1984

Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court

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

Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court

Barry C. Feld*

I. INTRODUCTION

The 1967 United States Supreme Court decision *In re Gault*[1] precipitated a procedural revolution that has transformed the juvenile court into a legal institution very different

* Professor of Law, University of Minnesota. I benefitted from the critical comments of a number of colleagues who reviewed an earlier draft of this Article, including Ms. Kathy Bishop and Professors Daniel Farber, Richard Frase, and Robert Levy. Of course, they bear no responsibility for my failure to heed their advice. This Article could not have been completed without the research contributions of a number of students whose assistance is gratefully acknowledged, including Maria Wyant Cuzzo, Gadi Hill, Elizabeth Neufeld-Smith, Polly Peterson, Jeff Saunders, Agnes Schipper, Ann Underbrink, and Mary Ann Wray.

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

from that envisioned by its Progressive creators.[2] In the years since *Gault*, states have struggled to bring the administration of their juvenile courts into harmony with the requirements of the Constitution,[3] aided by professional commentary and the continuing evolution of juvenile procedural due process requirements.

This Article studies the effects of these efforts on the juvenile justice system. The Article briefly reviews the Progressive conception of the juvenile court and examines both the changes resulting from the Supreme Court's due process decisions and the legislative impetus those decisions provided. Then, through consideration of recent efforts such as Minnesota's new Rules of Procedure for Juvenile Court,[4] the Article analyzes the contemporary juvenile court, examines the extent to which it has departed from its original conception, and assesses its criminalization and its convergence with adult criminal courts. The Article concludes that the juvenile court has been effectively criminalized in that its current administrative assumptions and operations are virtually indistinguishable from those of adult criminal courts. At the same time, however, the procedures of the juvenile court often provide protections for juveniles less adequate than those afforded adult criminal defendants. As a result, juveniles receive the worst of both worlds, and the reasons for the very existence of a separate juvenile court are called into question.

II. HISTORICAL BACKGROUND

A. THE PROGRESSIVE JUVENILE COURT

Between 1870 and World War I, the railroads changed

2. For various interpretations of the development of the juvenile justice system, see generally 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); D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); E. RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978); S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE 1825-1920 (1977); JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS (L. Empey ed. 1979) [hereinafter cited as JUVENILE JUSTICE]; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

3. *See, e.g.*, Note, *Minnesota Juvenile Court Rules: Brightening One World for Juveniles*, 54 MINN. L. REV. 303, 303 (1969).

4. The Rules were promulgated by the Minnesota Supreme Court on December 17, 1982, and became effective on May 1, 1983. *See infra* notes 81-87 and accompanying text.

America from an agrarian to an industrial society by fostering economic growth, changing the processes of manufacturing, and ushering in a period of rapid economic modernization.[5] Simultaneously, traditional social patterns faced challenges as new immigrants, primarily from southern and eastern Europe, and rural Americans flooded into the burgeoning cities and crowded into ethnic enclaves and urban slums.[6] Overburdened by numbers, cities proved unable to provide even basic needs.[7] As a result, urban ghettos, poverty, congestion, disorder, crime, and inadequate social services accompanied the development of modern urban industrial life.

Accompanying these developments were changes in family structure and function, including a reduction in the number and spacing of children, a shift of economic functions from the family to other work environments, and a modernization and privatization of the family that substantially modified the roles of women and children.[8] The latter development was espe-

5. *See generally* T. COCHRAN, BUSINESS IN AMERICAN LIFE (1972); 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 CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); D. NOBLE, AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM (1977); H. THORELLI, THE FEDERAL ANTI-TRUST POLICY (1954); A. TRACHTENBERG, THE INCORPORATION OF AMERICA (1982); J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918 (1968); R. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

6. The "new immigrants" differed in language, religion, political heritage, and culture from the dominant Anglo-Protestant Americans. They predominantly were peasants, and their cultural and linguistic differences from the dominant culture, coupled with their numbers, hindered their assimilation. *See, e.g.*, R. HOFSTADTER, *supra* note 5, at 8. *See generally* U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 (Bicentennial ed. 1976) (statistics about immigration and the changing demographics of the United States population).

7. *See, e.g.*, W. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 135 (3d ed. 1984); H. WILENSKY & C. LEBEAUX, INDUSTRIAL SOCIETY AND SOCIAL WELFARE 115-32 (1958). The needs of the urban masses increased by the end of the nineteenth century because of changes in the economic structure and the difficulties of assimilation created by linguistic and cultural difference. *See, e.g.*, H. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 87 (1974); R. HOFSTADTER, *supra* note 5, at 8.

8. *See, e.g.*, J. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT 114-16 (1977); Hareven, *The Dynamics of Kin in an Industrial Community*, in TURNING POINTS: HISTORICAL AND SOCIOLOGICAL ESSAYS ON THE FAMILY 151 (J. Demos & S. Boocock eds. 1978); Hareven & Vinovskis, *Patterns of Childbearing in Late Nineteenth-Century America: The Determinants of Marital Fertility in Five Massachusetts Towns in 1880*, in FAMILY AND POPULATION IN NINETEENTH-CENTURY AMERICA 85 (T. Hareven & M. Vinovskis eds. 1978). *But see* C. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 9, 178-209 (1980) (industrialization is an inade-

cially noticeable in the upper and middle classes, which had begun to view children as corruptible innocents whose upbringing required special attention, solicitude, and instruction.[9] As a result, women, especially in the middle and upper classes, assumed a greater role in supervising the child's moral and social development.[10]

At the same time, the general social and economic

---

quate explanation of the mid-nineteenth century decline in fertility; that decline is caused by women's "increasing consciousness of themselves as individuals" and, consequently, their desire to control reproduction). *See generally* C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 6-10 (1977) (effects on family life of the nineteenth-century emancipation of women and the growth of industrialization); E. SHORTER, THE MAKING OF THE MODERN FAMILY 205-68 (1975) (explaining changes in family life as consequences of the growth of laissez-faire capitalism); Wells, *Women's Lives Transformed: Demographic and Family Patterns in America, 1600-1970,* in WOMEN IN AMERICA: A HISTORY 16, 18-24 (C. Berkin & M. Norton eds. 1979) (comparing changes in household structure and women's place in that structure to the increase in life expectancies, the decrease in fertility, and the migration to the cities that resulted from industrialization).

9. *See generally* P. ARIÈS, CENTURIES OF CHILDHOOD 329 (1962) (summarizing the development of the "modern theory" of childhood that suggests that children are not small adults, but rather that childhood is a separate stage of development); C. DEGLER, *supra* note 8, at 86-110 (change in child-rearing methods of nineteenth century related to new perception of children as innocent and trainable); J. GILLIS, YOUTH AND HISTORY: TRADITION AND CHANGE IN EUROPEAN AGE RELATIONS 1770-PRESENT 98-105 (1974) (concern for children extended to older youths); D. HUNT, PARENTS AND CHILDREN IN HISTORY: THE PSYCHOLOGY OF FAMILY LIFE IN EARLY MODERN FRANCE 33-36 (1970) (slow emergence of the concept of "childhood" in France, beginning in the Middle Ages and attaining full realization during the *ancien régime*); J. KETT, *supra* note 8, at 109-43 (origins of the idea of "adolescence" from 1840-1880); B. WISHY, THE CHILD AND THE REPUBLIC 94-114 (1968) (new ideas of childhood and child rearing as reflected in children's books and child-rearing manuals for parents from 1860-1900); deMause, *The Evolution of Childhood,* in THE HISTORY OF CHILDHOOD 1 (L. deMause ed. 1974) (noting the gradual shift from a norm of physical and sexual abuse of children to one promoting socialization; the new norm viewed children as malleable creatures to be trained by adults to conform to societal mores).

Childhood as a recognizable developmental stage is a recent phenomenon. Prior to the past two or three centuries, there was neither a fully separate, highly valued social status based on age nor a corresponding age segregation. Young people were perceived as miniature adults or inadequate versions of their parents who did not require any special protection or discrete legal status. Even in the early nineteenth century the newer views of children were only beginning to alter child-rearing practices. This trend was accentuated as commercial and industrial developments enabled young people to achieve economic independence. *See* Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go,* 39 LAW & CONTEMP. PROBS. 78, 80 (1975). By the end of the nineteenth century, however, the preparation of children for adult roles and their autonomous departures from home became much more restrictive. *See* authorities cited *supra* notes 2 & 8.

10. *See, e.g.,* A. PLATT, *supra* note 2, at 75-83; *see also* B. WISHY, *supra* note 9, at 116 (discussing increased role of mothers in child development).

problems sparked the Progressive Movement.[11] Progressivism included a host of ideologies and addressed issues ranging from economic regulation to criminal justice and political reform.[12] A unifying theme, however, was the development by professionals and experts of rational and scientific solutions that would be administered by the State.[13] Progressive reliance on the State reflected a fundamental belief that state action could be benevolent, that government could rectify social problems, and that Progressive values could be inculcated in others.[14]

The Progressive trust of state power combined with changes in the cultural conceptions of children and child-rearing to lead Progressives into the realm of "child-saving"—child

11. *See generally* authorities cited *supra* note 5.

12. *See generally* B. BRINGHURST, ANTITRUST AND THE OIL MONOPOLY (1979) (antitrust); L. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957 (1961) (compulsory education); G. KOLKO, RAILROADS AND REGULATION 1877-1916 (1965) (railroad regulation); D. ROTHMAN, *supra* note 2 (criminal justice reform); H. THORELLI, *supra* note 5 (antitrust); S. TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA (1982) (child welfare); W. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN NEW YORK STATE (1965) (child labor laws); W. TRATTNER, *supra* note 7 (urban welfare reform); R. WIEBE, BUSINESSMEN AND REFORM (1962) (business regulation); Hays, *The Politics of Reform in Municipal Government in the Progressive Era,* PAC. NW. Q., Oct. 1964, at 152 ("good government").

13. *See, e.g.,* S. HAYS, *supra* note 5, at 156; R. WIEBE, *supra* note 5, at 166-70. Professors Hays and Wiebe attribute Progressive reforms to the newly emerging middle class of college-educated technocrats, corporate managers, and professionals who viewed the decline of the older order as an opportunity to realize their own potentials through the development of rational, scientific, and managerial solutions to a host of social problems. *See* S. HAYS, *supra* note 5, at 73-74; R. WIEBE, *supra* note 5, at 111-32. This interpretation explains the role of the detached, objective professional and scientific rationality and expertise that recurs throughout most Progressive reform efforts. *See* Kennedy, *Overview: The Progressive Era,* 37 HISTORIAN 453, 460 (1975); Stone, *A Spectre is Haunting America: An Interpretation of Progressivism,* 3 J. LIBERTARIAN STUD. 239, 243-44 (1979). There have been extensive and often conflicting interpretations of the origins and goals of the Progressive reformers. *Compare* R. HOFSTADTER, *supra* note 5 *and* Kennedy, *supra* (Progressive era was an era of transition) *with* R. WIEBE, *supra* note 5 *and* G. KOLKO, *supra* note 5 (emphasizing conservative aspects of Progressivism).

14. *See, e.g.,* F. ALLEN, *Legal Values and the Rehabilitative Ideal,* in THE BORDERLAND OF CRIMINAL JUSTICE 25, 26-27 (1964) [hereinafter cited as BORDERLAND]; F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 11-15 (1981) [hereinafter cited as F. ALLEN, DECLINE]; D. ROTHMAN, *supra* note 2, at 60-61; Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice,* 27 CLEV. ST. L. REV. 147, 150-51 (1978). Progressives felt no reservations when they attempted to "Americanize" the immigrants and poor through a variety of agencies of assimilation and acculturation to become sober, virtuous, middle-class Americans. D. ROTHMAN, *supra* note 2, at 49.

labor laws, child welfare laws, compulsory education laws, and the juvenile court system.[15] The Progressive programs were intended to structure child development and to control and mold children while protecting them from exploitation. The goals and the methods of these programs, however, often reflected antipathy to the immigrant hordes and a desire to save the second generation from perpetuating the old world ways.[16]

Similarly, the development of new theories about human behavior and social deviance led Progressives to new views on criminal justice and social control policies.[17] The Progressives saw crime not as a product of the deliberate exercise of an individual's free will[18] but as a result of external, antecedent forces.[19] They focused, therefore, on reforming the offender

15. As one author noted, many Progressive programs shared a unifying child-centered theme. "The child was the carrier of tomorrow's hope whose innocence and freedom made him singularly receptive to education in rational, humane behavior. Protect him, nurture him, and in his manhood he would create that bright new world of the progressives' vision." R. WIEBE, *supra* note 5, at 169; *see also* J. KETT, *supra* note 8, at 226-27 (many groups were instrumental in structuring the activities of children); REPORT OF PANEL ON YOUTH OF THE PRESIDENT'S SCIENCE ADVISORY COMMITTEE, YOUTH: TRANSITION TO ADULTHOOD 34 (1974) [hereinafter cited as YOUTH: TRANSITION TO ADULTHOOD] (the United States adopted a variety of laws to protect children against dangerous labor and neglect, to require them to attend school, and to secure for them a better future); D. ROTHMAN, *supra* note 2, at 206-07 (Progressives attempted to influence immigrant children to adopt the American way of life); E. RYERSON, *supra* note 2, at 27-31 (the establishment of the juvenile court was an outgrowth of a more comprehensive child-study movement, based on a view of children as innocents); S. TIFFIN, *supra* note 12, at 61-83 (institutional child care in the nineteenth and early twentieth centuries was based on children's innocence and malleability of character); Schlossman & Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 67 (1978) (girls were discriminated against in the early twentieth century juvenile court because it was believed that they needed more protection than boys).

16. *See* Empey, *Introduction: The Social Construction of Childhood and Juvenile Justice*, in THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE 1, 19-21 (L. Empey ed. 1979); Empey, *The Progressive Legacy and the Concept of Childhood*, in JUVENILE JUSTICE, *supra* note 2, at 3, 25-28. All four of these reforms—child labor laws, child welfare laws, compulsory education requirements, and the juvenile court system—reflected the central Progressive assumption that the ideal way to prepare children for life was to strengthen the nuclear family, shield children from adult roles, and formally educate them for upward mobility. *See, e.g.*, D. ROTHMAN, *supra* note 2, at 206-09; YOUTH: TRANSITION TO ADULTHOOD, *supra* note 15, at 25.

17. *See* D. ROTHMAN, *supra* note 2, at 43.

18. *See, e.g.*, D. MATZA, DELINQUENCY AND DRIFT 5 (1964); D. ROTHMAN, *supra* note 2, at 50-51.

19. The new criminology, as distinguished from the old theory of "free will," asserted a scientific determinism of deviance and sought to identify the causal variables producing crime and deliquency. In its quest for scientific legitimacy, criminology borrowed both methodology and vocabulary from the medical profession. Medical metaphors such as pathology, infection, diagnosis,

rather than on punishing the offense.[20] The result was the "Rehabilitative Ideal" that permeated all Progressive criminal justice reforms.[21] The Ideal emphasized open-ended, informal, and highly flexible policies so that the criminal justice professional had the discretion necessary to formulate individualized, case-by-case strategies for rehabilitating the deviant.[22]

---

and treatment were popular analogues for criminal justice professionals, who also prescribed an individualized approach to the diagnosis and cure of each offender. *See, e.g.,* A. PLATT, *supra* note 2, at 18; D. ROTHMAN, *supra* note 2, at 56.

20. *See* E. RYERSON, *supra* note 2, at 22. These deterministic interpretations of human behavior caused a redirection of research efforts in order to identify the causes of crime by scientifically studying the offender, because the ability to identify the causes of crime also implied the correlative ability to "cure" crime. Although early positivistic criminology attributed criminal behavior to hereditary and biological factors, these views were soon challenged by social and environmental explanations of crime. The social science professionals in psychology, sociology, and social work who were emerging from colleges and universities acquired a professional stake in environmental explanations of deviance, because environmental factors allowed for greater possibilities of intervention and cure than did imperious biological determinism. *See, e.g.,* J. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA 192 (1971); R. LUBOVE, THE PROFESSIONAL ALTRUIST 56 (1967); A. PLATT, *supra* note 2, at 53; E. RYERSON, *supra* note 2, at 24; W. TRATTNER, *supra* note 7, at 186. The environmental interpretations of deviance attributed deviance to the social and economic conditions associated with immigrant ghettos and urban slums into which the benefits of the American society could not penetrate. Environmentalists emphasized the impacts of industrialization and urbanization in the process of crime causation. Although there was always a touch of moralism condemning those who succumbed to these deleterious influences, there was also an appreciation of the vulnerability of the urban poor to economic forces and social conditions beyond their control. *See, e.g.,* E. RYERSON, *supra* note 2, at 24.

21. These reforms included increased use of probation and indeterminate sentencing, parole supervision following release, and the juvenile court. *See* F. ALLEN, *Legal Values and the Rehabilitative Ideal,* in BORDERLAND, *supra* note 14, at 25, 26; *see also* F. ALLEN, DECLINE, *supra* note 14, at 6 (twentieth century innovations in criminal justice reflect the Rehabilitiave Ideal); Allen, *supra* note 14, at 149 (same).

22. A pervasive feature of all Progressive criminal justice reforms was discretionary decision making by experts. Discretion was necessary because identifying the causes and prescribing the cures for delinquency required an individualized approach that precluded uniformity of treatment or standardization of criteria. *See* D. ROTHMAN, *supra* note 2, at 54. It is probably not coincidental that the increased flexibility, indeterminacy, and discretion in social control practices corresponded to the increasing volume and changing characteristics of offenders during this period. *See id.* at 77; *see also* Feld, *supra* note 2, at 182 (discretion afforded flexibility in social control of immigrants and their children).

A flourishing Rehabilitative Ideal requires both a belief in the maleability of human behavior and a basic moral consensus about the appropriate directions of human change. It also requires agreement about means and ends, the goals of change, and the strategies necessary to achieve them. Progressives believed that the new sciences of human behavior provided them with the tools for systematic human change. They also believed in the virtues of the social

The juvenile court was based on this Rehabilitative Ideal. It was conceived as a specialized, bureaucratic agency, staffed by experts and designed to serve the needs of a specific category of client: the "child at risk," whether offender, dependent, or neglected. The juvenile court professionals were to make discretionary, individualized treatment decisions to achieve benevolent goals and social uplift by substituting a scientific and preventative approach for the traditional punitive philosophy of the criminal law.[23] The legal justification for intervention was parens patriae—the right and responsibility of the state to substitute its own control over children for that of the natural parents when the latter were unable or unwilling to meet their responsibilities or when the child posed a community crime problem.[24] The parens patriae doctrine drew no distinction be-

---

order and the propriety of imposing the values of a middle-class lifestyle on immigrants and the poor. *See* F. ALLEN, *Legal Values and the Rehabilitative Ideal,* in BORDERLAND, *supra* note 14, at 25.

23. *See* Hazard, *The Jurisprudence of Juvenile Deviance,* in PURSUING JUSTICE FOR THE CHILD 4 (M. Rosenheim ed. 1976) [hereinafter cited as PURSUING JUSTICE]; Mennel, *Attitudes and Policies Toward Juvenile Delinquency in the United States: A Historigraphical Review,* in 4 CRIME AND SOCIAL JUSTICE 191, 207-15 (M. Tonry & N. Morris eds. 1983); Platt, *The Triumph of Benevolence: The Origins of the Juvenile Justice System in the United States,* in CRIMINAL JUSTICE IN AMERICA 356, 377-84 (R. Quinney ed. 1974); Schultz, *The Cycle of Juvenile Court History,* 19 CRIME & DELINQ. 457, 458-59 (1973). *See generally* authorities cited *supra* note 2.

Many of the characteristics of the Progressive juvenile court can be traced to the Houses of Refuge that emerged in the first third of the nineteenth century. The Houses were the first specialized agency for the control of youth. *See, e.g.,* H. FINESTONE, VICTIMS OF CHANGE: JUVENILE DELINQUENTS IN AMERICAN SOCIETY 25-27 (1976); J. HAWES, *supra* note 20, at 144-45; J. KETT, *supra* note 8, at 122, 222; R. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825-1940, at 130-35 (1973); R. PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE 1815-1857, at v (1969); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 207 (1971); Fox, *supra* note 2, at 1187-89, 1207-12. One authority contends that

> developments in the 19th century laid the foundation for the subsequent development of the juvenile justice system in the United States. . . . [L]egislation establishing the juvenile court in Chicago did no more than formalize long-standing practices for dealing with juveniles in Illinois. . . . [I]n almost every state the legal and ideological innovations typically associated with the juvenile court (e.g., the extension of legal control over noncriminal children, the denial of due process, and the legalization of the rehabilitative ideal) had occurred before the advent of children's courts, as a result of earlier legislation establishing juvenile reformatories.

Sutton, *Social Structure, Institutions, and the Legal Status of Children in the United States,* 88 AM. J. SOC. 915, 917 (1983).

24. *See, e.g.,* Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. REV. 147, 181 (1970); Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?,* 25 DE PAUL L. REV. 895, 901-02 (1976); Pisciotta, *Saving the Children: The Promise and Practice of Parens Pa-*

tween criminal and noncriminal youth conduct, a view that supported the Progressive position that juvenile court proceedings were civil rather than criminal in nature. The civil nature of the proceedings fulfilled the reformers' desire to remove children from the adult criminal system and allowed greater supervision of the children and greater flexibility in treatment.[25] Because the reformers eschewed punishment, they could reach behavior such as smoking, sexual activity, truancy, immorality, stubbornness, vagrancy, or living a wayward, idle, and dissolute life—behavior that had previously been ignored but that the Progressives wished to end because it betokened premature adulthood.[26] Such "status jurisdiction" reflected the dominant concept of childhood and adolescence that had taken root during the nineteenth century and authorized predelinquent intervention to forestall premature adulthood, enforce the dependent conditions of youth, and supervise children's moral

---

triae, 1838-98, 28 CRIME & DELINQ. 410, 410 (1982); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court,* 23 S.C.L. REV. 205, 207-10 (1971). The leading case of the period, *Ex parte* Crouse, 4 Whart. 9 (Pa. 1838), reflects not only the ideology of environmentalism and preventive intervention, but also the breadth of the parens patriae doctrine and the futility of legal challenges to state intervention. *See id.* at 11; *see also* D. ROTHMAN, *supra* note 2, at 212 (reformers' use of parens patriae to justify state intervention); Fox, *supra* note 2, at 1192-93 (the emergence of the doctrine of parens patriae).

25. The juvenile court sought to aid children as well as to control their criminal behavior. Historically, controlling youth through the criminal law presented the stark alternatives of a criminal conviction and punishment as an adult or an acquittal or dismissal that freed the youth from all supervision. Jury or judicial nullification to avoid punishment excluded many youths from control, particularly minor offenders. Desires for greater supervision and control, rather than leniency, animated many reformers. They sought a system that would allow the law to intervene affirmatively in the lives of young offenders, rather than only to impose punishment. The rehabilitative juvenile court provided Progressives with a middle ground between punishing behavior through the criminal process, thereby criminalizing a youth, and ignoring it altogether, thereby encouraging a resumption of a criminal career. *See, e.g.,* J. HAWES, *supra* note 20, at 162; A. PLATT, *supra* note 2, at 46-55, 101-36; D. ROTHMAN, *supra* note 2, at 213; E. RYERSON, *supra* note 2, at 33; Fox, *supra* note 2, at 1194, 1212-15.

