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The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes

Barry C. Feld
University of Minnesota Law School, feldx001@umn.edu

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BARRY C. FELD

I. INTRODUCTION

The United States Supreme Court's decision *In re Gault*[1] transformed the juvenile court into a very different institution than that envisioned by its Progressive creators.[2] Judicial and legislative efforts to harmonize the juvenile court with *Gault*'s constitutional mandate have modified the purpose, process, and operation of the juvenile justice system. The Progressives envisioned a procedurally informal court with individualized, offender-oriented dispositional practices. The Supreme Court's due process decisions impose procedural formality on the juvenile court's traditional, individualized-treatment sentencing schemes. As the juvenile court system deviates from the Progressive ideal, it increasingly resembles, both procedurally and substantively, the adult criminal court system.[3]

This Article analyzes the changing sentencing practices of the juvenile court. Contemporary juvenile courts increasingly focus on the offense committed—the "Principle of Offense," rather than on the youth's "best interests"—in their sentencing decisions. Changes in juvenile courts' "purpose clauses" to emphasize characteristics of the offense rather than the offender reflect the ascendance of the Principle of Offense. Moreover, the trend of

* Professor of Law, University of Minnesota Law School. B.A., University of Pennsylvania, 1966; J.D., University of Minnesota Law School, 1969; Ph.D. (Sociology), Harvard University, 1973. This research was supported by the University of Minnesota Law Alumni Association's "Partners in Excellence" program. I received exceptional research assistance from Ms. Susan Pasch, 1987, University of Minnesota Law School. Earlier versions of this Article were presented at Yantai University, Yantai, People's Republic of China, June, 1987, and at the 1987 Annual Meeting of the American Society of Criminology, Montreal, Canada. I received constructive critical comments from several colleagues including: Jeffrey Fagan, Robert Levy, and Lloyd Ohlin. Any remaining deficiencies stem from my failure to heed their wise counsel.

[1] 387 U.S. 1 (1967).

[2] *See* Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141, 141-42 (1984); *see also* D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205 (1980); E. RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 148 (1978).

[3] Feld, *supra* note 2, at 142; Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167, 241-42 (1981).

juvenile courts to employ a "justice model," which prescribes the appropriate sentence on the basis of "just deserts" rather than "real needs," reflects a movement away from a rehabilitation-treatment based model. Recent legislative changes in juvenile sentencing statutes and correctional administrative guidelines emphasize proportional and determinate sentences based on both the present offense and prior record, and dictate the length, location, and intensity of intervention. The shift in emphasis from treatment to punishment is also illustrated in dispositional decisionmaking processes and the harsh reality of juvenile correctional confinement.

These changes serve to both indicate and advance the substantive and procedural criminalization of the juvenile court. Emphasis on punishment, rather than treatment, of delinquents raises fundamental questions about the adequacy of procedural protections in the juvenile court. Affording juveniles procedural parity with adults as a prelude to punishment, however, raises the issue of whether there is any need for a separate juvenile court system.

II. HISTORICAL BACKGROUND

A. *The Progressive Juvenile Court—Procedural Informality and Individualized, Offender-Oriented Dispositions*

The social history of the juvenile court is an oft-told tale.[4] Economic modernization brought with it changes in family structure, the function of the family in society, and a new cultural perception of childhood.[5] Rapid

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[4] *See, e.g.*, authorities cited *supra* note 2; *see also* J. INVERARITY, P. LAUDERDALE & B. FELD, LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW 173 (1983); A. PLATT, THE CHILDSAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977); S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE 1825-1920 (1977); Empey, *The Progressive Legacy and the Concept of Childhood*, in JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS 3 (1979); Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 473-78 (1987); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Rothman, *The Progressive Legacy: Development of American Attitudes Towards Juvenile Delinquency*, in JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS 34 (1979).

[5] For information on economic modernization and industrialization in the United States, see generally S. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914 (1957); R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); G. KOLKO, THE TRIUMPH OF CONSERVATIVISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916 (1963); D. NOBLE, AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM (1977); R. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967); J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918 (1968).

For analysis of changes in family structure and function as the result of economic

industrialization and urbanization fostered the Progressive movement, many of whose programs shared a unifying child-centered theme.[6]

The Progressives introduced a variety of criminal justice reforms at the turn of the century—probation, parole, indeterminate sentences, and the juvenile court—all of which emphasized open-ended, informal, and highly flexible policies to rehabilitate the deviant.[7] Discretionary decisionmaking

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modernization, see generally: C. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 178-209 (1980); J. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT (1977); C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 6-10 (1977); S. ROTHMAN, WOMAN'S PROPER PLACE: A HISTORY OF CHANGING IDEALS AND PRACTICES, 1870 TO THE PRESENT (1978); E. SHORTER, THE MAKING OF THE MODERN FAMILY (1975); TURNING POINTS: HISTORICAL AND SOCIOLOGICAL ESSAYS ON THE FAMILY (J. Demos & S. Boocock eds. 1978).

Demographic changes in the number of children and a shift of economic functions from the family to other work environments altered the roles of women and children. Especially within the upper and middle classes, a more modern conception of childhood emerged in which children were perceived as corruptible innocents whose upbringing required greater physical, social, and moral structure than had previously been regarded as prerequisite to adulthood. The family, particularly women, assumed a greater role in supervising a child's moral and social development. For analysis of the modernization of the family and the changing conception of childhood, see generally: AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK (J. Hawes & N. Hiner eds. 1985); P. ARIES, CENTURIES OF CHILDHOOD (1962); deMause, *The Evolution of Childhood*, in THE HISTORY OF CHILDHOOD (L. deMause ed. 1974); J. GILLIS, YOUTH AND HISTORY: TRADITION AND CHANGE IN EUROPEAN AGE RELATIONS 1770-PRESENT (1974); D. HUNT, PARENTS AND CHILDREN IN HISTORY: THE PSYCHOLOGY OF FAMILY LIFE IN EARLY MODERN FRANCE (1970); B. WISHY, THE CHILD AND THE REPUBLIC (1968).

[6] The Progressives' policies, embodied in juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws, reflected the changing cultural conception of childhood. *See, e.g.*, R. WIEBE, *supra* note 5, at 169; L. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957 (1961); J. KETT, *supra* note 5, at 221-27; Empey, *supra* note 4; S. TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA (1982); W. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 45-47 (1970).

[7] D. ROTHMAN, *supra* note 2, at 43; Allen, *Legal Values and the Rehabilitative Ideal*, in BORDERLAND OF CRIMINAL JUSTICE 25-28 (1964). The Progressives' reliance on the State to implement their social reforms reflected their perception of the benevolence of state action, the ability of government to correct social problems, a confidence in their own values, and a belief in the propriety of inculcating those values in others. They experienced no reservations in their attempts to "Americanize" the poor and immigrants and employed a variety of agencies of assimilation and acculturation in an effort to create sober, virtuous, middle-class Americans. *See* Rothman, *The State as Parent: Social Policy in the Progressive Era*, in DOING GOOD: THE LIMITS OF BENEVOLENCE 67, 74-76 (1978).

pervaded Progressive criminal justice reforms; diagnosis of the causes of delinquency and prescribing a cure required an individualized approach that precluded uniform treatment or standardized criteria.

The Progressive criminal justice reforms reflected basic changes in the ideological assumptions about the sources of crime and deviance. Positivism—the effort to identify the antecedent variables that cause crime and deviance—challenged the classic formulations of crime as the product of conscious free-will choices.[8] Positivist criminology regarded deviance as determined rather than chosen, and sought to identify the causes of crime and delinquency. By attributing criminal behavior to external forces, the Progressive movement reduced an actor's moral responsibility for crime and thus focused on efforts to reform rather than punish the offender. Criminology borrowed both methodology and vocabulary from the medical profession; pathology, infection, diagnosis, and treatment provided popular analogues for criminal justice professionals. The conjunction of positivistic criminology, the use of medical models in the treatment of criminals, and the emergence of social science professionals gave rise to the "Rehabilitative Ideal."[9]

The juvenile court movement attempted to remove children from the adult criminal justice and corrections systems and provide them with individualized treatment in a separate system. The Progressives envisioned juvenile court professionals using indeterminate procedures, substituting a scientific and preventative approach for the traditional punitive scheme of the criminal law, to achieve benevolent goals and better society.[10] Under the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment and allowed the State ever wider discretion to intervene in the lives of young offenders.[11] As a result, the juvenile court's

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[8] D. MATZA, DELINQUENCY AND DRIFT 5 (1964); D. ROTHMAN, *supra* note 2, at 50-51; Allen, *supra* note 7, at 26.

[9] A flourishing rehabilitative ideal requires both a belief in the malleability of human behavior and a basic moral consensus about the appropriate directions of human change. Moreover, a rehabilitative ideal requires agreement about ends and means; the Progressives believed both in the virtues of their social order and that new social sciences provided them with the tools to bring about systematic human change. *See* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 11-15 (1981) [hereinafter DECLINE OF REHABILITATIVE IDEAL]; Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 151-53 (1978); Allen, *supra* note 7, at 25-26 (1964).

[10] *See* A. PLATT, *supra* note 4, at 43-47; E. RYERSON, *supra* note 2, at 35-42; Mack, *supra* note 4, at 109-11.

[11] *See, e.g.*, *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1838) (justifying the establishment of the House of Refuge, which offered aid to homeless and destitute youth, on the basis of *parens patriae*); Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. REV. 147, 181 (1970); Rendleman, Parens Patriae: *From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205, 207-10 (1971).

jurisdiction over "status" offenses encompassed situations that might previously have been ignored.[12]

In separating child from adult offenders, the juvenile court system also rejected the jurisprudence and procedure of adult criminal prosecutions. Courtroom procedures were modified to eliminate any implication of a criminal proceeding; a euphemistic vocabulary and a physically separate court building were introduced to avoid the stigma of adult prosecutions.[13] To avoid stigmatizing a youth, hearings were confidential, access to court records limited, and children were found to be delinquent rather than guilty of committing a crime. Juvenile court proceedings concentrated on the child's background and welfare rather than the details surrounding the commission of a specific crime. Consequently, juries and lawyers were excluded from juvenile court proceedings, as were the rules of evidence and formal procedures.

The system proffered by the Progressives left judges, assisted by social workers, to investigate the problematic child's background, identify the sources of the misconduct at issue, and develop a treatment plan to meet the child's needs. Juvenile court personnel enjoyed enormous discretion to make dispositions in the "best interests of the child." Principles of psychology and social work, rather than formal rules, guided decisionmakers. The court collected as much information as possible about the child—his life history, character, social environment, and individual circumstances—on the assumption that a scientific analysis of the child's past would reveal the proper diagnosis and cure. The overall inquiry accorded minor significance to the offense committed by the child, as it indicated little about the child's "real needs." At hearings and dispositions, the court directed its attention first and foremost to the child's character and lifestyle.

Dispositions continued for the duration of minority, and were indeterminate and nonproportional. The courts were given maximum discretion to allow for flexibility in diagnosis and treatment. The offense that brought the child before the court affected neither the intensity nor the duration of intervention because each child's "real needs" differed.

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[12] Illicit activities, such as smoking or truancy, and conduct that reflected inappropriate values, such as immorality, stubbornness, vagrancy, or living a wayward, idle, and dissolute life, subjected youths to pre-delinquent intervention by the courts to supervise their upbringing. *See* A. PLATT, *supra* note 4, at 137-38; Schlossman & Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 70, 81 (1978).

[13] *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 92-93 (1967); D. ROTHMAN, *supra* note 2, at 217-18; E. RYERSON, *supra* note 2.

B. *The Constitutional Domestication of the Juvenile Court—Procedural Formality and Individualized, Offender-Oriented Dispositions*

With the Supreme Court's decision in *Gault*, mandating procedural safeguards in the adjudication of delinquency, judicial focus turned toward the determination of legal guilt or innocence of the minor. The Court's "constitutional domestication" of the juvenile court system altered the objective of the pre-sentencing stage of juvenile adjudication from "saving" an offender's "soul" to proof of the minor's commission of a criminal offense. In so doing, *Gault* fundamentally altered the operation of the juvenile court.

In *Gault*, the Court reviewed the history of the juvenile justice system and the traditional rationales for denying procedural safeguards to juveniles: hearings involving juvenile offenders were not adversarial; the adjudication of delinquency was civil, not criminal; and a child was entitled to custody, not liberty, when the State acted as *parens patriae*.[14] In rejecting these traditional rationales, the Court observed that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure" and concluded that the denial of procedural rights frequently resulted in arbitrariness rather than "careful, compassionate, individualized treatment."[15] Although the Court hoped to retain the potential benefits of the juvenile process, it insisted that the "claimed benefits of the juvenile court process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes" to the realities of recidivism, the failures of rehabilitation, the stigma of a "delinquency" label, the breaches of confidentiality, or the arbitrariness of the process.[16]

Several factors contributed to the Court's decision in *Gault* to impose procedural safeguards on the juvenile justice process: the adjudication of juveniles as delinquent for behavior that would be a criminal offense if committed by adults; the attendant stigma of delinquency/criminal convictions; and the realities of juvenile institutional confinement.[17] The juvenile court system's failure to live up to the Progressive ideal provoked the *Gault* Court to mandate elementary procedural safeguards, including the right to advanced notice of charges, a fair and impartial hearing, the right to the assistance of counsel, including the opportunities to confront and cross-examine witnesses; and the protections of the privilege against self-incrimination.[18]

Despite its critical dicta, the Court narrowly confined its decision to the adjudicatory hearing at which a child is determined to be a delinquent, without considering the entire procedural apparatus, jurisdictional reach, or

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[14] 387 U.S. 1, 14-17 (1967).
[15] *Id.* at 18-19.
[16] *Id.* at 21-25.
[17] *Id.* at 27-29.
[18] *Id.* at 31-57.

dispositional practices of the juvenile justice system.[19] The Court noted that its procedural requirements would in no way impair the unique procedures for processing and treating juveniles separately from adults;[20] it asserted, however, that the procedural safeguards associated with the adversarial process were essential to both the determination of truth and the preservation of individual freedom.[21]

In subsequent juvenile court decisions, the Supreme Court elaborated upon the procedural and functional equivalence between criminal and delinquency proceedings. In *In re Winship*,[22] the Court decided that proof of delinquency must be established "beyond a reasonable doubt" rather than by the lower civil standards of proof.[23] Because there is no explicit constitutional provision regarding the standard of proof, the Court in *Winship* first held that proof beyond a reasonable doubt was a constitutional requirement in adult criminal proceedings and then extended that same requirement to juvenile proceedings both to insure accurate fact-finding and to constrain governmental overreaching.[24]

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[19] *Id.* at 13. There are numerous works that discuss the narrow holding in *Gault* and the limitations on juvenile procedural rights. *See, e.g.*, McCarthy, *Pre-Adjudicatory Rights in Juvenile Courts: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459-60 (1981) (analyzing limitations on juveniles' procedural rights); Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 661-63 (1980).

[20] *In re* Gault, 387 U.S. 1, 22 (1967).

[21] *Id.* at 20-21; *see also* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-47 (1967) (arguing that procedural due process ensures the reliability of the guilt-determining process and ensures respect for the dignity of the individual). The dual functions of procedural safeguards—to provide factual accuracy and prevent governmental oppression—were clearly implicated by the Court's holding that the privilege against self-incrimination applied to delinquency adjudications. *Gault*, 387 U.S. at 49-50; *see also* Feld, *supra* note 2, at 154-56 nn.46-47. By recognizing the applicability of the privilege against self-incrimination, juvenile adjudications could no longer be characterized as either "non-criminal" or "non-adversarial," since the fifth amendment privilege is both the guarantor of an adversarial process and the primary mechanism for maintaining a balance between the state and the individual. *Compare, e.g., Gault*, 387 U.S. at 50, *with* Allen v. Illinois, 478 U.S. 364, 373 (1986) ("The Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile offenders . . . ." (emphasis added)).

[22] 397 U.S. 358 (1970).

[23] *Id.* at 368.

[24] *Id.* at 361-67. It is helpful to compare the *Winship* Court's treatment of the standard of proof in delinquency cases with the standard of proof required by the Court for involuntary civil commitment of the mentally ill. Addington v. Texas, 441 U.S. 418, 433 (1979) (holding that only "clear and convincing" evidence is necessary as the standard of proof). In *Addington* the Court continued to equate criminal and

Similarly, in *Breed v. Jones*,[25] the Court held that the protections of the double jeopardy clause of the fifth amendment prohibited adult criminal re-prosecution of a youth previously convicted on the same charges in juvenile court.[26] The Court posited a functional equivalence between an adult criminal trial and a delinquency proceeding, describing the virtually identical human and institutional costs implicated in both—"anxiety and insecurity," "heavy personal strain," and the increased burdens of the juvenile system as it became more procedurally formalized.[27] In light of the potential consequences, the Court concluded that there was little basis to distinguish a delinquency proceeding from a traditional adult criminal prosecution.[28]

In *McKeiver v. Pennsylvania*,[29] the Court halted the extension of procedural rights of juveniles to that of full parity with adult criminals by denying a constitutional right to jury trials in state delinquency proceedings.[30] The Court held that the due process standard of "fundamental fairness" in juvenile proceedings, as interpreted and applied in *Gault* and *Winship*, emphasized "accurate fact-finding"—an objective as easily attained by a judge as a jury.[31] In suggesting that due process in the juvenile context required nothing more than accurate fact-finding, however, the Court departed significantly from its prior analyses of the *dual* functions of juvenile court procedures: to assure accurate fact-finding *and* to protect against government oppression.[32] By identifying accurate fact-finding as the

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delinquency proceedings, distinguishing both from involuntary commitment proceedings:

> The Court [in *Winship*] saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue—whether the individual in fact committed a criminal act—was the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt. . . .
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> . . . Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution.

Id. at 427-28.

[25] 421 U.S. 519 (1975).

[26] *Id.* at 541.

[27] *Id.* at 528-29.

[28] *Id.* at 530.

[29] 403 U.S. 528 (1971).

[30] *Id.* at 545.

[31] *Id.* at 543.

[32] *See supra* note 21-24 and accompanying text; *see also* Feld, *Reference of Juvenile Offenders for Adult Prosecutions: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 602-05 (1978).

Justice Brennan's opinion in *McKeiver* notes that protection from governmental oppression is a fundamental element of procedural justice, but one that might be afforded by an alternative method than that of a jury trial, such as a public trial that

sole underlying rationale of the fundamental fairness doctrine, the Court ignored its analysis in *Gault* which held the fifth amendment's privilege against self-incrimination to be necessary in order to protect against government oppression, even though accurate fact-finding might be compromised.[33] Invoking the mythology of the sympathetic, paternalistic juvenile court judge, the *McKeiver* Court denied that protection against government oppression was required[34] and rejected the argument that the inbred, closed nature of the juvenile court system could affect the accuracy of fact-finding.[35]

The *McKeiver* Court was concerned that requiring jury trials would disrupt the traditional juvenile court and its adjudicative practices.[36] The Court

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would render the adjudicative process visible and accountable to the community. *See McKeiver*, 403 U.S. at 553-55 (Brennan, J., concurring and dissenting). The *McKeiver* decision involved two cases, one initiated in Pennsylvania and the other in North Carolina, both of which had raised the issue of jury trials in juvenile proceedings. Although Justice Brennan acknowledged that delinquency prosecutions were not criminal proceedings for purposes of implicating the sixth amendment right to a jury trial and required only the "essentials of due process and fair treatment," *id.* at 553, he differentiated between the Pennsylvania and North Carolina proceedings. Justice Brennan noted that "the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve." *Id.* at 554. He noted that the availability of trial by jury protects the individual against oppression by providing a mechanism to appeal to the conscience of the community. *Id.* at 555. The Pennsylvania juvenile procedures permitted a public trial, which Justice Brennan regarded as providing a functional equivalent safeguard for the core values protected by the right to a jury trial. *See id.* at 554-55. Justice Brennan dissented in the North Carolina case, however, because North Carolina procedures either permitted or required the exclusion of the public, and the public had in fact been excluded from the proceedings, thus precluding any "protection against misuse of the judicial process." *Id.* at 556; *see also* Feld, *supra* note 2, at 158-60, 262-66 (discussing Justice Brennan's opinion in *McKeiver*).

[33] *See* Feld, *supra* note 2, at 154-59 nn.46-47.

[34] *See McKeiver*, 403 U.S. at 550.

[35] According to the Court, concern about procedural safeguards such as jury trials to assure accurate fact-finding and protection against governmental oppression ignores the notion of benevolence and compassion as the premise of the juvenile court system. *See id.* at 550-51.

> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

Id.

[36] *Id.* at 550.

noted the potential adverse impact of jury trials on the informality, flexibility, and confidentiality of juvenile court proceedings;[37] to institute this last remaining formality of the criminal process would make juvenile courts virtually indistinguishable from criminal courts and raise the more basic question of whether there is any need for a separate juvenile court.[38]

Although the *McKeiver* Court found faults with the juvenile process, it asserted that jury trials would not correct those deficiencies but would instead make the juvenile process unduly formal and adversarial.[39] Yet the Court did not consider: possible advantages due to increased formality in juvenile proceedings;[40] whether its earlier decision in *Gault* had effectively foreclosed renewed concern with flexibility and informality; nor why formality at the adjudication stage was incompatible with therapeutic dispositions.

Most importantly, the *McKeiver* Court did not analyze the crucial distinctions between treatment in juvenile courts and punishment in criminal courts that justified different procedural safeguards for each forum.[41] No factual record of dispositional practices or conditions of confinement was reviewed by the Court in its deliberation over whether juvenile court intervention was punishment or treatment.[42] The Court simply noted that the ideal juvenile

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[37] *Id.*

[38] *Id.* at 551 ("If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.").

[39] The *McKeiver* Court noted that providing for trial by jury in juvenile court "would bring with it . . . the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." *Id.* at 550.

[40] One of the Court's rationales for imposing procedural formality onto juvenile delinquency proceedings was that "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *In re* Gault, 387 U.S. 1, 18-19 (1967).

[41] The Court has held that fundamental fairness in *adult* criminal proceedings requires both factual accuracy and protection against governmental oppression. For example, the Court has said that "[p]roviding an accused with a right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[42] Compare *McKeiver* with Allen v. Illinois, 478 U.S. 364 (1986). In *Allen*, the Court denied petitioner the protections of the fifth amendment's privilege against self-incrimination in a "sexually dangerous person" commitment proceeding. Since the privilege is only available when the State purports to "punish," the Court's ruling was based, in part, on petitioner's failure to disprove the State's assertion that it provided treatment, rather than punishment:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is

court system is "an intimate, informal protective proceeding,"[43] even while acknowledging that the "ideal" is seldom, if ever, realized.[44]

The Progressive creators of the juvenile court envisioned a benevolent treatment agency in which informality and flexibility facilitated discretionary decisionmaking in the "best interests of the child." Despite the subsequent procedural formalization of the juvenile court in *Gault*, the Supreme Court in *McKeiver* remained ideologically committed to the traditional "treatment" rationale of the juvenile court. In accepting the assertion that juvenile courts are "rehabilitative" rather than punitive, the Court did not examine either how juvenile court treatment differed from traditional criminal law punishment or whether there was any corresponding need for procedural protections against government oppression. Thus, the Court never analyzed the fundamental basis for not affording juveniles all criminal procedural safeguards.

Despite the *McKeiver* Court's reluctance to hasten the demise of the juvenile court system, its earlier decisions in *Gault* and *Winship* drastically altered the form and function of the juvenile court. By emphasizing procedural regularity in the determination of criminal guilt as a prerequisite to a delinquency disposition, the Supreme Court shifted the focus of the juvenile court from the "real needs" of a child to proof of the commission of criminal acts.[45] As the next sections of this Article will show, the underlying purposes and sentencing framework of juvenile courts increasingly reflect the substantive goals of the criminal law.

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essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex. . . . We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and thus render "criminal" the proceedings which led to confinement.

Id. at 373-74.

See generally B. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977) (examining conditions of confinement in juvenile correctional facilities); Feld, *supra* note 2, at 258-62.

[43] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

[44] *Id.* at 547-48.

[45] *See, e.g., In re* Javier A., 159 Cal. App. 3d 913, 206 Cal. Rptr. 386 (1984) (denying petitioner a jury trial in a juvenile proceeding, but urging the Supreme Court to reconsider prior decisions in light of evidence that juvenile court proceedings have taken on many attributes of criminal trial proceedings). In *Javier A.*, the Court noted that "juvenile proceedings now feature the same contests over admission of evidence as adult proceedings since only proof admissible in a criminal trial can be used to support a finding the juvenile committed the criminal offense." *Id.* at 960, 206 Cal. Rptr. at 419.

III. THE PRINCIPLE OF OFFENSE IN JUVENILE COURT: JUST DESERTS IN SENTENCING PRACTICES

Justice White's concurrence in *McKeiver* highlighted some distinctions between "treatment" in juvenile courts and "punishment" in criminal proceedings. Whereas the criminal law punishes morally responsible actors for making blameworthy choices, the juvenile justice system regards juveniles as less culpable or responsible for their criminal misdeeds. Justice White noted:

> For the most part, the juvenile justice system rests on more deterministic assumptions [than the criminal justice system]. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. A typical disposition in the juvenile court where delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is the authorization for custody until 21 any measure of the seriousness of the particular act that the juvenile has performed.[46]

The non-proportional, indeterminate length of juvenile dispositions and the "eschewing [of] blameworthiness and punishment for evil choices" satisfied Justice White that "there remained differences of substance between criminal and juvenile courts."[47] Justice Stewart's dissent in *Gault* articulated a similar distinction between the sentencing practices in the juvenile and adult criminal justice systems, observing that "a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act."[48] Accordingly, the *McKeiver* Court assumed that the juvenile system provided only positive rehabilitative treatment and thus required no further special safeguards against government encroachment on individual rights. By contrast, the Court understood retributive criminal punishment in the adult criminal process to require additional procedural guarantees in order to prevent governmental oppression.

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[46] *McKeiver*, 403 U.S. at 552 (White, J., concurring).

[47] *Id.* at 551-52.

[48] *Gault*, 387 U.S. at 79 (Stewart, J., dissenting).

The fundamental justification for denying jury trials in delinquency proceedings and, more basically, for maintaining a juvenile justice system separate from the adult one is based on the differences between punishment and treatment.[49] Yet, part of the *McKeiver* Court's failure to distinguish between punishment and treatment in the contemporary juvenile justice system stems from a lack of analytical clarity about the conceptual differences between the two justifications for intervention. Punishment involves the imposition by the State, for purposes of retribution or deterrence, of burdens on an individual who has violated legal prohibitions.[50] Treatment, by contrast, focuses on the mental health, status, and future welfare of the individual rather than on the commission of prohibited acts.[51]

Conceptually, punishment and treatment are mutually exclusive penal goals.[52] Both make markedly different assumptions about the sources of criminal or delinquent behavior. Punishment assumes that responsible, free-will moral actors make blameworthy choices and deserve to suffer the prescribed consequences for their acts.[53] Punishment imposes unpleasant consequences because of an offender's *past offenses*. By contrast, most forms of rehabilitative treatment, including the rehabilitative ideal of the juvenile court, assume some degree of determinism.[54] Whether grounded in psychological or sociological processes, treatment assumes that certain antecedent factors cause the individual's undesirable conditions or behavior. Treatment and therapy, therefore, seek to alleviate undesirable conditions in order to improve the offender's *future welfare*.[55]

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[49] *See, e.g.*, Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791 (1982). Gardner argues that "unlike the criminal law, juvenile justice responds to the status of children in need, treating them for what they are rather than punishing them for what they have done." *Id.* at 791.

For a comprehensive review of the Supreme Court's analysis of the punishment/nonpunishment distinctions, see generally, Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

[50] *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4-6 (1968).

[51] *See* H. PACKER, LIMITS OF THE CRIMINAL SANCTION 23-28 (1968); Allen, *supra* note 7, at 25; Allen, *supra* note 9, at 2-3.

[52] *See* Feld, *supra* note 2, at 248-49 nn.415-16; Gardner, *supra* note 49, at 793-94 n.16, 815-16.

[53] *See, e.g.*, H.L.A. HART, *supra* note 50; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 49 (1976) (rejecting the rehabilitative ideal as unworkable and unjust, concluding that the severity of an offender's sentence should reflect the severity of the offender's crime).

[54] *See* D. MATZA, *supra* note 8, at 5.

[55] *See* D. GIBBONS, CHANGING THE LAWBREAKER: THE TREATMENT OF DELINQUENTS AND CRIMINALS 130 (1965). *See generally* Feld, *supra* note 32, at 530-40 (discussing the underlying assumption of treatment in juvenile justice).

In analyzing juvenile court sentencing practices, it is useful to examine whether the sentencing decision is based upon considerations of the past offense or the future welfare of the offender. When a sentence is based on the characteristics of the offense, it is typically determinate and proportional, with the objective of retribution or deterrence. The decision is based upon an assessment of past conduct—the present offense and any prior criminal record. When a sentence is based upon characteristics of the offender, however, it is typically open-ended, non-proportional and indeterminate, with the goal of rehabilitation or incapacitation.[56] The decision is based upon a diagnosis or prediction about the effects of intervention on an offender's future course of conduct.

It is also useful to distinguish the bases of such dispositions. David Matza has described the Principle of Offense as a principle of equality: an effort to treat similar cases in a similar fashion based on a relatively narrowly defined frame of relevance.[57] Matza observes:

> The principle of equality refers to a specific set of substantive criteria that are awarded central relevance and, historically, to a set of considerations that were specifically and momentously precluded. Its meaning, especially in criminal proceedings, has been to give a central and unrivaled position in the framework of relevance to considerations of *offense* and conditions closely related to offense like prior record, and to more or less preclude considerations of status and circumstance.[58]

By contrast, the Principle of Individualized Justice differs from the Principle of Offense in two fundamental ways. First, the Principle of Individualized Justice is much more inclusive;

> [i]t contains many more items in its framework of relevance. . . . The principle of individualized justice suggests that disposition is to be guided by a *full understanding* of the client's personal and social character and by his "individual needs." [Secondly, t]he consequence of the principle of individualized justice has been mystification. . . . [I]ts function is to obscure the process of decision and disposition rather than to enlighten it.[59]

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[56] *See, e.g., In re* Felder, 93 Misc. 2d 369, 402 N.Y.S.2d 528 (N.Y. Fam. Ct. 1978). The *Felder* court noted that "[t]he distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment." *Id.* at 377, 402 N.Y.S.2d at 533; *see also* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 11-14 (1976); A. VON HIRSCH, *supra* note 53, at 11-26. For a criticism of the use of the rehabilitative ideal in our criminal justice system, see N. MORRIS, THE FUTURE OF IMPRISONMENT 13-20 (1974).

[57] D. MATZA, *supra* note 8, at 14.

[58] *Id.* at 113-14.

[59] *Id.* at 114-15.

By including all personal and social characteristics as relevant, without assigning controlling significance to any one factor, individualized justice relies heavily on the "professional judgment" of juvenile court administrators.[60]

In the adult dispositional framework, determinate sentences based on the offense increasingly supersede indeterminate sentences as "just deserts" displaces rehabilitation as the underlying sentencing rationale.[61] The Progressives' optimistic assumptions about human malleability are challenged daily by the observation that rehabilitation programs fail to consistently rehabilitate and by volumes of empirical evaluations that question both the effectiveness of treatment programs and the "scientific" underpinnings of those who administer the enterprise.[62]

Proponents of "just deserts" reject rehabilitation as a justification for intervention for a number of reasons. First, they argue that an indeterminate sentencing scheme vests too much discretionary power in presumed experts.

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[60] Matza argues that "[because] the kinds of criteria it includes are more diffuse than those commended in the principle of offense . . . [one] consequence of the principle of individualized justice has been mystification." *Id.* at 116.

[61] *See* J. PETERSILIA & S. TURNER, GUIDELINE-BASED JUSTICE: THE IMPLICATIONS FOR RACIAL MINORITIES (1985). The report notes:

> By 1985, at least 25 states had enacted determinate sentencing statutes, 10 states had abolished their parole boards, and 35 states had mandatory minimum sentence laws. . . . [M]any states and jurisdictions had established formal guidelines for sentencing decisions (e.g., prison vs. probation, length of sentence), for determining supervision levels for parolees and probationers, and for parole release.

Id. at 1. For arguments critical of the rehabilitative ideal as a goal of penal reform and supportive of model prison programs based on punishment, see generally AMERICAN FRIENDS SERV. COMM., A REPORT ON CRIME AND PUNISHMENT IN AMERICA: STRUGGLE FOR JUSTICE 45-53 (1970); D. FOGEL, "WE ARE THE LIVING PROOF . . . ," THE JUSTICE MODEL FOR CORRECTIONS 260-72 (2d ed. 1979); N. MORRIS, *supra* note 56, at 45-50; R. SINGER, JUST DESERTS (1979); A. VON HIRSCH, *supra* note 53, at 49-55.

[62] There have been numerous studies of the efficacy of both juvenile and adult correctional programs in rehabilitating offenders. Few have encouraged proponents of rehabilitation. *See generally* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964); G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT (1971); L. SECHEREST, S. WHITE & E. BROWN, THE REHABILITATION OF CRIMINAL OFFENDERS (1979); Fishman, *An Evaluation of Criminal Recidivism in Projects Providing Rehabilitation and Diversion Services in New York City*, 68 J. CRIM. L. & CRIMINOLOGY 283 (1977); Greenberg, *The Correctional Effect of Corrections*, in CORRECTIONS AND PUNISHMENT 111 (D. Greenberg ed. 1977); Law & Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 CRIME & DELINQ. 60 (1988); Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974); Robinson & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67 (1971).

