms of the community if he is to attain (and retain) office. (Jacoby 1980: 47)

It is crucial to recognise that although the population a prosecutor represents is instrumental to the creation and implementation of a particular prosecutorial policy, this link is not a directly causal one. The public cannot dictate to a prosecutor what can and should be done. Rather, the role perception that prosecutors have carved out for themselves, as informed by, *inter alia*, internal and external feelings of alterity, influences those policies or working rules which prosecutors implement and utilise as part of their decision-making process. For instance, as Donald Landon suggests,

[t]he size of the community may very well affect the degree to which an attorney can develop the attitudes that in theory distinguish the profession from other occupations. (Landon 1982a: 461)

In the sense that the size and nature of the community (i.e. rural or urban) can affect a prosecutor's perceptions and ideas, the public can be said to influence prosecutorial policy indirectly: it influences the prosecutorial role perception which in turn influences policy. This distinction between the exertion of influence indirectly rather than directly is acute, as any statement that prosecutorial policy is directly influenced by the public may suggest that prosecutors must bow to the public will on every decision-making matter. Yet the very thought of such direct public influence on the decision-making process is anathema to most prosecutors. One prosecutor describes the influence which the population he is responsible for representing exerts over his job as being more holistic than specific in nature:

It's hard to remain impartial in the face of external pressures. I mean, I'd be lying if I said it wasn't. I look at it as, this job isn't personal. I represent the state...and I have to remember that always. And when you're in court it's not 'I feel,' it's, 'the state...feels,' and so what one person wants to see happen in a case is really irrelevant, unfortunately. You have to consider the state as a whole, essentially. You represent all the people. (Respondent 10)

Another prosecutor highlights the underlying problem in such a statement, asserting that determining how best to represent 'all the people' can be especially difficult when the nature of the jurisdiction is such that 'the people' who comprise it have largely divergent perceptions of what constitutes a serious offence and an appropriate response:

This is an interesting county to look at in some ways, because you've got a major metropolitan area and you have a small town where you have one chief and three part-time cops. Well, somebody knocks over five mailboxes in the small town, they think that's a big deal, but you knock over three mailboxes in a large metropolitan area, they go, yeah, right. The trick is that you've got to balance the fact that this is a big deal in the small town against the fact that it isn't a big deal in the city, so you try to take into consideration the context in which some of these offences occur, and not just arbitrarily say we will or we won't prosecute. I don't live in a vacuum. I mean, I think it goes back to the

fact that we are our community's representative and so we have to be aware sometimes that even in our academic models we would say that's not a big deal. I mean, we may try to manipulate the outcome but we may have to act in certain ways to balance the community's interests or the community's sense of things in relationship to our role. (Respondent 7)

Prosecutors do indeed develop a perception of their prosecutorial role based in part upon the public's expectations, but how that role is applied to the implementation of particular policies and specific decisions is entirely up to the individual prosecutor's own discretion. As John Lachs (1981) has written in his account of individual acceptance and abnegation of responsibility,

[h]is decisions, though taken on our behalf, are therefore his, not ours. He may know what we think or at least what some small number of us hold, but he evaluates these thoughts, places them in perspective as but one factor, and then decides. It is impossible for him to be merely a mouthpiece for others. The question with which he must struggle is not whether his [decisions] mirror the idea of his constituents; if that is all he tried to do, disagreement among the folks back home would have him [decide one thing or another]. His genuine concern must be to find a way in which his decisions can be responsive to the deeper, hidden wisdom of his people. He must try to subserve and express the interests, the largely unconscious impulses and commitments of those whose will he bears. (Lachs 1981: 85)

These feelings of commitment and responsibility on the part of prosecutors and their beliefs about their role and their obligations are perpetuated to some extent by the expectations that members of their particular electoral community have of them. As Lachs contends,

[o]ur representatives are temporarily empowered to speak on our behalf. As such, they make *our* decisions. And government officials are but agents in carrying out our will; they ought to be what, today only by hyperbole, we call them - *civil servants*. (Lachs 1981: 83)

This transference of responsibility for the decision-making process, Lachs asserts, is at the very heart of this conception of the nature and legitimacy of government. (Lachs 1981: 83)

In making these decisions, one prosecutor distinguishes between representing the public interest and bowing to public pressure:

A prosecutor is duty-bound not to be influenced by public pressure. However, we are elected to represent the public interest. Each county gets to choose their prosecuting attorney. If he is not representing their interest, they get to choose someone who will. The law is for the people and by the people. (Respondent 21)

Moreover, the types of expectations that a community will have of a prosecutor may depend largely upon the nature of that community with regard to locality and size.

Landon has written that

The lawyer practicing in a small town experiences his local community differently than does the lawyer practicing in an urban or metropolitan setting. In the small town, relationships of every sort are presumed to be on a more personal level...Friendship, intimacy, and altruism are the orienting principles of association, and...obviously the lawyer experiences considerable cross-pressure as he functions in his legal role in such a setting...Disputes often carry community-wide implications, and his independence may be constantly under the pressure of intimacy, familiarity, and community scrutiny. (Landon 1982a: 468)

Prosecutors working in small towns, as Landon suggests, are highly visible individuals. One prosecutor concurs:

I recognise that the decisions I make every day can have a very significant impact on other people's lives. But with that said, I try and give whatever consideration needs to a decision before I make it, and once I make it, I don't worry about it, because I've got to move on to the next one. I don't have time to lose sleep. To some extent, you're wearing the white hat. You're out protecting the public in general and trying to take care of their interests and there's satisfaction in feeling like if you do it well, that you should be taking care of the good people that elected you to office, their interests. I try and spend what time I need to feel comfortable about the decision that has to be made. I make it, but I don't fret over it when I'm done because I don't have time. I got another decision to make the next day. I find some satisfaction in that it's an elected office, it's a political office, you're kind of recognised as a public figure in the community and there is some satisfaction to that. (Respondent 11)

In many instances, as in the case of this particular prosecutor, they may be the sole agent of prosecution in the county, working alone and making seemingly independent decisions (albeit guided by internal and external motivations). As elected officials, it is not surprising that prosecutors may feel a strong sense of *electoral alterity* towards the community that voted them into office, what this particular prosecutor refers to as

‘taking care of the good people that elected you to office’. However, small-town or rural prosecutors may also feel a strong sense of *specific alterity*. As a result of those associations characterised by what Landon describes as intimacy, familiarity, and even friendship, prosecutors may find themselves feeling beholden to particular individuals. One prosecutor has suggested that a possible reason for this sense of personal responsibility is that

in a rural area, you will see the after-effects of prosecution without much effort. (Respondent 25)

Another prosecutor agrees, stating that:

With it being a small community, I tend to see some of the kids and I'll just ask them how things are going, or I'll check with their community corrections or court services officers to find out how things are going with them, or I try to help them find community service work. And hopefully, if things are going positively or if I can make sure that their probation is going well, we won't have them again. (Respondent 12)

This type of familiarity and intimacy is somewhat less expected in larger, more urban settings, wherein a prosecutor cannot possibly be acquainted first-hand with all of his or her constituents. In such larger settings, prosecutors may be more likely to be singly motivated by electoral alterity, a general sense of responsibility for the surrounding community, rather than by feelings of compassion or altruism towards any one particular individual whom they may never have met. These differential notions of electoral and specific alterity and how they inform the prosecutorial perception of visions of prosecuting and indeed the process of constructing juvenile offenders as more or less accountable will be discussed in a later section of this chapter. What is important to recognise at this time is that the nature and size of a community within which a prosecutor operates significantly affects that prosecutor's perception of his or her role and also shapes the community's expectations of that prosecutor.

#### 4.4.1 'Fix my Child': Societal Expectations of Mediation of Action

Increasingly the public demands that criminal justice agencies and elected officials will exemplify these feelings of alterity and non-mutual paternalism; individuals expect that someone else will 'fix' their problems for them if they are unable to do so themselves. Beaulieu and Cesaroni, in writing about the changing nature of the youth court judge towards the end of the last century, cite criminologist Anthony Doob as suggesting that youth justice institutions can be seen as the 'Emergency Room of the Children's Services System' (1999: 363), indeed the place

[w]here society takes some of its most serious and pressing matters, where sometimes problems are brought that nobody wants to deal with and where, like the emergency room in most hospitals, problems are dealt with that shouldn't be there at all. (Doob 1989 cited in Beaulieu and Cesaroni 1999: 363)

These societal expectations apply no less to prosecutors than they do to youth court judges. Moreover, Beaulieu and Cesaroni also write that

[t]he administration of justice is a social problem which the community as a whole must meet [and that]...[c]onsciously or unconsciously judges reflect the philosophy of the time in which they live and their decisions reflect their view as to social needs sought to be reached by law. (Beaulieu and Cesaroni 1999: 367)

Lachs has written extensively on the subject of these social needs and community expectations of what he terms *mediation of action*, or action taken on behalf of another. He argues that what enables human beings to avoid taking responsibility for their own actions is the creation of *psychic distance*, which is facilitated by the dependence upon an intermediary man who is able to intervene and create distance between the individual and their actions. Lachs describes the *intermediary man* as

[t]he person who performs the action on one's behalf...: he stands between me and my action, making it impossible for me to experience it directly. He obstructs my view of the action and of its consequences alike. (Lachs 1981: 12)

Prosecutors as elected officials are often called upon by members of the communities they represent to act as such intermediary men. In the words of one prosecutor,

[There is an] expectation that somebody else will fix the problem...that they don't have to change their behaviour, somebody will come in and force the other person to change. Beyond parental control kids, kids that are having family problems, they tend to want us to bring them here and say, fix my kid and I'll be back. And we say, we'll be glad to work with you and your child, and they go, well, no, we just want you to fix the kid. I'm sorry, but our best guess is it's not the kid, the kid's twelve, it's not his problem alone...Or they bring them in and we get them involved and then...we either want to escalate or de-escalate the situation and they go, well, no, that's not what we want. Well, the trouble with coming to us is you lose some of your autonomy...It's an easy system to get into, it is impossible to get out of. So don't come here unless you are fully prepared...once you get in here, then we start to identify the ten thousand other things that somebody thinks might be appropriate to do with them...Don't come here unless you have to, bottom line, at least not to the formal system. We've tried to develop a much more extensive informal system that you can come to and walk away from at will. If we can get them to do that then maybe we won't have to deal with them formally. (Respondent 7)

Another prosecutor similarly suggests that parents are more likely now than previously to refer cases involving their troublesome or 'problem' children to prosecutors and to the police, expecting that the prosecutors will act as intermediary men and deal effectively with the situation:

We get referrals of neighbourhood incidents, and it's interesting. Sometimes the parents are almost insistent that there's some kind of prosecution whereas when we were kids, I think it wouldn't have happened. I mean, our parents would have probably took us back into the room and spanked us and then we would have been friends the next day. That doesn't happen anymore. It's interesting with regard to rights of people, expectations that police and the prosecutors are going to do things. (Respondent 8)

Such transference of responsibility onto prosecutors on the part of parents can be understood perhaps more readily in terms of control over outcomes of given situations. The idea that some parents may have that, firstly, prosecutors *can* 'fix a kid' and, secondly, that it is their responsibility rather than that of the parents to do so, stems from the parents' desire to avoid retaining control over the situation and thereby simultaneously avoid placing themselves in a situation where they could be blamed for any untoward and unforeseen outcomes. In other words, if a decision is made to deal with a juvenile offender formally and the result of that formal action is to



stigmatise the young person and predispose him or her towards acting in similarly troublesome or problematic ways in the future (see Section 1.4.3 of Chapter One for a discussion of the labelling perspective and the presumed effects of stigmatisation), the parents of that juvenile could abnegate responsibility by suggesting they had not acted wrongly or inappropriately. Instead, it would be easier and infinitely more comfortable for them to believe that the blame lies squarely with the prosecutor who made the wrong decisions. Lachs describes this process as an

inability to appropriate acts as our own and thus assume responsibility for them. We do not know the suffering that is caused and cannot believe that we are the ones who cause it. Our *psychic distance* from our deeds renders us ignorant of the conditions of our existence and the outcome of our acts... The distance we feel from our actions is proportionate to our ignorance of them; our ignorance, in turn, is largely a measure of the length of the chain of intermediaries between ourselves and our acts... The longer and more extensive the chain of intermediaries, the less one retains control over them. (Lachs 1981: 13)

So long as prosecutors in their elected capacity act as intermediary men, other members of the community who may have contact with a juvenile offender are conveniently impeded from accepting full responsibility for that juvenile offender's actions. The school teacher who observed restless and aggressive behaviour in the classroom but did not report it is not made to feel responsible for that juvenile's escalating aggression or violence. Likewise, the parents who did not consider certain aspects of their child's behaviour to be symptomatic of future problems with the law are not made to admit any bad parenting on their part. Even other agents of law enforcement and other social institutions, such as police officers, social workers, and probation officers, are able to abdicate full responsibility for that juvenile's behaviour since somewhere along the way, it must have been someone else's fault, someone else's wrong decision, that contributed to this eventuality. Lachs refers to this particular outlook as an *imagined insularity*, and argues that such ignorance of the

immediate consequences of one's own actions makes it all the easier to believe that the error in judgment was committed by someone else. This is the viewpoint which holds that an individual appreciates that something has gone awry, but 'I' as the individual believes that 'I' did everything right - therefore it must have been someone else's fault:

The remarkable thing is that we are not unable to recognize wrong acts or gross injustices when we see them. What amazes is how they could have come about when each of us did none but harmless acts. We look for someone to blame then, for conspiracies that might explain the horrors we all abhor. It is difficult to accept that often there is no person and no group that planned or caused it all. It is even more difficult to see how our own actions, through their remote effects, contributed to causing misery. It is no cop-out to think oneself blameless and condemn society. It is the natural result of large-scale mediation which inevitably leads to monstrous ignorance. (Lachs 1981: 57-8)

One prosecutor reasons that such ignorance on the part of some members of the public may lead to an ambivalence about juvenile offenders, which further exacerbates the unrealistic expectations they have for prosecutors:

As far as juveniles go, it costs so much money to run the kinds of programmes that you need to turn a juvenile around from the way they're going, take them out of a bad situation that they're in that may be leading them to this behaviour. It just takes so many resources, it takes so much that I don't think people realise how much it costs. And I don't know that the public really understands that you can't just say, we want the juvenile problem to be dealt with one day, and the next day say, we want taxes cut. You just can't. If you really want the job done right, it's going to cost a certain amount. (Respondent 13)

Another prosecutor justifies the relative lack of direct influence which public sentiment brings to bear on his job performance by arguing that, at times, the public is not best-equipped to make certain judgment calls about what is in their own best interests:

We do consider the public interest to a degree, but that's not our goal, because the public doesn't know the facts. Since I've been here, I've been through a number of real hot cases and the public doesn't know what the evidence is. They get a little blurb in the newspaper and so they think, well, this should be done. Well, maybe it shouldn't be done, maybe the evidence isn't there. I think we're interested in the public interest but we try not to react to what the public may think their

interest is at any given time. For example, the public interest all through the early 1960s was that black people couldn't go into a diner in Alabama and buy a cup of coffee, and that's what the public wanted. Well, the public was wrong. So sometimes you have to do what you think is right and not what the public sentiment becomes involved in. (Respondent 2)

Unfortunately, expectations of this type of large-scale mediation have serious implications for the prosecutorial decision-making process. As a previously cited prosecutor noted, if a twelve-year-old child is breaking the law, it stands to reason that the problem is not his alone, that the fault does not lie solely with him. Consequently, a prosecutor who is forced to make sense of that twelve-year-old and to make decisions about his just deserts can only do so on the basis of the information with which he is confronted, which may be incomplete. The full context of the situation may not be known to the prosecutor. Consequently, although that prosecutor may know what his or her desired outcome is and how he or she would like to secure that outcome, he or she has no way of knowing with any degree of certainty that such are the results which will ensue and that nothing unforeseen will present itself. Robert Merton has written extensively on the unanticipated consequences of various forms of social actions, and argues that although it may appear that a particular course of action, namely one which has been selected from amongst a variety of alternatives, may have unforeseen consequences, it is erroneous to assume that the fault lies entirely with the seemingly incorrect choice of action. Instead, what must be considered is the interrelatedness of the action that has been decided upon and carried out, and the context of the original situation which prompted that action to be taken:

Rigorously speaking, the consequences of purposive action are limited to those elements in the resulting situation that are exclusively the outcome of the action, that is, that would not have occurred had the action not taken place. Concretely, however, the consequences result from the interplay of the action and the objective situation, the conditions of action. (Merton 1936: 895)

In other words, prosecutors must be cognisant of the fact that, despite their best intentions, their decisions in dealing with juvenile offenders may prove to be the 'wrong ones' simply because they are ignorant of the true nature of the situation and lack all the requisite information. As Merton contends,

The most obvious limitation to a correct anticipation of consequences of action is provided by the existing state of knowledge. (Merton 1936: 896)

As such, in attempting to meet the expectations that others have of them and acting as intermediary men on their behalf, prosecutors must make uncertain 'educated guesses' and appreciate that their interpretations and predictions may turn out to be the 'wrong ones.' One prosecutor acknowledged the uncertainty of the outcomes of her decisions, despite the best of intentions:

We had a twelve-year-old that killed a three-year-old, and we made a decision in disposition to place the twelve-year-old in a treatment programme as opposed to a detention facility, hoping that that twelve-year-old was *salvageable*. If it had been a 22-year-old, the decisions would have been very different. And sending anyone who takes a life to treatment as opposed to custody was not a popular decision. But I knew, in my heart, that this was the only chance this kid was going to get. And if we just locked him up at that point, we'd better make sure we locked him up for the rest of his life. May turn out to have been the wrong decision, but I hope not. Don't know ahead of time. I keep waiting for that crystal ball, but no one's giving it to me. (Respondent 1)

Prosecutorial conceptions of the *salvageability* (or disposability) of juvenile offenders are discussed in greater detail in a later section of this chapter, as is the notion of *integrity* (namely, doing what is believed to be 'right' as opposed to what the popular alternative may be) as an instrumental prosecutorial value. This prosecutor demonstrates confidence in her decision as being what she believed at the time to be the 'right' thing, the just option. Yet she clearly recognises the possibility that despite her best intentions, the ultimate outcome involving this particular juvenile offender whom she sent to treatment as opposed to custody may be one which she had not

foreseen or anticipated. Such uncertainty about the future on the part of prosecutors is understandable in this situation. As Lachs writes,

How could persons who know little of the context and consequences of their acts be expected to assume responsibility for what they do? One's actions might form a minuscule partial cause of something much bigger which, when added to other distant causes, might lead to a condition with disastrous consequences. The planners themselves may not know the ultimate results. (Lachs 1981: 57)

The information which prosecutors receive about a case and about a juvenile offender will be examined in a later section of this chapter. The best that prosecutors can do in interpreting what information is made available to them from various sources, in evaluating and assessing who the juvenile offender actually is and what he or she truly deserves, is to draw upon their own experience of doing the job and doing justice, and that of other prosecutors. As suggested in Part One of this thesis, prosecutors are members of an informal prosecutorial institution, a prosecutorial culture with its own set of shared goals, norms and values. They may have differing views on the applicability of particular working rules or policies (as described in Chapter One, i.e. whether or not to seek a conviction at all costs), but their over-arching belief of working to seek justice comes under a broad public service ethos which links them all together while setting them apart from others in the law enforcement community and the legal profession.

#### **4.5 'We the Prosecutors': An Examination of the Triad of Instrumental Prosecutorial Values in a Cultural Context**

The idea that prosecutors may draw upon not only their own previous experience and standards of morality in making moral sense of juvenile offenders and making legal decisions about their just deserts, but also that of other prosecutors, is only understandable in a cultural context. Although no formal organisational structure exists in the United States linking all local prosecutors into a cohesive unit,

prosecutors can nonetheless be considered members of a *prosecutorial collective* with its own unique culture. They are connected to one another by certain key cultural elements which will be described shortly, and, as a result, they may and do draw upon not just their own personal morality but upon the shared professional morality and the experience of other prosecutors. A prosecutor may consult another prosecutor to inquire whether the latter has been confronted with a similar case, and if so, how he or she made sense of the juvenile offender and how he or she made legal and strategic decisions about that offender. As one prosecutor describes,

Once in a while you just call and say, have you ever done this and if so, how. (Respondent 4)

Such consultations on issues involving juvenile offenders may be of the *intra-office* variety, amongst prosecutors working within the same jurisdiction. As prosecutors indicate, these office staff meetings, which American prosecutors refer to as ‘staffings,’ are quite commonplace and occur frequently:

I consult with colleagues in my office daily, hourly. We're all the time asking one another, okay, I've got this. What would you do here? What do you think about this situation? What would be our policy about this? Yeah, we bounce things off one another all the time. (Respondent 15)

Rarely a day goes by without us asking each other for a second opinion, just to get a balance. (Respondent 46)

There's a lot of sharing back and forth, talking out ideas, problems in a case. (Respondent 4)

I consult with colleagues in my office daily. We have weekly staffings and myself being new, I visit the other attorneys regularly. (Respondent 10)

This manner of *intra-office* consultation is understandable and predictable, as prosecutors working within the same office would be expected to abide by the same matrix or office policy which has been implemented by the elected chief prosecutor. Yet other prosecutors recognise that *inter-office* consultation, or that amongst

prosecutors in different offices and in different jurisdictions, is immensely valuable as well:

I am more than willing to take advice from others because I am the only one in this office. I don't like to think I know everything, and I realise that I can receive good advice outside my office at times. (Respondent 12)

I consult with colleagues outside my office fairly regularly, just depends upon the cases. Because I handle everything from some child stealing a piece of gum all the way to a murder charge, so the larger ones that I don't have very often - I've only had one murder case, in fact, and it was the first one in this area since 1950, so I did receive assistance - some of those larger crimes I try and obtain assistance and advice because it just doesn't happen that often here. (Respondent 12)

I consult with colleagues outside my office maybe once every other week. I'll have a kid that's offended in my jurisdiction and I'll want to know what's going on in another jurisdiction or vice versa, somebody from there will want to know what I'm doing down here. (Respondent 15)

The reason such inter- and intra-office consultation is so valuable to prosecutors is that it provides them with an *experiential guideline*, a glimpse into how another prosecutor regarded the most 'acceptable' ways to proceed and how that prosecutor worked to fulfill the prosecutorial role perception in that particular case.

As one prosecutor describes,

there's going to be *standard resolutions* that are acceptable or appropriate. (Respondent 1)

In discussing notions of appropriateness or standards of acceptable behaviour, it is essential to acknowledge that prosecutors are not entirely autonomous individuals.

Although few if any explicit constraints exist limiting their discretionary authority, as stated in Chapter One, they are nonetheless bound by their culture's standards of what constitutes acceptable and unacceptable behaviour in the course of doing the job.

These standards of acceptable behaviour can perhaps best be understood as *shared basic assumptions* and *values*, two aspects comprising an organisation's culture.

Edgar Schein, who has written extensively on the nature of organisational culture and leadership, argues that while culture may encompass and be reflected in such features as observed behavioural regularities, norms, dominant espoused values, philosophy, and rules, none of these form the true 'essence' of an organisation's culture. Instead, he asserts,

the term "culture" should be reserved for the deeper level of *basic assumptions and beliefs* that are shared by members of an organization, that operate unconsciously, and that define in a basic "taken-for-granted" fashion an organization's view of itself and its environment... They come to be taken for granted because they solve... problems repeatedly and reliably. (Schein 1985: 6)

It may be problematic for some readers to accept seemingly independent and autonomous American prosecutors as members of an organisation since, as previously stated, no coherent nor formal organisational structure exists. Yet, as Schein maintains, an organisation does not have to be rigidly structured in order to be so labeled, and more importantly, in order to be characterised by a unique culture of its own. He posits that shared history and experience are the key contributory factors in the creation and development of an organisation and its culture:

Culture should be viewed as a property of an independently defined stable social unit. That is, if one can demonstrate that a given set of people have shared a significant number of important experiences in the process of solving external and internal problems, one can assume that such common experiences have led them, over time, to a shared view of the world around them and their place in it. There has to have been enough shared experience to have led to a shared view, and this shared view has to have worked for long enough to have come to be taken for granted and to have dropped out of awareness. Culture, in this sense, is a *learned product of group experience* and is, therefore, to be found only where there is a definable group with a significant history. (Schein 1985: 7)

Accepting Schein's broader definition of an organisation (rather than one which is dictated by its hierarchy and codified rules), American prosecutors can clearly be seen as comprising and subsequently belonging to an organisation. Moreover, Schein does allow that



[t]he word "culture" can be applied to...the level of *occupation, profession, or occupational community*. If such groups can be defined as stable units with a shared history of experience, they will have developed their own cultures. (Schein 1985: 8)

The evolution of the prosecutorial job, the transition from appointed to elected status, the bestowing upon them of certain discretionary powers, and the creation of ethical considerations which guide them (albeit loosely) in the exercise of those powers all constitute *shared experiences* and a *shared history* for prosecutors. The recently elected prosecutor is no less a member of that prosecutorial community or collective than is the prosecutor who has served the same jurisdiction for over forty years. Moreover, although prosecutors may be elected to the office from disparate backgrounds - some prosecutors having been teachers before assuming their current positions, others having served their communities as police officers, still others assuming the position directly out of law school - they nonetheless, as members of this prosecutorial organisation, now have a *shared view* of their place in the world. This shared view has elsewhere in this thesis been described as their perception of their role, their belief that they are entrusted with the function of administering and seeking justice. This perception of the prosecutorial role, then, is the *learned product* of their *group experience*. Although prosecutors may hold different visions of the most appropriate way to seek justice in specific situations, their overall sense of purpose, their perceived function, remains constant and acts to unify them whilst distinguishing them from other lawyers, other criminal justice practitioners, and other elected officials.

This perception of role which binds prosecutors together in what Schein refers to as a *stable social unit* also contributes to that unit's culture, which Schein describes as the underlying

pattern of basic assumptions - invented, discovered, or developed by a given group as it learns to cope with its problems of external

adaptation and internal integration - that has worked well enough to be considered valid and, therefore, to be taught to new members as *the correct way to perceive, think, and feel in relation to those problems*. (Schein 1985: 9)

Schein suggests that these underlying assumptions shared by all members of the prosecutorial collective or community help them make sense of and interpret their environment, human nature, human activity, and human relationships. Moreover, he contends that the amalgamation of these underlying assumptions and the articulation of certain key values can

be helpful in bringing the group together, serving as a source of identity and core mission. (Schein 1985: 17)

Heinrich Rickert, cited earlier in this thesis for his contribution to the field of concept formulation theory, has also theorised about the value of cultural values. He posits that cultural values are what inform human beings as they seek the most moral or 'best' way to act, not out of true obligation but out of a desire to contribute to the well-being of society and of the culture:

Culture in the highest sense...must be concerned not with the values attaching to the objects of mere desire, but with excellences which...we feel ourselves more or less "obligated" to esteem and cultivate for the sake of the society in which we live. However, we must not think of these exclusively in terms of "moral necessity." It suffices that, in general, the *value* be connected with the idea of a *norm of some good that ought to be actualized*. (Rickert 1986: 37)

Therefore, whilst *basic assumptions* of an organisation may suggest to members of that organisation - in this instance, to prosecutors - what they believe they are doing, *values* reflect the organisational sense of what ought to be done and how prosecutors ought to go about doing it. In his account of organisational behaviour, Gerald Cole (1995) writes that a *value*

is an underlying acceptance of a general way of behaving that is seen as preferable to alternative ways, and usually carries notions of right and wrong within it. (Cole 1995: 111)

Clearly, Cole's discussion of values mirrors many of the same aspects expressed in Rickert's work. Milton Rokeach (1973) distinguishes between two types of values, which he refers to as terminal values and instrumental values. *Terminal values*, he suggests, are the desired end-states or eventual preferred outcomes. Freedom, a comfortable life, inner harmony, and self respect could all be considered examples of terminal values. *Instrumental values*, however, are more critical for the purposes of this thesis and for understanding prosecutorial motivations. These are concerned with the achievement of terminal values, and are therefore indicative of modes of behaviour rather than goal-setting. Rokeach identifies a number of such instrumental values, including ambition, competence, neatness, helpfulness, obedience, and dependability. Given that it could be expected, then, that specific instrumental values shared by the prosecutorial collective suggest to prosecutors how best to do their job and how to fulfill their basic assumptions about their role, it is imperative that they be examined. It is the contention of this thesis that, as will be evidenced shortly by prosecutorial remarks and anecdotes, there exists a triad of instrumental prosecutorial values:

*Fairness*, which is tied into prosecutorial conceptions of equality, consistency, and uniformity;

*Flexibility*, which relates to prosecutorial understandings that in certain situations, individualised consideration of a case or an offender may and should occur in order for justice to appear to be done; and

*Integrity*, which is associated with prosecutorial views of honesty, decency, and impartiality in the face of external pressures.