26. *See* authorities cited *supra* notes 2 & 23; *see also* Andrews & Cohn, *Ungovernability: The Unjustifiable Jurisdiction,* 83 YALE L.J. 1383, 1388 (1974) (discussing the significance of juvenile adjudications for status offenses); Garlock, *"Wayward" Children and the Law, 1820-1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court,* 13 GA. L. REV. 341, 342-43 (1979) (questioning whether juvenile courts should refuse to exercise jurisdiction over status offenses); Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son,* 74 MICH. L. REV. 1097, 1098-99 (1976) (noting that every state and the District of Columbia have statutes giving the juvenile court jurisdiction over status offenses); Schlossman & Wallach, *supra* note 15, at 70, 81 (discussing the purpose of the Progressives' concern with certain behavior).

upbringing.[27]

The Progressives envisioned a juvenile court administered by an expert judge and assisted by social service personnel, clinicians, and probation officers. They hoped judges would be specialists, trained in the social sciences and child development, whose empathic qualities and insight could aid in making individualized dispositions in the "best interests of the child."[28] Because it was assumed that a rational, scientific analysis of facts would reveal the proper diagnosis and prescribe the cure, the juvenile court's methodology encouraged collecting as much information as possible about the child. The resulting factual inquiry into the whole child accorded minor significance to the specific criminal offense because the offense indicated little about a child's "real needs."[29] Because the reformers' aims were benevolent, their solicitude individualized, and their intervention guided by science, they saw no reason to narrowly circumscribe the power of the state. They maximized discretion to provide flexibility in diagnosis and treatment and focused on the child and the child's character and lifestyle rather than on the crime.

In distinguishing children from adult offenders, the juvenile court also rejected the procedures of criminal prosecution. It introduced a euphemistic vocabulary and a physically separate court building to avoid the stigma of adult prosecutions, and it modified courtroom procedures to eliminate any implica-

27. *See* A. PLATT, *supra* note 2, at 135. Ironically, the juvenile court simultaneously affirmed the primacy of the nuclear family and expanded the power of the state to intervene in instances of parental inadequacy. *See* D. ROTHMAN, *supra* note 2, at 212. Child rearing had become too complex to relegate to unsupervised family control. Immigrant and lower class families, caught in the conflict of cultures, could not be expected adequately to Americanize their children, and state supervision was imposed to assure that the next generation adopted an acceptable middle-class way of life. *See id.* at 206. The juvenile court provided the agency through which Anglo-Protestant Americans defined the norms of family and childhood to which the outsiders were to adhere. *See* E. RYERSON, *supra* note 2, at 48.

28. One consequence of judicial discretion, however, "was a system that made the personality of the judge, his likes and dislikes, attitudes and prejudices, consistencies and caprices, the decisive element in shaping the character of his courtroom." D. ROTHMAN, *supra* note 2, at 238.

29. *See id.* at 215. A system of decision making in which literally everything is relevant to the ultimate determination of a child's "best interests" necessarily is heavily dependent on sound judgment and professional expertise. The Progressives envisioned a well-trained probation staff schooled in the principles of psychology and social work, aided by mental hygiene clinics and psychological diagnostic services, and able to provide the scientific undergirding that would assure consistency in dispositions. *Id.* at 242-43.

tion of a criminal proceeding.[30] For example, proceedings were initiated by a petition in the welfare of the child, rather than by a criminal complaint. Because the important issues involved the child's background and welfare rather than the commission of a specific crime, courts dispensed with juries, lawyers, rules of evidence, and formal procedures. To avoid stigmatization, hearings were confidential and private, access to court records was limited, and youths were found to be "delinquent" rather than guilty of an offense. To make proceedings more personal and private, the judge was supposed to sit next to the child while court personnel presented a treatment plan to meet the child's needs as determined by a background investigation identifying the sources of the child's misconduct. Dispositions were indeterminate and nonproportional and could continue for the duration of minority. The events that brought the child before the court affected neither the degree nor the duration of intervention because each child's needs differed and no limits could be defined in advance. The dispositional process was designed to determine why the child was in court in the first instance and what could be done to change the character, attitude, and behavior of the youth to prevent a reappearance.[31]

B. The Constitutional Domestication of the Juvenile Court

Despite occasional challenges and criticism of some conceptual or administrative aspects of juvenile justice, no sustained and systematic examination of the juvenile court occurred until the 1960's.[32] In 1967, however, *In re Gault*[33] began a "due process revolution" that substantially transformed the juvenile court from a social welfare agency into a legal institution. This "constitutional domestication"[34] was the first step in the convergence of the procedures of the juvenile justice system with those of the adult criminal process.[35]

30. *See, e.g.*, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 92 (1967) [hereinafter cited as Juvenile Delinquency and Youth Crime]; D. Rothman, *supra* note 2, at 218; *see also* authorities cited *supra* notes 2 & 23.

31. *See* E. Ryerson, *supra* note 2, at 38.

32. *See, e.g.*, Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 8; Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 Harv. L. Rev. 775, 775-76 (1966).

33. 387 U.S. 1 (1967).

34. *Id.* at 22.

35. On the "criminalization" of the juvenile court, see, e.g., Feld, *Juvenile*

In re Gault involved the delinquency adjudication and institutional commitment of a youth who allegedly made a lewd telephone call of the "irritatingly offensive, adolescent, sex variety" to a neighbor.[36] Fifteen-year-old Gerald Gault was taken into custody, detained overnight without notification of his parents, and made to appear at a hearing the following day. A pro forma petition alleged simply that he was a delinquent minor in need of the care and custody of the court. The complaining witness did not appear, no sworn testimony was taken, and no transcript or formal memorandum of the substance of the proceedings was made. The judge interrogated Gault, who apparently made incriminating responses. At no time was Gault assisted by an attorney or advised of a right to counsel. Following his hearing, the judge returned Gault to a detention cell for several days. At his dispositional hearing the following week, the judge committed Gault as a juvenile delinquent to the State Industrial School "for the period of his minority [that is, until 21], unless sooner discharged by due process of law."[37]

The Court examined the realities of juvenile incarceration rather than accepting the rehabilitative rhetoric of Progressive juvenile jurisprudence. In reviewing the history of the juvenile court, the Court noted that the traditional rationales for denying procedural safeguards to juveniles included the belief that the proceedings were neither adversarial nor criminal and that, because the State acted as parens patriae, the child was entitled to custody rather than liberty.[38] The Court rejected these assertions, however, because denial of procedures frequently resulted in arbitrariness rather than "careful, compassionate, individualized treatment."[39] Although the Court hoped to re-

---

Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal," 65 MINN. L. REV. 167, 202 (1980). On the due process revolution in the juvenile court, see, e.g., Paulsen, *The Constitutional Domestication of the Juvenile Court,* 1967 SUP. CT. REV. 233, 237; Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167, 168-69 [hereinafter cited as Paulsen, *Constitutional Context*].

36. 387 U.S. at 4.

37. *Gault,* 387 U.S. at 7-8 (brackets in original). If Gault had been an adult, his offense would have resulted in no more than a $50 fine or two months' imprisonment; as a juvenile, however, he was subject to incarceration for up to six years, the duration of his minority. *Id.* at 8-9. Although Arizona has increased the penalties that can be imposed in misdemeanor cases, they still are much less severe than the dispositions juveniles can receive. *Cf.* ARIZ. REV. STAT. ANN. §§ 13-2904 (1978) (Gault's conduct is a class 1 misdemeanor); 13-707 (a class 1 misdemeanor carries a maximum term of imprisonment of six months); 12-802(A) (a class 1 misdemeanor carries a maximum fine of $1000).

38. *See Gault,* 387 U.S. at 14-17.

39. *Id.* at 18.

tain the potential benefits of the juvenile process, it insisted that the claims of the juvenile court process had to be candidly appraised in light of the realities of recidivism, the failures of rehabilitation, the stigma of a "delinquency" label, the breaches of confidentiality, and the arbitrariness of the process.[40] The Court noted that a juvenile justice process free of constitutional safeguards had not abated recidivism or lowered the high crime rates among juvenile offenders. It also emphasized that the realities of juvenile institutional confinement mandated elementary procedural safeguards.[41] These safeguards included advance notice of charges, a fair and impartial hearing, assistance of counsel, opportunity to confront and cross-examine witnesses, and a privilege against self-incrimination.[42]

Although the Court discussed the realities of the juvenile system and mandated procedural safeguards, it limited its holding to the adjudicatory hearing at which a child is determined to be a delinquent.[43] It asserted that its decision would

---

40. *See id.* at 21.

41. The Supreme Court noted that:

> 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. . . . [U]nder our Constitution, the condition of being a [child] does not justify a kangaroo court.

Id. at 27-28.

42. *See id.* at 31-57; *see also id.* at 22, 24, 27 (discussing whether juveniles should be afforded constitutional protection through procedural safeguards); Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 662-63 (1980) (constitutional protections should attach in proceedings that may result in incarceration of a child). The *Gault* opinion is unclear regarding whether the various rights afforded juveniles attach because of the possibility of institutional commitment, *see, e.g., Gault*, 387 U.S. at 13, or if they attach only when the youth is actually committed to a state correctional facility, *see id.* at 36-37, 41, 44, 49, 56, 57; *cf.* Schultz & Cohen, *Isolationism in Juvenile Court Jurisprudence*, in PURSUING JUSTICE, *supra* note 23, at 20, 28 (*Gault* opinion unclear about basis of extension of right to juveniles). *Compare* Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial in state criminal proceedings determined by the penalty authorized by law rather than the sentence actually imposed) *with* Scott v. Illinois, 440 U.S. 367 (1979) (sixth amendment right to counsel in state misdemeanor trials attaches only if a jail sentence is actually imposed).

43. *See Gault*, 387 U.S. at 13. The Court specifically held that "[w]e do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even con-

in no way impair the value of the unique procedures for processing and treating juveniles and that the procedural safeguards associated with the adversarial process were essential in juvenile proceedings, both to determine the truth and to preserve individual freedom by limiting the power of the state.[44]

In contrast to the narrow holding, the basis for the Court's constitutional analysis of what rights must be afforded juveniles in adjudicatory hearings was broad. The Court used the "fundamental fairness" requirements of fourteenth amendment due process to grant the rights to notice, counsel, and confrontation and did not even refer specifically to the explicit requirements of the sixth amendment.[45] The Court did, how-

---

sider the entire process relating to juvenile 'delinquents.' " *Id.*; *see also* McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459-60 (1981) (discussing the limitations on juveniles' procedural rights). The Court's holding did not address a juvenile's rights in either the preadjudicatory (i.e., intake and detention) or postadjudicatory (i.e., disposition) stages of the proceeding, but narrowly confined itself to the actual adjudication of guilt or innocence in a trial-like setting. *See Gault*, 387 U.S. at 13, 31 n.48. As will be suggested in the analysis of the Minnesota Supreme Court's Rules of Procedure for Juvenile Court, the United States Supreme Court's reluctance to address the nonadjudicatory stages of the juvenile process has resulted in the consistently "second class" procedural characteristics of the juvenile court. *See infra* notes 284-331, 344-387, and accompanying text.

44. *See Gault*, 387 U.S. at 21. In its subsequent delinquency decisions, the Court balanced the particular function that a constitutional right served against its impact on the unique processes of the juvenile court and used the degree of impairment of the traditional juvenile court's functions as one of the criteria in determining whether a right would be afforded to juveniles. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 535-39 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971). In *Gault*, however, the Court was adjudicating constitutional rights in a procedural void.

45. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The discussion of the notice requirement in *Gault* made no reference to the sixth amendment's provision for notice; rather, the Court held that "due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding." *Gault*, 387 U.S. at 33. Similarly, although the Court described a delinquency proceeding as "comparable in seriousness to a felony prosecution," *id.* at 36, the right to counsel in a juvenile proceeding is grounded in the "due process clause of the fourteenth amendment" rather than the sixth amendment's right to counsel, *id.* at 41. Finally, the Court's analysis of the right to confront and examine witnesses rested on "our law and constitutional requirements" rather than the specific language of the sixth amendment. *Id.* at 57. In deciding the applicability of the fifth amendment privilege against

ever, explicitly invoke the fifth amendment to establish that juveniles were protected against self-incrimination in delinquency proceedings.[46] The Court's extension of the self-incrimination protection provides the clearest example of the dual

---

self-incrimination, the majority resorted to an analytical strategy akin to selective incorporation, finding a "functional equivalence" between a delinquency proceeding and an adult criminal trial. *See id.* at 50.

Cases such as Adamson v. California, 332 U.S. 46 (1947); Betts v. Brady, 316 U.S. 455 (1942), *overruled,* Gideon v. Wainwright, 372 U.S. 335 (1963); Palko v. Connecticut, 302 U.S. 319 (1937); and Twining v. New Jersey, 211 U.S. 78 (1908), reflect the historical constitutional debate between proponents of "selective incorporation" and proponents of "fundamental fairness" and "total incorporation" of the Bill of Rights. *See, e.g.,* Henkin, *"Selective Incorporation" in the Fourteenth Amendment,* 73 YALE L.J. 74 (1963); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism,* 66 YALE L.J. 319, 327-33 (1967); Rosenberg, *supra* note 42, at 666-67.

The irony of the "fundamental fairness" strategy employed by the Court in *Gault* to provide procedural safeguards is that this same strategy later permitted the Court to deny juveniles a jury trial by finding that the right was not fundamental. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *infra* notes 57-71 and accompanying text. The irony stems from the fact that in the years between *Gault* and *McKeiver,* the Supreme Court decided Duncan v. Louisiana, 391 U.S. 145 (1968), which held that the sixth amendment right to a jury trial was applicable to the states via the fourteenth amendment due process clause because it was "fundamental to the American scheme of justice." *Duncan,* 391 U.S. at 149.

46. It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. . . . [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. at 49-50; *accord* Addington v. Texas, 441 U.S. 418, 428 (1979) (criminal and delinquency proceedings are distinguishable from involuntary civil commitment because the former are punitive).

As a consequence of the Court's decision in *Gault* recognizing the applicability of the privilege against self-incrimination, juvenile adjudications no longer could be characterized as either "noncriminal" or as "nonadversarial," because the fifth amendment privilege, more than any other provision of the Bill of Rights, is the fundamental guarantor of an adversarial process and the primary mechanism for maintaining a balance between the state and the individual.

The Court, in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), described the multiple policies underlying the fifth amendment:

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; *our preference for an accusatorial rather than an inquisitorial system of criminal justice;* our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; *our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,"* . . . ; our distrust of self-deprecatory statements; and our realization that the privilege,

functions of such safeguards in juvenile court adjudications: assuring accurate fact finding and protecting against government oppression.[47] In this respect, *Gault* is a premier example of the Warren Court's belief that expansion of constitutional rights and limitation on the coercive powers of the State could be obtained through the adversary process, which in turn would assure the regularity of law enforcement and reduce the need for

---

while sometimes "a shelter to the guilty," is often "a protection to the innocent."

378 U.S. at 55 (emphasis added) (citations omitted). *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968) (historical analysis of the fifth amendment as a limitation on state power over the individual); Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 385-86 (1977) (discussing the importance of the policies requiring the government to leave the individual alone and of prohibiting the government from the act of compelling self-incrimination).

47. If the Court in *Gault* had been concerned solely with the reliability of juvenile confessions and the accuracy of fact finding, safeguards other than the fifth amendment privilege, such as a requirement that all confessions must be shown to have been made voluntarily, would have sufficed. In both Gallegos v. Colorado, 370 U.S. 49 (1962), and Haley v. Ohio, 332 U.S. 596 (1948), the U.S. Supreme Court considered the admissibility of confessions made by juveniles and, employing the "voluntariness" test, concluded that youthfulness was a special circumstance requiring close judicial scrutiny. *Gallegos*, 370 U.S. at 54-55; *Haley*, 332 U.S. at 599-601. The Court, however, recognized that fifth amendment safeguards are not required simply because they ensure accurate fact finding or reliable confessions, but also because they serve as a means of maintaining a proper balance between the individual and the state:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

Gault, 387 U.S. at 47 (footnotes omitted); *see also* Rosenberg, *supra* note 42, at 668 (discussing the *Gault* Court's argument that a juvenile proceeding may be "functionally equivalent" to an adult criminal proceeding). One author distinguishes between those aspects of procedural due process that ensure the reliability of the process of determining guilt and those that are designed to ensure respect for the dignity of the individual. *See* Kadish, *supra* note 45, at 346-67; *see also* McCarthy, *supra* note 43, at 464 (distinguishing between procedures "designed to lead to accurate determinations" and those designed to safeguard the "balance in the relationship between an individual and the government"); *infra* notes 101-64 and accompanying text (analyzing the Minnesota Rules of Procedure for Juvenile Court's treatment of the admissibility of juvenile confessions).

continual judicial scrutiny.[48]

In subsequent juvenile court decisions, the Supreme Court further elaborated upon the criminal nature of delinquency proceedings. In *In re Winship*,[49] the Court decided that proof of delinquency must be established "beyond a reasonable doubt," rather than by lower civil standards of proof.[50] Because there is no explicit provision of the Bill of Rights regarding the standard of proof in criminal cases, the *Winship* Court first held that proof beyond a reasonable doubt was a constitutional requirement in adult criminal proceedings.[51] The Court then extended the same standard of proof to juvenile proceedings because of the standard's equally vital role there.[52] The Court concluded that the need to prevent unwarranted convictions and to guard against government power was sufficiently important to outweigh the dissenters' concerns that the juvenile court's unique therapeutic function would be thwarted and that "differences between juvenile courts and traditional criminal courts [would be eroded]."[53]

---

48. *See* Allen, *The Judicial Quest for Penal Justice: The Warren Court and The Criminal Cases*, 1975 U. ILL. L.F. 518, 530-31.

49. 397 U.S. 358 (1970).

50. *See id.* at 368.

51. *See id.* at 361-64.

52. *See id.* at 365-67. It is instructive to compare the *Winship* Court's treatment of the standard of proof in delinquency cases with that required for involuntary civil commitment of the mentally ill, which requires only "clear and convincing" evidence. Addington v. Texas, 441 U.S. 418, 433 (1979). In *Addington*, Chief Justice Burger distinguished both criminal and delinquency prosecutions from involuntary civil commitments and, in so doing, equated criminal trials and delinquency 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.
>
> . . . Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution.

441 U.S. at 427-28. Chief Justice Burger also noted that proof "beyond a reasonable doubt" is a critical component of criminal cases because it helps to preserve the "'moral force of the criminal law,' . . . and we should hesitate to apply it too broadly or casually in noncriminal cases." *Id.* at 428 (citation omitted).

53. *See Winship*, 397 U.S. at 376-77 (Burger, C.J., dissenting). Although parens patriae intervention may be a desirable method of dealing with wayward youths, "that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult." 397 U.S. at 367.

Five years later, the Court in *Breed v. Jones*[54] held that the protections of the double jeopardy clause of the fifth amendment prohibit the adult criminal prosecution of a youth after a conviction in juvenile court for the same offense. Although the Court framed the issue in terms of the applicability of an explicit provision of the Bill of Rights to state proceedings,[55] it resolved the question by recognizing the functional equivalence and the identical interests of the defendants in a delinquency proceeding and an adult criminal trial.[56]

Only in *McKeiver v. Pennsylvania*[57] did the Court decline to extend the procedural safeguards of adult criminal prosecutions to juvenile court proceedings.[58] The Court in *McKeiver* held that a jury is not required in a juvenile proceeding because the only requirement for "fundamental fairness" in such proceedings is "accurate factfinding," a requirement that can be as well satisfied by a judge as by a jury.[59] In suggesting that due process in the juvenile context required nothing more than

---

54. 421 U.S. 519 (1975).

55. *See id.* at 520.

56. The Court reiterated:

> Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities.
>
> . . . [I]t is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.

Id. at 528-29. The Court concluded that, with respect to the risks associated with double jeopardy, "we can find no persuasive distinction in that regard between the [juvenile] proceeding . . . and a criminal prosecution, each of which is designed to 'vindicate [the] very vital interest in enforcement of criminal laws.'" *Id.* at 531 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion)) (brackets in *Breed*).

57. 403 U.S. 528 (1971).

58. *McKeiver* was ultimately decided on the basis of fourteenth amendment due process and "fundamental fairness," even though the Court noted that the sixth amendment jury trial guarantee was applicable to state criminal proceedings by its incorporation into the fourteenth amendment. *See id.* at 540. The Court insisted, however, that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label." *Id.* at 541. The Court cautioned that "[t]here is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545.

59. *See id.* at 543.

accurate fact-finding, however, the Court departed significantly from its own prior analyses, which relied on the *dual* rationales of accurate fact-finding and protection against governmental oppression.[60] Furthermore, in insisting that the accuracy of the fact-finding process is the only concern of fundamental fairness, the Court ignored its own analysis in *Gault*, in which it held that the fifth amendment's privilege against self-incrimination was necessary in order to protect against governmental oppression even though accurate fact-finding might be impeded.[61] Justice Brennan's concurring-dissenting opinion in *McKeiver* notes that protection from governmental oppression might also be afforded by an alternative method, such as a public trial that would render the adjudicative process visible and accountable to the community.[62] The Court, however, denied that protection against government oppression was required at all[63] and, invoking the mythology of the sympathetic, paternalistic juvenile court judge, rejected the argument that the inbred, closed nature of the juvenile court could prejudice the accuracy of fact-finding.[64]

---

60. *See, e.g., In re* Winship, 397 U.S. 358, 363-64 (1970); *In re* Gault, 387 U.S. 1, 47 (1967).

61. *See supra* notes 46-47 and accompanying text.

62. *See McKeiver,* 403 U.S. at 553-55 (Brennan, J., concurring and dissenting). The *McKeiver* decision involved two cases raising the issues of jury trials in juvenile proceedings, one arising in Pennsylvania and the other in North Carolina. 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 (Brennan, J., concurring and dissenting), 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 (Brennan, J., concurring and dissenting). 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.* (Brennan, J., concurring and dissenting). The Pennsylvania juvenile procedures permitted a public trial, which Justice Brennan regarded as providing a functionally equivalent safeguard for the core values protected by the jury trial rights. *See id.* at 554-55 (Brennan, J., concurring and dissenting). He dissented in the North Carolina case, however, because the North Carolina procedures either permitted or required the exclusion of the public, and the public had in fact been excluded from the proceedings, which arose out of demonstrations by black students and adults against public school discrimination. *Id.* at 556-57 (Brennan, J., concurring and dissenting); *see also infra* notes 480-83 and accompanying text.

63. *See McKeiver,* 403 U.S. at 547-48.

64. *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

In denying juveniles the constitutional right to jury trials, the Court in *McKeiver* departed from its earlier mode of analysis[65] and emphasized the adverse impact that this right would have on the informality, flexibility, and confidentiality of juvenile court proceedings.[66] Rather than asking whether the constitutional right in question would have an adverse impact on any unique benefits of the juvenile court, the Court asked whether the right to a jury trial would positively aid or strengthen the functioning of the juvenile justice system.[67] Although the *McKeiver* Court found faults with the juvenile process, it asserted that imposing jury trials would in no way correct those deficiencies and would make the juvenile process unduly formal and adversarial. The Court did not consider, however, whether there might be any offsetting advantages to increased formality in juvenile proceedings[68] or to what extent its earlier decision in *Gault*[69] had effectively foreclosed its renewed concern with flexibility and informality at the adjudica-

---

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. at 550. There is, however, ample reason for concern about the accuracy of the fact-finding process in a justice system in which the same probation officers and the same child appear repeatedly before the same judge, who has access to the minor's previous social history and delinquency record in the course of deciding different aspects of the case at different stages. *See infra* notes 378-79 and accompanying text (describing the inherently prejudicial nature of such repeated contacts and excessive familiarity).

65. The *McKeiver* case is a "peculiar" decision because it required the Court both to misread its own precedents regarding the dual functions of procedural safeguards and the appropriate method of constitutional adjudication, and to ignore its own legal premises in *Winship* regarding the standard of proof beyond a reasonable doubt. *See, e.g.*, F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 83 (1982); Rosenberg, *supra* note 42, at 677.