Second, they point to the inability of such clinical experts to justify their differential treatment of similarly situated offenders based on validated classification schemes with objective indicators. Finally, opponents of rehabilitation emphasize the inequalities, disparities, and injustices that result from therapeutically individualized sentences.[63] "Just deserts" sentencing, with its strong retributive foundation, punishes offenders according to their past behavior rather than on the basis of who they are or who they may become. Similarly situated offenders are defined and sanctioned equally on the basis of relatively objective and legally relevant characteristics such as seriousness of offense, culpability, or criminal history.

The same changes in sentencing philosophy are appearing in the juvenile process as well. However, "just deserts" sentences for juveniles have important implications for *McKeiver*'s therapeutic rationale and procedural implementations. The inability of proponents of juvenile rehabilitation to demonstrate the effectiveness of *parens patriae* intervention has led an increasing number of states to incorporate "just deserts" sentencing principles into their juvenile justice systems. The underlying premises of "just deserts" are that a juvenile's personal characteristics or social circumstances do not provide a principled basis for determining the length or intensity of coercive intervention and that "only a principle of propor-

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[63] *See, e.g.*, AMERICAN FRIENDS SERV. COMM., *supra* note 61, at 124-44. An analysis of the impact of the American Friends Service Committee's *Struggle for Justice* summarizes its premises:

> [C]riminal justice practitioners had never developed the technical capabilities required to implement the [treatment] model. Evaluations of rehabilitation programs had consistently failed to find persuasive evidence for the success of treatment; after fifty years of research on the prediction of criminality, post-release recidivism still could not be predicted accurately. The prospects of major improvement in these areas were questioned on theoretical grounds: If crime is not the product of an individual pathology, then it cannot be "cured." . . .
>
> Going beyond this technical criticism, the [AFSC] Working Party rejected coerced therapy as undignified and potentially repressive, and attacked individualization in sentencing as a violation of fundamental norms of distributive justice and proportionality . . . . Where decisions are unstructured by law, regulation, or even meaningful guidelines and are for the most part unreviewed and unchecked, decisions supposedly to be made on the basis of criteria related to rehabilitation can be and sometimes are made on the basis of other criteria that are legally irrelevant and discriminatory in their impact, such as race, class, sex, life style, and political affiliations. . . . Seen in this light, rehabilitation was not merely a laudable goal that scientific research had unfortunately failed thus far to achieve, but something far more insidious—an ideology that explained crime in highly individualistic terms and legitimated the expansion of administrative powers used in practice to discriminate against disadvantaged groups and to achieve covert organizational goals.

Greenberg & Humphries, *The Cooptation of Fixed Sentencing*, 26 CRIME & DELINQ. 206, 207-08 (1980); *see also* Lopez, *The Crimes of Criminal Sentencing Based on Rehabilitation*, 11 GOLDEN GATE U. L. REV. 533 (1981).

tionality (or "deserts") provides a logical, fair, and humane hinge between conduct and an official, coercive response."[64]

Whether a juvenile receives punishment based on his past offense or treatment based on his personal characteristics may be answered by examining several aspects of juvenile courts' sentencing practices: the decision whether a youth should be transferred to criminal court for prosecution and punishment as an adult;[65] the explicit legislative purposes of contemporary juvenile codes; the sentencing framework used for making juvenile dispositions; the actual sentencing practices of the juvenile court; and the conditions of confinement in juvenile institutions. Such an examination reveals that despite persisting rehabilitative rhetoric, the dispositional practices of the contemporary juvenile court increasingly are based on the Principle of Offense and reflect the punitive character of the criminal law.

Concluding that juvenile courts punish rather than treat raises fundamental questions about the quality of procedural justice in juvenile courts, since the failure to provide all criminal procedural safeguards is justified by the "alternative purpose" of treatment. Moreover, many juveniles currently may serve longer sentences than do their adult counterparts convicted of similar offenses. Juveniles' equal protection challenges to legislative classifications imposing longer terms for juveniles than for adults for similar offenses consistently have been rejected on the grounds that juveniles receive "treatment" rather than punishment.[66] If juvenile courts punish, then

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[64] Cohen, *Juvenile Offenders: Proportionality vs. Treatment*, 8 CHILDREN'S RTS. RPT. 1, 3 (1978).

[65] *See* Feld, *supra* note 4, at 471.

[66] The California Supreme Court in *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976), limited the maximum sentence that could be imposed upon an adult misdemeanant committed to the California Youth Authority to the maximum length that could be imposed on an adult sentenced for the same offense. By contrast, in *People v. Eric J.*, 25 Cal. 3d 522, 601 P.2d 549, 159 Cal. Rptr. 317 (1979), the court refused to apply the *Olivas* adult sentence limitations when sentencing juveniles to the Youth Authority and upheld a longer term imposed on a juvenile than could be imposed on an adult sentenced for the same offense. In so doing, the court emphasized that unlike "punitive" sentences for adults,

> [t]here has been no like revolution in society's attitude toward juvenile offenders. It is still true that "[j]uvenile commitment proceedings are designed for the purposes of rehabilitation and treatment, not punishment."

Id. at 554. *See generally* Vallandigham, People v. Olivas: *The Concept of "Personal Liberty" as a Fundamental Interest in Equal Protection Analysis*, 4 HASTINGS CON. L. Q. 757 (1977); Note, People v. Olivas: *Equalizing the Sentencing of Youthful Offenders with Adult Maximums*, 4 PEPPERDINE L. REV. 389 (1977); Note, *Equality of Sentencing Between Juveniles and Adults: A Logical Extension of* People v. Olivas, 10 PACIFIC L. J. 161 (1978).

The lengths of sentences that could be imposed on adult misdemeanor defendants sentenced under Youth Corrections Acts are generally limited to those that can be imposed on other adult offenders. *See, e.g.*, United States v. Amidon 627 F.2d 1023,

the underlying basis for distinguishing juvenile and adult sanctions is eliminated. Finally, if juvenile courts in fact punish without safeguards of the criminal process in a fashion frequently more severe than could be legally imposed upon a similarly situated adult, is there any remaining justification for a separate system for adjudicating young offenders for committing criminal offenses?

A. *The Purpose of the Juvenile Court—Distinguishing Punishment From Treatment*

The Progressives envisioned, and the *McKeiver* decision endorsed, a model of the juvenile court as a benevolent treatment agency making dispositions in the "best interests of the child."[67] Because the *McKeiver* Court subscribed to the view that juvenile courts rehabilitate rather than punish, it did not analyze further the differences between "treatment" and "punishment." The Court, however, has developed criteria in other contexts to answer the question whether seemingly punitive and coercive governmental intervention constitutes punishment.[68] For example, in *Kennedy v. Men-*

1026 (9th Cir. 1980) (rejecting conclusions that the rehabilitative purposes underlying the YCA justify a longer confinement); *cf.* United States v. Lowery, 726 F.2d 474, 477-78 (9th Cir. 1983).

By contrast, the adult maximum sentence lengths provide no limitations on the sentences that may be imposed upon juveniles sentenced within the juvenile court. *See* Smith v. State, 444 S.W.2d 941 (Texas 1969). In rejecting the juvenile defendant's equal protection challenge to a longer sentence, the court concluded that there was a rational basis for the legislative classification.

> Since the purpose of the legislation is to salvage youthful offenders, it requires no straining of the judicial imagination to find the existence of a reasonable relationship between the legislative purpose and the use of age as the classifying trait. . . . [I]f the difference in treatment is founded upon an arguably rational basis, the legislative decision is determinative. The Legislature could have concluded that children, as a class, should be subject to indefinite periods of confinement . . . in order to insure sufficient time to accord the child sufficient treatment of the type required for his effective rehabilitation. The conclusion might be based on physiological and psychological differences between children and adults, the types of crime committed by children, their relation to the criminal world, their unique susceptibility to rehabilitation, and their reaction as a class to confinement and discipline, as well as reformative treatment.

Id. at 945; *see also In re* K.V.N., 116 N.J. Super. 580, 283 A.2d 337 (1971) (classification based on age, calling for longer sentence for same offense for juvenile than for adult, does not violate equal protection).

[67] The *McKeiver* Court noted that although the guiding consideration for courts of law dealing with threatening conduct should be the protection of the community, rehabilitating offenders through individualized treatment is still the most appropriate manner to deal with juvenile offenders. *McKeiver*, 403 U.S. at 546 n.6.

[68] *See generally* Clark, *supra* note 49.

doza-Martinez[69] the Court identified factors that determine whether a particular State sanction or imposition is punitive:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purposes assigned are all relevant to the inquiry, and may often point in different directions.[70]

Even when a State incarcerates on the basis of underlying conduct that is criminal, however, the Court must still determine whether the purpose of the confinement is penal. In *Allen v. Illinois*,[71] the Supreme Court considered the distinctions between "punishment" and "treatment" in deciding whether a person incarcerated under a "Sexually Dangerous Persons Act" was entitled to invoke the fifth amendment privilege against self-incrimination. Even though commitment under the Act was triggered by the filing of criminal charges and accompanied by many of the safeguards of a criminal proceeding, the Court endorsed psychiatrically "compelled" testimony once it concluded that commitment was "essentially civil in nature" and that the aim of the statute was to provide "treatment, not punishment."[72] While acknowledging that a "civil label is not . . . dispositive," the Court concluded that because the statutory purpose was to provide "care and treatment" and commitment was indeterminate,

> the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confine-

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[69] 372 U.S. 144 (1963).

[70] *Id.* at 168-69 (footnotes omitted); *see, e.g.*, Allen v. Illinois, 478 U.S. 364 (1986) (holding that proceedings under Illinois' Sexually Dangerous Persons Act did not amount to "criminal" proceedings within the meaning of the fifth amendment's guarantee against compulsory self-incrimination). Note that even when the State incarcerates on the basis of underlying conduct that is criminal, the Court must still determine whether the purpose of the confinement is penal. *Id.* at 367-70. *See also* Trop v. Dulles, 356 U.S. 86 (1958).

[71] 478 U.S. 364 (1986).

[72] *Id.* at 367 (quoting People v. Allen, 107 Ill. 2d 91, 99-101, 481 N.E.2d 690, 694-95 (1985)). The dissent in *Allen* pointed out that "[a] goal of treatment is not sufficient, in and of itself, to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as 'criminal'. . . . if this were not the case, moreover, nothing would prevent a State from creating an entire corpus of 'dangerous person' statutes to shadow its criminal code. . . . The goal would be 'treatment'; the result would be evisceration of criminal law and its accompanying protections." *Id.* at 380 (Stevens, J., dissenting).

> ment. The Act thus does not appear to promote either of "the traditional aims of punishment—retribution and deterrence."[73]

The Court distinguished its denial of the privilege against self-incrimination in *Allen* from its holding in *Gault* by noting that

> [t]he Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile offenders, observing that in many States juveniles may be placed in "adult penal institutions" for conduct that if committed by an adult would be a crime. Here, by contrast, the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.[74]

Finally, the Court concluded that Allen had failed to negate the State's claim of "treatment" by failing to show that the nature of his confinement was "essentially identical to that imposed upon felons with no need for psychiatric care . . . ."[75] The Court acknowledged, however, "that the conditions of . . . confinement [could] amount to 'punishment' and thus render 'criminal' the proceedings which led to confinement."[76]

The inquiry into the distinction between punishment and treatment may be advanced by applying the *Mendoza-Martinez* and *Allen* criteria to a scenario in which a juvenile offender is incarcerated in a state training school following conviction for conduct that would be a felony if committed by an adult. Institutional confinement is a restraint that has been historically regarded as punishment and is generally invoked by the courts in a delinquency proceeding upon proof of mens rea and criminal behavior.[77] Nevertheless, incarcera-

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[73] *Id.* at 369-70 (citations omitted).

[74] *Id.* at 373 (emphasis in the original) (citation omitted). In distinguishing *Gault*, the *Allen* Court subtly shifted the rationale of the *Gault* Court's fifth amendment holding. The *Allen* Court implied that it was the possibility of placing a juvenile in an adult penal institution that required recognizing the privilege against self-incrimination. *Allen*, 478 U.S. at 373. The Court's rationale for allowing the privilege in *Gault* was considerably broader: "[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' " *In re* Gault, 387 U.S. 1, 50 (1967). It was the "deprivation of liberty" per se that accounted for the *Gault* ruling, the Court noting "the equivalence . . . of exposure to commitment as a juvenile delinquent and exposure to imprisonment as an adult offender . . . ." *Id.*

[75] *Allen*, 478 U.S. at 373. The dissent in *Allen* emphasized that the commitment authorized far longer imprisonment than a criminal conviction and the "stigma associated with an adjudication as a 'sexually dangerous person' is at least as great as that associated with most criminal convictions and 'is certainly more damning than a finding of juvenile delinquency.' " *Id.* at 377 (Stevens, J., dissenting) (quoting United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975)).

[76] *Id.* at 374.

[77] *See generally* Gardner, *supra* note 49, at 809-15 (suggesting a conceptual framework to identify the punitive aspects of the juvenile justice system in order to assess juvenile rights); Shepherd, *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21

tion is not characterized as punitive if done for the "alternative purpose" of treatment, as was purportedly the situation in *Allen*, and if deemed proportional to its therapeutic purpose.[78] Despite lingering rhetoric of rehabilitation as an "alternative purpose," the contemporary juvenile court system increasingly and explicitly resembles a punitive institution.

Most states' juvenile court statutes contain a "purpose clause" or preamble, a statement of the underlying rationale of the legislation intended to aid the courts in interpreting the statute. Thus, examining a juvenile code's purpose clause provides one insight into the goal of juvenile court intervention.[79] Since the creation of the original juvenile court in Cook County, Illinois, in 1899, the historical purpose of juvenile court law has been

> to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should be given by his parents . . . .[80]

Many states included this statement of purpose from the original Illinois juvenile court act in the preamble to their juvenile codes.[81] Some states provided the additional purpose of "remov[ing] from a minor committing a

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ST. LOUIS U.L.J. 12, 35-40 (1977) (criticizing indeterminate sentencing schemes of juvenile system in light of its frequent failure to provide adequate treatment and exploring a juvenile's right to punishment that is not disproportionate to the offense); Simpson, *Rehabilitation as a Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984 (1976) (criticizing rehabilitation as a justification for the juvenile justice process and proposing a juvenile system similar to the adult one).

[78] *See* Gardner, *supra* note 49, at 810.

[79] Professor Gardner analyzed the Supreme Court's "punishment" decisions and concluded that one of the Court's criteria is the intended purpose of the sanction. "[F]rom its earliest views in *Cummings* to its most recent opinion in *Wolfish*, the Court consistently has focused upon the intent of the alleged punisher as an essential element to determine the presence or absence of punishment." *Id.* at 816-17.

[80] ILL. ANN. STAT. ch. 37, ¶ 701-2 (Smith-Hurd 1972). The original statute, ILL. REV. STAT. ch. x, ¶ y (1899), provided simply:

> This act shall be liberally construed, to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an improved family home and become a member of the family by legal adoption or otherwise.

[81] *See, e.g.*, IOWA CODE ANN. § 232.1 (West 1904); OR. REV. STAT. § 419.474 (2) (1919); R.I. GEN. LAWS § 14-1-2 (1944); UTAH CODE ANN. § 78-3a-1 (1931). *See generally* Feld, *supra* note 2, at 250; Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 523 (1984).

delinquency offense the taint of criminality and the penal consequences of criminal behavior, by substituting therefore an individual program of counselling, supervision, treatment, and rehabilitation."[82]

Forty-two of the states' juvenile codes contain a statement of legislative purpose or similar preamble.[83] Within the past decade, however, ten state legislatures—almost one-quarter of states with a legislative purpose statement or preamble in their juvenile law statutes—have redefined the purpose of their juvenile courts.[84] These recent amendments of juvenile code purpose clauses downplay the role of rehabilitation in the child's "best interest" and acknowledge the importance of public safety, punishment, and individual accountability in the juvenile justice system. One of the distinguishing characteristics of the "new" juvenile law is that "in many jurisdictions accountability and punishment have emerged among the express purposes of juvenile justice statutes."[85]

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[82] N.H. REV. STAT. ANN. § 169-B:1 II (1979); *see also* N.D. CENT. CODE § 27-20-01 (1969); OHIO REV. CODE ANN. § 2151.01 (Anderson 1969); TENN. CODE ANN. § 37-1-101 (1970); VT. STAT. ANN. tit. 33, § 631 (1967).

[83] *See* ARK. STAT. ANN. § 9-27-302 (1975); CAL. WELF. & INST. CODE § 202 (West 1976); COLO. REV. STAT. § 19-1-102 (1967); DEL. CODE ANN. tit. 10, § 902 (1953); FLA. STAT. ANN. § 39.001 (West 1951); GA. CODE ANN. § 15-11-1 (1971); HAW. REV. STAT. § 571-1 (1965); IDAHO CODE § 16-1801 (1963); ILL. ANN. STAT. ch. 37, ¶ 701-2 (Smith-Hurd 1965); IND. CODE ANN. § 31-6-1-1 (West 1978); IOWA CODE ANN. § 232.1 (West 1904); KAN. STAT. ANN. § 38-1601 (1982); ME. REV. STAT. ANN. tit. 15, § 3002 (1977); MD. ANN. CODE § 3-802 (1957); MASS. GEN. LAWS ANN. ch. 119, § 53 (West 1906); MICH. COMP. LAWS ANN. § 712A.1 (West 1939); MINN. STAT. ANN. § 260.011 (West 1959); MISS. CODE ANN. § 43-21-103 (1979); MO. ANN. STAT. § 211.011 (Vernon 1957); MONT. CODE ANN. § 41-5-102 (1947); NEB. REV. STAT. § 43-246 (1981); NEV. REV. STAT. § 62.031 (1949); N.H. REV. STAT. ANN. § 169B:1 (1979); N.J. STAT. ANN. § 2A:4A-21 (West 1929); N.M. STAT. ANN. § 32-1-2 (1953); N.Y. FAM. CT. ACT § 301.1 (McKinney 1962); N.C. GEN. STAT. § 7A-516 (1979); N.D. CENT. CODE § 27-20-01 (1969); OHIO REV. CODE ANN. § 2151.01 (Anderson 1969); OKLA. STAT. ANN. tit. 10, § 1129 (West 1968); OR. REV. STAT. § 419.474 (1959); 42 PA. CONS. STAT. ANN. § 6301 (Purdon 1972); R.I. GEN. LAWS § 14-1-2 (1944); S.C. CODE ANN. § 20-7-470 (Law. Co-op. 1981); S.D. CODIFIED LAWS ANN. § 26-8-2 (1909); TENN. CODE ANN. § 37-1-101 (1970); TEX. FAM. CODE ANN. § 51.01 (Vernon 1943); UTAH CODE ANN. 78-3a-1 (1953); VT. STAT. ANN. tit. 33, § 631 (1967); VA. CODE ANN. § 16.1-227 (1950); WASH. REV. CODE ANN. § 13.40.010 (1977); WIS. STAT. ANN. § 48.01 (West 1955). (Note: Date refers to the year that the juvenile code purpose clause was originally adopted).

[84] *See* ARK. STAT. ANN. § 9-27-302 (1987); CAL. WELF. & INST. CODE § 202 (West 1984); FLA. STAT. ANN. § 39.001(2)(a) (West Supp. 1988); HAW. REV. STAT. § 571-1 (1985); IND. CODE ANN. § 31-6-1-1 (Burns 1980); MINN. STAT. ANN. § 260.011(2) (West 1985); TEX. FAM. CODE ANN. § 51.01(2) (Vernon 1986); VA. CODE ANN. § 16.1-227 (1988); WASH. REV. CODE ANN. § 13.40.010(2) (Supp. 1988); W. VA. CODE § 49-1-1(a) (1986).

[85] Walkover, *supra* note 81, at 523.

The state of Washington, for example, revised its juvenile code along the lines of the "justice" model, with an emphasis on retributive punishment and "just deserts" rather than individualized treatment.[86] The Washington statute's purpose clause reflects these new goals.[87] The revised Washington code, however, excludes jury trials in juvenile proceedings.[88]

The Minnesota legislature also redefined the purpose of its juvenile courts.[89] Minnesota derived its new statement of purpose from the Juvenile Justice Standards, which recommend jury trials and determinate sentences

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[86] *See, e.g.*, A. SCHNEIDER & D. SCHRAM, A COMPARISON OF INTAKE AND SENTENCING DECISION-MAKING UNDER REHABILITATION AND JUSTICE MODELS OF THE JUVENILE SYSTEM (1983) [hereinafter INTAKE AND SENTENCING DECISION-MAKING]; A. SCHNEIDER & D. SCHRAM, A JUSTICE PHILOSOPHY FOR THE JUVENILE COURT (1983) [hereinafter A JUSTICE PHILOSOPHY]; Clements, *Symposium: Juvenile Law Preface*, 14 GONZ. L. REV. 285 (1979) (symposium on the revised Washington juvenile code); Walkover, *supra* note 81, at 528-33.

[87] The purpose clause of the Washington juvenile code states:

> It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders . . . be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that both communities and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, it shall be the purpose of this chapter to:
>
> (a) Protect the citizenry from criminal behavior;
>
> (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;
>
> (c) Make the juvenile offender accountable for his or her criminal behavior;
>
> (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;
>
> (e) Provide due process for juveniles alleged to have committed an offense;
>
> (f) Provide necessary treatment, supervision, and custody for juvenile offenders;
>
> (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
>
> (h) Provide for restitution to victims of crime;
>
> (i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels; and
>
> (j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions and community services.

WASH. REV. CODE ANN. § 13.40.010(2) (Supp. 1988).

[88] WASH. REV. CODE ANN. § 13.40.021.

[89] "The purpose of the laws relating to children alleged or adjudicated to be delinquent is *to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior.*" MINN. STAT. ANN. § 260.011(2) (Supp. 1988) (emphasis added); *see also* JUVENILE JUSTICE STANDARDS RELATING TO DISPOSITIONS, STANDARD 1.1 (1980). *See generally* Feld, *supra* note 3, at 197-203.

that are proportional to the seriousness of the offense and injury.[90] Although Minnesota's new punitive purpose clause marks a fundamental philosophical departure from its previous rehabilitative orientation,[91] the legislature did not provide for jury trials in juvenile proceedings.[92]

Similarly, other states have redefined the purpose of their juvenile courts to include the following objectives: "correct juveniles for their acts of delinquency";[93] "provide for the protection and safety of the public";[94] "protect society . . . [while] recognizing that the application of sanctions

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[90] *See* JUVENILE JUSTICE STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS, STANDARDS 5.2, 6.2 (1980); JUVENILE JUSTICE STANDARDS RELATING TO ADJUDICATION, STANDARD 4.1(A) (1980).

Changes in purposes clauses are more than cosmetic. Recently, for example, the Minnesota Court of Appeals based its decision to transfer a youth from juvenile to criminal court on the language of the amended purpose clause. *See In re* D.F.B., 430 N.W.2d 475 (Minn. App. 1988). In the *D.F.B.* decision, the court of appeals emphasized that

> the 1980 amendments [to the purpose clause] reflect a shift in legislative attitude regarding punishment as a goal of juvenile courts. Prior to the amendments the stated purpose of those courts was to secure care and guidance, and to serve the welfare of the minor child. . . . Prior to 1980, legislative concentration had been directed toward rehabilitating all errant youths, not to punish them. . . . Subsequent to the 1980 amendment, . . . [f]or youths charged with the commission of a crime, a more punitive approach [has been] emphasized. . . .

Id. at 478.

[91] *See* Feld, *supra* note 3, at 197-98.

[92] *Id.* at 196. Moreover, in *In re* K.A.A., 410 N.W.2d 836 (Minn. 1987), the Minnesota Supreme Court held that a juvenile could not voluntarily waive juvenile court jurisdiction in order to obtain a jury trial in an adult criminal proceeding. "The legislature could, and apparently did, conclude that allowing a juvenile to waive juvenile court jurisdiction for some perceived short-term benefit ignores the best interests of the State in addressing juvenile problems as well as the overall interests of the juvenile." *Id.* at 840.

[93] ARK. STAT. ANN. § 9-27-302(b)(2) (1987).

[94] CAL. WELF. & INST. CODE § 202 (West Supp. 1988). An earlier version of the California purpose clause, adopted in 1976, provided that the purpose was to "protect the public from criminal conduct by minors; to impose on the minor a sense of responsibility for his or her own acts." CAL. WELF. & INST. CODE § 202 (1976). The current version of the purpose clause also authorizes "punishment that is consistent with the rehabilitative objectives" and charges juvenile courts to "consider the safety and protection of the public" as well as the best interests of the minor in making its decisions. CAL. WELF. & INST. CODE § 202 (West Supp. 1988). However, the legislature qualifies its "punitive" thrust by insisting that " '[p]unishment,' for the purposes of this chapter, does not include retribution." *Id.* A recent task force examining juvenile justice administration in California also concluded that "[t]he Juvenile Court Law of California, founded on the concept of rehabilitation, has been amended to emphasize punishment and accountability as legitimate goals of the system." PRIVATE SECTOR TASK FORCE ON JUVENILE JUSTICE, FINAL REPORT 3 (March 1987).

which are consistent with the seriousness of the offense is appropriate in all cases";[95] "render appropriate punishment to offenders";[96] "protect the public by enforcing the legal obligations children have to society";[97] "protect the welfare of the community and to . . . control the commission of unlawful acts by children";[98] "protect the community against those acts of its citizens which are harmful to others and . . . reduce the incidence of delinquent behavior";[99] and "reduce the rate of juvenile delinquency and . . . provide a system for the rehabilitation or detention of juvenile delinquents and the protection of the welfare of the general public."[100]

Some courts recognize that these changes in legislative purpose clauses signal basic changes in philosophical direction, "a recognition that child welfare cannot be completely 'child centered.' "[101] Courts, as well as legislatures, increasingly acknowledge that "punishment" may be an acceptable purpose of a juvenile court's "therapeutic" dispositions. In *State v. Lawley*,[102] the Washington Supreme Court reasoned that "sometimes punishment is treatment" and upheld the legislature's conclusion that "accountability for criminal behavior, the prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile."[103] Similarly, in *In re Seven Minors*,[104] the Nevada Supreme Court endorsed punishment as a legitimate purpose of its juvenile courts:

> By formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population.[105]

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[95] FLA. STAT. ANN. § 39.001(2)(a) (West Supp. 1988).

[96] HAW. REV. STAT. § 571-1 (1985).

[97] IND. CODE ANN. § 31-6-1-1 (Burns 1980).

[98] TEX. FAM. CODE ANN. § 51.01 (2) (Vernon 1986).

[99] VA. CODE ANN. § 16.1-227 (1988).

[100] W. VA. CODE 49-1-1(a) (1986).

[101] *See, e.g.*, State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 409 n.8 (W. Va. 1980) (holding that a juvenile court cannot justify incarceration in a secure facility based on rehabilitation alone; specific factors must support such a disposition). In *In re* Javier A., 159 Cal. App. 3d 913, 206 Cal. Rptr. 386 (1984), the court analyzed changes in juvenile purpose clauses and concluded that "[i]n 1984 the emphasis is on protecting the citizens of the state of California from the child." The court also noted that "the United States Supreme Court had recognized the actual purposes already were similar to those of the adult criminal system." *Id.* at 958, 206 Cal. Rptr. at 418.

[102] 91 Wash. 2d 654, 591 P.2d 772 (1979).

[103] *Id.* at 656-57, 591 P.2d at 773.

[104] 99 Nev. 427, 664 P.2d 947 (1983).

[105] *Id.* at 932, 664 P.2d at 950.

The court suggested that, in order to effect this purpose, "[j]uvenile courts should be able to fashion reasonable punitive sanctions as part of dispositional programs in delinquency cases."[106] Possible sanctions include restitution, compensation for crime victims, and incarceration in detention facilities and jails.[107]

In *State ex rel. D.D.H. v. Dostert*,[108] the West Virginia Supreme Court provided a comprehensive and thoughtful examination of the tensions between punishment and treatment in juvenile proceedings and the social control functions of juvenile court intervention.

> [I]t is now generally recognized that caring for the juvenile and controlling the juvenile are often quite contradictory processes. Much of our juvenile law at the moment is predicated upon a healthy skepticism about the capacity of the State and its agents to help children when they are incarcerated in one of the juvenile detention facilities. Thus, the control of juveniles and the treatment of juveniles (if that expression can be used without conjuring Kafkaesque images) are frequently irreconcilable goals. Furthermore, children can be dangerous, destructive, abusive, and otherwise thoroughly anti-social, which prompts an entirely understandable expectation in society of protection, even if we have matured beyond expecting retribution.[109]

After describing the often conflicting goals of juvenile court intervention and the operational limitations of the rehabilitative model, the *D.D.H.* court concluded:

> In reaching the conclusion that rehabilitation alone does not exhaust the goals of a juvenile disposition, and that responsibility and deterrence are also important elements in our juvenile philosophy, we have not simply embraced a conservative theory that juvenile delinquents need to be punished. Liberals and conservatives alike may find solace in this opinion because we acknowledge what has been an unspoken conclusion: *our treatment looks a lot like punishment*. At first glance an agreement among commentators at both philosophical poles may appear strange; however, both share the conclusion that *treatment is often disguised punishment*. Liberals are pleased that juvenile courts must exercise restraint in resorting to questionable "treatments" at the dispositional stage and conservatives are pleased that it has been admitted that punishment can be a viable goal of any given juvenile disposition.
>
> While the conservatives talk about punishment as "retribution" and the cornerstone of "responsibility," the liberal child advocates speak in terms of the "right to punishment." Once the rehabilitative model is accepted, the next fight is always to show that "treatment" is often a caricature—something worthy of a story of Kafka or a Soviet mental

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[106] *Id.* at 436, 664 P.2d at 953.

[107] *Id.* at 436 n.8, 664 P.2d at 953 n.8.

[108] 269 S.E.2d 401 (W. Va. 1980).

[109] *Id.* at 408-09 (footnotes omitted).