Each of these instrumental prosecutorial values shall be examined in turn with reference to prosecutors' own comments about their believed 'right' and 'wrong'

ways to carry out the prosecutorial job with regard to making moral sense of and legal decisions about juvenile offenders.

#### **4.5.1 Fairness as an Instrumental Prosecutorial Value**

Perhaps the most fundamental prosecutorial value is that of *fairness*. The prosecutorial perception of role, as previously stated, is one of administrators of not just legal justice but moral justice as well. It is due to this perception of their role that prosecutors strive to make moral sense of and subsequently legal decisions about juvenile offenders. Consequently, considerations of doing the 'right thing' are paramount to prosecutors, and although what is thought to be the 'right thing' in one situation may be the wrong thing in another instance, there must be some constant standards of fairness against which prosecutors can measure their actions and decision-making processes. In other words, the justice they dispense must be

*fair and equal justice, (Respondent 10)*

which means that in more specific terms, prosecutors perceive their role not just as being the administration of justice but more particularly,

*the responsibility of the fair administration of justice. (Respondent 32)*

Fairness in the prosecutorial context can be taken to mean maintaining *consistency* and *uniformity* wherever and whenever possible, or treating all similarly situated juvenile offenders similarly. Prosecutors emphasise that fairness as an instrumental value means that in making their moral and legal judgments, they must consider cases equally, regardless of who the juvenile offender, or likewise who the victim, may be. Such considerations of background and potential nepotism or favouritism would violate the shared prosecutorial standards of fairness:

*We strive to ensure fairness. In other words, everyone is treated equally, no matter who they are, where they come from. Many of our victims were defendants the week before. Many of them don't come from the Ozzie-and-Harriet-type background, so it's very important to ensure that everyone is treated equally. (Respondent 1)*

One way to define fairness is by the word *consistency*. Treating similar people - regardless of who they are, who they know, who they aren't, and who they don't know - given similar basic facts, treating them the same. (Respondent 11)

I need to be charging things the same way and not making my decisions based on who the people were but on what happened. (Respondent 13)

It is important to treat everyone *fairly* and with respect. Make charging decisions based on the crime and proof available and not on who the defendant is, if we like them, etc., or on any issue of race, sex, religion, etc. (Respondent 19)

I try to treat everyone *fairly* and *consistently* and not give special treatment to someone either more harshly or more leniently just because the media may or may not be involved or the person may or may not have a certain status in the community. (Respondent 29)

Shared prosecutorial notions of fairness and value-driven perceptions of their role as the fair and equal administration of justice once again relate to expectations that others - either within the prosecutorial organisation or within the specific communities the prosecutors serve - may have of them. It has been argued earlier that these external expectations serve to reinforce prosecutors' own feelings of responsibility towards others. More specifically, it can now be asserted that these external expectations serve to reinforce not only prosecutors' own feelings of responsibility but also their perceptions about the importance of administering and dispensing justice fairly. Prosecutors are cognisant of the fact that sometimes, their fair and consistent dispensation of moral justice will make them unpopular as far as the public is concerned. Nonetheless, they contend that if the administration is justice they attempt to dole out is to be fair, it has to be applied even-handedly and consistently regardless of the consequences that may result in the public's opinion of them. One prosecutor relates the following anecdote:

We had an interesting case that we just filed recently. A sixteen-year-old kid shot his be-be gun and shot into the windows of a school bus full of kids. Didn't hit any of the kids, barely missed them, but did break several of the windows or whatever. But this kid, he's a senior, he's

been accepted into Harvard and Yale undergraduate schools, brilliant kid. And of course, they're like, we don't want him to have to have this adjudication on his record. Well, you should have thought of that before. Very interesting case, I mean, that comes down to the fairness issue. I mean, here's this kid who everybody says has such a bright future or whatever, and we are going to be interfering in that future if we prosecute it. And we're like, okay. (Respondent 8)

It is evident that this particular incident involved certain members of the community, such as parents, teachers, or simply concerned citizens, attempting to create moral or psychic distance by intimating to the prosecutor in question that whatever negative consequences resulted from this juvenile's reckless act would be the fault of the prosecutor himself. Yet this prosecutor considered the message that would be sent to the community at large and to other would-be juvenile offenders if he decided not to prosecute strictly on the basis of this juvenile's 'goodness,' and he decided that the risk of appearing to be inconsistent simply because the juvenile had good standing and a promising academic future would be too great. As a result of his symbolic interpretation of this particular juvenile as 'good,' he did not seek to construct him as being morally deserving of punishment and the juvenile was never sent to a lock-up or detention facility. Nonetheless, he will have a temporary stain on his juvenile record, and the prosecutor expressed his hope that this stain will both dissuade him from attempting similar acts in the future, and simultaneously deter other potential juveniles from engaging in similar forms of behaviour by demonstrating to them that they can expect to be treated 'the same as everybody else' if they break the law.

Another prosecutor highlighted the importance of fairness and of sending out 'the right message' in a vignette involving a seventy-two-year-old woman who had crossed over into the wrong lane while driving and hit a tree, instantly killing the passenger who was riding in the car with her. The passenger happened to be the driver's own aged mother. The prosecutor in question discusses the difficulty he experienced in making the unpopular decision to prosecute the elderly woman and the

importance, to him, of choosing a particular course of action in an attempt to send out the right message of consistency:

It boils down to those two questions, what can you charge and what should you charge. Obviously we can charge vehicular homicide and I felt like I should, too, which a lot of people disagreed with. I felt I should because if I didn't do it in that case just because she was older and her mother was the one that had died, what am I going to do if the very next day some seventeen-year-old high school student does exactly the same thing but someone else dies? How do I differentiate between these two? How do I say, he ought to be prosecuted but she shouldn't? Because she's older? That's not right. Because the person who died was related to her? That didn't seem right. So I did prosecute the case, but I was incredibly naïve politically because she got hold of an attorney who thought this would just make great headlines, and it did. People all over the county just thought I was a monster for prosecuting this woman and it took me an awful long time to get past that. And it even affected other cases. I would be presenting cases to jurors and you could see it in their eyes, they were thinking, oh, you monster, the whole time, and they weren't even paying attention to what this case was about and it had nothing to do with her! They just knew what they'd read in the papers about what a monster I was, so that was pretty naïve on my part. But that was a case where I thought that was what I wanted to get out of that case. I felt like it should be charged because I needed to be charging things the same way and not making my decisions based on who the people were, but on what happened. (Respondent 13)

Prosecutors realise that although a particular decision they make regarding the appropriateness (or likewise, the inappropriateness) of prosecution may render them momentarily unpopular, the long-term ramifications of such decisions will strengthen the public's faith and trust in them and in their abilities to carry out the job fairly. One prosecutor acknowledged that

I've made some decisions that the community weren't overly taken with, but we got re-elected by a wide margin. (Respondent 2)

Prosecutors cannot make only those decisions that are popular with the community. Regardless of their political accountability and the fact that they are conscious of the possibly ephemeral nature of their position, they cannot make decisions they believe to be unfair and in violation of their sense of ethics and morality simply to appease the public sentiment. One prosecutor articulated,

If you make a horrible mistake, people will come and let you know. And every four years I have to stand for election. But my own personal view is, the only right way to do it is the way I believe in my heart is the right way to do it. And if it turns out that people don't think my view is the right view, then they shouldn't elect me. I should go somewhere else and do something else. I can't really run it as a popularity contest, though. If I did that, then only unpopular people would be prosecuted. Sometimes popular people do things they aren't supposed to do and I'm supposed to prosecute them, and I will. (Respondent 13)

Over the long term, prosecutors must be seen to be even-handed and consistent, rather than random or unduly influenced, if they are to maintain people's confidence in them and in their abilities and thereby maintain their perception of the role they are meant to fulfill:

I try to keep people's confidence in me, try to be dependable and consistent in what I do. (Respondent 22)

We try to remember that we're dealing with human beings and we try to be as fair with them as we can. And we try to avoid external pressures, by that I mean political pressure or media pressure. We try to sit back and say, if this was done in what we think would be the fairest way, what would that be, and that's what we try to do. (Respondent 2)

Nonetheless, there is a world of difference to a prosecutor between being (or appearing to be) random, and being flexible. Indeed, prosecutors may sometimes feel that considering justice on an individualised basis may be fairer than applying the same rules to all offenders in the same way:

I try and be *fair* and *consistent* given the same basic set of facts, have the same consequences available, but the facts are never identical. The kids are never quite the same, so you've got to be flexible. (Respondent 11)

Therefore, individualised prosecutorial considerations of justice must be regarded not as random acts but as attempts at marrying the twin instrumental values of *fairness* and *flexibility*.

#### **4.5.2 Flexibility as an Instrumental Prosecutorial Value**

The previous section introduced fairness as an instrumental prosecutorial value, suggesting that in doing their job and more importantly, in doing justice, prosecutors



must apply the rules and other criteria in an even-handed and consistent way to all juvenile offenders. Yet prosecutors recognise that in some instances, such uniform practices may disadvantage, *inter alia*, the first-time offender or the juvenile who is at heart of sound moral character and who has simply committed a youthful indiscretion. As a result, prosecutors as a group recognise the value of weighing the merits of each case and each offender individually. Keith Bottomley, writing from the perspective of decision-making in the criminal justice process in the United Kingdom, points out that individualised justice is individualised in two important ways: it considers the individual circumstances of the *particular offender* in question, and it does so through the individual morality of the *particular criminal justice official* (or prosecutor, in this instance, whose individual morality is guided by shared organisational assumptions):

the consequence [of individualized justice is] that not only are the individual needs and characteristics of 'clients' taken into account, but the decisions themselves are very likely to be influenced by the individual characteristics and values of the *decision-makers*.  
(Bottomley 1973: 220)

This individualised justice is crucial in that it allows and encourages prosecutors to make determinations - both legal and moral - about juvenile offenders given their individual circumstances. As demonstrated in Chapter Three, such individualised consideration of the circumstances of a case involving a juvenile offender is enshrined in the philosophy (and indeed, the structure) of the juvenile justice system. The child-savers and social reformers of the late nineteenth century sought, above all else, to ensure that children were treated qualitatively differently than adults and that individualised care and attention was afforded to their circumstances in order that they might receive the most appropriate treatment to meet their needs. A later section in this chapter will demonstrate the specifics of such individual prosecutorial considerations of offenders' maturity levels, moral character, and rehabilitative prospects. For the purposes of this section, however, it is pivotal to examine

prosecutors' own considerations of flexibility and to understand that they believe they are being compassionate and open-minded by considering the extenuating circumstances of a particular case (although not guaranteeing a particular result which may or may not be brought on by such compassionate listening and flexible consideration):

I think I'm a compassionate prosecutor. I think this office has established itself as a compassionate office and will be willing to listen to the mitigation. Now, that doesn't mean that mitigation makes it okay or makes the case go away, but we certainly will consider it.  
(Respondent 1)

Everybody is not the same. If a guy goes in and robs a Kwik Trip because he has a wife who is dying of cancer and her medicine is \$5,000 a month and the insurance company won't give you two bucks, and she's in tremendous pain and he thinks, I have to have that money, I'm going to go steal it. He's different than the guy who goes in and robs a Seven-Eleven and says, I think I'll rob a Seven Eleven so I can get myself a new set of wheels to drive down the street to pick up women. Two different guys, two different sentences. (Respondent 2)

As one prosecutor highlights, *flexibility* as an instrumental value helps prosecutors in that it guides them as to the most (socially and organisationally) appropriate and acceptable way to act. In other words, flexibility does not just mean the individualised consideration of an offender's circumstances. As Bottomley suggests, flexibility in such a context includes the possibility of the individualised consideration of the prosecutor's response to those circumstances. This possibility entails careful consideration of not just the circumstances of the offence and the offender, but of the local and national context (and the prosecutor's own - and organisationally informed - sense of morality):

It wasn't long after Columbine a couple of years ago that we had a threat at one of our local high schools and ended up having the school evacuated and that sort of thing. As it ended up, I think it was as much a joke, and I dealt with those two young people who were involved in that. To me, the task at hand in that situation was wanting to react to it properly but not overreact because of a general consensus and a public concern about a particular type of issue. And so that was really the challenge in that case, was trying to find the right medium, to not overreact and treat the young people too harshly because of some

tragedy that had occurred a thousand miles from here shortly before then. (Respondent 11)

This is Rokeach's definition of instrumental values at its most fundamental level, where instrumental values are meant to guide prosecutors as to the most appropriate and acceptable way to do their job and to fulfill their perceived function. In making moral and legal determinations about juvenile offenders, prosecutors recognise that they are expected to be fair, and that fairness can sometimes assume the form of individualised justice. In such an instance, prosecutors are expected to be flexible and consider not just the merits of an individual case but also the most appropriate individual reaction they can and should have to that case. Moreover, the reason that such fair, equal, and in some cases individualised treatment or juvenile and under-age offenders are all considered valid and legitimate methods of doing justice is that prosecutors are expected to demonstrate integrity in their pursuit of their prosecutorial function. In other words, as they seek to do justice and to see that justice (both moral and legal) is done, prosecutors must uphold certain core standards of decency, honesty, and even righteousness. Therefore, realising that the triad of instrumental prosecutorial values is interdependent, it is important to consider *integrity* as the third instrumental prosecutorial value.

#### ***4.5.3 Integrity as an Instrumental Prosecutorial Value***

Integrity can be defined as an uncompromising or principled adherence to a personal (or organisational, as in this instance) moral code. It means, in colloquial terms, doing 'what is right'. It is apparent, then, that this should be the third component of the triad of instrumental prosecutorial values. The shared instrumental value of *integrity* tells them, albeit tautologically, that the right thing to do is to do the right thing, the honest and decent if not the popular and publicly desirable thing. This instrumental value of integrity is central to prosecutors as they determine what the right thing in any given

case involving a juvenile offender may be, especially in light of external political or media pressures as previously indicated. As the following prosecutors posit, media and political pressures are predictable and are a regrettable but necessary part of the job, but having integrity means not making a decision simply to appease these external parties:

If I have done the *right* thing on a case, part of the job is to be second-guessed by the media or the public. I'm not doing the right thing if I'm just trying to look good for the media. (Respondent 17)

It is difficult to remain *impartial* in the face of external pressures. Just go on doing your job as best you can. (Respondent 19)

Do your job well, and *do the best job possible*. (Respondent 21)

External pressures will always exist and it is impossible to please everyone. We *do the best job that we can*, as consistently as we can, and let our record speak for itself. (Respondent 30)

Most cases do not draw a lot of media or public attention. In the cases that do, I *concentrate on the facts* and admissible evidence, not what someone else thinks is the right thing to do. (Respondent 31)

I have, on many occasions, known that my decision was not going to be a popular one. It's easy to do the popular thing, you don't take anything away. It's easy to do the popular thing, it's hard to do the *right* thing. I believe that I've always done at least what I believe was right. (Respondent 1)

Another prosecutor suggests that pressure may not come in the form of an intrusive media corps or a particularly interested community. Rather, it may assume the form of other agents of the criminal justice system who seek to somehow enhance (or diminish) their responsibility by making certain demands on the prosecutor. In such an instance, according to this prosecutor's understanding of the triad of shared instrumental prosecutorial values, *integrity* means dealing effectively with the case before him, making (moral and legal) decisions about juvenile offenders according to the organisationally acceptable standards of appropriateness and inappropriateness, and, colloquially speaking, letting the chips fall where they may:

Our job is not to control the number of cases that go to court, our job isn't to control the number of kids that get on probation. Our job is to *effectively* deal with the referrals that we get. If that causes too many cases to go to court, well then the judge has got to figure out how to deal with that. And if it causes too many kids to go on probation, then we got to figure out how to deal with that. But you don't corrupt the system. (Respondent 7)

Another prosecutor concurs, asserting that other agents within the criminal justice system who may try to exert undue influence on the prosecutor will simply have to accept that he abides by his own (and his organisation's) standards of right and wrong, and if their request does not meet his (or his organisation's) criteria, then they will have to accept his decision:

I try to keep true to my own ideals as far as what I believe is the right thing to do. And most people who try to influence you improperly aren't very good at it. And as long as you can explain to them that this isn't personal, I just believe I have to do this because it's the right thing to do, they may go away disappointed but the vast majority of them will respect your opinion at least. And the ones who don't probably aren't worth worrying about. (Respondent 13)

What is apparent from prosecutors' comments is that regardless of whether the external pressures they must confront assume the form of media insinuations, public demands, or inter-agency conflict, prosecutors recognise that the job they have to do is a crucial one, and that the decisions they make have the potential for altering the lives of the individuals with whom they come into contact. Consequently, their internalisation of integrity as an instrumental value is all the more critical, in that they believe it is expected of them - and therefore come to expect of themselves - to exercise good judgment and to display more than a modicum of decency and honesty as they go about not only doing their job, but doing justice as well. Just as moral justice can not appear to have been done if the way in which it was allegedly accomplished has been random or universalised, so too is it problematic if justice is presumed to have been achieved or secured in a way which was unduly influenced by one party or another. One prosecutor describes the value of integrity and the

importance of exercising impartial good judgment, especially in the context of the prosecutorial office where members of her community and other prosecutors (within and without her office) regard such things as necessary if she is to be trusted and if she hopes to maintain others' confidence in her abilities:

There's a great deal of power here. I have the power to ruin people's lives, the things that I do here affect people pretty much for the rest of their lives. So it's important to have somebody with integrity doing this job, somebody that you can trust and somebody who has established that they can use good judgment. (Respondent 1)

This triad of instrumental prosecutorial values, as previously mentioned, guide prosecutors in terms of knowing what constitutes an organisationally appropriate or acceptable way to do moral and legal justice. Having internalised these shared prosecutorial values, prosecutors may develop certain modes for doing or administering justice which are consistent with these values and with both their overarching role perception and their beliefs of what society expects of them. In other words, prosecutors recognise that what constitutes the 'right thing' in one situation involving one particular juvenile offender may not constitute the 'right thing' in a different situation. Drawing upon their shared instrumental prosecutorial values, prosecutors develop (organisationally and socially) acceptable modes or visions for carrying out the interests of (moral) justice in a particular case. In other words, they develop ways of *knowing* what the right thing to do is in a given situation.

#### **4.6 Prosecutorial Constructions of Juvenile Offenders: 'Knowing' the 'Right' Thing to 'Do'**

It has been asserted in Chapter One that a prosecutor's primary responsibility is that of providing for the safety and welfare of the community and victims whilst simultaneously considering the special interests and needs of juveniles to the extent that such an action is possible (and indeed, desirable) without compromising the

primary directive or duty. The first and foremost consideration of a prosecutor is the application and enforcement of the criminal law. Whichever decisions may be made in the interests of moral justice, and however much these decisions may be grounded in moral sentiments of alterity or other extra-legal factors, prosecutors must always operate within the confines of the law. Nonetheless, in the changing climate of juvenile justice, the traditional role of prosecutors is shifting and the concept of *administrator of justice* has become something far more nebulous than it has previously been. In order to illustrate this change in prosecutorial role, it is instructive to demonstrate the outcomes of incidents of high-profile school shootings:

The April 1999 shootings at Columbine High School in Littleton, Colorado and the March 1998 shootings at a Jonesboro, Arkansas Middle School were among seven cases of multiple shootings by students in U.S. schools that received widespread media coverage over a 19-month period. In addition to reporting the details of the shootings, newspaper journalists attempted to answer the questions that occupied many minds: 'Why? Why this shooting? Why this rash of shootings in schools?' Experts, politicians, and parents indicted the general culture of violence in the United States, a southern culture of violence, media violence in the news and entertainment industries, a generation of kids out of control, gangs, individual psychopathology, family problems, and guns... These seven shootings, by nine male students, resulted in the deaths of 13 female and nine male students as well as one female and one male teacher and injuries to 32 female and 24 male students and two female teachers. (Danner and Carmody 2001: 88)

As the nature and extent of juvenile crime becomes increasingly visible and worrisome to various segments of the community, school administrators, teachers, parents, and law enforcement officials are increasingly reporting incidence of juvenile lawbreaking in the expectation that prosecutors will somehow alleviate or 'fix' the 'juvenile problem.' As one prosecutor describes, largely as a result of the highly publicised school shootings in the last years of the twentieth century,

What I have noticed is the way we perceive certain offences has taken on a more serious nature, if that makes sense. What we used to perceive as kids being kids, let them handle this amongst themselves, we are now seeing the court involvement. Schools used to deal with kids at their level, but now the social environment that we are in, they

refer a numerous amount of cases to the police officers who then refer them to us for charging. Used to be, you got in a fight at school, you got suspended. Cops never knew about it, nobody ever got charged. Fight happens at school now, you're going to be charged with disorderly conduct or battery. It's society's response to the recent developments in serious juvenile cases. (Respondent 15)

Another prosecutor concurs, citing that

assaults are up, and that's because schools and other people are more sensitive. I mean, what used to be a school-yard fight where the principal would grab them by the back of the neck and say, don't do this again or whatever, they now call the cops. (Respondent 7)

One prosecutor maintains that such an expectation that the 'proper authorities,' such as law enforcement officers or prosecutors, will intervene and 'fix' the problem, is relatively novel, and that it does inform the prosecutorial job:

A lot of the cases that we file against juveniles are all sort of enforcement-driven numbers, particularly with juvenile crime. For example, with truancy, right now we've got a real aggressive truancy programme down here that we've had for the last two or three years. So consequently, our truancy filings have gone through the ceiling, but that's because we want them to. It's no necessarily indicative of the fact that there's more truancy than there used to be, rather it's that we're much more aggressive in enforcing that now. We look for those violations so we can file them, because we think it's the right thing to do to get kids back in school. To a certain extent, there are some other categories of juvenile crime that are similar to that, like a lot of the substance abuse cases. We file all those now. A lot of those things in years past wouldn't necessarily be filed. (Respondent 3)

Ironically, prosecutors realise that, as the 'problem' of juvenile crime did not originate with them, their own actions stand a very minute chance of effectively rectifying the situation. One prosecutor contends that

You can sure trace a lot of these kids' problems back to their environment and broken homes and families. Not that we don't have kids that come out of the traditional family that everything looks and appears to be fine, as far as you know was fine, and that's the bottom line to fixing these kids and the problems kids have. It isn't the system. The real fix is society in general, and morality, and parents being good parents, and there's where the problems really lie. That's where the fixes really lie is the system can't fix all these things. It's parents being parents, or not being parents. I often wish that parents would make better decisions. Then they'd have less problems with their kids. (Respondent 11)



A second prosecutor agrees, suggesting that the sentiment is understandable if misplaced:

This all sort of implied to the schools that if they didn't refer crimes that occurred in the schools, that there was some liability or some accountability that attributed to them. And so, police are going crazy because every time one kid said to the other kid, you dumb fool, get out of my way or I'll knock you down, they called the police. I think schools felt they had to refer them. We get the referrals but we don't prosecute them, by and large. We'll offer services, we'll try to divert them, but that's like using a baseball bat when shooing them out the door would be sufficient. (Respondent 7)

Nonetheless, parents, teachers, school administrators, and other parties interested in the amelioration of the juvenile crime 'problem' expect that prosecutors will not only have all the answers, but that they will willingly and readily apply those answers to the appropriate questions at hand. One prosecutor indicates that since this is the expectation the community has of him, he will do the best job he can to meet that expectation and community perception, regardless of the fact that he may not agree with the sentiment behind it:

I don't want to prosecute all these school fights. I think the schools should be taking care of them. But the schools have referred them to us and have called the police and the schools want to make a statement to the kids that if you fight at school, you're not just going to get slapped on the hand. You're going to get in trouble at school and you're going to get in trouble in the community, too. So since the schools have decided that then that's what we have decided too, that we'll embrace that. Anything that's gang-related we should bring into the court system. So if somebody's having a fight or just even yelling back and forth about gangs between each other, then that's disorderly conduct, and it doesn't do anything to a criminal history to get a disorderly conduct, but at least it gets them into the court system. And the community has perceived the gangs to be a problem, so we try to do what we can. (Respondent 16)

In 'doing what they can' to contend with community perceptions and expectations, then, prosecutors in different jurisdictions must contend with juveniles who have committed crimes ranging from the relatively trivial, such as truancy and mailbox-bashing, to the absolutely grave, such as rape and homicide. As members of the community have grown to expect that such issues will be dealt with effectively by the

prosecutors' offices, that prosecutors will act as intermediary men on their behalf (in order that they themselves can maintain moral or psychic distance from such distasteful things), the role of prosecutors has necessarily expanded to include those of judges and juries. It has become an expected social phenomenon that prosecutors will somehow innately 'know' what to 'do' with a juvenile offender, so prosecutors in turn have developed ways or modes of 'knowing' what to 'do' and when to 'do' it. There are sets of rules, as discussed in Chapter One, which must be followed in carrying out certain tasks associated with the prosecutorial job. Yet how those rules are carried out and how certain criteria are applied depends on the subjective meaning which prosecutors have attributed to specific symbols. In other words, prosecutors seek to utilise legal means to secure their views of moral justice, and that which comprises moral justice in any given case will have to be subjectively determined through the interpretation of certain symbols, certain phenomena that hold unique meaning for prosecutors.

Taking as a point of departure, then, the assumption that prosecutors adhere to the triad of instrumental prosecutorial values in making their assessments and decisions about particular cases, it can be surmised that in some cases involving juvenile offenders, as they deem appropriate, they will seek to punish, whilst in other cases they may seek to provide treatment or care. In attempting to reconcile conflicting concerns about public safety with concerns about the protection of the interests of a given juvenile offender, prosecutors construct juvenile offenders in symbolically interpretive ways in order to give them meaning and to suggest appropriate courses of conduct. It is these symbolic interpretations or constructions of juvenile offenders which must now be addressed.

#### 4.6.1 Prosecutorial Constructions of 'Good Kids' and 'Bad Guys'

When constructing juvenile offenders as 'good' or 'bad,' prosecutors attempt to make sense of their *overall character* in a way that is symbolically meaningful to them.

Robert Emerson proposes that the use of concepts (such as 'good' or 'bad,' for example) to make sense of juvenile offenders implies a fundamental concern with juveniles' *moral character*:

Moral character involves the judgment of what a person 'really is,' what his 'essential nature' is...With the partial exception of 'serious offenses,' mere violation of the law does not make a youth a 'real delinquent' in the eyes of the court staff. As a probation officer noted about one youth: 'There are delinquents and there are delinquents...All children steal things. She's not a delinquent.' Thus, a 'real delinquent' is seen as not simply a youth who has committed a delinquent act, but as one whose actions indicate he or she is the kind of person who has or will become regularly and seriously engaged in delinquent activity. Character assessments of this kind thus underlie the court's handling of cases, particularly in its identification of cases as 'serious problems.' In this sense, a 'real,' 'hardcore' delinquent is a youth who comes to be seen as fundamentally criminal in character by court staff. While such a youth may already be heavily involved in serious delinquent activity, he need not be, and may show only minor delinquent conduct. Nonetheless, he may be felt to be 'the kind of kid who will go bad,' the kind of youth who in time will become a real delinquent, regularly engaged in serious, perhaps violent, delinquent activity. (Emerson 1999: 257)

In attempting to determine what juvenile offenders 'really are,' and whether they are in fact 'the kinds of kids who will go bad,' prosecutors draw upon the information provided to them by that component of the juvenile court system known as *juvenile intake*. When the police believe a juvenile offender needs a court referral, the juvenile becomes involved in the intake division of the court. The term 'intake' refers to the screening of cases by the juvenile court system. The juvenile and his or her family are screened by intake officers, who may be police or probation officers, to determine whether the juvenile needs the services of the juvenile court. The intake process reduces demands on limited court resources, screens out cases that are not within the court's jurisdiction, and obtains assistance from community agencies when court

authority is not necessary for referral (see Feld 2000). The pivotal role played by intake officers cannot be underestimated. While police officers are often guided by rules and regulations that require specific actions, such as taking juveniles into custody when certain events are observed or reported, the guidelines governing intake actions and decision-making are less straightforward. In most jurisdictions, intake proceedings are not open to the public, involve few participants, and do not presume the existence of the full range of a juvenile's constitutional rights. This is not meant to imply that juveniles may not exercise one or more of their constitutional rights during an intake hearing or proceeding, rather, the informal nature of many intake proceedings is such that one's constitutional rights are not usually the primary issue. The formality of these proceedings consists of information compiled by intake officers during their interviews with juvenile arrestees. The long-range effects of intake decision-making are often serious and have profound implications for juvenile offenders once they reach adulthood (see Glaser et al. 2001).