66. The result clearly was dictated by the Court's concern that the right to a trial by jury would be the one procedural safeguard most disruptive of the traditional juvenile court and would require substantial alteration of traditional juvenile court practices because "it would bring with it . . . the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." *McKeiver*, 403 U.S. at 550. Ultimately, the Court realized that such an imposition would render the juvenile court virtually indistinguishable from a criminal court and would raise the more basic question of whether there is any need for a separate juvenile court at all. *See id.* at 551.

67. *See id.* at 547.

68. As one of its rationales for imposing procedural formality in *In re* Gault, 387 U.S. 1 (1967), the Court opined that the absence of formality "frequently resulted not in enlightened procedure, but in arbitrariness." *Id.* at 18-19.

69. 387 U.S. 1 (1967). *Gault*, particularly with its importation of the fifth amendment as the bulwark of the adversary system, had determined that an informal, flexible, nonadversarial procedure was inconsistent with the requirements of due process. *See, e.g.*, Gardner, *Punishment and Juvenile Justice: A*

tory stage. The Court also gave no indication why a more formal hearing was incompatible with the therapeutic dispositions that a young delinquent might receive. Although the Court decried the possibility of a public trial,[70] it presented no evidence or arguments to support its conclusion that publicity would be undesirable and that confidentiality of juvenile court proceedings was an indispensable element of the juvenile justice process.[71]

Together, *Gault*, *Winship*, and *McKeiver* precipitated a procedural revolution in the juvenile court system that has unintentionally but inevitably transformed its original Progressive conception. Progressive reformers envisioned the commission of an offense as essentially secondary to a determination of the "real needs" of a child—the child's social circumstances and environment. Intervention was premised on the need for rehabilitation and social uplift, not on the commission of an offense. Although *McKeiver* refused to extend the right to a jury trial to juveniles, *Gault* and *Winship* imported the adversarial model, the privilege against self-incrimination, attorneys, the criminal standard of proof, and the primacy of factual and legal guilt as a constitutional prerequisite to intervention. By emphasizing criminal procedural regularity in the determination of delinquency, the Supreme Court shifted the focus of the juvenile court from the Progressive emphasis on the "real needs" of the child to proof of the commission of criminal acts, thereby effectively transforming juvenile proceedings into criminal prosecutions.[72]

Since these decisions, the transformation of the juvenile court has continued through legislative, judicial, and administrative action. In addition to increased procedural formality, there have been major changes in other parts of the system.

Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders, 35 VAND. L. REV. 791, 830 (1982).

70. *See McKeiver*, 403 U.S. at 550. The *McKeiver* plurality did not respond to the point made by Justice Brennan in his partial dissent that the possibility of a public trial was an alternative mechanism that satisfied the core values of a jury trial. *See supra* note 62.

71. In other cases, the Court has held to the contrary, finding that the confidentiality of juvenile proceedings must in some circumstances give way to other important interests. *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1978) (freedom of the press in publishing lawfully obtained information prevails over state's interest in protecting juvenile's privacy); Davis v. Alaska, 415 U.S. 308, 319 (1974) (the defendant's right of confrontation in a criminal case is paramount to the state's interest in preserving the confidentiality of a juvenile record).

72. *See* E. RYERSON, *supra* note 2, at 156.

The Supreme Court's recognition that the Progressive juvenile court failed to realize its benevolent therapeutic promise has led to changes in the jurisdiction of the juvenile court. Diversion, deinstitutionalization, and "decriminalization" of status offenders have altered the role of the juvenile court[73] as states have removed status jurisdiction from their juvenile codes entirely,[74] redefined it to avoid the stigma of crime/delinquency adjudications,[75] and limited the dispositions that noncriminal

73. *See, e.g.,* Empey, *Juvenile Justice Reform: Diversion, Due Process, and Deinstitutionalization,* in PRISONERS IN AMERICA 13 (L. Ohlin ed. 1973). Although "[t]he juvenile court's jurisdiction over children's noncriminal misbehavior has long been seen as a cornerstone of its mission," that foundation is rapidly eroding. INSTITUTE OF JUDICIAL ADMININSTRATION AND AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT (1977) [hereinafter cited as JUVENILE JUSTICE STANDARDS]. The quotation is from JUVENILE JUSTICE STANDARDS, *supra,* STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 2. The Standards continue: "These standards take the position that the present jurisdiction of the juvenile court over noncriminal behavior—the status offense jurisdiction—should be cut short and a system of voluntary referral to services provided outside the juvenile justice system adopted in its stead." *Id.*

The Juvenile Justice Standards Project was a cooperative effort of the Institute of Judicial Administration and the American Bar Association. The result of the Project's efforts was a multivolume set of standards that was intended to be to the juvenile justice process what the Standards Relating to Criminal Justice was to the criminal process. Most of these standards were approved by the ABA at its mid-year meeting in 1979. The remainder, with the exception of one volume, were approved at the ABA's mid-year meeting in 1980. The STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR were published in 1982. *See also* E. SCHUR, RADICAL NON-INTERVENTION: RETHINKING THE DELINQUENCY PROBLEM 46-51 (1973) (discussing the failure of programs for predicting delinquency); Rosenheim, *Notes on Helping Juvenile Nuisances,* in PURSUING JUSTICE, *supra* note 23, at 52 (courts persist in handling status offenses despite studies recommending alternative treatment).

Virtually every professional group that has considered the issue of status jurisdiction has recommended either its elimination from the juvenile court or drastic restrictions on the grounds for and intensity of intervention. These recommendations also have sustained the "deinstitutionalization" movement. *See generally* NEITHER ANGELS NOR THIEVES: STUDIES IN THE DE-INSTITUTIONALIZATION OF STATUS OFFENDERS (J. Handler & J. Zatz eds. 1982) [hereinafter cited as NEITHER ANGELS NOR THIEVES].

74. *See, e.g.,* MINN. STAT. 260.015(5)(e) (1971), *repealed by* Act of April 11, 1974, ch. 469, § 1, Minn. Laws 1149.

75. One version of the redefinitional process was the removal of status offenses from the delinquency jurisdiction of the juvenile court and the creation of a separate legal category of "Persons in Need of Supervision" (PINS). M. LEVIN & R. SARRI, JUVENILE DELINQUENCY: A COMPARATIVE ANALYSIS OF LEGAL CODES IN THE UNITED STATES 12 (1974).

Minnesota has chosen not to label truants, runaways, alcohol and controlled substance offenders, and petty offenders as "delinquent." *See* MINN. STAT. § 260.015 (5), (19)-(23) (1982). Although the juvenile court still has jurisdiction over these offenders, *see, e.g.,* MINN. STAT. §§ 260.111 (1982), the dispositions it may impose are more limited than those that can be imposed on delinquent children. *Compare id.* § 260.194 (dispositions available to children who are habitually truants, runaways, or juvenile petty offenders) *and id.*

offenders can receive.[76] Similarly, legislatures and courts have extensively scrutinized the handling of serious young offenders, and the most difficult youths in the juvenile justice process are now removed to criminal courts for prosecution as adults.[77] These jurisdictional modifications narrow the scope of the juvenile court both at the "hard" end, through the removal of serious juvenile offenders, and at the "soft" end, through the removal of status offenders. At the same time that juvenile jurisdiction is being narrowed, the dispositions of the remaining delinquents increasingly reflect the impact of the "justice model," in which "just deserts" rather than "real needs" prescribe the appropriate sentence.[78] Principles of proportionality and determinacy based on the present offense and prior record, not the best interests of the child, dictate the length, location, and intensity of intervention.[79] Finally, as the dispositions by the juvenile court increasingly subordinate the "needs" of the offender to the nature of the offense and traditional justifications for punishment, the formal procedural safeguards of the juvenile court increasingly resemble those of the adult criminal process.[80] These four developments—the removal of status offenders, the waiver of serious offenders into the adult system, the increasing punitiveness of dispositions, and the growing emphasis on procedural formality—have contributed to the criminalization of the juvenile court. Current practice, as ex-

---

§ 260.195 (dispositions available to juvenile alchohol and controlled substance offenders) *with id.* § 260.185 (Supp. 1983) (dispositions available to delinquent children).

76. *See, e.g., In re* Ellery C., 32 N.Y.2d 588, 591, 300 N.E.2d 424, 425, 347 N.Y.S.2d 51, 53 (1973) (prohibiting the commitment of status offenders to the same institutions as youths who committed crimes); Harris v. Calendine, 233 S.E.2d 318, 325 (W. Va. 1977) (prohibiting incarceration of status offenders in a secure institution with children guilty of criminal conduct).

The deinstitutionalization of status offenders received substantial impetus with the passage of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601-5640 (1976 & Supp. III 1979), *as amended by* Juvenile Justice Amendments of 1980, Pub. L. No. 96-509, 94 Stat. 2750 (1980). That Act provided, inter alia, that "juveniles . . . charged with . . . offenses that would not be criminal if committed by an adult . . . , shall not be placed in juvenile detention or correctional facilities." 42 U.S.C. § 5633(a)(12)(a) (1976 & Supp. III 1979) (current version at 42 U.S.C. § 5633(a)(12)(a) (1982)). *See generally* NEITHER ANGELS NOR THIEVES, *supra* note 73 (evaluative studies of impact in the states of J.J.D.P. deinstitutionalization mandate).

77. *See, e.g.,* Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions,* 62 MINN. L. REV. 515, 519-20 (1978) [hereinafter cited as Feld, *Reference of Juvenile Offenders*]; Feld, *supra* note 35, at 172; *infra* notes 497-522 and accompanying text.

78. *See infra* notes 428-53 and accompanying text.

79. *See infra* notes 442-53 and accompanying text.

80. *See infra* notes 391-95 and accompanying text.

emplified by Minnesota's new rules of procedure, can be understood only against this background.

C. The Background of Minnesota's Rules of Procedure for Juvenile Court

In September, 1975, Chief Justice Robert Sheran of the Minnesota Supreme Court appointed a seventeen-member Study Commission to assess the role and operation of the juvenile courts in Minnesota and to recommend to the supreme court ways to improve the administration of juvenile justice.[81] Elected officials, county attorneys, defense lawyers, police, juvenile court judges, school officials, and citizens comprised the Study Commission,[82] and a supreme court justice served as its liaison with the court. Acting on a Study Commission recommendation, Chief Justice Sheran appointed a Special Task Force in early 1980 and charged it with developing uniform statewide rules of juvenile court procedure to replace the existing patchwork of rules.[83] Because the Commission remained ultimately responsible for proposing the rules to the Minnesota Supreme Court, members of the two groups consulted each other regularly during the year and a half that the Task Force met.[84] The majority of the Task Force members were con-

81. *See, e.g.*, SUPREME COURT JUVENILE JUSTICE STUDY COMMISSION, REPORT TO THE MINNESOTA SUPREME COURT 1-3 (1976).

82. *See id.* at 1. The Commission conducted a number of studies about the administration of juvenile justice and made various recommendations to the court.

83. Order of the Minnesota Supreme Court, *In re* Proposed Rules of Juvenile Court Procedure (Feb. 25, 1980) (copy on file with the author). The Task Force was composed of several members of the Study Commission and a number of other active participants in the juvenile justice process. Rules existing at the time of the Task Force's creation allowed the urban counties to promulgate their own rules of procedure while requiring rural counties to adhere to uniform rules. *Compare* MINN. R.P. JUV. CT. (1982) (uniform rules for rural counties) *with* BENCH BOOK: HENNEPIN COUNTY JUVENILE COURT RULES (1977).

84. Although never explicitly articulated, the views of members of both groups diverged on several important juvenile justice policy issues, reflecting their fundamental philosophical differences. Within the Rules Drafting Task Force, the policy views of the "practitioners"—the urban juvenile court judges, prosecutors, and defense attorneys—prevailed. When the Task Force Report was submitted to the full Juvenile Justice Study Commission, the commission members on the Rules Drafting Task Force who had been in the minority on the Task Force were able to persuade a majority of the Commission's members to endorse their "minority" position. Thus, the proposed rules of procedure for juvenile court that were eventually submitted to the Minnesota Supreme Court for adoption represented the minority position of those who were responsible for their drafting. *Compare* STATE OF MINNESOTA SUPREME COURT, PROPOSED RULES OF PROCEDURE FOR JUVENILE COURT (July 20, 1982) (the Task Force mi-

cerned primarily with the efficient administration of juvenile justice and wanted to afford the young defendant considerable autonomy as a participant in the process, whereas the majority of the Study Commission subscribed to the traditional rehabilitative and paternalistic approach.[85]

The Court promulgated the new Minnesota Rules of Procedure for Juvenile Court on December 17, 1982, with an effective date of May 1, 1983.[86] Although some of the new rules add little more than a processing timetable to the preexisting procedures,[87] others raise issues of substantive juvenile jurispru-

---

nority position) *with* R. SCOTT, MINORITY REPORT TO THE PROPOSED JUVENILE COURT RULES (1982) (the Task Force majority position) (a copy of the Minority Report is on file with the author).

85. The latter position is reflected in the letter of transmittal that accompanied the Proposed Rules when they were submitted to the Minnesota Supreme Court for adoption:

> Children by reason of their status deserve the special protection of the law. And the interests of society are best served by affording them every reasonable assistance and incentive to adapt their future conduct to the norms of society, despite the odds against success with many . . . . While the juvenile courts cannot assure rehabilitation, they must secure to the children coming within their jurisdiction an environment which invites that outcome. This environment is best evidenced by practices and procedures which adapt themselves to the circumstances of the case, which make the child's rights and interest a first concern of the court, which promote the child's self-respect and acceptance of society's standards of conduct and which encourage confidence in the integrity and compassion of the juvenile courts.

Supreme Court Juvenile Justice Study Commission, Letter Submitting Proposed Rules 2-3 (May 24, 1982) (copy on file with the author).

86. After receiving the Proposed Rules of Procedure for Juvenile Court, the Minnesota Supreme Court ordered their publication and scheduled a hearing for November 16, 1982, at which the court would receive oral and written testimony. Order of Minnesota Supreme Court, *In re* Proposed Rules of Procedure for Juvenile Court (Aug. 24, 1982). There were a number of briefs and petitions filed, and extensive oral testimony, virtually all of which centered on one provision of the rules that would have extended the *Miranda* warning requirement to "school personnel." Proposed Rule 6.01 provided that confessions, admissions, or statements would not be admissible if they were obtained "during an interrogation of a child who is physically restrained by . . . school staff personnel," unless the interrogators complied with certain procedural requirements. *In re* Proposed Rules of Procedure for Juvenile Court, *supra*, Rule 6.01. This provision was eliminated from the rules ultimately promulgated. *See, e.g.*, MINN. R.P. JUV. CT. 6.01 (limits *Miranda* requirement to interrogations by peace officers, probation officers, and parole officers).

The members of the Rules Drafting Task Force whose majority positions within the Task Force had been overruled by the majority of the Supreme Court's Juvenile Justice Study Commission filed a "Minority Report to the Proposed Juvenile Court Rules." The rules that the supreme court ultimately adopted repudiated several of the Commission's proposals and reinstated the Rules Task Force recommendations. *See supra* note 84.

87. The Rules establish two timetables for processing juvenile offenders through the various stages of the justice system. The timetables vary depending upon whether the youth is being held in detention. For youths not held in

dence. In promulgating these rules, the Minnesota Supreme

detention, the formal process is initiated by the filing of a delinquency petition. MINN. R.P. JUV. CT. 19.

The Rules are silent on what role an intake screening unit will perform in deciding which cases are petitioned to the juvenile court. Traditionally, intake involves a preliminary screening of cases prior to the filing of charges, typically performed by the juvenile court's probation department, which may dismiss the case, authorize the filing of a petition, or "informally adjust the case." In many juvenile courts approximately half the cases are informally adjusted at intake, either by referral to another agency, by continuation on "informal probation," or in some other way. JUVENILE DELINQUENCY AND YOUTH CRIME, *supra* note 30, at 5; *see also* JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION: INTAKE AND PREDISPOSITION INVESTIGATIVE SERVICES, Standard 2.1 commentary at 31 (commenting on the frequency of nonjudicial handling of cases).

Prior to the new rules, referrals to those Minnesota juvenile courts that had intake units received a discretionary social evaluation, and the social services staff then decided which cases to send to the county attorney for formal handling. The Rules may reverse the order of review by providing that "[t]he discretionary decision as to whether a delinquency or petty matter should be initiated lies with the county attorney." MINN. R.P. JUV. CT. 17; *see also* MINN. R.P. JUV. CT. 19.02(2) (requiring the county attorneys to approve and endorse all petitions). The enhanced role of the prosecutor in the juvenile justice process is one of the consequences of *Gault*'s importation of the adversarial process into the juvenile court. *See generally* McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale,* 52 N.Y.U. L. REV. 1093, 1099-1100 (1977) (discussing the enhanced role of the prosecutor afforded by the Juvenile Justice Standards); Rubin, *The Emerging Prosecutor Dominance of the Juvenile Court Intake Process,* 26 CRIME & DELINQ. 299, 312-17 (1980) (discussing the emergence and significance of the prosecutor's role at intake in California and Florida). Some county attorneys have promulgated policies and guidelines to structure the relationship between the intake social screening function and the legal charging function. *See, e.g.,* HENNEPIN COUNTY ATTORNEY'S OFFICE—JUVENILE SECTION, POLICY AND PROCEDURE MANUAL 1-5 (Dec. 7, 1983). The Hennepin County Attorney allows intake discretionary authority only for first offenders who have not committed serious offenses.

Service of summons or notice must be by personal service or by mail and must be made sufficiently in advance of the hearing to give the person time to prepare. MINN. R.P. JUV. CT. 9.02(6). A child who is not being held in custody must be arraigned within 20 days after the petition has been served and must admit or deny the allegations of the petition at that time. MINN. R.P. JUV. CT. 20.02(2). If the child admits the allegations and the court accepts those admissions, the case will be set for disposition. Prior to the dispositional hearing, the court may order the preparation of a social report, and this report must be available for inspection 24 hours prior to the time set for the hearing. MINN. R.P. JUV. CT. 30.03. For youths not in detention, the disposition hearing will occur within 45 days of the delinquency determination. MINN. R.P. JUV. CT. 30.02.

For youths who deny the allegations of the petition, a trial must commence within 60 days. Prior to the trial and within five days of being notified by the court that a youth has denied the petition, the county attorney shall give notice of evidence and identification procedures, MINN. R.P. JUV. CT. 23.01, and additional offenses that it intends to offer at trial, MINN. R.P. JUV. CT. 23.02. In addition, the Rules provide for the completion of reciprocal discovery procedures between the county attorney and the defense attorney within five days of receipt of a request for the items governed by the Rules. MINN. R.P. JUV. CT. 24.01. The Rules also provide for a discretionary pretrial conference if re-

Court made a number of fundamental policy choices about the nature and theory of the juvenile court, choices that reflect some of the philosophical tensions that existed between the Task Force and the Study Commission. These philosophical tensions are symptomatic of the basic questions surrounding the administration of juvenile justice and the role of the juvenile court as an institution.

The remainder of this Article examines the evolution of the juvenile court system from the benevolent, therapeutic institution envisioned by its Progressive creators to one that gives juveniles neither the minimal procedural safeguards guaranteed to adults nor the special solicitude needed by children.[88]

---

quested by either party or the court, MINN. R.P. JUV. CT. 25.01, and an evidentiary hearing either prior to or, more typically, as part of the trial to determine the constitutional admissibility of evidence, MINN. R.P. JUV. CT. 26.01. At the conclusion of the trial, the court may withhold an adjudication of delinquency for 90 days, and it may delay making an adjudication for an additional 90 days. MINN. R.P. JUV. CT. 29.02. If the court does make a finding of delinquency, the case will be sent on for disposition as described previously.

For a youth who is taken into custody and held in detention, the sequence and timing of the stages of the process are accelerated and a detention hearing is required. The detention hearing must be commenced within 36 hours after the child is taken into custody, MINN. R.P. JUV. CT. 18.06, and a petition stating probable cause also must be filed within this same 36-hour period. Following arraignment, a detained youth must be brought to trial within 30 days rather than the 60 days provided for youths who remain at liberty, and the various notice, discovery, and pretrial proceedings must be completed during this period. MINN. R.P. JUV. CT. 27.02(1)(a). Following trial, the court may withhold an adjudication of delinquency of a detained youth for 15 days or, if it makes a finding of delinquency, make a disposition of the case within 15 days. MINN. R.P. JUV. CT. 29.02; 30.02(a).

88. This thesis will be developed through an analysis similar to Professor Herbert L. Packer's analytical framework. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-246 (1968); Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1 (1964). Critiques of Packer's analysis include Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process,* 79 YALE L.J. 359 (1970); Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure,* 26 STAN. L. REV. 1009 (1974). Packer distinguishes two sets of values, each conceptualized in a different model: the Crime Control Model and the Due Process Model. *See* H. PACKER, *supra,* at 153. Packer's insight enables us "to recognize explicitly the value choices that underlie the details of the criminal [or juvenile] process. In a word, what we need is a *normative* model, or rather two models, to let us perceive the normative antinomy that runs deep in the life of the criminal law." Packer, *supra,* at 5. The Crime Control Model is based on a belief that the repression of crime assures the liberty of the law-abiding and that the goal of liberty is accomplished most efficiently by an administrative process heavily relying upon the professionalism and expertise of the various law enforcement officials. *See* H. PACKER, *supra,* at 158-63. In Packer's Crime Control Model, the quest for efficiency—the expeditious apprehension, conviction, and disposition of offenders—is set in the context of a high volume of offenders and limited resources with which to deal with them. Assuring the speedy and final resolution of cases requires an administrative, rather than adversarial, model of justice in

The Article discusses the Supreme Court decisions that underlay this evolution and analyzes the Minnesota Rules of Procedure for Juvenile Courts as a dramatic and troubling example of states' responses to those decisions.[89] The Article concludes that, in every instance in which the Minnesota Supreme Court had the opportunity to provide juveniles with greater procedural safeguards than those afforded adult criminal defendants and to recognize the special characteristics of youth, the court chose not to furnish the safeguards but to treat juveniles just like adult criminal defendants. Conversely, in every instance in which the court had an opportunity to treat juveniles at least as well procedurally as adult criminal defendants, it adopted juvenile court procedures with *less* effective safeguards. Thus, despite two decades of Supreme Court decisions, legislative reform, and rule revisions, it is as true today as in 1966 that "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous

---

which the professionalism of the police and prosecutors quickly will cull the innocent defendants out of the system. A heavy reliance on informal administrative decision making and discretion is crucial to the successful operation of the system. *See id.* The Due Process Model, by contrast, is based on a belief that the reliability of the process is more important than its efficiency and that reliability is best assured by a variety of formal procedures designed to fend off the coercive powers of the state from all but the legally guilty. *See id.* at 163-71. The Due Process Model rejects informal procedures, the inherent inaccuracy of which are magnified when coupled with human fallibility. Instead, the Due Process Model requires the development of elaborate procedural safeguards to provide a check against such errors because of the adverse consequences of an erroneous criminal conviction. The Due Process Model, to a far greater extent than the Crime Control Model, recognizes the oppressive potential of the state and imposes limitations on official power in order to assure individual liberty and autonomy. *See id.* The two models differ significantly in their views of discretionary decision making, their beliefs about the importance of the availability of counsel, and their reliance on per se rules and procedural safeguards to assure the orderly working of the process. *See id.* at 171-73.

The Progressives reformers' conception of the juvenile court exemplified many of the procedural features of Packer's Crime Control Model, including discretionary decision making, heavy reliance on professional expertise, and an informal administrative process rather than a formal adjudicative one. The Progressives, at least in theory, justified their emphasis on discretionary decision making and professional expertise with the "medical model" of treatment, which required individualized evaluation. *See* D. ROTHMAN, *supra* note 2, at 59.