TABLE I
JUVENILE COURT SENTENCING STATUTES

STATE Dispositional Statute	AGE[1] Minimum/ Maximum	OFFENDER ORIENTED[2] Indeter- minate	OFFENSE-ORIENTED Determinate Present Offense	Prior Offense	Sentence Range	Mandatory Minimum Present Offense	Prior Offense	Commit- ment Discretion	Minimum Sentence	Year Adopted[3]
Alabama ALA. CODE § 12-15-65	None/21	Yes[4]								
Alaska ALASKA STAT. § 47.10.080	None/19	Yes 2 yrs.[5]								
Arizona ARIZ. REV. STAT. ANN. § 8-241	8/21	No				Adminis- trative Guidelines[6]			18 mos.- 3 mos.	1981
Arkansas ARK. STAT. ANN. § 45-436	None/18	Yes				Class A Felony		Yes	<6 mos.	1981
California CAL. WELF. & INST. CODE § 731	None/21[7]	Yes				Youthful Offender Parole Board[8]		Yes	7 yrs.- >1 yr.	1979
Colorado COLO. REV. STAT. § 19-3-113 (delinquent child) § 19-3-113.1 (violent and repeat juvenile offenders) § 19-3-113.2 (aggravated juvenile offenders)	10/21 13/21 12/21 16/21	Yes	 Murder[11] Violent Crime	 Felony	 5 yrs. 5 yrs.	 Violent Juvenile[9] Felony[10]	 Delinquent	 No No	1 yr. 1 yr.	1977 1977 1984 1984
Connecticut CONN. GEN. STAT. § 46b-140	None/16	Yes 2 yrs.[12]	Serious Juvenile Offense[13]		1 yr. Out of Home	Serious Juvenile Offense		Yes	>6 mos.	1979
Delaware DEL. CODE ANN. tit. 10, § 937	None/18					Felony w/in 1 yr.	Felony	No	6 mos.	1981 1980
District of Columbia D.C. CODE § 16-2320	None/21	Yes 2 yrs.[14]								
Florida FLA. STAT. § 39.11	None/19	Yes								
Georgia GA. CODE ANN. § 15-11-33 (delinquent child) § 15-11-37 (designated felony act)	None/21 13/21	Yes 2 yrs.[15]	Admin. Guidelines[16]			 Designated Felony[17] Burglary Designated Felony w/injury victim 62 yrs. >: Designated Felony	 2 Burglaries Designated Felony	 Yes No No No	 12 mos.- 18 mos.[18]	 1980 1980
Hawaii HAW. REV. STAT. § 571-48	None/18	Yes[19]								
Idaho IDAHO CODE § 16-1814	None/19	Yes								
Illinois ILL. ANN. STAT. ch. 37, para. 805-35	None/21	Yes				Violent Offense[20]	2 Adju- dications	No	Until 21	1979
Indiana IND. CODE § 31-6-4-15.5	12[21]/18	Yes								1983
Iowa IOWA CODE § 232.52	None/18[22]	Yes								
Kansas KAN. STAT. ANN.	10/21	Yes[23]								
Kentucky KY. REV. STAT. ANN. § 208.194 § 208.200	None/19	Yes				Capital; Class A, B Felony; & 16 yrs. >: Felony & 16 yrs. >:	 Felony	Yes Yes	6 mos. 6 mos.	1976 1976
Louisiana LA. CODE JUV. PROC. art. 89	None/ 18,21[24]	Yes								
Maine ME. REV. STAT. ANN. tit. 15, § 3314	None/ 18,21[25]	Yes								
Maryland MD. CTS. & JUD. PROC. CODE ANN. § 3-820	None/21	Yes 3 yrs.[26]								
Massachusetts MASS. ANN. LAWS ch. 119, § 58	None/18	Yes								
Michigan MICH. COMP. LAWS § 712A.18	None/18	Yes								
Minnesota MINN. STAT. ANN. § 260.015 § 260.195	None/18 None/18	Yes Yes	Adminis- trative Guidelines							1982
Mississippi MISS. CODE ANN. § 43-21-605	None/20	Yes								
Missouri MO. ANN. STAT. §§ 211.181, .231	None/21	Yes								
Montana MONT. CODE ANN. § 41-5-523	None/21	Yes								
Nebraska NEB. REV. STAT. § 43-286	12[27]/19	Yes								1981
Nevada NEV. REV. STAT. § 62.211	8/21[28]	Yes								
New Hampshire N.H. REV. STAT. ANN. § 169-B:19	11[29]/18[30]	Yes								
New Jersey[31] N.J. STAT. ANN. §§ 2A:4A-43, -44	11[32]/18[33]	Yes	Murder 1°, 2° Murder 3° Crime 1° Crime 2° Crime 3° Crime 4° Disorderly Person Murder Crime 1°/ Crime 2° Crime 3° 3 Separate Offenses of 1°/2°/3°	 2 prior 1° or 2° & committed 2 prior 1° or 2° & committed 2 prior 1° or 2° & committed	20 yrs. 10 yrs. 4 yrs. 3 yrs. 2 yrs. 1 yr. 6 mos. Max + 5 yrs. Max + 2 yrs. Max + 1 yr. Max + 2 yrs.					1982 1982 1982 1982 1982 1982 1982 1982 1982 1982 1982
New Mexico N.M. STAT. ANN. § 32-1-34	None/18	Yes								
New York N.Y. FAM. CT. ACT § 352.2 § 353.5	7/16	Yes[34]				 Designated Felony[35] w/injury victim 62 yrs. >[36] Class A Designated Felony Designated Felony Designated Felony	 Dsgtd. Felony	 Mandatory Yes (12 mos.- 18 mos.) Yes Yes	 5 yrs. 3 yrs. (6 mos.- 12 mos.) 5 yrs. (12 mos- 18 mos.)	1976 1976 1976 1976
North Carolina N.C. GEN. STAT. § 7A-649 § 7A-652	10/18 14/18[37]	Yes	Felony 2°	Felonies	2 yrs.					1979
North Dakota N.D. CENT. CODE § 27-20-31	None/ 18, 20[39]	Yes[38]								
Ohio OHIO REV. CODE ANN. § 2151.353 § 2151.355	None/21	Yes				 Felony 3°, 4° Aggravated Felony 3° Felony 1°, 2° Aggravated Felony 1°, 2° Murder Aggravated Murder		 Yes Yes	 6 mos.[40] 1 yr. Age 21	 1981 1981 1981
Oklahoma OKLA. STAT. ANN. tit. 10, § 1116	10/18, 19[41]	Yes								
Oregon OR. REV. STAT. § 419.507	None/18	Yes								
Pennsylvania 42 PA. CONS. STAT. ANN. § 6352	12/21	Yes								
Rhode Island R.I. GEN. LAWS § 14-1-32	None/18	Yes								
South Carolina S.C. CODE ANN. § 20-7-1330	12/21	Yes								
South Dakota S.D. CODIFIED LAWS ANN. § 26-8-39	10/21	Yes								
Tennessee TENN. CODE ANN. § 37-1-131 § 37-1-137[42]	None/21	Yes	 Class X Felony[43] Offense	 3 Felonies & Prior Commitment	 Adult Maximum Adult Maximum					1985 1985 1985
Texas TEX. FAM. CODE ANN. § 54.04 § 53.045	10/21	Yes	Designated Felony[44]		30 yrs.					1987
Utah UTAH CODE ANN.	10/21[45]	Yes								
Vermont VT. STAT. ANN. tit. 33, § 657	10[46]/21[47]	Yes 18 mos.[48]								
Virginia VA. CODE ANN. § 16.1-279 § 16.1-285.1	10/21 16/21	Yes				Felony	Parole Status	Yes	6 mos.- 12 mos.	1985
Washington WASH. REV. CODE § 13.40.160	None/18[49]	Yes	Serious Offender[50] Middle Offender[52] Minor Offender[54]		Standard Range[51] Standard Range[53] Community Supervision[55]					1977 1977 1977
West Virginia W. VA. CODE § 49-5-13	10[50]/18	Yes								
Wisconsin WIS. STAT. ANN. § 48.34	12/18	Yes[57]								
Wyoming WYO. STAT. § 14-6-229	None/19	Yes								

[1] AGE refers to the minimum age for institutional commitment if stated or where it differs from the minimum age for delinquency jurisdiction. Maximum age refers to the age at which juvenile court jurisdiction or sentences terminate automatically.

[2] OFFENDER-ORIENTED Indeterminate refers to the maximum lengths of sentences plus any additional extensions where the indeterminacy is defined by a fixed time period rather than the maximum age of juvenile court jurisdiction.

[3] "Year Adopted" refers to the year that offense-oriented sentencing statutes or administrative guidelines were adopted.

[4] ALA. CODE § 12-15-65(d) (1986) provides that evidence of any felony "is sufficient to sustain a finding that the child is in need of care or rehabilitation"; such a finding is a jurisdictional prerequisite to disposition.

[5] ALASKA STAT. § 47.10.080 (1987) authorizes commitment for a maximum period of two years with the possibility of one additional two-year extension, except that the initial commitment or extension may not extend beyond the minor's nineteenth birthday. The statute also allows an additional one year of supervision after age 19 with the juvenile's consent.

[6] Arizona's Department of Corrections adopted specific guidelines for the confinement of juveniles, pursuant to which youths are classified on the basis of their most serious offense and mandatory minimum terms of confinement for periods of three to eighteen months are prescribed. *See* text notes 274-78 and accompanying text.

[7] CAL. WELF. & INST. CODE § 1769(a) (West 1984) provides that juveniles committed to the California Youth Authority "shall . . . be discharged upon the expiration of a two-year period of control or when the person reaches his or her 21st birthday, whichever occurs later . . . ." However, § 1769(b) authorizes incarceration until age twenty-five of juveniles committed by a juvenile court for the commission of one of the catalogued offenses listed in CAL. WELF. & INST. CODE § 707(b) (West 1984). The catalogue of offenses listed include a variety of major felony offenses committed by juveniles sixteen years old or older. *See* Feld, *supra* text note 2, at 507 n.3 for a discussion of § 707(b).

[8] The decision to release juveniles committed to the California Youth Authority is made by an independent Youthful Offender Parole Board ("YOPB"). *See* CAL. WELF. & INST. CODE §§ 4941-57 (West 1984). The YOPB uses seven offense categories to classify a youth for parole eligibility; based on the seriousness of the commitment offense, a juvenile's parole consideration date may range from less than one to seven years. *See* text notes 288-95 and accompanying text.

[9] COLO. REV. STAT. § 19-1-103(28) (1986) defines a "violent juvenile offender" as a youth thirteen years or older who is adjudicated, or whose probation is revoked, for a violent offense. Violent offenses include: crimes in which a deadly weapon is used or an elderly or handicapped person is the victim, murder, kidnapping, sexual assault, robbery, arson, and serious assault. *See* COLO. REV. STAT. § 16-11-309(2) (1986).

[10] COLO. REV. STAT. § 19-1-103(23.5) (1986) defines a "repeat juvenile offender" as any youth, previously adjudicated a delinquent, who is subsequently adjudicated or has probation revoked on the basis of conduct that would be a felony. COLO. REV. STAT. § 19-1-103(19.5) (1986) defines a "mandatory sentence offender" as a juvenile with two prior delinquency adjudications or a delinquency adjudication with probation revoked who is subsequently adjudicated delinquent.

[11] COLO. REV. STAT. § 19-1-103(2.1) (1986) defines an "aggravated juvenile offender" as any youth twelve years or older convicted of first or second degree murder, or any youth sixteen years or older with a prior felony conviction who is subsequently adjudicated delinquent for a violent offense.

[12] CONN. GEN. STAT. ANN. § 46b-141 (West 1980) provides that delinquency dispositions shall be indeterminate up to a maximum of two years, with the possibility of one additional two-year extension. If a juvenile is sentenced as a serious juvenile offender, the maximum initial commitment is four years with the possibility of an additional two year extension.

[13] CONN. GEN. STAT. ANN. § 46b-120 (West 1980) defines "serious juvenile offense" as any one of thirty-nine serious offenses, including homocide, assault, kidnapping, and certain categories of burglary and larceny. The determinate sentencing provision operates when the juvenile would normally be transferred to criminal court for prosecution as an adult, but the juvenile court retains jurisdiction. *See* Feld, *supra* text note 2, at 141-42.

[14] D.C. CODE ANN. § 16-2322(a)(2) (1981) authorizes an indeterminate sentence of up to two years, with provisions for additional one-year extensions up to twenty-one years of age, the maximum age of jurisdiction.

[15] GA. CODE ANN. § 15-11-41(b) (1985) provides that delinquent youths (youths committed for nondesignated felonies) are committed to the Division of Youth Services (the "DYS") for two years, although they may be discharged earlier. In addition, the DYS may petition the committing court for one additional two-year extension.

[16] The Georgia Division of Youth Services has developed a five-category system for classifying committed youth, based on public risk, institutional risk, and a variety of medical, educational, and vocational needs. A youth's minimum and maximum length of stay are determined by public risk classification, with the lowest risk-level youths serving four to six months, and the highest risk-level youths serving eighteen to twenty months. *See* text notes 281-83 and accompanying text.

[17] GA. CODE ANN. § 15-11-37(b)-(d) (1985) defines two categories of designated felonies: those that allow for discretionary mandatory minimum sentences, and those that require the imposition of mandatory minimum sentences. Fourteen major offenses are defined as designated felonies if committed by a juvenile 13 or more years of age, including murder, manslaughter, rape, armed robbery, kidnapping, and arson. The juvenile court retains discretion as to whether to impose a "restrictive custody" designated felony sentence. Youths committed to the DYS designated felons are placed in custody for an initial five-year period. For designated felonies that result in serious physical injury to a person who is sixty-two years of age or older, or for burglars with two prior burglary adjudications, sentencing to "restrictive custody" is mandatory.

[18] GA. CODE ANN. § 15-11-37(e)(1) (1985) provides that a youth sentenced under the "designated felony" provision is placed in the custody of the DYS for a five-year period, with the initial twelve to eighteen months served in confinement.

[19] HAW. REV. STAT. § 571-48 (1985) allows a sentencing court, as a condition of probation, to incarcerate a juvenile for a "term not to exceed one year . . . ."

[20] ILL. ANN. STAT. ch. 37, para. 805-35 (Smith-Hurd Supp. 1987) defines an "Habitual Juvenile Offender" as any youth with two prior delinquency adjudications who is subsequently convicted of one of a number of designated violent offenses that include murder, manslaughter, criminal sexual assault, robbery, burglary, and arson. An "Habitual Juvenile Offender" *must* be committed to the Department of Corrections until his twenty-first birthday without possibility of parole.

[21] IND. CODE ANN. § 31-6-4-15.6 (West Supp. 1988) provides that a child less than twelve years of age may not be committed to the Department of Corrections, except for a child of age ten or eleven who is convicted of murder.

[22] IOWA CODE ANN. § 232.53 (West 1985) provides that dispositions automatically terminate when a child becomes eighteen years of age, except that dispositional orders entered after a child has attained the age of seventeen years and six months, but prior to the age of eighteen, terminate one year after the date of disposition.

[23] KAN. STAT. ANN. § 38-1663(f) (1986) restricts commitments to the State's youth center to those juvenile offenders who are thirteen years of age or older and either have been adjudicated for Class A, B, or C felonies or have a prior delinquency adjudication.

[24] LA. CODE JUV. PROC. art. 89 (West 1988) provides two ages of automatic termination: eighteen years old if the youth is under the age of thirteen at the time of sentencing, and twenty-one years old if the youth is between the ages of thirteen and seventeen at the time of sentencing.

[25] ME. REV. STAT. ANN. tit. 15, § 3316(2)(A) (Supp. 1988) provides that commitments terminate at age eighteen, unless the court expressly extends the commitment to age twenty-one.

[26] MD. CTS. & JUD. PROC. ANN. § 3-825(b) (1984) provides a three-year limit on dispositions, although the court may renew its order until a child becomes twenty-one years old.

[27] NEB. REV. STAT. § 43-286 (1984) prohibits confining youths under the age of twelve in state training schools unless the youth has violated probation or has committed an additional offense such that the court finds the interests of the juvenile and the welfare of the community depend on the youth's commitment. The minimum age requirement does not apply in the event that the present delinquency proceeding is for *murder* or *manslaughter*.

[28] NEV. REV. STAT. § 210.180 (Michie 1955) authorizes institutional commitments of delinquents between the ages of eight and eighteen years of age. NEV. REV. STAT. § 62.271 (Michie 1955) authorizes a court that has placed a delinquent on probation to place the youth in a county jail or state prison for violations of probation if the youth is between the ages of eighteen and twenty-one.

[29] N.H. REV. STAT. ANN. § 169-B:30 (Supp. 1988) prohibits institutionalization of minors under the age of eleven unless the court has consulted with and exhausted all other placement options.

[30] N.H. REV. STAT. ANN. § 169-B:19(III) (Supp. 1988) authorizes dispositional jurisdiction up to the age of nineteen over a minor found to be delinquent after the youth's seventeenth birthday.

[31] A complete discussion of the New Jersey juvenile sentencing statutes may be found in the Article at notes 169-83 and accompanying text.

[32] N.J. STAT. ANN. § 2A:4A-44(c)(1) (West 1987) prohibits incarceration of juveniles age eleven or younger, except those convicted of arson or crimes of the first or second degree.

[33] N.J. STAT. ANN. § 2A:4A-47 (West 1987) provides that delinquency jurisdiction ends at age eighteen or one year from the date of the dispositional order, except in cases involving incarceration.

[34] N.Y. FAM. CT. ACT § 353.3(5) (McKinney 1983) imposes a maximum outer limit on the length of a juvenile's initial period of placement: eighteen months for felonies and twelve months for misdemeanors.

[35] N.Y. FAM. CT. ACT § 301.2(8) (McKinney 1983) provides an extensive list of "designated felony acts" that includes first and second degree murder, first degree manslaughter, first degree kidnapping, first degree arson, first degree assault, first and second degree robbery, first and second degree burglary, and first degree rape. Under the provisions of N.Y. FAM. CT. ACT § 301.2(8) (McKinney 1983) some of the less serious designated felonies require a prior conviction of second degree assault, second degree robbery, or another designated felony. N.Y. FAM. CT. ACT § 301.2(9) (McKinney 1983) defines Class A designated felonies as any crime of first or second degree murder, first degree kidnapping, or first degree arson, if committed by a juvenile thirteen, fourteen, or fifteen years of age.

[36] N.Y. FAM. CT. ACT § 353.5(3) (McKinney 1983) provides for a mandatory restrictive placement where the victim of a designated felony is sixty-two years of age or older and suffers serious physical injury.

[37] N.C. GEN. STAT. § 7A-652(b)(1)(2) (1986) provides that a juvenile may be committed for an indefinite period up to the juvenile's eighteenth birthday, or a definite term of no greater than two years, if the juvenile is over the age of fourteen, has been previously adjudicated delinquent for two or more felonies, and has previously been committed.

[38] N.D. CENT. CODE § 27-20-36(2) (Supp. 1987) provides that dispositions are indeterminate for a maximum period of two years and renewable for additional two-year periods.

[39] N.D. CENT. CODE § 27-20-36(6) (Supp. 1987) provides that all dispositional orders affecting a youth who has attained the age of twenty years terminates and that youth is discharged from further obligation or control. N.D. CENT. CODE § 27-21-02 (Supp. 1987) provides that the state youth authority shall retain jurisdiction over the youth until the youth reaches the age of eighteen.

[40] OHIO REV. CODE ANN. §§ 2151.355(4)-(6) (Page's Supp. 1987) authorize mandatory minimum sentences of six months or one year with the maximum length of sentence the youth's attainment of age twenty-one. Youths convicted of murder are confined until age twenty-one.

[41] OKLA. STAT. ANN. tit. 10, § 1139 (West 1987) establishes a minimum age of ten years old for institutional commitment and a maximum age of eighteen years old, with a possible extension to age nineteen pursuant to a court order.

[42] TENN. CODE ANN. § 37-1-137(a)(1)(B) (Supp. 1988) authorizes institutional confinement for a "determinate period of time," limited only by the maximum length of the adult sentence, for any juvenile convicted of a Class X felony or adjudicated for three separate felony offenses at least one of which resulted in institutional confinement, or any juvenile within six months of his nineteenth birthday at the time of his adjudication of delinquency.

[43] TENN. CODE ANN. § 39-1-702 (1982) defines a Class X felony as any of the following: first or second degree murder (excluding vehicular homicide); aggravated rape or sexual battery; aggravated kidnapping; robbery accomplished by use of a deadly weapon; aggravated arson; conspiracy to take human life or to commit a felony on the person of another; assault with intent to commit murder with bodily injury to the victim; the manufacture, delivery, sale, or possession of certain controlled substances; assault from ambush with a deadly weapon; or willful injury by explosives.

[44] TEX. FAM. CODE ANN. § 53.045 (Supp. 1989) allows a prosecutor to refer a juvenile petition to a grand jury if the youth is charged with murder, capital murder, aggravated kidnapping, aggravated sexual assault, deadly assault on a law enforcement officer, corrections officer, or court participant, or criminal attempt of capital murder. TEX. FAM. CODE ANN. § 54.04(3) (Supp. 1989) provides that if the grand jury approves the petition and the juvenile is convicted of the offense charged, a determinate sentence of up to thirty years is permissible.

[45] UTAH CODE ANN. § 62A-7-101(14) (Supp. 1988) defines "youth offender" as a person over the age of ten and under the age of twenty-one committed by the juvenile court to the custody of the Division of Youth Corrections.

[46] VT. STAT. ANN. tit. 33, § 632(a)(1)(c) (1982) provides that a youth alleged to have committed an act before the age of ten that would be murder if committed by an adult may be subject to delinquency proceedings.

[47] VT. STAT. ANN. tit. 33, § 634(b) (1981) provides for the juvenile court, in its discretion, to retain jurisdiction over a youth up to the age of twenty-one if the youth has been found to have committed a delinquent act.

[48] VT. STAT. ANN. tit. 33, § 658(a) (Supp. 1988) provides that dispositional orders are for an indeterminate period to be "reviewed one and one-half years from the date entered and each one and one-half years thereafter," terminating when the child becomes eighteen years old.

[49] WASH. REV. CODE ANN. *S* 13.40.300(c) (Supp. 1989) provides for the extension of juvenile court jurisdiction over a youth beyond the age of eighteen to the age of twenty-one if the court makes a formal finding that such an extension is required to allow for the execution and enforcement of the court's disposition.

[50] WASH. REV. CODE ANN. § 13.40.020(1) (Supp. 1989) defines "Serious Offender" as any individual fifteen years of age or older who has been convicted of committing certain designated crimes, including a Class A felony, first degree manslaughter, second degree rape, second degree assault, second degree kidnapping, and second degree robbery.

[51] WASH. REV. CODE ANN. § 13.40.160(1) (Supp. 1989) provides that in the case of a serious offender, the court may impose a disposition outside the standard range if a disposition within the standard range would effectuate a manifest injustice.

[52] WASH. REV. CODE ANN. § 13.40.020(13) (Supp. 1989) defines a "Middle Offender" as one who has committed an offense who is neither a Minor Offender or a first offender nor a Serious Offender.

[53] WASH. REV. CODE ANN. § 13.40.160(4) (Supp. 1989) provides that a court may impose a maximum sentence if imposition of a sentence within the standard range for a Middle Offender would effectuate a manifest injustice.

[54] WASH. REV. CODE ANN. § 13.40.020(14) (Supp. 1989) defines a "minor or first offender" as an individual sixteen years of age or younger whose current offense (or offenses) and criminal history fall entirely within various combinations of minor current offenses or prior convictions.

[55] WASH. REV. CODE ANN. § 13.40.160(2) (Supp. 1989) provides that the court, if it determines that the imposition of community supervision would effectuate a manifest injustice, may impose a sentence beyond community supervision.

[56] W. VA. CODE § 49-5-13 (Supp. 1988) provides commitment ages of ten to eighteen years of age for a male youth, while W. VA. CODE § 28-3-2 (1986) provides commitment ages of twelve to eighteen years of age for a female youth.

[57] WIS. STAT. ANN. § 48.34(4)(m) (West 1987) limits the institutional confinement of juveniles to those convicted of offenses that, if committed by an adult, could result in incarceration of the offender for six months or more, and the youth has been found to be a danger to the public and to be in need of restrictive custodial treatment.

> hospital. Therefore, while the conservatives throw up their hands because they believe punishment works better than treatment, the juvenile advocates return increasingly to punishment on the grounds that punishment is much less punishing than "treatment."[110]

Unlike *D.D.H.*, however, many legislatures and courts fail to consider adequately whether a juvenile justice system can explicitly punish without simultaneously providing criminal procedural safeguards such as a jury trial.[111] Although a legislature certainly may conclude that punishment is an appropriate goal and a legitimate strategy for controlling young offenders, it must provide the procedural safeguards of the criminal law when it opts to shape behavior by punishment. Any ancillary social benefit or individual reformation resulting from punishment is irrelevant to the need for such procedural protections. Confinement of a juvenile for a determinate sentence based on the nature of the offense committed still entails a loss of liberty imposed explicitly to punish violations of the criminal law, regardless of whether the length of confinement is shorter than for a similarly situated adult and the place of incarceration is not called a "prison."

B. *Dispositional Practices and the Juvenile Court's Sentencing Framework*

While the legislative purpose clause states whether the intent behind a juvenile's disposition is punishment or treatment, analyzing the juvenile court's statutory sentencing framework and dispositional practices may also indicate whether there is a therapeutic "alternative purpose." When based on the characteristics of the offense, the sentence usually is determinate and proportional, with a goal of retribution or deterrence. When based on the characteristics of the offender, however, the sentence is typically indeterminate, with a goal of rehabilitation or incapacitation.[112] The theory that correctional administrators will release an offender only when he is determined to be "rehabilitated" underlies indeterminate sentencing. When sentences are individualized, the offense is relevant only for diagnosis. Thus, it is useful to contrast offender-oriented dispositions, which are indeterminate and non-proportional, with offense-based dispositions, which are determinate, proportional, and directly related to the past offense.[113]

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[110] *Id.* at 415-16. (emphasis added) (footnote omitted).

[111] West Virginia is among the small minority of states that provides for jury trials in juvenile delinquency proceedings. *See, e.g.*, W. VA. CODE ANN. § 49-5-6 (1980).

[112] *See, e.g.*, AMERICAN FRIENDS SERV. COMM., *supra* note 61; N. MORRIS, *supra* note 56; H. PACKER, *supra* note 51, at 23-28; Allen, *supra* note 7, at 25.

[113] *See supra* notes 56-60 and accompanying text; *see also* INSTITUTE OF JUDICIAL ADMIN.-AM. BAR ASS'N, JUVENILE DELINQUENCY AND STANDARDS RELATING TO SANCTIONS (1980).

1. Indeterminate Sentencing in Juvenile Court

Historically, the premise of sentencing in the juvenile court system was the "best interests" of the child-offender implemented through indeterminate and non-proportional dispositions.[114]

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interests of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding.[115]

Judicial inquiry focuses not on a youth's prior conduct but rather on the development of a program to alleviate the conditions that caused the youth's delinquency. The delinquency disposition entails a variety of assumptions: the causes of the "delinquency," its course if left untreated, the appropriate forms of intervention to alter those conditions, and the ultimate prospects of success; in short, it requires diagnosis, classification, prescription, and prognosis.[116] Because one cannot predict accurately the length of rehabilitative therapy necessary to ensure success, sentences are characteristically indeterminate.

As Table I indicates, the contemporary juvenile sentencing provisions of

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[114] Conceptually, juvenile delinquency is a legal hybrid, falling between criminal law and mental health civil commitments. *See, e.g.*, Cohen, *Juvenile Offenders: Proportionality vs. Treatment*, 8 CHILDREN'S RTS. REP. 2 (1978); Schultz & Cohen, *Isolationism in Juvenile Court Jurisprudence*, in PURSUING JUSTICE FOR THE CHILD 21 (M. Rosenheim ed. 1976). From its inception, juvenile court intervention was deliberately flexible, individualized, and highly discretionary to afford maximum latitude to juvenile justice administrators. D. ROTHMAN, *supra* note 2, at 58-60, 248-60.

[115] Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909). Appellate court judges, as well as their juvenile court counterparts, emphasize the civil and therapeutic nature of juvenile court intervention. In *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), for example, the Pennsylvania Supreme Court noted:

> The proceedings in [a juvenile] court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective,—aimed to check juvenile delinquency and to throw around a child, just starting, perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting as parens patriae. The State is not seeking to punish an offender but to salvage a boy who may be in danger of becoming one, and to safeguard his adolescent life. Even though the child's delinquency may result from the commission of a criminal act the State extends to such a child the same care and training as to one merely neglected, destitute or physically handicapped.

Id. at 603-04, 109 A.2d at 525.

[116] The ability to diagnose the causes of delinquency and prescribe cures for it has been critiqued extensively. *See, e.g.*, Feld, *supra* note 32; Feld, *supra* note 4.

most states reflect their Progressive origins. Following an adjudication of delinquency, the state statutes typically offer a range of sentencing alternatives—dismissal, probation, out-of-home placement, or institutional confinement—and give the juvenile court judge broad discretion to impose an appropriate disposition.[117] Some legislatures instruct the court to consider the "least restrictive alternative"[118] when choosing among dispositional options in the child's "best interests."[119]

Most juvenile sentences are indeterminate; confinement ranges from one day to a period of years until the offender reaches the age of majority or some other statutory age.[120] In *Gault*, for example, fifteen-year-old Gerald Gault allegedly made "lewd phone calls" for which he was committed to the State Industrial School "for the period of his minority [that is, until age 21], unless sooner discharged by due process of law."[121] An adult convicted of the same offense would face a fine of fifty dollars or imprisonment for a maximum of two months.[122] While the majority of indeterminate juvenile sentencing statutes continue for the duration of minority or some other maximum age,[123] a minority prescribe a statutory maximum sentencing period for juvenile offenders, typically two years with judicial authority to extend for an additional two years or more.[124] Most adolescent offenders, however, reach the age necessary for statutory termination of their sentence before the initial maximum sentencing period, plus any extension can be

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[117] *See, e.g.*, FLA. STAT. ANN. § 39.11 (Supp. 1988); HAW. REV. STAT. § 571-48 (Supp. 1987); IOWA CODE ANN. § 232.52 (West 1985); S.C. CODE ANN. § 20-7-1330 (Law. Co-op. 1985).

[118] Professor Cohen has noted that

> [s]tatutory guides for the selection of dispositions and for the conduct of dispositional proceedings are virtually nonexistent. The "best interests of the child" and "the protection of the community" represent the most frequently used statutory language and are so obviously broad and inherently contradictory as to call for little comment.

Cohen, *supra* note 114, at 2.

[119] *See, e.g.*, ARK. STAT. ANN. § 45-436(3) (1985) (advocating the "least restrictive disposition consistent with the best interest and welfare of the juvenile and society . . . ."); IOWA CODE ANN. § 232.52(1) (West 1985).

[120] *See, e.g.*, D.C. CODE ANN. § 16-2322(f) (1981) (age 21); FLA. STAT. ANN. § 39.11(c) (West Supp. 1988) (age 19); NEV. REV. STAT. § 62.082 (1985) (age 20).

[121] *Gault*, 387 U.S. at 7-8.

[122] *See id.* at 8-9.

[123] With the reduction of the age of majority from 21 to 18, some jurisdictions continue dispositions even beyond the age of majority. *See, e.g.*, MINN. STAT. ANN. § 260.181 Subd. 4 (West 1986) (age 19). *See generally* Forst, Fisher & Coates, *Indeterminate and Determinate Sentencing of Juvenile Delinquents: A National Study of Commitment and Release Decision-Making*, 36 JUV. & FAM. CT. J. 7 (1985).

[124] *See, e.g.*, ALASKA STAT. § 47.10.080(1)(3)(A) (1984) (two-year sentence maximum with two-year extension; sentence not to extend beyond 19th birthday). *See generally* Forst, Fisher & Coates, *supra* note 123, at 9.

completed. Within the broad range of sentences authorized by the juvenile law statutes, the judge's authority is virtually unrestricted.

Even states that subscribe to traditional indeterminate sentences for juveniles increasingly recognize the significance of the "Principle of Offense" as a dispositional constraint. The North Carolina legislature requires its judges to "select the least restrictive disposition . . . that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile."[125] Similarly, Iowa judges must consider "the seriousness of the delinquent act, the child's culpability as indicated by the circumstances of the particular case, the age of the child and the child's prior record."[126] Oklahoma courts must consider a juvenile's violent, aggressive, or assaultive behavior, and habitual or multiple serious acts of delinquency in making institutional placements.[127]

2. Legislative and Administrative Changes in Juvenile Court Sentencing Statutes—De Jure Dispositional Decisionmaking

The punishment-treatment dichotomy is most explicit in the context of the decision whether to imprison juveniles. In the vast majority of indeterminate jurisdictions, the judge's sentencing power ends with a commitment to the state's juvenile correctional agency.[128] Thereafter, the juvenile correctional authority or a parole board determines when a youth should be released from custody.

Table I summarizes juvenile sentencing legislation among the states. The column "Age" refers to the minimum age, if any, for institutional confinement and the age at which juvenile court jurisdiction terminates automatically. The column "Offender Oriented" refers to the maximum length of an indeterminate sentence, whether it be the maximum age of jurisdiction or some statutorily fixed period.

Indeterminate sentencing schemes typically include an unspecified period of confinement with a wide range between the minimum and maximum

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[125] N.C. GEN. STAT. § 7A-646 (1986).

[126] IOWA CODE ANN. § 232.52(1) (West 1985).

[127] OKLA. STAT. ANN. tit. 10, § 1138 (West 1987).

[128] *See, e.g.*, ALASKA STAT. § 47.10.080 (1984). In *In re* Welfare of M.D.A. v. State, 306 Minn. 390, 237 N.W.2d 827 (1975), the Minnesota Supreme Court analyzed the allocation of commitment and release authority between the juvenile court and the commissioner of corrections. The court concluded that the "statute places the authority over final dispositions of juveniles exercised [in Minnesota] by the juvenile court in the hands of the commissioner of corrections once the juvenile court has committed the delinquent child to his custody. . . . [T]he Juvenile Court Act does not confer jurisdiction upon the juvenile court to review a decision of the commissioner of corrections to release a juvenile. . . . [S]uch a decision is properly that of the commissioner acting alone." *Id.* at 829-30. *See generally* Forst, Fisher & Coates, *supra* note 123, at 5-6.

length; a release decision made after incarceration and based, in part, on behavior during confinement; and a release decision based on progress toward rehabilitation rather than on formal standards.[129] The columns under "Offense Oriented"—"Determinate" and "Mandatory Minimum"—summarize the elements of a determinative sentencing framework. The column labeled "Commitment Discretion" indicates whether the judge retains sentencing discretion or must impose the sentence mandated. The final column, "Year Offense Criteria Added," shows when the legislature, the correctional administrators, or both adopted offense criteria to govern commitments and releases.

In contrast to the indeterminate sentencing schemes, a determinate sentencing framework usually includes a presumptive sentence or narrow dispositional range; an early determination of length of institutional stay set either at the time of adjudication or shortly thereafter; and a sentence based on formal, articulated standards that are proportional to the seriousness of the youth's present offense, any prior record, and age.[130] To the extent that the length of the sentence is determined by a judge at trial or shortly after commitment, it reflects the offender's prior conduct. Alternatively, if the sentence is determined by an administrative agency during the later stages of confinement, it is more likely to reflect the offender's conduct during confinement.[131]

The statutes summarized in Table I reveal that about one-third of the states currently use offense-based criteria to regulate decisions on juvenile institutional commitment and release. These determinate and mandatory minimum sentencing provisions require judges to consider the present offense, the prior record of the youth, or both.

(a) *Determinate Sentences in Juvenile Court.* For most of this century, theories of positivism and the use of confinement for utilitarian, preventive, or rehabilitative purposes dominated sentencing practices.[132] Indeterminate sentences were the norm as long as the view prevailed that offenders should

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[129] *See, e.g.*, Forst, Fisher & Coates, *supra* note 123, at 4. Professor Alan Dershowitz notes:

> The indeterminate sentence is not a unitary concept of precise definition. It is a continuum of devices designed to tailor punishment, particularly the duration of confinement, to the rehabilitative needs and special dangers of the particular criminal (or more realistically, the category of criminals).
>
> A sentence is more or less indeterminate to the extent that the amount of time actually to be served is decided not by the judge at the time sentence is imposed, but rather by an administrative board while the sentence is being served.

Dershowitz, *Indeterminate Confinements: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298 (1974); *see also* INSTITUTE OF JUDICIAL ADMIN.-AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS RELATING TO DISPOSITIONS 24 n.6 (1980).

[130] Forst, Fisher & Coates, *supra* note 123, at 4.

[131] Dershowitz, *supra* note 129, at 301-02.