Intake officers must often rely on their own powers of observation, feelings, and past experiences rather than a list of specific decision-making criteria in order to determine what they believe is best for each juvenile. Each juvenile's case is different from all others, despite the fact that several types of offences, such as shoplifting and theft, burglary, and other property crimes, occur with great frequency. Some juveniles have lengthy records of delinquent conduct, while others are first-time offenders. Intake officers compile a social history report, describing, *inter alia*, a juvenile's *identifying data* (including birthplace, address, and legal guardian); *delinquency history*; *developmental history* (including early history, medical history, and a description of the parents' perception of the youth's attitudes and behaviour patterns); *family history* (including marital history, family income, and an impression of family

functioning); *community information* (including placement possibilities and community attitudes towards placement); *school and vocational history* (including school performance, level of scholastic performance, part-time or full-time jobs held, and performance evaluation by superiors); and *impressions and recommendations* (including the family's willingness to become involved and cooperate, a problem list, and strengths and assets of both family and juvenile which can be utilised in dealing with problems). Moreover, sometimes intake officers will have access to several *alternative indicators* of a juvenile's behaviour, both past and future, through the administration of paper-pencil instruments that purportedly measure one's risk or likelihood of re-offending. Armed with this information, intake officers attempt to describe juveniles' overall character and subsequently make important decisions about what should be done with and for juveniles who appear before them; those recommendations, along with the supporting information, are passed on to the respective prosecutors. Prosecutors consider the information transmitted to them by juvenile intake officers very carefully, and attribute a great deal of weight to it. One prosecutor describes the influence of intake in informing the overall outcome of a juvenile's case:

The police can refer a juvenile to a group called juvenile intake that is part of the court system, and they can interview that juvenile, recommend some sort of programme that doesn't require filing charges at all. We call that immediate intervention, and it works particularly well with alcohol cases. Rather than have us drag the kid into court and kind of waste everybody's time, they might just speak to the kid and his parents and say, look, we can get you into this programme where you'd go and you'd learn about the dangers of alcohol. Give you a chance of doing it that way rather than going through the formal system. And most families facing something like that, if they take it seriously, will jump at that opportunity. (Respondent 13)

Consequently, sometimes the intake officer's determination means that prosecutors ultimately have no formal involvement, while at other times, when the decision is

made to pass the case on to a prosecutor to review, all the extra-legal data that has been collected on that individual juvenile offender is available for that prosecutor's perusal along with the legal information gathered by the police. Consequently, prosecutors feel well-equipped to formulate impressions about a juvenile offender based on the information that is presented to them from both sources.

Drawing upon their external sources of information, prosecutors consider such factors as family support, previous delinquent or criminal history, school and employment performance, and exhibited attitude, and construct a juvenile symbolically as either 'good' or 'bad'. A 'good' juvenile, in a prosecutor's view, is one who has never had any previous run-ins with the law or any allegations of lawbreaking, whose offence is relatively minor, whose parents are both physically and emotionally available to offer support and guidance on the road to rehabilitation, whose school and job performance has been above-average, and whose attitude demonstrates remorse, guilt, shame, or concern for the long-term implications of a foolish isolated incident. One prosecutor describes a 'good' juvenile as meeting several of these criteria, and explains how her 'goodness' affected his determination about what course of action would be in her best interest, or what she morally deserved:

There was a young lady who made a criminal threat against another student at school, and in the span of about a week's time, she racked up probably a total of six to seven charges. And instead of proceeding against all the charges, we made the decision to get this young lady into some counseling. And she was a good kid, she had been an A/B student up until just this spot in the school year where things just crashed and she went on like a week or two binge of nothing but bad acts. And so we determined that it wouldn't necessarily be in her best interest to charge her with all of the crimes that she had committed if we could get her some help, get her in to see a psychiatrist or family therapy of some sort. (Respondent 10)

As this prosecutor's anecdote reveals, this 'young lady' was one that he had constructed as a 'good' juvenile, a 'good kid,' and as such, he believed that her spree

of 'bad acts' was an isolated incident in an otherwise seemingly trouble-free existence. The prosecutor's specific selection of semantics, whereby he opts to refer to the juvenile as 'a young lady,' reflects his positive portrayal of her. In making sense of this particular juvenile, and of her moral just deserts, he attributes meaning to her school performance and to her lack of prior record. In other words, she was an 'A/B student,' which he symbolically interprets to mean that she is an individual who is normally very concerned about and involved in scholastic pursuits, and therefore would not be the 'kind of person,' specifically the 'kind of girl,' who could realistically be painted as a 'troublemaker.' This prosecutor's choice of counseling or family therapy as an alternative to formal prosecution suggests also that this is a juvenile whose family would be interested and inclined to participate in alternative methods of resolution. It could even be inferred that the fact that this juvenile is in fact female weighs heavily in the prosecutor's symbolic construction of her as 'good,' in that prevailing social gender roles may prompt individuals to believe that females are more likely to behave properly and to be naturally and innately 'good' than males. Peter Kratcoski and Lucille Dunn Kratcoski, in their review of the research and literature on the subject, have written that:

in spite of the strides made in promotion of the rights of women, the adolescent girl's treatment by parents, the police, and officials of the juvenile court is still strongly influenced by the fact of her gender.  
(Kratcoski and Kratcoski 2004: 161)

It is hardly surprising, then, that this particular prosecutor, like police officers and other juvenile justice officials, would take this juvenile's sex and the socially accepted gender roles associated with it into account in constructing her as 'good.' A second prosecutor refers to a juvenile whom he has constructed as 'good,' alluding to similar criteria:

You have a good kid who obviously has made a mistake, obviously has committed a crime, and the kid's a 4.0 kid, just being a kid, doing

something stupid. You know that if you let this kid have a break, he's never going to come back. (Respondent 15)

Like his fellow prosecutor, this particular county attorney paints a picture of a specific juvenile offender as someone who can only be constructed as 'good' by virtue of his exemplary academic record and lack of prior record. In this prosecutor's mind, these twin factors, possibly combined with the attitude the juvenile may have displayed to the juvenile intake officer or to the prosecutor himself, suggest that this is not some hardened career criminal, but rather someone who has made a 'stupid mistake,' and who regrets making that mistake tremendously. As this juvenile is a 'good kid,' he is not the 'type' to 'come back'; this prosecutor does not anticipate future recidivism on his part because he is symbolically constructed as 'good.'

If symbolic 'goodness' of character is determined by prosecutors by drawing upon such factors as academic performance, family support, attitude, and previous record, then it would stand to reason that those same aspects could, in alternate situations, point to symbolic 'badness' of character. A symbolically 'bad' juvenile, to prosecutors, would be 'a certain kind of person,' one who has very little concern and sensitivity for the feelings and well-being of others around him, one whose crime was of such a vicious or cruel nature that it overshadows all other extra-legal considerations, including scholastic performance and family support. Whereas with a juvenile who has been constructed as 'good,' the best interests of that juvenile can be taken into account and prosecutors may attempt to secure moral justice for them through legal means in order to ensure that one 'stupid mistake' does not end up costing them permanently, a juvenile who has been constructed as 'bad' poses such a high level of risk or threat to the community that the only moral outcome which would be perceived as just would involve ensuring the public safety and dealing with



that juvenile as harshly as possible. One prosecutor describes 'bad' juveniles in the following manner:

Some juveniles commit a crime that is of sufficient magnitude and the defendant is not amenable to treatment through the juvenile system. In other words, they're too extreme. We have one I can think of right now, we have three juveniles who are charged with hailing a cab and then murdering the cab driver for a small amount of money, I forget what it was. The youngest at the time was thirteen. These ones I'm talking about are horrendous crimes, not guys who steal a car, bad guys. Well, then, the way I look at that is, that's when you say society has to be protected. We have this person who is extremely violent and whatever age he is, we have to make sure they don't inflict this violence on somebody again. I mean, it's not unusual to see a bad guy who did a violent crime when he was fifteen and he was sent to a juvenile home for a year and he gets out and does it again, so you've got to recognise that you've got those kinds of people. (Respondent 2)

Unlike the previous examples where the situations had lent themselves well and comfortably to a prosecutorial construction of the juveniles as 'good,' in that the juveniles in question had a good 'track record' and indicated that they could quite possibly be amenable to some form of treatment, the 'kinds' of juveniles to which this prosecutor is referring in his account seem to suggest by their previous behaviour, by their attitudes, and by the nature of their crimes that they would not be agreeable to rehabilitative efforts. When a juvenile commits a relatively minor offence, or one which can be identified as an isolated, one-off occurrence, it is easy to dismiss both the action as trivial and the actor as 'stupid.' Yet when a juvenile commits a violent or serious offence, as in the example cited by this prosecutor, neither the action nor the actor can be dismissed, and instead, what assumes paramount importance is the safety and best interest of the community rather than that of the juvenile. A 'bad' juvenile, therefore, is one whose actions eclipse any glimmer of 'goodness,' someone whose character is presumed to be so dubious and so malevolent that the word 'kid' is not even attached as an epithet. The previous prosecutors, referring to 'good' juveniles, alluded to them as 'good kids,' yet these 'kinds' of juveniles to which this latter

prosecutor is referring are so 'bad' that to call them 'kids' would be inappropriate. They have crossed that invisible line not only from 'good' to 'bad' but from 'kid' to 'guy'. Even without consciously citing their behaviour as adult-like, this prosecutor has indicated that juveniles who exhibit violence and malice through their actions can no longer be regarded as children. This, then, begs a closer examination into the process of differentiating between those juveniles who are child-like and those who are adult-like.

#### ***4.6.2 Prosecutorial Constructions of Child-Like and Adult-Like Status***

In drawing upon the information provided to them by law enforcement and by juvenile intake officers, prosecutors not only subjectively and symbolically construct juvenile offenders as 'good' or 'bad,' but also make determinations as to the level of *maturity* they have displayed in their actions. Chapter Two discussed the different capacities presumed by law to be present (or absent) in individuals or certain chronological ages, and, as Chapter Three posited, the juvenile court was founded with the intention of dealing separately with those individuals presumed to lack those capacities. It was believed that juveniles should be handled separately from adults because they are qualitatively different from one another, and therefore court procedures, detention facilities, even terminology should take those differences into account and make the necessary adjustments in order to treat those who are adults more harshly and more punitively than those who are juveniles, and therefore in need of care and compassion. Yet as Chapter Two outlined, not all individuals who have attained chronological maturity will have necessarily attained the emotional maturity that the law presumes them to possess. As one prosecutor comments,

Picking ages and speculating about whether it is proper to expect certain behaviours from certain people is a futile exercise. I have seen thirty-year-olds that were child-like and fifteen-year-olds that were seasoned criminals with little conscience or concern. (Respondent 22)

Although the law makes distinctions between individuals on the basis of objective criteria, therefore, prosecutors clearly do not. While they recognise the need for such objective differentiation amongst individuals, as addressed in Chapter Two, they do not limit their decision-making in cases involving juvenile offenders to such stark absolutes. One prosecutor summarises her views on the relevance of an often seemingly arbitrary age of responsibility:

Ideally you wouldn't have a line that's drawn in the sand at any particular age. Ideally, you'd take each child as an individual and look at their circumstances. But on a practical level, you simply can't. We'd never get anything done if we spent that level of time just deciding that question. So I understand the need to have a line somewhere. And I'm not sure that, again, on a practical level, that makes as much difference as it might. (Respondent 13)

Prosecutors are cognisant of the fact that some adults will in fact be 'child-like,' and that some juveniles will display traits or characteristics that they perceive as 'adult-like'. The more child-like a prosecutor believes a particular juvenile offender to be, the easier it will be for that prosecutor to reconcile the image of that juvenile with the ideal type of juvenile described by the child savers in the creation of the juvenile court: namely, one who is in need of treatment, mercy, and compassion. Conversely, the more adult-like a prosecutor believes a particular juvenile offender to be, the harder it will be for that prosecutor to reconcile the image of that juvenile with the ideal type of juvenile, and the more likely that prosecutor will be to regard that juvenile as an adult: namely, one who deserves to be held morally accountable for his or her actions and consequently punished for them.

The first criterion prosecutors draw upon in making judgments about juvenile offenders' maturity levels – namely, whether they are child-like or adult-like – relates to issues of *competency*. Chapter Two discussed those mental elements which individuals must possess in order to be held legally accountable for their actions and subsequently legally liable to punishment, such capacities as, *inter alia*, the ability to

differentiate between right and wrong, the ability to reason through various behavioural options, and the ability to appreciate the short- and long-term consequences of possible actions. The point was made that the very assignment of an age of responsibility reflects the jurisprudential belief that some people objectively possess those capacities, that degree of competency, whilst others do not. Prosecutors, then, must make subjective determinations not as to whether or not a juvenile offender is objectively competent, but rather, *how* competent a particular juvenile offender is.

As one prosecutor explains,

There's always a competency issue in any case of any kind. And obviously, if you have a two-year-old who picks up a firearm and shoots somebody, a) of course it's whoever left the gun lying around's fault, and b) it's not a criminal act on the part of the two-year-old. Case law, such as it is, suggests that this is something the court has to consider: competency, the ability to form criminal intent, ability to advise counsel, direct their case. But, I mean, if you have a Doogie Howser or somebody, they could obviously form perhaps a criminal intent or whatever maturity more than the average child. (Respondent 9)

Ultimately, then, prosecutorial constructions of child-like or adult-like status involve making comparisons between a particular juvenile offender and the ideal type of 'average child'. This prosecutor demonstrates her belief that children as young as two years old (that is, younger than the age of responsibility) cannot possibly be expected to possess the necessary capacities to be held morally and legally culpable for their actions. Yet above that cut-off point, above the age of responsibility, some juveniles will be more mature than the average child, whilst others will be less so. The character of 'Doogie Howser' to which she is referring is a fictitious twelve-year-old child prodigy who had obtained his medical degree at a precociously young age and who is a practicing staff physician at a hospital. In referring to this character, she is displaying an awareness that some juveniles will be more like him than like the 'average child,' in other words, more sophisticated, more socially aware, and

possibly, more competent. Part of this distinction on the basis of emotional maturity, sophistication, and competence relates to whether or not a juvenile is fully able to grasp the seriousness of his or her actions, for while the criminal law makes generalisations and wholesale presumptions about the presence (or absence) of these capacities in persons of certain ages, prosecutors make individual determinations as to *how* capable juvenile offenders are of such thoughts and actions. Another prosecutor notes,

I see fifteen-year-old kids who don't know what they've done, and I see ten-year-olds who know exactly what they've done. There was a case that came down in 1997 and it was *In re B and B*, and that was a case about a ten-year-old boy who had literally penetrated a six-year-old girl in the sandbox, and did that kid know what he was doing? I don't know. You're charging a ten-year-old with a sex offence, and is a ten-year-old able to grasp the seriousness of that? (Respondent 5)

The juvenile's age, in this particular instance, made it difficult for the prosecutor in question to believe that he was in fact capable of grasping the seriousness of what he had done. That same prosecutor admits that sometimes, the difficulty in making those determinations is exacerbated by a juvenile's outward physical appearance. As she tries to determine how capable a particular juvenile offender may be of understanding the wrongfulness and the consequences of his actions, inevitably the fact that he 'looks' like a 'kid' will factor into her assessment:

I have a kid upstairs right now who I'm trying to decide what to do with, who is eleven. And he walked into two people's houses, two separate homes, and stole three Pokemon video games out of one house and out of another house he stole a gold dollar coin and some Pokemon cards. And that's two residential burglaries, and if he were convicted of both of those, he would have those two person felonies for the rest of his life. They would always go against him. So yes, he absolutely committed those residential burglaries, there is no doubt about it. What he did was a felony and it was very serious. But you have to weight that against, is there a way to impose a punitive consequence on the kid, rehabilitate the kid, and leave him with a chance at not having a record like this. He's eleven, my gosh, and I mean, I've had eleven-year-olds in court, it's the funniest thing, and they walk in and they're this tall. I mean, is a kid that young really getting what district court is about, the seriousness of it? That kid probably doesn't, but I don't think when he walked into those houses

and took those Pokemon cards, he was thinking, I've now become a felon. I'm thinking he thinks, hey, you know, those are neat videos right there, I could see it through the window, I'm going to get that. They can't always differentiate. (Respondent 5)

There is no doubt in this prosecutor's mind that this juvenile was responsible for the residential burglaries in the *causal* sense (as described in Chapter Two). What she does express uncertainty over, however, is his *legal* responsibility. In other words, she is hesitant over whether or not this particular juvenile should be held legally liable to punishment for his actions when, largely as a result of his size and stature, she regards him as a 'kid' who may not have known any better. *Physical appearance*, then, is one symbol to which prosecutors attribute unique interpretive meaning. A juvenile offender who 'looks' like a 'kid' will, as evidenced by this prosecutor's statement, be more likely to be constructed as child-like than one who 'looks' more adult-like.

The importance of a juvenile offender's physical appearance to the prosecutorial construction of that juvenile as child-like or adult-like, as indicated by the aforementioned prosecutor's comment, can perhaps best be explained in the context of what Erving Goffman has described as the *interaction order* (see Goffman 1961; Goffman 1971). It has previously been stated that the primary source of information upon which prosecutorial decisions are based is the social history report compiled and prepared by the juvenile intake officer. Technically, prosecutors should not make any decisions regarding a juvenile offender based upon their own personal knowledge of that juvenile. Constitutionally, they are not permitted to speak with juveniles who have been taken into custody. One prosecutor explains the formal interaction the way it should operate:

With juveniles, if they're under eighteen and it's a juvenile case, they've got to have a lawyer by law, whether it's a private lawyer or, if they can't afford one or the family can't, then they'll have one appointed by the court. (Respondent 11)

Such physical distance and emotional detachment is much easier to maintain in a larger urban setting than in a small, rural county. In the latter, prosecutors may, in the course of their daily routines, both personal and professional, come upon the very juveniles whose cases they are currently in the process of reviewing. One prosecutor recounts:

I have kids that will try to talk to me. I have attorneys that want me to talk to their kids, and just by the nature of being here sometimes that happens. But we really try to stay away from that. It happens probably more here than it does in a bigger community. I mean, some of the kids I prosecute I know from before they commit their crime, from church or wherever. (Respondent 5)

Such encounters, whether deliberate or inadvertent on the part of either party, offer prosecutors a unique opportunity to see the juveniles for themselves and to make judgments about 'how they look,' whether they appear to display remorse or belligerence, whether they appear to be 'good' or 'bad,' whether they appear to have strong family supports or not, and so on. Erving Goffman has written extensively on face-to-face social *interaction*, which he has described as a situation

where two or more individuals are physically in one another's presence. (Goffman 1983: 8)

Goffman attempts to make the case that the interaction order should be treated as a substantive domain in its own right (see Goffman 1961), and outlines some of the basic units and recurrent structures and processes of the interaction order, from the smallest (persons) to the largest (celebrative social occasions). In so doing, he describes what he refers to as *encounters*, or

arrangements in which persons come together into a small physical circle as participants in a consciously shared, interdependent undertaking (for example, card games, meals, lovemaking, and service transactions). (Goffman 1983: 8)

Meetings between prosecutors and juvenile offenders whose cases they are reviewing would constitute encounters, and insofar as they have a direct bearing on a specific prosecutor's perception of a particular juvenile offender and consequently on

decisions made relevant to the case, they can be termed *processing encounters*.

Goffman defines processing encounters as:

another element of the interaction order that has a direct effect on a person's life chances. These include interviews conducted by school counselors, personnel department staff in business organizations, psychologists, and courtroom officials. These processing encounters can affect the relevant social institution as well as the person involved. (Goffman 1983: 10)

Goffman suggests that through these processing encounters, observing individuals (namely, prosecutors) can attain information about other individuals (namely, juvenile offenders) which will in turn shape the way that expectations are formulated and situations are understood:

Information about the individual helps to define the situation, enabling others to now in advance what he will expect of them and what they may expect of him. Informed in these ways, the others will know how best to act in order to call forth a desired response from him. (Goffman 1973: 1)

In seeing juvenile offenders either formally inside the courtroom or outside of it, in informal chance encounters, prosecutors can glean information about juvenile offenders and assess how those juveniles 'look' to them, and what they believe that appearance implies. The 'desired response' to which Goffman refers, in this case, is the cessation of lawbreaking behaviour, and in observing juvenile offenders and making sense of them based on their appearance and performance, prosecutors can begin to determine what they think the most appropriate course of action would be.

As Goffman suggests, in making sense of juvenile offenders in this way, prosecutors

can rely on what the individual says about himself or on documentary evidence he provides as to who and what he is. If they know, or know of, the individual by virtue of experience prior to the interaction, they can rely on assumptions as to the persistence and generality of psychological traits as a means of predicting his present and future behavior. (Goffman 1973: 1)

In other words, throughout the course of their processing encounters with juvenile offenders, prosecutors will observe their gestures, cues, and behaviour patterns and



attribute symbolic meaning to them, meaning which will in turn affect their moral determinations of these juveniles' just deserts. In constructing this symbolic meaning and in 'making sense' of these juveniles, prosecutors will draw upon the information that they already have in their possession about the juveniles, including any information provided by, *inter alia*, the juvenile intake officer, parents, teachers, and other interested members of the community, in order to validate whether or not they believe that the impression they have formulated is one which is consistent with 'what is known' by others about the juveniles in question. Consequently, as Goffman contends, a great deal depends on the basis of the impressions formed by prosecutors of juveniles during these encounters, impressions of which neither the juveniles nor the prosecutors may be immediately conscious at the time:

The individual tends to treat the others present on the basis of the impression they give now about the past and the future. It is here that communicative acts are translated into moral ones. The impressions that the others give tend to be treated as claims and promises they have implicitly made, and claims and promises tend to have a moral character. In his mind the individual says: 'I am using these impressions of you as a way of checking up on you and your activity, and you ought not to lead me astray.' The peculiar thing about this is that the individual tends to take this stand even though he expects the others to be unconscious of many of their expressive behaviors and even though he may expect to exploit the others on the basis of the information he gleans about them. Since the sources of impression used by the observing individual involve a multitude of standards pertaining to politeness and decorum, pertaining both to social intercourse and task-performance, we can appreciate afresh how daily life is enmeshed in moral lines of discrimination. (Goffman 1973: 43)

A juvenile who 'looks' (a value-laden, subjective term in and of itself) not only like what has been described earlier as a 'good kid,' but who is also, as one prosecutor mentioned, quite physically slight and small, will likely be viewed by a prosecutor as child-like due to his unconscious expressive behaviours and thereby constructed accordingly. Conversely, a juvenile who 'looks' older, more self-assured, and possesses a more dominating physical presence may unintentionally communicate the claim that he is adult-like, and will therefore be constructed as such. Goffman does

warn that sometimes promissory impressions formed on the basis of such encounters are fallacious, and that individuals may be 'playing a part' or performing in order to convey a desired 'look' or 'appearance.' Nonetheless, he argues, some performances and the implicit promises contained within them must be accepted on faith:

The expressiveness of the individual...involves a wide range of action that others can treat as symptomatic of the actor, the expectation being that the action was performed for reasons other than the information conveyed in this way...The individual does of course intentionally convey misinformation by means of...deceit [and] feigning. Taking communication in both its narrow and broad sense, one finds that when the individual is in the immediate presence of others, his activity will have a promissory character. The others are likely to find that they must accept the individual on faith, offering him a just return while he is present before them in exchange for something whose true value will not be established until after he has left their presence...The security that they justifiably feel in making inferences about the individual will vary, of course, depending on such factors as the amount of information they already possess about him, but no amount of such past evidence can entirely obviate the necessity of acting on the basis of inferences. (Goffman 1973: 3)

In other words, it is highly probable that juvenile offenders, in their encounters with prosecutors (either formal or informal) will attempt to convey a certain image or 'look' about themselves, specifically that they are 'good,' 'innocent,' and deserving of leniency rather than harsh disposition. Prosecutors can never be fully certain of the extent to which these promises are truly accurate, as one previously cited prosecutor admitted in her comment that she 'keeps waiting for that crystal ball, but no one is giving it' to her. Much of their moral assessments about juvenile offenders and their just deserts necessarily involves making *inferences*. Goffman cites William Thomas, who notes that social interaction must inevitably involve some inferential elements:

It is also highly important for us to realize that we do not as a matter of fact lead our lives, make our decisions, and reach our goals in everyday life either statistically or scientifically. We live by inference. (Goffman 1973: 3)

In making their inferences about juvenile offenders, prosecutors will draw upon the expressive behaviours they will have observed during processing encounters, and they

will attempt to substantiate their impressions by looking for the presence or absence of certain other predicates that they believe will help them determine whether a particular juvenile offender is child-like, more immature than the 'average child' and less likely to 'know any better,' or adult-like, more mature than the 'average child' and already likely to 'know better' (and therefore deserving of being held to more exacting standards).

One prosecutor asserts that:

Most ten-year-olds today are fairly sophisticated. They are computer literate, their organizational skills tend to be pretty good, they are addressing issues in school that we wouldn't have addressed, so I think children are pretty sophisticated today, for the most part.  
(Respondent 1)

Indicators of *sophistication*, then, are symbolically meaningful to prosecutors in assisting in their formation of inferences that specific juvenile offenders are adult-like. This individual prosecutor's personal belief that 'children are pretty sophisticated today' is confirmed by Marvin Wolfgang, who draws on the work of Reuel Denney (see Denney 1965) and others (see Bernard 1961; Blaine 1966; Friedenberg 1959; Goodman 1960; Keniston 1965; Mays 1965) in formulating his theory that this sophistication on the part of increasingly younger children and teenagers is largely a result of their combined consumer power:

youth in general are richer today than they have ever been and have more alternatives of action and more privileges. The list of privileges usurped by youth has not only increased but has shifted downward in age. The high school student of today has the accoutrements of the college student of yesteryear – cars, long pants, money, and more access to girls. This downward shift in privileges, precocious to younger ages, is a phenomenon well known to every parent whose own youth subculture was devoid to them. Not only are our youth more privileged and richer, but they have for some time constituted an increasingly significant portion of American purchasing power...The magnified purchasing power of young teenagers is one of the factors that tends to make them want to grow up faster or not at all, which is suggestive of Reuel Denney's credit-card viewpoint of 'grow up now and pay later.' (Wolfgang 1967: 148)

With juveniles spending more and more at earlier and earlier ages, it is hardly surprising that they are perceived by prosecutors and other members of society as sophisticated. One prosecutor notes that she, too, is conscious of the fact that

children are growing up much faster than they used to, so therefore they are committing crimes earlier. (Respondent 12)

Even though the physiological process of maturation and development may not be occurring at any faster a rate now than it has previously, prosecutors are attentive to the fact that juveniles appear, at least to them, to be more sophisticated than their predecessors.