89. The following analysis will show that the Minnesota Supreme Court's resolution of these issues, as reflected in the Minnesota Rules of Procedure for Juvenile Court, closely corresponds to the assumptions embodied in the Crime Control Model. *See supra* note 88. Unlike the Progressives' conception of the juvenile court, however, *see supra* note 88, the Minnesota Supreme Court's contemporary version of the juvenile court is not premised on a "medical model" of administrative expertise, but is simply a Crime Control Model applied to youths charged with crimes.

care and regenerative treatment postulated for children."[90]

III. WAIVER OF THE RIGHT TO REMAIN SILENT AND THE RIGHT TO COUNSEL

When the Supreme Court in *In re Gault* made the privilege against self-incrimination applicable to juvenile court proceedings,[91] the procedural safeguards developed in *Miranda v. Arizona*[92] also became applicable to juveniles. Accordingly, the validity of a minor's waiver of fifth amendment rights, the voluntariness of any confession obtained, and the waiver of any other constitutional right were determined by assessing whether there was a "knowing, intelligent, and voluntary waiver" under the "totality of the circumstances."[93] Prior to *Miranda*, only the "voluntariness" of a confession was determined by judicial review of the totality of the circumstances.[94]

---

90. Kent v. United States, 383 U.S. 541, 556 (1966).

91. 387 U.S. 1, 42-57 (1967); *see supra* notes 46-47 and accompanying text.

92. 384 U.S. 436 (1966). The *Gault* Court cited *Miranda* as authority for the assertion that persons, even juveniles, cannot be compelled to testify against themselves. *See In re* Gault, 387 U.S. at 50 n.87, 56 n.97. Because *Miranda* rights attach whenever an accused is in custody, presumably *Gault* extends those same rights to juveniles, even though the decision itself was concerned with adjudicatory rights. *See id.* at 13. Although the Supreme Court has never explicitly held that *Miranda* applies to juvenile proceedings, the Court, in Fare v. Michael C., 442 U.S. 707 (1979), "assume[d] without deciding that the *Miranda* principles were fully applicable to the present [juvenile] proceedings." *Id.* at 717 n.4.

93. *Miranda*, 384 U.S. at 444; *see also* Brady v. United States, 397 U.S. 742 (1970) (guilty pleas); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of counsel). *See generally* Y. KAMISAR, *A Dissent from the* Miranda *Dissents*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 41-76 (1980) (inadequacy of "totality of circumstances" evaluations of voluntariness); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 214-16 (1977) (discussing the distinction between "voluntarily" and "knowingly").

In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court first established the "totality of the circumstances" test to determine the validity of a waiver of rights:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Id. at 464.

94. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 543-44 (1961); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944); Comment, *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & CRIMINOLOGY 195, 196 (1976). *See generally Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 954-1030 (1966) (general discussion of the "voluntariness" issue prior to *Miranda*).

Since *Miranda*, however, the validity of waivers of both the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel are evaluated under this test as well.[95]

Even before *Miranda* and *Gault*, the United States Supreme Court instructed trial courts to be particularly solicitous of the effects that a youth's age and inexperience may have on the validity of waivers and the voluntariness of confessions.[96] *In re Gault* reiterated and reemphasized that "admis-

95. *Miranda*, 384 U.S. 436, 475-77 (1966); *see also* Mincey v. Arizona, 437 U.S. 385, 396-402 (1978) (detailing the circumstances of police interrogation of hospitalized accused that demonstrated that accused's will was overcome).

96. In Haley v. Ohio, 332 U.S. 596 (1948), a fifteen-year-old "lad" was interrogated by police in relays beginning shortly after midnight, denied access to counsel, and confronted by confessions of codefendants before he finally confessed at five o'clock a.m. The Supreme Court reversed his conviction, ruling that a confession obtained under these circumstances was involuntary:

> What transpired would make us pause for careful inquiry if a mature man was involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic.
>
> . . . .
>
> The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police toward his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction.

Id. at 599-601.

In Gallegos v. Colorado, 370 U.S. 49 (1962), the confession was obtained from "a child of 14." The Court reiterated that the youth of the accused is a special circumstance that may affect the voluntariness of a confession, and it reemphasized the vulnerability of youth:

> But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . [W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Id. at 54. It then added:

> A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Id.

sions and confessions of juveniles require special caution."[97] In *Fare v. Michael C.*,[98] however, the Court seemed to retreat somewhat from its solicitude for age, at least when the defendant was a 16-year-old with several arrests and considerable experience with the police and had served "time" in a youth camp.[99] *Fare* reaffirmed the "totality of the circumstances" test as the appropriate standard for evaluation of the validity of waivers of rights and the admissibility of juvenile confessions. It held that the juvenile's request to speak with his probation officer while subjected to custodial interrogation was neither a per se invocation of his *Miranda* privilege against self-incrimination nor the functional equivalent of a request to consult with counsel, which would have required the cessation of further interrogation.[100]

The Minnesota Supreme Court has followed the "totality of the circumstances" standard in determining the validity of a juvenile's waiver of *Miranda* rights, other constitutional rights, and the voluntariness of any statement, both in its decisions and in its rules.[101] In *State v. Nunn*,[102] for example, the Minnesota Supreme Court specifically rejected the argument that no confession by a juvenile should be admitted unless a parent or guardian was present at the time that the juvenile waived his rights.[103] The court in *Nunn* quoted the Supreme Court deci-

97. *Gault*, 387 U.S. at 45.

98. 442 U.S. 707 (1979).

99. *See id.* at 726-27.

100. *See id.* at 722-24. Analytically, *Fare* is not even a juvenile case, but simply an interpretation of *Miranda* focusing on whether a request to consult with a probation officer is the equivalent of a request to meet with an attorney. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981) (police cannot continue interrogation after an accused has requested counsel until counsel is made available). In holding that a child's request to speak with someone other than an attorney was simply one of many factors in determining the validity of a *Miranda* waiver, the *Fare* Court expressly declined to give children greater protection than adults. *See Fare*, 442 U.S. at 724-27; *see also* Rosenberg, *supra* note 42, at 686-90 (analyzing effect of *Fare*'s presumption that *Miranda* rights extend to delinquency actions).

101. *See, e.g., In re* M.A., 310 N.W.2d 699 (Minn. 1981); *In re* Welfare of S.W.T., 277 N.W.2d 507 (Minn. 1979); State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973); State v. Hogan, 297 Minn. 430, 212 N.W.2d 664 (1973). The Minnesota Supreme Court's contribution to the jurisprudence of juvenile confessions primarily consists of the recognition that juveniles interrogated in the informal atmosphere of the juvenile court may be lulled into confessions, which may be to their detriment. As the *Loyd* court noted, however, as long as it is made clear to juveniles that the questioning authorities are not operating as their friends, but as their adversaries, the confidential atmosphere of the juvenile court poses no danger. 297 Minn. at 450, 212 N.W.2d at 676-77.

102. 297 N.W.2d 752 (1980).

103. *See id.* at 755. The court characterized the presence of parents simply

sion in *Fare* with approval and reaffirmed its own adherence to the "totality" approach in determining the validity of a waiver of *Miranda* rights by a juvenile.[104]

Minnesota's new rules also reflect this stance. Rule 6 provides that confessions, admissions, or statements obtained from a child in custody will be admissible only to "the extent a statement is admissible against an adult defendant in a criminal matter"[105] and requires, as a prerequisite to admissibility, that a child receive *Miranda* warnings "to the same extent that an adult in a criminal matter is advised prior to custodial interrogation."[106] Rule 15 governs waivers of the right to counsel and constitutional rights other than the privilege against self-incrimination. In determining whether a child "voluntarily and intelligently" confessed or waived the right to counsel, Rules 6 and 15 require the court to look at the "totality of the circumstances," which is defined as including but not limited to "the presence and competence of the child's parent(s) or guardian, the child's age, maturity, intelligence, education, experience, and ability to comprehend."[107]

In adopting this standard, the Minnesota Supreme Court affirmed the principle that juveniles are legally capable of waiving the fifth amendment right against self-incrimination, the sixth amendment right to counsel, or any other constitutional right when the circumstances indicate that they did so knowingly, intelligently, and voluntarily. The court's position is also consistent with the legislature's judgment that youths twelve years of age or older are capable of making informed decisions regarding waiver of rights without parental concurrence.[108]

---

as one factor in the totality of the circumstances bearing on the voluntariness issue. *See id.* The Minnesota Supreme Court had, on previous occasions, rejected defendants' requests that parental presence be an absolute prerequisite for the admissibility of statements obtained from juveniles:

> Although we recognize that the presence of parents and their guidance during interrogation of a juvenile is desirable, we reject the absolute rule that every minor is incapable and incompetent as a matter of law to waive his constitutional rights. In determining whether a juvenile has voluntarily and intelligently waived his constitutional rights, parental presence is only one factor to consider and is not an absolute prerequisite.

State v. Hogan, 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973).

104. *See Nunn*, 297 N.W.2d at 755 (quoting with approval Fare v. Michael C., 442 U.S. 707, 725-26 (1979)).

105. MINN. R.P. JUV. CT. 6.01.

106. MINN. R.P. JUV. CT. 6.01(1).

107. MINN. R.P. JUV. CT. 6.01(2); 15.02(1); 15.03.

108. Minnesota law provides:

> Waiver of any right which a child has under this chapter must be an express waiver intelligently made by the child after the child has been

There are problems, however, in applying such standards. When evaluating the validity of a waiver under the totality of the circumstances, courts tend to focus on characteristics of the juvenile, such as age, education, and I.Q., and on circumstances surrounding the interrogation, such as methods and length of the interrogation and any subsequent repudiation of the statement.[109] Courts have identified factors relevant to the determination of "voluntariness" but have declined to give controlling weight to any particular factor, instead remitting the weighing of different factors to the unfettered discretion of the trial court.[110] Consequently, there are "no clear-cut rules which could protect a child who is not as mature or knowledgeable as an adult, [and] courts are left without clear touchstones by which to evaluate a particular confession."[111] Similarly, the police who interrogate a juvenile may be unable to determine in advance whether a waiver will be admissible at trial. Indeed, the factors invoked in the "totality of the circumstances" test have been characterized as "amorphous, illusive, and largely unreviewable."[112]

Despite the judicial determinations, both by decision and

---

fully and effectively informed of the right being waived. If a child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter.

MINN. STAT. § 260.155(8) (1982).

109. *See, e.g.,* West v. United States, 399 F.2d 467, 469 (5th Cir. 1968), *cert. denied,* 393 U.S. 1102 (1969); People v. Lara, 67 Cal. 2d 365, 376-77, 432 P.2d 202, 217-18, 62 Cal. Rptr. 586, 599 (1967), *cert. denied,* 392 U.S. 945 (1968); State v. White, 494 S.W.2d 687, 691 (Mo. Ct. App. 1973). The factors that emerge from the cases include the age of the juveniles, their education, the "criminal sophistication" and experience of the youths that bear on their knowledge of their rights, whether the youths were questioned incommunicado, whether the interrogation occurred before or after the filing of formal charges, the methods and length of interrogation, and whether the youths subsequently repudiated their statements. *See, e.g., West,* 399 F.2d at 469.

110. *See, e.g.,* Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis,* 68 CALIF. L. REV. 1134, 1138-39 (1980). "There is no case law, however, which suggests how to evaluate all the considerations systematically. The manner in which the factors are weighed and combined has always been a matter of judicial discretion." *Id.* at 1138.

111. Comment, *supra* note 94, at 202. Professor Thomas Grisso, after surveying all of the relevant juvenile waiver decisions between 1948 and 1979 to identify whether a youth's characteristics affected a court's ruling on the validity of a waiver, concluded that no single variable is determinative since constellations of variables are usually cited in conjunction with one another. He notes that confessions obtained from juveniles 12 years of age or younger frequently are excluded, as well as those from juveniles with I.Q. scores below 75, but that no single factor is treated by courts as conclusive. *See* Grisso, *supra* note 110, at 1138 n.24.

112. *See* Y. KAMISAR, *supra* note 93, at 43-44, 64-76; *see also* Schulhofer, *Confessions and the Court,* 79 MICH. L. REV. 865, 867-71 (1981) (reviewing Y.

by rule, that the "totality of the circumstances" test is an adequate tool for assessing a youth's ability to understand and waive constitutional rights, considerable doubt remains as to whether a typical juvenile's waiver is, or even can be, "knowing, intelligent, and voluntary." Empirical studies evaluating juveniles' understanding of their *Miranda* rights indicate that most juveniles who receive the *Miranda* warning may not understand it well enough to waive their constitutional rights in a "knowing and intelligent" manner.[113] Such lack of comprehension by minors raises questions about the adequacy of the *Miranda* warning as a safeguard. The *Miranda* warning was

---

KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980)).

This emphasis on discretion parallels Packer's Crime Control Model, *see supra* note 88, which accepts the legitimacy of police interrogation, particularly in the initial stages of an investigation, and which emphasizes the reliability and trustworthiness of statements obtained rather than the interrogation circumstances that produced them. *See* H. PACKER, *supra* note 88, at 187-88. Accordingly, "no hard and fast rule can be laid down about how long the police should be permitted to interrogate the suspect . . . [nor] about what kinds of police conduct are coercive. It is a factual question in each case . . . ." *Id.* at 188-89. The Due Process Model, on the other hand, would oppose such discretion. It would suggest that custodial interrogation conflicts with the premises of an adversary process that imposes the burden on "the state to make its case against a defendant without forcing him to cooperate in the process, and *without capitalizing on his ignorance of his legal rights.*" *Id.* at 191 (emphasis added). The goals of the Due Process Model are achieved through "the substitution of broad, quasi-legislative rules of administration for the more traditional case-by-case adjudication;" greater equality between the state and the accused, primarily through the assistance of counsel; and "restriction[s] on law enforcement discretion." *Id.* at 194. The Due Process Model would favor a per se rule, preferably one mandating consultation with counsel prior to police interrogation, to avoid the discretionary problems associated with case-by-case adjudications of the admissibility of confessions. *Id.* at 201.

113. *See, e.g.*, T. GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 54 (1970); Grisso, *supra* note 110, at 1160. One study found that over 90% of the juveniles interrogated waived their rights, that an equal number did not understand the rights they waived, and that even a simplified version of the language in the *Miranda* warning failed to cure these defects. Ferguson & Douglas, *supra*, at 53. Another study found that the problems of understanding and waiving rights were particularly acute for younger juveniles:

> As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension . . . . The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated signicantly poorer comprehension of the nature and significance of the *Miranda* rights.

Grisso, *supra* note 110, at 1160. Grisso also reported that although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the level of comprehension exhibited by youths sixteen and older, although comparable to that of adults, left much to be desired. *See id.* at 1157.

designed to inform and educate a defendant to assure that subsequent waivers would indeed be "knowing and intelligent."[114] If most juveniles lack the capacity to understand the warning, however, its ritual recitation hardly accomplishes that purpose.[115]

Empirical research also suggests that juveniles are simply not as competent as adults to waive their rights in a "knowing and intelligent" manner. Indeed, it is this "developmental fact" that accounts for many of the legal disabilities imposed upon children.[116] The alternative policies that might respond to this

---

114. *Miranda* requires advising the accused of his or her constitutional rights in order to assure that any subsequent waiver is made in a knowing, intelligent, and voluntary manner. The Court reasoned that unless the protective warning is given to dispel "the compulsion inherent in custodial surroundings," no statement could be truly voluntary. *See* Miranda v. Arizona, 384 U.S. 436, 458 (1966). By providing for an automatic advisory, courts also were relieved from examining the facts and circumstances surrounding each confession to determine whether its maker "knew" of his or her rights. Thus, *Miranda* not only introduced a mandatory, "per se" procedure, but focused judicial scrutiny on the issue of waiver. *See, e.g.*, Comment, *supra* note 94, at 197.

115. "The purpose of the *Miranda* warnings is to convey information to the suspect. Plainly, one who is told something he does not understand is no better off than one who is told nothing at all." United States v. Frazier, 476 F.2d 891, 900 (D.C. Cir. 1973) (Bazelon, C.J., dissenting), *cert. denied*, 414 U.S. 911 (1973).

116. The recognition that children stand on a different legal footing than adults is reflected in the host of legal disabilities imposed on children for their own protection. As one court noted:

> The concept of establishing different standards for a juvenile is an accepted legal principle since minors generally hold a subordinate and protected status in our legal system. There are legally and socially recognized differences between the presumed responsibility of adults and minors. . . . [M]inors are unable to execute a binding contract . . ., unable to convey real property . . ., and unable to marry of their own free will . . . . It would indeed be inconsistent and unjust to hold that one whom the State deems incapable of being able to marry, purchase alcoholic beverages . . ., or even donate their own blood . . ., should be compelled to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign and unfamiliar.

Lewis v. State, 259 Ind. 431, 437-38, 288 N.E.2d 138, 141-42 (1972) (citations omitted). The same factors of age and relative immaturity that have resulted in various legal doctrines to protect minors from their own incapacity would appear to apply to waivers of constitutional rights and their attendant consequences as well. If children are legally incapable of making a contract, executing a valid will, or entering into a marriage, the disability seemingly would also attend the making of incriminating statements. *See, e.g.*, Bailey & Soderling, *Born to Lose—Waiver of Fifth and Sixth Amendment Rights by Juvenile Suspects*, 15 CLEARINGHOUSE REV. 127, 129 (1981). Courts have, however, indulged the view that minors can intelligently waive their rights, at least to incriminate themselves, because the judiciary views confessions as an important tool of law enforcement. *See, e.g.*, Comment, *supra* note 94, at 201; *see also* People v. Lara, 67 Cal. 2d 365, 379-81, 432 P.2d 202, 212-13, 62 Cal. Rptr. 586, 596-97 (1967), *cert. denied*, 392 U.S. 945 (1968).

difficulty, however, raise other troublesome issues.[117] The option adopted by the Minnesota Supreme Court[118] is to continue to use a "totality of the circumstances" test, raise judicial awareness about the particular vulnerabilities of youth, and hope that juvenile court judges conscientiously reviewing waivers under the totality of the circumstances will be able to distinguish between competent and incompetent waivers and confessions by juveniles.[119] This solution, however, is weakened by the multitude of factors implicated by the "totality" approach, the lack of guidelines as to how the various factors should be weighed, and the myriad combinations of factual situations that make almost every case unique. These factors result in virtually unlimited and unreviewable judicial discretion.[120] Thus, when the "totality" test is viewed in its procedural context, it appears to exclude only the most egregiously obtained confessions and then only on a haphazard basis.[121]

---

117. For example, one commentator identifies five policy strategies for assessing the validity of a juvenile's waiver: 1) continued adherence to the adult "totality of the circumstances" test; 2) exclusion of confessions obtained from a juvenile who is under juvenile court jurisdiction from admission in an adult criminal prosecution following waiver; 3) an "Atmospheric Requisite Standard," or a requirement that the relationship between the juvenile and the interrogator be sufficiently adversarial, so that the youth would not be lulled into confessing by the informal atmosphere of the juvenile court; 4) a statutory requirement that parents be promptly called or a youth promptly arraigned as a prerequisite to police interrogation; and 5) a mandatory requirement of parental presence during police interrogation. *See* Comment, *supra* note 94, at 201-07.

118. *See supra* notes 101-07.

119. *See* MINN. R.P. JUV. CT. 6.01; *cf.* Commonwealth v. Roane, 494 Pa. 389, 396-98, 329 A.2d 286, 289-90 (1974) (Eagen, J., dissenting) (parental presence requirement is "a prophylactic rule [that] is unrealistic").

120. *See, e.g.,* Y. KAMISAR, *supra* note 93, at 43-44, 64-76; Comment, *supra* note 94, at 202. Grisso notes that "[t]he degree to which judges can weigh these factors consistently, however, is difficult to discern. There are numerous combinations of factors possible and no guidelines as to how they should be weighed and balanced. This results in almost unlimited judicial discretion." Grisso, *supra* note 110, at 1138-39. Indeed, in Fare v. Michael C., 442 U.S. 707 (1979), in which the United States Supreme Court upheld the applicability of the totality of the circumstances test, there were substantial divisions within the Court over its meaning as applied to the facts of the case itself. Both dissenting opinions concluded that the youth did not understand the rights he purportedly waived. *Compare id.* at 724-27 (the youth made an intelligent waiver) *with id.* at 733-34 (Powell, J., dissenting) (discussing evidence suggesting that the youth did not understand his rights) *and id.* at 730 & n.1 (Marshall, J., dissenting) (the police did not attempt to allay the youth's concern that the police would erroneously tell him that a police officer was an attorney in order to elicit information).

121. Even a cursory review of the cases suggests the extreme facts required to find that a juvenile's waiver is invalid. *See, e.g.,* People v. Baker, 9 Ill. App. 3d 654, 292 N.E.2d 670 (1973) (15-year-old, I.Q. of 72, first grade reading level, non-

In light of the difficulties of the "totality" test, several jurisdictions have attempted to develop some concrete guidelines or per se rules requiring the presence of an "interested" adult, such as a parent or an attorney, at the interrogation of a juvenile before the confession or waiver can be valid.[122] The per se approach, as advocated by commentators and adopted by courts, excludes any waiver or confession made by a juvenile without adherence to the requisite procedural safeguards.[123]

Courts and commentators have advanced a variety of reasons for such a per se requirement. In *In re Dino*,[124] for example, the Louisiana Supreme Court asserted that

> the rights which a juvenile may waiver [sic] before interrogation are so fundamental to our system of constitutional rule and the expedient of requiring the advice of a parent, counsel or advisor so relatively simple and well established as a safeguard against a juvenile's improvident judicial acts, that we should not pause to inquire in individual cases whether the juvenile could, on his own, understand and effectively exercise his rights.[125]

---

functional student). Juvenile's confessions typically are admitted by trial courts, and only extreme facts will overturn those admissions on appeal. For examples of the facts required to overturn a confession, see, e.g., Thomas v. State, 447 F.2d 1320 (4th Cir. 1971) (15-year-old, I.Q. of 72, fifth grade dropout, 19 hours of incommunicado interrogation, not taken before a judge for two days, and not given adequate explanation of his constitutional rights); *In re* Estrada, 1 Ariz. App. 348, 403 P.2d 1 (1965) (14-year-old, low education and literacy, serious and complex charges, hasty proceedings); *In re* P., 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972) (14-year-old, retarded, immature, first offender).

122. *See, e.g.*, Lewis v. State, 259 Ind. 431, 288 N.W.2d 138 (1972) (parental presence an absolute prerequisite to admissibility); *In re* Dino, 359 So. 2d 586 (La.) (same), *cert. denied*, 439 U.S. 1047 (1978). *See generally* Levy & Skacevic, *What Standard Should be Used to Determine a Valid Juvenile Waiver*, 6 PEPPERDINE L. REV. 767 (1979); Note, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543 (1973); Note, *Waiver of* Miranda *Rights by Juveniles: Is Parental Presence a Necessary Safeguard?*, 21 J. FAM. L. 725 (1982); Comment, *The Judicial Response to Juvenile Confessions: An Examination of the Per Se Rule*, 17 DUQ. L. REV. 659 (1978).

123. The difference between the totality test and the per se approach reflects the tensions between the Crime Control and Due Process Models. *See supra* note 88. The totality approach allows courts discretion to consider a youth's maturity, but imposes minimal interference with police investigative work. The per se approach assumes that most juveniles are immature and hence require special protections to assure their understanding of the process. Although the per se requirement greatly simplifies the role of courts in the administration of the juvenile process, *see* Allen, *supra* note 48, at 532, it may provide unnecessary protection for the occasional sophisticated youth in order to afford adequate protection for the vast majority of unsophisticated juveniles, *see* Grisso, *supra* note 110, at 1135.

124. 359 So. 2d 586 (La. 1978), *cert. denied*, 439 U.S. 1047 (1978).