[132] *See, e.g.*, Dershowitz, *supra* note 129, at 297; Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 WAYNE L. REV. 45, 87 (1977).

be treated rather than punished, that the duration of confinement should relate to rehabilitative needs, and that therapists possessed the scientific expertise to determine an offender's progress toward reform. Indeterminacy is based on the assumption that the goal of rehabilitation can be achieved and that the technical means to achieve it are available.[133]

The precipitous decline of support for the rehabilitative ideal in the 1970s stemmed from dissatisfaction over empirical results. The apparent failure of the rehabilitative effort reawakened the quest for penal justice. Courts sentenced similarly situated offenders on the basis of relatively objective factors such as their offenses.[134] In a justice system in which reform of offenders remains elusive, the quest for consistent sentencing acquires greater allure.

1) Washington. The most dramatic departure from traditional *parens patriae* juvenile rehabilitation occurred in 1977, when the State of Washington enacted "just deserts" sentencing principles for its juvenile justice system.[135] The primary goals of the new legislation were to assure individual and systemic accountability through presumptive sentencing guidelines.[136]

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[133] *See, e.g.*, INSTITUTE OF JUDICIAL ADMIN.-AM. BAR ASS'N, *supra* note 129, at 26. As the American Friends Service Committee noted:

> The underlying rationale of [the indeterminate sentencing] model is deceptively simple . . . [I]t would save the offender through constructive measures of reformation, protect society by keeping the offender locked up until that reformation is accomplished, and reduce the crime rate not only by using cure-or-detention to eliminate recidivism, but hopefully also by the identification of potential criminals in advance so that they can be rendered harmless by preventive treatment. . . . Carried to an extreme, the sentence for all crimes would be the same: an indeterminate commitment to imprisonment, probation, or parole, whichever was dictated at any particular time by the treatment program. Any sentence would be the time required to bring about rehabilitation, a period which might be a few weeks or a lifetime.

AMERICAN FRIENDS SERV. COMM., *supra* note 61, at 37.

[134] *See, e.g.*, F. ALLEN, *supra* note 9; INSTITUTE OF JUDICIAL ADMIN.-AM. BAR ASS'N, *supra* note 129, at 26-27; authorities cited *supra* notes 58, 61-63 and accompanying text.

[135] *See* WASH. REV. CODE § 13.40.0 (Supp. 1988). *See generally* Krajick, *A Step Toward Determinacy for Juveniles*, CORRECTIONS MAG. 37 (Sept. 1977); *see also supra* notes 86-88 and accompanying text.

[136] A JUSTICE PHILOSOPHY, *supra* note 86, at 2.

> Presumptive dispositions, proportionate to the offense, age, and prior criminal record of the offender, were viewed as mechanisms to achieve greater uniformity among youths who had committed similar types of offenses as well as greater uniformity from one area of the state to another. It was generally believed that youths from rural areas of the state were being institutionalized for offenses that would not even be filed in King county [Seattle]. Those who framed the law wanted the disposition to be based on the *act* that was committed rather than on the "needs of the child," or the "past social history," or the child's "best interests," as these presumably benevolent criteria were believed to have produced inequity and unfairness.

Legislative guidelines emphasized uniformity, consistency, proportionality, equality, and accountability, rather than rehabilitation.[137] Under these guidelines, presumptive sentences for juveniles are determinate and proportional to the age of the offender, the seriousness of the offense, and the juvenile's prior record.[138]

As summarized in Table I, the Washington juvenile code creates three categories of offenders—serious, middle, and minor—with presumptive sentences and standard ranges for each.[139] A sentencing guidelines commis-

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Id. at 24 (citations omitted). The principle legislative sponsor of Washington's presumptive sentencing asserted that the rationale for the scheme was "to hold youngsters more accountable for their crimes by dealing with them according to the nature and frequency of their criminal acts rather than on the basis of their social background and need for treatment." Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289, 308 (1979).

[137] Becker, *supra* note 136, at 307-08. Becker notes "the new law moves away from the parens patriae doctrine of benevolent coercion, and closer to a more classical emphasis on justice. The law requires the court to deal more consistently with youngsters who commit offenses . . . . Serious offenders are to be incarcerated as a matter of public safety." *Id.* at 307.

[138] *See* WASH. REV. STAT. ANN. § 13.40.010(2)(c), (d) (Supp. 1988). *See generally* B. FISHER, M. FRASER & M. FORST, INSTITUTIONAL COMMITMENT AND RELEASE DECISION-MAKING FOR JUVENILE DELINQUENTS: AN ASSESSMENT OF DETERMINATE AND INDETERMINATE APPROACHES, WASHINGTON STATE—A CASE STUDY (1985); A JUSTICE PHILOSOPHY, *supra* note 86; Clements, *supra* note 86. One scholar, commenting on Washington's juvenile sentencing statute, noted:

> A presumptive sentencing scheme plays a key role in ensuring juvenile accountability for offenses committed. Presumptive dispositions are tied to the youth's age, the offense committed, and the history and seriousness of previous offenses. The statute provides both upper and lower limits on the standard dispositional range and sets out aggravating and mitigating factors for sentencing within the range. Dispositions can be made outside the standard range only where to do otherwise would create a manifest injustice . . . . Juvenile sentencing practice may be said to no longer focus on the "needs" of the offender. Rather, dispositions are carefully tailored to hold juveniles accountable in proportion to the culpability of their acts and their criminal history.

Walkover, *supra* note 81, at 530-31. Professors Patrick and Jensen note that

> [t]he new juvenile code in Washington codifies a philosophical shift in the treatment of juvenile offenders. Traditionally, the juvenile courts have acted as a quasi-rehabilitative agency which, in loco parentis, "benevolently" protected the welfare of a youth in need of help. The new juvenile code, however, . . . limits the juvenile court's function to that of trier of fact and holds the juvenile offender accountable to society for his actions. The juvenile will no longer be treated as a delinquent possessing a misguided perception of society; rather, he will be classified as an "offender" of society who must be dealt with in a like manner.

Patrick & Jensen, *Changes in Rights and Procedures in Juvenile Offense Proceedings*, 14 GONZ. L. REV. 313, 313 (1979).

[139] These categories of offenders are defined in WASH. REV. CODE ANN. § 13.40.020(1), (13), (14) (Supp. 1988).

sion developed dispositional and presumptive length-of-stay guidelines in the form of standard ranges (in weeks) that are proportionate to the seriousness of the present offense, age, and prior record.[140] The sentencing judge has the responsibility of classifying a youth as a minor, middle, or serious offender, but he cannot set indeterminate sentences for the offenders. Instead, the judge refers to a dispositional schedule that prescribes the standard range of sentences for a youth with that offense record.[141] The judge may deviate from the presumptive guidelines only by finding with "clear and convincing evidence" that following the dispositional guidelines would produce a "manifest injustice."[142] Any disposition outside of the standard range may be appealed by the State or the juvenile.[143] The guidelines provide that a first or "minor" offender may not be institutionalized, while the most menacing "serious" offender must be institutionalized for 125 weeks to three years.[144] After a youth is incarcerated, institutional staff make security level assignments, facility placements, and program recommendations. A release date must be set by the time a youth has served sixty percent of the minimum sentence imposed.[145]

An evaluator of the revised Washington code concluded that it improved juvenile sentencing practices: "Sentences in the post-reform era were considerably more uniform, more consistent, and more proportionate to the seriousness of the offense and the prior criminal record of the youth than were the sentences in the rehabilitation system which existed before 1978."[146] The evaluation also reports that while referrals to juvenile courts increased, commitments to correctional facilities declined, resulting in "a substantial and marked reduction in the severity of sanctions . . . ."[147] Another study of Washington's sentencing practices noted a clear correlation between the seriousness of the offense and a youth's length of stay.[148]

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[140] WASH. REV. CODE ANN. § 13.40.030(1)(a) (Supp. 1988) (stating that the "juvenile disposition standards commission shall propose to the legislature . . . ranges which may include terms of confinement and/or community supervision established on the basis of a youth's age, the instant offense, and the history and seriousness of previous offenses . . . .").

[141] WASH. REV. CODE ANN. § 13.40.160 (Supp. 1988). Illustrative copies of the Washington dispositional guidelines are reproduced in F. MILLER, R. DAWSON, G. DIX & R. PARNAS, THE JUVENILE JUSTICE PROCESS 846-51 (3d ed. 1985).

[142] WASH. REV. CODE. ANN. § 14.40.160(1) (Supp. 1988). The Washington code defines "manifest injustice" as "a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter." *Id.* at § 13.40.020(12).

[143] *Id.* at § 13.40.160(1).

[144] F. MILLER, R. DAWSON, G. DIX & R. PARNAS, *supra* note 141, at 849-51.

[145] B. FISHER, M. FRASER & M. FORST, *supra* note 138, at 19, 24-25.

[146] INTAKE AND SENTENCING DECISION-MAKING, *supra* note 86, at 76.

[147] *Id.* at 30-31.

[148] *See* B. FISHER, M. FRASER & M. FORST, *supra* note 138. Professors Fisher, Fraser, and Forst's report notes that while the average length of stay in a Washington

Despite increased uniformity, certainty, and proportionality at sentencing, Washington's juvenile code revisions have been criticized. Professional commentators concede that institutional commitments declined in the first years following the new juvenile code's adoption. They note, however, that as more youths acquired extensive prior records, the number of youths incarcerated has increased, while the average length of stay has dropped to keep pace with the increase in commitments.[149] The commentators concluded that "the Washington experience does not justify emulation, either in terms of its success or cost benefit."[150]

In *State v. Lawley*,[151] the "just deserts" philosophy of Washington's new juvenile code was challenged, the defendant arguing that the legislative changes in purpose and sentencing practices had made the proceedings essentially criminal in nature and thus entitled him to a jury trial. The Washington Supreme Court acknowledged that the legislature's attempts to hold juveniles accountable for criminal behavior and to punish them on the basis of their present and past offenses might seem to convert juvenile court proceedings into criminal proceedings. They found, however, that the legislation authorized treatment as well as punishment and required that juveniles be incarcerated in facilities other than adult penal institutions.[152] The *Lawley*

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training school is approximately six months, burglars serve nearly nine months and robbers more than seventeen months. *Id.* at 31-32. Moreover, offense-related variables correlated highly with a youth's length of institutional stay. *Id.* at 33. While a youth's post-commitment conduct in the institution also correlated with the length of the institutional stay, this follows from the use of presumptive sentencing ranges—youths who obey the rules are released at the end of their minimum range, whereas youths who run away or receive numerous disciplinary write-ups are likely to serve a maximum sentence. *Id.* at 38-39.

[149] A. BREED & R. SMITH, REFORMING JUVENILE JUSTICE: A MODEL OR AN IDEOLOGY? 25-27 (on file at the Boston University Law Review); *see also* INTAKE AND SENTENCING DECISION-MAKING, *supra* note 86, at 24.

> The average number of commitments to the Department of Juvenile Rehabilitation dropped substantially after the legislation was implemented and remained below the 1975-1978 commitment rate for more than two years. . . . [H]owever, the number of youths committed increased steadily from its lowest point . . . until by the last half of 1981, commitments were higher than they had been in the pre-reform era.

Id. This increase is attributed to "the gradual build-up of prior criminal history [that] has increased the number of [criminal history score] points for juveniles committing their second, third, fourth, and subsequent offenses. Thus, the increase in commitments may be due primarly [sic] to the increased number of prior adjudicated [and diverted] offenses." *Id.* at 30.

[150] A. BREED & R. SMITH, *supra* note 149, at 27.

[151] 91 Wash. 2d 654, 591 P.2d 772 (1979).

[152] *Id.* at 657, 591 P.2d at 773. The Washington Supreme Court was guided by a post-*Gault* decision, Estes v. Hopp, 73 Wash. 2d 263, 438 P.2d 205 (1968). *Estes* denied a right to a jury trial because delinquency hearings were non-criminal proceedings where a juvenile could

court reasoned that punishment may sometimes serve as treatment and held that the legislature could permissibly conclude that "accountability for criminal behavior, the prior criminal activity and punishment commensurate with age, crime, and criminal history does as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile."[153] Thus, although Lawley's sentence was determinate and proportional, the court held that a jury trial was not constitutionally required. In subsequent decisions, the Washington Supreme Court emphasized that since treatment is not formally precluded, the juvenile justice system is not the equivalent of the adult criminal process.[154] Washington courts, however, have experienced consid-

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> be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of a jury.

Id. at 268, 438 P.2d at 208. The *Lawley* court rejected the defendants argument that the *Estes* decision should not rule because of the significant changes in the juvenile code in 1977, concluding that the new code did not differ enough from the pre-1977 juvenile code to merit a jury trial. 91 Wash. 2d at 656-58, 591 P.2d at 772-73.

Evaluation of the objectives of the Washington legislature clearly contradict the *Lawley* court's analysis. Professors Schneider and Schram conclude:

> [T]he philosophy of the law is unambiguous. There is no attempt to incorporate the new approach, with its emphasis on accountability, uniformity, proportionality, and due process into a system in which rehabilitation and treatment are still viewed as the most important goals . . . . In Washington, treatment and rehabilitation are important objectives insofar as they might contribute to a reduction in recidivism, but they are not the primary goals and, most importantly, *decisions regarding the processing of cases are not to be made in terms of the treatment needs of the youth.*

INTAKE AND SENTENCING DECISION-MAKING, *supra* note 86, at 1-2 (emphasis added).

[153] *Lawley*, 91 Wash. 2d at 656-57, 591 P.2d at 773-74. Other courts have been more sensitive to the Orwellian "double-think" idea that "sometimes punishment is treatment." *See, e.g., In re* L.K.W., 372 N.W.2d 392, 399 (Minn. Ct. App. 1985) ("Reason does not permit a distinction between punitive incarceration and a so-called 'placement' to 'teach you discipline,' a disposition explained as the end of personal choice and as a consequence of breaking rules."); *see also* Gammons v. Berlat, 144 Ariz. 148, 696 P.2d 700 (1985) (Feldman, J., dissenting).

> Allowing criminal prosecution and punishment without proof of *mens rea* by the simple expedient of calling such prosecution "civil" or "rehabilitative" confers too much dignity on juvenile court euphemisms. It is only to the love-struck poet that stone walls do not a prison make, nor iron bars a cage. To the rest of mankind, to be "awarded" to the department of corrections and put behind stone walls or iron bars is to be in prison, even if it is called "juvenile rehabilitation."

Id. at 153, 696 P.2d at 705.

[154] *See, e.g.*, State v. Rice, 48 Wash. 2d 384, 655 P.2d 1145 (1982). The *Rice* court allowed juveniles' sentences to exceed the adult statutory maximum for those of-

erable difficulty in treading the fine line between the "twin principles of rehabilitation and punishment."[155]

The dissent in *Lawley* argued that a jury trial is required because juvenile court proceedings first decide whether the youth committed the alleged offense and then punish the offender proportionally to that offense. The dissent's analysis of the Washington purpose clause and sentencing legislation differed sharply from that of the majority:

> In these provisions the legislature has made it clear that it is no longer the primary aim of the juvenile justice system to attend to the welfare of the offending child, but rather to render him accountable for his acts, to punish him, and to serve society's demand for retribution. While the punishment prescribed may well be less than that imposed upon offending adults for the same offense, it nevertheless involves . . . a loss of liberty. . . . The present act focuses upon the purposes which are generally served by adult criminal law.[156]

The dissent reasoned that although the Supreme Court in *McKeiver* was reluctant to impose the requirement of jury trials on states still pursuing the "rehabilitative ideal" in their juvenile systems, once the Washington legislature reshaped the purpose and practices of the state's system so as to punish offenders, the judiciary had no choice but to recognize that jury trials were required.[157]

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fenses on the grounds that in the juvenile system, unlike the adult system, there exists a policy of "responding to the needs" of offenders. *Id.* at 392-93, 655 P.2d at 1150. The court noted that

> [t]he [Juvenile Justice Act] has not utterly abandoned the rehabilitative ideal which impelled the juvenile justice system for decades. It does not embrace a purely punitive or retributive philosophy. Instead, it attempts to tread an equatorial line somewhere midway between the poles of rehabilitation and retribution.

Id. at 393, 655 P.2d at 1150-51. The dissent in *Rice*, however, noted that apart from the fundamental shift in sentencing philosophy, "[a] juvenile still shares with an adult offender the one feature that overwhelms the differences between their circumstances—they are both incarcerated against their will." *Id.* at 408, 655 P.2d at 1158 (Dore, J., dissenting).

[155] *Id.* at 394, 655 P.2d at 1151; *see, e.g., In re* Smiley, 96 Wash. 2d 950, 640 P.2d 7 (1982) (holding that the juvenile court was entitled to maintain concurrent jurisdiction regarding a sentence for a past juvenile offense, even though the juvenile had committed a post-majority offense); *In re* Erickson, 24 Wash. App. 808, 604 P.2d 518 (1979) (holding that juvenile sentences, like adult criminal sentences, constitute punishment for crimes sufficient to fall within the constitutional exception to involuntary servitude); *In re* Trambitas, 96 Wash. 2d 329, 635 P.2d 122 (1981) (holding that the time that juveniles are held in pre-adjudication detention must be credited against their eventual sentences).

[156] State v. Lawley, 91 Wash. 2d 654, 662, 591 P.2d 772, 775-76 (1979) (Rosellini, J., dissenting).

[157] *Id.* at 663-64, 591 P.2d at 776 (Rosellini, J., dissenting). *See generally* Feld, *supra* note 2, at 251-56; Walkover, *supra* note 81, at 530-31.

Less than a decade later, in *State v. Schaaf*,[158] the Washington Supreme Court reexamined and affirmed its decision in *Lawley*. The issue in *Schaaf*, as in *Lawley*, was whether a jury trial was constitutionally required because of changes in Washington's juvenile justice system. In other words, did "[j]uvenile proceedings remain rehabilitative in nature and distinguishable from adult criminal prosecutions?"[159] Although the *Schaaf* court's principal concern was the administrative impact of jury trials on the juvenile justice system,[160] the court proferred other reasons the juvenile an adult systems were not analogous.

> The fact that juveniles are accountable for criminal behavior does not erase the differences between adult and juvenile accountability. The penalty, rather than the criminal act committed, is the factor that distinguishes the juvenile code from the adult criminal justice system. . . . [T]he purpose of the juvenile system is to provide an alternative to incarceration in adult correctional facilities.[161]

While the *Schaaf* court recognized that some of its prior decisions acknowledged the similarities between juvenile and criminal courts,[162] it insisted that the juvenile court legislation had not completely rejected the ideal of rehabilitating juvenile offenders.[163] The court noted that the continued pres-

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[158] 109 Wash. 2d 1, 743 P.2d 240 (1987).

[159] *Id.* at 5, 743 P.2d at 242.

[160] *Id.* at 3, 743 P.2d at 241.

> While we recognize the importance of the right to trial by jury, we also recognize the realities of life, and the enormous impact that jury trials would have on the juvenile justice system. We question whether the system, as presently structured, could even begin to absorb jury trials in juvenile cases without a restructuring of the entire legal system.

Id.

[161] *Id.* at 7, 743 P.2d at 243.

[162] *See, e.g.*, State v. Q.D., 102 Wash. 2d 19, 23, 685 P.2d 557, 560 (1984) (entitling juveniles to use the common law infancy mens rea defense because "[b]eing a criminal defense . . . [it] should be available to juvenile proceedings that are criminal in nature"); State v. Bird, 95 Wash. 2d 83, 88, 622 P.2d 1262, 1265 (1980) (holding that juvenile offenses are in certain situations sufficiently analogous to crimes to allow trial courts to suspend juvenile sentences); State v. Erickson, 24 Wash. App. 808, 809, 604 P.2d 513, 514 (1979) (holding that a juvenile disposition order "constitute[s] 'punishment for crime' sufficient to fall within the constitutional exception to involuntary servitude").

[163] 109 Wash. 2d at 10, 743 P.2d at 244 (1987). The court relied on language from its decision in State v. Rice, 98 Wash. 2d 384, 655 P.2d 1145 (1982).

> [W]hile the [Juvenile Justice Act] shares with the adult system the purposes of rendering a child accountable for his acts, punishing him and exacting retribution from him, such purposes are tempered by, and in some cases must give way to, purposes of responding to the needs of the child. . . . [T]he [Juvenile Justice Act] has not utterly abandoned the rehabilitative ideal which impelled the juvenile justice system for decades. It does not embrace a purely punitive or retributive

ence of other informal and flexible procedures distinguished juvenile from criminal courts.[164]

Justice Goodloe, writing the dissent in *Schaaf*, argued that Washington's legislature and juvenile courts "have so far departed from a 'rehabilitative' model of juvenile justice as to render any differences from adult criminal justice too minor to justify the withholding of the right to a jury trial."[165] Reiterating the *Lawley* dissent, Justice Goodloe analyzed earlier Washington decisions that emphasized "the similarities between the juvenile and the adult criminal justice system,"[166] and noted that legislative changes permitted the transfer of some juvenile offenders to the Department of Corrections for adult incarceration without the benefit of a jury trial.[167] The dissent concluded that "[t]he reality of the [Juvenile Justice Act] is that *rehabilitation no longer remains a substantial goal of the juvenile criminal justice system*."[168]

2) New Jersey. As part of a comprehensive juvenile code revision, the New Jersey legislature instructed juvenile courts to consider the characteristics of an offense and the criminal history of the offender when sentencing and provided for enhanced sentences for certain serious or repeat offenders.[169] New Jersey's code revisions reflect a desire to promote uniform terms in sentencing and to judge delinquent acts similarly based on their characteristics.[170] Although the juvenile court judge retains discretion over the commitment decision, he must base his decision on legislatively prescribed offense-based criteria.[171] The New Jersey code lists "aggravating

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philosophy. Instead, it attempts to tread an equatorial line somewhere midway between the poles of rehabilitation and retribution.

Id. at 393, 98 P.2d at 1150.

[164] State v. Schaff, 109 Wash. 2d 1, 12-13, 743 P.2d 240, 245-46 (1987).

[165] *Id.* at 23, 109 P.2d at 250-51 (Goodloe, J., dissenting).

[166] *Id.* at 25, 743 P.2d at 252; *see* sources cited *supra* note 157.

[167] *Schaff*, 109 Wash. 2d at 26, 743 P.2d at 252 (Goodloe, J., dissenting).

[168] *Id.* at 27, 743 P.2d at 253 (emphasis added).

[169] N.J. STAT. ANN. §§ 2A:4A-43(a), -44(a), (d) (West 1987).

[170] *Id.* at § 2A:4A-20. (Senate Judiciary Committee Statement at § 25); *see also* JUVENILE DELINQUENCY DISPOSITION COMM'N, THE IMPACT OF THE NEW JERSEY CODE OF JUVENILE JUSTICE 14 (1986):

> One objective of the Code is to increase uniformity and equity in the handling of juvenile cases. This lack of uniformity was viewed as a major pre-Code problem. . . . [V]ariations in court practices had led to disparity in treatment and, in some cases, to insufficient due process protections. . . . A series of standards and "guidelines" require the court to weigh certain factors in arriving at dispositions, prohibit the incarceration of certain offenders and relate the terms of incarceration the court may impose to offenses.

[171] In determining the appropriate disposition for a juvenile adjudicated delinquent the court shall weigh the following factors:

(1) The nature and circumstances of the offense;

(2) The degree of injury to persons or damage to property caused by the juvenile's offense;

and mitigating factors" to guide the court's decision whether or not to incarcerate a youth.[172] Finally, the legislation creates a "presumption of nonincarceration for any crime or offense of the fourth degree or less" where the juvenile has no record of a prior offense.[173]

As indicated in Table I, the New Jersey juvenile code authorizes substantial sentences for the most serious crimes and proportionally shorter sentences for less serious offenses.[174] In addition, the legislation provides for periods of incarceration beyond the statutory maximum if a juvenile is convicted of a crime of the first, second, or third degree, has two prior convictions of crimes of the first or second degree, and has been committed previously to a correctional facility.[175] The release of juveniles on parole prior to the completion of at least one-third of their sentence requires the approval of the sentencing court.[176]

An evaluation of the New Jersey code's impact on juvenile adjudication in that state reported relatively low overall use of incarceration sentences.[177] A

(3) The juvenile's age, previous record, prior social service received and out-of-home placement history . . . .

N.J. STAT. ANN. § 2A:4A-43(a) (West 1987).

[172] *Id.* at § 2A:4A-44(a), (b). Aggravating factors included the circumstances of the crime, the injury to or special vulnerability of the victim, the juvenile's prior record and its seriousness and whether the youth was paid for committing the crime. The mitigating factors included youthfulness, lack of serious harm, provocation, restitution for damage, the absence of prior offenses, and likely responsiveness to non-incarcerative dispositions.

[173] *Id.* at § 2A:4A-44(b)(1).

[174] The New Jersey juvenile code includes a table for sentences:

(a) Murder [first or second degree]	20 years
(b) Murder [other]	10 years
(c) Crime of the first degree, except murder	4 years
(d) Crime of the second degree	3 years
(e) Crime of the third degree	2 years
(f) Crime of the fourth degree	1 year
(g) Disorderly Persons offense	months

N.J. STAT. ANN. § 2A:4A-44(d)(1) (West 1987).

[175] *Id.* at § 2A:4A-44(3). Youths with prior convictions who are convicted of murder may have their 20-year term extended by five years. Youths with prior records who are convicted of other crimes of the first, second, or third degree may have their maximum sentence extended by an additional two years.

In response to criticism that the system was ineffective in dealing with serious or repetitive offenders, the Code modifies the provisions for the waiver of juveniles to adult court and provides increased deterrence capacity by authorizing extended incarceration terms. Early parole of incarcerated offenders is made subject to court review. The Code was characterized as more punitive in dealing with more serious offenders and less punitive in dealing with minor offenders.

JUVENILE DELINQUENCY DISPOSITION COMM'N, *supra* note 170, at 16.

[176] N.J. STAT. ANN. § 2A:4A-44(d)(2) (West 1987).

[177] JUVENILE DELINQUENCY DISPOSITION COMM'N, *supra* note 170, at 33. The Commission found that incarceration sentences were only used in approximately six percent of delinquency dispositions. *Id.*

comparison of sentences imposed and served by youths before and after the adoption of the new juvenile code indicates that changes in the actual lengths of time served are "negligible: incarceration terms are actually declining in length for the majority of offenders . . . ."[178] To the extent that the legislature sought to achieve uniformity and equality of sentencing throughout the state, the revised code has had only limited success.[179] The evaluation reports that substantial county-by-county disparity in sentencing persists.[180]

> These facts suggest that it may be the county in which a juvenile commits his or her crime, rather than characteristics of that juvenile or the crime committed, which determines the probability of incarceration. This may be because each county is incarcerating its serious offenders and seriousness is a relative term. Our data base indicates that those incarcerated from some counties . . . are more often adjudicated delinquent for such serious offenses as Robbery, Aggravated Assault, and/or Sexual Offenses. Conversely, other generally suburban counties incarcerate juveniles adjudicated delinquent for less serious offenses such as Burglary, Theft, and Minor Assault.[181]

This finding is consistent with other research on juvenile justice sentencing.[182] On the basis of the first-year evaluation, however, the Commission

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[178] The Juvenile Delinquency Disposition Commission reported:

> [T]he new Code does, in fact, provide longer terms for a limited class of offenses (e.g. first degree) but equal or lesser terms for the larger group of offenses (second and third degree offenses). Assuming that pre-Code commitment patterns are comparable, the net impact is shorter sentences for most offenders . . . .

Id. at 85-86. Comparing the sentences imposed before and after the adoption of the Code, the Commission reported:

> The sentences received by these two [pre- and post-Code] groups differed considerably. The post-Code group, on average, received shorter sentences than the pre-Code group.

Id. at 86. However, the Commission reports that post-Code juveniles are actually serving a greater proportion of their total sentence, suggesting that "present parole policy has toughened despite the less punitive provisions in the Code. The actions of the Parole Board may reflect the fact that juveniles who are now incarcerated represent increasingly severe cases." *Id.*

[179] *Id.* at 83-84.

[180] *Id.* In attempting to account for the "significant" regional differences in rates of incarceration, the Commission concluded that those differences could not be explained by: differences in county juvenile populations; variations in crime rates or serious crime; degree of urbanization; variations in juveniles' prior records; previous use of diversion or other prior dispositions; or the level of prior social services. *Id.*

[181] *Id.*

[182] *See, e.g.*, Feld, *supra* note 4, at 492-93 (noting county-by-county variations in waiver of juvenile offenders for adult criminal prosecution).

was reluctant to propose presumptive sentencing guidelines to structure judicial commitment decisions.[183]

3) Texas. In 1987, Texas adopted legislation providing for the determinate sentencing of some juvenile offenders.[184] The prosecutor may submit petitions to a grand jury alleging very serious offenses. If the petition is approved and the youth is ultimately convicted, "the court or jury may sentence the child to commitment in the Texas Youth Commission with a transfer to the Texas Department of Corrections *for any term of years not to exceed 30 years*."[185] Because of the seriousness of the sentences authorized, the Texas legislation provides juveniles with a jury trial at adjudication and sentencing.[186]

(b) *Mandatory Minimum Terms of Confinement Based on Offense.* As Table I indicates, in addition to experimenting with determinate sentencing, a number of jurisdictions have altered their juvenile sentencing statutes and practices. The changes emphasize characteristics of the offense rather than the offender as the formal determinant of dispositions. This has been accomplished through the adoption of either offense-based determinate sentences for some offenders,[187] offense criteria as sentencing guidelines,[188] or mandatory minimum sentences for certain offenses.[189] All of these limit individualized consideration of a juvenile's "real needs."

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[183] JUVENILE DELINQUENCY DISPOSITION COMM'N, *supra* note 170, at 87.

> Since we have traditionally granted significant discretion to the courts and other agencies in handling delinquency, there is increasing interest in how discretion is used. Dispositional guidelines are often mentioned as a means to encourage uniformity and equity, discourage bias or achieve other policy goals. But guidelines can also restrict appropriate judicial discretion or have other negative impacts. Some suggest that equity should be a central goal of the system. Others note that the desire for equity must be balanced by an appreciation for local community values.

Id. While the Commission's research documented substantial variation in dispositional decisionmaking, it recommended "a major study of the factors underlying variation in sentencing and the implications of this variation be undertaken in cooperation with the judiciary." *Id.* at 88.

[184] TEX. FAM. CODE ANN. §§ 53.045, 54.04(d)(3) (Vernon Supp. 1988). Determinate sentences may be imposed upon youths charged with and convicted of murder, capital murder, aggravated kidnapping, aggravated sexual assault, deadly assault on a law enforcement official, or attempted capital murder. The new Texas legislation is analyzed in Dawson, *The Third Justice System: The New Juvenile Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943 (1988).

[185] *Id.* at § 54.04(d)(3) (emphasis added).

[186] *Id.* at § 54.03(b), (c), .04(a).

[187] *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-140(e) (West 1986).

[188] *See, e.g.*, COLO. REV. STAT. §§ 19-3-113, -113.1, -113.2 (1986).

[189] *See, e.g.*, DEL. CODE ANN. tit. 10, § 937 (Supp. 1986); N.Y. FAM. CT. ACT §§ 352.2, 353.5 (1987 & Supp. 1988); OHIO REV. CODE ANN. § 2151.353 (Anderson Supp. 1987).

Under many of the mandatory minimum sentencing statutes, the judge retains discretion to commit a juvenile to the state's department of corrections.[190] If the judge does decide to incarcerate a youth, she may also prescribe the minimum sentence to be served for that offense.[191] In several jurisdictions, however, the mandatory sentence is non-discretionary, and the judge must commit the juvenile for the statutory period.[192] These non-discretionary mandatory minimum sentences are typically imposed on juveniles charged with serious or violent present offenses[193] or those who have prior delinquency adjudications.[194] The mandatory minimum sentences may range from twelve to eighteen months,[195] until age twenty-one,[196] or until the adult maximum sentence for the same offense.[197]

1) Colorado. While Colorado is, in general, an indeterminate juvenile sentencing state,[198] it has several statutes, indicated at Table I, governing the dispositions of "Violent and Repeat Juvenile Offenders,"[199] "Mandatory Sentence Offenders,"[200] and "Aggravated Juvenile Offenders."[201] For

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[190] *See, e.g.*, ARK. STAT. ANN. § 9-27-344 (1987 & Supp. 1987); COLO. REV. STAT. §§ 19-3-113, -113.1, -113.2 (1986).

[191] *See e.g., id.* (stating that the "juvenile court *may* commit the juvenile [convicted of a Class A Felony] . . . for a minimum period of time to be set by the court, not to exceed six months" (emphasis added)).

[192] *See, e.g.*, DEL. CODE ANN. tit. 10, § 937 (Supp. 1986) (requiring six months institutionalization for a felony conviction within one year of a prior felony conviction).

[193] *See, e.g.*, N.Y. FAM. CT. ACT § 352.2 (1987 & Supp. 1988).

[194] *See, e.g.*, DEL. CODE ANN. tit. 10, § 937 (Supp. 1986).

[195] *See, e.g.*, GA. CODE ANN. § 15-11-37 (1985 & Supp. 1988).

[196] *See, e.g.*, ILL. ANN. STAT. ch. 37, ¶ 805-33 (Smith-Hurd Supp. 1988).

[197] *See, e.g.*, 1988 KY. REV. STAT. & R. SERV. § 640.030 (Baldwin).

[198] *See* COLO. REV. STAT. § 19-3-113 (1986).