In defining what such sophistication entails, one prosecutor

looks at their age and the seriousness of the crime and, are they living like an adult. Some of them have jobs, aren't going to school, things of that nature, so you treat them more like an adult. (Respondent 12)

As previously noted, in circumstances involving a juvenile offender who appears to be more child-like, prosecutors will emphasise issues of treatment and the best interests of the juvenile; conversely, in circumstances involving a juvenile offender who appears to be more adult-like, prosecutors will prioritise issues of punishment and the best interests of the community. As demonstrated previously, an eleven-year-old who is 'this tall,' meaning slight and small in stature, will be more likely to be constructed as child-like than an older juvenile, one who is approximately sixteen years of age or older. Chapter Two established that, in a number of landmark decisions involving the appropriateness of the death penalty for juveniles, the Supreme Court ruled that sixteen years seems to be an appropriate age at which to draw a distinction between those 'younger' juveniles who do not deserve morally to be punished, and those 'older' juveniles who do. Consequently, prosecutors also 'look at age' in determining the most suitable construction of just deserts for juvenile offenders, and additionally, at the seriousness of the crime they are charged with

having committed. A brutal, violent personal crime will overshadow considerations relating to the juvenile's age, even if that juvenile is younger than sixteen years, since prosecutors believe, as previously cited, that in these extreme instances,

juveniles have proven by their actions that they should be charged as adults. (Respondent 34)

The 'actions' to which prosecutors look as 'proof' of adult-like behaviour include those that have violated the law, but additionally refer to those conventional forms of behaviour which imply quasi-adult status. The previously cited prosecutor referred to juveniles who hold down jobs and 'aren't going to school' as exhibiting indicators of sophistication, and other prosecutors concur, citing both of these and a number of additional indices:

If they're already driving, if they have jobs and other responsibilities, I believe they need to be responsible for their actions as well. (Respondent 29)

If they can drop out of school, work, drive, contract, and marry, then they're presumed to have the maturity to make decisions, and to be held responsible for their decisions. They must take responsibility for their actions. (Respondent 21)

In seeking to construct juvenile offenders as adult-like or child-like, and in so doing to confirm and substantiate those promissory inferences made during processing encounters, prosecutors consider such factors as the seriousness of the offence committed and whether or not a juvenile is working, attending school, and driving, as well as whether or not they are old enough to engage in 'normal' behaviours such as marriage and contracts. The implication contained therein is that even if the prosecutors were deceived or 'fooled' during the processing encounters and made the wrong inferences about the juveniles in question, if those juveniles are 'old enough' and 'responsible enough' to be doing each of the aforementioned activities, then surely they are 'old enough' and 'responsible enough' to know better, and therefore must be held legally responsible for their actions.

#### **4.6.3 *Prosecutorial Constructions of Salvageability and Disposability***

How prosecutors make sense of juvenile offenders, whether they construct them as ‘good kids’ who are unlikely to ‘turn bad,’ or whether they symbolically interpret them as ‘bad guys’ who are clearly set on a path towards a criminal career, and whether they perceive them as child-like and less legally responsible for their actions or adult-like and ‘old enough’ to know better and to be held morally and legally accountable, will inevitably colour what those prosecutors will believe to be the particular juveniles’ just deserts, namely whether they morally deserve the opportunity to be treated and rehabilitated or whether they morally deserve to be punished for what they have done. It is this construction of juvenile offenders as salvageable or disposable which will be the subject of the final section of this chapter.

As demonstrated in Chapter Three, the ideological and philosophical premise behind the creation of a separate system of justice for juveniles was the very extent of their ‘salvageability,’ the fact that they were believed to be young enough and sufficiently impressionable to turn their lives around with the proper guidance, therapy, and care. Julian Mack has written,

Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, orally, and then if it learns that he is treading the path that leads to criminality, to take him to charge, 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. And it is this thought – the thought that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities; it is this principle, which...was first fully and clearly declared, in the Act under which the Juvenile Court of Cook County, Illinois, was opened in Chicago, on July 1, 1899. (Mack 1909: 106)

The social reformers of the time recognized that some juveniles may be ill-suited to treatment and to rehabilitative efforts, and for those juvenile offenders, particular waiver provisions were created (see Section 5.5.1 of Chapter Five for a discussion of waiver mechanisms) in order that they might be tried as adults in criminal court on the basis of their more 'serious' offending behaviour. Yet the general perception was that on the whole, juveniles constituted a group that was amenable to treatment and capable of being directed back on the correct path to conventional, law-abiding action.

As one prosecutor contends,

I think, generally speaking, there is someone, a population, that should be rehabilitated or be susceptible to being rehabilitated. There ought to be. I mean, it's not like they've got forty years of a criminal lifestyle and drug abuse under their belts. They may have two or three years of it, but they should be susceptible to treatment and that sort of thing. So I think for the vast majority, that should be looked at as the first alternative, is how do we make sure that this kid gets on to being a productive adult. (Respondent 11)

Consequently, in formulating their symbolic interpretations of juvenile offenders today, prosecutors are informed by their constructions of individuals as 'good' or 'bad,' 'child-like' or 'adult-like,' and proceed to attribute meaning to those individuals as to their degree of 'salvageability' or otherwise. Those juveniles who are constructed as *salvageable* will be dealt with in ways which will seek to maximise their rehabilitative potential, whilst those juveniles who are not presumed by prosecutors to be salvageable will be dealt with more harshly and more punitively, quite possibly in the context of the criminal rather than juvenile court. As one prosecutor discusses,

I think with a juvenile, there is more of a tendency to look at prospects of rehabilitation, what they are. That's going to enter into it a little bit. If it's a really serious crime, it's not going to enter into it at all, but if it's a lower-grade crime, those factors are probably going to come into it somewhat. (Respondent 3)

Moreover, it is likely that these latter juveniles, those who have committed more serious offences and whose rehabilitative potential does not figure prominently in prosecutorial constructions of them, will be referred to in terminology suggesting that they have 'no further use' for society in that they are 'unable' to become productive and constructive citizens. As such, those juveniles who are not constructed as salvageable are instead constructed as *disposable*.

In making the distinction between those juvenile offenders who are supposed to be salvageable and those who are regarded as disposable, prosecutors consider their previous constructions of juvenile offenders as 'good' or 'bad' and 'child-like' or 'adult-like' in an instrumental context. In other words, they review those same factors which prompted them to view a particular juvenile offender as, for example, good and child-like and attribute meaning to those same factors in trying to assess whether their very presence suggests that a juvenile would be amenable to treatment. Those juveniles who have been constructed as good on the basis of their lack of a prior delinquent record, their high level of scholastic achievement, and their strong parental support, for instance, could be seen as 'good risks' for behaviour modification and could be adjudged to be likely prospects for succeeding at rehabilitative efforts on the basis of those same factors. Furthermore, the very same lower chronological ages, remorseful attitudes, and less than intimidating physical presence that informed prosecutorial constructions of them as child-like could induce prosecutors to believe that they are 'young enough' to make a meaningful positive change in their lives and consequently, to turn their 'young' lives around. As one prosecutor remarks,

I would hope that if you get a child into the system early enough and are able to get all of the necessary resources to aid that child in her development, there is a chance that you can change that child's behaviour before it escalates. (Respondent 31)



This notion of 'getting a child into the system early enough' appears, at least upon first glance, to be a paradoxical one. Earlier in this chapter, comments made by prosecutors were examined in an attempt to demonstrate their sentiments of responsibility for members of their community, their commitment and feelings of alterity for the people whose interests they were elected to represent. It was noted that sometimes, prosecutors may experience a sense of frustration at some of the unrealistic expectations that members of their community may have of them, namely that they will 'fix' certain children and 'fix' the juvenile crime problem. Several prosecutors were quoted as expressing their exasperation at having to cope with and generate solutions for a problem that they had nothing to do with causing. A number of them articulated their occasional irritation at the fact that parents, schools, and law enforcement refer cases to them that should be dealt with informally as they 'once' were, as opposed to by the formal juvenile justice system. Yet the very fact that prosecutors receive filings of cases that sometimes involve juveniles who have committed relatively trivial or minor offences presents these prosecutors with what they regard as a pivotal opportunity, the opportunity to impact meaningfully on a child's life, to 'make a difference,' and to set them back on the 'right path.' One prosecutor observes:

I think that sometimes we make a difference. Sometimes it's for the victim and I think sometimes we actually make a difference for the child. We do really rehabilitate kids, we really do convince them this is not where they want to be. (Respondent 4)

It is at the discretion of prosecutors, which, as suggested in Chapter One, is immense, to deal with juveniles legally as they view morally appropriate. In other words, those juveniles that they believe to be good and child-like, whose cases have crossed their desk because someone, whether parent, school administrator, or law enforcement official, was concerned that their lawbreaking actions constituted a warning sign of

future serious criminal behaviour, may be dealt with informally and in ways which would bring about the desired outcome of halting their lawbreaking activity and 'making a difference.' One prosecutor describes this difference as

How can I help turn this kid around? (Respondent 10)

Chapter Five will explore the various mechanisms or instruments by which prosecutors can secure that desired outcome or goal of 'turning kids around' or 'making a difference,' but before they will embark on the pursuit of a particular course of action, they must construct a specific juvenile offender as salvageable and therefore, in all probability, both susceptible to rehabilitative efforts and morally deserving of them. In truth, the prosecutorial job involves enforcing the law and helping the community rather than an individual offender, but prosecuting a juvenile is qualitatively different than prosecuting adults, and particular attention is given to the best interests of the child so long as those interests do not conflict with the needs and interests of the community. As one prosecutor observes,

It's different than when you look at an adult because in most of the time when you get an adult case, they're repeat offenders or it's a pretty serious case, and you're not looking to try and save them. You want to be fair in all your prosecutions, but in a juvenile case, if you get a kid early enough and you're able to offer them some help, then perhaps they won't become offenders the rest of their lives. Perhaps it'll just be an isolated one-time incident, just difficulty being a kid. But you really have to look at what all the kid has done when you're making your decisions. (Respondent 16)

Conversely, those juveniles who have been constructed as 'bad' by prosecutors as a result of their extensive previous criminal history, the seriousness of their current offence, their poor academic performance, and their lack of social and familiar supports could be likewise constructed as 'bad risks' for salvageability. Prosecutors would review their files, notice that this is the second or third time (at least) that they have violated the law, and would deduce that if previous attempts at

rehabilitation have failed, then this time should be no different. Moreover, they no longer morally 'deserve' a second opportunity. One prosecutor observes:

If this is somebody that we have seen time and time and time again, what possible reason do we have of giving them another break when we know that they haven't taken advantage of any of the other breaks they got? If they haven't learned their lesson yet, why would this time be any different? (Respondent 1)

Part of the emphasis, therefore, appears to be on *number of previous 'breaks'* or rehabilitative attempts afforded to the juvenile offender in question, and what he or she has 'done' with them, whether the results were successful or otherwise. The hope with those juvenile offenders who are constructed as salvageable is that they have not yet received those opportunities, but that if such opportunities are given to them, they will seek to maximise them and turn their lives around. Those juveniles, on the other hand, who are symbolically constructed as disposable, are ones who have been given numerous such opportunities and have nonetheless continued with their criminal lifestyles. It is highly likely that such offenders had previously been constructed as bad based on the severity of their offence, and as adult-like on the basis of their chronological age and other more conventional, if still seemingly age-inappropriate, lifestyle choices. As individuals that had been constructed as adult-like, they are seen as 'old enough to know better' and 'old enough' to be held legally responsible for their actions and thereby legally liable to punishment. One prosecutor highlights the difference between the way he perceives juvenile offenders he has constructed symbolically as salvageable, and those that he regards as disposable on the basis of their perceived maturity levels:

Generally speaking, with juveniles, our concern is not only in protection of the community but also how can we get this kid some help, how can we make this kid a productive member of society through some kind of rehabilitation. I believe the more grown up they are, the less time is spent thinking about rehabilitation. I'm more willing to do punitive action to one who's more grown up. They know better. They're members of society, they've been trusted with different

responsibilities, they should know better. And a kid, sometimes kids just do things that for the life of me I don't understand why they do it, and some of the younger ones, I don't think they do either. They think impulsively sometimes, they just act, and that's not to excuse their behaviour. But I think that with juveniles, we have to take that into consideration. We're going to treat a seventeen-and-a-half-year-old who commits a battery at school a lot different than a kid who's eleven years old and commits a battery at school. So we have to consider that when we look at it. (Respondent 15)

In the example cited by this prosecutor, that of a seventeen-and-a-half-year old juvenile and one who is eleven years of age, he speaks of treating the two cases 'a lot different,' yet the gravity of the offence remains constant and no mention is made of whether or not the older juvenile has an extensive record of delinquency whereas the younger juvenile does not. What this prosecutor is actually considering is the extent to which he has an easier time believing that the younger juvenile made a mistake, one he did may not have even realised he was mistaking at the time he committed the offence, while the older juvenile is almost instinctively viewed as one who 'should know better.' Therefore, in his mind, this prosecutor regards the younger juvenile as a good risk for rehabilitation, one who is probably still young enough and impressionable enough to respond well to treatment, while the older juvenile is believed to pose more of a danger to society by virtue of his age and supposed experience, and therefore is not expected to be successful should any opportunities be afforded to him. He has 'had his chance,' he is 'old enough to know better,' and by this time, he should be held legally responsible for his actions and liable to punishment. Whereas the younger juvenile would be described as salvageable, the older one, the one nearing the age of majority, would be termed disposable.

Those juveniles who are constructed as disposable are unlikely to be dealt with informally. Whereas salvageable juvenile offenders may be, as discussed in Chapter Five, diverted from the juvenile court system altogether or else prosecuted but, possibly through the use of plea agreements, given treatment rather than punishment

by the juvenile court authorities, disposable juvenile offenders will almost certainly be handled formally. At the very least, they will be adjudicated in juvenile court and could be removed from their homes and placed in a juvenile detention facility, and at most, they could be transferred to the adult criminal justice system, where they would face the full range of criminal sanctions applied to adults. Such criminal sanctions may include community correctional alternatives, such as probation or restitution, a sentence in an adult jail or prison, or, in extreme circumstances, the death penalty. Since a symbolic label of 'disposable' may incur such stiff penalties, the decision to construct a juvenile offender as disposable is not one prosecutors take lightly. One prosecutor comments on the philosophical difficulties involved in the process:

There have been juveniles through the system who were as appropriate for capital punishment as any adult. Now, do I think a ten-year-old and a seventeen-year-old can be treated the same? No. So that gets you down into, well, what about the thirteen-, fourteen-, or fifteen-year-olds? Well, that makes it a little harder for me to just say yes because there are other things that have to be taken into consideration, like have they done this before, how often have we seen them before. And when you're dealing with somebody who's under eighteen, again, are you willing to say that this is a person that's disposable? Is this person never going to have any use for society again? (Respondent 1)

Making such an absolute statement as 'this person is never going to have any use for society again' is sufficiently problematic in cases involving adult offenders, where the sole consideration is the welfare and protection of the community and the offender's eligibility to punishment. Yet in cases involving juvenile offenders, even those who have been constructed symbolically as bad and adult-like, prosecutors will inevitably have doubts and reservations about obviating the best interests of the juveniles and ignoring what they could always continue to see as a cry for help. The ideological underpinnings of the juvenile court system will always remain an unseen, but not unfelt, influence on the prosecutorial decision-making process, and even in those instances where juveniles are constructed as bad, adult-like, and disposable, and

thereby possibly waived to the adult criminal justice system and dealt with punitively, 'like adults,' prosecutors will always feel the need to justify both to themselves and to others why embodying the doctrine of *parens patriae* should be a secondary concern to the primary issue of protecting the best interests of the community. Indeed, the very fact that the best interests of the individual juvenile offender and their moral just deserts should enter into the prosecutorial decision-making process only further underscores the challenge of carrying out the prosecutorial job in a way that is consistent with the perceived prosecutorial role.

#### **4.7 Conclusion**

How prosecutors construct juvenile offenders, whether they regard them as good or bad, child-like or adult-like, and salvageable or disposable, speaks to their *moral interpretations* as to how likely these juvenile offenders are to turn their lives around and how deserving they are of the opportunity to accomplish just that end. These constructions are in no way sequential; prosecutors do not formally construct a juvenile offender, for example, as good, then as child-like, and finally as salvageable on the basis of the previous two attributions of meaning. Rather, the process is *simultaneous*. Upon reviewing the case file of a juvenile offender as prepared by the juvenile intake officer, drawing upon the reports of law enforcement agents, school officials, and parents, and encountering the juvenile personally either within the courtroom or outside in the community, a prosecutor develops a sense of what kind of person the juvenile in question is and what kind of person he or she is likely to become.

The previously cited comment by the prosecutor who wishes regularly that she be given a crystal ball is not to be taken flippantly. It is expected by other agents in the

juvenile court system and by those members of the community whose interests prosecutors have been elected (or less frequently, appointed) to represent that prosecutors innately ‘know’ how to deal with juvenile offenders and what to ‘do’ with them. Yet it is inconceivable that any decisions prosecutors make can ever fully address the plethora of unanticipated consequences that may await them further down the line.

As part of their job, prosecutors are entrusted with enforcing the law and holding individuals legally accountable for their actions when those actions violate the law, yet they envision their role as administering more than just legal justice. They regard themselves as administrators of moral justice as well, which necessarily involves making decisions about what ‘kinds’ of people morally deserve to be held culpable and to be punished for their actions. Bennett Gershman has written extensively on what he refers to as the ‘moral standard’ for prosecutorial decision-making and contends that upon weighing all *legal* factors, prosecutors must take into account *moral* or extra-legal considerations in order to ascertain that only those persons who morally deserve to be punished actually are:

The prosecutor should then assure herself that she is morally certain that the defendant is both factually and legally guilty, and that criminal punishment is morally just...Why a standard of moral certainty? Such a standard fits the reality that the prosecutor is the gatekeeper of justice. It requires the prosecutor to engage in a rigorous moral dialogue in the context of factual, political, experiential, and ethical considerations. It also requires the prosecutor to make and give effect to the kinds of bedrock value judgments that underlie our system of justice – that the objective of convicting guilty persons is outweighed by the objective of ensuring that innocent persons are not punished. (Gershman 1993: 520)

Making such absolute moral decisions in cases involving adult offenders is difficult enough, in that prosecutors are expected by others – and indeed, expect themselves – to know which offenders pose the greatest danger to the social welfare and should therefore be incapacitated. In cases involving juvenile offenders, however,

the decision-making process becomes infinitely more difficult, since culturally, prosecutors have been socialised to presume that all children, at least to some extent, should be amenable to treatment and should be handled with care, compassion, and mercy, rather than punitively and harshly. This is one of the fundamental problems inherent in the juvenile justice system, the presence of what scholar Kevin Wright (1981) has termed *goal conflict*.

The juvenile justice system must deal with juveniles who have committed crimes, the delinquents. Under the doctrine of *parens patriae*, the juvenile court was designed to be a place of redemption and rehabilitation, saving the child from the rigours of the adult system. The belief was that exposure to adult institutions could not only harm the juvenile, but could also spur the delinquent on the way to the development of a criminal career. Consequently, the basic issue becomes the conflict between *guardianship* and *accountability*, notably punishment. Increasingly, the balance between these two ideals is edging towards punishment. Most states have abandoned rehabilitation and *parens patriae* in favour of holding juvenile offenders legally and morally responsible, punishing them 'as if they were adults.' In fact, it is this mounting emphasis towards punishment that has led the Supreme Court to depart from *parens patriae* and to provide procedural safeguards to protect the rights of juveniles. Prosecutors, then, must make what Gershman has referred to as 'bedrock moral judgments.' Before they abandon their guardianship mantle and assume the position of enforcer and punisher, they must make sense in their own minds of those 'kinds' of juvenile offenders who morally deserve to be treated and those who morally deserve to be punished, and in doing so, they must construct juvenile offenders in each of the aforementioned ways, namely as good or bad, as child-like or adult-like, and as salvageable or disposable. Such symbolic constructions are closely



interrelated with one another and draw upon similar criteria, and when combined, indicate to prosecutors which outcome would be most morally desirable. The next chapter, then, will outline the various prosecutorial constructions of just deserts, those end goals which they view as morally appropriate in different situations, and the legal mechanisms or instruments which are available to prosecutors as they seek to secure or bring about their desired outcomes.

## CHAPTER FIVE:

### **Making (Legal) Decisions about Juvenile Offenders: Prosecutorial Constructions of Just Deserts and Instruments for their Attainment**

#### **5.1 Introduction**

Chapter Four outlined prosecutorial sentiments of alterity and commitment, both towards the community whose members they have been elected (or appointed) to represent and towards individual juvenile offenders. Statements from prosecutors themselves demonstrated their perception of their role as that of *administrators of justice*, yet justice, to them, constitutes something greater than the application of legal principles to those that are deemed legally responsible. As one prosecutor asserts,

My primary duty is to try to enforce the laws of the state and seek justice at the same time, which *usually* concur with each other so it's pretty easy to do most of the time. (Respondent 3)

The very fact that prosecutors may regard the enforcement of the criminal law and the attainment of justice as two distinct ideals is reflective of their perception of their overall role as being one of administrators of *both legal and moral justice*.

Interpreting what comprises legal and moral justice, what the 'right' thing to 'do' in many instances might be, is a complicated and highly subjective process. One prosecutor likens the process of making sense of a given case and making decisions about the 'right' thing to 'do' to a juggling act:

Sometimes it's a conflict. The state law says my primary duty is always to get that conviction and that always stays the same, but after that conviction, the statute says my job is to keep the community safe. And then secondary to that is what is in the best interest of the child, can't forget that. Sometimes those are in conflict. Sometimes you don't know that a child is going to do well back in the community and you're not sure you're safeguarding the community, so you kind of juggle everything. (Respondent 4)

In order to fulfill their perceived prosecutorial role, then, prosecutors must necessarily engage in certain interpretive and predictive activities and attempt to make moral

sense of juvenile offenders, a task which is often cumbersome and complicated inasmuch as juvenile offenders as a group are endowed with certain societal and cultural associations relating to their supposed degree of culpability. It has previously been stated in this thesis that in cases involving juvenile offenders, prosecutors are expected – and indeed, expect of themselves – to ‘know’ almost instinctively (through the cultural transmission of shared instrumental prosecutorial values and through the creation of moral distance by those members of society who wish them to act as intermediary men on their behalf) what the ‘right’ thing to ‘do’ is in cases involving juvenile offenders. Yet different circumstances necessarily involve divergent interpretations of the ‘right’ thing to ‘do,’ since some juveniles will appear to prosecutors to be more *susceptible* to rehabilitative efforts and more morally *deserving* of those efforts than others. Consequently, prosecutors must draw upon information afforded them by juvenile intake officers, law enforcement officials, school administrators, parents, and other concerned citizens, as well as that information which they glean themselves through processing encounters with the juveniles in question, in constructing juvenile offenders as either good or bad, child-like or adult-like, and salvageable or disposable. In so doing, prosecutors attribute symbolic meaning to gestures, actions, and other expressive and behavioural cues exhibited by the juvenile offenders, and are therefore able to make value judgments in their own minds as to whom they believe morally deserves to be punished as if they were adults and whom they believe morally deserves to be treated as if they were children, which may encompass a variety of different activities. As will be evidenced shortly by remarks made by American prosecutors, it is the contention of this chapter that prosecutors assign three degrees of moral accountability to juvenile offenders:

*Educability*, which applies to first-time, child-like young offenders whom prosecutors interpret as ‘not knowing any better’ but who ‘should know better,’ and should be taught (informally) that there are social and legal norms of acceptable and unacceptable behaviour, and consequences for breaching those norms. Prosecutors view educable offenders as those either whose offences are not significantly indicative of any future dangerousness, or whose offences are not significantly indicative that the juveniles in question have no cognisance of social and legal rules governing the appropriateness or certain behaviour, nor that the juveniles are cognisant of these rules and have chosen to violate them flagrantly. The educable offender deserves to be ‘taught a lesson’ for his or her actions.

*Treatability*, which applies to those offenders who may be young, although past their mid-teens, whose actions may be serious but who are constructed as salvageable and about whom prosecutors believe that they are adult-like in that they are ‘old enough to know better’ (that is, past the point of educability), yet child-like in that there is still an expectation that they will be susceptible or amenable to treatment. The treatable offender deserves to be treated and rehabilitated.

*Punishability*, which applies to those offenders who are older, constructed as disposable, whose actions are serious or violent and about whom prosecutors believe they must be made to suffer the consequences of their actions by virtue of their chronological age and relative adult-like status, as well as because either they have been given the opportunity at treatment or rehabilitation previously and have failed, or because the offence is too serious to consider treatment as a viable option for public protection considerations. The punishable offender deserves to be punished.

It may be helpful to consider these three degrees of prosecutorial determinations of just deserts as ranging along a continuum of deserts. Comments

made by prosecutors will demonstrate that those offenders who are constructed as educable are morally deserving of *something less* than those who are treatable, either less formal, less serious, or less permanent in its ramifications, and those treatable offenders are likewise perceived as morally deserving *something less* than offenders who are believed to be punishable. Prosecutorial determinations of just deserts may be *upgraded* along that continuum. For example, an offender who has been constructed as educable for a first offence on the basis of his or her presumed good moral character, child-like status, and salvageability may be morally adjudged as treatable for a second offence, or, if he or she persists in engaging in lawbreaking behaviour, may finally be assessed and handled by prosecutors as punishable as they concede that only 'so many' opportunities or 'breaks' can logically be afforded any one offender. Conversely, the prosecutorial assignation of desert to juvenile offenders may not be downgraded. An offender who has been branded as bad, adult-like, and disposable and thereby deserving of punishment for repeated and violent offences cannot be regarded as educable or treatable by virtue of the number of rehabilitative efforts or 'breaks' attempted (and failed) previously. This chapter will discuss these three categories of prosecutorial assessments of accountability and just deserts, the three end goals prosecutors may envision as their desired outcomes in various cases involving juvenile offenders, and the mechanisms or instruments available to them in attempting to achieve those conclusions that they would view as satisfactory, including such options as pretrial diversion, probation, and waiver or transfer to the adult criminal justice system. First, however, it is necessary to expand upon the principle of just deserts, as introduced in Chapter Two, in order to develop a solid foundation for any subsequent examination of the prosecutorial attribution of various levels of accountability and blame to juvenile offenders.

## **5.2 The Principle of Just Deserts: Assigning Consequences According to Blameworthiness**

Chapter Two of this thesis discussed those principles of legal liability which serve to inform prosecutors of those individuals whom they can hold legally responsible for their actions as opposed to those who are presumed to be lacking the necessary mental capacities and therefore ineligible for subjugation to legal forms of accountability.

Legal scholars Alf Ross and H. L. A. Hart were cited as part of an overall argument suggesting that legal responsibility indicated legal liability to punishment, and Jocelyn Pollock was quoted as saying that in assessing legal liability, the emphasis must surely be on just deserts and on ensuring that juvenile offenders 'get what they deserve.' Yet principles of legal responsibility act more as guidelines than as absolute rules of conduct, and although those individuals who are presumed by law to be incapable cannot, under any circumstances, be held legally responsible for their actions, it cannot be conversely assumed that all individuals who are presumed by law to be capable will necessarily be held legally responsible to the same degree. Pollock contends that ascertaining that offenders 'get what they deserve' is the very fundamental premise of justice, and as prosecutors envision their role as being that of administrators of not just legal but moral justice as well, it remains to them to determine what those offenders 'truly deserve' morally.

The ways in which such assignations of moral culpability, indeed of the varying shades of blameworthiness and blamelessness, are formulated draw tremendously upon those prosecutorial constructions of juvenile offenders as either good or bad, child-like or adult-like, and salvageable or disposable, as addressed in Chapter Four. Professor Edmund Pincoffs would refer to the influence of these symbolic prosecutorial constructions on moral assessments of desert as *desert-making considerations*. He argues that decisions about moral just deserts are not made in a

vacuum, but rather must be contextual in light of information known about those individuals about whom the judgments are being made. As he describes the importance of such considerations,

If A claims that B *deserves* C, it always makes sense to ask A what it is *about* B that leads A to think he deserves C. To put the point another way, it would have no clear sense for A to say B deserves C, but there's absolutely nothing about B, nothing he has done or suffered, no quality of character, *in virtue of which* he deserves C. He just deserves C. People don't just deserve well or ill, they deserve *because* of some fact about or feature of themselves. Not only must there be reasons then, for meaningful desert claims, but the reasons must have to do with some feature of the agent. For convenience, I will refer to these agent-directed reasons for desert claims as Desert-making Considerations. (Pincoffs 1977: 76)

Prosecutors, then, utilise their constructions of juvenile offenders, those in which they have made sense in their own minds as to the moral character, maturity level, and likelihood of rehabilitation pertaining to specific juvenile offenders and in interpreting which they have drawn upon a multitude of sources, including but not limited to information gathered by juvenile intake officers, parents, school administrators, and by themselves through processing encounters with the juvenile offenders in question, as desert-making considerations. These constructions, in a sense, serve as indices for prosecutors as they attempt to determine what 'kinds of people' these juvenile offenders are and what they morally deserve, not because they 'just' deserve to be either educated, treated, or punished, but rather because they deserve such outcomes morally 'by virtue of' things they have done or aspects of their moral character which they have demonstrated.