125. *Id.* at 592. The *Dino* court also observed that reliance on the "totality of the circumstances" test

> tends to mire the courts in a morass of speculation similar to that from which *Miranda* was designed to extricate them in adult cases. Although the *Miranda* court did not express itself specifically on the spe-

The perceived virtues of a per se parental presence requirement include mitigating the dangers of untrustworthiness, reducing coercive influences, providing an independent witness who can testify in court as to any coercion that was present, assuring the accuracy of any statements obtained, and relieving police of the burden of making subjective judgments on a case-by-case basis about the competency of the youths they are questioning.[126] Indiana[127] and Georgia[128] also have judicially created per se requirements, as did Pennsylvania until very re-

---

cial needs of juveniles confronted with police interrogation, the reasons given for making the warning an absolute prerequisite to interrogation point up the need for an absolute requirement that juveniles not be permitted to waive constitutional rights on their own.

Id. at 591.

126. The problem of the inability of police to anticipate in advance whether a statement obtained from a juvenile will be admissible has been a concern of other courts as well. As the Indiana Supreme Court noted in Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972):

> The authorities seeking to question a juvenile enter into an area of doubt and confusion when the child appears to waive his rights to counsel and against self-incrimination. They are faced with the possibility of taking a statement from him only to have a court later find that his age and the surrounding circumstances precluded the child from making a valid waiver. There are no concrete guidelines for the authorities to follow in order to insure that the waiver will be upheld. The police are forced to speculate as to whether the law will judge this accused juvenile on the same plane as an adult in regard to the waiver of his constitutional rights, or whether the court will take cognizance of the age of the child and apply different standards. . . .
>
> . . . .
>
> . . . Clearly defined procedures should be established in areas which lend themselves to such standards in order to assure both efficient police procedure and protection of the important constitutional rights of the accused. Age is one area which lends itself to clearly defined standards.

Id. at 436-37, 288 N.E.2d at 141; *see also Dino*, 359 So. 2d at 591.

127. *See* Lewis v. State, 259 Ind. 431, 439, 288 N.E.2d 138, 142 (1972) (requiring the presence of a parent or guardian is a safeguard that recognizes "the inherent differences between adults and minors" and ensures that any waiver is truly voluntary). The *Lewis* court emphasized that it was not erecting a bar to juvenile confessions, but rather establishing a procedure by which to gauge their admissibility:

> The rule adopted here does not mean that a minor's confession is per se inadmissible but merely holds that, as a result of the age of the accused, the law requires certain specific and concrete safeguards to insure the voluntariness of a confession. The long standing tradition that juveniles can waive their right to silence or to an attorney is continued, but at the same time another long termed tradition, that such waivers require special precautions to insure it be done knowingly and intelligently, is recognized.

Id. at 440, 288 N.E.2d at 142-43.

128. *Cf.* Freeman v. Wilcox, 119 Ga. App. 325, 329, 167 S.E.2d 163, 167 (1969) (both parent and child must be advised of the child's right to have counsel present during interrogation).

cently.[129] The California Supreme Court created a slightly dif-

129. The Pennsylvania Supreme Court has come full circle on its view of the procedural safeguards required at the interrogation of a juvenile. Initially, the standard for determining the admissibility of a juvenile's waiver and confession was the traditional totality of the circumstances test. *See, e.g.*, Commonwealth v. Porter, 449 Pa. 153, 159, 295 A.2d 311, 317 (1972); Commonwealth v. Moses, 446 Pa. 350, 354, 287 A.2d 131, 133 (1971). It then created a per se "interested adult" rule which provided that juveniles could not waive their right to silence or to the assistance of counsel without first being provided opportunity to consult with an "interested adult," who is informed of the juvenile's rights and is interested in the welfare of the child. *See, e.g.*, Commonwealth v. Markle, 475 Pa. 266, 269, 380 A.2d 346, 348 (1977); Commonwealth v. McCutchen, 463 Pa. 90, 93, 343 A.2d 669, 670 (1975), *cert. denied*, 424 U.S. 934 (1976), *overruled*, People v. Christmas, 502 Pa. 218, 465 A.2d 989 (1983); Commonwealth v. Starkes, 461 Pa. 178, 185-86, 335 A.2d 698, 701 (1975); Commonwealth v. Roane, 459 Pa. 389, 394-95, 329 A.2d 286, 289-90 (1974).

In *Roane*, 459 Pa. 389, 329 A.2d 286 (1974), the Pennsylvania Supreme Court relied upon language in Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962), *see supra* note 96, suggesting that an immature youth needs the opportunity to consult with a lawyer or other adult. The court excluded a juvenile's confession because a request by the boy's mother for counsel for her son was ignored. *Roane*, 459 Pa. at 394-95, 329 A.2d at 288. In *Markle*, 475 Pa. 266, 380 A.2d 346 (1977), the court emphasized the per se nature of the parental consultation requirement. "When a juvenile has not been given this opportunity for consultation, we need not look to the totality of the circumstances to determine the voluntariness of the confession." *Id.* at 270, 308 A.2d at 348. Then, in Commonwealth v. Christmas, 502 Pa. 218, 465 A.2d 989 (1983), the Pennsylvania Supreme Court retreated from its "overly protective and unreasonably paternalistic" per se rule in order to give "more adequate weight to the interests of society." *Id.* at 223, 465 A.2d at 992. According to the *Christmas* formulation, there is a rebuttable presumption of a juvenile's incompetence to waive his or her rights.

> [W]e presume that a juvenile is incompetent to waive his rights without opportunity for consultation with an informed and interested adult; this presumption must be tested against the totality of the circumstances surrounding a given waiver to determine whether the particular juvenile might in fact be competent to waive his rights without such opportunity.

Id. at 223, 465 A.2d at 992.

Because the prosecution already bears the burden of establishing the voluntariness of confessions, *see, e.g.*, Lego v. Twomey, 404 U.S. 477, 489 (1972), it is unclear how a presumption of incompetence differs from a requirement that the prosecution affirmatively establish the validity of a waiver under the totality of the circumstances. *See, e.g.*, Commonwealth v. Christmas, 502 Pa. at 225-26, 465 A.2d at 993 (Larsen, J., concurring). Finally, in Commonwealth v. Williams, — Pa. —, 475 A.2d 1283 (1984), the Pennsylvania Supreme Court repudiated the rebuttable presumption it had created in *Christmas*, and returned to the traditional totality of the circumstances analysis.

> The requirements of due process are satisfied, and the protection against the use of involuntary confessions which law and reason demand is met by application of the totality of circumstances analysis to all questions involving the waiver of rights and the voluntariness of confessions made by juveniles. All of the attending facts and circumstances must be considered and weighed in determining whether a juvenile's confession was knowingly and freely given. Among those factors are the juvenile's youth, experience, comprehension, and the presence or absence of an interested adult.

Id. at —, 475 A.2d at 1288.

ferent per se rule in *People v. Burton*,[130] treating a juvenile's request to see his parents as the functional equivalent of an invocation of the fifth amendment privilege and analogous to a request to consult with an attorney.[131] A number of other states have enacted statutes that make the opportunity for a youth to consult with an interested adult a prerequisite to the admissibility of any confession.[132]

The Minnesota Supreme Court's Juvenile Justice Study Commission, hoping to achieve a similar result, proposed a per se rule requiring parents or guardians to be present at any interrogation and to agree in writing to any waiver of rights by the juvenile.[133] Without such an adult presence, no statement

130. 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

131. *See id.* at 383-84, 491 P.2d at 798, 99 Cal. Rptr. at 6; *see also* People v. Randall, 1 Cal. 3d 948, 954, 464 P.2d 114, 117-18, 83 Cal. Rptr. 658, 661-62 (1970) (" 'If the individual [in an adult criminal case] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendmant privilege . . . .' ") (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)). The California Supreme Court held in *Burton* that when a child who is in custody and who is interrogated without the presence of counsel requests to see one of his or her parents, further questioning must cease. That holding presaged the United States Supreme Court's decision in Fare v. Michael C., 442 U.S. 707 (1979). *See supra* notes 98-100 and accompanying text. In *In re* Michael C., 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978), *rev'd sub nom.*, Fare v. Michael C., 442 U.S. 707 (1979), the California Supreme Court extended *Burton*'s "parental request" rule to a youth's request to consult with his or her probation officer. The California court reasoned that because the probation officer is a "trusted guardian figure" who exercises the parens patriae authority of the state, a minor's request for his or her probation officer is the same as a request to consult with parents during an interrogation which, under *Burton*, constitutes an invocation of the fifth amendment privilege. *See id.* at 476, 579 P.2d at 10, 146 Cal. Rptr. at 361. The United States Supreme Court rejected this position in Fare v. Michael C., 442 U.S. 707 (1979), distinguishing the role of counsel from that of probation officers in the *Miranda* process. *See id.* at 718-24.

132. *See, e.g.*, COLO. REV. STAT. § 19-2-102(3)(c)(I) (1978); CONN. GEN. STAT. ANN. § 46b-137(a) (West Supp. 1984); N.M. STAT. ANN. § 32-1-27(E)(8) (1978); OKLA. STAT. ANN. tit. 10, § 1109(A) (West Supp. 1983-1984).

133. The proposed rules that the Juvenile Justice Study Commission originally submitted to the Minnesota Supreme Court recommended a per se requirement that parents or guardians be present at any juvenile's interrogation and also would have required that the parents agree to any waiver of rights. *See In re* Proposed Rules of Procedure for Juvenile Court, *supra* note 86, Rule 6.02 ("[A] waiver made out of court must be in writing and signed by the child *and* the child's parent(s) or guardian.") (emphasis added). Proposed Rule 15.02, governing the waiver of counsel, included a similar per se parental concurrence requirement. The Proposed Rules' inclusion of a per se parental presence requirement was one of the philosophical and procedural issues dividing the Rules Drafting Task Force and the Juvenile Justice Study Commission. The Minnesota Supreme Court's reinstatement of the totality of the circumstances test represents one of the instances in which the court had a clear choice between providing an additional safeguard that recognized the immatur-

by the juvenile would have been admissible.[134] The proponents of the rule, like the jurisdictions requiring per se parental presence, viewed juveniles as neither mature enough to understand their rights nor competent enough to waive them without prior consultation with a knowledgeable adult. Advocates of parental presence believe that it reduces the juvenile's sense of isolation, pressure, and fear in the interrogation process and provides legal advice about the consequences of a waiver that the juvenile otherwise might not appreciate.

A per se requirement assumes both that the presence of parents would benefit the child, because of an identity of interests, and that parents can adequately understand their child's legal rights and function as effective advisors. Such assumptions, however, may not be valid. Requiring parental presence during interrogation may not benefit the child because it may increase rather than decrease the coercive pressures to which the youth is subjected.[135] The parents' potential conflict of interest with the child, their emotional reactions to their child's arrest, or their own intellectual or social disabilities may make them unable to play the envisioned supportive role for the child.[136] One study found that most parents did not directly advise their children about the waiver decision and that those that did almost always urged the child to waive rights.[137] Moreover, research on the extent to which adults understand and intelligently waive their own *Miranda* rights casts doubt on whether even well-intentioned parents can provide much assistance; they seldom have legal training and may not understand the problems facing the child.[138] Indeed, the case law is

---

ity and lack of capacity of most juveniles, or treating youths like adult criminal defendants, and chose the latter course.

134. *In re* Proposed Rules of Procedure for Juvenile Court, *supra* note 86, Rule 6.03.

135. One critic of the parental presence requirement noted:

> [Will] the presence of this "friendly adult" . . . create the intended results[?] Parents, possibly ashamed and/or angered that their child is in custody, may further coerce the child into owning up to the alleged offense, instead of affording the youth shelter. Moreover, a parent may be no more knowledgable than the juvenile about constitutional rights and the consequences of a confession.

Comment, *supra* note 94, at 205.

136. *See* Grisso, *supra* note 110, at 1142; Comment, *supra* note 94, at 205.

137. T. Grisso, *supra* note 113, at 187, 200. This empirical observation was bolstered by questionnaire surveys that found that a substantial majority of the parents felt that juveniles should never be allowed to withhold from police any information about their involvement in a crime. *Id.* at 175, 179.

138. Professor Grisso explained:

> The most serious objections to this [parental presence] alternative concern the ability of laymen to provide effective assistance in a

replete with instances of parents coercing their children into confessing to the police.[139] Rather than mitigating the pressures of interrogation, parents appear predisposed to coercing their children to waive the right to silence.

The Minnesota Supreme Court ultimately rejected the Study Commission's proposed per se rule requiring parental presence. The court's decision seems wise, because the proposed rule would not adequately safeguard a child's rights and

---

preinterrogation setting. Commentators have observed that many parents do not care, and that "[o]ften the parents are, at best, only equal in capacity to the child and therefore poorly equipped to comprehend the complexities confronting them." In one recent empirical study, nearly three-quarters of a sample of parents disagreed with the premise that children should be allowed to withhold information from the police when suspected of a crime. In another study, more than two-thirds of the parents present during actual preinterrogation waiver proceedings offered no comments or advice to their children. When these findings are coupled with those of the instant studies, which indicate that many adults do not themselves adequately understand their *Miranda* rights, the "interested adult" alternative becomes even less attractive.

Grisso, *supra* note 110, at 1163 (quoting McMillian & McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 ST. LOUIS U.L.J. 561, 570 (1970)); *see also* T. GRISSO, *supra* note 113, at 170-82; Grisso & Ring, *Parents' Attitudes Toward Juvenile's Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 224 (1979) (citing studies that suggest "that parental guidance in such matters often is not an adequate substitute for the advice of trained legal counsel").

Research evaluating the extent to which adults understand and intelligently waive their *Miranda* rights raises the question whether parents can provide their children with much technical, legal assistance. *See, e.g.*, Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 59 (1968) ("even highly educated men may make incriminating admissions simply because they fail to comprehend the legal significance of their remarks"); Griffith & Ayres, *A Postscript to the* Miranda *Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300, 305-10 (1967) (even sophisticated subjects failed to understand the nature and function of their constitutional rights); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1372-75 (1968) ("ratings indicated that 15 percent of the eighty-five 'post-*Miranda* defendants' failed to understand the warning of the right to presence of counsel, and 24 percent failed to understand the warning of the right to appointed counsel"); Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1613 (1967) ("Warnings are not useless, but neither can they eliminate whatever 'inherently coercive atmosphere' the police station may have.").

139. *See, e.g.*, United States v. Fowler, 476 F.2d 1091, 1093 (7th Cir. 1973). Some courts have held that when a child responds to a question from his or her parent in the presence of police officers, he or she is not subjected to custodial interrogation and *Miranda* does not apply. *See, e.g., In re* C.P.D., 367 A.2d 133, 135 (D.C. 1976). Others have ignored reality in order to avoid finding coercion. *See, e.g.*, Anglin v. State, 259 So. 2d 752, 752 (Fla. Dist. Ct. App. 1972) (mother repeatedly urged her fifteen-year-old boy "to tell the truth" or "she would clobber him," but the court concluded that "the motherly concern for . . . the basic precepts of morality are to be commended. . . . [and there was no] threat or coercion on [her] part").

might even aggravate the problem. Moreover, it would have introduced an additional tier of litigable issues, requiring courts to determine whether the parent was informed of the juvenile's rights, whether the parent understood those rights, and whether the parent and child had an adequate opportunity to confer. This might have diverted judicial attention from an assessment of the validity of the confession itself to a mechanical inquiry into the parents' presence and understanding. The court's decision to reinstate the "totality of the circumstances" test is hardly an adequate alternative, however, because of the inability to adequately consider the child's immaturity and because appellate courts are unable to continually monitor the discretionary decisions of trial judges.[140] In addition, the new Minnesota rules on waivers of rights may constitute a regression from the safeguards previously afforded juveniles. The previous juvenile rules of procedure used in the nonmetropolitan counties prohibited a child from waiving the "right to counsel at a hearing to determine whether a delinquency cause shall be referred for prosecution, when the cause involves an alleged act by the child that would be a felony if committed by an adult" and required that the child have access to counsel at reasonable times whenever in custody or detention.[141]

Although the preceding discussion has focused on waivers of *Miranda* rights during police interrogation, similar problems exist with respect to analyzing waivers of the right to counsel under Minnesota's Rule 15 as well. There is both a "fifth amendment right to counsel" and a sixth amendment right to the assistance of counsel at trial.[142] The Minnesota Rules of Procedure for Juvenile Court use the same "totality of the circumstances" to evaluate waivers of both types of rights. Although a waiver of *Miranda* rights may provide the state with additional evidence it would not otherwise have, a waiver of the right to counsel fundamentally alters both the structure and function of the entire juvenile justice process and the ability of a defendant to participate in adversarial proceedings. The need to insure that waiver of the right to counsel is "knowing" and "voluntary" is thus even more compelling than for waiver of *Miranda* rights.

Instead of relying on a discretionary review of the circum-

140. *See supra* notes 109-12 and accompanying text.
141. Minn. R. P. Prob.-Juv. Cts. 1-5(1).
142. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981) (fifth amendment right to have counsel present during custodial interrogation); United States v. Henry, 447 U.S. 264 (1980) (sixth amendment right to the assistance of counsel at trial).

stances, a better way to "assure that the constitutional rights of the child are protected and to promote the rehabilitation of the child"[143] would be the adoption of a per se rule that requires consultation with counsel and the presence of an attorney at every interrogation of a juvenile and prior to any waiver of the right to counsel.[144] Since waivers of both *Miranda* rights and the right to counsel involve legal and strategic considerations as well as knowledge and understanding of rights and an appreciation of consequences, it is difficult to see how any other alternative could be as effective. A per se requirement of consultation with counsel prior to a waiver takes account of the immaturity of youths and their lack of experience in law enforcement situations. In addition, however, it recognizes that attorneys rather than parents possess the skills and training necessary to assist the child in the adversarial process.[145] Both the Juvenile Justice Standards Project and the *Gault* and *Fare* Courts emphasized the importance of adequate legal counsel in situations where a juvenile's waiver of rights is likely to affect

143. MINN. R.P. JUV. CT. 1.02.

144. *See* T. GRISSO, *supra* note 113, at 200.

145. The Juvenile Justice Standards Project recommended that "[t]he right to counsel should attach as soon as the juvenile is taken into custody . . ., when a petition is filed . . ., or when the juvenile appears personally at an intake conference, whichever occurs first." JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 5.1 at 89. In addition, "[the juvenile] should have 'the effective assistance of counsel at all stages of the proceeding'" and this right to counsel is mandatory and nonwaivable. *Id.*

The commentary to the Standards does qualify the absolute, nonwaivable nature of the right to counsel. "In recommending that the respondent's right to counsel in delinquency proceedings should be nonwaivable, this standard is not intended to foreclose absolutely the possibility of *pro se* representation by a juvenile." JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEDURES, Standard 5.1 commentary at 93. The United States Supreme Court, in Faretta v. California, 422 U.S. 806 (1975), held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he or she voluntarily and intelligently elects to do so. *Id.* at 835-36. The *Faretta* Court emphasized that the sixth amendment guarantees defendants the "assistance of counsel."

> It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. at 820. The crucial issue for juveniles, as for adults, is whether such a waiver can occur "voluntarily and intelligently," particularly without prior consultation with counsel. It would be an extraordinary juvenile who should be able to persuade a court that he or she possesses sufficient maturity and legal sophistication to effect pro se representation and still obtain a fair trial.

the result of a proceeding.[146] Mandatory, nonwaivable representation by counsel not only protects the rights of the juvenile, but also helps the courts by assisting in the efficient handling of cases and assuring that any waivers that the juvenile is entitled to make are in fact made knowingly and intelligently.[147]

---

146. The Supreme Court in *Gault* mandated the right to counsel because "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." *In re* Gault, 387 U.S. 1, 36 (1967). Because the decision to waive the privilege against self-incrimination and confession often is determinative of the outcome of the proceeding, "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.* at 36 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)) (emphasis added).

The *Gault* Court noted that the President's Crime Commission recommended that "in 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.'" *Id.* at 38 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)). The Court also observed that the 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 justices requires." *Id.* at 38 n.65 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967)).

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 crucial role of counsel in the criminal and juvenile processes. "It is this pivotal role of legal counsel that justifies the *per se* rule established in *Miranda*, and that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend." *Id.* at 722. 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. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence.
>
> 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 (quoting Miranda v. Arizona, 384 U.S. 436, 469 (1966)).

147. JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 5.1 commentary at 92. Commentators

The requirements of assistance of counsel, nonwaivability of counsel, and consultation with counsel prior to the waiver of other rights is not just the "idealistic" recommendation of policy groups and commentators. For several years, the Texas Family Code had a provision invalidating juvenile waivers of rights made without assistance of counsel.[148] The Texas courts interpreted the legislation to include an absolute right to counsel unless the child waived the right with the assistance of an attorney.[149] One court concluded that

> the Legislature was taking every precaution to protect the rights of minors from those who might unintentionally or perhaps in some cases intentionally take advantage of one who is young, inexperienced and perhaps unable to exercise his constitutional rights until he finds it is too late to have those rights protected.[150]

Legislative amendments in 1975 eliminated the absolute assistance of counsel, substituting instead the conventional *Miranda*

---

have suggested other advantages that could follow from mandatory representation of juveniles. Professor Grisso, for example, has observed:

> [W]hile defense counsel would almost always advise a client to remain silent until the attorney has had the opportunity to review the case fully, the per se proposal would not always reduce the amount of information the police acquire about juvenile offenses. In some instances, the lawyer might assist the suspect to explain clearly his noninvolvement in the incident; in other cases, the lawyer might help the juvenile make a statement that is not susceptible to an inaccurate or adverse interpretation by the police. At all events, since information gathered from police interrogations of juveniles is often inaccurate and therefore useless, the proposed per se rule could only serve to increase the accuracy of any information imparted.

Grisso, *supra* note 110, at 1163-64.

148. The Texas law provided that:

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:
> (1) the waiver is made by the child and the attorney for the child;
> (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
> (3) the waiver is voluntary; and
> (4) the waiver is made in writing or in court proceedings that are recorded.

TEX. FAM. CODE ANN. § 51.09 (Vernon 1975) (amended 1975); *see infra* note 151 and accompanying text; *see also* Dawson, *Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH L. REV. 509, 524-25 (1974) (the Texas legislature felt that the child's attorney is the only appropriate adult who may effectively concur with a waiver of a right by a child); Comment, *Waiver of Constitutional Rights by a Juvenile Under the Texas Family Code: The 1975 Amendment to Section 51.09*, 17 S. TEX. L.J. 301, 303 (1975) (the Texas statute gave rise to the most progressive provisions of juvenile law before its scope was limited by the 1975 amendments).

149. *See, e.g., In re* S.E.B., 514 S.W.2d 948, 950 (Tex. Civ. App. 1974); *In re* R.E.J., 511 S.W.2d 347, 349 (Tex. Civ. App. 1974).

150. *In re* S.E.B., 514 S.W.2d 948, 950-51 (Tex. Civ. App. 1974).

warning/waiver formula.[151] Several other jurisdictions, however, including Iowa and Wisconsin, maintain significant restrictions on the circumstances under which a juvenile may waive either *Miranda* rights or the right to the assistance of counsel in all stages of the juvenile process.[152] These states have also recognized that uncounseled delinquency convictions cannot lead to out-of-home dispositions of such youths.[153]

Affording mandatory, nonwaivable counsel to juveniles during interrogation and at all court proceedings is not, however, a panacea. Attorneys may not be capable of or committed to representing juvenile clients in an effective adversarial manner. Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles "beat a case," or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court.[154] Although *Gault* was premised on the ability of

151. *See* TEX. FAM. CODE ANN. § 51.09(b) (Vernon Supp. 1975-1983). The legislative changes provoked one writer to note:

> Under the new amendment, the child is subjected to the same pressure and police chicanery that has diluted the protection of *Miranda* for adults, but the juvenile does not have the same presence of mind as the more mature adult violator. The juvenile's right to counsel, which was so effectively safeguarded by prior § 51.09, has now been denied him . . . . One might surmise that the amendment is worded to ensure swift and easy confessions and, therefore, convictions.