[199] *Id.* at § 19-3-113.1. Under Section 19-1-103(28), "Violent Juvenile Offender" is defined as a child 13 years of age or older who is adjudicated delinquent or has his probation revoked "for an act which would constitute a crime of violence as defined in section 16-11-309(2) [murder, assault, kidnapping, robbery, bodily injury or death in the commission of a felony, rape, weapon use in a crime against the elderly or handicapped, etc.] if committed by an adult . . . ." *Id.* at § 19-1-103(28). A "Repeat Juvenile Offender" is defined as a child with a prior delinquency adjudication who is subsequently adjudicated delinquent or has his probation revoked for conduct that would be a felony if committed by an adult. *Id.* at § 19-1-103(23.5).

[200] *Id.* at § 19-1-103(19.5). A "Mandatory Sentence Offender" is a juvenile who has either two prior delinquency adjudications or a delinquency adjudication and a probation revocation, and who is subsequently adjudicated delinquent. *Id.*

[201] *Id.* at § 19-1-103(2.1). An "Aggravated Juvenile Offender" is defined as a child 12 years of age or older who is adjudicated delinquent or has his probation revoked for committing first or second degree murder, or who is 16 years of age or older, with a prior delinquency adjudication for a felony, who is subsequently convicted of a crime of violence as defined in section 16-11-309(2). *See supra* note 199.

juveniles sentenced as violent, repeat, or mandatory offenders, the statutes mandate an out-of-home placement for a minimum of one year.[202] If the judge decides to commit such an offender to an institution, he may specify the minimum term to be served. If a youth is sentenced as an "Aggravated Juvenile Offender," the court may "commit the child to the department of institutions for a determinate period of five years."[203] A study on the processing of violent and serious offenders by the Colorado juvenile justice system reported that

> the severity of the committing charge was significantly related to the length of the minimum sentence in Denver, with the percentage of youth receiving a minimum sentence of 12 or more months falling as offense severity decreased. The use of special sentencing statutes for those committed to [Division of Youth Services] was also significantly related to offense severity in Denver, with the percent being adjudicated as repeat, mandatory, or violent offenders falling as offense severity decreased.[204]

At the same time, however, the report noted that the most severe sentences were imposed upon a broad, heterogeneous population of "delinquent" offenders, concluding that "proportionality of disposition is neutralized when broad categories of youth with different histories or severity of behaviors are treated alike."[205]

In recognition of the length of the potential sentences for serious juvenile offenders, Colorado has authorized twelve-member jury trials for delinquents tried as aggravated juvenile offenders.[206] Among the states with determinate sentences or mandatory minimum sentences, Colorado is in the distinct minority in providing the protections of a jury trial.[207] Moreover, Colorado is one of the few states in which delinquency cases can be tried to a jury and in which the right is regularly exercised.[208]

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[202] COLO. REV. STAT. § 19-3-113.1(1), (2) (1986).

[203] *Id.* at § 19-3-113.2(1).

[204] E. HARTSTONE, E. SLAUGHTER, & J. FAGAN, PROCESSING OF VIOLENT AND SERIOUS JUVENILE OFFENDERS BY THE COLORADO JUVENILE JUSTICE SYSTEM: FINAL REPORT 5 (1986). This research also reports that the Colorado Juvenile Justice and Delinquency Prevention Council's policy goals, which sponsored the research, include a desire to: "[p]romote fairness and proportionality in juvenile justice decision making"; "[p]romote accountability for youth through sanctions which link behaviors to consequences"; and "[p]romote accountability for agencies of the juvenile justice system through consistent application of policies and statutes." *Id.* at 7.

[205] *Id.* at 17.

[206] COLO. REV. STAT. § 19-3-106.5(3)(a) (1986). Except for petty offenses in which the district attorney waives the right to seek institutionalization, all juveniles are entitled to a jury trial by a jury of six. *See id.* at § 19-1-106(4)(a).

[207] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 549 (1971).

[208] *See* Keegan, *Jury Trials for Juveniles: Rhetoric and Reality*, 8 PAC. L.J. 811, 834 (1977); McLaughlin & Whisenand, *Jury Trial, Public Trial and Free Press in*

2) Connecticut. Connecticut is another indeterminate sentencing state, with special offense-based provisions for the disposition of serious juvenile offenders.[209] The definition of "serious juvenile offenses" in the Connecticut juvenile code includes forty-four serious offenses such as homicide, assault, sexual assault, kidnapping, and certain categories of burglary and larceny.[210] If a juvenile is convicted of a serious juvenile offense, "the court may set a period of time up to six months during which the department of children and youth services shall place such child out of his town of residence at the commencement of such child's commitment."[211] Connecticut law also requires a transfer hearing to determine the appropriateness of transferring to adult criminal courts youths charged with serious juvenile offenses who have prior convictions for serious juvenile offenses.[212] When a serious juvenile offender is considered for transfer to adult criminal court, but the juvenile court ultimately retains jurisdiction, the determinate sentence law mandates that the court place the youth out of his town of residence for a period of one year at the commencement of the juvenile's commitment.[213]

3) Delaware. Delaware legislation provides that any youth who is adjudged delinquent for conduct that would be a felony if committed by an adult within one year of a prior felony adjudication *must* serve a mandatory

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Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force and NAC Standards, 46 BROOKLYN L. REV. 1, 12-13 (1979). *But cf.* Comment, *Juveniles and Their Right to a Jury Trial*, 15 VILL. L. REV. 972, 995 (1970) (noting that in a twenty-five year period, only two requests were made for jury trials in juvenile proceedings and both were withdrawn before trial).

In 1986 there were 21,083 delinquency petitions filed in Colorado leading to 17,967 terminations. *See* OFFICE OF STATE COURT ADMINISTRATOR, ANNUAL REPORT OF THE COLORADO JUDICIARY 18 (1986). Of those cases, there were a total of 1,735 juvenile trials, of which 848 were jury trials and 887 were court trials. Letter from James D. Thomas, Colorado State Court Administrator (Jan. 30, 1987) (copy on file with author).

[209] CONN. GEN. STAT. § 46B-141(a) (1986). The Connecticut juvenile code provides that juvenile disposition "shall be for an indeterminate time up to a maximum of two years, or, when so adjudged on a serious juvenile offense, up to a maximum of four years at the discretion of the court . . . ." *Id.* On the petition of the Commissioner of Corrections, the committing court, after a hearing, may "continue the commitment for an additional period of not more than two years." *Id.* at § 46B-141(b).

[210] *Id.* at § 46B-120.

[211] *Id.* at § 46B-140(e)(1).

[212] *See id.* at § 46B-126. *But see id.* at 46B-127 (requiring that if a youth is charged with murder, or with a Class A felony and has a prior Class A felony conviction, or a Class B felony and has two prior convictions of Class A or B felonies, then the accused must be transferred to the criminal courts). In all other transfer proceedings involving serious juvenile offenders, transfer is discretionary. *See generally* Feld, *supra* note 4, at 488.

[213] CONN. GEN. STAT. § 46B-140(e)(2) (West 1986).

minimum term of confinement.[214] Despite this offense-based mandatory disposition, the Delaware Supreme Court has affirmed the contention that such juvenile sentencing is an aspect of the rehabilitative effort.[215] However, one commentator has concluded that the mandatory confinement of juvenile offenders under this statute constitutes punishment:

> The determinate nature of the restraint—a mandatory term fixed for at least six months—strongly suggests a legislative intent to punish while belying a rehabilitative purpose. The statute did not provide an indeterminate disposition, which is characteristic of therapeutic attempts to alter undesirable status conditions, but rather fixed a term of confinement based solely upon the offenses committed. . . . The punitive purposes of retribution and deterrence are evident.[216]

4) Georgia. Under Georgia's Designated Felony Act,[217] if a juvenile is sentenced as a designated felon, then the Division of Youth Services retains custody over the youth for an initial period of five years, and the judge must order the child to be confined in a youth development center for "not less than 12 nor more than 18 months."[218] Moreover, if a juvenile commits a

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[214] DEL. CODE ANN. tit. 10, § 937(c)(1) (Supp. 1986) (emphasis added).

[215] *See, e.g.*, State v. J.K., 383 A.2d 283, 289 (Del. 1977).

[216] Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 835-36 (1982) (footnotes omitted). As additional evidence of the statute's punitive purpose, Professor Gardner notes that

> the Delaware Legislature would later describe the purpose of the statute before the *J.K.* court as follows: "[T]he general intention behind the enactment of a mandatory commitment law for juveniles adjudicated delinquet [sic] for certain delineated offenses was to serve as a warning to a first offender of the consequences of a second conviction."

[217] GA. CODE ANN. § 15-11-37(a)(2) (1985 & Supp. 1988). Under the Georgia code, "Designated felony act" means an act which, if done by an adult would be one or more of the following crimes:

> (A) Murder, rape, kidnapping, or arson in the first degree, if done by a juvenile 13 or more years of age;
> (B) Aggravated assault, voluntary manslaughter, aggravated sodomy, arson in the second degree, aggravated battery, robbery, or armed robbery, if done by a juvenile 13 or more years of age;
> (C) Attempted murder or kidnapping, if done by a juvenile 13 or more years of age; or
> (D) Burglary, if done by a juvenile 13 or more years of age who has previously been adjudicated delinquent at separate court appearances for an act which, if done by an adult would have been the crime of burglary.
> (E) Any other act which, if done by an adult, would be a felony, if the juvenile committing the act has three times previously been adjudicated delinquent for acts which, if done by an adult, would have been felonies.

Id.

[218] *Id.* at § 15-11-37(e)(1)(A), (B). However, a juvenile court judge retains initial discretion as to whether to sentence a juvenile as a designated felon or as a delinquent. *Id.* at § 15-11-37(b). *See generally* M. FORST, E. FRIEDMAN & R. COATES,

designated felony that inflicts serious physical injury on a person aged sixty-two years or older, or commits a burglary following two prior burglary adjudications, the court *must* sentence the youth as a designated felon for the mandatory twelve to eighteen-month term.[219]

5) Illinois. Illinois' Juvenile Court Act of 1987 provides that a juvenile with two prior felony convictions who is subsequently convicted of one of the listed violent or serious felonies *must* be committed to the Department of Corrections until age twenty-one without the possibility of parole.[220] As a practical matter, however, the Juvenile Court Act and its predecessor, the Habitual Juvenile Offender statute, are seldom used. Several years after the Act's adoption, Illinois passed waiver legislation that excluded several of the listed offenses from the jurisdiction of the juvenile court.[221] Following the passage of the excluded offense legislation, there was a sharp increase in the number of juveniles charged with those offenses who were tried in the adult criminal courts.[222]

6) Kentucky. Kentucky legislation provides that most youth offenders charged with felonies be tried as youth offenders in circuit court.[223] If the juvenile is convicted of a felony offense in a circuit court, he is subject to the same type of sentencing procedures and duration of sentence as an adult convicted of the same felony.[224] However, the decision to transfer the juvenile to circuit court is still somewhat discretionary.

7) New York. New York's "designated felony" legislation,[225] characterized as "one of the harshest juvenile justice [sentencing] systems in the country,"[226] provides mandatory sentences for youths convicted of certain offenses.[227] If a youth is convicted of a Class A designated felony act and a discretionary restrictive placement is ordered, the juvenile is committed to

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INSTITUTIONAL COMMITMENT AND RELEASE DECISION-MAKING FOR JUVENILE DELINQUENTS: AN ASSESSMENT OF DETERMINATE AND INDETERMINATE APPROACHES, GEORGIA—A CASE STUDY 1.

[219] GA. CODE ANN. § 15-11-37(d) (1985 & Supp. 1988).

[220] ILL. ANN. STAT. ch. 37, ¶ 805-35 (Smith-Hurd Supp. 1988). The statute currently lists the serious offenses as: murder, manslaughter, criminal sexual assault, battery with injury, burglary, robbery, or aggravated arson.

[221] *Id.* at ch. 37, ¶ 805-4.

[222] *See* Feld, *supra* note 4, at 515.

[223] 1988 KY. REV. STAT. & R. SERV. 635.020 (Baldwin).

[224] *Id.* at 640.030.

[225] *See* N.Y. FAM. CT. ACT § 301.2(8), (9) (Consol. 1987). The statute defines designated felonies as offenses by a 14 or 15-year-old which, if done by an adult, would constitute the crime of murder, manslaughter, robbery, kidnapping, arson, burglary, assault, rape, or sodomy.

[226] Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1, 2 (1980); *see also* Whisenand & McLaughlin, *Completing the Cycle: Reality and the Juvenile Justice System in New York State*, 47 ALB. L. REV. 1, 1 (1982).

[227] *See* N.Y. FAM. CT. ACT § 353.5 (Consol. 1987).

the Department for Youth (DFY) for an initial period of five years, the first twelve to eighteen months of which must be spent in a "secure facility."[228] If the designated felony involved serious physical injury or a victim who is sixty-two years of age or older, restrictive placement is mandatory.[229] If the youth is convicted of any other designated felony act, the initial placement is for three years, with the first six to twelve months spent in secure confinement.[230] Finally, if a youth is convicted of a designated felony act and has a prior conviction for a designated felony, the court must sentence the juvenile under the five-year Class A provisions rather than the three-year provisions.[231] At the request of the DFY, such secure placements can be extended by court order for one-year intervals until the juvenile's twenty-first birthday.[232] Special procedures have been provided to assure enforcement of the designated felony legislation.[233]

In 1978, two years after the adoption of the designated felony act, New York adopted additional legislation to transfer serious juvenile offenders to criminal courts for adult prosecution.[234] The new juvenile offender legislation only served to further confuse the judicial response to young, serious offenders.[235] Characterized by one commentator as "awkward and inefficient . . . [and] in many ways counterproductive,"[236] both the concep-

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[228] *Id.* at § 353.5(4).

[229] *Id.* at § 353.5(3).

[230] *Id.* at § 353.5(5).

[231] *Id.* at § 353.3(6).

[232] *Id.* at § 353.5(5)(d).

[233] *See id.* at § 311.1(5) (mandating that a petition must conspicuously note that the juvenile is charged with a designated felony); *id.* at § 254-a (providing that district attorneys, rather than corporate counsel or county attorneys, may prosecute juveniles charged with designated felonies); *id.* at § 117(b)(i), (ii) (creating a separate division of family court to hear designated felony petitions in New York City and giving hearing preference to designated felony petitions in family courts outside New York City).

[234] *See* N.Y. PENAL LAW § 30.00(2) (McKinney 1987). *See generally* Feld, *supra* note 4, at 487 (discussing various ways juveniles are transferred to adult criminal courts).

[235] In a Practice Commentary to the Family Court Act, Professor Merril Sobie notes:

> In establishing a new classification of delinquency, the "designated felony," the Reform Act added several definitions. The 1978 Juvenile Offender Act added yet another classification, the "juvenile offense." Through the enactment of the two acts [1976 and 1978] juvenile delinquency, which had been a relatively simple cause of action, became a tripartite series of complicated measures with accompanying definitional nomenclature [juvenile offense, designated felony and delinquency].

Sobie, *Practice Commentary*, following N.Y. FAM. CT. ACT § 301.2 (McKinney 1985).

[236] Woods, *supra* note 226, at 37.

tualization and implementation of the New York juvenile sentencing legislation has been uniformly criticized.[237]

8) North Carolina. North Carolina is an indeterminate sentencing jurisdiction with special legislative provisions for sentencing repeat offenders.[238] If a juvenile delinquent is fourteen years of age or older, has two or more prior felony adjudications and has been previously committed to a facility of the Department of Corrections, the juvenile court may impose "a definite term not to exceed two years."[239]

9) Ohio. Ohio has adopted mandatory minimum terms of confinement based on the seriousness of the offense for which a youth is committed.[240] The purpose of the Ohio legislation was to discharge minor offenders, reduce overcrowding, and reserve the institutions for the more serious offenders.[241] Although the sentencing judge retains discretion over whether to commit a youth convicted of a felony, once institutionalization is ordered the juvenile must serve a mandatory minimum term of six months, one year, or until age twenty-one, depending on the seriousness of the offense.[242] Moreover, if a youth is convicted of murder or a first or second-degree felony, the commitment must be served in a secure facility.[243] One commentator has noted that the Ohio legislation "tends to focus more on retribution for the offense committed as opposed to the needs of the juvenile offender."[244]

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[237] *See, e.g.*, Roysher & Edelman, *Treating Juveniles As Adults in New York: What Does It Mean and How Is It Working?*, in READINGS IN PUBLIC POLICY 265 (Hall, Hamparian, Pettibone & White co-eds. 1981); Whisenand & McLaughlin, *supra* note 226; Woods, *supra* note 226. Indeed, Whisenand and McLaughlin conclude that the abolition of the juvenile court is to be preferred to further "reforms."

> [I]t is time to seriously consider a complete overhaul of the juvenile justice system. Rather than chip away at juvenile court jurisdiction and create a maze of extremely complicated procedures which to date appear less than successful in stemming the surge in juvenile crime, public debate should center around the repeal of . . . the Family Court Act and the consolidation of jurisdiction over criminal acts in the criminal courts.

Whisenand & McLaughlin, *supra* note 226, at 4.

[238] N.C. GEN. STAT. § 7A-652(b)(1), (2) (1987).

[239] *Id.* at § 7A-652(b)(2).

[240] OHIO REV. CODE ANN. § 2151.355 (Anderson Supp. 1987).

[241] *See* Note, *H.B. 440: Ohio Restructures Its Juvenile Justice System*, 8 U. DAYTON L. REV. 237 (1982); *see also* FEDERATION FOR COMMUNITY PLANNING, JUVENILES IN INSTS. OF THE OHIO DEP'T OF YOUTH SERVS. (May 1982) [hereinafter JUVENILES IN INSTS.]; FEDERATION FOR COMMUNITY PLANNING, JUVENILES IN INSTS. OF THE OHIO DEP'T OF YOUTH SERVS.: THE EARLY IMPACT OF OHIO H.B. 440 (September 1982); FEDERATION FOR COMMUNITY PLANNING, JUVENILES IN INSTS. OF THE OHIO DEP'T OF YOUTH SERVS.: THE 1ST YEAR'S IMPACT OF OHIO H.B. 440 (December 1982) [hereinafter THE 1ST YEAR'S IMPACT].

[242] OHIO REV. CODE ANN. § 2151.355(A)(4)-(6) (Anderson Supp. 1987).

[243] *Id.* at § 2151.355(5), (6).

[244] Note, *supra* note 241, at 245.

Evaluations of the Ohio mandatory minimum sentencing legislation report that it has exacerbated institutional overcrowding.[245] Intended, in part, to discharge minor offenders, the legislation has increased the average length of stay for juveniles who are convicted of felonies and committed to institutions.[246] The mandatory minimum provisions have also increased the overall institutional populations.[247]

10) Tennessee. Tennessee is an indeterminate sentencing jurisdiction with special determinate sentencing provisions for serious or repetitive offenders.[248] Normally an order committing a juvenile to the Tennessee Department of Corrections "shall be for an indefinite time." However, if the juvenile is adjudicated delinquent for a Class X felony,[249] has three prior delinquency adjudications for felony offenses at least one of which resulted in institutional confinement, or is within six months of his nineteenth birthday, then the "commitment may be for a determinate period of time," limited only by the adult maximum sentence for the same offense and the juvenile's twenty-first birthday.[250]

11) Virginia. Virginia is an indeterminate sentencing jurisdiction with

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[245] *See* JUVENILES IN INSTS., *supra* note 241, at 22. Evaluations of the impact of the legislation after one year also concluded that "[juvenile] institutions remain seriously overcrowded as a whole; there is no evidence, as of yet, that the problem is easing. Overcrowding is very severe in a few of the institutions and not a serious problem in others." THE 1ST YEAR'S IMPACT, *supra* note 241, at 2.

[246] *See* Note, *supra* note 241, at 247.

> Prior to H.B. 440 [the Ohio juvenile code legislation], the average stay of a juvenile in Department of Youth Service institutions was five to six months. Under the new bill, the minimum sentence for a minor felony is six months. A serious felony, such as rape or aggravated robbery, carries a minimum sentence of one year. The H.B. 440 minimum sentence requirements increase the average length of time that a juvenile will be institutionalized. This increase could cause overcrowding since commitment rates have not significantly decreased under H.B. 440.

Id.

[247] *See* JUVENILES IN INSTS., *supra* note 241, at 14. The Federation concluded that "the increase [in juvenile institution populations] is attributable to institutionalization of more adjudicated delinquents who are committed for serious property crimes. These youths more than made up for the misdemeanants who were no longer institutionalized after H.B. 440." *Id.*

[248] TENN. CODE ANN. §§ 37-1-131, -137 (Supp. 1987).

[249] *Id.* at § 39-1-702. Class X felonies are defined as: murder; aggravated rape and aggravated sexual battery; robbery with a deadly weapon; aggravated arson; conspiracy to murder or commit a felony against the person; assault with intent to murder; assault from ambush with a deadly weapon; serious drug offenses; and injury caused by explosives. *Id.* Adult sentences for Class X felonies are determinate with no provisions for "good time" credit or early parole. *Id.* at § 39-1-703.

[250] *Id.* at § 37-1-137(a)(1)(B).

special provisions for sentencing "serious offenders."[251] A "serious offender" is defined as a child sixteen years of age or older who is convicted of a felony and has a recent prior record.[252] Although the judge retains discretion over whether to sentence under this statute, if she does commit the child to the Department of Corrections, "the court may specify a minimum period of commitment, not less than six nor more than twelve months."[253] Additionally, a juvenile court judge may sentence juveniles to local detention or secure facilities for up to six months.[254]

(c) *Administratively Adopted Determinate/Presumptive or Mandatory Minimum Sentencing Guidelines*. Several states have repudiated traditional individualized juvenile justice sentencing in favor of offense-based dispositions. Washington, New Jersey, and Texas have done so by adopting determinate sentencing schemes for some or all juvenile offenders. Others, such as Georgia, New York, and Ohio have adopted mandatory minimum sentencing statutes to govern the lengths of institutional confinement for those youths committed to the state's departments of corrections.

Another trend in juvenile sentencing practices is the adoption of guidelines for determining length of confinement by a state's department of corrections or juvenile parole authority. These administrative guidelines use offense-based criteria to structure institutional release decisions. While the adult corrections process has employed parole release guidelines for several decades,[255] their use in the juvenile process is more recent.

1) Minnesota. Statutorily, Minnesota is an "indeterminate" sentencing state.[256] In 1980, however, the Minnesota Department of Corrections ad-

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[251] VA. CODE ANN. § 16.1-285 (1988).

[252] *Id.* at § 16.1-285.1(A). "Recent prior record" is defined as either parole status or a delinquency placement within the preceding year. *Id.*

[253] *Id.* at § 16.1-285.1(C).

[254] *Id.* at § 16.1-284.1(A) (allowing for placement of a child age 16 or older who committed any offense for which an adult could be incarcerated and who is without prior record in a secure facility for thirty days); *id.* at § 16.1-284.1(B) (allowing for a child age 16 or older who committed any offense for which an adult could be incarcerated who has a prior record of delinquency to be placed in secure facility for up to six months).

[255] *See, e.g.*, Federal Parole Guidelines, 28 C.F.R. § 2.1-.64 (1987).

[256] *See* MINN. STAT. ANN. § 260.185(4) (West 1982). In addition to providing the customary range of dispositional options, Minnesota's dispositional statute includes the following language that was adopted in 1976:

> Any order for a disposition authorized under this section shall contain written findings of fact to support the disposition ordered, and shall also set forth in writing the following information:
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> (a) why the best interests of the child are served by the disposition ordered; and (b) what alternative dispositions were considered by the court and why such dispositions were not appropriate in the instant case.

Id. In *In re* Welfare of L.K.W., 372 N.W.2d 392 (Minn. Ct. App. 1985), the court

ministratively implemented a determinate sentencing plan for youths committed to the state's juvenile institutions. Based on the juvenile's present offense and prior record, the plan "provide[s] a more definite and distinct relationship between the offense and the amount of time required to bring about positive behavior change."[257] A juvenile's projected minimum length of stay, based on the present offense and prior record, is established within seven weeks after admission to an institution.[258] The actual parole release within the minimum and maximum range is based upon both the presumptive sentence, which reflects aggravating and mitigating factors associated with the commitment offense, and subsequent institutional conduct, including the completion of an agreed upon treatment plan.[259]

The departmental decision to implement a determinate sentencing system reflects concerns with the adequacy and equity of individualized treatment dispositions. An evaluation of decisionmaking commitment and release of juveniles in Minnesota's correctional institutions found that

> there is no relationship between the juvenile's offense and the disposition of his case at either the State Training School or the Minnesota Home School.
>
> . . . Status offenders stay slightly longer in the institution than serious offenders. . . .
>
> All in all, there are no consistent or systematic criteria used in making

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interpreted the language to require consideration of less restrictive alternatives and proportionality of sanctions.

> To measure what is necessary, a trial court must assess two factors, the severity of the child's delinquency, and the severity of the proposed remedy. When the severity of intervention is disproportionate to the severity of the problem, the intervention is not necessary and cannot lawfully occur. The court must take the least drastic necessary step.

Id. at 398; *see also*, Comment, *Minnesota Articulates Standards for Delinquency Disposition*, 13 WM. MITCHELL L. REV. 247 (1987). *But cf. In re* Welfare of D.S.F., 416 N.W.2d 772, 774 (Minn. Ct. App. 1987) (employing the analysis of *L.K.W.* but noting that the preference of allowing children to remain at home applies only to children adjudicated dependent or neglected, not to children found to be delinquent).

[257] MINNESOTA DEP'T OF CORRECTIONS, JUVENILE RELEASE GUIDELINES 2-3 (1980) [hereinafter JUVENILE RELEASE GUIDELINES].

[258] MINNESOTA DEP'T OF CORRECTIONS, OFFICE OF JUVENILE RELEASE § 5-204.4 (June 1985).

> The scheduling of parole consideration reviews shall be based on the severity, recency, and chronicity of the juvenile's adjudicated offenses according to the grid for projected length of stay. Using the severity, recency, and chronicity of a juvenile's offense behavior as a starting point in projecting the length of stay recognizes that state juvenile correctional facilities are expensive and restrictive facilities, that the best predictor of future offending is the number of past offenses and that the Minnesota Juvenile Code emphasizes public safety as well as treatment.

Id. (citations omitted).

[259] *Id.* at § 5-204.2.

> decisions about whether or not to institutionalize and when to parole juveniles.[260]

The study found that commitment and release decisions were so "individualized" that no factors could explain the differentiation in treatment of youths by an institution.[261] There was no relationship between the most serious offenses in a juvenile's file and the youth's disposition.[262] The most significant variable affecting the length of a youth's incarceration was the institution to which the juvenile was committed.[263]

These findings are consistent with studies in other jurisdictions that report that within a nominally indeterminate juvenile sentencing system, incarcerated youths serve "fixed sentences" based on the institutions to which they are committed.[264] The studies conclude that a pattern of uniformity in sentences, rather than individualized differentiation, prevails in such institutions.[265]

Under the Minnesota Department of Corrections sentencing guidelines, a juvenile's length of stay is based on the severity of the most serious offense

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[260] D. CHEIN, DECISION MAKING IN JUVENILE CORRECTIONS INSTITUTIONS: RESEARCH SUMMARY AND RECOMMENDATIONS 1 (1976); *see also* G. WHEELER, COUNTER-DETERRENCE: A REPORT ON JUVENILE SENTENCING AND EFFECTS OF PRISONIZATION (1978) [hereinafter COUNTER-DETERRENCE]; Wheeler, *Juvenile Sentencing and Public Policy: Beyond Counterdeterrence*, 4 POLICY ANALYSIS 33 (1978) [hereinafter *Beyond Counterdeterrence*]. Professor Wheeler reports that

> [t]he juvenile sentencing structure is a paradox. Each institution . . . appears to have operationalized a sentencing procedure that often discriminated against the youngest age group, the least serious offender, and the white offender in long-term, "treatment-oriented" facilities. But generally, the institutional decision-making process that determined release appeared more random than deliberate. There is an absence of discrimination in release criteria with regard to offense at commitment. The fact that felony offenders were treated equally or less strictly than status and non-felony offenders resulted in disproportionately heavy application of correctional resources on youngsters who were the least threat to the community.

Id. at 44.

[261] D. CHEIN, *supra* note 260, at 35.

[262] *Id.* at 33.

[263] *Id.* at 37.

[264] *See* COUNTER-DETERRENCE, *supra* note 260, at 36 ("[i]nstitutional assignment . . . appeared more important in determining the duration of confinement than the offenders' social characteristics or committing offenses").

[265] [T]he institutional effect . . . is more random than deliberate. While release practices in individual institutions tended to discriminate against whites, the youngest age group, and the least serious offenders, these differences [are] nullified by disparity observed in mean stay for each of these groups when . . . controlled for institutional assignment. . . . [I]nstitutional assignment emerges as more important in terms of predicting length of incarceration than the offender's social characteristics or offense.

Beyond Counterdeterrence, *supra* note 260, at 41.

committed by the individual and the weight of "risk of failure" factors that are "predictive to some degree of future delinquent behavior."[266] Factors considered in the risk of recidivism include prior felony adjudications, and probation and parole failures. Minnesota's sentencing guidelines for adult offenders, which are explicitly punitive and expressly designed to achieve "just deserts," rely on these same factors.[267]

Ironically, the Minnesota Department of Corrections' decision to implement presumptive determinate sentences for juveniles that are similar to those mandated by the adult sentencing guidelines introduces greater "individualization" of dispositions than the former "therapeutic" regime, in which a youth's institutional assignment determined his length of stay. Individualization, based on the present offense and prior record, represents a step toward rationality and justice, albeit a departure from the "rehabilitative" tradition.

Apparently, some of Minnesota's juvenile courts are using determinate sentencing guidelines as well. In *In re D.S.F.*,[268] the juvenile received a ninety-day sentence of incarceration for an assault. Rejecting a less restrictive disposition, the trial court asserted that confinement was required because "a specific consequence was necessary to impress upon D.S.F. the seriousness of his behavior."[269] The majority in *D.S.F.* concluded that the disposition was within the broad sentencing discretion that juvenile courts enjoy. The dissent, however, characterized it as "a purely offense-based determinate sentence of incarceration as a largely predetermined consequence for a serious assault."[270]

Judge Crippen's dissent in *D.S.F.* correctly perceived that determinate sentencing strikes at the very heart of the traditional juvenile court system.[271] Judge Crippen suggested that punitive juvenile sentencing practices

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[266] *See* JUVENILE RELEASE GUIDELINES, *supra* note 257, at 7.

[267] MINN. STAT. ANN. § 244 app. I.2, II.B (West 1988) (Minnesota Sentencing Guidelines and Commentary).

[268] 416 N.W.2d 772 (Minn. Ct. App. 1987).

[269] *Id.* at 774.

[270] *Id.* at 775 (Crippen, J., dissenting). Judge Crippen further noted that the

> determinate sentence of incarceration imposed by the trial court was prompted by unpublished sentencing guidelines, based singularly on the offense committed, and not by spontaneous exercise of discretion by the presiding judge. . . . [Where the sentence is based upon the type of offense committed,] we are dealing . . . with a criminal justice sentence, not a juvenile court disposition aimed at doing what is best for the individual. The juvenile has been ordered incarcerated for a definite term as part of a predetermined sentencing practice.

Id. at 780.

[271] Judge Crippen's analysis noted:

> Deliberate acceptance of offense-based determinate sentencing categorically belies the promises which are the foundation for the 1971 due process analysis of the United States Supreme Court [in *McKeiver*]. Appellate affirmation of criminal justice sentencing in the juvenile court unravels the rationale underlying the

posed three alternative options: restructuring juvenile courts to fit their original rehabilitative purpose; extending to juveniles all of the procedural safeguards afforded to adults in criminal cases;[272] or abolishing juvenile courts altogether.[273] While Judge Crippen was reluctant to acknowledge his "ultimate disillusionment" with the juvenile court experiment, neither could he endorse the majority opinion's approval of punitive sentences for juveniles without full procedural safeguards.

2) Arizona. Arizona's Department of Corrections has adopted Length of Confinement Guidelines to govern juvenile release decisions.[274] The primary objective of the administrative sentencing guidelines is to assure that a juvenile "shall be retained in institutional confinement for a period which is

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equal protection analysis of the Minnesota Supreme Court [in *In re* K.A.A., 410 N.W.2d 856 (Minn. 1987)]. A system already on the brink of its demise is pushed still closer to a long postponed day of reckoning.

Id. at 777.

[272] *Id.* Judge Crippen noted two fundamental procedural deficiencies in juvenile justice administration: "the demonstrated need for jury trials in accusatory proceedings where juveniles may be incarcerated, and the additional need for representation by competent counsel in every case where a juvenile is faced with incarceration." *Id.*; *see also infra* notes 351-52 and accompanying text.

[273] Judge Crippen concludes that

we could call for dismantling a system that openly exacts from our younger citizens a sacrifice of liberties and gives in return a false promise to serve the best interests of those who come before it. The federal and state constitutions do not permit a criminal justice system without criminal justice safeguards . . . . Can we accept as merely unfortunate a system meting out punishment without fundamental constitutional safeguards?

Id.

[274] *See* STATE OF ARIZONA, DEP'T OF CORRECTIONS, LENGTH OF CONFINEMENT GUIDELINES FOR JUVENILES (rev. ed. April, 1986). Arizona's legislature precipitated the administrative decision to adopt the guidelines. *See* ARIZ. REV. STAT. ANN. § 8-241 (1987). The legislation prompting the guidelines included the following legislative findings and policy:

2. The deterrence of juvenile crime can be best achieved by instituting strict rules and policies in the system of juvenile justice.