One criticism that some objectivist thinkers may pose at this point relates to purpose. Instead of inquiring as to *how* prosecutors make moral judgments as to individual deserts and appropriate outcomes, there could be speculation as to *why* prosecutors make such moral judgments. Part of the answer to such a question lies in the *prosecutorial interpretation of role* and the very notion that prosecutors believe,

both professionally and personally, that such moral judgments are their responsibility to make in carrying out their job responsibilities and in attempting to preserve the best interests of the society they serve and simultaneously protect (whenever appropriate) the best interests of the juvenile offenders they encounter. Yet the answer delves even further than that. One prosecutor, when asked about his job satisfaction, referred to his position as one subsumed within

a specific universe of jobs that deals with crime and punishment and justice. (Respondent 13)

Individuals working within that particular ‘universe of jobs,’ namely in the criminal justice system, who concern themselves on a daily basis with the administration of moral justice and the application and enforcement of the criminal law subscribe to a central principle that Andrew von Hirsch terms *commensurability*. He posits that:

Sentences should be proportionate in their severity to the gravity of offenders’ criminal conduct. The criterion for deciding quanta of punishments should, according to this principle of commensurability, be retrospective and focus on the blameworthiness of the defendant’s actions...Punishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong. Treating the person punished as a wrongdoer...is central to the idea of punishment. If one asks why punishment ought to be apportioned to the gravity of the criminal conduct, therefore, the answer is not that this would create the optimum deterrent or pedagogical influence, for it may or may not do so. The requirement of proportionate punishment is, instead, derived directly from the censuring implications of the criminal sanction. Once one has created an institution with the condemnatory connotations that punishment has, then it is a requirement of justice, not merely of efficient law enforcement, to punish offenders according to the degree of reprehensibility of their conduct. Disproportionate punishments are unjust not because they are ineffectual or possibly counterproductive, but because the state purports to condemn the actor for his conduct and yet visits more or less censure on him than the gravity of that conduct warrants. (Von Hirsch 1987: 31-36)

Prosecutors develop a sense as to the extent of ‘reprehensibility’ of juvenile offenders’ actions from their personal experience, their professional contact with other prosecutors and with different agents of the criminal and juvenile justice



systems, and from members of the community they serve who, as argued in Chapter Four, are distinctly forthright in voicing their approval or disapproval with certain perceptions. They assess not only whether an individual offender deserves to be censured but whether he or she is deserving of 'more or less censure.' Yet the concept of 'reprehensibility' is subjective, since different communities will inevitably have disparate views on what constitutes a more or less serious offence (largely as a result of the size and type of community, as noted in Chapter Four), and consequently, making moral determinations about the appropriate deserts, what von Hirsch refers to as the 'proportionality of punishment,' must necessarily be subjective as well. For this reason, as will be addressed in the final section of this chapter, prosecutors must be sufficiently prepared to justify their moral determinations of 'reprehensibility' and of their desired and proportional outcomes to any individuals, either within or without their professional culture, who may question their interpretations of particular actions or of specific aspects of individuals' characters. Ultimately, however, as von Hirsch asserts, it is the State which 'purports to condemn the actor for his conduct' rather than individual citizens, and it is the prosecutor that represents the State, as observed in Chapter One, in any such legal actions against lawbreaking persons. As such, whatever indirect forms of influence members of the community may seek to exert upon the prosecutorial interpretive process, making both these moral and subsequent legal decisions remains the remit of the prosecutor.

This chapter will now concern itself, therefore, with explaining prosecutorial determinations of desert, including the specific desert-making considerations considered in each instance and the legal ramifications for the decision to pursue a particular degree of censure. As educability, treatability, and punishability are discussed, it may be useful to appreciate that sometimes, outwardly, two applications

of criminal sanctions may closely approximate one another. As one prosecutor describes, what she views as treatment may be construed by the individual offenders as punishment:

We want to keep the problem from happening again. So if we see that there's like a depression issue or a substance abuse issue there, we'll plug in whatever services we can to keep the problem from happening again. So we may refer them to a mental health centre for intake. And the kids see it as punishment, like, oh, my gosh, I have to go to mental health. Oh, my gosh, now I have to do this and I don't want to. But we feel like if we treat this problem right now, we may not see this kid again, and that's really what we want. (Respondent 5)

An important point to reiterate, then, is that prosecutorial constructions of moral just deserts, namely educability, treatability, and punishability, relate specifically to certain desert-making considerations and to prosecutorial understandings of the degree of wrongfulness of the juvenile offender's actions and the extent to which he or she can be interpreted as blameworthy or blameless. The entire process revolves around the principle of commensurability and prosecutorial perceptions of proportional responses.

### **5.3 The Educable Offender: The One Who 'Can Be Taught to Know Better'**

Chapter Three of this thesis described the philosophical and ideological underpinnings of the juvenile court system, and Chapter Four discussed the extent to which these very beliefs exacerbate the difficulties involved in the prosecutorial process of 'making sense' of juvenile offenders. The social reformers at the turn of the twentieth century presumed that all children who misbehave, who violate the law, do so as a result of poor parenting, inferior educational standards, and a host of additional social ills, and consequently, if those issues are properly addressed and children are cared for, nurtured, and nourished, then the lawbreaking behaviour should cease. In lieu of the punitive concept, proponents of the juvenile court believed that

the care, custody, and discipline of the child should approximate as nearly as possible that which should be given by his parents.  
(Caldwell 1961: 495)

The objective was to find out why the child was misbehaving and then to use the information of the behavioural and medical sciences to assist the child in changing his or her ways. The social reformers (elsewhere described in this thesis as the ‘child savers’) regarded all children as fundamentally *educable*, and presumed that the very reason for their offending behaviour is one which concerns the fact that they simply ‘do not know any better,’ but that they can indeed be taught the correct way to behave. For some juvenile offenders, prosecutors may believe that it is too late to ‘teach them a lesson’ and that if the goal of ‘turning their lives around,’ as noted in Chapter Four, is to be realised, then they must be taken *formally* through the juvenile court system and subjected to the most extensive and varied forms of treatment modalities available in the particular community. Yet for those juvenile offenders who, on the basis of the relatively minor nature of their current and only offence, and on the basis of their early age and apparent susceptibility to treatment (as discussed in Chapter Four, deduced through processing encounters with prosecutors and with juvenile intake officers and other members of the community) are constructed as good, child-like, and salvageable, *informal* handling may be deemed more appropriate. As one prosecutor describes their understanding of educability, it’s about distinguishing between those individuals for whom it is ‘too late’ and those for whom it is still ‘early enough’ on the basis of their chronological age and presumed maturity levels, and teaching those juveniles for whom it is still ‘early enough’ that there are consequences for inappropriate actions without necessarily holding them legally responsible for those actions and making them suffer the consequences as would be apropos for those who are older:

By the time you've reached adulthood, not only does society expect that you're making your own decisions, but it's just a matter of natural maturity. You've reached a point where if you're not taking responsibility for your actions, then you really need to be brought up short and made to understand that it's time. But a thirteen-year-old needs to be made to understand the same message, but not by forcing them to pay the consequences as much as to understand the concept that there are consequences for bad decisions. By the time they reach adulthood, I think for the most part you teach them that lesson by making them suffer those consequences. Kids you may not have to make them suffer, just to make them understand because maybe they've never had an opportunity to learn that lesson.  
(Respondent 13)

Although 'teaching a lesson' to juveniles who have never had the opportunity to learn it beforehand may not be part of the prosecutorial job per se, prosecutors nonetheless perceive their role of administrators of justice as encompassing the function of educator or instructor where appropriate. For those juveniles who are child-like, good, and salvageable in their eyes, the most appropriate course of action – indeed, the 'right' thing to 'do' – is to refrain from doing anything formally and, instead, to pursue courses of action that would accomplish the ultimate goal of teaching them a lesson without exposing them to the potentially devastating effects of the official court process. The idea that dealing with some deserving juveniles informally may in fact be more beneficial than formally prosecuting them in juvenile court is one that has been largely influenced by labelling theory, which was introduced in Chapter One of this thesis and which should now be discussed in greater detail.

### ***5.3.1 Labelling Theory and Educability: Ensuring that a Bad Mistake Does Not Become an Unerasable Mistake***

Labelling theory is concerned less with what causes the onset of an initial delinquent act and more with the effect that official handling by the police, court, and correctional agencies has on the future of youths who fall into the arms of the law. It is more a theory of delinquent career formation than one that predicts the onset of individual delinquent behaviours (see Mahoney 1974; Matza 1974). According to

labelling theorists, juveniles may violate the law for a variety of reasons, *inter alia*, poor family relationships, neighbourhood conflict, peer pressure, psychological and/or physiological deficiencies, and pre-delinquent learning experiences. Regardless of the cause, if a juvenile's delinquent behaviour is detected by law enforcement or school officials, the offender will be given a negative social label that can follow him or her throughout life. These labels may include such monikers as 'troublemaker,' 'juvenile delinquent,' or 'criminal.' The way labels are applied and the nature of the labels themselves are believed to be likely to have important future consequences for the juvenile offender. The degree to which juveniles are perceived as 'criminals' may affect their treatment at home, at work, and at school. It has been demonstrated in Chapter Four that members of the public do not always have accurate or realistic understandings of juveniles and the juvenile crime 'problem,' and therefore juvenile offenders may find that their parents consider them a detrimental influence on younger siblings and that teachers may place them in classes or tracks reserved especially for students with behavioural 'problems,' potentially minimising their chances of obtaining higher education qualifications. The delinquency label may also restrict eligibility for employment and negatively affect the attitudes of society in general. Without the opportunities afforded to those juveniles regarded as 'normal,' juvenile offenders who have been formally labeled are more likely to associate with those in similar circumstances, thus increasing the likelihood of further deviance (see Lemert 1951; Lilly 1995). Depending on the visibility of the label and the manner and severity with which it is applied, juveniles will have an increasing commitment to delinquent careers. As the negative feedback of law enforcement agencies, parents, friends, teachers, and other figures strengthens the commitment, juvenile offenders may begin to re-evaluate their identity and come to regard themselves as criminals,

troublemakers, or problem children (see Goffman 1963). Consequently, through a process of identification and sanctioning, re-identification, and increased penalties, the identity of juvenile offenders becomes transformed. They are no longer children in trouble, but rather delinquents, and they accept that label as a personal identity through a process of self-labelling. Moreover, depending on the severity of the label, juvenile offenders will be subjected to official sanctions ranging from a mild reprimand to incarceration.

The juvenile justice system began to become increasingly sensitised to the problems of labelling and stigmatisation in 1967, when the consequences of a negative label were identified by the President's Commission on Law Enforcement and the Administration of Justice. In its report on juvenile delinquency, the commission asserted:

The affixing of that label [delinquency] can be a momentous occurrence in a youngster's life. Thereafter he may be watched; he may be suspect; his every misstep may be evidence of his delinquent nature. He may be excluded more and more from legitimate activities and opportunities. Soon he may be designed and dealt with as a delinquent and will find it very difficult to move into a law-abiding path even if he can overcome his own belligerent reaction and self-image and seeks to do so. (President's Commission on Law Enforcement and the Administration of Justice 1967: 43)

Such sentiments helped set the course for juvenile justice policy in the 1970s.

National programmes were created to insulate juveniles from the label-producing processes of the juvenile justice system, and studies were conducted to assess the extent of the damaging effects of labelling. In one such noteworthy study, Charles Frazier describes the case of a young man named Ken who was tried and 'branded' a criminal in a small town (see Frazier 1976). Frazier remarks that labelling Ken as a criminal led his former friends and associates to regard him differently. Rejected by his former peers, Ken had fewer opportunities for engaging in conventional activities and began to see himself as a criminal.

Labelling theorists, then, focus primarily on the social audience's reaction to persons and their behaviour and the subsequent effects of that reaction, rather than on the cause of the deviant behaviour itself. Moreover, labelling theorists allege that the treatment of offenders in the labelling process depends far less on their behaviour than on the way others view their acts (see Becker 1963). Individuals form enduring opinions of others based on brief first impressions (see Section 4.6.2 of Chapter Four; Ambady and Rosenthal 1993). If interactions involve perceptions of deviance, individuals may be assigned the kinds of previously mentioned negative labels, such as 'criminal,' 'delinquent,' or 'troublemaker.' Their suspected behaviour 'problems' are carefully scrutinised by those they interact with and if there are signs of 'visible' deviance, they may be shunned altogether (see Harris et al. 1992). Official labels may be applied when deviant behaviour contravenes socially accepted rules, laws, or conventions, and are often bestowed during ceremonies designed to redefine the deviants' identity and place them apart from the normative social structure, as in during trials or civil commitment (see Garfinkel 1956). The net effect of this legal and social process is a *durable negative label* and an accompanying *loss of status*. The labeled deviant becomes a social outcast who is prevented from enjoying higher education, well-paying jobs, and other societal benefits. Prosecutors are conscious of the durable negative label and loss of status that may attach to a juvenile offender who has been formally processed through the court system. For example, as one prosecutor observes,

Any person convicted of a felony-level sex offence within this state must register as a sex offender for ten years. For an adult who understands the full ramifications of their actions, that is an appropriate penalty. For a juvenile however, and many times a very young juvenile, that is not appropriate. To think that a mistake you make when you are twelve years old will impact you, at the very least, until you are twenty-two, is astounding. You may not get a job because of it, even if you are completely rehabilitated. And then where will you be? (Respondent 30)

This prosecutor implies the possibility of the development of what labelling theorists refer to as a *self-fulfilling prophecy* (see Cooley 1922), and expresses concern over the fact that while such a durable negative label may be appropriate for adults (who may be presumed as a class to be morally and legally responsible), it may be inappropriate for juvenile offenders (who may be regarded as child-like, as ‘too young to know any better,’ and as salvageable under the proper conditions). The danger, according to labelling theorists, is that if children are reacted to negatively by parents, teachers, and others (including prosecutors), they will view these negative labels as an accurate portrayal of their personality. Charles Horton Cooley developed a concept which he termed the *looking-glass self*, speculating that people learn ways of conforming by paying attention to the reactions of others in response to their own behaviour (see Cooley 1922). Cooley argued that individuals imagine how others see them. They look for others’ reactions to their behaviour and make interpretations of these reactions as either good or bad. If others’ reactions are defined as good, the individuals will feel a sense of pride and likely persist in the behaviours. However, if reactions to behaviours are perceived as bad, individuals might experience a sense of mortification. Given this latter reaction, or at least the perception of it, individuals might modify their behaviours to conform to what others might want and thereby elicit approval from them. In response to the rhetorical question posed by the previously cited prosecutor, if the labels are applied consistently, juveniles will alter their behaviour in an attempt to kowtow to others’ views of them, and they will join with their detractors in regarding themselves in a negative light. Eventually, their behaviour will begin to conform to these negative expectations that others – and they themselves – have.



It is further expected that labeled delinquents will seek out others who are similarly stigmatised because members of conventional society shun and avoid them. The outcome of the labelling and stigmatization process is the development of a new, deviant identity. Individuals become what society says they are and then begin to behave predictably. Juvenile offenders will seek out others who sympathise with their plight and can identify with their needs and experiences. Their peers may help the labeled juveniles 'reject their rejectors'. In other words, if conventional society cannot accept them, it is not their fault, it is the fault of those teachers, police officers, or parents who 'just do not understand.' Once the durable negative label and the loss of status have been internalised and the juvenile has developed a new, deviant identity, what may have initially begun as a 'stupid mistake,' what some prosecutors have referred to in Chapter Four as 'just kids being kids,' will have escalated into an 'unerasable mistake,' one whose effects are far-reaching and possibly permanent. In appreciation of the dangers associated with formal labelling, prosecutors wish to avoid labelling those good, child-like, and salvageable juveniles whom they have constructed symbolically and morally undeserving of such a fate and prefer to utilise those measures instead which would keep a 'stupid mistake' from becoming an 'unerasable mistake.' As one prosecutor describes,

I'm not anxious to turn a juvenile into a convicted felon unless that's what needs to be done. And sometimes, I've made that decision to prosecute as opposed to divert because I started looking at a history of violence and some other things that I had been made aware of. And in fact, he was still harassing the victim after it occurred, which didn't settle well with me. This kid ain't learning, he's thumbing his nose at people in the system. But I think when you're young, you want to avoid making an unerasable mistake, one that's going to haunt you for a long time. And I like to give them the opportunity to show me that there's not a reason to create an unerasable mistake. (Respondent 11)

For those juveniles that this prosecutor has constructed as bad, adult-like, and disposable, the labelling process is an inescapable reality of an individual who is

believed to be morally deserving of punishment. In other words, those juveniles that are perceived by, *inter alia*, their attitudes, by their histories, and by their offences (as a result of information that the prosecutor has been 'made aware of' through reports compiled by juvenile intake officers and through processing encounters) as being significantly blameworthy and thereby punishable, are not viewed as deserving of an opportunity to bypass the labelling process. They have 'proven' through their previous and current actions that they are past the point of 'learning any better' and consequently, the primary consideration in dealing with them is providing for the welfare and the safety of the community around them. Conversely, those juveniles that are symbolically interpreted as good, child-like, and salvageable are presumed to be morally deserving of the prospect of a future free of the negative effects of labelling. For these educable offenders, for whom it is still 'early enough' by virtue of their good overall moral character and relatively young chronological age to 'learn better' and to 'learn their lesson,' subjugation to the detrimental effects of the labelling process and exposure to a durable negative label, loss of status, and potential secondary deviance would be seen as horribly unjust and inconsistent with the prosecutorial perception of their role as administrators of legal and moral justice.

Prosecutorial concerns could perhaps be understood more succinctly in the context of the difference between what Lemert has referred to as primary and secondary forms of deviance. Lemert argues that each of these two distinct classes of deviant acts, primary and secondary, comprises a specific role orientation of the individual. *Primary acts* can be rationalised by the offender or considered a function of a socially acceptable role, such as getting drunk at an older sibling's wedding party or accidentally throwing a rock through a neighbour's window. Although primary acts may be considered serious, they do not materially affect self-concept. Primary

deviants are not recognised by others as deviant, nor do they recognise themselves in these terms. As Lemert has written,

Primary deviance is assumed to arise in a wide variety of social, cultural, and psychological contexts, and at best has only marginal implications for the psychic structure of the individual; it does not lead to symbolic reorganization at the level of self-regulating attitudes and social roles. (Lemert 1951: 48)

Lemert attaches little importance to this category of offence, but argues that deviations become significant (or *secondary*) when they are organised into active roles that become the social criteria for assigning status:

Secondary deviation is deviant behavior, or social roles based upon it, which becomes a means of defense, attack, or adaptation to overt and covert problems created by the societal reaction to primary deviation. In effect, the original 'causes' of the deviation recede and give way to the central importance of the disapproving, degradational, and isolating reactions of society. (Lemert 1951: 48)

Lemert suggests that deviant role re-organisation, although dependent to some extent on cultural and psychological factors, is controlled mostly by the labelling that results from a negative social interaction. When discussing secondary deviant identity, he states that if a person's behaviour is repetitive, highly visible, and subject to severe social reaction, it is likely that the person will incorporate a deviant identity into his or her psyche. Subsequently, all life roles will be predicated on this new, deviant model.

To further define and clarify the process of secondary deviance, Lemert suggests that stigmatisation, punishment, segregation, and social control are all contributing factors in the transformation of personal roles and identity. In other words, secondary deviance is a product of re-socialisation in which the deviant role becomes the central fact of existence (what Erving Goffman has referred to as the *master status*; see Goffman 1963), and a person is transformed into one who

employs his behavior (deviant) or role based upon it as a means of defense, attack, or adjustment to the overt and covert problems created by the consequent societal reaction to him. (Lemert 1951: 75)

Consequently, an important part of secondary deviance involves the labeled person's maintaining behaviour and beliefs that society considers deviant. Yet this behaviour enables offenders to cope with the subsequent negative social reactions to their label. Personal acceptance of this behaviour and beliefs comprises label internalisation or successful self-labelling.

A number of prosecutors were cited in Chapter Four as having commented that they prefer to see juveniles 'early on' in order that they might 'make a difference' and help those juveniles to 'turn their lives around.' Presumably their intent is to be able to address appropriately the 'original causes of the primary deviation,' whatever it was that prompted those juveniles to violate the law in the first place, whether psychological, situational, familial, or environmental factors. Prosecutors are conscious of the fact that once a juvenile is formally processed by the juvenile court system, their likelihood of engaging further in delinquent activity increases and their chances of 'succeeding' at convention, law-abiding lifestyles diminish significantly. Consequently, those offenders that prosecutors construct as *educable* are regarded as morally deserving of being spared the adverse effects of labelling and simultaneously believed to be still 'young enough' and 'salvageable enough' to be susceptible to treatment for the 'real,' underlying causes of their lawbreaking behaviour, their primary deviance. As one prosecutor recounts,

If we have a child that's never been in trouble before and it's a misdemeanour, we can put them in several different types of diversion programmes and that's where we use a lot more of our discretion. Those first contacts, we try to get them in a programme right away so hopefully they don't come back a second time. And it ends up not being a conviction so it's really nothing on their record, it just allows us to sort of offer them care if they need it. (Respondent 4)

The very fact that prosecutors believe part of their role to be 'offering care' to those 'who need it' is reflective of the ideological and philosophical underpinnings of the juvenile court framework within which they work. Through providing different forms

of care, if available, to those juveniles that they deem morally deserving of informal as opposed to formal processing, they are able to avoid a conviction and, with 'nothing on their record,' those educable juveniles are spared the possibility of their primary act of deviance amplifying into a more serious and ongoing secondary act of deviance and simultaneously find that they are afforded the same opportunities for employment and education that are afforded to 'normal' juveniles who have never committed primary acts of deviance. The emphasis with educable offenders, then, is to 'teach them a lesson,' handle them in a way which is consistent with the ideals of the juvenile court system without actually exposing them to the court process itself. In other ways, educable offenders are those who deserve to be *diverted away* from the court system and dealt with informally, through the use of alternatives to formal prosecution.

### **5.3.2 *How to 'Teach a Lesson': Diversion as an Instrument for Educating the Educable***

The use of alternatives in dealing with juvenile offenders has been accepted policy since the creation of the juvenile court in 1899. Mark Ezell writes:

A central theme in the history of the juvenile court is the endless search for effective alternatives. The juvenile court itself was established as an alternative to handling juvenile cases in adult criminal court; houses of refuge were built to remove young offenders from jails; and probation was introduced as an alternative to reform schools. Diversion is one of the more recent chapters in this search for alternatives in that juvenile diversion programs are intended to operate as alternatives to the traditional processing of youth through the juvenile court. Diversion necessarily involves a decision by a court official to turn the youth away from usual juvenile justice system handling, and usually includes the provision of such services to the youth as individual, group, or family counseling, remedial education, job training and placement, drug and/or alcohol treatment, and recreation. (Ezell 1992: 45)

Diversion programmes are the most useful instrument for prosecutors to utilise in attempting to secure the goal of 'education' for those offenders that they have constructed as being morally deserving of being 'taught a lesson.' *Diversion*

encourages a juvenile offender to participate in some specific programme or activity by express or implied threat of further prosecution, and is defined by experts as

the channeling of cases to non-court institutions in instances where these cases would ordinarily have received an adjudicatory hearing by a court. (Nejelski 1976: 393)

Generally, diversion refers to formally acknowledged and organised efforts to process offenders informally, outside the justice system. As one prosecutor describes it, diversion assumes the form of a contract between the court (as represented by the prosecutor) and the juvenile in question:

It's an agreement after we file charges not to prosecute it, give the defendant an opportunity to do certain things, and then at the end of a period of time, if they've done what they're supposed to do, then the case is dismissed and there's no conviction. Community service, restitution, treatment, counseling, that kind of stuff. Level one, two, and three felonies are not eligible, so the most serious crimes, murder, rape, aggravated kidnapping, those individuals are not eligible for diversion. But anyone else is eligible for consideration. (Respondent 1)

Generally, then, as long as the offender is a first-time lawbreaker who has not committed a serious or violent infraction, the prosecutor may be willing to handle him or her informally and divert the case away from the juvenile court system in an attempt to spare the juvenile in question the application and internalisation of a durable negative label, as discussed previously. Other prosecutors concur with such criteria:

Usually if it's a real serious crime that involves a death or great bodily harm, we're going to be pretty tough about it. But another example would be of a kid that maybe shoplifts for the first time. That kid is probably going to be allowed to go into a diversion programme so he doesn't end up with a felony conviction on his record in an effort to try and turn him or her around. (Respondent 3)

Evidently, the desire to help an educable juvenile avoid the potentially debilitating effects of a formal label – in this instance, a felony conviction – prompts this prosecutor as well to consider using a variety of different diversion programmes in order to achieve his goal of 'teaching the juvenile a lesson' without the infliction of

the permanent stigma associated with a durable negative label and loss of status.

Another prosecutor concurs that sometimes formal processing is not the best way to accomplish that goal:

There's another group of cases that even if there's a legally sufficient basis, we're not going to file them because we believe that there are more effective means of dealing with those cases than formally filing, truancy being one. We file as few of those as humanly possible. I mean, we just don't think that's the best way to deal with them. (Respondent 7)

There are no absolute universal criteria established for deciding which juvenile offenders can be morally assessed as educable and, subsequently, as divertable.

Rather, some prosecutors may establish a set of guidelines in keeping with their own prosecutorial policy which will inform their intra-office colleagues as to those criteria which are deemed appropriate to consider. Consequently, there may be some variance in the criteria used by prosecutors in different jurisdictions. Usually, overall goodness of moral character factors into it, as do child-like status and salvageability. However, in terms of what constitutes a sufficiently trivial offence in order for an offender to be regarded as relatively blameless in that he or she does not know any better and deserves to be taught a lesson informally as opposed to dealt with formally, prosecutorial views differ. Prosecutors as a group are willing to divert those juvenile offenders who have committed 'less serious' offences:

Most first-time offenders of less serious cases receive a recommendation of a suspended imposition of sentence where they have the opportunity to avoid a conviction. (Respondent 29)

I have wide discretion in determining whether to divert less serious cases. (Respondent 33)

Yet there is significant variation in what prosecutors regard as 'less serious' offences.

Some prosecutors may restrict their eligibility guidelines for diversion only to specific types of misdemeanours:

We only have misdemeanour diversions, and they're for first-time offenders that have never been in trouble before and where there's no

financial loss to the victim. So we have a drug diversion programme for possession of marijuana or paraphernalia, we have a theft diversion programme for our first-time misdemeanour shoplifters, and we have a different diversion programme for assaulting or disorderly conduct kids. (Respondent 4)

Other prosecutors may divert first-time misdemeanants as well as first-time felons in restricted, lower-level types of felonies:

We have a guideline system. Some felonies are divertable, but the majority of felonies are not divertable. All of your misdemeanours are divertable. However, if the kid has a prior adjudication or a prior offence in another county or in this county, they are not eligible for diversion. This is their one bite at the apple. They've never been in trouble before, they've never been truant from school, they get their second chance on these lower-level crimes. Now, if it's a serious crime like an aggravated assault, like they've put a knife to somebody's throat, that's not going to be divertable, those serious crimes. But say you've never been in trouble before and you shoplifted from a place like [clothing retailer] Abercrombie and Fitch, where it's real easy to rack up five hundred dollars' worth of stuff, that felony would be divertable. But something serious like that assault, calling in a bomb threat at your school, saying that you're going to shoot someone at school, or bringing a gun to school and shooting someone, those cases are not divertable. (Respondent 15)

The variance in prosecutorial guidelines for diversion eligibility stems from the fact that the disparate communities whose members prosecutors have been elected or appointed to represent may have divergent views on what constitutes a 'serious' offence. Chapter Four discussed prosecutorial commitments to their community and feelings of responsibility and alterity that they possess and manifest not only towards the public at large (what was referred to as *electoral alterity*), but towards particular individuals about whom they are uniquely concerned (what was termed *specific alterity*). Such prosecutorial sentiments necessarily entail a sense of responsiveness, as highlighted in Chapter Four, and just because individual prosecutors may not regard a particular action as 'serious' does not mean that they will disregard community perceptions of that same action as 'serious' or 'dangerous.' The previously cited prosecutor refers to school crimes as a grouping of offences which would not be divertable, and such a guideline would be expected to be maintained



across most, if not all, localities. Nonetheless, his comment about a shoplifting felony being eligible for diversion seems to indicate that members of his community do not (yet) regard the incidence of larceny-theft as a 'serious' or 'dangerous' threat to the public order. Other counties or towns, on the other hand, may regard the prevalence of shoplifting as an all too frequently occurring phenomenon, and may seek to curb it accordingly. In those areas, the elected or appointed prosecutors would likely consider shoplifting an offence which would not be divertable. What remains consistent amongst all American prosecutors, however, is that while those 'serious' offenders may be morally adjudged as treatable or punishable (however 'seriousness' is interpreted in particular jurisdictions), those 'less serious,' first-time offenders who have been constructed as good, child-like, and salvageable, will be afforded the opportunity to escape the judicial process relatively – or at the very least, formally – unscathed.