Comment, *supra* note 148, at 310.

152. *See* IOWA CODE ANN. § 232.11 (West Supp. 1984-1985); WIS. STAT. ANN. § 48.23 (West 1983). Iowa prohibits the waiver of counsel at interrogation by any youth under sixteen years of age without written parental concurrence. Regardless of any *Miranda* waivers, no child of any age may waive the assistance of counsel at any of the various stages and hearings of the juvenile justice process. IOWA CODE ANN. § 232.11. Alabama has also experimented with measures to secure effective legal advice to juveniles prior to interrogation. *See* ALA. CODE § 12-15-57 (1975) (repealed 1981).

153. *See, e.g.*, WIS. STAT. ANN. § 48.23(1)(a) (West Supp. 1983-1984); *cf.* Scott v. Illinois, 440 U.S. 367 (1979) (no indigent defendant may be imprisoned unless the state has afforded him the assistance of appointed counsel).

154. The co-optation of defense attorneys in the adult criminal process has been described in Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC'Y REV., June 1967, at 15, 19-20. Blumberg argues that certain institutional pressures and the need to maintain stable, cooperative relationships with other personnel in the system are inconsistent with effective advocacy and an adversary position. Defense attorneys are involved in ongoing relations with prosecutors and judges and become dependent on their cooperation. Similarly, prosecutors and the court depend on defense attorneys to cooperate in order to expedite a large volume of cases. The result is a system of informal relationships in which maintaining organizational stability may become more important than the representation of any given client. *See id.* at 18-24. The same analysis has been applied to the role of attorneys in juvenile court. *See, e.g.*, A. PLATT, *supra* note 2, at 163-75. *See gen-*

lawyers to manipulate formal procedures for the benefit of their clients, many commentators have noted that this does not always happen in juvenile proceedings.[155] Indeed, there are some indications that representation of juveniles by lawyers in more traditional "therapeutic" juvenile courts may actually redound to the disadvantage of the client in adjudications or dispositions.[156]

A rule mandating nonwaivable assistance of counsel for juveniles prior to interrogation as well as throughout the process would have substantial implications for the juvenile court. It would probably restrict the ability of police to obtain waivers from and interrogate youths who are criminally sophisticated as well as those too immature to protect themselves. Indeed, courts have decried the effects that procedural safeguards and per se rules would have on the efficient repression of crime. "It is apparent most courts, required to deal pragmatically with an ever-mounting crime wave in which minors play a disproportionate role, have considered society's self-preservation interest

---

erally Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 548-53 (1971) (juveniles with counsel are more likely to be incarcerated than juveniles without counsel); Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1184 (1968) (private lawyers do not enhance juveniles' bargaining power or rights); Platt, Schechter & Tiffany, *In Defense of Youth: A Case Study of the Public Defender in Juvenile Court*, 43 IND. L.J. 619, 629 (1968) (informal relationships in juvenile court influence judges to dispose of cases based on their personal feelings about counsel). Other studies have questioned whether lawyers can actually perform as adversaries in a system rooted in parens patriae and benevolent rehabilitation. *See, e.g.*, W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 37-39 (1972); Fox, *supra* note 2, at 1236; Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 587-93 (1978); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1410 (1973); Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice:* Gault *and Its Implementation*, 3 LAW & SOC'Y REV. 491, 561 (1969); Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 430-34; *see also* Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 411 (1971) (it is sometimes the proper role of counsel to seek the least serious disposition rather than to defend zealously); McMillian & McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 ST. LOUIS U.L.J. 561, 597-98 (1970) (role of counsel as advocate unclear when placement appears to be best for the child).

155. *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY 171-219 (1977); W. STAPLETON & L. TEITELBAUM, *supra* note 154, at 63-96; Fox, *supra* note 2, at 1236.

156. *See, e.g.*, D. HOROWITZ, *supra* note 155, at 191-94; W. STAPLETON & L. TEITELBAUM, *supra* note 154, at 63-96; Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 304-06 (1980).

in rejecting a blanket exclusion for juvenile confessions."[157] Such an exclusion would impose substantial burdens on the delivery of legal services in rural areas.[158]

The response to all of these objections, however, is that every defendant is already entitled by *Gault* and *Miranda* to the assistance of counsel during interrogation and at every critical stage of the process, that only "an inexperienced person in the toils of the law" will cooperate with the police to the person's own detriment, and that only an attorney can redress the imbalance between a vulnerable youth and the state.[159] The issue is not one of entitlement, but rather the ease or difficulty with which waivers of counsel are found, which in turn has the enormous implications for the entire administration of the juvenile justice process discussed above.

Despite these difficulties, however, the one inescapable fact of juvenile justice administration in Minnesota is that a majority of all youths prosecuted as delinquents are not represented by counsel during the process.[160] Nearly half the juveniles charged with felonies and more than a quarter of those sentenced to correctional facilities had no lawyer,[161] and the county-by-county variations in rates of representation suggest that nonrepresentation reflects judicial policies rather than

157. *In re* Thompson, 241 N.W.2d 2, 5 (Iowa 1976); *see also* Commonwealth v. Christmas, 502 Pa. 218, 465 A.2d 989 (1983) (adopting a presumption that no person under eighteen years of age is competent to waive the right to counsel).

158. JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 5.1 commentary at 93 (inadequate availability of legal services in rural areas may make compliance with mandatory counsel recommendation difficult).

159. *See* H. PACKER, *supra* note 88, at 203. As Professor Grisso explained:

> The beneficial effects of a per se requirement of counsel in juvenile waiver proceedings should be enhanced as the juvenile justice system increases its own support of a strong advocacy role for these attorneys. At a minimum, the requirement provides a reasonable level of protection for younger juveniles; without this protection, they would be subjected to the very circumstances that Miranda sought to eliminate.

Grisso, *supra* note 110, at 1164.

160. "In the majority of delinquency/status offense cases (62%) there is not representation." K. FINE, OUT OF HOME PLACEMENT OF CHILDREN IN MINNESOTA: A RESEARCH REPORT 48 (1983).

161. Data collected in 1983, which does not include Hennepin County, indicates that juveniles appear without counsel in 48% of delinquency adjudications and 68% of status adjudications. Data provided by Dr. Stephen Coleman, Stastical Analysis Center of the Minnesota State Planning Agency 1 (1984) (a copy of the tables is on file with the author). Forty-five percent of the youths adjudicated for the felony of burglary were convicted without counsel, and 28% of the youths sentenced to juvenile correctional facilities had no lawyers. *Id.* at 2.

youthful competencies.[162] Although national statistics are not available, surveys of representation by counsel in other jurisdictions suggest that "there is reason to think that lawyers still appear much less often than might have been expected."[163] There may be several reasons so many youths are unrepresented—parental reluctance to retain an attorney, inadequate public-defender legal services in nonurban areas, a judicial encouragement of and readiness to find waivers of counsel in order to ease judges' administrative burdens, or a judicial predetermination of dispositions with nonappointment of counsel where probation is the anticipated outcome. Whatever the reason, and despite *Gault*'s requirement of a right to counsel for juveniles facing potentially coercive action,[164] most youths never see a lawyer, waive their rights without any appreciation of the legal consequences, and thus face the prosecutorial powers of the State alone and unaided.

The constitution does not require mandatory, nonwaivable counsel for minors, or prohibit minors from waiving their fifth amendment rights without prior consultation with their attorneys, or prevent minors from confronting the coercive power of the state without the assistance of counsel. These requirements and prohibitions are nonetheless policy options available to the courts. The Minnesota Supreme Court's rejection of a parental presence requirement in the Proposed Rule in favor of the "totality of the circumstances" analysis is constitutional as well as clearly consistent with the law of Minnesota and a majority of other jurisdictions. As a matter of policy, however, the court's choice to put juvenile offenders on the same procedural footing as adult criminal defendants ignores the juveniles' relative immaturity, inexperience, and vulnerability to adult coercion.

---

162. There are enormous county-by-county variations in the rates of nonrepresentation, ranging from a high of over 90% to a low of less than 10%. *Id.* at 2.

163. D. HOROWITZ, *supra* note 155, at 185. Although the rates of representation vary widely from county to county within a state, Horowitz' survey of the available data failed to find one state in which even 50% of the juveniles were represented by counsel. *Id.* at 185-86; *see also* Clarke & Koch, *supra* note 156, at 297 (in 1976, the Juvenile Defender Project represented 22.3% of all juvenile cases in Winston-Salem, N.C. and 45.8% in Charlotte).

164. *See In re* Gault, 387 U.S. 1, 41 (1967).

IV. DETENTION AND IDENTIFICATION PROCEDURES

A. PREVENTIVE DETENTION

> The Queen observes that the King's Messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all." Perplexed, Alice asks, "Suppose he never commits the crime?" "That would be all the better, wouldn't it?" The Queen replied.[165]

Preventive detention on a predictive basis raises several controversial issues.[166] First, controversy arises from the technical difficulty of accurately predicting which offenders should be detained in order to prevent their commission of further offenses before trial.[167] In addition, the detainee experiences preventive detention as *punitive* confinement, regardless of the stated regulatory purposes of the practice. Finally, there are issues of the propriety of incarceration prior to the determination of guilt, the compatibility of pretrial detention with the presumption of innocence, and the procedural safeguards that must be afforded to legitimate such a practice.[168]

The constitutionality of preventive detention was recently affirmed in *Schall v. Martin*.[169] In *Schall*, the United States Supreme Court divorced law from reality and upheld a New York statute that authorized the preventive detention of a juvenile if a court found that there was a "serious risk" that the child "may . . . commit an act which if committed by an adult would constitute a crime."[170] In reversing the lower courts and

---

165. L. CARROLL, THROUGH THE LOOKING GLASS 88 (Harper & Bros. ed. 1902).

166. *See, e.g.*, Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973); Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291 (1971); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970); Note, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289 (1971).

Preventive detention of juveniles has been considered by a number of commentators. *See, e.g.*, R. SARRI, UNDER LOCK AND KEY: JUVENILES IN JAILS AND DETENTION 37 (1974); Ferster, Snethen & Courtless, *supra* note 154; Guggenheim, *Paternalism, Prevention, and Punishment: Pretrial Detention of Juveniles*, 52 N.Y.U. L. REV. 1064 (1977); Wald, *Pretrial Detention for Juveniles*, in PURSUING JUSTICE, *supra* note 23, at 119; Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95 (1983).

167. *See infra* notes 187-91 and accompanying text.

168. *See infra* notes 197-209 and accompanying text.

169. 104 S. Ct. 2403 (1984).

170. *Id.* at 2405. The district court held that the statute violated due process because

> (1) it gives the judge a license to act arbitrarily and capriciously in a § 789 prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of

upholding the statute, Justice Rehnquist's majority opinion held that "preventive detention under the Family Court Act serves a legitimate state objective, and that the procedural protections afforded pre-trial detainees" satisfies the requirements of due process.[171]

The Court identified a number of "legitimate state objectives" advanced by the preventive detention provisions. It noted that crime prevention is "a weighty social objective," that juveniles account for a substantial number of crimes, and that the "harm suffered by the victim of a crime is not dependent upon the age of the perpetrator."[172] The Court also asserted

---

due process, and (3) in addition, [pretrial detention] constitutes punishment that is constitutionally impermissible under the due process clause.

United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 707 (S.D.N.Y. 1981). The court of appeals affirmed, concluding that the statute, as administered, imposed punishment without a finding of guilt. *See* Martin v. Strasburg, 689 F.2d 365, 372 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

171. *See Schall,* 104 S. Ct. at 2406. In framing the issue as it did, the majority departed from the three factor due process analysis in Mathews v. Eldridge, 424 U.S. 319 (1976), which calls for a consideration of "the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. Instead, the Court emphasized that juveniles do not enjoy the same liberty interests as adults.

> The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. But that interest must be qualified by the recognition 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. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.* In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

Schall, 104 S. Ct. at 2410 (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)); *see also* Pauley v. Gross, 1 Kan. App. 2d 736, 742, 574 P.2d 234, 240 (1977) ("When [a juvenile is] so detained, he is not really deprived of anything as he, unlike an adult, is already subject to parental or some substituted control."). It was only by minimizing the liberty interests of children, deprecating the consequences of preventive incarceration, and ignoring the values of additional procedural safeguards that the Court was able to reach the result that it did.

172. *Schall,* 104 S. Ct. at 2410. Although the majority noted that juveniles account for 7.5% of arrests for violent crimes, 19.9% of arrests for serious property crimes, and 17.3% of arrests for violent and serious property crimes, *id.* at 2410 n.14, virtually every study of juvenile detention practices has found that a substantial portion of juveniles who are actually confined in pretrial detention were not charged with serious crimes, and many were status offenders who had committed no crimes at all. *See, e.g.* GENERAL ACCOUNTING OFFICE, IMPROVED FEDERAL EFFORTS NEEDED TO CHANGE JUVENILE DETENTION PRACTICES 6 (1983);

that, although the statute aimed primarily at crime prevention, it also "protect[ed] the juvenile from his own folly" by preventing the injury that a juvenile offender might suffer from victim resistance or police arrest and by halting a youth's downward spiral into criminal activity.[173] The Court's finding of substantial state interest in preventive detention of juveniles was bolstered by the presence of comparable provisions for juvenile pretrial incarceration in every state.[174] The Court in *Schall* was clearly concerned that a contrary constitutional holding would invalidate the practice of every state in the nation.

The court of appeals in *Schall* had concluded that the large

---

JUVENILE DELINQUENCY AND YOUTH CRIME, *supra* note 30, at 36; R. SARRI, *supra* note 166, at 19-20; Guggenheim, *supra* note 166, at 1072.

173. *Schall*, 104 S. Ct. at 2410-11. The Court relied upon the New York Court of Appeals decision in People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976), which held that the New York statute authorizing pretrial detention of youths when there was a "serious risk" of further criminal acts before the time of trial did not violate equal protection or due process. *Schupf*, 39 N.Y.2d at 688-89, 350 N.E.2d at 909-10, 385 N.Y.S.2d at 520-21. The *Wayburn* court found a compelling state interest that justified the detention of juveniles under circumstances that would not be allowed for adults. Noting that juveniles are immature and "not held to the same standard of individual responsibility for their conduct as are adult members of our society," the court concluded that their lack of self-restraint, experience, and comprehension rendered them more likely than adults to commit further crimes if released. *Id.* at 687-88, 350 N.E.2d at 908-09, 385 N.Y.S.2d at 520. Therefore, "[i]n consequence of these and other like considerations, protection of the public peace and general welfare justifies resort to special procedures designed to prevent the commission of further criminal acts on the part of juveniles as differentiated from adults." *Id.* at 688, 350 N.E.2d at 909, 385 N.Y.S.2d at 521. Without further analysis, the *Wayburn* court concluded that because it is a legitimate state interest "to prevent the commission of further criminal acts," it is an acceptable means to "remove the offender from the arena of possible action." *Id.* at 689, 350 N.E.2d at 910, 385 N.Y.S. 2d at 521.

174. *See Schall*, 104 S. Ct. at 2411 n.16. The Supreme Court also noted that a number of model juvenile justice acts contained provisions for preventive detention. *Id.* at 2411 n.17 (collecting statutes). Most of the model statutes, however, recommend restrictive detention criteria and procedures far more rigorous than those at issue in the New York statute. *See, e.g.*, JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO INTERIM STATUS, Standard 6.6; NATIONAL ADVISORY COMMITTEE, TASK FORCE ON JUVENILE JUSTICE § 12.7 (1976).

One commentator has noted that one of the underlying assumptions sustaining this practice

> is that pretrial detention is no more inimical to the interests of the child than release. But the legislators and judges who make that assumption—that is, those who are willing, as an exercise of their *parens patriae* power, to lock up children in the jails and detention facilities currently in use in this country—are either deliberately myopic or frighteningly cynical. Every respected report on pretrial detention of juveniles has concluded that far too many children are detained, for the wrong reasons, in deplorable conditions.

Guggenheim, *supra* note 166, at 1071.

number of detained youths whose cases were dismissed prior to trial or who were returned to the community following adjudication indicated that courts used preventive detention primarily to impose punishment prior to a determination of guilt.[175] The Supreme Court, however, found that preventive detention was merely an incident of legitimate governmental regulation and not a pretrial imposition of punishment.[176] The Supreme Court suggested that a number of considerations collateral to the merits of the petition could lead to high dismissal rates following pretrial detention.[177] The Court also insisted that an initial decision to detain and a later decision to release on probation after more information is available were not inconsistent.[178] The Court thus concluded that detention was

175. *See* Martin v. Strasburg, 689 F.2d 365, 373-74 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

176. *See Schall*, 104 S. Ct. at 2412. The Court noted that:

> Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement . . . are in fact compatible with those purposes. "A court must decide whether the disability is imposed for purposes of punishment or whether it is but an incident of some other legitimate governmental purpose."

Id. (quoting Bell v. Wolfish, 441 U.S. 520, 538 (1979))(citations omitted); *see also* United States v. Edwards, 430 A.2d 1321, 1331-34 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982)(preventive detention of adults is regulatory, and not punitive). In Bell v. Wolfish, 441 U.S. 520 (1979), the United States Supreme Court was called upon to evaluate the conditions of confinement of adult pretrial detainees, all of whom remained in custody because they were unable to afford bail or qualify for other nonmonetary conditions of release. The only justification for pretrial detention asserted by the Government was the need to ensure the detainees' presence at trial. *Id.* at 534 n.15. The Court adverted to its distinction between "punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Id.* at 537. The Court reiterated the test it had announced in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963): whether a governmental imposition constituted punishment or "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose . . . ." *Wolfish*, 441 U.S. at 538. The *Wolfish* Court concluded that because ensuring the defendant's presence at trial was a legitimate governmental objective, the detention of offenders pending trial was regulatory rather than penal. *Id.* at 540. In *Wolfish*, however, the petitioners did not challenge the constitutionality of the initial decision to detain, and the Court specifically reserved the question whether any governmental interest besides assuring the accused's presence at trial could justify pretrial detention in order to challenge the conditions of confinement. *Id.* at 534 & n.15. *Schall* provides an answer to this question, at least for juveniles.

177. *See Schall*, 104 S. Ct. at 2414-15.

178. *Id.* Several commentators have noted that of all juveniles detained pending trial, only a small percentage were removed from the community following their adjudication. *See* Ferster, Snethen & Courtless, *supra* note 154, at 189 (Massachusetts, 25.9%; Illinois, 22%; Ohio, 19.5%; Texas, 9.7%); *see also* Guggenheim, *supra* note 166, at 1067 n.13 (New York City, 23%). The *Schall* Court chastened the court of appeals for invalidating a legislative judgment

"consistent with the regulatory and parens patriae objectives relied upon by the State and was not used or intended as punishment."[179]

The Court then considered whether the procedures used for the detention decision provided adequate "protection against erroneous and unnecessary deprivations of liberty"[180] by comparing them with the Court's requirements for a probable cause determination for arrested adults as established in *Gerstein v. Pugh*.[181] *Gerstein* held that the constitution requires a judicial determination of probable cause before extended postarrest restraints on liberty because prolonged detention entails a fourth amendment seizure of the person.[182] The *Gerstein* Court noted, however, that such a probable cause determination need not occur in an adversarial hearing.[183]

The majority in *Schall* concluded that the New York procedures for juvenile preventive detention satisfied the *Gerstein* requirements because the juvenile received notice of the charges at an informal initial appearance, a stenographic record of the appearance was made, the juvenile was accompanied by a parent or guardian, and the juvenile was advised of the right to remain silent and the right to counsel.[184] The Court implied that a probable cause determination occurred at the initial appearance,[185] but it also noted that a petition stating probable

---

that preventive detention serves an important and legitimate function in the juvenile justice system on the basis of "some case histories and a statistical study" and a "rather cavalier equation of detentions that do not lead to continued confinement after an adjudication of guilt and 'wrongful' or 'punitive' pretrial detentions." *Schall*, 104 S. Ct. at 2414.

179. *Schall*, 104 S. Ct. at 2413.

180. *Id.* at 2415.

181. 420 U.S. 103 (1975).

182. *Id.* at 114.

183. *See id.* at 120-21. The Court also noted that all of the exigencies that justify arrests without a prior judicial determination of probable cause and a warrant dissipated once the defendant was in custody:

> The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. . . . Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

Id. at 114 (citations omitted).

184. *See Schall*, 104 S. Ct. at 2416.

185. *See id.* at 2416 n.27. The dissent in *Schall* disputed the majority's implication that there was a probable cause determination at the initial appearance.

cause had to be filed in any event and that a formal probable cause hearing was held within three days of the initial appearance.[186]

The *Schall* majority also found nothing improper in the preventive detention of a juvenile based solely on a finding that there was a "serious risk" that the juvenile would commit another crime prior to the juvenile's next court appearance. It rejected the district court's view that it is "virtually impossible to predict future criminal conduct with any degree of accuracy" and insisted that "from a legal point of view" there are no problems with predicting future criminal conduct.[187] The Court

---

It pointed out that "[t]he judge ordinarily does not interview the juveniles . . . , makes no inquiry into the truth of allegations in the petition . . . , and does not determine whether there is probable cause to believe the juvenile committed the offense." *Id.* at 2421 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting) (citations omitted). It characterized the majority's conclusion that there is a probable cause determination prior to detention as a "novel reading of the statute" that provides "only shaky support for its contention." *Id.* at 2421 n.6 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). The dissent concluded that "[t]he lesson of this foray into the tangled provisions of the New York Family Court Act is that the majority ought to adhere to our usual policy of relying whenever possible for interpretation of a state statute upon courts better acquainted with its terms and applications." *Id.* at 2421 n.6 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

A number of lower courts previously had decided that juvenile detention decisions required a determination of probable cause. *See, e.g.,* R.W.T. v. Dalton, 712 F.2d 1225, 1230 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 527 (1984); Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976); Cox v. Turley, 506 F.2d 1347, 1353 (6th Cir. 1974); Cooley v. Stone, 414 F.2d 1213, 1214 (D.C. Cir. 1969); J.T. v. O'Rourke, 651 P.2d 407, 409 (Colo. 1982).

186. *See Schall,* 104 S. Ct. at 2416-17. An additional three day extension was possible for good cause shown. *Id.* While the delay in determining probable cause exceeded the time limits envisioned in Gerstein v. Pugh, 420 U.S. at 124 n.25, the Court suggested that prolonged detention actually benefitted juveniles because it gives their counsel additional time to prepare. *Schall,* 104 S. Ct. at 2417 n.28. *But see infra* notes 203-06 and accompanying text.

187. *See Schall,* 104 S. Ct. at 2417.

> [F]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and the district court, "that it is impossible to predict future behavior and that the question is so vague as to be meaningless."

Id. at 2417-18 n.30 (quoting Jurek v. Texas, 428 U.S. 262, 274 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) (footnote omitted). The Court noted that predictions of dangerousness or future criminality were implicated in death sentence decisions, *see* Jurek v. Texas, 428 U.S. 262 (1976), the granting and revoking of parole, *see* Greenholtz v. Nebraska Panel Inmates, 442 U.S. 1 (1979); Morrisey v. Brewer, 408 U.S. 471 (1972), and sentencing under "dangerous special offender" statutes, *see* 18 U.S.C. § 3575 (1982).

Similarly, the defendant's challenge to the District of Columbia's preventive detention statute in United States v. Edwards, 430 A.2d 1321 (D.C. 1981),

nevertheless declined to itemize or codify the predictor variables on which a court should rely in making this prediction, emphasizing that such a list was not necessary.[188]

The *Schall* dissent questioned both the substantive goals advanced by preventive detention and the adequacy of the procedures used. The dissenters agreed with the district court's finding that identifying persons who would commit crimes if released is technically difficult and noted that this difficulty made it impossible for the statute as administered to achieve the legitimate public objective of crime prevention.[189] Indeed, the

---

cert. denied, 455 U.S. 1022 (1982), on the ground that inability to predict dangerousness or future criminality rendered the statute overbroad and a violation of due process also was rejected. *See infra* notes 213-20.