3. The loss of freedom of juvenile offenders must be meaningful in order to achieve respect for the juvenile justice system and respect for the rights of others in society. . . .

. . . .

6. The state department of corrections should strictly adhere to guidelines for length of confinement of juvenile offenders.

ARIZ. REV. STAT. ANN. § 8-241 (Supp. 1988). Recent legislation explicitly states that the Department of Corrections' responsibilities are to "adopt and enforce guidelines for the length of confinement of a youth offender in secure institutions based on and proportionate to the sentencing provisions of [adult criminal code]." *Id.* at § 41-1608(A).

proportionate to adult sentences for the same crimes."[275] The underlying assumptions of these guidelines are explicitly punitive:

> First, the length of confinement of juvenile offenders should be of sufficient length of time to provide a *deterrent* to future delinquent/criminal activity. . . .
>
> Second, the primary purposes of the [Department of Corrections] is *protection of the public*. . . .
>
> Third, to conform to practices prevalent with adults, the period of confinement *should be related to the juvenile's committing offense*.[276]

To accomplish these goals of deterrence, public protection, and proportionality, the guidelines establish five sentencing categories based on the seriousness of the commitment offense. For each of the five categories, the sentencing guidelines specify a mandatory minimum term of confinement ranging in length from three to eighteen months. No maximum limit on institutional confinement is specified other than a youth's eighteenth birthday.[277] Moreover, the guidelines specify that the offense-based mandatory minimum is only a minimum, and a juvenile's incarceration may be extended "should such continued confinement be necessary . . . to protect the public."[278] Thus, Arizona's sentencing system provides for minimum sentences proportional to the seriousness of the offense committed with a maximum sentence constrained only by the age of the juvenile offender.

3) Georgia. As indicated in Table I, Georgia has two different types of offense-based dispositional schemes for juvenile delinquents. Georgia's Designated Felony Statute fixes the length and type of stay for youths convicted of specified serious offenses.[279] In addition, Georgia has an administratively created determinate sentencing framework adopted by the Division of Youth Services ("DYS") in 1981.[280] Under the DYS's Uniform Juvenile Classification System, committed delinquents are placed in one of five classifications based on "Public Risk," the primary determinant of which is the seriousness

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[275] STATE OF ARIZONA, DEP'T OF CORRECTIONS, *supra* note 274, at 1 (emphasis added).

[276] *Id.* (emphasis added).

[277] *Id.* at 3.

[278] *Id.* at 1.

[279] *See* GA. CODE ANN. § 15-11-37. For an analysis of Georgia's Designated Felony Statute, see *supra* notes 217-19 and accompanying text.

[280] *See* GEORGIA DEPT. OF HUMAN RESOURCES-DIV. OF YOUTH SERVS., POLICY AND PROCEDURE MANUAL §§ 901.00-.06 (1985); M. FORST, E. FRIEDMAN & R. COATES, *supra* note 218. The Georgia juvenile corrections agency's decision to adopt determinate sentencing guidelines was influenced, in part, by Washington's "just deserts" guidelines and the recommendations of the Juvenile Justice Standards Project as well as by a desire to obviate any legislatively imposed determinate sentencing statute. *See* INSTITUTE OF JUDICIAL ADMIN.-AM. BAR ASS'N, *supra* note 113, at 34-35; M. FORST, E. FRIEDMAN & R. COATES, *supra* note 218, at 9-10.

of the present offense.[281] A screening committee classifies youths and makes decisions concerning a juvenile's commitment, length of stay, and release. The committee's decisions are based on a juvenile's offense classification level[282] and other "aggravating factors," such as being a "habitual" or "multiple" offender.[283]

The impact of the Principle of Offense on juvenile sentences in Georgia is evident. Research evaluating the impact of the DYS guidelines reports that "[o]ffense-related variables are most consistently and most highly correlated with the length of institutional stay. Five of the seven independent variables listed deal directly with the seriousness of the commitment offense."[284] In addition to the increase in offense-based determinacy, there was also an increase in the proportionality of sentences; youths committed for more serious offenses served longer periods than youths committed for less serious offenses.[285]

4) California. In California, a sentencing judge may opt to commit a juvenile to the California Youth Authority, a division of the State Depart-

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[281] In classifying a juvenile for sentencing, the Georgia Division of Youth Services considers:

> *Public Risk*. The public risk scale rates the level to which the youth presents a danger to the public and is the primary determinant in the decision to place a youth in an institutional program or allow him to remain in the community. This scale also sets the minimum and maximum length of stay for those youth who are placed in YDC. . . .
>
> *Public Risk Criteria*. The following are the criteria by which the youth shall be rated on the public risk scale: a) Committing offense b) Has escaped c) Committed for an offense which resulted in bodily injury d) Is a habitual offender e) Is a multiple offender.

GEORGIA DEP'T OF HUMAN RESOURCES-DIV. OF YOUTH SERVS., CLASSIFICATION PROFILE 1 (rev. ed. 1986).

[282] The Classification Profile contains extensive lists of offenses that are used to classify juveniles. Under certain defined conditions, youths convicted of the most serious offenses *must* be incarcerated. *See supra* note 219 and acompanying text.

The relationship between classification level, based on gravity of offense committed, and sentence is quite explicit:

a) Level Five	18 to 20 months
b) Level Four	12 to 18 months
c) Level Three	9 to 12 months
d) Level Two	6 to 9 months
e) Level One	4 to 6 months

GEORGIA DEP'T OF HUMAN RESOURCES, *supra* note 281, at 1.

[283] "Habitual Offender" is defined as a delinquent youth who has committed a level two, three, or four offense and who is recommitted within 30 months of a prior commitment for a level two, three, or four offense. *Id.* at 24. "Multiple Offender" is defined as a youth convicted of four or more separate offenses at the time of his commitment to DYS. *Id.*

[284] M. FORST, E. FRIEDMAN & R. COATES, *supra* note 218, at 35.

[285] *Id.* at 33-34.

ment of Corrections.[286] The Youth Authority is responsible for running the state's training schools and receives both juvenile offenders committed by juvenile courts and young adult offenders—individuals between the ages of eighteen and twenty-one—sentenced to the Youth Authority by criminal courts. The majority of Youth Authority commitments come from juvenile courts, and most of those committed to the Youth Authority were not convicted for violent crimes.[287]

Once a juvenile is sentenced to the Youth Authority, any release decision is made by the Youthful Offender Parole Board.[288] At an initial hearing following commitment, the Board either grants or denies parole. If parole is denied, the Board establishes a parole consideration date.[289] While that date is neither "a fixed term or sentence, nor . . . a fixed parole release date," it represents the time by which a youth "may reasonably and realistically be expected to achieve readiness for parole."[290] In establishing the parole consideration date, the Board uses offense-based categories reflecting its assessment of the "seriousness of the specific [offense] and the degree of danger those committed to the Youth Authority pose to the public."[291] While the maximum length of confinement is limited by the jurisdiction of the Youth Authority,[292] within the Youth Authority's sentencing range, the primary determinant of a youth's length of stay is the seriousness of the commitment offense.[293] The Board classifies a youth into one of seven

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[286] CAL. WELF. & INST. CODE § 731 (West 1984).

[287] *See* PRIVATE SECTOR TASK FORCE ON JUVENILE JUSTICE, FINAL REPORT 39 (1987). "Most of the CYA's first commitments come from the juvenile courts; in 1985, 88% of first commitments to CYA were from juvenile courts." *Id.* Juveniles convicted of major offenses against the person—homicide, robbery, and rape—accounted for about 22% of CYA commitments, while property crimes—burglary, theft, and forgery—accounted for about 48%.

[288] *Id.* at 40; *see also* CAL. ADMIN. CODE tit. 15, §§ 4941, 4944-4945 (1987).

[289] CAL. ADMIN. CODE tit. 15, § 4941(a).

[290] *Id.* at § 4945(a).

[291] *Id.*

[292] "Every person committed to the Department of the Youth Authority by a juvenile court shall . . . be discharged upon the expiration of a two year period of control or when the person reaches his or her 21st birthday, whichever occurs later . . . ." CAL. WELF. & INST. CODE § 1769(a) (West 1984). However, if a juvenile has been committed to the Youth Authority for committing one of a number of statutorily delineated offenses, commitment may continue until age 25. *Id.* at § 707(b). A discussion of § 707(b) may be found in Feld, *supra* note 4, at 507 n.3.

[293] PRIVATE SECTOR TASK FORCE ON JUVENILE JUSTICE, *supra* note 287, at 71.

> Terms for wards in the CYA are set by the Youthful Offender Parole Board (YOPB), using guidelines that are based *almost exclusively on the seriousness of the commitment offense*. The average parole consideration date assigned by YOPB in 1985 was 15.7 months, and the range was from 70.4 months (Murder 1) to 12.6 months (crimes in Category VII).

Id. (emphasis added); *see infra* note 295 for a definition of Category VII offenses.

categories based on the offense for which the juvenile is being committed.[294] Typically, youths convicted of the most serious offenses will not be considered for parole for seven years, while youths classified in the least serious category may be eligible for parole in less than one year.[295]

One consequence of the Board's jurisdiction over the release of committed juvenile offenders, independent of the Youth Authority, has been a dramatic increase in institutional overcrowding.[296] The Youth Authority institutions have filled beyond capacity as the average length of a juvenile's stay has increased.[297] This, in turn, has led to recommendations that the Board either develop risk assessment criteria that respond to a youth's dangerousness more reliably than purely offense-based criteria, or adopt juvenile sentencing guidelines based on present offense and prior record.[298]

3. Empirical Evaluations of Juvenile Court Sentencing—De Facto Dispositional Decisionmaking

Assessing the relative impact of the Principle of Individualized Justice or the Principle of Offense on dispositions requires ascertaining the relationships between legal variables—present offense and prior record—and dis-

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Statutorily defined aggravating and mitigating factors provide some discretionary basis for deviations from and modification of parole consideration dates. *See* CAL. ADMIN. CODE tit. 15, § 4945(h)-(j) (1987).

[294] CAL. ADMIN. CODE tit. 15, §§ 4951-4957 (1987).

[295] *See id.* California's administrative laws classify juvenile offenses in the following seven categories, with their respective suggested periods until parole: Category I Offenses: first and second degree murder—seven years; Category II Offenses: manslaughter, rape—four years; Category III Offenses: armed robbery, armed assault, armed burglary—three years; Category IV Offenses: vehicular manslaughter, assault, burglary, drugs—two years; Category V Offenses: robbery, theft—eighteen months; Category VI Offenses: weapons, unlisted felonies—one year; Category VII Offenses: technical violations of parole, any offenses not listed in Categories I through VI—less than one year.

[296] *See, e.g.*, PRIVATE SECTOR TASK FORCE ON JUVENILE JUSTICE, *supra* note 287, at 2.

[297] *Id.* "[The Youth Administration] institutions are filled beyond capacity . . . . The primary pressure feeding population levels . . . is length of stay. The mean length of stay in [Youth Administration] institutions for 1985 was 17.1 months, up from 12.9 months five years earlier." *Id.*

[298] *Id.* at 73. One report on California's juvenile justice system recommended that

> [t]he legislature recognize punishment, along with treatment and incapacitation, as an appropriate juvenile justice system objective and charge the [Sentencing] Commission with the gradual development of prescriptive sentencing guidelines as a means of articulating the appropriate balance between these competing sentencing objectives and available resources. Such guidelines are now used for the sentencing of juveniles in Washington and for adults in Minnesota.

P. GREENWOOD, A. LIPSON, A. ABRAHAMSE & F. ZIMRING, YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA: REPORT TO THE LEGISLATURE vi-vii (1983).

position, and social characteristics or "extra-legal" variables—race and social class—and dispositions. However, "even a superficial review of the relevant literature leaves one with the rather uncomfortable feeling that the only consistent finding of prior research is that there are no consistencies in the determinants of the decisionmaking process."[299] The studies, having been conducted in different jurisdictions at different times and employing different methodologies and theoretical perspectives, yield contradictory results;[300] however, two general findings emerge from this research. The first is that the Principle of Offense accounts for most of the variance in dispositions that can be explained.[301] The second is that after controlling for present offense and prior record, discretionary individualization is often synonymous with racial discrimination.[302]

Juvenile court judges answer the question "what should be done with this child?" in part, by reference to explicit statutory mandates. The discretionary decisionmaking powers of the judge, however, are also tempered by practical and bureaucratic considerations.[303] Administrators of justice in juvenile courts enjoy greater discretion than do their adjudicatory counterparts at the adult criminal level because of the presumed need in juvenile justice proceedings to look beyond the present offense to the "best interests of the child" and because of paternalistic assumptions about the ability to rehabilitate children.[304]

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[299] Thomas & Sieverdes, *Juvenile Court Intake: An Analysis of Discretionary Decisionmaking*, 12 CRIMINOLOGY 413, 416 (1975).

[300] For methodological critiques of prior juvenile sentencing research, see Fagan, Slaughter & Hartstone, *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224, 229-30 (1987); McCarthy & Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41, 43-47 (1986).

[301] *See, e.g.*, Ferdinand & Luchterland, *Inner-City Youth, The Police, The Juvenile Court, and Justice*, 17 SOC. PROB. 510 (1970); McCarthy & Smith, *supra* note 300; McEachern & Bauzer, *Factors Related to Dispositions in Juvenile Police Contacts*, in JUVENILE GANGS IN CONTEXT 148 (M. Klein & B. Myerhoff eds. 1964); Terry, *Discrimination in the Handling of Juvenile Offenders by Social Control Agencies*, 4 J. RES. CRIME & DELINQ. 218 (1967) [hereinafter *Discrimination by Agencies*]; Terry, *The Screening of Juvenile Offenders*, 58 J. CRIM. L. CRIM. & P.S. 173 (1967) [hereinafter *Screening of Juvenile Offenders*]; Thomas & Cage, *The Effect of Social Characteristics on Juvenile Court Dispositions*, 18 SOC. Q. 237 (1977).

[302] *See, e.g.*, Fagan, Slaughter & Hartstone, *supra* note 300; Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173 (1987) [hereinafter *Incarceration of Minority Youth*]; McCarthy & Smith, *supra* note 300.

[303] *See, e.g.*, M.A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE (1982); A. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE (1968); R. EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURTS (1969); D. MATZA, *supra* note 8; *see also infra* notes 328-29 and accompanying text.

[304] Feld, *supra* note 32, at 587. Two scholars note that the juvenile justice

The relevance given to individualized justice in the adjudication of juvenile offenses, however, raises concerns about the impact of discretionary decisionmaking. Lower-class and nonwhite youths are substantially overrepresented in the juvenile justice system.[305] Basing the severity of a juvenile's sentence on social characteristics such as race or socioeconomic status raises issues of fairness, equality, and justice.[306] When practitioners of "individualized justice" base discretionary judgments on social characteristics or race, rather than legal variables, their decisions frequently redound to the disadvantage of the poor and minorities and lead to charges of discrimination.[307] This discrimination is reflected in differential processing and more severe sentencing of minority youths relative to whites.[308]

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system differs significantly from its adult counterpart in its express incorporation of highly differential processing of alleged delinquents. The separate juvenile court system emerged from a pervasive belief that the goal of rehabilitation best could be served by permitting juvenile courts to maximize flexibility, informality, and discretion, especially at the dispositional or sentencing stage. Thus, the dispositional alternatives available to the juvenile court are extremely broad.

Thomas & Fitch, *An Inquiry into the Association Between Respondents' Personal Characteristics and Juvenile Court Dispositions*, 17 WM. & MARY L. REV. 61, 64 (1975).

[305] *See, e.g.*, Dannefer & Schutt, *Race and Juvenile Justice Processing in Court and Police Agencies*, 87 AMER. J. SOC. 1113 (1982); Fagan, Slaughter & Hartstone, *supra* note 300; *The Incarceration of Minority Youth*, *supra* note 302; McCarthy & Smith, *supra* note 300; Thornberry, *Race, Socioeconomic Status and Sentencing in the Juvenile Justice System*, 64 J. CRIM. L. & CRIMINOLOGY 90 (1973).

[306] Thornberry, *Sentencing Disparities in the Juvenile Justice System*, 70 J. CRIM. L. & CRIMINOLOGY 164 (1979).

[307] Feld, *supra* note 32, at 591. Professor Thornberry notes that

> [s]uch a finding [of discrimination] would raise questions about the ability of the American criminal justice system to dispense fair and equitable justice for all. In turn, that unfairness would raise questions about the ability of correctional institutions to rehabilitate offenders who doubt the legitimacy of the system because of its perceived bias.

Thornberry, *supra* note 306, at 164; *see also* Chiricos, Jackson & Waldo, *Inequality in the Imposition of a Criminal Label*, 19 SOC. PROBS. 553 (1972); Green, *Race, Social Status, and Criminal Arrest*, 35 AM. SOC. REV. 476 (1970). *See generally* AMERICAN FRIENDS SERV. COMM., *supra* note 61. Research analyzing earlier studies that found racial differentials in sentencing practices have found "clear and consistent evidence of a racial differential operating at each decision level. Moreover, the differentials operate continuously over various decision levels to produce a substantial accumulative racial differential which transforms a more or less heterogeneous racial arrest population into a homogeneous institutionalized black population." Liska & Tausig, *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decision-Making for Juveniles*, 20 SOC. Q. 197, 205 (1979); *accord* Fagan, Slaughter & Hartstone, *supra* note 300; McCarthy & Smith, *supra* note 300.

[308] *See, e.g.*, Bishop & Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. CRIME & DELINQ. 242 (1988); Fagan, Slaughter & Hartstone, *supra* note 300; *Incarceration of Minority Youth*, *supra* note 302; McCarthy & Smith, *supra* note 300, at 59.

An alternative explanation for the disproportionate overrepresentation of minorities in the juvenile justice process is that, despite the juvenile system's nominal commitment to individualized justice, dispositional decisions are based on the Principle of Offense rather than on an assessment of individual needs. If that is the case, then overrepresentation of minority and lower-class youths in the juvenile system may be attributed to real differences in rates of delinquent activity by these youths.[309]

An obvious question, then, is to what extent legal factors—present offense and prior record—or social characteristics—race, sex, or social class—influence judges' dispositional decisionmaking. Evaluations of dispositional practices suggest that the Principle of Offense pervades practical decisionmaking throughout the juvenile justice system, whether the decision is made by the police, during intake, or at adjudication.[310] Historically, the

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[309] One group of observers note that "official delinquents," those whose contacts with law enforcement personnel resulted in official records, are disproportionately concentrated in poor and minority communities and that in every socioeconomic category black youths engaged in delinquency to a greater extent than their white counterparts. *See* W. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 246 (1972); *see also* Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93 (1978) (racial differentials in criminal justice system may reflect real differences in behavior rather than effects of discriminatory decisionmaking). Alternatively, others have concluded that

> it does not appear that differences in incarceration rates between racial groups can be explained by differences in the proportions of persons of each racial group that engage in delinquent behavior. Even if the slightly higher rates for more serious offenses among minorities were given more importance than is statistically indicated, the relative proportions of whites and minorities involved in delinquent behavior could not account for the observed differences in incarceration rates.

Huizinga & Elliot, *Juvenile Offenders: Prevalence, Offender Incidence, and Arrest Rates by Race*, 33 CRIME & DELINQ. 206, 212 (1987); *see also Incarceration of Minority Youth*, *supra* note 301, at 196 (noting that "differences in incarceration rates by race cannot be explained by the proportions of each racial group that engage in delinquent behavior").

[310] A number of individuals make dispositional decisions concerning the welfare and status of a youth engaged in the juvenile justice process. Police officers may refer a case to intake for formal processing, adjust it informally on the street or at the station-house, or divert it. Intake, in turn, may refer a youth to the juvenile court for formal adjudication or dispose of the case through informal supervision or diversion. Finally, even after formal adjudication, the juvenile court judge may choose from a wide array of dispositional alternatives ranging from continuing a case without a finding of delinquency, probation, or commitment to a state training school. *See generally* S. FOX, CASES AND MATERIALS ON MODERN JUVENILE JUSTICE (1972); F. MILLER, R. DAWSON, G. DIX & R. PARNAS, *supra* note 141; J. SENNA & L. SIEGEL, JUVENILE LAW (1976); Harris, *Is the Juvenile Justice System Lenient?*, in CRIMINAL JUSTICE ABSTRACTS 104 (March, 1986).

Recent research indicates that the dispositional decisionmaking process is cumula-

juvenile justice system premised its dispositional decisions on the characteristics of the offender. Contemporary research, however, suggests the system has shifted its emphasis from the characteristics of the offender to the offense committed. As a corollary, juvenile courts increasingly seek formal rationality in decisionmaking by using general rules applicable to categories of cases rather than pursuing individualized substantive justice.[311]

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tive; decisions made by the initial participants—police or intake—affect the types of decisions made by subsequent participants. *See, e.g.*, Barton, *Discretionary Decision-Making in Juvenile Justice*, 22 CRIME & DELINQ. 470 (1976); Bishop & Frazier, *supra* note 308; McCarthy & Smith, *supra* note 300; Phillips & Dinitz, *Labelling and Juvenile Court Dispositions: Official Responses to a Cohort of Violent Juveniles*, 23 SOC. Q. 267 (1982).

Assessing judicial decisionmaking requires familiarity with decisionmaking by other juvenile justice actors. Evaluations of police dispositional decisionmaking are reported by: Bittner, *Policing Juveniles: The Social Context of Common Practice*, in PURSUING JUSTICE FOR THE CHILD 69 (M. Rosenheim ed. 1976); Black & Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970); Ferdinand & Luchterhand, *Inner-City Youth, the Police, the Juvenile Court, and Justice*, 17 SOC. PROB. 510 (1970); Hohenstein, *Factors Influencing the Police Disposition of Juvenile Offenders*, in DELINQUENCY: SELECTED STUDIES 138 (T. Sellin & M. Wolfgang eds. 1969); McEachern & Bauzer, *Factors Related to Dispositions in Juvenile Police Contacts*, in JUVENILE GANGS IN CONTEXT 148 (M. Klein & B. Myerhoff eds. 1964); Piliavin & Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206 (1964); *Discriminating by Agencies*, *supra* note 301, at 218; *The Screening of Juvenile Offenders*, *supra* note 301, at 173; Thornberry, *supra* note 305; Weiner & Willie, *Decisions by Juvenile Officers*, 77 AM. J. SOC. 199 (1971); Werthman & Piliavin, *Gang Members and the Police*, in THE POLICE 56 (D. Bordua ed. 1970); Williams & Gold, *From Delinquent Behavior to Official Delinquency*, 20 SOC. PROB. 209 (1972).

If the police refer a case to juvenile court, typically an intake probation officer will screen it to decide whether to process the case formally or informally. About half of the cases referred to intake are closed or informally adjusted. *See* E. NIMICK, H. SNYDER, D. SULLIVAN & N. TIERNEY, JUVENILE COURT STATISTICS 1982 12 (1985). Between 1957 and 1982, the percentage of delinquency referrals resulting in formal petitions has ranged from 41% to 54%. In 1982, 44% of referrals resulted in formal petitions, the lowest rate in a decade. Some research suggests that a child's social characteristics, demeanor, or race, rather than the referral offenses, influence intake decisionmaking, thereby amplifying racial and class disparities in processing youths referred to juvenile court. *See* Bell & Lang, *The Intake Dispositions of Juvenile Offenders*, 22 J. RES. CRIME & DELINQ. 309 (1985); Fagan, Slaughter & Hartstone, *supra* note 300; McCarthy & Smith, *supra* note 300; Thomas & Sieverdes, *supra* note 299, at 425-26; Thornberry, *supra* note 305, at 94; Williams & Gold, *supra*, at 299.

[311] *See, e.g.*, M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1954). Weber's typology of law distinguishes between formal legal rationality and substantive rationality. Formal rationality is characterized by the application to legal problems of explicit, universal rules. By contrast, substantive rationality prevails when decisions are made on the basis of principles not derived from the legal system but from some other authoritative source or belief system. *See*

A number of studies report that minority or lower-class youths receive more severe dispositions than white youths even after controlling for relevant legal variables.[312] One report notes that initial decisions as to screening, detention, charging, and adjudications are strongly influenced by the Principle of Offense. The report concludes, however, that as cases progress in the adjudicatory process, race and class directly affect dispositions, with minority youths receiving more severe sentences.[313] Another study, conducted with a control for legal and processing variables, found that a juvenile's race had a direct effect on decisions made at several processing junctures.[314] Others have concluded that when legal variables are held constant, the juvenile court's individualized justice "typically applies harsh sanctions to blacks, those who have dropped out of school, those in single parent or broken homes, [and] those from lower socioeconomic backgrounds . . . ."[315] A study of the impact of extralegal factors, particularly race, on

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generally J. INVERARITY, P. LAUDERDALE & B. FELD, *supra* note 4, at 112-16. Decisions made within the juvenile court system tend to be the result of Weberian substantive rationality.

> Decision-making in systems of substantive justice is guided by reference to a substantive goal or by the best decision in the individual case, not by the application of abstract rules. The ideal in the juvenile court has been one of "individualized" justice whereby each offender should be treated as unique and as deserving such treatment. The framework of relevant criteria of decision-making is far broader than only the "legal" factors relevant in adult courts, and encompasses a variety of social background variables that are indicative of the offender's personal, home, and community situations.

Horwitz & Wasserman, *Some Misleading Conceptions in Sentencing Research: An Example and Reformulation in the Juvenile Court*, 18 CRIMINOLOGY 411, 417 (1980); *see also* D. MATZA, *supra* note 8; A. PLATT, *supra* note 4; Schultz, *The Cycle of Juvenile Court History*, 19 CRIME & DELINQ. 457 (1973).

[312] *See, e.g.*, Arnold, *Race and Ethnicity Relative to Other Factors in Juvenile Court Dispositions*, 77 AM. J. SOC. 211 (1971); Thomas & Cage, *supra* note 301; Dannefer & Schutt, *supra* note 305, at 1129; Fagan, Slaughter & Hartstone, *supra* note 300; *Incarceration of Minority Youth*, *supra* note 302; McCarthy & Smith, *supra* note 300; Thomas & Fitch, *supra* note 304; Thornberry, *supra* note 306; *cf.* Carter, *Juvenile Court Dispositions: A Comparison of Status and Nonstatus Offenders*, 17 CRIMINOLOGY 341, 356 (1979) (finding social class bias at all levels of juvenile court disposition); Carter & Clelland, *A Neo-Marxian Critique, Formulation and Test of Juvenile Dispositions as a Function of Social Class*, 27 SOC. PROBS. 96 (1979) (finding discrimination against youths from unstable working class backgrounds.

[313] McCarthy & Smith, *supra* note 300.

[314] Bishop & Frazier, *supra* note 308, at 257-58. The study also reported indirect and cumulative effects of race on dispositional decisionmaking; noting, for example, that reliance on a juvenile's record of prior offenses implicates previous decisions influenced by a juvenile's race as well. *Id.* at 259.

[315] Thomas & Cage, *supra* note 301, at 250; *see also* Thomas & Fitch, *supra* note 304, at 82-83.

decisionmaking at six points in the juvenile process found that "minority youth receive consistently harsher dispositions."[316] The study concluded that

> [t]he evidence for racial discrimination . . . is compelling. Its sources may lie in the individual attitudes of decisionmakers in the system's independent agencies, but it is unlikely that these seemingly isolated decisionmakers of substantially different backgrounds would produce such consistent, systemic behaviors. Rather than a chance convergence of independent behaviors, they seem to reflect a sociological process, if not a generalized perspective, shared across decisionmakers of disparate backgrounds. Like other societal institutions, the justice system is not blind to ethnic and racial differences.[317]

Other research has found race affects only the dispositions of minor offenders, while for serious or repeat offenders, sentencing disparities between the races decline.[318] Contrary to expectations, a few studies report that white youths receive more severe dispositions than blacks.[319] Some studies report that substantive factors such as "family and school problems," along with legal criteria, explain variations in sentencing.[320] Summarizing this research, the Principle of Offense appears to be the most significant factor influencing juvenile court dispositions, with a substantial amount of sentencing variation related to a juvenile's race.[321]

The elevation of the Principle of Offense to a dispositional standard received tacit endorsement in 1967 from the report of the President's Com-

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[316] Fagan, Slaughter & Hartstone, *supra* note 300, at 252.

[317] *Id.* at 253.

[318] *See* Carter, *supra* note 312, at 355; Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263 (1980); Cohen & Kluegel, *Determinants of Juvenile Court Dispositions: Ascriptive and Achieved Factors in Two Metropolitan Courts*, 43 AM. SOC. REV. 162 (1978); Ferdinand & Luchterhand, *supra* note 310, at 521; *Screening of Juvenile Offenders*, *supra* note 301.

[319] *See, e.g.*, Ferster & Courtless, *Pre-Dispositional Data, Role of Counsel and Decisions in a Juvenile Court*, 7 LAW & SOC'Y REV. 195 (1972); Scarpitti & Stephenson, *Juvenile Court Dispositions: Factors in the Decision-Making Process*, 17 CRIME & DELINQ. 142 (1971).

[320] *See, e.g.*, Horwitz & Wasserman, *supra* note 311, at 421; Thomas & Fitch, *supra* note 304, at 77, 83.

[321] *See supra* notes 312-18 and accompanying text. Phillips and Dinitz report that in addition to present offense and the number of prior arrests, prior court responses tend to predict subsequent dispositions; there is a strong correlation between prior institutionalization and the probability of subsequent institutionalization independent of both past and present behavior. Phillips & Dinitz, *supra* note 310, at 275-76; *see also* Kowalski & Rickicki, *Determinants of Juvenile Postadjudication Dispositions*, 19 J. RES. CRIME & DELINQ. 66 (1982) (reporting that correctional administrators in a postadjudication context use present offense and prior record for making placements in institutions or the community).

mission on Law Enforcement and the Administration of Justice, which explicitly recognized the punitive character of juvenile court intervention.[322] Subsequently, several juvenile justice policy groups have recommended the replacement of indeterminate sentences with formal dispositional criteria and sentences proportional to the seriousness of the offense;[323] in short, a shift from substantive justice to formal legal rationality.

The elevation of the Principle of Offense has also received practical administrative impetus from bureaucratic imperatives—the desire of juvenile and criminal justice agencies to avoid scandal and unfavorable political and media attention. Several scholars have noted the constraint that "fear of scandal" imposes on juvenile court dispositions.[324] One such scholar has observed that

> juvenile court decision-making comes to be pervaded by a sense of *vulnerability* to adverse public reaction for failing to control or restrain delinquent offenders. . . . [Fear of scrutiny and criticism increases pressures] to impose maximum restraints on the offender—in most instances incarceration. Anything less risks immediate criticism. But more than this, it also exposes the court to the possibility of even stronger reaction in the future. For given any recurrence of serious illegal activity, former decisions that can be interpreted as "lenient" become difficult to defend.[325]

The Principle of Offense and scandal avoidance encourage formal and restrictive responses to the more serious forms of juvenile deviance.[326]

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[322] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 13, at 2:

> Court adjudication and disposition of [juvenile] offenders should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection. While rehabilitative efforts should be vigorously pursued in deference to the youth of the offenders and in keeping with a general commitment to individualized treatment of all offenders, the incapacitative, deterrent, and condemnatory aspects of the judgment should not be disguised.

[323] *See, e.g.*, INSTITUTE OF JUDICIAL ADMIN.-AM. BAR ASS'N, *supra* note 129, at 5.1-5.2; NATIONAL ADVISORY COMM. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 3.181 (1980).

[324] *See, e.g.*, M.A. BORTNER, *supra* note 303; A. CICOUREL, *supra* note 303; R. EMERSON, *supra* note 303; D. MATZA, *supra* note 8.

[325] Emerson, *Role Determinants in Juvenile Court*, in HANDBOOK OF CRIMINOLOGY 624 (D. Glaser ed. 1974); *see also* R. EMERSON, *supra* note 303.

[326] Matza notes that the juvenile court judge is

> ultimately responsible to the public. He will have to explain . . . why the 17-year-old murderer of an innocent matron was allowed to roam the streets, on probation, when just last year he was booked for mugging. This is no easy question to answer. Somehow, an invoking of the principle of individualized

"[W]hether a juvenile goes to some manner of prison or is put on some manner of probation . . . depends first, on a traditional rule-of-thumb assessment of the total risk of danger and thus scandal evident in the juvenile's current offense and prior record of offenses . . . ."[327]

Finally, juvenile courts necessarily develop bureaucratic strategies to reconcile their need for highly individualized assessments with their pursuit of often contradictory formal goals.[328]

> Time after time after time procedures emerge which permit officials in these organizations to classify and categorize those who come to their attention as swiftly and simply as they can. The form of these categorization processes is commonly defined by the types of information which organizations routinely capture as a basis for forming or, equally often, defending the decisions they are obligated to make.[329]

Because the present offense and the prior record of delinquency are among the types of information routinely and necessarily collected in juvenile court processing, it is hardly surprising that they provide a type of decisional rule.

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justice and a justification of mercy on the basis of accredited social-work theory hardly seems appropriate on these occasions.

D. MATZA, *supra* note 8, at 122.

[327] *Id.* at 125.

[328] Internal and external organizational factors constrain judicial autonomy. While exercising discretion, the judge

> is restricted by the peculiar bureaucratic setting in which it appears. His judgment and wisdom may reign but only precariously since he is simultaneously the manager of the court and must thus concern himself with public relations, internal harmony, efficient work flow, and the rest. . . . Within the limits set by the demands of time, efficiency, and work flow, the kadi's wisdom and judgment may operate. He must decide which portion of the wide frame of relevance to invoke in each case, and in every case he is subjected to the remaining cross-pressures; one calling for severity, the other for mercy; one emanating from far-off and occasional critics, the other from nearby and ever-present underlings with whom he must work; one irrelevant to the day-to-day administration of an efficient court, the other crucially relevant; but one representing what he takes to be public opinion, the other what he takes to be professional opinion; and one holding the sanction of public scandal, the other of professional criticism.