One prosecutor explains how constructions of salvageability factor into the decision to consider a juvenile offender as eligible for diversion:

We divert quite a bit of stuff, actually. We have a criteria list and it's based on the offence, whether or not it appears the offender is motivated to rehabilitate himself or herself, and whether it appears likely that they will successfully complete the terms of our diversion. Ultimately it's discretionary with the prosecutor's office, but those are the things we try to take into account. (Respondent 5)

One reason for 'trying to take those things into account' is that those juvenile offenders that prosecutors attempt to divert out of the formal juvenile justice systems are those that they have assessed as educable. Their primary goal, then, is to teach these juveniles a lesson, teach them that there are right and wrong ways of behaving and that there are consequences to be met for misbehaving. As one prosecutor explains, if her goal is to educate the juvenile in question as to their wrongdoing, if she feels she can accomplish that goal through the use of diversion, she sees no reason

for formally processing that juvenile through the court system and potentially apply a durable negative label to him or her:

The over-arching idea is, can you achieve through a diversion what we want to achieve in this case? Can we get them to understand that what they did was wrong, not just because they got caught because it's just plain wrong, and get them not to do it anymore? (Respondent 13)

Since the beginning of the juvenile court, thousands of juvenile delinquency cases have been handled informally, 'adjusted' in some fashion such that the juvenile's case was either closed or referred to a non-court agency. These diversions of cases away from the formal juvenile justice system were permissible because of the broad discretionary powers inherent in the jobs of law enforcement officers, juvenile intake workers, prosecutors, and judges. Prior to the 1960s, therefore, diversion was an informal disposition used by juvenile justice officials, and specific programmes were rarely labeled or funded as diversionary alternatives. However, as observed in Chapter Three, with the escalation of juvenile crime in the 1960s, the juvenile court encountered strong criticism both for its failure to reduce delinquency and for making it 'worse' by negatively labelling juveniles and by mixing serious juvenile offenders with first-time, minor offenders. Most juvenile justice professionals expressed the view that the court would do a better job by focusing on the smaller number of serious juvenile offenders and by developing alternative approaches for those juveniles charged with less serious offenses.

Accordingly, the aforementioned President's Commission on Law Enforcement and the Administration of Justice in 1967 recommended that diversion programmes be used in order to avoid long-term negative consequences for juveniles and to work with juveniles to rehabilitate them. The President's Commission advocated the use of diversion programmes on the grounds that, firstly, diversion keeps the juvenile justice system operating and insulates it from collapse as a result of

overwhelming caseloads; secondly, that diversion is preferable to dealing with the juvenile justice treatment system, which was perceived at the time as being wholly 'inadequate'; thirdly, that diversion offers legislators the opportunity to reallocate resources to programmes that may be more successful in the treatment of juvenile offenders; fourthly, that diversion costs are significantly less than the per capita cost of institutionalisation; and finally, that diversion helps juveniles avoid the stigma of being labeled a delinquent, which was believed to be an important factor in developing a criminal career (see President's Commission on Law Enforcement and Administration of Justice 1967). Anthony Platt was cited in Section 3.3 of Chapter Three as observing that perhaps the original child savers were not as altruistic in their motives to create a separate court for juveniles as they were driven by their own desire to preserve the standard of living to which they had become accustomed, and it could be deduced from the Commission's report that part of the impetus for relying increasingly upon diversion programmes was fiscal rather than compassionate in nature. Nonetheless, regardless of the true underlying reasons or the expressed justifications for its use, diversion became commonplace as a mechanism by which those juveniles who were not seen as 'serious risks,' in other words, those who violated the law not because they were chronic offenders but rather because they simply 'did not know any better,' could be dealt with. In handling those offenders constructed as educable, then, modern-day prosecutors have the option of making use of those diversion programmes at their disposal.

Since the late 1960s, as a result of the President's Commission report advocating the use of diversion where appropriate, a number of diversion programmes have been developed. Prosecutors rely on a variety of different diversion programmes and conditions in order to secure their overall goal of 'teaching a lesson' to juvenile

offenders, opening their eyes to societal norms of appropriate and inappropriate behaviours whilst simultaneously sparing them from the formal juvenile court system and consequently, from the potentially adverse effects of negative labelling. The types of diversion programmes prosecutors make use of depend largely on the type of jurisdiction in which they operate and the resources available to them. As a general rule, larger, wealthier counties could be expected to use a variety of different programmes that may be run by different social service or welfare agencies, whilst smaller, less affluent localities may rely on those means that centralise the responsibility for operating the diversion programmes within the prosecutors' own offices. Consideration must also be given to the specific needs of the individual offender. As prosecutorial constructions of educability are heavily influenced by the ideological underpinnings of the juvenile court system and the desire and inclination to address the 'real' needs of each juvenile offender, the 'real' reasons underlying their initial primary deviant act, individualised concerns are prioritised over generalised approaches, and particular attention must be paid to what is presumed to be at the heart of the juvenile's lawbreaking behaviour. As one prosecutor explicates,

It kind of is done on a case-by-case basis. Sometimes we refer them for anger management, if it's a battery case. Sometimes we refer them for a twelve-week drug and alcohol education class, if it's like a possession of marijuana or a DUI. If there's something in the report to indicate to me that the kid has problems at home or some other kinds of issues, like a depression issue or something like that, I may refer them to a mental health centre for an intake. The thing with diversion is, we want to keep the problem from happening again, and so whatever services we can plug in right then to make sure it's not going to happen again, that's what we want to do. We kind of feel like if we get it resolved, we're not going to see this kid again, and that's always the goal with diversion. Also, there are assigned community service hours, they have to do those not for profit. Sometimes they have to write apology letters. Occasionally I make them write a report, just because. They may also have to make a financial contribution to the Coalition Against Substance Abuse if it's a substance abuse-related offence, or if they've been in a violent relationship with a boyfriend or girlfriend, they may have to make like a ten or fifteen or twenty dollar donation to the Battered Women's Shelter, something like that. So it depends. (Respondent 5)

As this prosecutor illustrates, the goal with educable and divertable juvenile offenders is to ‘teach them’ that their behaviour was inappropriate and that there are consequences to be incurred for engaging in that kind of activity. Yet the kind of offence committed and the kinds of information about the juvenile’s scholastic performance, home life, and mental health, as gathered by the juvenile intake officer and by the prosecutor herself through processing encounters with the juvenile, will indicate to her what an appropriate modality for teaching that lesson might be.

Community service and restitution, collectively referred to as *reparative alternatives*, are often perceived as beneficial in that the juvenile offender is afforded the opportunity to repair part of the harm caused by his or her offence and to observe firsthand that when a crime is committed, a debt must be repaid to society. An additional benefit of such reparative forms of diversion is their high degree of visibility. Members of the community can witness juveniles ‘making amends’ for their illegal actions and may feel, at least in some small measure, recompensed for the harm that has been inflicted upon their society.

*Specialised alternatives*, which involve sending a juvenile offender to an instructional programme where he or she will be surrounded by other juveniles who have committed similar offences and where, as a group, they will learn the harms and dangers associated with that particular type of behaviour, are another diversionary option for prosecutors. The previously cited prosecutor referred to the reliance upon anger management courses in battery cases and substance abuse resistance education in drug- and alcohol-related offences. Such specialised approaches are utilised heavily by prosecutors across different jurisdictions, although the specific programme or particular offence may vary. One prosecutor contends that specialised diversionary approaches work especially well in alcohol-related cases, which are prevalent in his

county but nonetheless are not regarded by the public as serious enough to warrant prosecution:

That kind of immediate intervention that doesn't require filing charges at all works especially with alcohol cases. Rather than have us drag the kid into court and kind of waste everybody's time, they might just speak to the kid and his parents and say, look, we can get you into this programme where you'd go and you'd learn about the dangers of alcohol. Give you a chance of doing it that way rather than going through the formal system. And most families facing something like that, if they take it seriously, will jump at that opportunity. (Respondent 13)

Likewise, another prosecutor describes a specialised diversionary alternative he employs for juvenile first-time shoplifters:

We do some different things, we have different programmes. It's not uncommon for us to give diversion for shoplifting. Most of the children that we get for shoplifting, we send them to a shoplifting diversion programme, a seminar. I mean, we discuss with them things like the impact that shoplifting causes all of us, on the store. And most of the kids that go through that never come back. (Respondent 8)

Clearly, this prosecutor's intent in sending an educable juvenile who has shoplifted for the first time to a diversion seminar of this nature is to teach them the consequences of their actions and to encourage them to accept responsibility for those actions. Sometimes, such a structured seminar is not deemed necessary, as prosecutors in individual situations may believe that the goal of educating a juvenile as to the nature of their wrongdoing can be accomplished through the use of *unstructured alternatives*. One prosecutor was quoted earlier as suggesting that occasionally, she may demand that letters of apology or reports be written as part of the diversion conditions. Another prosecutor relies on similar instruments:

I've had some little kids that'll steal a pack of gum and a pack of cigarettes from a convenience store. They may come in on their first appearance with their parents and we do a diversion. And again, if they've never had anything before, I may give them that, which means they won't have a juvenile record then but they'll still have to do some of the same things that they would do on probation, because we want them to get the picture. They have to go to school, they have to write letters of apology and do some community service hours, things of that nature. So that may not take as long and I may not have as much

contact, and hopefully if they're good, if they abide by everything, I'll never have them again. (Respondent 12)

Such unstructured alternatives as these allow prosecutors to deal appropriately with those juvenile offenders that they view as the most salvageable and the most educable. In other words, these are the juveniles who are very young, very scared, and very conscientious about having been caught. It may take less to 'teach them a lesson' than it would take to achieve the same end result with other educable offenders. For some offenders, it may not even require as ordered an approach as a letter of apology. One prosecutor discusses the appropriateness, in individual cases, of simply bringing juveniles and their parents in for a conference in the hopes of teaching them a lesson:

I've had some young kids that I have not filed charges on, and what I've ultimately done in reviewing it was, I've had them and their parents have to come see the County Attorney. And we sit down and have a little chat. I guess I'm of the opinion, when I was young growing up in this county, if I would have had to have gone to the County Attorney's with my mom and dad, I would've tried to avoid having that happen very often. So I've informally dealt with them on that appropriate basis, and I guess that really comes down to the amount of discretion I have on different things. (Respondent 11)

As diversion is employed predominantly by prosecutors to handle those juvenile offenders which they have constructed as educable, the long-term objective of diversion is clearly to 'teach a lesson' to juveniles in a bid to minimise recidivism, or, as one prosecutor phrases it,

so we never have them again. (Respondent 12)

Yet, as the evidence presented by the aforementioned prosecutors demonstrates, there is no single 'right' way of 'teaching' that lesson, since some juveniles will be more amenable by virtue of their age, relative child-like status, and degree of salvageability to unstructured alternatives while others who may be older, less child-like, and perhaps less salvageable may require more specialised or reparative approaches. No method is universally appropriate, nor universally inappropriate. The choice of which type of alternative or approach to pursue in diverting educable offenders from the

formal juvenile court system is entirely at the (largely unchecked) discretion of the individual prosecutor. What does remain consistent, it must be reiterated, is the belief shared by prosecutors that certain individuals who have been constructed as educable as a result of their lack of prior record, their relative child-like status, their overall goodness of moral character, and their considered salvageability should be spared the potentially adverse and damaging effects of the formal judicial process. The preponderance of evidence from a survey of available literature suggests that diversion, while not fully effective at preventing recidivism, nonetheless tends to reduce it substantially (see Davidson et al. 1987; Shoemaker 2000). This evidence is largely supportive of less aggressive, more informal intervention strategies for dealing with minor delinquent offenders until after they have committed at least another more serious offence (see Davidson et al. 1987; Regoli, Wilderman, and Pogrebin 1985). A number of diversionary studies have reported lower rates of recidivism amongst participating juveniles, suggesting that those individuals constructed by prosecutors as educable are, in fact, largely capable of 'being taught a lesson' and able to learn not to repeat their mistakes. Implicit in most of these studies has been the idea that minimising formal involvement with the juvenile justice system has been favourable for reducing participants' self-definitions as delinquent and avoiding the delinquent label. Consequently, labelling theory appears to figure prominently in the use and operation of diversionary programmes. Moreover, many divertees have been exposed to experiences that either enhance or improve their self-reliance and independence, and many juveniles have learned to think out their problems rather than act them out unproductively or antisocially. Nonetheless, prosecutors appreciate that not all juvenile offenders, however young, child-like, good, and salvageable they may appear, are educable. Some are clearly not capable of being 'taught a lesson,' and



consequently, some deserve to be processed formally. However, even those that are believed to be morally deserving of prosecution ‘can still know better,’ owing to their symbolically interpreted salvageability. Prosecutors may still ‘make a difference’ and help them ‘turn their lives around,’ although these more serious offenders are presumed to deserve formal treatment. These are the *treatable* offenders, and they will be discussed in the following section.

#### **5.4 The Treatable Offender: The One Who ‘Can Still Know Better’**

In making moral determinations regarding the degree of blameworthiness or blamelessness of juvenile offenders who have been constructed as good and salvageable, prosecutors distinguish between those juveniles who are still ‘young enough’ to morally deserve to be diverted away from the formal juvenile court system and its potential adverse effects, and those who are ‘old enough’ to morally deserve to be processed formally. The emphasis with both groups of offenders is on ‘making a meaningful difference in their lives’ and on maximising the potential for success at rehabilitative efforts, yet educable offenders are those that have been understood as child-like, whilst treatable offenders are those that have been interpreted as more adult-like, meaning that they should be ‘old enough to know better.’ Yet unlike those adult-like and disposable offenders who, by virtue of these two features of their symbolic construction and additionally, that of their ‘bad’ moral character, are adjudged as punishable (which will be addressed in the following section of this chapter), *treatable* offenders are perceived as fundamentally good and still capable of ‘turning their lives around.’ With regards to these types of juveniles, prosecutors are not yet ‘ready or willing’ to concede that they have been given all the possible opportunities to reform and are subsequently solely deserving now of being punished.

One prosecutor explains the difference to her way of thinking between educable and treatable offenders:

If you have a seventeen-year-old kid who's never been in trouble before but, let's say they've gotten charged with minor in possession of marijuana. I could just divert that kid, but you wouldn't want to. They're old enough that we should just try and work something out and have them go get some treatment and some help. Because at seventeen, you probably can still do something to help them. If they are seventeen and they are using marijuana, then there is probably a problem and it's probably not an isolated incident. But let's say you have a twelve-year-old who's charged with possession of marijuana. Then you have the same reasoning, they need some help, but they're so young, I most likely would give them a diversion. (Respondent 16)

This prosecutor's assessment of a seventeen-year-old juvenile who has been charged with possession of marijuana would be highly similar to that of a similarly situated twelve-year-old, with the key distinction being that the twelve-year-old is 'so young,' or child-like, and the seventeen-year-old is 'old enough,' or adult-like. The offence in question is not a serious or violent one, not one in which there are any victims that have been harmed, and its nature, coupled with the fact that this individual has 'never gotten into trouble before,' leads the prosecutor to conclude that the juvenile in question, regardless of his or her age, is of good, sound moral character. She also believes that, like with a twelve-year-old, this is someone who could likely succeed at rehabilitative efforts if given the 'proper help.' This is not someone she would like to see punished, but rather a juvenile she believes she could still – and should still – try to help.

Another prosecutor concurs that the treatable juvenile is one who is regarded as good and salvageable, yet is 'old enough' and sufficiently adult-like to be handled more formally than the divertable educable offender. She alludes to similar goals, namely those dealing with 'not wanting them to do it again,' and argues that at a certain stage, it must be recognised that by virtue of both their ages and their behaviours, some juveniles are past the point of diversion yet not quite deserving of

formal punishment. According to her, they deserve something in the middle, and that intermediate area is the designation of treatability:

I think that the overall idea is not so much is it a first offence or not, but will we achieve by the diversion what we want to achieve. If you keep your eye on that, obviously if it's a second offence, they've already been through the system once, then you have to wonder if a diversion is going to do them any good a second time. So yeah, that's part of it. But I think the overarching idea is, can you achieve through a diversion what we want to achieve? Can we get them understand that what they did was wrong, not just because they got caught but because it's wrong, and get them not to do it anymore? Probably the younger they are, yeah, a diversion will do that, but when they're older, more sophisticated, you have to wonder how much good diverting them will do. (Respondent 13)

In discussing punishability in a subsequent section of this chapter, one prosecutor will be cited who observes the sequential nature of 'breaks given' to juvenile offender: initially, they may be diverted, then they may be tried and sentenced to community corrections, then they may be subject to home confinement and electronic monitoring, and when all treatment options have been exhausted, there may be nothing left but punishment. For those juveniles who are 'older, more sophisticated,' which, as Chapter Four illustrated, are indicators of adult-like status, diversion may be viewed as inappropriate. Yet the nature of their offence is such that they are not understood as bad or disposable, and in light of such desert-making considerations, they are interpreted as morally undeserving of punishment. Yet they must be morally deserving of 'something,' some action that will be a step above education and instruction and yet a step below full-blown punitive sanctions or waiver to the adult criminal court system. One prosecutor suggests that that 'something' does not necessarily have to involve very serious or complicated action:

Sometimes you wonder if you don't have just a little bit of a justice served in the fact that just the fact that you're there and you're prosecuting them is enough to get this kid's attention, and the judge realises that. (Respondent 15)

This particular prosecutor confirms that some juveniles, whilst good and salvageable, are nonetheless sufficiently adult-like and therefore undeserving of diversion and education, yet she maintains that it would not take a great deal to treat them and to 'get their attention' and ensure that they do not repeat their mistake in the future. The threat of a formal prosecution is, according to her, sometimes sufficiently intimidating that treatable juveniles may decide not to re-offend but rather to remain law-abiding and stay out of trouble in order to avoid similar experiences in the future. For other juvenile offenders, the 'something' that is believed to be needed may be slightly more extensive, such as probation. As one prosecutor remarks,

You can get some kids that are old enough or they've been in trouble before and you just know that they got to be dealt with. You can't keep letting them off the hook, otherwise what kind of message would that send? It would breed disrespect for the system. But at the same time, you know, these aren't kids that belong in prison. They didn't kill anybody, they're not out of control, so you can place them on probation and if they complete their probationary period, they hopefully won't be back again. (Respondent 29)

In an effort to treat these particular juvenile offenders who are understood as morally deserving of a 'break,' just one not as great as diversion (which might be seen as 'letting them off the hook'), prosecutors may initiate charges against them and recommend probation as a disposition.

#### ***5.4.1 How to 'Send the Message': Probation as an Instrument for Treating the Treatable***

The belief that incarceration should be used a 'last resort' for juveniles was the driving force behind the development of community correctional alternatives. The National Advisory Commission on Criminal Justice Standards and Goals recommended that community supervision emphasises practices consistent with the philosophy of employing the 'least coercive dispositional alternative' in juvenile cases (see National Advisory Commission on Criminal Justice Standards and Goals 1976). Accordingly, juveniles should be given full opportunity to participate in the

preparation of a treatment plan and act in accordance with the directives outlined by the court. Similarly, Victor Streib strongly recommends that the role of the juvenile probation officer

should be more restrictively designed, with active supervision of all activities and written justification for all decisions. (Streib 1978: 80)

Consequently, the thrust of juvenile probation is consistent with the doctrine of *parens patriae*, emphasising treatment and helping the juvenile adjust to the community. As a sentencing option, probation allows the juvenile to remain in the community under the supervision and guidance of a probation officer. Generally, it involves a judicial imposition of conditions upon his or her continued freedom and the provision of means of helping the juvenile meet those conditions. As in the adult system, probation is the heart of community-based corrections, and it is the most frequently used sanction (see Snyder and Sickmund 1995).

John Augustus, the Boston shoemaker, is credited as the founder of probation for both adults and juveniles. In 1841, more than fifty years before the establishment of the first juvenile court, Augustus began to speak for and assist offenders. His caseload included men, women, and girls. By 1863, the Children's Aid Society of Boston was extremely active in the area of probation, led by Rufus R. Cook and Miss L. P. Burnham, who were concerned with providing investigations of and supervision for boys placed on probation by the police and superior courts. The official establishment of juvenile probation took place in Massachusetts in 1869, and with the development of the juvenile court, juvenile probation followed the basic idea that the provision of guidance, supervision, resources, and counseling for non-dangerous, low-risk juveniles (those constructed by prosecutors as good and salvageable) would benefit the juveniles themselves, their families, and the community (see Coffey 1974).

The three traditional goals of probation are protecting the community, imposing accountability for offenses, and equipping juvenile offenders with the ability to live productively and responsibly in the community (see Maloney, Romig, and Armstrong 1988). The aims of juvenile probation, therefore, are similar to those of its adult counterpart. The first notion is that probation offers a type of *leniency*. The offender is given a second chance because he or she is considered to be a good risk who is not a danger to the community; in prosecutorial terms, the offender is considered to be good and salvageable. Although the juvenile will undergo some measure of surveillance and be afforded the label of 'probationer,' he or she is also able to avoid the perils of incarceration and the potential problems that the stigma of a prison sentence can cause, as previously discussed. Secondly, probation does involve a certain measure of *policing* to ascertain that the juvenile abides by the conditions of probation. The conditions under which a juvenile is released typically include such terms as, *inter alia*, requiring the probationer to obey all laws, follow home rules, be home each day by a certain time, meet with a probation officer when requested, and attend school each day and obey the rules of the academic institution (see Campbell and Schmidt 2000; Shearer 2002). The conditions are typically designed to prevent future delinquent acts by the juvenile and are directly related to the nature and seriousness of the current offence. Failure to abide by these conditions can lead to revocation and the imposition of a custodial sentence. Moreover, as judges may be expected to be similarly interested as prosecutors to preserve the welfare of the juvenile and simultaneously to protect the well-being of the community, they may implement additional rules of probation if they believe them to be necessary to assist the juvenile and protect the community. For example, the court might demand that the juvenile avoid certain people or places, attend counseling, and make restitution to the

victim (see Knupfer 2001). Finally, probation can be considered as a form of *treatment* in which the probation officer either directly or indirectly, through referral to the appropriate agency or professional, provides therapy or counseling or other appropriate form of treatment.

It is the responsibility of the probation officer to ensure that the juveniles are monitored and assisted in their efforts to adhere to the rules and terms of their probation. Whenever special conditions of probation are attached, they usually mean additional work for probation officers. Some of these conditions may include medical treatments for drug or alcohol dependencies, individual or group therapy or counseling, or participation in a driver's safety course. In some instances involving theft, burglary, or vandalism, restitution provisions may be included, where juveniles must repay victims for their financial losses. Most standard probation programmes in the United States require little, if any, direct contact with the probation office. Logistically, this works out well for probation officers, who are often overworked and have enormous client caseloads of three hundred or more juveniles. However, greater caseloads mean less individualised attention devoted to juveniles by probation officers, and some of these juveniles may require more supervision than others while on probation. Consequently, like prosecutors, judges, and police officers, probation officers may experience conflict between their 'law enforcement' and 'social work' roles in performing their various duties. As agents of social control, probation officers have a responsibility to protect the community and to ensure that their clients follow the rules of probation. This is their 'law enforcement' role. Yet they are also expected to work closely with their clients in order to help them make appropriate choices and avoid further law-violating behaviour, which amounts to their 'social work' role. These roles are not always compatible (see Ohlin et al. 1956), and individual officers

may deal with the role conflict by emphasising one role over another or by attempting to balance the roles (see Whitehead and Lab 1990), often attributing primacy to divergent roles with different offenders depending upon their specific circumstances. However, large caseloads cause many probation officers, regardless of their own beliefs about their roles, to operate in a crisis intervention mode. When clients' problems come to their attention, they attempt to react to these crises as best they can, but they may have very little time left over to spend in providing proactive assistance to clients. Consequently, the true extent to which juvenile offenders who are given probation as a disposition, by virtue of their being designated by prosecutors as morally deserving of treatment, are actually *treated* in accordance with the overall aims of probation is somewhat questionable.

There has been some research on the subject of whether or not juvenile probationers actually receive treatment and how effective that treatment ultimately proves to be, but that research is often complicated by the wide variability in probation practices across and within jurisdictions and by the failure of some studies to document extensively the operation and quality of activities carried out by probation officers. Nonetheless, some of the existing literature does seem to indicate that probation is effective at both reducing and prolonging recidivism (see Empey and Erickson 1972; Murray and Cox 1979; National Institute of Mental Health 1973; Reiss 1951; Scarpitti and Stephenson 1968; and Wooldredge 1988) and, additionally, represents a cost-effective alternative to incarceration, particularly for those juvenile offenders that may be constructed as treatable rather than disposable. Other studies, however, suggest that probation does not appear to be particularly effective at treating juvenile offenders or reducing recidivism, particularly for those juveniles involved in serious delinquency, those that prosecutors may construct as bad, comparatively



adult-like, and bordering on the disposable (see Lab and Whitehead 1988; Lipton et al. 1975; Robison and Smith 1971). While probation does appear to be a useful instrument for treating those offenders who are not only morally deserving of but also capable of being treated, namely those who have been previously constructed as good, child-like, and salvageable, prosecutors recognise that given the structural limitations of correctional options available to the courts and the diminished susceptibility of some juvenile offenders to rehabilitative efforts, those offenders who are bad, adult-like, and disposable may simply be 'beyond the point' of treatment. Along the continuum of deserts, some juvenile offenders may have been given a number of 'breaks' at diversion and treatment, and have failed repeatedly, whilst others may be 'first-time losers' whose crimes and circumstances seem to dictate to prosecutors that they deserve nothing short of punishment. It is these punishable offenders who will be the subject of the final prosecutorial categorisation of just deserts.

### **5.5 The Punishable Offender: The One Who 'Will Never Know Any Better'**

Those juvenile offenders who are constructed by prosecutors as educable are presumed to be young enough, child-like, possessed of good overall moral character, and sufficiently salvageable to be understood as morally deserving of the opportunity to 'turn their lives around' without suffering the potentially adverse effects of the formal court process. Prosecutors believed that their goal of minimising recidivism and ensuring that they 'never see these kids again' can be achieved through informal alternatives, such as diversionary programmes of various types, as discussed above. Likewise, those juvenile offenders who are adjudged by prosecutors as treatable are regarded as equally possessed of good moral fibre and similarly salvageable, yet they tend to be older and perceived as more adult-like than child-like. By virtue of their

more advanced chronological age and the fact that they appear to prosecutors to be more mature or sophisticated, prosecutors still strive for the same end result, that of minimal repeat offending, yet they believe that since these juveniles 'act more like adults' or are 'less child-like,' they are less morally deserving of the opportunity to be handled informally and are therefore processed through the formal juvenile court system. The hope prosecutors have in dealing with these treatable offenders is that through the application of appropriate treatment modalities, such as probation, therapy, and a wide range of community correctional non-residential alternatives, these offenders can still develop the proper understanding of acceptable and unacceptable forms of behaviour and can, in fact, still 'know better.'

With regard to those juvenile offenders that are morally assessed as *punishable*, however, prosecutors abandon any hope for teaching them to 'know any better' and opt instead to prioritise concerns of public safety and community welfare. Punishable offenders are those that are chronologically older, adult-like, believed to be of bad overall moral standing (as evidenced by the violent or serious nature of their current offence and, additionally, by the extensive experience they have had previously with illegal activities), and considered disposable. These are offenders who have been afforded numerous times what prosecutors view as 'breaks,' they have had their 'bite at the apple' and have chosen to continue on a lifestyle path fraught with lawbreaking behaviour. These are juveniles who may associate with known delinquents their own ages or with adults from whom they have learned how to be 'better' criminals, they demonstrate no remorse for their actions, and moreover, they are believed to pose serious threats to the well-being of the community around them. When the offence committed involves damage to property or a the creation of a public nuisance, prosecutors find it somewhat easier to assign primacy to the best interests of

the juvenile in question and to attempt to make a 'meaningful difference' in some way in his or her life. The implicit justification contained therein is that society, in the long run, will benefit if a juvenile that is believed to be salvageable can turn his or her life around and become a productive, constructive citizen. Yet sometimes, the crimes committed by juveniles involve damage not to property or to public order, but to individuals and to society as a whole. Juveniles have demonstrated that they are capable of committing violent personal crimes, and when they do, prosecutors such as the one cited at the beginning of this chapter push community considerations to the fore of their decision-making concerns and de-prioritise or render secondary those issues relating to the best interests of the juveniles themselves.