> Prediction of the likelihood of certain conduct necessarily involves a margin of error, but is an established component of our pretrial release system. Trial judges have been engaged in predicting the likelihood of flight for all defendants . . . . Appellant's argument relies on the assumptions, which we do not share, that the judicial prediction of dangerousness, as distinguished from the likelihood of flight, is both a denial of a fundamental right and the imposition of punishment.

Edwards, 430 A.2d at 1342 (citations omitted).

188. The Court emphasized that since the juvenile is entitled to a hearing, "there is no reason that the specific factors upon which the Family Court judge might rely must be specified in the statute." *Schall*, 104 S. Ct. at 2418.

The Supreme Court has, however, attempted to specify criteria to guide the juvenile court's decision making in other contexts. In Kent v. United States, 383 U.S. 541 (1966), the juvenile court waived the juvenile for prosecution as an adult after a "full investigation." *Id.* at 546. Although the decision was based on procedural grounds, the Supreme Court attached a lengthy appendix in which it enumerated a host of factors that a juvenile court should properly consider in deciding to waive jurisdiction. *See id.* at 565-68 app. Although the *Kent* criteria have been faulted for their excessive generality, *see infra* notes 517-21 and accompanying text, the *Schall* Court declined to give even that much guidance.

189. *Schall*, 104 S. Ct. at 2425-29 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). In United States *ex rel* Martin v. Strasburg, 513 F. Supp. 691 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984), the district court examined this issue in depth and concluded that the inability to predict dangerousness was the most pernicious defect of the entire preventive detention scheme.

> The judge is empowered to make a prediction about the probability of an individual committing a crime if released. No guidelines for making that determination are set out in the statute, and none has been adopted by the court. The judge's determination is moored to no concrete or reasonably determinable yardsticks. . . . [E]ach judge utilizes his own personal standards.

513 F. Supp. at 707. Following its review of the prediction literature and the expert testimony, *see id.* at 708-12, the district court concluded that any effort to predict future dangerousness based on the present state of the art is necessarily doomed to failure, *see id.* at 712.

Numerous commentators raise similar concerns about a court's ability accurately to predict human behavior, especially behavior that is unusual or violent. *See, e.g.*, J. MONAHAN, PREDICTING VIOLENT BEHAVIOR (1981); N. MORRIS, THE FUTURE OF IMPRISONMENT 62-73 (1974); S. PFOHL, PREDICTING DANGEROUS-

majority's position that such predictions occur often[190] ignores the important issue of whether those predictions can be made with acceptable accuracy, particularly where the subjects of the prediction have not yet been found guilty of any criminal offense.[191]

NESS: THE SOCIAL CONSTRUCTION OF PSYCHIATRIC REALITY (1978); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions,* 23 J. LEGAL EDUC. 24 (1970); Dix, *Clinical Evaluation of the "Dangerousness" of "Normal" Criminal Defendants,* 66 VA. L. REV. 523 (1980); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 693, 711-16 (1974); Gottfredson, *Assessment and Prediction Methods in Crime and Delinquency,* in JUVENILE DELIQUENCY AND YOUTH CRIME, *supra* note 30, at 181-82; Livermore, Mahlmquist & Meehl, *On the Justifications for Civil Commitment,* 117 U. PA. L. REV. 75, 81-83 (1968); Monahan, *The Prediction of Violence,* in VIOLENCE AND CRIMINAL JUSTICE 17-20 (D. Chappell & J. Monahan eds. 1975); Shah, *Dangerousness and Civil Commitment of the Mentally Ill: Some Public Policy Considerations,* 132 AM. J. PSYCH. 501 (1975); Shah, *Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas,* in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 177-79 (C. Frederick ed. 1978); Shah, *Some Interactions of Law and Mental Health in the Handling of Social Deviance,* 23 CATH. U.L. REV. 674, 700-12 (1974); Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry,* 1 J. PSYCH. & L. 409 (1973); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment,* 88 YALE L.J. 1408 (1979); Wenk, Robison & Smith, *Can Violence be Predicted?,* 17 CRIME & DELINQ. 393 (1972).

Psychiatrists as well as lawyers have criticized the assumption of mental health professionals that they are able to predict dangerousness. One author, for example, observes that there is no empirical basis for the assumption that psychiatrists can predict dangerous behavior and that even with "the most careful, painstaking, laborious, and lengthy clinical approach to the prediction of dangerousness, false positives [or erroneous prediction] may be at a minimum of 60% to 70%." Rubin, *Prediction of Dangerousness in Mentally Ill Criminals,* 27 ARCHIVES GEN. PSYCHIATRY 397, 397-98 (1972).

The dissent in *Schall* relied upon these authorities to support its conclusion that "'no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime.'" *Schall,* 104 S. Ct. at 2425 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting) (quoting United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 708 (S.D.N.Y. 1981), *aff'd,* 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984)).

190. 104 S. Ct. at 2417-18; *see supra* note 187.

191. *Schall,* 104 S. Ct. at 2426 n.20 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

> Whatever the merits of the decisions upon which the majority relies [affirming the validity of making decisions on a prediction of future criminal conduct], they do not control the problem before us. In each of the cases in which the Court has countenanced reliance upon a prediction of future conduct in a decision-making process impinging upon life or liberty, the affected person had already been convicted of a crime. . . . The constitutional limitations upon the kinds of factors that may be relied on in making such decisions are significantly looser than those upon decision-making processes that abridge the liberty of presumptively innocent persons.

Id. (Marshall, J., joined by Brennan and Stevens, JJ., dissenting) (citations omitted).

The prediction problem is compounded by the New York statute's lack of criteria to structure the initial detention decision and the *Schall* majority's express refusal to impose any such criteria.[192] Although the majority's selective description of certain members of the class of plaintiffs in *Schall* implies that they were a group of uniformly "dangerous" offenders,[193] few offense characteristics typically distinguish detained juveniles from nondetained juveniles.[194] Evaluations of the detention process also indicate that the *majority* of juveniles who are preventively detained are not charged with serious offenses.[195] In this regard, the dissent is certainly correct that

> the public reaps no benefit from incarceration of the majority of the detainees who would not have committed any crimes had they been released. Prevention of the minor offenses that would have been committed by a small proportion of the persons detained confers only a slight benefit on the community.[196]

The dissent also criticized the majority's characterization

---

192. *See* 104 S. Ct. at 2412 n.18. The majority noted:

> Appellees argue that some limit must be placed on the categories of crimes that detained juveniles must be accused of having committed or being likely to commit. But the discretion to delimit the categories of crimes justifying detention, like the discretion to define criminal offenses and prescribe punishments, resides wholly with the state legislatures.

Id.

193. *Id.* at 2414 n.21. *But see id.* at 2421 n.7 (Marshall, J. joined by Brennan and Stevens, J.J., dissenting). *See generally* United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 695-700 (S.D.N.Y. 1981) (detailed description of the characteristics of the 34 members of the plaintiff class), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

194. *See, e.g.*, R. COATES, A. MILLER & L. OHLIN, DIVERSITY IN A YOUTH CORRECTIONAL SYSTEM 65-67 (1978) (current offense, offense history, and prior experience in youth corrections do not appear to be strongly related to the decision to detain, and youths detained prior to commitment are not significantly more dangerous than youths committed without pretrial detention); *see also* Bookin-Weiner, *Assuming Responsibility: Legalizing Preadjudicatory Juvenile Detention*, 30 CRIME & DELINQ. 39 (1984); Cohen & Kluegel, *The Detention Decision: A Study of the Impact of Social Characteristics and Legal Factors in Two Metropolitan Juvenile Courts*, 58 SOC. FORCES 146, 151 (1979); Krisberg & Schwartz, *Rethinking Juvenile Justice*, 29 CRIME & DELINQ. 333, 355 (1983) (decision to detain strongly influenced by space availability in detention centers); Pawlak, *Differential Selection of Juveniles for Detention*, 14 J. RESEARCH CRIME & DELINQ. 152, 154-55 (1977) (primary determinant of rates of detention are the availability of detention bedspaces).

195. *See, e.g.*, GOVERNMENT ACCOUNTING OFFICE, IMPROVED FEDERAL EFFORTS NEEDED TO CHANGE JUVENILE DETENTION PRACTICES 9-10 (1983); L. COHEN, PRE-ADJUDICATORY DETENTION IN THREE JUVENILE COURTS 29-32 (1975).

196. *Schall*, 104 S.Ct. at 2427 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). The district court had also noted the dangers of erroneous predictions and the resultant over-incarceration:

> [N]ot only does it appear that one cannot predict dangerousness with an acceptable degree of accuracy, but, to the extent that dangerousness can be predicted at all, there is a substantial problem of overprediction,

of juveniles' liberty interests as inconsequential and the majority's trivialization of the unfavorable circumstances in which juveniles were detained.[197] Empirical research supports the

---

that is, to identify persons potentially dangerous who, if subsequently released, would engage in no further violent or even criminal behavior.

United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 709 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984). One author noted that

> [t]he conclusion to emerge most strikingly from these studies is the great degree to which violence is overpredicted . . . . Of those predicted to be dangerous, between 65 percent and 99 percent are false positives—that is, people who will not, in fact, commit a dangerous act . . . . Violence is vastly overpredicted whether simply behavioral indicators are used or sophisticated multivariate analyses are employed and whether psychological tests are administered or thorough psychiatric examinations are performed.

J. Monahan, The Prediction of Violent Behavior in Juveniles 10-11 (paper presented at National Symposium on the Serious Juvenile Offender in Minneapolis, Minnesota, Sept. 19-20, 1977) (emphasis deleted).

One commentator used statistical techniques to predict which offenders who met the District of Columbia preventive detention statute would commit future offenses. There was substantial overprediction regardless of the nature of the indicators employed. Depending upon the particular criteria used, the ratios of false positives (those who committed no further offenses) to true positives ranged from seven false positives for every three true positives detained to eight nonrecidivists for every recidivist. Note, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289, 310 (1971).

197. In determining that pretrial detention of juveniles was not violative of due process, the majority in *Schall* found that detention was not imposed for the purpose of punishment. The majority noted that the statute itself did not indicate "that preventive detention is used or intended as a punishment." *Schall*, 104 S. Ct. at 2413. Citing the time limits on such detention and the usual separation of juveniles from adults, the majority concluded that "[s]ecure detention is more restrictive, but it is still consistent with the regulatory and *parens patriae* objectives relied upon by the State." *Id.* By contrast, the dissent quoted from testimony and studies revealing that the juvenile detention facility "is not the most pleasant place in the world." *Id.* at 2423 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). The institution at issue in *Schall* was the Spofford Detention Facility. *Id.* at 2424 n.13 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). That facility had been the subject of extensive litigation, judicial scrutiny, and critical reports. *See, e.g.*, Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), *enforced*, 359 F. Supp. 478 (S.D.N.Y. 1973). The *Martarella* court described Spofford as follows:

> The building is surrounded by a high wall. Although individual sleeping rooms are left open at night unless the particular child poses a risk to himself or others, the children (boys) are otherwise locked in their dormitories, recreation rooms or classrooms . . . . Each corridor of the building that leads to the dormitories, classrooms, dining halls or offices has metal doors at each end that are locked at all times. An electronically locked metal door controls movement in and out of the buildings. The windows are secured from inside by a screen made of institutional netting. . . .
>
> When boys arrive at Spofford their personal clothing is taken from them and they are issued uniforms of blue jeans and T-shirts on whose fronts is an institutional legend . . . .
>
> . . . .
>
> . . . [T]he facility is "fraught with problems related both to archi-

dissent's view. For example, the vast majority of juveniles' institutional contacts occur in pretrial detention centers rather than in postadjudication commitments to training schools or other correctional facilities.[198] Moreover, many juvenile court jurisdictions do not have juvenile detention institutions and juveniles routinely endure preventive detention in adult jails.[199] Juveniles confined in such adult jails have a suicide rate nearly five times that of youths in the general population.[200] Judge Patricia Wald has summarized the realities of ju-

---

tectural layout and to maintenance." For example, it is 1/7 of a mile from one end of the structure to the other; the building is "poorly designed for its functional purpose"; space for receiving children is inadequate so that searching is often conducted in the toilet facilites; there is lack of sufficient area for visitation; the school is divided among three separate floors, creating "traffic problems"; lighting is "generally inadequate," the rooms are often cold in winter . . . .

. . . .

In addition to being locked institutions (internally and externally) whose male "inmates" must wear uniform clothing, there are other characteristics which the centers share with penal institutions. . . . [C]hildren are required to walk in line from place to place without talking, and are "hit" or have a smoking break taken away if they get out of line. Knives are not generally furnished at meals. Homosexuality, both forced and consensual, exists in both boys' and girls' centers as what all parties appear to agree is an inevitable concomitant of incarceration.

349 F. Supp. at 580-83 (citations omitted). The conditions described at Spofford are endemic to juvenile detention facilities around the nation. *See, e.g.*, R. SARRI, *supra* note 166; Wald, *supra* note 166, at 119, 127-30.

198. One author reports that "[a]nalysis of population distribution in juvenile justice indicates that on a given day, 9 out of 10 youths in residential facilities in the juvenile justice system will be found in detention units or adult jails." Sarri, *Service Technologies: Diversion, Probation, and Detention*, in BROUGHT TO JUSTICE? JUVENILES, THE COURTS AND THE LAW 166 (R. Sarri & Y. Hasenfeld eds. 1976); *see also* R. SARRI, *supra* note 166, at 5 (estimating that up to 500,000 juveniles are processed through local adult jail systems each year).

199. *See, e.g.*, D.B. v. Tewksbury, 545 F. Supp. 896 (D. Or. 1983). *Tewksbury* provides a particularly graphic description of the conditions under which juveniles are confined in adult jails. The *Tewksbury* court found that "[n]othing . . . is responsive to the emotional and physical needs of children . . .", *id.* at 903, the institutional policies generally "result in harsher treatment for pre-trial detainee children than for adult prisoners, many of whom have been convicted and sentenced," *id.* at 904, and there are no educational programs, no treatment programs, no recreational programs, and no access to books, radios, television, or the like, *id.* at 900-01. The court concluded that "[w]hen children who are found guilty of committing criminal acts cannot be placed in adult jails, it is fundamentally unfair to lodge children accused of committing criminal acts in adult jails." *Id.* at 907; *see also* MINN. STAT. ANN. § 641.14 (West 1983) ("No person awaiting trial shall be kept in the same room with a person convicted of a crime."); R. GOLDFARB, JAILS, THE ULTIMATE GHETTO 286-344 (1975).

200. *See* M. FLAHERTY, AN ASSESSMENT OF THE NATIONAL INCIDENCE OF JUVENILE SUICIDE IN ADULT JAILS, LOCKUPS, AND JUVENILE DETENTION CENTERS 10 (1980). These statistics may seriously underestimate the significance of juvenile suicide rates in confinement for at least three reasons. First, institutional

venile confinement thus:

> Over half a million juveniles annually detained in "junior jails," another several hundred thousand held in adult jails, penned like cattle, demoralized by lack of activities and trained staff. Often brutalized. Over half the facilities in which juveniles are held have no psychiatric or social work staff. A fourth have no school program. The median age of detainees is fourteen; the novice may be sodomized within a matter of hours. Many have not been charged with a crime at all.[201]

It is this institutional reality that Justice Rehnquist has characterized as the equivalent of parental supervision.[202]

The dissent in *Schall* was also concerned with the injurious consequences of imprisonment, such as deprivation of liberty, stigmatization, negative self-labeling, and prisonization,[203] and with the impairment of juveniles' ability to prepare legal defenses.[204] Detention may be even more inimical than the dis-

---

embarrassment concerning suicides may cause underreporting. Second, suicide rates in confinement are calculated on the basis of average length of stay (seven days for children in adult jails and 17 days for children in juvenile detention facilities), whereas suicide rates for the general population are calculated on the basis of a 365 day calendar year. "[C]hildren in adult jails . . . kill themselves more frequently than do children in juvenile detention facilities and children in the general population despite the fact that children in jails . . . have less time in which to commit suicide." *Id.* at 12. Third, it is more difficult to commit suicide in confinement because the "techniques at one's disposal are much more limited." *Id.* The lower suicide rate in juvenile detention centers as opposed to adult jails may be attributable to greater supervision, less isolation, and greater participation in ongoing youth activies. *Id.*

201. Wald, *supra* note 166, at 119; *see also* Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976) ("Pretrial detention is an onerous experience, especially for juveniles."); D.B. v. Tewksbury, 545 F. Supp. 896, 903 (D. Or. 1982) (pretrial dention is "confinement without regard for human dignity or need"); R. SARRI, *supra* note 166, at 35-63.

202. *Schall,* 104 S. Ct. at 2410.

203. *Id.* at 2424 n.14 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). In *In re* M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970), the court noted that:

> It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weeks in a cold, impersonal cell or room away from home or family. . . . The experience tells the youngster that he is "no good" and that society has rejected him. So he responds to society's expectation, sees himself as a delinquent, and acts like one.

Id. at 31 n.25, 437 P.2d at 747 n.25, 89 Cal. Rptr. at 43 n.25 (citation omitted).

204. *Schall,* 104 S. Ct. at 2421 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). This impairment has been documented by other commentators:

> [A] number of studies indicate that "the defendant at liberty pending trial stands a better chance of not being convicted or, if convicted, of not receiving a prison sentence." . . . This disparity may be attributable to "[c]onditions of confinement that impeded a defendant's preparation of his defense (apart, of course from the fact of confinement itself), or that are so harsh or intolerable as to induce him to plead guilty, or that damage his appearance or mental alertness at trial."

sent suggested. Although the initial decision is not based on offense criteria or other rational factors, detention itself increases both a juvenile's probability of conviction and the likelihood of institutional confinement following adjudication.[205] For example, one study reports that "[c]hildren detained were much more likely to be found delinquent than those not detained . . . and to be committed when they had been found delinquent."[206]

The *Schall* dissenters also believed the procedural safeguards of the preventive detention statute were inadequate because eligibility for detention was not limited to juveniles whose present offenses or past conduct indicated a substantial likelihood of immediate future criminality and because trivial offenders and those with no prior juvenile court contacts could be and were routinely detained.[207] Moreover, the statute specified neither the nature of the future crimes being predicted nor the burden of proof needed to sustain the prediction, other than requiring that there be a "serious risk" that the juvenile would commit an offense.[208] The lack of statutory standards or

---

United States v. Edwards, 430 A.2d 1321, 1355 (D.C. 1981) (Ferren, J., concurring and dissenting) (citations omitted), *cert. denied*, 455 U.S. 1022 (1982).

205. *See, e.g.*, R. COATES, A. MILLER & L. OHLIN, *supra* note 194, at 101-04; Clarke & Koch, *supra* note 156, at 293-94.

206. Clarke & Koch, *supra* note 156, at 293.

> [After controlling for the effects of present offense and prior record], the commitment rate remained much greater for children held in detention, except at the highest level of record and offense seriousness . . . . We conclude that being detained before adjudication had an independent effect on the likelihood of commitment, entirely apart from the fact that both detention and commitment had some common causal antecedents.

Id. at 294. Professors Clarke and Koch suggest that the independent effects of detention on rates of adjudication and commitment stem from the fact that "[t]he child's ability to defend himself may have been impaired by detention, either because he was prejudged by the same court that later decided his case, or because it was harder for him to talk to his lawyer and otherwise prepare his defense." *Id.* at 295. These findings are similar to studies reporting the impact of pretrial confinement on adults. *See, e.g.*, Ares, Rankin & Sturtz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U. L. REV. 67, 86 (1963). *But see* Goldkamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 JUST. SYS. J. 234, 234 (1980); Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. LEGAL STUD. 287, 333 (1974). The *Schall* dissenters also concluded that pretrial detention was unlikely to prevent the commission of serious crimes in any significant way and was more likely to injure juveniles than to protect them from their own folly. *See Schall*, 104 S. Ct. at 2425-28 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

207. *See Schall*, 104 S. Ct. at 2422, 2426 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

208. *Id.* at 2430 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting); *see also* Martin v. Strasburg, 689 F.2d 365, 377 (2d Cir. 1982) ("The statute

criteria about ultimately speculative future behavior remits the detention decision to the individual discretion of each judge. As the dissent noted, unstructured discretion both creates the danger that many juveniles will be detained "erroneously" and fosters arbitrariness, inequality, and discrimination in a process that impinges on fundamental liberty interests.[209]

Despite the concerns of the dissenters and other critics of *Schall*, states continue to subscribe to the *Schall* majority's position. For example, Minnesota's new Rule 18 authorizes the preventive detention of juveniles at several different stages in the juvenile justice process whenever an official predicts that "others would be endangered" if the child were released,[210] although there is no comparable provision for the preventive detention of adults in Minnesota.[211] The New York and Minnesota preventive detention statutes for the pretrial incarceration of juveniles are not unique: such statutes are found in all states.[212]

---

places no limits on the crimes for which the person subject to detention has been arrested . . . , the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused[,] . . . [and] the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released."), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

209. *Schall*, 104 S. Ct. at 2431-33 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

> A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that impinge upon fundamental rights. Two concerns underlie this principle: excessive discretion fosters inequality in the distribution of entitlements and harms, inequality which is especially troublesome when those benefits and burdens are great; and discretion can mask the use by officials of illegitimate criteria in allocating important goods and rights.

Id. at 2432 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). For a general discussion of the problems of discretion, vagueness, and discrimination in the context of juvenile court decisions to transfer juvenile offenders to the adult criminal process, see Feld, *Reference of Juvenile Offenders, supra* note 77, at 546-56; see also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 80 (1960) ("Prejudiced discriminatory, or overreaching exercises of state authority may remain concealed beneath findings of facts impossible for the Court to redetermine when such sweeping statutes have been applied to the complex, contested fact constellations of particular cases.").

210. MINN. R.P. JUV. CT. 18.02(2)(A)(i); 18.06(5)(b)(i); 18.09(2)(D)(i).

211. Minnesota encourages releasing an adult defendant with a citation on personal recognizance or other nonmonetary conditions of release whenever possible. *See* MINN. R. CRIM. P. 6; 6.01; 6.02.

212. *See* Schall v. Martin, 104 S. Ct. 2403, 2411 & n.16 (1984) (collecting statutes). Rule 18.02(2)(C)(2)(a) also authorizes the court to release a child upon the posting of bail, although many states do not provide for a child's release on bail. *See, e.g.*, Fulwood v. Stone, 394 F.2d 939, 943 (D.C. Cir. 1967); Doe v. State, 487 P.2d 47, 52 (Alaska 1971) (since minors cannot enter into binding contracts with bail bondsmen, their freedom would be contingent on their parent's will-

It is instructive to compare the procedural strategy used for the preventive detention of adults in the District of Columbia[213] with the New York statute upheld in *Schall* and with Minnesota's Rule 18 for juveniles. Although the D.C. statute shares with the New York and Minnesota provisions the vice of preventive detention based on a prediction of future criminality, it imposes detention under far more restricted circumstances and with respect to a far narrower category of potential offenders.[214] The D.C. statute allows preventive detention only when the court finds by "clear and convincing evidence" that the defendant falls within one of the statutorily defined categories of persons eligible for detention because they are charged with "dangerous crimes" and "crimes of violence."[215] Moreover, the court must also find that, on the basis of the defendant's past and present pattern of behavior, there is "no condition or combinations of conditions of release which will reasonably assure the safety of any other person or the community" and that there is a "substantial probability" that the person committed the offense charged.[216]

---

ingness or ability to do so). *See generally* Guggenheim, *supra* note 166, at 1081-85; Note, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime"*, 18 VAND. L. REV. 2096 (1965); Comment, *Juvenile Right to Bail*, 11 J. FAM. L. 81 (1971). The focus of this analysis is on preventive detention and not the appropriateness of bail as an alternative basis for release for either adults or juveniles. The manifold discriminatory deficiencies of the bail system have been analyzed extensively. *See, e.g.*, D. FREED & P. WALD, BAIL IN THE UNITED STATES (1964); Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 1125 (1965).