Id. at 122-23. In a quest to balance these internal and external considerations, the juvenile courts have restored the Principle of Offense, at least in part, as a form of decisional rule. Matza argues that

> [t]he court's solution [to its dispositional dilemma] contains two elements. One, the main part of the solution, is to more or less reinstore—*sub rosa*—the *principle of offense*. . . . [T]he concern with individual characteristics and with treatment is not completely surrendered by the court . . . but they are transformed. . . . The workable bureaucratic equivalents of the stress on extraordinary individual characteristics—equity—and the philosophy of treatment are the doctrines of *parental sponsorship* and *residential availability*.

Id. at 124-25 (emphasis in original).

[329] Marshall & Thomas, *Discretionary Decision-Making and the Juvenile Court*, JUV. & FAM. CT. J. 55-57 (1983).

A survey of juvenile sentencing practices in California reported that, despite claims of individualization, juvenile dispositions appear to be based primarily on the youth's present offense and prior record. The study concluded that

> comparisons of juvenile and adult sentencing practices suggest that juvenile and criminal courts in California are much more alike than statutory language would suggest, in the degree to which they focus on aggravating circumstances of the charged offense and the defendant's prior record in determining the degree of confinement that will be imposed.[330]

While legal variables exhibit a stronger statistical relationship to dispositions than do social variables, a substantial amount of variation in the sentencing of juveniles cannot be explained. Present offense and prior record are the best predictors of dispositions, yet they only account for approximately one-quarter of the variance in sentencing.[331] With respect to the large amount of unexplained variation, commentators have observed that "the juvenile justice process is so ungoverned by procedural rules and so haphazard in the attribution of relevance to any particular variables or set of variables that judicial dispositions are very commonly the product of an arbitrary and capricious decision-making process."[332] The absence of any explanatory relationship between legal or social variables and dispositions may be interpreted as true "individualized justice," where every child receives a unique disposition tailored to his or her individual needs. "Given the philosophy of the juvenile court system, this finding might be interpreted as quite positive in the sense that it could imply that judges consider a broad spectrum of both legal and social variables in their attempt to individualize decisions."[333] This discretionary "individualization" has important consequences, however, such as the disproportional affects of race on sentencing.

An equally plausible interpretation, however, is that there is no rationale

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[330] P. GREENWOOD, A. LIPSON, A. ABRAHAMSE & F. ZIMRING, YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 51 (1983). This study further reports:

> The evidence suggests that the juvenile system is becoming increasingly *punitive*, particularly for the more serious offenders. Between 1978 and 1981 the number of juveniles placed in secure county facilities jumped by 23 percent while CYA placements increased by more than 10 percent. All this is occurring at the same time that arrest rates for most crime categories are either leveling off or declining.

Id. (emphasis added).

[331] Feld, *supra* note 32, at 598-99; *see also* Clarke & Koch, *supra* note 318, at 286; Horwitz & Wasserman, *supra* note 311, at 411; Marshall & Thomas, *supra* note 329, at 57; Thomas & Cage, *supra* note 301, at 244; Thomas & Fitch, *supra* note 304, at 75.

[332] Marshall & Thomas, *supra* note 329, at 57.

[333] Thomas & Cage, *supra* note 301, at 244.

to dispositional decisionmaking; it consists of little more than intuition, guesswork, and hopes, constrained marginally by the youth's present offense and prior record. In such a case, individualization is simply a euphemism for arbitrariness and discrimination:

> [T]hese findings also suggest the possibility that those who share various social characteristics will be treated in a significantly different fashion from those drawn from other categories in the population; those against whom complaints are filed by one type of complainant will be treated differently than those who have engaged in comparable behavior, but whose offense has been brought to the attention of social control agencies by a different complainant; and those who come before one judge will be disposed of differently than those who appear before another judge, regardless of who they are or what their present and past offense record might be.[334]

A system of justice in which the most powerful explanatory variables—present offense and prior record—have a relatively low correlation to variations in sentencing remains highly discretionary and, perhaps, discriminatory. It means that there is substantial attenuation between a youth's criminal behavior and the severity of the disposition; minor offenders can receive much more severe dispositions than serious offenders. Similarly situated offenders, in terms of their present offense or prior record, can receive markedly dissimilar dispositions. To a substantial degree, the recent legislative changes summarized in Table I represent legislative uneasiness with the underlying premises of individualized justice, the idiosyncratic exercises of judicial discretion to achieve that goal, and the invidious inequities that result.

4. Summary of Changes in Juvenile Court Sentencing Practices

The preceding analysis of de jure and de facto juvenile justice sentencing practices demonstrates a very strong nationwide movement, both in theory and in practice, away from therapeutic, individualized dispositions toward determinate or mandatory sentences based on the Principle of Offense. This very strong trend has emerged only since the *McKeiver* decision. When *McKeiver* was decided in 1970, no states used determinate sentencing statutes, mandatory minimum sentencing statutes for serious juvenile offenders, or administratively promulgated sentencing and release guidelines. Today, nearly one-third of the states employ one or more of these sentencing strategies.

As indicated in Table I, in 1976, New York and Kentucky adopted designated felony legislation. In 1977, Washington adopted determinate sentencing guidelines for juveniles, and Colorado passed the first of a series of serious juvenile offender laws. The Washington experiment, with its exten-

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[334] *Id.*

sive evaluation research, provided a model for other jurisdictions. In 1979, Connecticut, Illinois, and North Carolina adopted serious offender sentencing legislation, and California's Youth Parole Board and offense-based release guidelines were passed. Since 1980, nine more states—Arizona, Arkansas, Delaware, Georgia, Minnesota, New Jersey, Ohio, Tennessee, and Virginia—have adopted either serious juvenile offender legislation, determinate sentencing guidelines, or administrative commitment and release guidelines.

Viewed as a whole, the various legislative and administrative changes and operational practices described thus far have eliminated virtually all of the significant distinctions between sentencing practices in the juvenile and adult criminal processes. The use of determinate sentences based on the present offense and prior record of the juvenile, whether de jure or de facto, calls into question any possible therapeutic "alternative purpose" for juvenile dispositions. The use of mandatory minimum statutes to sentence on the basis of the seriousness of the juvenile's offense avoids any reference to the offender's "real needs" or "best interests." The revision of purpose clauses in juvenile justice statutes, with greater emphasis placed on the integrity of the substantive criminal law or the need to protect public safety, eliminates even rhetorical support for the traditional rehabilitative goals of juvenile justice. These changes were succinctly summarized by a California court in *In re Javier A.*,[335] which concluded that "the purposes of the juvenile process have become more punitive, its procedures formalistic, adversarial and public, and the consequences of conviction much more harsh."[336]

One of the most comprehensive studies of state juvenile sentencing practices reports:

> Numerous states have, by statute, adopted determinate sentencing policies for serious or violent offenders, and several states have now either adopted determinate sentence statutes or have created administrative release guidelines that establish explicit time or ranges of time to be served for any delinquent who has committed an act that would be a crime if committed by an adult.
>
> *These policies contradict some of the basic assumptions of the original juvenile court: that juvenile offenders should be handled quite differently than adult offenders, that the juvenile court and youth corrections are designed to operate and therefore function in the best interest of the child, that the objective of the juvenile justice system is rehabilitation of the youth and not applying fixed time of punishment, and that rehabilitation is an open-ended process requiring treatment of each youth as an individual, thus "time served," as it were, is indeterminate depending on the successful rehabilitation of the youth.*[337]

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[335] 159 Cal. App. 3d 913, 206 Cal. Rptr. 386 (1984).

[336] *Id.* at 963-64, 206 Cal. Rptr. at 421.

[337] R. COATES, M. FORST & B. FISHER, INSTITUTIONAL COMMITMENT AND RELEASE DECISION-MAKING FOR JUVENILE DELINQUENTS: AN ASSESSMENT OF DE-

In short, these changes call into question the underlying rationale of the *McKeiver* decision that juvenile dispositions are for the "alternative purpose" of rehabilitation.

C. *"Get Tough" Legislation and Conditions of Confinement in Juvenile Institutions*

Formal legislative and administrative sentencing criteria, as well as the operational practices they foster, contradict the traditional individualized, offender-oriented sentencing rationales of the juvenile court. This conflict is further reflected in the conditions of confinement in the institutions to which juvenile offenders are committed for rehabilitation. Studying the institutional reality of juvenile corrections, the supposed locus of "rehabilitation," advances the punishment versus treatment inquiry.

Examining juvenile correctional facilities helps to determine whether institutional confinement constitutes punishment or a therapeutic "alternative purpose." Indeed, it was the reality of institutional conditions that motivated the Court in *Gault* to afford juveniles procedural safeguards. There, the Supreme Court noted:

> The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine, and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[338]

In *Gault*, the Court belatedly recognized conditions that have long persisted. The *Gault* Court's emphasis on incarceration and institutional confinement is relevant to the issue of punishment and underlies its fifth amendment holding. The Court has never held that involuntary confinement per se constitutes punishment.[339] The *Gault* Court, however, correctly perceived incarceration per se as a severe penalty, a substantial deprivation of autonomy, and a continual reminder of one's delinquent status, all of which are punitive in nature.

The contradictions between the rhetorical affirmation of rehabilitation and

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TERMINATE AND INDETERMINATE APPROACHES—A CROSS-STATE ANALYSIS 1 (1985) (emphasis added).

[338] *In re* Gault, 387 U.S. 1, 27 (1967) (footnotes omitted) (quoting in part Holmes' Appeal, 379 Pa. 599, 616, 109 A.2d 523, 530 (1954) (Musmanno, J., dissenting)).

[339] *See, e.g.*, Addington v. Texas, 441 U.S. 418, 428 (1979) ("In a civil commitment state power is not exercised in a punitive sense."); Allen v. Illinois, 478 U.S. 364, 374 (1986) ("We . . . cannot say that the conditions of petitioner's confinement themselves amounted to 'punishment.' ").

the reality of custodial institutional confinement have characterized the juvenile court since its inception. Rothman's study of the early juvenile training schools describes institutions that not only failed to rehabilitate but were scarcely distinguishable from their adult penal counterparts.[340] Schlossman provides a similarly pessimistic account of the reality of juvenile correctional programs under the aegis of Progressivism.[341] Indeed, the juvenile court's lineage of punitive, custodial confinement in the name of rehabilitation can be traced back to its institutional precursors in the Houses of Refuge.[342]

Gault's criticism of the adequacy of juvenile correctional programs is not simply a historical artifact. Evaluations of juvenile correctional facilities in the years since *Gault* reveal a continuing gap between the rhetoric of rehabilitation and its punitive reality.[343] The author's study of juvenile institutions in Massachusetts describes facilities in which staff physically abused inmates and were frequently powerless to prevent the worst aspects of inmate abuse by other inmates.

> [T]he lives of the low-status inmates in the custody-oriented cottages were miserable. . . . The direct physical assaults and abuse were substantial and real. The attendant psychological trauma was equally apparent. These victims of terrorization were afraid of other inmates. Their fear emboldened others who, by their aggression, reinforced their fear.[344]

A study in Ohio reveals a similarly violent and oppressive institutional environment for the "rehabilitation" of young delinquents.[345]

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[340] *See* D. ROTHMAN, *supra* note 2, at 261-89.

[341] S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT (1977).

[342] *See, e.g.*, J. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA (1971); R. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825-1940 276 (1973); R. PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE (1969); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 235 (1971).

[343] *See generally* C. BARTOLLAS, S. MILLER & S. DINITZ, JUVENILE VICTIMIZATION 259 (1976); B. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977); S. LERNER, BODILY HARM: THE PATTERN OF FEAR AND VIOLENCE AT THE CALIFORNIA YOUTH AUTHORITY (1986); D. STREET, R. VINTER & C. PERROW, ORGANIZATION FOR TREATMENT: A COMPARATIVE STUDY OF INSTITUTIONS FOR DELINQUENTS 8 (1966); K. WOODEN, WEEPING IN THE PLAYTIME OF OTHERS: AMERICA'S INCARCERATED CHILDREN 97 (1976); Feld, *A Comparative Analysis of Organizational Structure and Inmate Subcultures in Institutions for Juvenile Offenders*, 27 CRIME & DELINQ. 336, 352-56 (1981); Poole & Regoli, *Violence in Juvenile Institutions: A Comparative Study*, 21 CRIMINOLOGY 213, 213 (1983).

[344] B. FELD, *supra* note 343, at 160.

[345] *See* C. BARTOLLAS, S. MILLER & S. DINITZ, *supra* note 343, at 152-64.

Extensive scrutiny of the Texas juvenile correctional system during the 1970s revealed patterns of staff and inmate violence and the subjection of inmates to degrading make-work tasks.[346] The California Youth Authority conducted extensive reviews of its institutions and concluded that "a young man convicted of a crime cannot pay his debt to society safely. The hard truth is that the CYA staff cannot protect its inmates from being beaten or intimidated by other prisoners."[347] The research attributed the violence to inappropriately designed facilities, inadequate staffing, and substantial overcrowding, all of which "promote the formation and ascendancy of prison gangs."[348] Despite the rhetoric of rehabilitation, the daily reality of juvenile offenders confined in many "treatment" facilities is one of staff and inmate violence, predatory behavior, and all of the attendant punitive consequences of custodial incarceration.

During the period of these post-*Gault* evaluation studies, a number of lawsuits challenged the conditions of confinement in juvenile correctional facilities, alleging that the conditions violated the committed inmates' "right to treatment" and inflicted "cruel and unusual punishment."[349] The "right to treatment" is a logical extension of the state's invocation of its *parens patriae* power to intervene for the purported benefit of the individual.[350] In settings other than juvenile correctional facilities, such as institutions for the mentally ill and mentally retarded, states confine individuals "for their own good" without affording them the procedural safeguards required for criminal incarceration. In all of these settings, it is the promise of benefit—a therapeutic "alternative purpose"—that justifies the less stringent procedural safeguards.[351] Thus, failing to deliver the promised treatment results

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[346] *See* Guggenheim, *A Call to Abolish the Juvenile Justice System*, 2 CHILDREN'S RTS. REP. No. 9, June 1978, at 6-7.

[347] S. LERNER, *supra* note 343, at 12.

[348] *Id.* at 14.

[349] *See* Feld, *supra* note 2, at 260 n.461; Feld, *supra* note 32, at 535-39.

[350] Incarcerating an individual without treatment is punishment; subjecting a person to punishment requires full criminal procedural safeguards. Thus incarceration without the benefit of criminal procedural safeguards is justified only if rehabilitative treatment is forthcoming. *See generally* Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 752-53 (1969) (commenting on the judicial need for a "right to treatment"); Goodman, *Right to Treatment: The Responsibility of the Courts*, 57 GEO. L.J. 680, 697 (1969) (arguing that the promise of treatment must be fulfilled in a *parens patriae* proceeding); Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 850 (1969) (noting that broken *parens patriae* promises gave the "right to treatment" new life); Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1316-57 (1974) (examining rights and obligations of individuals who are involuntarily committed).

[351] *See* Donaldson v. O'Connor, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring); Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.O. Ala. 1971).

in simple custodial confinement—punitive incarceration and a loss of liberty—which is the essence of a due process violation.[352]

The "right to treatment" and "cruel and unusual punishment" cases provide another view of the reality of juvenile corrections. In *Nelson v. Heyne*,[353] the court found that inmates were routinely beaten with a "fraternity paddle," injected with psychotropic drugs for social control purposes, and deprived of minimally adequate care and individualized treatment. In *Inmates of Boys' Training School v. Affleck*,[354] the court found inmates confined in dark, cold, dungeon-like cells in their underwear, routinely locked in solitary confinement, and subjected to a variety of punitive practices.[355] In *Morales v. Turman*,[356] the court found numerous instances of physical brutality and abuse, including hazing by staff and inmates, staff-administered beatings, exposure of inmates to tear gas, homosexual assaults, extensive use of solitary confinement, repetitive and degrading make-work, and minimal clinical services.[357] In *Morgan v. Sproat*,[358] the court found that youths were confined in padded cells with no windows or furnishings and only flush holes for toilets, and denied access to all services, programs, or materials except a Bible.[359] In *State v. Werner*,[360] the court found that inmates were locked in solitary confinement, beaten and sprayed

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[352] *See* Feld, *supra* note 32, at 535-39. The constitutional rationales that underlie the civil commitment cases have been invoked to secure treatment for juveniles incarcerated in state training schools. *See* Nelson v. Heyne, 491 F.2d 352, 358-60 (7th Cir. 1974) (holding that juveniles have a fourteenth amendment due process right to rehabilitative treatment), *cert. den.*, Heyne v. Nelson, 417 U.S. 976 (1974); Martarella v. Kelley, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (noting that state-imposed detention under *parens patriae* must include adequate treatment to meet the constitutional requirement of due process and prohibition of cruel and unusual punishment); Inmates of Boy's Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972) (holding that due process requires post-adjudicative institutionalization in the juvenile justice system to further the goal of rehabilitation); Note, *Recent Developments—Limits on Punishment and Entitlement to Rehabilitative Treatment of Institutionalized Juveniles:* Nelson v. Heyne, 60 VA. L. REV. 864, 865 (1974) (discussing the growing judicial trend towards the recognition of the rights of institutionalized youths).

[353] 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974), *cert. den.*, Heyne v. Nelson, 417 U.S. 976 (1974). For a discussion of *Nelson v. Heyne*, see Comment, *Constitutional Right to Treatment for Juveniles Adjudicated to be Delinquent*—Nelson v. Heyne, 12 AM. CRIM. L. REV. 209 (1974); Note, *supra* note 352.

[354] 346 F. Supp. 1354 (D.R.I. 1972).

[355] *Id.* at 1358-62.

[356] 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977), *reh'g den.*, 430 U.S. 988 (1977).

[357] *Id.* at 72-85.

[358] 432 F. Supp. 1130 (S.D. Miss. 1977).

[359] *Id.* at 1138.

[360] 161 W. Va. 192, 242 S.E.2d 907 (1978).

with mace by staff, required to scrub floors with a toothbrush, and subjected to punitive practices such as standing and sitting for prolonged periods without changing position.[361]

Unfortunately, these cases are not atypical, as the list of judicial opinions documenting institutional abuses demonstrates.[362] Rehabilitative euphemisms, such as "providing a structured environment" and a therapeutic "alternative purpose," cannot disguise the punitive reality that characterizes confinement in a juvenile institution. Although not as uniformly bad as adult prisons, juvenile correctional facilities are certainly not so benign and therapeutic as to justify depriving those who face commitment to them of procedural safeguards. While the prospect of incarcerating juveniles in barbarous adult facilities is not appealing, the well-documented prevalence of violence, aggression, and homosexual rape in juvenile facilities is hardly consoling.[363]

Evaluations of juvenile corrections have consistently found violent inmate subcultures to be a function of institutional security arrangements; the more authoritarian controls are imposed to facilitate security, the higher the level of covert inmate violence within the subculture.[364] Juveniles sentenced to long terms under "get tough" legislation are the most serious and chronic offenders, yet facilities designed to handle them often suffer from limited physical mobility, inadequate program resources, and intense interaction among the most problematic youths in the system. The result is a situation that can easily give rise to a juvenile corrections "warehouse" with all of the worst characteristics of adult penal incarceration.[365]

The changes in juvenile court sentencing legislation have exacerbated all of the deleterious side effects that institutional overcrowding produces.[366] Changing sentencing practices without simultaneously accounting for their impact on the correctional system is a prescription for disaster.

> Not only were more youth being sent to training schools, they were also staying longer. Whereas training school average length of stay declined from 260 days in 1974 to 238 in 1979, length of stay rose back up to 256 days by 1982. . . .

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[361] *Id.* at 196-97, 242 S.E.2d at 909-10.

[362] *See, e.g.*, Krisberg, Schwartz, Litsky & Austin, *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5, 32 (1986) (summarizing additional unreported cases and concluding that there is "growing evidence that harsh conditions of confinement continue to plague juvenile detention centers and training schools").

[363] *See, e.g.*, C. BARTOLLAS, S. MILLER & S. DINITZ, *supra* note 343; B. FELD, *supra* note 343; H. POLSKY, COTTAGE SIX—THE SOCIAL SYSTEM OF DELINQUENT BOYS IN RESIDENTIAL TREATMENT 55-68 (1962).

[364] *See, e.g.*, B. FELD, *supra* note 343, at 132-38, 163-69; D. STREET, R. VINTER & C. PERROW, *supra* note 343, at 199.

[365] *See, e.g.*, Rolde, Mack, Scherl & Macht, *The Maximum Security Institution as a Treatment Facility for Juveniles*, in JUVENILE DELINQ. 437 (J. Teele ed. 1970).

[366] *See supra* notes 149-50, 245-47, 296-98 and accompanying text.

> . . . [T]he proportion of minority youth in the nation's training schools has [also] increased. In 1977 whites made up 53% of the public training school population; by 1982 the proportion of whites in training schools had declined to 46%.[367]

Longer terms of confinement in custodial warehouses increasingly populated by minority youths is hardly the therapeutic "alternative purpose" envisioned in *McKeiver*.

IV. PUNISHMENT, TREATMENT, AND THE DIFFERENCE IT MAKES—THE IMPLICATIONS OF CHANGING SENTENCING PRACTICES FOR JUVENILES AND JUSTICE

The shift in juvenile sentencing strategies from the offender to the offense and from treatment to punishment has implications for the juvenile court as an institution as well as for juveniles and justice. The explicit emphasis on punishment implicates underlying assumptions about youthful culpability and criminal responsibility. Acknowledging that punishment plays an increasing, if not dominant, role in juvenile court sentencing practices raises issues of procedural justice that the Court in *McKeiver* conveniently ignored.

A. *Juveniles' Criminal Responsibility—Offense-Based Sentencing Regimes, Youthful Culpability, and Criminal Responsibility*

The shift from indeterminate to determinate sentences based on characteristics of the offense rather than the offender requires a reassessment of the criminal responsibility of young people. The imposition of substantial penalties in juvenile court, as well as the execution of juveniles waived to and convicted in criminal courts, provides a stark indicator of changes in attitudes about the criminal responsibility of adolescents.[368]

The juvenile court, as originally conceived, was premised on the immaturity and irresponsibility of children. The deterministic assumptions of positivism and the view that juveniles lack criminal capacity followed from

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[367] Krisberg, Schwartz, Litsky & Austin, *supra* note 362, at 23; *see also* JUVENILE JUSTICE BULLETIN, CHILDREN IN CUSTODY: PUBLIC JUVENILE FACILITIES 1987 (Oct. 1988) (noting that minority youths comprise more than half the juveniles in public custody facilities).

[368] The most dramatic examples of attributing criminal responsibility to youths arise in the cases in which juveniles convicted of serious crimes may receive capital punishment in adult courts. *See, e.g.*, Thompson v. Oklahoma, 108 S. Ct. 2687 (1987) (vacating death sentence of a juvenile who committed murder at age 15); Eddings v. Oklahoma, 455 U.S. 104 (1982) (vacating death sentence of a juvenile who committed murder at age 16). *See generally* V. STREIB, DEATH PENALTY FOR JUVENILES (1987); Feld, *supra* note 4, at 487-99 (discussing the waiver of juvenile offenders for criminal prosecution).

the earlier common law's infancy mens rea defense.[369] Because criminal liability is premised on rational actors who make blameworthy choices and are responsible for the consequences of their acts, the common law recognized and exempted from punishment categories of persons who lacked the requisite moral and criminal responsibility.[370] Children less than seven years old were conclusively presumed to lack criminal capacity, while those fourteen years of age and older were treated as fully responsible. Between the ages of seven and fourteen years, there was a rebuttable presumption of criminal incapacity.[371] Juvenile court legislation simply extended by a few years the general presumption of youthful criminal incapacity.

The emergence of the Principle of Offense in sentencing statutes challenges the juvenile court's basic assumptions about young peoples' lack of criminal responsibility.[372] Such legislation constitutes a legislative judgment that young people are just as responsible, culpable, and blameworthy as

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[369] *See generally* Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 659-61 (1970) (examining the infancy and insanity defenses under the common law); McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J. L. REF. 181, 184-87 (1977) (describing the relationship between the mens rea requirement and the juvenile's capacity to form intent); Walkover, *The Infancy Defense In the New Juvenile Court*, 31 UCLA L. REV. 503 (1987) (proposing that the state have the burden of proving that a seven to fourteen-year-old defendant had the capacity to understand the wrongfulness of his conduct); Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DEN. L.J. 485 (1983); *see also supra* notes 62-65 and accompanying text.

[370] *See* Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 274 (1968).

[371] *See, e.g.*, W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 46, at 351 (1972); Fox, *supra* note 369, at 660; Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAM. L. 121 (1965); McCarthy, *supra* note 369, at 184-85; Weissman, *supra* note 369, at 490. Kadish, analyzing the insanity and infancy defense, explains that

> [i]n requiring *mens rea* in the sense of legal responsibility, the law absolves a person precisely because his deficiencies of temperament, personality or maturity distinguish him so utterly from the rest of us to whom the law's threats are addressed that we do not expect him to comply.

Kadish, *supra* note 370, at 275.

[372] The issue of the criminal responsibility of youths should be seen in the broader context of deserved punishments and the tension between retributivist and utilitarian rationales. *See generally* PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-70 (1968); H.L.A. HART, *supra* note 50 (describing criminal punishment "as a compromise between distinct and partly conflicting principles"); N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982) (examining the criminal law's treatment of the responsibility of the mentally ill); Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983) (discussing the justifications for punishment); Weinreb, *Dessert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986); Levenbook, *Responsibility and the Normative Order Assumption*, 49 LAW & CONTEMP. PROBS. 81 (1986).

their somewhat older counterparts; therefore, they are just as deserving of punishment.[373]

The extent to which young offenders, like their adult counterparts, deserve punishment hinges on the meaning of *culpability*. The underlying rationale of deserved punishments—"just deserts"—derives from Von Hirsh's writings in moral philosophy.[374] The notion of punishment as censure, condemnation, and blame is central to the contemporary "just deserts" theory, which explicitly addresses only adult offenders. "[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it."[375] Penalties proportionate to the seriousness of the crime reflect the connection between the nature of the conduct and its blameworthiness.

While the principle of commensurate punishment apportions sanctions—condemnation and blame—in scale with the seriousness of the offense, it shifts the analytical focus to the meaning of seriousness. The seriousness of an offense is the product of two components—harm and culpability.[376] Evaluations of harm focus on the degree of injury inflicted, risk created, or value taken.[377] When assessing the harmfulness of a criminal act, the age of the perpetrator is of little consequence.

Assessments of seriousness, however, also include the quality of the actor's choice (mens rea) to engage in the conduct that produced the harm. It is with respect to the culpability of choices—the blameworthiness of acting in a particular harm-producing way—that the issue of youthfulness becomes especially troublesome.

Psychological research concerning legal socialization indicates that young people move through developmental stages of cognitive functioning with respect to legal reasoning, internalization of social and legal expectations, and ethical decisionmaking.[378] This developmental sequence and the

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[373] *See, e.g.*, E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 173-75 (1975) (arguing that juveniles should be punished under the same laws as adults).

[374] *See, e.g.*, A. VON HIRSCH, *supra* note 53; A. VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985).

[375] A. VON HIRSCH, *supra* note 53, at 48; *see also* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

[376] A. VON HIRSCH, *supra* note 52, at 79.

[377] *Id. See generally* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 212-22 (2d ed. 1960) (describing "harm" and its role in penal theory).

[378] *See* Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347 (D. Goslin ed. 1969) (presenting a social-psychological development model to analyze the legal reasoning of the individual); J. PIAGET, THE MORAL JUDGEMENT OF THE CHILD (1932); Tapp & Kohlberg, *Developing Senses of Law and Legal Justice*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 90 (J. Tapp & F. Levine eds. 1977); Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974).

changes in cognitive processes are strikingly parallel to the imputations of responsibility associated with the common-law infancy defense. Developmental psychology research indicates that individuals acquire most of the legal and moral values and reasoning capacity that will guide their behavior through later life by the age of fourteen.[379]

If a youth fourteen years of age or older knows "right from wrong," that is, possesses the requisite mens rea, then the courts may find the juvenile as criminally responsible as any adult offender facing the same charges. In the mens rea-as-capacity formulation, if one is criminally responsible for making blameworthy choices, then one deserves the same punishment as any other criminal actor making comparable choices.[380] Mens rea as a criminal law grading principle is characteristically binary; it is either present or not.[381] In theory, there should be no special doctrinal protections for youths older than fourteen who are tried in criminal courts absent some "diminished responsibility" doctrine.[382]

Even if it were acknowledged that juveniles are capable of inflicting harm identical to that of older offenders, whether they are as culpable is a more difficult question. Developmental psychological research suggests that while minors may be abstractly aware of "right from wrong," they are less capable than adults of making sound judgments or moral distinctions.[383] Relative to

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[379] *See, e.g.*, Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11, 16 (1963) (noting that by the age of fourteen, most adolescents employ the same or nearly the same level of moral reasoning as they will as adults); Tapp, *Psychology and the Law: An Overture*, 27 ANN. REV. PSYCHOLOGY 359, 374 (1976) (noting that "crystallization occurs during the adolescent years and . . . substantial consistency is demonstrated during adulthood").

[380] *See, e.g.*, J. HALL, *supra* note 377, at 98-104 (2d ed. 1960) (arguing that mens rea must be given an objective ethical meaning).

[381] Apart from the infancy defense, the presence or absence of criminal responsibility, i.e., the knowledge of right from wrong, is typically litigated in the context of an insanity defense. *See generally* H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 142 (1972) (describing criteria for assessing knowledge of wrong); A. GOLDSTEIN, THE INSANITY DEFENSE 15-20 (1967) (describing the insanity defense and the "reasonable man" standard); N. MORRIS, MADNESS AND THE CRIMINAL LAW 29 (1982) (discussing the criminal responsibility of the mentally ill); Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 779, 782-83 (1985) (arguing that there is no morally just punishment without responsibility).

[382] For a general discussion of diminished capacity doctrine, see Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977); Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

[383] *See supra* note 379; *see also* G. MANASTER, ADOLESCENT DEVELOPMENT AND THE LIFE TASKS 53-67 (1977); M. RUTTER, CHANGING YOUTH IN A CHANGING SOCIETY 43-45 (1980) (detailing changing patterns of disorder during adolescence); Kohlberg, *Development of Moral Character and Moral Ideology*, in REVIEW OF CHILD DEVELOPMENT RESEARCH 402-05 (M. Hoffman & L. Hoffman eds. 1964)

adults, juveniles are less able to form moral judgments, less capable of controlling their impulses, and less aware of the consequences of their acts. Juveniles are less responsible, hence less blameworthy, than adults; their diminished responsibility means that they "deserve" a lesser punishment than an adult who commits the same crime.[384] In part, this lessened capacity stems from a lower appreciation of the consequences of their acts.[385] Moreover, the crimes of children are seldom their fault alone; society shares at least some of the blame for their offenses as a result of their truncated opportunities to learn to make correct choices.[386] Indeed, to the extent that the ability to make responsible choices is learned behavior, the dependent status of youth systematically deprives them of opportunities to learn to be responsible.[387] Finally, even where a youth is aware of the general criminal prohibition, juveniles are more susceptible to peer group influences and group process dynamics than their older counterparts.[388]

The Supreme Court recently analyzed the culpability of young offenders in *Thompson v. Oklahoma*.[389] *Thompson* presented the issue of whether the execution of an offender for a heinous murder committed by the individual when he was fifteen years old violated the eighth amendment prohibition on "cruel and unusual punishments." In vacating the capital sentence, the

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(concluding that large groups of moral concepts acquire meaning only in late childhood and adolescence).

[384] *See* C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 355 (1978).

[385] *See* TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978).

> [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 have less capacity to control their conduct and to think in long-range terms than adults.

Id.

[386] "[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* Another researcher has noted:

> The socialization of the young is an obligation of the whole society, not just of the parents involved; school attendance is compulsory, and courts have the power to take children away from parents who neglect or abuse them. Thus society bears a responsibility for youth crime that it does not have in the case of adults.

C. SILBERMAN, *supra* note 384, at 355.

[387] *See, e.g.*, F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 21-22 (1982) (noting that increased periods of economic dependency have delayed adolescent social development).

[388] Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 874-75 (1981) (noting that group participation of juveniles in criminal activity overstates the age contribution to overall crime rates).

[389] 108 S. Ct. 2687 (1988).

plurality concluded that "a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[390]

Although the Court provided several rationales for its decision,[391] it explicitly concluded that juveniles are less culpable for their crimes than are their adult counterparts.[392] This was consistent with earlier decisions that had emphasized the youthfulness of an offender as a mitigating factor at sentencing.[393] The Court emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults."[394] Significantly, even though Thompson was found to be responsible for his crime, the Court concluded that he could not be punished as severely as an adult, simply because of his age.

> [Y]outh 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 judgement" expected of adults. . . . [T]he 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.[395]

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[390] *Id.* at 2692.