One prosecutor discusses the idea of punishability as a 'last resort,' indicating that whenever possible, juveniles are given repeated opportunities to 'turn their lives around,' and for those who fail at maximising those opportunities, there is no logical alternative remaining save to hold them legally liable to punishment:

I've got one right now that involved a matter that I'm looking at his history, and there's some violence where he's been bullying other kids around. I'm looking at the fact that I had the victim in last week to talk to her about it and this kid is still harassing her after it's happened, even while the case is ongoing. Those kinds of things shouldn't be happening. Under the state's juvenile law, you can't send them away to juvenile lock-up until they've got a felony under their belt and then they screw up again. I don't want to give this kid a felony except as a last resort. But every now and then, you identify that this kid's a problem and I know he's going to be back and he's violent, and I need to get this one under his belt right now so the next time he does it we can do something about it. Because we ain't going to do nothing the first time, the system just doesn't allow it much the first time, and so I try and identify those that need a break, give them a chance for a break. As I told you earlier, I can usually identify about everyone that ain't going to make it on diversion, bet I'm going to have this kid back. But if I've got one I identify like that, as well as them being violent, then they commit further violent behaviour, like the one I've got now, I've come to that conclusion that I'm looking to put a felony under that kid's belt because he's fourteen but he's violent, and I'll bet you it's going to happen again. And if we don't do something this time, we're not going to be able to do what we really need to do next time, unless I get one under his belt. The kid I'm talking about, his father is in prison somewhere, his mother just got out of prison in November, and

he's got a lot of problems. There's no question about it, that the problems beyond his control are probably moving him to this violent stage he's at at fourteen, but for the victims and potential victims out here, that don't matter. That don't make much difference when you've got to try and protect people from his activity. (Respondent 11)

What this particular prosecutor is engaging in could be referred to as *end-based thinking*, what a previous prosecutor has termed 'being tunnel-visioned.' He knows what his desired outcome is in the particular instance involving a juvenile offender that he has constructed as dangerous, violent, and therefore punishable, and he is considering the legal decisions available to him in light of likely future events. He recognises that the reasons behind a violent juvenile offender's behaviour, such as that of the fourteen-year-old he mentions, may be multifaceted and may involve a host of familial, psychosocial, and environmental issues. Nonetheless, because this juvenile is one that he has constructed as bad, in that he is still harassing his victim after the crime has been committed, and disposable, in that he is not believed to be one that 'needs a break' or that could 'make it on diversion,' this prosecutor believes that he is morally deserving of punishment for his actions. This is not a juvenile who morally deserves to be taught a lesson, nor is he one whose problems can be treated or remedied appropriately by the juvenile court system. He is violent, and predicted to be a chronic offender, and consequently is perceived to be a public risk. As such, this prosecutor would like to see him punished. However, in order to punish him appropriately in the way that he morally deserves to be punished (for example, to send him to 'lock-up,' a secure juvenile detention facility where he will be isolated from the community and kept under close correctional supervision), this prosecutor needs to make the immediate decision to charge him with a felony, what he refers to as 'getting a felony under his belt.'

In a previous section of this chapter concerned with educable offenders who are believed to be divertable, one prosecutor noted that he would be willing to divert

juveniles who have committed certain felonies, those felonies that he perceives (and that the community perceives) as 'less serious.' The distinction between what constitutes a misdemeanour and what constitutes a felony varies from state to state, but generally, misdemeanours are those offences for which the maximum penalty, if convicted, would be less than a year in jail whilst felonies are those offences for which the maximum penalty, if convicted, would be at least a year in prison. In the previous example, the prosecutor considering diversion was demonstrating how blurred the lines between misdemeanours and felonies could be. For example, in his state, shoplifting merchandise worth less than one hundred dollars in value could be considered a misdemeanour, while shoplifting merchandise worth over one hundred dollars in value would result in a felony. The point he was making was that in a particular clothing retail establishment, 'racking up' five hundred dollars' worth of merchandise is not difficult and may actually involve the theft of any two items of clothing which, in any other store, could add up to less than one hundred dollars and therefore be considered a misdemeanour. He was inclined to be lenient in amending the shoplifting charges to include misdemeanour larceny-theft rather than felony larceny-theft in order to make a juvenile charged under those specific circumstances more eligible for diversion in light of his presumed educability. Similarly, the prosecutor discussing wanting to 'get a felony under the belt' of the fourteen-year-old punishable juvenile appears to be mulling over a comparable course of action. He is seeking to *amend the charges* of misdemeanour assault and battery to those of felony assault and battery, which would subsequently render the particular juvenile in question more likely to be legally punished in the way that this prosecutor would find morally satisfactory the 'next time he gets into trouble,' something this prosecutor views as an inescapable conclusion. His desired outcome is to 'protect people' from

the illegal activities and violent tendencies of this particular juvenile offender, and he believes that the only way to accomplish that outcome or goal is to see this juvenile confined to a correctional facility, something the prosecutor believes he morally deserves. Accordingly, he is seeking to utilise a felony conviction as his instrument for the attainment of both of those ends.

### ***5.5.1 How to 'Punish': Transfer to Criminal Court as an Instrument for Punishing the Punishable***

Ensuring that those bad, adult-like, disposable offenders who are believed to be morally punishable receive their just deserts may involve more on the part of prosecutors than simply amending the charges involved. If holding them legally liable to punishment can be described as the 'last resort,' then demanding that the juvenile court waive jurisdiction over their cases and transfer them to criminal court to stand trial as adults is surely reserved for only the most extreme scenarios.

With the establishment of the first formally organised juvenile court in Illinois in 1899 and the spread of juvenile courts to other states (as described in Chapter Three), jurisdiction over juveniles charged with lawbreaking shifted from the criminal courts to the juvenile courts. However, many states recognised that in certain circumstances, some juveniles, such as those who commit 'serious' offences, might be more appropriately dealt with by criminal (or adult) courts. Consequently, most early juvenile codes contained provisions for transferring some types of juvenile cases to criminal courts, although the criteria used to make such decisions were often vague and highly subjective (see Forst 1995). As of the end of the twentieth century, all states and the District of Columbia make it possible for some juveniles to be tried in criminal courts (see Snyder and Sickmund 1995). The process by which juveniles are bound over to criminal courts can be called *waiver*, *certification*, *remand*, *bindover*, or *transfer*. The use of transfer has increased dramatically in recent years as more

policymakers have adopted a 'get tough' approach in dealing with juvenile crime. *Transfer* occurs when jurisdiction over a juvenile case is turned over to the criminal court. The waiver or transfer of jurisdiction from juvenile court to criminal court is predicated on the assumption that some juveniles are not appropriate for processing in juvenile court and can be more effectively dealt with by criminal courts. In other words, it is believed that whilst juveniles, as a class, may be amenable to treatment and therefore appropriate for juvenile court handling, particular juveniles, by virtue of their actions (and the subsequent constructions prosecutors make about them), do not merit the protected status given to juveniles in the juvenile court. Instead, protection of the community from such juveniles demands that they be identified and transferred to the adult criminal justice system (see Butts et al. 1997). Once a juvenile is transferred to a criminal court for trial, the juvenile legally becomes an adult and is subject to the same types of correctional responses as any other adult, including the death penalty in those jurisdictions with capital punishment statutes (see Bortner 1988; Gardner 1973; Gasper and Katkin 1980).

In order to determine which juveniles are appropriate for juvenile court jurisdiction, states have established various guidelines. Typically, the juvenile has to meet certain age and offence criteria. For example, in Michigan, under its traditional waiver statute, a juvenile has to be at least fourteen years of age (the maximum age of original juvenile court jurisdiction in Michigan is seventeen years) and must be charged with a felony offence before he or she can be waived to criminal court. Traditionally, the decision to transfer a case over to the criminal court was made in a juvenile court hearing, but over time, several mechanisms developed by which juvenile cases could be transferred to adult courts. Indeed, some states have more than one mechanism by which the transfer or waiver of a juvenile case can be achieved.

Except in Nebraska, New Mexico, New York, and the District of Columbia, juveniles can be transferred to an adult criminal court by means of a separate waiver or transfer hearing in the juvenile court to determine the appropriateness of waiver, which is referred to as a *judicial waiver*. The initiation of a waiver hearing in juvenile court usually occurs when a prosecutor, believing that the transfer of a case to criminal court is the appropriate course of action for punishable juveniles, requests such a hearing (see Snyder and Sickmund 1995).

The exact procedure by which judicial waiver occurs varies from state to state. Nonetheless, waiver hearings typically encompass four elements: firstly, a determination of probable cause that the accused juvenile committed the crime(s) charged; secondly, a consideration of the potential threat the juvenile presents to the community; thirdly, an evaluation of the extent to which the offender is amenable to treatment by existing juvenile justice programmes; and lastly, a consideration of the types of programmes in the adult system that might better meet the juvenile's needs. In determining the potential threat a juvenile poses to the community, the seriousness of the offence and the juvenile's offence history are considered, much like they are in the construction of prosecutorial understandings of juvenile offenders as bad. In evaluating the extent to which a juvenile is amenable to treatment, the results of previous juvenile court dispositions and information about existing juvenile justice and adult corrections programmes may be evaluated, as they are in prosecutorial interpretations of juveniles as disposable. Evidently, then, one potential problem with basing waiver decisions on such factors as a juvenile's amenability to treatment in juvenile justice programmes or adult programmes is that such determinations are necessarily highly subjective. They cannot be made based on empirical evidence, and



instead are predicated on predictions that judges and prosecutors make about individual cases, some of which will invariably be wrong.

A study conducted by Barry Feld found that juvenile court judges exercise considerable discretion in making transfer decisions and do not administer transfer statutes in an even-handed manner. According to Feld,

Within a single jurisdiction, waiver statutes are inconsistently interpreted and applied from county to county and from court to court. (Feld 1987: 472)

Another study, carried out by Tammy Poulos and Stan Orchowsky, examined transfers in Virginia and concluded that juvenile offenders in metropolitan areas are less likely to be transferred than those whose cases are processed in non-metropolitan juvenile courts. Although the authors were unable to provide a definitive explanation for their results, they noted the following:

Juvenile court judges serving metropolitan jurisdictions may be less likely to send young offenders to the criminal courts for a number of reasons. Because they see so many serious offenders, their threshold for defining an offense as serious enough to warrant transfer may be higher than that of their rural counterparts. On the other hand, metropolitan judges may have at their disposal more dispositional options at the juvenile court level than their rural counterparts and thus rely less heavily on the last resort of transfer. (Poulos and Orchowsky 1994: 14)

Such a finding about the variable classification of offences as 'serious' or 'less serious' is particularly enlightening in context of the observation made earlier in this chapter, namely that prosecutors are more inclined to divert those educable offenders who have committed offences that are perceived as 'less serious' than those who have committed 'more serious' offences, although there are no universal criteria for seriousness per se. It is yet another suggestive example of the influence that the nature and context of a particular community can exert (albeit indirectly) on court personnel operating in that jurisdiction.

Since the 1970s, a number of states have developed additional mechanisms for transferring juvenile cases to criminal courts. One of these is the *legislative waiver*, which involves the passage of laws that indicate that juveniles who meet certain age and/or offence criteria will automatically be tried as adults, bypassing the juvenile justice process altogether. For example, in Georgia and New York, juveniles who are at least thirteen years old and are charged with murder are automatically tried in criminal courts. One prosecutor describes the automatic legislative waiver guidelines in his state:

Under our statute, any child who commits any of those offences we call the seven deadly sins, meaning murder, attempted murder, kidnapping, armed robbery, arson of a dwelling, possession of narcotics, and delivery or manufacture of narcotics, irrespective of age, is automatically transferred to the adult system. There's been a whole discussion about the common law and the age of responsibility for kids, but that issue has never been decided here. Theoretically, under the law, it doesn't make any difference what a juvenile's age is if they've committed one of those seven deadly sins. (Respondent 8)

Legislative waivers permit the minimal exercise of discretion on the part of prosecutors in deciding whether or not to request a transfer. In actuality, the sole opportunity prosecutors operating in states with legislative waiver provisions truly have is that of amending the charges, as explained previously, to reflect a 'more serious' or 'less serious' offence. If they frame the action in such a way that it constitutes either a misdemeanour or a felony which is not classified as 'serious' – for example, in this particular prosecutor's instance, one which is not listed as one of the 'seven deadly sins' – then they have the option of pursuing the case against the juvenile in juvenile court. Alternatively, if they opt to file charges signifying a 'more serious' offence, then the juvenile in question will be automatically tried in adult court and they will be able to abnegate any responsibility for that transfer decision. In effect, they will not have been the ones to 'decide' to try the juvenile as an adult,

although through their moral construction of just deserts and their end-based strategic thinking, that is precisely what they have done.

In contrast, the third method of waiver that has become possible in some jurisdictions, involving direct decision-making by prosecutors to transfer a juvenile's case to criminal court, is the *prosecutorial transfer*, otherwise called *direct file*. Presently, twelve states have passed legislation that allows prosecutors to file certain cases directly in the adult court when a juvenile meets certain age and offence criteria (see Butts et al. 1997). For example, in Florida, prosecutors have the discretion to file a felony case in either the juvenile or adult court when the alleged juvenile offender has reached sixteen years of age, depending upon their construction of the juvenile as treatable or punishable. Significantly less is known about the types of cases that are being waived under prosecutorial transfer laws than about judicially transferred cases. Research indicates that, at least in some jurisdictions, a large percentage of those juveniles transferred by prosecutorial waiver are nonviolent offenders. In a study of prosecutorial waivers in two Florida counties, Donna Bishop and her colleagues found that, despite the fact that prosecutors indicated that the juveniles who were transferred were dangerous offenders, only twenty-nine per cent had committed a violent felony (see Bishop et al. 1989). In fact, the majority (fifty-five per cent) had committed property felonies. Moreover, Bishop and her colleagues found that the tendency had been for prosecutors to transfer greater proportions of nonviolent offenders, particularly juveniles charged with felony drug offences, and misdemeanants over time. After examining the characteristics of juveniles transferred in the two counties they studied, Bishop and her colleagues concluded that

few of the juveniles transferred to criminal court via prosecutorial waiver would seem to be the kinds of dangerous offenders for whom transfer is most easily justified. (Bishop et al. 1989: 193)

The current research conducted as part of this doctoral thesis, however, demonstrates that precisely the opposite is true, and that prosecutors do seek waivers for those juvenile offenders that they have constructed as punishable, those that they believe to be so dangerous and so ill-suited for treatment in the juvenile court system that no other satisfactory alternative exists than to try them as adults in criminal court. It is inaccurate to assert that seeking transfer for a juvenile charged with a felony drug offence can be equated to seeking transfer for a nonviolent or non-dangerous juvenile. Evidence suggests that there is a linkage between drug law violations and violent offences (see Farrell et al. 1992; VanderWaal et al. 2001), and those juveniles that prosecutors file waivers for are specifically those juveniles that they believe pose the greatest threat and danger to society and are therefore inappropriate for processing in the juvenile court system. Moreover, in referring to prosecutorial waivers as the sole ‘satisfactory alternative’ in dealing with certain punishable juvenile offenders, one prosecutor distinguishes between the process itself, which can be described as distasteful and ‘dissatisfactory,’ and the ultimate outcome, which should be otherwise:

I have personally prosecuted some juveniles that there was no doubt in my mind that I was doing the right thing by prosecuting them as an adult. But it was still a very dissatisfying and disheartening event. I had a seventeen-year-old who, by the time I got him, had two prior felonies. One was a robbery, one was a sale of drugs case. I convicted him of two aggravated assaults as an adult, and then was prosecuting him as an adult for an aggravated robbery and another sale of cocaine case. Seventeen-years-old and I was sending him to prison for fifteen years. Now, when he gets out, he’s not going to be somebody that we want to deal with. I knew that, but I also knew that he had had as many breaks as a person could get as a juvenile, and it didn’t matter. So was I satisfied? At the time, absolutely not, because I knew that I wasn’t going to benefit him in any way. But I knew that society was going to benefit, as much as society could benefit, at least in the short term. In the long term, society may suffer because he was institutionalised for fifteen years, but in the short term, I felt that society would benefit, so I was satisfied. (Respondent 1)

Despite experiencing what Chapter Three referred to as *goal conflict*, the internal struggle between attempting to protect the best interests of the juvenile in question

and simultaneously preserve the welfare of her community, this prosecutor believed the juvenile offender to be punishable and took steps accordingly. Interestingly, this is the same prosecutor who was cited earlier in this thesis as stating that she ‘keeps waiting for that crystal ball, but no one is giving it to’ her, and it is apparent that she has reservations about sacrificing the child-like status of this juvenile. Yet as in all cases involving prosecutorial constructions of punishability, what assumes primacy for her in this situation is ensuring the well-being of the community she represents, and in order to accomplish that goal, she must realise that this juvenile has had ‘as many breaks as a person could get as a juvenile,’ and is therefore no longer morally deserving of another opportunity. What he morally deserves, to her way of thinking, is to be held legally liable to punishment for his actions, in light of her construction of him as adult-like, bad, and disposable, yet clearly it is not an easy moral decision to make. Another prosecutor illustrates the ‘last resort’ nature of dealing with punishable juveniles, and the fact that by the time she files a prosecutorial waiver to have them transferred to the adult criminal justice system, she must be satisfied that they have had what the previous prosecutor refers to as ‘as many breaks as a person could get’:

In my eight years here, we have only sent two children to the adult system, and that was just a year or so ago. And again, they’re children that their parents have finally come to the point and they say, no matter what we do, they just won’t shape up. And what we’ve done is we started out with them on probation with court services, which is the least restrictive. Then if we get them again, we put them up to community corrections, which is more restrictive, and then we might put on the bracelet for them so that they are on a house-arrest type of thing, the electronic monitoring. And if they violate that, then we look into putting them in the Juvenile Justice Authority’s custody and what we do there is they may be placed in a group home, and that’s usually what we do the first time. And I have a couple of kids that are in group homes right now through JJA. And I’ve had like essentially four or five kids that I’ve had back over and over and over again, and like I said, you go through the whole process. They’ve gotten a diversion, they’ve moved up, and a couple of them have even moved into the adult status then finally. We’ve had to move them over the line as far as that. (Respondent 12)

As this prosecutor indicates, the decision to transfer a juvenile to the criminal court system to be tried as an adult is not one she takes lightly or makes on the spur of the moment. On the contrary, there are those juvenile offenders that she initially perceives as educable and whom she tries to teach a lesson to while diverting them away from the formal juvenile court system. When those juveniles fail and repeatedly offend, her construction of their accountability level escalates and she views them as treatable, trying to minimise their future recidivism by putting them on probation or utilising other community correctional alternatives. Her goal at that point is still to help them turn their lives around, but there is stronger emphasis on inducing them to accept responsibility for their actions. By the time she has 'had them over and over and over again,' it is no longer appropriate to believe that they are either educable or treatable; they have demonstrated by their continued lawbreaking their blatant disregard for any 'meaningful difference' she has tried to make in their lives, and therefore, out of concern for the welfare of the community she has served for eight years, she believes she has no alternative but to consider them punishable and hold them to the most exacting standard of accountability that exists, namely, to be tried as an adult and held legally liable to the most restrictive types of punishment.

To those who may disagree with this prosecutor's decisions, she is able to outline succinctly the sequence of events that brought her to the stage of constructing these juveniles as punishable and seeking a prosecutorial waiver for them and is thereby able to avoid censure from various sources. Prosecutors may not have crystal balls, they may not always be able to predict the ultimate outcome in those cases in which they are expected by others to be able to make accurate predictions, yet as long as they can justify their decision-making process and demonstrate their commitment

in some way, their actions will be considered above reproach. It is imperative, then, to conclude with an examination of prosecutorial accountability in this context.

## **5.6 Prosecutorial Accountability: When Their Decisions and Those of the 'Other' Clash**

A fundamental contention of this thesis has been that the law makes absolute distinctions amongst individuals on the basis of the presumed presence or absence of certain capacities (by virtue of chronological age), and such objective differentiations do not allow for personal, moral, subjective interpretations that prosecutors can and wish to make about juvenile offenders and their supposed level of culpability. This, it has been argued, creates the risk for prosecutors that juvenile offenders may not receive their just deserts, and as prosecutors view their role as being that of administrators of both legal and moral justice, they perceive at least part of their function to be that of making moral sense of juvenile offenders and subsequently making legal decisions about them accordingly. Yet this process of making moral sense of individuals is, necessarily, a highly subjective one, and it can be anticipated that in certain eventualities, individuals either within or without the prosecutorial profession will disagree with the ways in which prosecutors have symbolically interpreted specific offenders. For example, 'outsiders' such as members of the community may disagree with a prosecutorial construction of a particular offender as educable and with the subsequent decision to divert him or her rather than seek formal prosecution. Alternatively, 'insiders' such as other prosecutors may disagree with a prosecutorial construction of a particular offender as punishable and the subsequent decision to seek transfer to have him or her tried as an adult in the criminal justice system.

Chapter One of this thesis outlined the four types of accountability of which prosecutors must remain cognisant, citing juridical, political, professional, and personal ‘checks on the job.’ With regard to *juridical accountability*, or review by appellate courts, as long as all decisions made by prosecutors have been consistent with case law and state and federal statutes, and all rules have been applied lawfully, prosecutors can remain relatively insulated from legal censure. As for *personal accountability*, referring to whether or not prosecutors themselves can live with the decisions they have made, prosecutors will generally be satisfied as long as either the best interests of their community or the best interests of the juvenile in question have been safeguarded (or, in rare situations, when both have been preserved). Owing to their sentiment of responsibility towards the various segments of the population, what were referred to in Chapter Four as *specific* and *electoral alterity*, insofar as prosecutors themselves are satisfied that they have addressed the need of either the particular or generalised ‘Other,’ they will consider their commitment upheld.

However, in examining political and professional ‘checks’ on the way prosecutors have carried out their jobs and the way they have made legal decisions in juvenile cases, the issue of justification becomes much more pivotal. In justifying their actions and decisions, and indeed, their sense of who they truly see themselves as, both to their political constituents and to their professional colleagues, prosecutors may and do anticipate some degree of conflict. Erving Goffman has written that such conflict is natural in interactions amongst individuals, stating that

when an individual appears before others, he knowingly and unwittingly projects a definition of the situation, of which a conception of himself is an important part. When an event occurs which is expressively incompatible with this fostered impression, significant consequences are simultaneously felt in three levels of social reality:...personality, interaction, and social structure. (Goffman 1973: 242-243)



It is in evaluating issues of political and professional accountability that prosecutors become acutely aware of the effects of seemingly incompatible views and perceptions on their personality, their interactions with others, and their position in the greater social framework.

In considering issues of *political accountability*, prosecutors are conscious of the fact that the very nature of their (largely) elected office means that members of the community that they have been elected to represent will feel unencumbered to approach them and express their dissatisfaction with any specific decisions that have been made. Some prosecutors take a relatively nonchalant view about the elective character of their position and rely on their extensive training and qualifications to assist them in making the 'right' kinds of decisions, allowing that if the public disagrees, they can always be replaced in an upcoming election:

The media and the public are not lawyers and prosecutors and, frankly, most of the time, have little concept of what it takes to prove a case. If they don't like how I do my job, they can vote me out.  
(Respondent 22)

Chapter Four demonstrated the often conflicting expectations that members of the public have in expressing their desires that prosecutors act as *intermediaries* on their behalf, that they 'fix' the juvenile crime 'problem' whilst simultaneously working to 'keep taxes low.' Generally, prosecutors realise that such outsiders do not have an accurate perception of the considerations involved in carrying out their job responsibilities, but feel that they can only do the best they can in a potentially ephemeral position. Such prosecutors recognise that the nature of the *social structure* is such that whatever consequences censure may entail, there is little they can do to alter them. Other prosecutors take a less laid back and more active approach in justifying their decisions to members of their community in the hopes that even if those individuals disagree with the specific outcomes reached, if they can appreciate

the *reasons* behind the pursuit of those outcomes, they might be satisfied. For example, in a case involving a juvenile offender that she has constructed as educable and is seeking to divert away from the formal juvenile court system, one prosecutor anticipates strong public outrage and has already planned how she is going to justify her inaction to the public:

If I have a victim that says, no, I do not want to do anything, I utilise that as my reason and I'll tell people that this was not prosecuted due to the victim's request, if I have people ask me. The evidence may be there and sometimes you get that in sex cases, that they just don't want to pursue it, they'd rather do something else. Or if it's criminal damage to property and they'd just rather see something else done or they want to handle it on their own, that type of thing. And that's what I'll tell people. (Respondent 12)

Such prosecutors are more concerned with managing their interactions with the 'Other' introduced in Chapter Four, namely the members of their community. They are cognisant of the social structure and the potentially short-lived duration of their position, yet for as long as they maintain that position, they want to uphold positive interactional relationships with the people who elected them to office. This is what Goffman refers to as the *art of impression management* (see Goffman 1973). Ultimately, if prosecutors such as this one can provide specific concrete reasons for their actions (or inactions) in certain cases without divulging their personal moral constructions of the juvenile offenders in question, they do so in the hopes that the public will feel satisfied that justice has been accomplished and their social interactions will remain intact. After all, as one prosecutor states,

Primarily we want the public to feel that justice is done in each case. (Respondent 19)

Satisfying external sources of political accountability, then, is somewhat straightforward as long as prosecutors either have the confidence to acknowledge their responsibility to the social order or else material proof that decisions have been made in accordance with specific incontrovertible considerations, thereby keeping

their social interactions intact. In confronting sources of *professional accountability*, prosecutors have a different task with which to contend, one which relies upon the representation of their professional *personality*. Professional accountability, as discussed in Chapter One, refers to answerability to other prosecutors, both within and without the specific geographic jurisdiction. In justifying their decisions to colleagues, prosecutors must be able to demonstrate that they have acted in accordance with the triad of shared instrumental prosecutorial values outlined in Chapter Four, namely fairness, flexibility, and integrity. Consequently, virtually every decision can be legitimised on the grounds that either a prosecutor exemplified *fairness* by handling a particular juvenile offender in exactly the same way as he or she has handled similarly situated juveniles previously (for example, diverting a first-time shoplifter that has been constructed as educable in the same way that previous similarly constructed, first-time shoplifters have been diverted, or seeking a prosecutorial waiver for a repeat offender that has been constructed as punishable in the same manner that previous similarly constructed, repeat offenders have been transferred); or by signifying that the prosecutor in question embodied *flexibility* in considering certain factors such as home life, prior delinquent record, psychological functioning, scholastic achievement, and the seriousness of the offence in order to differentiate between the extenuating circumstances of a particular juvenile offender as compared to other juvenile offenders who may, at least upon first glance, appear to be similarly situated and thereby deserving of similar handling. Other prosecutors occupying the same office, either physically or professionally, may not reach identical decisions, but as long as any decisions made on moral grounds are justified according to the core ethical principles they all share, no decision could be discounted as the ‘wrong’ one inasmuch as the prosecutorial personality was embodied. As one prosecutor observes,

If you do your job well with justice and fairness, you will never run afoul of professional conduct codes. (Respondent 21)

Consequently, prosecutors must accept that the formation of symbolic constructions of juvenile offenders as good or bad, child-like or adult-like, and salvageable or disposable, and the reliance on those desert-making considerations in attributing varying degrees of blameworthiness or blamelessness to individual actions, is inevitably a subjective process, one which is significantly informed by their prosecutorial personality, their interactions with others in the public sphere, and their position in the larger social framework. As long as they are able to justify either to themselves or to others that they have acted in a way which is consistent with any of those three factors and that, to their way of thinking, they have 'done' the 'right' thing, they succeed in insulating themselves from internal or external sources of censure, at least for the time being. As prosecutors are not in possession of that much sought-after crystal ball, they are unable to foresee all potential problems and complications, but ensuring professional harmony, however ephemeral it may be, remains a satisfactory goal.