[391] The Court used three indicators to guide its eighth amendment analysis of "evolving standards of decency that mark the progress of a maturing society." *Id.* at 2691. It reviewed death penalty legislation setting minimum ages for execution and concluded that a societal consensus disfavors execution of those under 16 years of age. *Id.* at 2691-96. The Court reviewed the behavior of juries in actually imposing capital sentences as additional evidence that executing juveniles is "abhorrent to the conscience of the community." *Id.* at 2697. The Court also considered "whether the juvenile's culpability should be measured by the same standard as that of an adult." *Id.* at 2698.

[392] *Id.* at 2698.

[393] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (giving full consideration to all mitigating factors). The *Lockett* Court noted that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. The Court invalidated the Ohio death penalty statute because "considerations of defendant's . . . age would generally not be permitted, as such, to affect the sentencing decision." *Id.* at 608. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court noted 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." *Id.* at 116.

[394] *Thompson*, 108 S.Ct. at 2698.

[395] *Id.* (citations omitted).

In reaching this conclusion, the Court emphasized that even though a youth may be capable of inflicting blameworthy harm, the culpability of the choice may be less than that of an adult.[396]

Contemporary changes in juvenile court sentencing legislation ignore many of these apparent differences in criminal responsibility and culpability between adolescents and adults. By punishing juveniles for criminal choices "as if" they were criminally responsible adults, such legislation denies the deterministic premises of the juvenile court that a juvenile's crime is "not his fault." While a juvenile sentence may be shorter than an adult sentence for comparable crimes, it is substantial nonetheless.

B. *The Quality of Procedural Justice in the Juvenile Court—The Consequences of Acknowledging Punishment*

To base juvenile sentences on the seriousness of the present offense and prior record raises questions about the quality of procedural justice in juvenile courts. The decades since *Gault* have witnessed a substantial procedural convergence between juvenile courts and adult criminal courts. Many of the formal procedural attributes of criminal courts are now routine aspects of the administration of juvenile justice as well. The greater procedural formality and adversary nature of the juvenile court reflects the attenuation between the court's therapeutic mission and its social control functions. The many instances in which states choose to treat juvenile

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[396] *Id.* at 2699. The Court noted:

> 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. The 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.

Id. The Court cited numerous other instances in which juveniles' lack of experience and judgment results in their being treated differently from adults; for example, serving on a jury, voting, marrying, driving, and drinking. *Id.* at 2693, Appendices A-F. In all of those instances, the State acts paternalistically and imposes disabilities because of youths' presumptive incapacity to "exercise choice freely and rationally." *Id.* at 2693 n.23. The Court emphasized that it would be both inconsistent and a cruel irony to suddenly find juveniles as culpable as adult defendants for purposes of capital punishment.

> It would be ironic if these assumptions that we so readily make about children as a class—about their inherent differences from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for the purposes of inflicting capital punishment. . . . [T]he very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent . . . .

Id.

offenders procedurally like adult criminal defendants is one aspect of this process.[397]

Despite the criminalizing of juvenile justice, it remains nearly as true today as two decades ago that "the child receives the worst of both worlds . . . receiving neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[398] Most state juvenile codes provide neither special procedural safeguards to protect juveniles from the consequences of their own immaturity nor the full panoply of adult criminal procedural safeguards to protect them from punitive state intervention. Instead, juvenile offenders are treated like adult criminal defendants when formal equality redounds to their disadvantage and subjected to less effective juvenile court procedures when those procedural deficiencies redound to the advantage of the state.

1. Jury Trials in Juvenile Court

Although the Supreme Court's decision to deny juveniles a right to a jury trial in *McKeiver* emphasized factual accuracy and parity between the quality of juvenile and adult adjudications,[399] the assertion that such factors

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[397] *See generally* Feld, *supra* note 2.

[398] Kent v. United States, 383 U.S. 541, 556 (1966). In an earlier article, the author identified a number of instances in which the procedural safeguards afforded to juvenile offenders are not comparable either formally or functionally to those provided to adult criminal defendants. Juveniles are found to waive their *Miranda* rights and their right to counsel under a standard that, in practice, is unlikely to discern whether they adequately understand the rights they relinquish. Feld, *supra* note 2, at 169-90. The high rate of waiver of counsel, in particular, is an indictment of the entire juvenile adjudicative apparatus because the effective assistance of counsel is a necessary prerequisite to the invocation of all other procedural safeguards. *Id.* at 189-90. Similarly, preventive detention, deplorable in its own right, further disadvantages a youth at adjudication and disposition. *Id.* at 201-04. The inadequate screening and charging practices in juvenile court result in more youths being drawn deeper into the process. *Id.* at 226-29. The absence of counsel to challenge deficient petitions leads many youths to admit allegations that could not be proved. To combine the suppression hearing with the trial on the merits is also a highly prejudicial practice that increases the likelihood of erroneous determinations of guilt. *Id.* at 232-43. The denial of jury trials and public trials raises troubling questions about the factual accuracy of delinquency adjudications. *Id.* at 243-46. At the same time, analysis of sentencing practices and conditions of institutional confinement indicate that whatever the rehabilitative justifications for these procedural deficiencies may have been, such justifications are increasingly untenable in a juvenile court that is explicitly punitive and offense oriented rather than rehabilitative and offender oriented. *Id.* at 258-60. Finally, while the procedural deficiencies noted above were analyzed separately, their prejudicial consequences are cumulative—the whole is far worse than the sum of its parts. *Id.* at 273-74.

[399] *McKeiver*, 403 U.S. 528, 543-48; *see also supra* notes 51-61 and accompanying text.

compensate for lesser procedural rights is subject to question. Judges and juries apply *Winship*'s "proof beyond a reasonable doubt" standard differently.[400]

> Juries serve special protective functions in assuring the accuracy of factual determinations, and studies show that juries are more likely to acquit than are judges. Substantive criminal guilt is not just "factual guilt" but a complex assessment of moral culpability. The power of jury nullification provides a nexus between the legislature's original criminalization decision and the community's felt sense of justice in the application of laws to a particular case. These tendencies are attributable to various factors, including jury-judge evaluations of evidence, jury sentiments about the "law" (jury equity), and jury sympathy for the defendant [of which youthfulness garnered the greatest support].[401]

As a result of the *McKeiver* Court's decision to deny juries, there is an increased probability that a youth on trial will be convicted, because given the same evidence a judge in juvenile court is more likely to convict than a jury of detached citizens in a criminal proceeding.[402]

Moreover, the *McKeiver* decision simply ignores the additional function of procedural safeguards, namely preventing governmental oppression.[403] In *Duncan v. Louisiana*,[404] the Court held that fundamental fairness in adult criminal proceedings requires both factual accuracy *and* protection against governmental oppression. The *Duncan* Court identified the manifold benefits of a jury trial: protections from a weak or biased judge; injection of the community's values into the decisionmaking process; and providing visibility and accountability for the workings of the process.[405] All of these consid-

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[400] Feld, *supra* note 2, at 244-46.

[401] *Id.* at 245. *See generally* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 121-34 (1983) (studying the characteristics of juror behavior).

[402] *See, e.g.*, P. GREENWOOD, A. LIPSON, A. ABRAHAMSE & F. ZIMRING, YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 30-31 (1983) (comparing the attrition rates of similar types of cases in juvenile and adult courts in California and concluding that "it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases"). *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 182, 185-90, 209-13 (1966) (noting the differences in interpretation of "reasonable doubt" between judge and jury and the role of the youthfulness of defendant in eliciting sympathy).

[403] *See supra* notes 29-45 and accompanying text.

[404] 391 U.S. 145 (1968).

[405] The Court in *Duncan* identified the multiple safeguards provided by a jury in criminal proceedings:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority . . . . Providing an accused with the right to be tried by

erations are equally applicable in juvenile proceedings.[406]

The increasingly punitive nature of juvenile justice raises a dilemma of constitutional dimensions:

> Is it fair, in the constitutional sense, to expose minors to adult sanctions for crimes, without granting them the same due process rights as adults? . . . The campaign to impose adult-type sanctions on children will collide with advocates who argue that children exposed to adult sanctions must have the same due process rights as adults.[407]

Very few of the states that sentence juveniles on the basis of the Principle of Offense provide juveniles with jury trials.[408] Several states that use offense-based sentencing schemes have explicitly rejected requests for jury trials.[409] For juvenile justice operatives, the jury trial has symbolic implications out of proportion to its practical impact.[410] Providing jury trials would acknowledge

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> a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trials provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155-56.

[406] *See In re* Javier A., 159 Cal. App. 3d 913, 970, 206 Cal. Rptr. 386, 426 (1984); R.L.R. v. State, 487 P.2d 27 (Alaska 1971). *But cf. In re* T.M., 742 P.2d 905, 910 n.4 (Colo. 1987) (declining to follow *R.L.R.*). *See also* Feld, *supra* note 2, at 258-66.

[407] PRIVATE SECTOR TASK FORCE ON JUVENILE JUSTICE, *supra* note 287, at 7.

[408] Currently, about a dozen states provide for jury trials in juvenile court: ALASKA STAT. § 47.10.070 (Supp. 1987); COLO. REV. STAT. § 19-1-106(1)(a) (Supp. 1987); MASS. ANN. LAWS, ch. 119 § 55A (Law. Co-op. Supp. 1984); MICH. COMP. LAWS. § 712A.17 (Supp. 1988); MONT. CODE ANN. § 41-5-521 (1987); N.M. STAT. ANN. § 32-1-31A (Supp. 1988); OKLA. STAT. ANN. tit. 10, § 1110 (West 1987); S.D. CODIFIED LAWS ANN. § 26-8-31 (1984); TEX. FAM. CODE ANN. § 54.03(c) (Vernon Supp. 1988); W. VA. CODE § 49-5-6 (1986); WIS. STAT. ANN. § 48.243(g) (West 1977); and WYO. STAT. § 14-6-224(a) (1986).

[409] *See, e.g., In re* Daedler, 194 Cal. 320, 228 P. 467 (1924) (no jury trial); *In re* Javier A., 159 Cal. App. 3d 913, 967, 206 Cal. Rptr. 386, 424 (1984) (*Daedler* is "overripe" for reconsideration); *see also supra* notes 151-68, 214-16, 256-73, 286-98 and accompanying text.

[410] While opponents of jury trials in juvenile court argue that the right would substantially disrupt juvenile proceedings, there is apparently no basis for such an objection, as evidenced both by the dozen jurisdictions that provide juvenile juries and empirical studies. *See* Burch & Knaup, *The Impact of Jury Trials Upon the Administration of Juvenile Justice*, 4 CLEARINGHOUSE REV. 345, 358 (1970) (finding that the number of jury trials accounted for less than 2% of total volume of cases heard); Note, *The Right to a Jury Under the Juvenile Justice Act of 1977*, 14 GONZAGA L. REV. 401, 420-21 (1979) (noting that the rate of jury trials ranged between 0.5% and 3% of total petitions).

the punitive reality of juvenile justice as well as the need to provide safeguards against even benevolently motivated governmental coercion.[411]

Providing jury trials in juvenile court requires candor and honesty about what actually transpires in the name of rehabilitation. Benevolence, therapy, and rehabilitation are expansive concepts that may widen the net of social control.[412] Who can be critical of "doing good"? Punishment, by contrast, acknowledges the harmfulness of coercion and carries with it a sense of limits and proportionality.[413] "[S]anctioning culpable conduct on a principle of proportionality, severely limiting the amounts and types of deprivations that are available, and honestly recognizing that the deprivation is a 'hurt' has less chance for preversion [sic] than the perpetuation of the system we now have."[414]

If one is hesitant to accept the juvenile justice system's purported objectives of benevolence and a therapeutic "alternative purpose," is there anything about juveniles or justice that justifies denying jury trials in delinquency proceedings? This Article demonstrates a fundamental shift in the underlying assumptions of juvenile justice administration. Proponents of the traditional juvenile court should demonstrate why juvenile court procedures should not be structured like other institutions that administer punishment. Is there anything about a criminal justice system for youth that justifies or requires different procedures than for similarly situated adults? If there is, does the difference lie in characteristics of juveniles or the nature of the

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[411] *See supra* notes 45-50 and accompanying text.

[412] *See* Allen, *supra* note 7, at 149-51 (arguing that the juvenile court system continually imposes middle-class values on poor and oppressed groups); Cohen, *supra* note 114, at 5 (arguing that the rehabilitative ideal is a "noble lie"). Professor Allen has elaborated on this theme, observing:

> It is important . . . to recognize that when, in an authoritative setting, we attempt to do something *for* a child "because of what he is and needs," we are also doing something *to* him. The semantics of "socialized justice" are a trap for the unwary. Whatever one's motivations, however elevated one's objectives, if the measures taken result in the compulsory loss of the child's liberty, the involuntary separation of a child from his family, or even the supervision of a child's activities by a probation worker, the impact on the affected individuals is essentially a punitive one. Good intentions and a flexible vocabulary do not alter this reality. This is particularly so when, as is so often the case, the institution to which the child is committed is, in fact, a peno-custodial establishment. We shall escape much confusion here if we are willing to give candid recognition to the fact that the business of the juvenile courts inevitably consists, to a considerable degree, in dispensing punishment. If this is true, we can no more avoid the problem of unjust punishment in the juvenile court than in the criminal court.

Allen, *supra* note 7, at 18 (emphasis in original).

[413] *See, e.g.*, FOX, *The Reform of Juvenile Justice: The Child's Right to Punishment*, 25 JUV. JUST. 2, 4 (August 1974) (noting that the juvenile justice system requires a compromise between punishment and treatment); Cohen, *supra* note 114, at 5.

[414] Cohen, *supra* note 114, at 5.

punishments imposed? In light of the unalloyed punitiveness of contemporary juvenile justice, the burden of proof must rest with proponents of the traditional juvenile court to justify with evidence, not just rhetoric, differences between juvenile and criminal proceedings.

2. The Right to Counsel in Juvenile Court

A second issue of procedural justice hinges on access to and competence of legal counsel in the juvenile court. Since *Gault*, juveniles have been constitutionally entitled to representation by counsel. The *Gault* Court observed that "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."[415] Despite *Gault*'s mandate, however, the right to counsel has been refused more often than granted. In the two decades since *Gault*, the promise of counsel remains unrealized; in many states less than fifty percent of juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled.[416] In the immediate aftermath of *Gault*, researchers examined institutional compliance and found that juveniles were neither adequately advised of their right to counsel nor provided with counsel.[417] Although national statistics are not available, surveys of representation by counsel in several jurisdictions suggest that "there is reason to think that lawyers still appear [in juvenile court] much less often than might have been expected."[418] In many of the states where data is available, statistics indicate that the majority of all youths prosecuted as delinquents are not represented by counsel during the juvenile judicial process.[419] There are several possible

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[415] *In re* Gault, 387 U.S. 1, 36 (1967). The Court noted that "the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings . . . . The child 'requires the guiding hand of counsel at every step in the proceedings against him.' " *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)). *See generally* Feld, *supra* note 2, at 186-90.

[416] *See* Feld, *supra* note 2, at 187-90; *see also* Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393 (1988) (finding that in half of the six jurisdictions studied, a majority of juveniles were unrepresented); *see also infra* note 418.

[417] *See., e.g.*, Lefstein, Stapleton, and Teitelbaum, *In Search of Juvenile Justice:* Gault *and Its Implementation*, 3 LAW & SOC'Y REV. 491, 505-16 (1969).

[418] D. HOROWITZ, THE COURTS AND SOCIAL POLICY 185-86 (1977). Although the rates of representation vary widely from county to county within a state, Horowitz's survey of the available data failed to find one state in which even 50% of the juveniles were represented by counsel. *Accord* Feld, *supra* note 416.

[419] *See generally* Feld, *supra* note 416 (presenting data on appointment and impact of counsel on juvenile courts in six states). In an evaluation of legal representation in North Carolina, Clarke and Koch reported that the juvenile defender project represented 22.3% of juveniles in Winston-Salem, North Carolina, and 45.8% in Char-

explanations for why so many youths are unrepresented. Despite *Gault*'s promise of the right to counsel, most juveniles face potentially coercive state action without having seen a lawyer, waive their right to counsel without consulting an attorney or appreciating the legal consequences, and face the prosecutorial power of the State alone and unaided.[420] While waiver of the right to counsel is the most common explanation, the variations in rates of representation within a state suggest that nonrepresentation reflects judicial policies, especially the continuing hostility of juvenile court judges towards lawyers, rather than any systematic differences in youthful competencies.[421]

The Supreme Court in *Gault* noted that the appointment of counsel is the prerequisite to procedural justice in the juvenile court.[422] "[I]n order to assure 'procedural justice for the child,' it is necessary that '[c]ounsel . . . be appointed as a matter of course *wherever coercive action is a possibility*, without requiring any affirmative choice by child or parent.' "[423] The Court also observed that the President's Crime Commission emphasized that the right to counsel was the cornerstone of the entire procedural apparatus of juvenile justice, " 'the keystone of the whole structure of guarantees that a minimum system of procedural justice requires.' "[424] As the possibility of

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lotte, North Carolina. Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 297 (1980). An evaluation of a large, midwestern county's juvenile court reported that "[o]ver half (58.2 percent) [of the juveniles] were not represented by an attorney." M. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 139 (1982). Evaluations of rates of representation in Minnesota also report that a majority of youths are unrepresented. K. FINE, OUT OF HOME PLACEMENT OF CHILDREN IN MINNESOTA: A RESEARCH REPORT 48 (1983) ("In the majority of delinquency/status offense cases (62%) there is not representation."); Feld, *supra* note 2, at 189. Like virtually all juvenile justice research, these evaluations report enormous county-by-county variations in the rates of nonrepresentation, ranging from a high of over 90% to a low of less than 10%. Feld, *supra* note 2, at 190 n.162.

[420] *See generally* Feld, *supra* note 2, at 169-90 (noting that juveniles are permitted to "waive" their constitutional rights, including the right to counsel, provided that their waiver is "knowing, intelligent, and voluntary" under the "totality of the circumstances"). Although the competence of children to fully understand and waive their rights has been questioned by researchers, courts reviewing waivers of rights assume that children are capable of "knowingly, intelligently, and voluntarily" relinquishing their constitutional rights and that trial courts are capable of discerning when they do not. *See id.* at 174 n.113, 176 n.121.

[421] *See supra* notes 215-420 and accompanying text; *see also* Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. LAW & CRIMINOLOGY—(1989).

[422] *In re* Gault, 387 U.S. 1, 38 (1967).

[423] *Id.* (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)).

[424] *Id.* at 38 n.65 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)).

coercive action in juvenile court increases with the elevation of the Principle of Offense, *Gault*'s insistence on the right to counsel and procedural justice acquires even greater salience.[425]

C. *The "Punitive" Juvenile Court*

The historical justifications for the procedural deficiencies of the juvenile court are increasingly untenable in an institution that is explicitly punitive and offense-oriented. Legislative and administrative changes in juvenile sentencing practices reflect a basic philosophical ambivalence about the continued role of the juvenile court.[426] The current status of the juvenile court system, which has become increasingly criminalized and more like its adult counterpart, raises the question whether there is any reason to main-

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Similarly, the Supreme Court in Fare v. Michael C., 442 U.S. 707 (1979), based its decision that a request for a probation officer was not a per se invocation of the right to counsel on the role of counsel in the criminal and juvenile processes. The *Fare* Court elaborated on the crucial role of counsel by noting that

> the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation . . . . The per se aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.

Id. at 719.

[425] Professor Cohen has noted the relationship between proportionality of sanctions and the importance of counsel.

> By adopting a system which responds to harm-producing conduct and which frankly recognizes that deprivations of liberty are painful sanctions, we can legally recognize *the adversary stance of the parties, emphasize the importance of factfinding* and diminish the scientific jargon which parades as expertise; we can bring some visibility to decision-making, further tighten procedures, and give some focus to the requisite training of system functionaries.

Cohen, *supra* note 114, at 6 (emphasis added).

[426] A number of commentators have questioned the justification for a separate juvenile court. *See, e.g.*, Feld, *supra* note 3, at 171-72; Feld, *supra* note 2, at 190; Guggenheim, *A Call to Abolish the Juvenile Justice System*, 9 CHILDREN'S RTS. REP. 1 (1978); McCarthy, *Should Juvenile Delinquency Be Abolished?*, 23 CRIME & DELINQ. 196 (1977) [hereinafter *Delinquency Abolished?*]; McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093, 1115-19 (1977) [hereinafter *Delinquency Dispositions*]; Shepherd, *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS U.L.J. 12, 14-19 (1977); Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984, 1012-13 (1976); Wizner & Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 132-35 (1977); Wolfgang, *Abolish the Juvenile Court System*, 2 CAL. LAW., November 1982, at 12.

tain a separate juvenile criminal court whose sole distinguishing characteristic is its persisting procedural deficiencies.[427]

The juvenile court as an institution is at a philosophical crossroads that cannot be resolved by reference to simplistic treatment versus punishment formulations.[428] In the contemporary juvenile court, there are no practical or operational differences between the two—"sometimes punishment is treatment."[429] Once the fundamentally penal character of juvenile court intervention is recognized, the strongest justification for the preservation of a separate juvenile court system is that the sentences that a juvenile delinquent receives are typically shorter than those received by adult felony offenders for comparable crimes.[430] Indeed, even under the offense-based determinate or mandatory minimum sentencing regimes, juvenile sentences are substantially shorter than their adult counterparts'. Since most young offenders will return to society, it is highly desirable that they have an opportunity to survive the mistakes of adolescence with their life chances intact. This policy goal is threatened by the draconian sentences frequently inflicted on eighteen-year-old "adults."

Shorter sentences for young people do not require separate juvenile courts in which to adjudicate them as offenders. Quite apart from specific juvenile court legislation, there are a variety of doctrinal and policy justifications for

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[427] On the procedural deficiencies of the juvenile court, see Feld, *supra* note 2, at 272-76; McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457 (1981); Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656 (1980).

[428] Contemporary legislative changes in regard to the judicial treatment of juveniles are the product of three, highly disparate critiques of juvenile justice. Proponents of "law and order" and "get tough" legislation contend that "youth must be held more accountable and punished for their delinquent acts, particularly acts of a violent nature or acts against the person." R. COATES, M. FORST & B. FISHER, *supra* note 337, at 1. Others question the juvenile justice system's ability to rehabilitate and the use of open-ended institutional confinement for treatment purposes. *Id.* A third group supports determinacy as a means of promoting equal justice by treating similarly situated offenders similarly. *Id.* at 2. *See generally* Krisberg, Schwartz, Litsky & Austin, *supra* note 362 (presenting an overview of current policy debates surrounding reform in the juvenile system).

[429] State v. Lawley, 91 Wash. 2d 654, 656-57, 591 P.2d 772, 773 (1979).

[430] Feld, *supra* note 2, at 275. Others have observed that

> [t]he only real differences between these [juvenile justice standards relating to delinquency and sanctions] and the adult criminal codes are that the former provide for shorter sentences and introduce certain special defenses. That an adult court is capable of dispensing lenient sentences when appropriate, however, is self-evident. And the principles represented by the standards' special defenses are already taken into consideration by adult criminal courts in those instances in which they have dealt with youthful offenders.

Wizner & Keller, *supra* note 426, at 1133.

sentencing young people less severely than their adult counterparts. For example, the common-law mens rea infancy defense, a variant of "diminished responsibility," provides a conceptual basis for shorter sentences with or without a juvenile court.[431] The common-law infancy gradations reflect developmental differences that render youths less culpable or criminally responsible than their adult counterparts for the same types of criminal harms. The Supreme Court's recent decision in *Thompson* provides additional support for shorter sentences based upon the reduced culpability of youths even for juveniles older than the common-law infancy threshold of age fourteen.

When sanctioning within a "just deserts" or deserved punishment framework, it would be fundamentally unjust to impose the same penalty upon a juvenile as upon an adult. Quite apart from differences in culpability for the quality of criminal choices, the ways in which a penalty is subjectively experienced will differ. In general, criminal penalties—whether adult punishment or juvenile "treatment"—are measured in units of time: days, months, or years. However, youths and adults conceive of and experience similar lengths of time differently.[432] The progression from children to adults in thinking about and experiencing time follows a developmental sequence similar to the development of responsibility for making blameworthy choices.[433] Indeed, without a mature and developed appreciation of future time, juveniles may be less able to understand the consequences of their acts and therefore be less responsible. Because juveniles do not have an adult "objective" sense of the duration of time, an objectively equivalent sentence may be subjectively unequal. While a three-month sentence may be lenient for an adult offender, for a child it represents the equivalent of an entire summer vacation, a very long period of time. Because of these developmental differences in time concepts, it would be unjust to sentence adults and juveniles to similar terms even for similar types of offenses.

Shorter sentences based upon reduced culpability or the subjective experience of punishment is a more modest rationale for treating young people differently than adults than the rehabilitative justifications advanced by the Progressive childsavers. Moreover, it recognizes the punitive realities of juvenile court intervention.

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[431] *See supra* notes 62-65 and accompanying text.

[432] Youths and adults may differ in their subjective and objective assessments of time both with respect to "future time perspective" and "present duration." *See generally* T. COTTLE, PERCEIVING TIME: A PSYCHOLOGICAL INVESTIGATION WITH MEN AND WOMEN 85-130 (1976); W. FRIEDMAN, THE DEVELOPMENTAL PSYCHOLOGY OF TIME (1982); J. PIAGET, THE CHILD'S CONCEPTION OF TIME (A. Pomerans trans. 1969).

[433] *See, e.g.*, B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (A. Parsons trans. 1958); Klineberg, *Changes in Outlook on the Future Between Childhood and Adolescence*, 7 J. PERSONALITY & SOC. PSYCH. 185 (1967).

Acknowledging that juvenile court intervention is punishment carries the concomitant obligation to provide appropriate procedural safeguards, since "the condition of being a [child] does not justify a kangaroo court."[434] If full procedural parity is afforded to young offenders, then the *McKeiver* Court's fear of sounding the death-knell of the juvenile court may well be realized.[435] To abolish the juvenile court's jurisdiction over criminal misconduct, however, may be desirable from the standpoint of both juveniles and society as a whole.[436]

A therapeutic "alternative purpose" is an untenable justification for the punitive nature of juvenile justice institutions. If shorter sentences for reduced culpability is the principal remaining rationale for juvenile courts, providing youths with fractional reductions of adult sentences could just as readily meet that goal. This could take the form of an explicit "youth discount" at the time of sentencing.[437] Many contemporary juvenile justice statutes provide appropriate models to determine sentence length for young offenders that would be considerably shorter than sentences for their adult counterparts.[438] Using the seriousness of the offense to grade proportionality would also limit some of the abuses of indeterminacy.[439] For youths below the age of fourteen, the common-law mens rea infancy defense would acquire new vitality.

Trying young people in criminal courts with full procedural safeguards would not especially diminish judges' expertise about appropriate disposi-

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[434] *In re* Gault, 387 U.S. 1, 28 (1967).

[435] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

[436] Feld, *supra* note 2, at 275; *see, e.g., Delinquency Abolished?*, *supra* note 426, at 203; *Delinquency Dispositions*, *supra* note 426; Feld, *supra* note 3; Wizner & Keller, *supra* note 426.

[437] A proposal for fractional reductions in juvenile sentences can only be made against the backdrop of realistic, humane, and determinate adult sentencing practices. Adult presumptive sentences in Minnesota, for example, are specified in terms of months rather than years, and "truth in sentencing" prevails. *Minnesota Sentencing Guidelines*, *supra* note 257, at IV (sentencing grid); Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLINE L. REV. 237, 244 (1982); Von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Commission*, 5 HAMLINE L. REV. 164, 188-89, 191-92 (1982). Not only are Minnesota's sentences realistic and determinable in advance, but Minnesota has one of the lowest rates of incarceration of any state in the nation. *See* UNITED STATES DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS IN 1982 5 (1984).

[438] An additional rationale for shorter sentences for juveniles has been suggested:

> [B]ecause juveniles are emotionally dependent on their parents in ways that adults are not, removal from the home tends to be a more severe punishment. I also mean significantly shorter terms, for time has a wholly different dimension for children than it does for adults.

C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 355 (1987).

[439] *See, e.g.*, Shepherd, *supra* note 426, at 35-40; Fox, *supra* note 413, at 6-9.

tional options for young people. To a considerable degree the information necessary for a just disposition resides with the court services personnel who advise the judge on sentences, rather than with the court itself. Following criminal conviction, a youth's case could be transferred to a family court judge if a "welfare" disposition is contemplated. Even a punitive sentence does not require incarcerating juveniles in adult jails and prisons. The existing training schools and institutions provide the option of age-segregated dispositional facilities. Moreover, insisting explicitly on humane conditions of confinement could do at least as much to improve the lives of incarcerated youths as has the "right to treatment" or the "rehabilitative ideal."[440] To provide for expunction of criminal records and the elimination of any collateral civil disabilities following the successful completion of a sentence could afford equivalent relief from an isolated youthful folly as does juvenile court confidentiality.[441] A recognition that most young offenders will return to society at some point will impose an obligation to provide the resources for self-improvement. The point is simply that the coerced and inadequate treatment that characterizes most juvenile dispositions can no longer justify indeterminate, nonproportional, and ultimately punitive incarceration.

Full procedural parity in criminal courts, coupled with alternative safeguards for children, can provide the same protections as does the current juvenile court. However, the case for abolishing the juvenile courts rests on the experience of two decades of procedural reform, "constitutional domestication," and now criminalization. It remains nearly as true today as when the Supreme Court first undertook reform of juvenile courts that juveniles receive the worst of both worlds. Juvenile courts have shown a distressing capacity to deflect, co-opt, ignore, and absorb ameliorative procedural reform with minimal institutional change. Two decades after *Gault* guaranteed the right to counsel to every juvenile, for example, many unrepresented juveniles continue to appear in juvenile courts, including many who are subsequently sentenced to terms of institutional confinement.[442] The general quality of procedural justice routinely afforded to youths would be intolerable for adult defendants facing incarceration. And yet, as this Article demonstrates, both in principle and in practice, the end result of juvenile court intervention is scarcely distinguishable from its adult criminal counterpart. Even "punishment" is fully subsumable in the Orwellian world of

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[440] *See* B. FELD, *supra* note 42, at 197-205 (arguing that the primary goal of correctional programs must be the minimization of brutalization and victimization of inmates); *cf. supra* notes 344-45 and accompanying text (discussing the currently inadequate conditions of juvenile confinement).

[441] Some proponents of the juvenile court contend that it is the reduced stigma, rather than the shorter sentences, that justify a separate juvenile court. *See* C. SILBERMAN, *supra* note 438, at 356.

[442] *See supra* notes 416-21 and accompanying text.

juvenile justice "treatment" as simply one more tool to effect behavioral change.

The juvenile court is the product of two nineteenth-century historical developments: changes in strategies of social control and changes in the cultural conception of children.[443] The contemporary procedural and substantive convergence between juvenile courts and criminal courts constitutes a repudiation of the Progressive's offender-oriented strategy of social control in favor of a more punitive, criminal model of juvenile justice. Thus, one of the two conceptual premises of the juvenile court is no longer available.

At the same time, however, the remaining gap between the quality of justice in juvenile courts and criminal courts can be conveniently rationalized on the grounds that "after all, they are only children," and children are entitled only to custody, not liberty.[444] So long as the mythology prevails that juvenile court intervention is "benign" coercion and that in any event children should not expect more, youths will continue to receive "the worst of both worlds." Abolishing the juvenile court would force a long overdue and critical reassessment of the entire social construct of "childhood." As long as young people are regarded as fundamentally different than adults, it becomes too easy to rationalize and justify a procedurally inferior justice system.

Professor David Rothman concluded his analysis of the Progressive origins of the juvenile court with trenchant insights and questions:

> In sum, one searches in vain for any thorough reappraisal of the Progressive ideology or any coherent effort to review reform postulates in light of their marginal relationship to actual practice.
>
> It is difficult to trace this record without some impatience and disappointment. Our predecessors should have known better. But rather than second-guess them, it is appropriate to analyze why they remained so dedicated to their principles, so unwilling to entertain self-doubt. In part, it may be inevitable that reformers become partisans, unable to examine the outcome of their efforts. In part, [they] . . . were frightened that the obvious alternatives to their design would generate even worse abuses. . . .
>
> The past was so bleak and so lacking in humanitarian spirit, that to undermine the Progressive program would be to return to barbarism. . . .
>
> Reformers did have one last defense: how could anyone condemn their principles or search for alternatives when their recommendations had never been truly implemented? Failures reflected not faulty conceptualization but inadequate funding. Hence it was appropriate to call for

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[443] *See supra* notes 4-13 and accompanying text.

[444] *See* Schall v. Martin, 467 U.S. 260, 265 (1984) (noting that "juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves.").

> more clinics, better probation officers, smaller cottages, and better trained house parents . . . .
>
> All of these contentions had a point. Given the many flaws in implementation, there was no shortage of corrective measures that might be adopted, and then perhaps rehabilitation would occur. And Progressives were entitled to believe that only an ethic of rehabilitation could dampen the spirit of retribution. The points certainly were fair—but they did not reach to the heart of the problem, to the tension between punishment and treatment. How condemn a court's casual indifference to the child when it claimed to be helping him? How condemn the severity of an institution when it purported to be acting in the child's best interest? But these were issues that could not be raised on the Progressive agenda.[445]

Any assessment of the contemporary juvenile court must answer these same questions and address the procedural and substantive implications of the fundamental tension between punishment and treatment. With the explicit emergence of retribution in juvenile courts coupled with a continuing lack of public and political willingness to commit scarce social resources to the welfare of children in general, much less to those who commit crimes, is there any remaining reason to believe that the juvenile court system can be rehabilitated?

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[445] D. ROTHMAN, *supra* note 2, at 288-89.