## **5.7 Conclusion**

*Justice* is a frequently cited concept by prosecutors, and indeed, it is crucial to the fulfillment of what they believe to be their fundamental role. Yet as prosecutors throughout this thesis have demonstrated, justice is a highly subjective ideal, what one previously cited prosecutor refers to as 'nebulous,' and consequently, it is impossible to evaluate empirically whether justice truly 'has been done' in any given case. Nonetheless, prosecutors claim to do their best, to act in accordance with the shared instrumental prosecutorial values of their profession, namely *fairness*, *flexibility*, and *integrity*, and in a manner that is consistent with the expectations that others have of

them (and, in fact, that they have of themselves) in making sense of the kinds of people juvenile offenders really are and the kinds of outcomes their cases deserve. In securing those desired outcomes that they believe to be the most morally and legally appropriate, prosecutors must be able to justify their actions to themselves, to their colleagues, to their constituents, and to the courts, and ultimately, as long as they have acted in a way that is concordant with what it is believed to mean to *be* a prosecutor, their decisions will be considered above reproach.

## CONCLUSION:

### **The Examination of Prosecutorial Commitment and Conflict in the United States**

The aim of this thesis has been to illuminate the often shadowed prosecutorial decision-making process. Much research has been conducted previously on individualised decision-making and the exercise of discretion in the criminal justice system. However, such research endeavours have tended to concentrate on the use of police discretion or judicial discretion, or, more rarely, the discretion exercised by probation or parole agents. Yet prosecutors occupy positions of particular importance in the criminal justice system, not unlike those of gatekeepers, and surprisingly, very little research has been conducted into their decision-making processes and the motivations behind them. What research has been carried out on prosecutorial decision-making has tended to focus on quantitative evaluations of outcome, namely, the number of offenders diverted as opposed to the number of offenders prosecuted, or the number of offenders adjudicated in juvenile court as opposed to the number of offenders tried as adults in criminal court.

As prosecutors are largely elected officials in the United States, their 'batting averages' and conviction rates are not only a matter of public record, but often the basis for their re-election (or otherwise). Members of their communities select them to represent and advocate the public interest because it is believed that they are competent, vigorous, and diligent in their application of the criminal law. Yet predominantly, all that the public actually knows about how prosecutors carry out the jobs with which they are entrusted revolves around the ultimate outcome, namely, the successful or unsuccessful *result*. Prosecutors have been cited repeatedly throughout this thesis as indicating that what members of a given community perceive as a successful or unsuccessful result varies widely, and that it is such a subjective

assignment of labels that they often find themselves baffled as to what it is that society actually expects of them. For while the expressed expectation is that prosecutors will pursue criminal charges against those individuals who are legally guilty and thereby ensure that they are held legally liable to punishment for their wrongful actions, the implied expectation of which prosecutors are all too cognisant is that they will simultaneously solve a multitude of problems which they had nothing to do with creating. In other words, the public expects that the civil servant they have elected to fill the office of the prosecutor will instinctively know how to 'fix' such problems as juvenile crime, and will take the necessary legal steps to bring about such fixes or solutions. However, in internalising these expectations as part of their role-set and subsequently in acting upon them, prosecutors must also reconcile potential conflicts that may arise between the expectations that their political constituents have of them with those expectations that their colleagues have of them, and indeed, that they have of themselves, as agents operating within a juvenile justice framework that strives to preserve the best interests of the juvenile offender in question. As the public is concerned chiefly with the end result, with *what* finally happens, the process by which prosecutors attain that result, including the process by which they attempt to resolve these internal struggles and ensure that the justice they secure is not only legal justice but moral justice as well, remains largely unexamined. It is this process of making moral sense of juvenile offenders and of situations involving them, and of the subsequent legal decisions which attach to those moral judgments, that this thesis has attempted to bring to light.

Prosecutors claim to do the very best job that they can, yet they know that no guarantees exist that each decision – both legal and extra-legal – that they make will be the 'right' one. Consequently, they establish guidelines for themselves that act as

ideal types and provide a normative basis for decision-making. They decide what kinds of people juvenile offenders might be, whether good or bad, child-like or adult-like, salvageable or disposable, and based upon these moral constructions, they determine what the most satisfactory outcome would be in a case involving a particular juvenile. At various points throughout this thesis, research has been alluded to that confirmed that the outcome which prosecutors may anticipate in a given situation may remain elusive. For example, those good, child-like, salvageable juveniles which prosecutors construct as educable are diverted away from the juvenile or criminal justice system in the hopes of sparing them the potentially adverse effects of the labeling process and ensuring that they do not receive a durable negative label which is likely to engender future recidivism. Yet prosecutors cannot know that diversion will always work to secure that result, and it is possible that some juveniles who are deemed educable and divertable will, in fact, re-offend. Likewise, those good, salvageable juveniles who are slightly less child-like and more adult-like, who have already been afforded a variety of previous opportunities to reform, may be designated as treatable and offered probation as a disposition in the hopes that they will be spared the harrowing experience of incarceration whilst nonetheless receiving the treatment that prosecutors morally believe they deserve. Yet probation officers are overworked, programmes are often under-funded, and accordingly, those juveniles that have been constructed as treatable may not necessarily receive the treatment that prosecutors had expected them to receive. What remains consistent, however, is the *belief* that prosecutors have that what they are doing in particular instances involving juvenile offenders is both morally and legally right. It is this belief that drives them to attempt to embody their role as administrators of justice, even when the large-scale mediation of action which they are undertaking is fraught with unforeseen and



surprising consequences, and it is this belief into which this thesis is able to provide some insight.

The sense of commitment which this thesis has demonstrated that American prosecutors experience, and which inevitably colours not only their perception of their role but also the ways in which they attempt to carry out that role, could be examined in a variety of different contexts in future research endeavours. Of necessity, the sample size involved in this research has been comparatively small in consideration of the number of prosecutors operating in the United States at this time. However, the data gathered could be analysed from divergent perspectives. Several differences have become noticeable between urban and rural prosecutors which could be useful to investigate further, particularly those concerned with prosecutorial sentiments of specific versus elective alterity. It could be expected that prosecutors working in small, rural settings may feel a stronger connection and sense of responsibility toward specific individuals as opposed to the generalised sense of responsibility that prosecutors in larger, urban areas may feel toward their constituency as a whole. Likewise, prosecutorial commitment could be analysed with respect to differences amongst male and female prosecutors. It may be significant to learn whether female prosecutors are more or less likely than their male counterparts to experience quasi-maternal sentiments of specific alterity toward particular juvenile offenders as compared to elective alterity, especially in light of existing sociological gender roles. Lastly, there is also the opportunity to explore the relationship between prosecutors and the victims of crimes committed by juvenile offenders, and to inspect in a comparative fashion the extent to which the latter experience prosecutorial commitment to greater or lesser extents in dealing with specific victims whom they morally construct as blameworthy or blameless. Traditional victimological

approaches of victim-blaming or victim-defending could be analysed in the context of the prosecutorial decision-making process, since the preponderance of existing research into victims and the criminal justice system has focused principally on the ways in which victims are treated by law enforcement officers and by judges. With the concept of prosecutorial commitment firmly established by this thesis, a variety of future applications are made possible.

In conclusion, one final remark should be made with regard to the methodological approach utilised in the analysis of the data introduced in this thesis (see Appendix for a further discussion of methodological issues). The choice to refrain from using data from actual prosecutorial decisions was a conscious one. In a number of instances, prosecutors who were interviewed offered very generously to open their files up to close scrutiny and to share specific details about the outcome of specific cases involving juvenile offenders. These offers were accepted gratefully and the available files were perused; however, the decision was made not to import such outcomes directly into the research findings. It may be interesting to learn whether a decision that one prosecutor made did, in fact, turn out to be the 'right' one, but what was deemed to be of primary importance was the very process by which prosecutors decided upon what the 'right' outcome would be and how they went about pursuing justice.

## **APPENDIX:**

### **Methodological Details**

#### **Fieldwork: Interviewing Prosecutors**

As stated in the conclusion to this thesis, existing research on prosecutorial decision-making has been predominantly quantitative in nature. Consequently, it was decided that the most suitable methodology for this research project would involve qualitative techniques, specifically the use of in-person interview surveys whereby the interviewer orally solicits responses from persons identified within a sample population. The interview is viewed as a fairly straightforward method of gaining information, especially if the conversation is clear and fairly to the point. One notable drawback of the personal interview as a research method is that the researcher is only able to access that information which the respondent voluntarily provides, and consequently, the veracity of responses is sometimes difficult (if not impossible) to ascertain. Discourse analysis was considered as a methodology, albeit briefly. For the purposes of this research undertaking, in-person qualitative interviewing was deemed to be an appropriate methodological choice, since the aim of the research was to determine how prosecutors explain their decision-making processes in cases involving juvenile offenders. In other words, the actions they ultimately took in specific instances were not believed to be as significant as the ways in which they justified the process by which they attempted to secure moral justice through legal means, and indeed, the reasons behind such justifications. Likewise, the veracity of their responses was not deemed to be as pivotal as the very fact that they used specific phrases and ascribed contextual meaning themselves to their own actions and decisions.

Various books about conducting social research, specifically those discussing the benefits of qualitative research in certain contexts and outlining considerations to be weighed in drawing up questionnaires and interview schedules, were consulted (see Gilbert 1994; Jupp 1996; Maxfield and Babbie 2001; May 1997; Sudman and Bradburn 1982). The format of the interviews was structured, and the researcher developed a pre-determined list of questions asking each of the respondents for specific replies in the same order. Semi-structured and unstructured interview formats were considered, and in comparing the relative advantages and disadvantages of each type of interview, the primary concern was the amount of control that the researcher could exert during the interview. In the unstructured interview, the respondent is given greater freedom of expression and asked for elaborate responses. This can make comparisons amongst responses quite difficult, and as the focus of the research was to compare responses of a relatively large sample group, the structured format was deemed to be most suitable.

Due to reasons of convenience, the interviews were to be restricted to subjects living and working within a five-hundred mile radius of the city of Kansas City, Missouri. The National District Attorneys Association provided a map of all the geographic divisions of county lines in the relevant area along with the mailing address and telephone numbers of all the current county attorneys. Twenty-five prosecutors were contacted, given a description of the aims and objectives of the research, promised complete confidentiality, and asked whether they would be willing to participate. Twenty-three agreed, and interviews were arranged and carried out over a nine-month period commencing in September 2000 and concluding in June 2001.

With regard to demographic information about the research sample, there was a wide array of different backgrounds and locations. Twelve of the respondents were female and eleven were male. The ages of the respondents ranged from approximately twenty-seven years (an individual who had turned to the prosecutorial profession directly upon graduating from law school and had been 'on the job' less than one year) to approximately sixty years (an individual who had been a police officer prior to running for the elected position of county prosecutor, and who had served in that capacity for over twenty years). Eighteen prosecutors represented rural communities and five represented urban communities. As for the sizes of the various jurisdictions represented by the respondents, they could be categorised as small, medium, or large. The National Survey of Prosecutors, a large-scale annual research endeavour which is ultimately analysed and compiled by the Bureau of Justice Statistics, differentiates between prosecutors representing small, medium, or large jurisdictions on the following basis: *small jurisdictions* are those with 249,999 or fewer members of the population, *medium jurisdictions* are those which between 250,000 to 999,999 members of the population, and *large jurisdictions* are those with at least one million members of population. However, given the nature of the doctoral research at hand and the nature of the Midwestern locale, such distinctions were deemed inappropriate. For example, no jurisdiction being sampled had more than 120,000 individuals in its population. This would have meant that each jurisdiction under study would have been labeled as small, and the variance amongst the jurisdictions in question would have been overlooked. Of necessity, therefore, a different classification was devised for the research in question. Small jurisdictions would be those serving 29,999 or fewer members of the population; there were twelve such small jurisdictions represented in the sample. Medium jurisdictions would be those serving between

30,000 and 99,999 members of the population; there were nine such medium jurisdictions represented in the sample. Finally, large jurisdictions would be those serving at least 100,000 members of the population; there were two such large jurisdictions represented in the sample. Jurisdiction size ultimately posed something of a dilemma with regard to coding the interview data. Since a number of the interview subjects wished to remain anonymous, one possibility would have been to ascribe pseudonyms to them and describe them as, for example, a female prosecutor from a large jurisdiction in Western Kansas. However, since the research sample only consisted of two large jurisdictions, in rural areas such as Western Kansas, where often prosecutors serve their county alone and unaided, the anonymity of specific respondents would not have been preserved. As a result, it was determined that the most suitable method of identifying respondents would be to ascribe numbers to them in the order in which the interviews were conducted. Consequently, prosecutors are described throughout the thesis as Respondent 1, Respondent 2, Respondent 3, and so on.

The interviewer attempted to dress in a fashion similar to that of the interview subjects, namely business attire. Each respondent was provided with a brief biography of the researcher prior to the commencement of the interview. They were told uniformly that the research on the prosecution of juvenile offenders was being conducted in conjunction with a doctoral degree scheme for a British university. The role of the researcher was modified slightly in accordance with each individual respondent. Those respondents who were older males were found to react in a more paternalistic fashion when the interviewer represented herself as demure and shyly curious. The interviews with such individuals generally began with them asking some questions of the interviewer relating to familial and personal issues, and as they grew

increasingly at ease, they began to open up about themselves. Consequently, by the time more sensitive questions arose, they felt quite at ease in responding to them. Female respondents, on the other hand, reacted better to more overt enthusiasm and curiosity on the part of the interviewer. They tended to ask fewer questions of the interviewer and open up about the nature of their job (and in some instances, about the nature of their family lives and the balance they struggled to strike between work and domesticity) much more readily. Respondents were always asked for their approval in tape recording the interview, and none declined. A new sixty-minute tape was provided for each interview, and all tapes were clearly labeled with the date and location of the interview and the name of the interview subject. On three separate occasions, more than one cassette was required, and these were carefully labeled with the same identifying information as well as numbered consecutively. The tapes were later transcribed as part of the coding process, a task which took approximately a fortnight.

Familiarity with the interview schedule was believed to be of the utmost importance, as some of the questions needed to be slightly adapted to the specific interview subject. For example, questions seeking to uncover the relationship between the prosecutor being interviewed and the other attorneys in the office were stricken as superfluous in those instances when the prosecutorial subject was the sole prosecutor operating out of the particular office. Occasional probing needed to be utilised to elicit more in-depth responses to some of the questions, and this was accomplished by providing such prompts as, 'How is that?' or 'In what ways?' A defining feature of survey methods is that research concepts are operationalised by asking people questions, and consequently, extensive planning went into the design of the interview schedule. The literature reviewed in Chapters One and Two of this thesis was

reviewed in order to learn as much as possible about the terminology and concepts used by prosecutors and incorporated into their daily work routines and questions were devised accordingly. The interview schedule consisted entirely of *open-ended questions*, in which the respondents were asked to provide their own answers. The interview schedule follows:

*A. Background:*

- A1. How long have you been a prosecutor?
- A2. Are you a full-time or part-time prosecutor?
- A3. What first attracted you to the job?
- A4. What do you see as your primary duty?

*B. Organisational issues:*

- B1. Could you describe the structure of your office? (i.e. number of staff, hierarchy, job responsibilities)
- B2. Do you have an office philosophy?  
If yes, what is it?
- B3. Would you consider yourself to be part of a group/organisation that extends beyond your immediate office?
- B4. How often do you consult with colleagues in your office?
- B5. How often do you consult with colleagues outside of your office?
- B6. How do you get along with someone who has a different philosophy of work than yours?

*C. Juvenile crime:*

- C1. What percentage of your workload concerns juvenile defendants?
- C2. What are the charges most frequently brought against juveniles?
- C3. Have you seen an increase in the number and seriousness of charges brought against juveniles in recent years?  
If yes, why do you think that is?

*D. Making decisions during the pre-trial process:*

- D1. How much time do you have to deal with each case?



- D2. What kind of information about the case and the defendant do you get?
- D3. From whom do you receive your information?
- D4. I know that evidential sufficiency and public interest are two criteria that you must consider in determining whether or not to prosecute an individual. How do you assess evidential sufficiency?
- D5. How do you interpret 'public interest'?
- D6. How much discretion do you feel that you have in determining the public interest?
- D7. Do you feel that the public interest criteria is too vague?
- If yes, how would you like to see it changed?
- If no, why not?
- D8. Have you ever felt that your 'hands were tied,' that you couldn't make a decision the way you would have liked to?
- If yes, could you please give me an example?
- D9. How do you remain impartial in the face of external pressures, i.e. from the media or from the public?
- D10. Once you've decided to prosecute an individual, how do you determine which charges to pursue?
- D11. Do you feel that you have different considerations to think about when you're prosecuting a juvenile than when you're prosecuting an adult?
- If yes, what are they?
- Could you give me an example of a case where you've had to bear these considerations in mind?
- D12. To what extent do you feel that professional codes of practice, such as the National Prosecution Standards, affect your work and your decisions?
- D13. How much discretion do you have in diverting less serious cases involving juveniles from formal adjudication?
- D14. Can you tell me about a case where you recommended diversion for a juvenile?
- D15. How much discretion do you have in deciding on jurisdiction when juvenile defendants are concerned?

D16. How do you determine whether a case against a juvenile is legally sufficient to be transferred to criminal court?

D17. How do you feel about trying juveniles in criminal court?

D18. What is the legal age of responsibility in your state?

Do you feel that age is appropriate?

If yes, why?

If no, what would you like to see the age of responsibility changed to?

D19. In cases where children are too young to be prosecuted for very serious offences, do you feel that someone else ought to be held responsible?

If yes, whom?

*E. The prosecutor-police relationship:*

E1. How much contact do you have with police officers in the course of your work?

E2. I know that the police work hard to gather evidence against a suspect. Once someone is arrested and charged, have you found that police officers try to influence you to prosecute that person?

E3. Do problems ever crop up with regard to evidence gathered by the police?

If yes, could you please give me an example?

E4. Have you ever used special investigators to collect evidence on a case?

If yes, how often do you use special investigators?

What can they offer you that police evidence cannot?

If no, why not?

*F. The prosecutor-defense relationship:*

F1. How much contact do you usually have with defence counsel?

F2. What reasons would prompt you to consider offering a plea agreement to a defendant?

F3. Can you give me an example of a case where you've offered a plea agreement to a defendant?

F4. What reasons would deter you from considering a plea agreement?

- F5. Can you give me an example of a case where you wouldn't consider offering a plea agreement?
- F6. How do you negotiate plea agreements?
- G. Recommending sentence:*
- G1. How much discretion do you have in recommending sentence for a defendant?
- G2. How do you decide which sentence to recommend?
- G3. Could you tell me about a case where you had to recommend sentence for a juvenile who has committed a serious crime?
- G4. How effective do you think prison sentences are for juveniles who have committed serious crimes?
- G5. Do you feel that there are sufficient treatment alternatives to detention for juveniles?
- G6. How effective do you think treatment alternatives are for juveniles who have committed serious crimes?
- G7. Do you feel that juveniles should be subject to the death penalty?
- H. Job satisfaction:*
- H1. Do you follow up on cases following their disposition?
- If yes, why?
- If no, why not?
- H2. What specifically do you enjoy about being a prosecutor?
- H3. Could you tell me about a case where you were quite pleased with the outcome?
- H4. Could you tell me about a case where you were quite disappointed with the outcome?
- H5. Why do you think that some prosecutions fail?
- H6. If you could change anything about the nature of your job, what would you change?

Open-ended responses must be coded before they can be processed, and this coding process required that the researcher not only transcribe but also interpret the *meaning*

behind the responses. It was this underlying meaning that ultimately led to one of the fundamental breakthroughs in the research.

### **Simultaneous Data Collection and Data Analysis**

In analysing the data, an interesting observation was made: in describing and justifying their decisions and actions, prosecutors consistently used the word ‘we,’ regardless of whether they worked alone in a rural county, where they themselves were responsible for the prosecution of all offences (and often also a part-time private practise on the side), or whether they were part of a prosecution team two-hundred-strong or larger. Such statements were made rather off-handedly as:

- We’re pretty comfortable with our evidence when we file charges.
- We have been very fortunate with our relationship with the police department.
- Once a case is dismissed, we probably won’t follow up on it.

Upon careful consideration, it was concluded that the reason prosecutors constantly refer to themselves as ‘we,’ even if there was no one they shared their physical office with, is due to a shared prosecutorial culture that binds all prosecutors together and somehow distinguishes them from all other attorneys and simultaneously from all other practitioners in the criminal or juvenile justice systems. Although no formal prosecutorial organisation exists, prosecutors nonetheless have a sense of shared history and shared instrumental prosecutorial values, modes of conduct that they regard collectively as appropriate rather than inappropriate. It was also believed that the ‘we’ could signify the prosecutorial attachment to their respective communities, and as the analysis of the data and the data collection process progressed, it was determined that each of the prosecutors interviewed had been elected to public office by the communities they represent. Therefore, it was believed that even in those instances where prosecutors emphasise that the voters exert no direct impact on their

job performance, there is nonetheless an indirect influence at work, one owing to the nature, size, and specific concerns unique to that community. Prosecutors, it was concluded, feel a sense of responsibility and obligation to their constituents (what was referred to in Chapter Four as *alterity*), partly as a result of the elective position of their office and partly due to the expectations that members of their community have of them. A number of prosecutors spoke of the demands that parents, teachers, school administrators, and law enforcement personnel make of them, and suggested that such expectations only serve to reinforce their desire to ‘do their best’ to ‘represent the community,’ even if they disagree on a personal level with the determinations that were being made.

From this stemmed the notion that prosecutors perceived their *role* as being qualitatively different from their *job*. Whereas the latter deals with the application and enforcement of the criminal law, the former has more to do with these societal expectations and with this over-arching sense of responsibility and commitment: in other words, prosecutors see themselves as being entrusted with the administration of justice, not only legal justice but moral as well. It is predicted that they will almost instinctively (by drawing upon both their shared instrumental values and their sense of prosecutorial commitment) ‘know’ what the ‘right thing’ to ‘do’ would be in a given case involving juvenile offenders. Yet complications arise because the ‘right thing’ varies from case to case, and prosecutors will always be conflicted in attempting to attribute primacy to either the best interests of the community they serve or to the best interests of the juvenile offender in question, as would be consistent with the doctrine of *parens patriae*. In order to determine what the ‘right thing’ might be, then, prosecutors must first make moral sense of the prosecutors with which they are confronted, drawing upon the information they receive from juvenile intake officers,

from concerned members of the community, and through their own processing encounters with the juveniles. They come to view juveniles in their own minds as being either of good or bad moral character, being child-like or adult-like (as understood from certain indicators of sophistication or from the absence of other indicators of immaturity), and being salvageable (susceptible to rehabilitative efforts) or disposable. Only once juveniles are constructed in certain uniquely prosecutorial ways that make moral sense to them can prosecutors attempt to construct what they believe to be desired outcomes.

This notion of desired outcomes or *just deserts* was another key development in the analysis of the data. The law only makes objective distinctions amongst individuals on the basis of their chronological age and the capacities that it presumes individuals or certain ages either possess or lack. In other words, individuals are either presumed to be capable of forming criminal intent and therefore held to be legally liable to punishment for their actions, or they are not. There is no grey area. Yet interviews with prosecutors revealed that prosecutors do not morally judge all juvenile offenders equally with regard to culpability: some are believed to be more deserving of punishment than others, some are believed to be more deserving of treatment, whilst others are believed to be undeserving of either, and simply deserving of being taught a lesson without being formally processed. These prosecutorial constructions of just deserts and the instruments and mechanisms by which prosecutors can secure those outcomes were also explored through prosecutorial responses.

One criticism of the research may involve questioning why actuarial methods were not delved into in an attempt to determine how prosecutors assess the concept of 'risk' posed by juvenile offenders. The research at hand was concerned with the

subjective process by which prosecutors construct the moral just deserts of juvenile offenders, and the objective processes by which they work to secure their visions of appropriate outcomes. Actuarial data, in that it is by nature objective and scientific, would have been inappropriate to include in discussions of prosecutorial interpretations of morality. In other words, it is the contention of this thesis that prosecutors do not, for example, seek diversion for a specific juvenile offender because it has been evaluated that he or she only stands a two per cent chance of recidivating, but rather because they have constructed that particular offender as good, child-like, and salvageable, and as a result believe him or her to be morally deserving of education rather than treatment or punishment.

#### **Supplemental Information: Using Survey Research to Broaden the Knowledge Base**

Although the responses gathered from the twenty-three in-person interviews of prosecutors in Kansas and Missouri yielded very rich information, it was believed that the data would be best served by supplementing it with data collected via self-administered questionnaires. Once again drawing upon information provided by the National District Attorneys Association, contact information was obtained and surveys were posted to approximately four hundred prosecutors around the country, with particular pains being taken to ensure that at least one county in each state was addressed. Each mailing contained a cover letter outlining the purpose of the research, the confidentiality statement, and providing contact information for the researcher and the dissertation supervisor; the interview schedule itself, identical to those administered in the in-person interviews; and a self-addressed stamped envelope to maximise response rates. The holiday months of November, December, and January were avoided since mail volume is greatest during those periods and it was believed that potential respondents would be more likely to discard the survey inadvertently if

it arrived accompanied by other mail than if it arrived during 'slower' times of the year.

The response rate for the self-administered questionnaires was around twenty-five per cent, as approximately one hundred prosecutors replied to the survey. Of particular interest was the fact that many of the responses of prosecutors in different states (and therefore, with different criminal statutes and different ages of responsibility) shared many of the opinions and attitudes expressed by the Kansas and Missouri prosecutors. Moreover, a number of respondents took the time to enclose additional information along with their completed questionnaire. Some prosecutors submitted articles they had written themselves, which proved to be quite informative as to the nature of community prosecution and developments on the legal front in their respective states. Other prosecutors returned the completed questionnaire with a note expressing their interest in the findings of the research and wishing the researcher luck in future endeavours. Even amongst those prosecutors who declined to participate, there were a number of returned questionnaires that were accompanied by a letter, explaining that the prosecutor who had been contacted was tremendously busy but that they had passed the survey along to a colleague in their office who had completed it instead. Consequently, demographic information about the respondents to the self-administered questionnaires is uncertain. Although it is known that those surveys that were completed and returned were in fact completed by prosecutors, it is unknown who exactly it was that completed them, especially in those offices in larger jurisdictions, with over one hundred prosecutors serving the population, where the survey could have been passed around to an individual believed to be most capable of answering the questions at hand. Overall, the response from those prosecutors who



replied was quite positive indeed, and it served to validate some of the conclusions reached from the in-person interviews of Kansas and Missouri prosecutors.

### **Opportunities for Further Research into Prosecutorial Decision-Making**

This research undertaking has proven to be highly informative with respect to the prosecutorial decision-making process. Given that American prosecutors are so open and accessible with regard to their work and their actions, it is not inconceivable that further research on the subject could be conducted. The conclusion to this thesis outlined several future research topics which could be explored from the starting point of prosecutorial commitment. Another area which would be interesting to pursue is one which this thesis only touched on briefly, relating to the different ways in which prosecutors make moral sense of delinquent boys and delinquent girls. Violence and criminal behaviour by young girls is becoming an increasingly serious problem in American society, one which a number of researchers have written on extensively, yet the emphasis appears to be on how girls are treated by juvenile court judges or how often they are sentenced to community corrections rather than incarceration. It may prove to be an interesting topic of future inquiry to consider how prosecutors make moral sense of and subsequently make legal decisions about delinquent girls, and whether additional constructions are formulated or additional instruments utilised in the process. Moreover, issues of race and class could be explored from the starting point of prosecutorial commitment and conflict. Decision-making in the criminal and juvenile justice systems regarding minority youth (specifically disproportionate minority confinement) has been investigated at length, but not from the specific perspective of the prosecutorial role. Upon reflection, it may appear that there are a number of areas dealing with such social inequality issues as race, gender, and social class, which have not been delved into by this research. However, this research aimed

only to provide a snapshot, a scholarly examination into the prosecutorial decision-making process in order to uncover what it is that prosecutors believe that they do in cases involving juvenile offenders and why they believe that they do it – or at the very least, the actions and the justifications that they espouse. Given this theoretical tool of prosecutorial commitment, specific areas, including restorative justice as opposed to retributive justice, the prosecution of white juveniles as opposed to juveniles who are members of ethnic minority groups, and decision-making in cases involving boys as opposed to girls can be inspected much more readily.

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