213. The District of Columbia authorizes detention only of persons charged with one of a prescribed set of "dangerous crime[s] of violence." D.C. CODE ANN. § 23-1322(a)(1)(2) (1981).

214. *Id.* The pitfalls of predicting dangerousness are discussed *supra* note 189 and accompanying text; *see also* United States v. Edwards, 430 A.2d 1321, 1369 (D.C. 1981) (Mack, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982).

215. D.C. CODE ANN. § 23-1322(b)(2)(A). Eligibility for detention is narrowly restricted to those accused of a statutorily defined "dangerous crime," a "crime of violence," or an "obstruction of justice." D.C. CODE ANN. §§ 23-1331(3), (4) ("dangerous crime" includes robbery, burglary, arson, rape, sale of narcotics; "crime of violence" includes murder, rape, statutory rape, robbery, kidnapping, assault).

216. D.C. CODE ANN. §§ 23-1321 (b); 23-1322 (b)(2)(B)(i); 23-1322(b)(2)(C). The "substantial probability" standard was discussed in United States v. Edwards, 430 A. 2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). The *Edwards* court noted that the higher standard of "a substantial probability," rather than simply probable cause, that the accused committed a designated crime, was intended to "be equivalent to the standard required 'to secure a civil injunction—likelihood of success on the merits.'" *Id.* at 1339 (citation omitted).

Judge Ferren, concurring in part and dissenting in part, rejected any implication that a "probable cause" standard would be constitutionally adequate and concluded that "due process mandates the much stricter requirement, con-

The D.C. Court of Appeals examined the procedural safeguards of this statute in *United States v. Edwards*.[217] The *Edwards* majority rejected the defendant's contention that he was entitled to an adversarial predetention proceeding including the right to confront and cross-examine witnesses. Instead, the *Edwards* court relied on the rigorous procedural safeguards and enumerated offense criteria of the D.C. statute[218] and held that the type of pretrial hearing envisioned by the Supreme Court in *Gerstein v. Pugh*[219] was sufficient.[220]

Neither the New York statute approved in *Schall* nor Minnesota Rule 18 provide comparable provisions for protection against erroneous and excessive detention of juveniles. The shortcomings of the *Schall* statute have already been discussed, and the Minnesota detention provision is even less adequate. In Minnesota, the detaining court need only find "probable cause that . . . others would be *endangered* if [the defendant were] released,"[221] and eligibility for detention is neither limited to the type of crime charged nor based on an

---

tained in the statute, that the finding be premised on clear and convincing evidence." *Id.* at 1351 (Ferren, J., concurring and dissenting).

Ferren added that the "substantial probability" standard is at least as high as the "clear and convincing" standard of proof which is required for involuntary civil commitment. *Id.* at 1360 (Ferren, J., concurring and dissenting). Even though an involuntary civil commitment is "nonpunitive," it entails a loss of liberty that requires a greater justification than the simple "more likely than not" of probable cause. *Compare* Addington v. Texas, 441 U.S. 418, 428 (1979) (clear and convincing evidence standard in "civil commitment proceeding as opposed to criminal prosecutions") *with* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("judicial determination of probable cause [held] to be a prerequisite to extended restraint of liberty following arrest").

217. 430 A. 2d 1321 (D.C. 1981), *cert. denied*, 445 U.S. 1322 (1982). The defendant in *Edwards* was charged with armed rape, and at the time of his arrest confessed to the rape, another forcible sodomy, two burglaries, and an additional seventeen robberies within the previous four months. He also had an extensive juvenile record. *Id.* at 1324. Thus, the court had little difficulty concluding either that he fit the category of persons eligible for detention or that based on his "pattern of behavior consisting of his past and present conduct. . . [that] no condition or combination of conditions of release [would] reasonably assure the safety of any other person or the community.'" *Id.* at 1334 (quoting D.C. CODE ANN. § 23-1322(b)(2)(B)(i) (1973)) (citation omitted).

218. *See supra* notes 213-15 and accompanying text.

219. *See supra* notes 180-83 and accompanying text.

220. *Edwards*, 430 A.2d at 1335-39. *But see id.* at 1353-65 (Ferren, J., concurring and dissenting) ("[P]retrial detention without bail is premised not only on a showing that the accused may have committed a particular crime, but also on a far more complex, inherently speculative prediction that the accused is likely to be dangerous in the future, based on past and present conduct. This kind of evaluation was not before the Court in *Gerstein* and, given its predictive nature, requires a more carefully focused, Fifth Amendment [due process] analysis.").

221. MINN. R.P. JUV. CT. 18.09(2)(D)(i) (emphasis added).

examination of the accused's individual circumstances.[222] Although continued detention is authorized based on an individual judge's conclusion that the community would be "endangered" by a youth's release, "endangerment" is not statutorily defined or circumscribed. The Minnesota rule lacks even the New York statutory requirement that the risk be that of "an act which if committed by an adult would constitute a crime."[223] Furthermore, as distinguished from the "substantial probability" of "dangerous crimes" requirement in *Edwards*, Minnesota requires only a finding of probable cause that a youth committed a delinquent act, which can include a violation of "any state or local law" as well as of many ordinances.[224] Presumably, every juvenile court judge in the state may apply this same lower standard of proof on any individual, idiosyncratic basis with virtually no means of effective appellate supervision.[225]

---

222. *See* MINN. R.P. JUV. CT. 18.06(5).

223. *Schall*, 104 S. Ct. at 2405 & n.1 (quoting N.Y. FAM. CT. ACT § 320.5 (Consol. 1983)). Rule 18 provides no criteria, guidelines, or standards to structure the detention decision. To what extent must a court speculate that others would be endangered—violent felonies against the person, repeated property offenses, disorderly conduct? Judge Mack, dissenting in *Edwards*, addressed this question:

> The court could say that a petty larceny or a petty offense was dangerous to the community, the guy was a drunk driver for example, and this was dangerous to the community. Such a conclusion, however, would be simply unreasonable. I think the conclusion that marijuana smoking is dangerous is unreasonable. But I don't know of any way to prevent courts from being unreasonable.

United States v. Edwards, 430 A.2d at 1371 (Mack, J., dissenting).

224. *See* MINN. STAT. § 260.015(5)(a) (1982). The available data indicate that less than one-third of the juveniles detained in Hennepin County, Minnesota, in 1982 were detained for major offenses against persons or property, and if burglary of an unoccupied building were removed from these totals, less than one-fifth of those detentions would be major offenders. *See* HENNEPIN COUNTY COURT SERVICES, JUVENILE CENTER 9-10 (1982) (7.6% major person, 23.7% major property). One-quarter of those detained in 1982 were status offenders. *Id.* at 11. Similarly, the Minnesota Supreme Court's own Juvenile Justice Study Commission Report, issued in 1976, found that only about 10% of the juveniles held in detention for longer than two days were charged with felonies. *Id.* at 39.

225. Although the majority in Schall v. Martin, 104 S. Ct. 2403 (1984), conceded that "in some circumstances detention of a juvenile would not pass constitutional muster," the Court required the validity of those detentions to be "determined on a case-by-case basis." *Id.* at 2415. As the dissent points out, however, the reality of case-by-case adjudication, particularly of juveniles, and the time-frame within which cases are decided make this an illusory safeguard. "[I]t would be impracticable for a particular detainee to secure his freedom by challenging the constitutional basis of his detention; by the time the suit could be considered, it would have been rendered moot by the juvenile's release or long-term detention pursuant to a delinquency adjudication." *Id.* at 2428 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

There are, of course, several obvious ways to prevent courts from being unreasonable: prohibit them entirely from incarcerating people on speculative predictive grounds; specify more explicitly what categories of alleged present offenses, prior records, or anticipated future offenses constitute minimum requirements for "dangerousness"; or constrain the entire determination with more elaborate procedural safeguards and standards of proof, comparable to those upheld in *Edwards*. In adopting Rule 18, however, the Minnesota Supreme Court shunned all of these methods. Instead, a judge must decide whether or not to detain a youth within 36 hours after the child is taken into custody. If the youth is in court for the first time, the court will have, within 36 hours, only the petition stating probable cause and perhaps a summary of a relatively brief interview conducted by the probation officer recommending detention.[226] There will be no clinical evaluations, psychiatric or psychological examinations, or other verified information regarding school performance, family functioning, and the like. Even for youths with prior juvenile court contacts, there is no mechanism for obtaining and verifying current information within the limited time envisioned by the rule. Defense counsel typically will be appointed only shortly before the detention hearing, if at all, and thus will have little opportunity to gather or verify background information on the child or determine the availability of other nonsecure placement alternatives.[227] In short, even if accurate predictions were possible, Minnesota's Rule 18 does not provide juvenile court judges in detention hearings with the information necessary to make such predictions. Although the Supreme Court in *Schall* alluded to its own limited function in formulating public policy or drafting a model rule in the context of constitutional adjudication,[228] the Minnesota Supreme Court has no similar excuse when promul-

226. *Cf.* United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 701-02 (S.D.N.Y. 1981) (procedures under comparable New York provision), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

227. *Cf. id.* at 708 (comparable New York law). The *Martin* district court was concerned that

> [i]f counsel is court appointed, . . . he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention. The judge has roughly 5 to 15 minutes to determine whether there is the likelihood that the juvenile would commit another crime before the return date if released.

Id. at 708.

228. *Schall*, 104 S. Ct. at 2419 ("[I]t is worth recalling that we are neither a legislature charged with formulating public policy nor an ABA committee charged with drafting a model statute.").

gating rules of procedure for Minnesota's juvenile courts.[229] State promulgation of such juvenile preventive detention procedures represents the state's choice to use less adequate procedures in juvenile courts than in adult courts.[230]

B. Identification Procedures

The Supreme Court established that a defendant has a sixth amendment right to counsel when placed in a postindictment lineup in *United States v. Wade*.[231] The Court reasoned that such a confrontation between the accused and the victim or witness constitutes a "critical stage" in the proceedings that requires the assistance of counsel in order to meaningfully cross-examine witnesses and make possible effective assistance of counsel at the trial itself.[232] The *Wade* Court believed that the unreliability of eyewitness identification, the possibil-

229. There are a number of recommended standards for detention that the Minnesota Supreme Court might have considered in limiting the scope of detention. For example, under the American Bar Association's Standards, a juvenile could not be detained unless: (1) the crime the youth is charged with is one of violence and which if proven would likely result in commitment to a secure institution; and (2) the offense is one which if committed by an adult would be punishable by twenty years or more (which in Minnesota would include only murder, aggravated robbery, first degree criminal sexual conduct, kidnapping, and a limited number of similar offenses); or (3) the juvenile is an escapee from an institution to which the juvenile has been previously committed as an adjudicated delinquent; or (4) no measure short of detention will ensure his appearance at subsequent proceedings in light of a demonstrated history of failing to appear at proceedings in the past. JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO INTERIM STATUS, Standard 6.6; *see also* NATIONAL ADVISORY COMMITTEE, TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, Standard 12.7, at 390 (1976) (A juvenile may be detained prior to a delinquency adjudication "[t]o prevent the juvenile from inflicting bodily harm on others."); *id.*, commentary at 391 ("A court may not, however, detain a youth simply to prevent the predicted commission of property offenses."); R. SARRI, *supra* note 166, at 68 ("Criteria for detention should be explicit and limited solely to acts that would be felonies requiring detention if committed by adults").

The Minnesota legislature shares the fault with the court by authorizing preventive detention of juveniles. See MINN. STAT. § 260.171(1), which provides for release "[u]nless there is reason to believe that the child would endanger himself or others, not return for a court hearing, not remain in the care or control of the person to whose lawful custody he is released, or that the child's health or welfare would be immediately endangered." The criteria enumerated in Rule 18 take into account these alternative grounds for release. Juveniles, like adults, must "appear for a court hearing." MINN. STAT. § 260.171(2)(a)(ii) (1982). Unlike adults, however, they require greater protection of their "health and welfare." MINN. STAT. § 260.171 (2)(A)(i), (iv).

230. The critical focus of this section of the Article is only on the authorization of preventive detention of juveniles, for which there is no adult counterpart.

231. 388 U.S. 218, 228-39 (1967).

232. *See id.* at 236-37.

ity of mistaken identification and erroneous convictions, the danger of suggestibility, and the difficulty of reconstructing at trial the manner and mode of identification create substantial dangers to defendant's rights to a fair trial and thus require the assistance of counsel to lessen those dangers.[233]

Nevertheless, in *Kirby v. Illinois*,[234] a plurality of the United States Supreme Court declined to extend the right to counsel to identification lineups that take place before a defendant is indicted or formally charged with a crime. The plurality's rationale was that a person's sixth amendment right to counsel attaches only at or after the initiation of adversarial proceedings.[235] This position drew both a strong dissent and extensive scholarly criticism. The *Kirby* dissenters noted that the presence of counsel at identification proceedings was required in *Wade* because of the inherent dangers identification procedures present to a fair trial, not because of any "abstract consideration of the words 'criminal prosecutions' in the Sixth Amendment."[236] Thus, in the dissenters' view, the initiation of adversary judicial criminal proceedings was completely irrelevant to the need for counsel.

The *Kirby* decision creates an additional danger to defendants by providing police with an incentive to conduct identification prior to the formal accusation.[237] Indeed, the vast majority

233. *See id.* at 228-32. For an examination of the dangers and unreliability of eyewitness identification, see, e.g., Goldstein, *The Fallibility of the Eyewitness: Psychological Evidence,* in PSYCHOLOGY IN THE LEGAL PROCESS 223, 225-28 (B. Sales ed. 1977); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1081-87 (1973); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969, 969-71 (1977). The sources of unreliability in eyewitness identifications include initial perceptual errors, memory failure, and the problems of suggestibility, social cues, and the expectations of police in the recognition process. *See, e.g.,* Levine & Tapp, *supra,* at 1095-1118; Note, *supra,* at 976-89.

234. 406 U.S. 682, 688-89 (1972).

235. The plurality explained:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90.

236. *Id.* at 696 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting).

237. In People v. Bustamante, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576

of identifications occur before the formal initiation of the adversarial process, in part because the pretrial identification by the witness or victim provides an essential link between the accused and the crime that often leads to the decision to charge.[238] Thus, *Kirby*'s decision not to extend the right to counsel to these earlier confrontations provides uncharged "defendants" with only the less adequate safeguards afforded by due process.[239]

Commentators[240] have also lamented the *Kirby* Court's less than faithful adherence to the *Wade* rationale, noting that nothing in the *Wade* analysis confined it exclusively to post-indictment proceedings.[241] They also argue that, even accepting *Kirby*'s formalistic reasoning, adverse positions between the State and the defendant may arise at least as early as the suspect's arrest, as evidenced in *Miranda v. Arizona*,[242] and that the *Kirby* Court's treatment of inconvenient precedents was, at the least, disingenuous.[243] Commentators have

(1981), the court noted that "to limit the right to counsel at a lineup to post-indictment lineups would as a practical matter nullify that right. . . . [T]he crucial confrontation necessarily will be held before the initiation of formal judicial proceedings when the defendant can be deprived of counsel." *Id.* at 101, 634 P.2d at 935, 177 Cal. Rptr. at 584; *accord* Blue v. State, 558 P.2d 636, 642 n.10 (Alaska 1977) ("[E]stablishment of the date of formal accusation as the time when the right to counsel attached, could only lead to situations where substantially all lineups were conducted before the indictment or information.").

238. *See, e.g.*, People v. Bustamante, 30 Cal. 3d 88, 101, 634 P.2d 927, 934, 177 Cal. Rptr. 576, 584 (1981).

239. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 113 (1977); Neil v. Biggers, 409 U.S. 188, 193 (1972); United States *ex. rel.* Kirby v. Sturges, 510 F.2d 397, 398-99 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975). *See generally* Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1116-19 (1974) (*Neil v. Biggers* adopts permissive interpretation of due process test).

240. *See, e.g.*, Grano, Kirby, Biggers, *and* Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 725 (1974); Quinn, *In the Wake of* Wade*: The Dimensions of Eyewitness Identification Cases*, 42 U. COLO. L. REV. 135, 143 (1970); Note, *Pretrial Right to Counsel*, 26 STAN. L. REV. 399, 410 (1974); Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of An Expanding Constitution*, 29 U. PITT. L. REV. 65, 78 n.81 (1967).

241. *See* Grano, *supra* note 240, at 726; *cf.* Comment, *supra* note 240, at 75 n.81 ("Since the reason for the rule is to prevent unfairness and to protect the right to meaningful confrontation at trial should the suspect be identified, the right to counsel must be afforded at any police-sponsored identification proceeding not conducted persuant [sic] to constitutionally sufficient regulations. Any other conclusion would be absurd."); Quinn, *supra* note 240, at 143 ("Since the purpose of the counsel's presence is to avert prejudice and assure meaningful cross-examination at trial on the issue of identification, it should make no difference that the lineup occurs prior to the filing of criminal charges.").

242. 384 U.S. 436 (1966).

243. *See, e.g.*, Grano, *supra* note 240, at 730. The *Kirby* plurality insisted

also characterized the *Kirby* decision as "wrong from every perspective,"[244] "perhaps the least defensible, from a technical point of view, of the Court's criminal law holdings during the term,"[245] a case where "the Court exalts form over substance,"[246] and one that "removes the protective effects of counsel's presence precisely when the danger of convicting an innocent defendant upon a mistaken identification is greatest."[247]

Several state supreme courts also have rejected the Supreme Court's position in *Kirby* and extended the right to counsel to preindictment identification proceedings.[248] Although most of these decisions draw on the language of *Kirby*,

---

that the sixth amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated." *Kirby*, 406 U.S. at 688. The Court went on to note that:

> [t]he only seeming deviation from this long line of constitutional decisions was *Escobedo v. Illinois*, 378 U.S. 478. But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, "to guarantee full effectuation of the privilege against self-incrimination . . . ." . . . . Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts . . . .

Id. at 689 (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)) (citation omitted). As Professor Grano points out, however,

> In a remarkable and questionable reinterpretation, *Miranda* stated that the denial of counsel in *Escobedo* made the defendant's subsequent statements the product of compulsion. The reinterpretation of *Escobedo*, however, does not lend support to Justice Stewart's holding in *Kirby*. *Wade*, like *Escobedo* in its new guise, did not vindicate the right to counsel as such, but rather vindicated the rights of cross-examination, confrontation, and fair trial. *Escobedo* still suggests that counsel must be provided at *any* pretrial stage when necessary to protect other constitutional rights. . . . Furthermore, *Wade*, which postdated *Johnson* by a full year, specifically relied on *Escobedo* to support the proposition that counsel must be provided at pretrial stages when that is necessary to protect the fairness of the subsequent trial. Therefore, if *Escobedo* has been limited to its facts, *Kirby*, rather than some prior case, has accomplished the deed.

Grano, *supra* note 240, at 728-29 (footnotes omitted) (emphasis in original).

244. Grano, *supra* note 240, at 730.

245. Young, *Supreme Court Report*, 58 A.B.A.J. 1092, 1092 (1972).

246. Case Note, *Criminal Law—The Lineup's Lament*, Kirby v. Illinois, 22 DE PAUL L. REV. 660, 675 (1973).

247. Note, *supra* note 233, at 996.

248. *See, e.g.*, Blue v. State, 558 P.2d 636, 641 (Alaska 1977); People v. Bustamante, 30 Cal. 3d 88, 98, 634 P.2d 927, 933, 177 Cal. Rptr. 576, 582 (1981); People v. Jackson, 391 Mich. 323, 338, 217 N.W.2d 22, 27 (1974); Commonwealth v. Richman, 458 Pa. 167, 171, 320 A.2d 351, 353 (1974); *see also* People v. Hawkins, 55 N.Y.2d 474, 488, 435 N.E.2d 376, 383-84, 450 N.Y.S.2d 159, 166 (Meyer, J., dissenting) (criticizing *Kirby*), *cert. denied*, 459 U.S. 846 (1982); Chandler v. State, 501 P.2d 512, 520 (Okla. 1972) ("[W]e strongly feel that better procedures require that before a line-up is conducted, the suspect be given the right to contact an

which balanced protection of a suspect from prejudice with the State's interest in prompt and purposeful investigation,[249] they conclude that "a suspect who is in custody is entitled to have counsel present at a pre-indictment lineup *unless exigent circumstances exist* so that providing counsel would unduly interfere with a prompt and purposeful investigation."[250] These state courts reason that once the investigation proceeds beyond the immediate on-the-scene show-up, and especially once the defendant is in custody at the station house, there is simply no further compelling law enforcement exigency that offsets the dangers of prejudice to the suspect.[251] In determining what circumstances might excuse the lack of counsel, courts have noted that, since defendants already have a *Miranda* right to counsel, "[t]he delay involved in securing counsel will generally be a matter of hours at most" and that "[i]f conditions require immediate identification without even minimal delay, or if counsel cannot be present within a reasonable time, such exigent circumstances will justify proceeding without counsel."[252]

---

attorney of his choice, or be informed that one will be called if he is unable to hire one. . . .").

249. *Kirby*, 406 U.S. at 691.

250. Blue v. State, 558 P.2d 636, 642 (Alaska 1977)(footnote omitted)(emphasis added). The *Blue* court, unlike the *Kirby* Court, acknowledged that extending counsel to preindictment lineups involved a balancing process between the state's concern for prompt investigation of unsolved crimes and the suspect's legitimate right to be protected from prejudicial procedures. *See id.* at 641.

251. Defendants already have a right to counsel when they are in custody and being interrogated. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966). If a defendant requests consultation with counsel, further interrogation must cease. *See, e.g.*, Oregon v. Bradshaw, 103 S. Ct. 2830, 2834 (1983); Edwards v. Arizona, 451 U.S. 477, 487 (1981). The state courts rejecting *Kirby* did so, in part, because the procedural mechanisms for providing counsel to protect the *Miranda* fifth amendment rights were equally necessary to protect the *Wade* sixth amendment rights of confrontation, cross-examination, and a fair trial. The court in *Blue* noted that the defendant

> was given his *Miranda* warnings which advised him of his rights to have counsel present and further advised him that if he could not afford counsel, one could be provided for him. . . . Even when a lineup is conducted within a few hours after the commission of a crime, if the suspect in custody requests an attorney at the lineup, he should be provided an opportunity to call one. If the attorney can arrive within a reasonably short time so as not to interfere with a prompt and purposeful investigation, then no evidence will be lost.

Blue v. State, 558 P.2d at 643 n.12.

252. People v. Bustamante, 30 Cal. 3d 88, 102-03, 634 P.2d 927, 935, 177 Cal. Rptr. 576, 584 (1981). In *Bustamante*, the California Supreme Court described the *Kirby* decision as a "wholly unrealistic" formalism that would "as a practical matter nullify" the right to counsel at lineups and concluded that all of the policies of *Wade* that made the identification process a "critical stage" were applicable regardless of when the confrontation occurred. *Id.* at 100-01, 634 P.2d at

Whatever the *Kirby* Court's reservations about preindictment guarantee of counsel, the state court decisions[253] demonstrate that any problems raised are not procedurally insuperable.

From the point of view of a misidentified suspect, the decision to deny counsel is an exaltation of form over substance. Nevertheless, the Minnesota Supreme Court endorses this formalism in Rule 18 by denying the right to counsel at lineups to juveniles who are already in custody but against whom a petition has not yet been filed, giving a right to counsel only when a delinquency petition *has* been filed.[254] Conducting a lineup without a lawyer, however consistent with the minimum constitutional standards of *Kirby*,[255] treats juveniles with no greater

---

934-35, 177 Cal. Rptr. at 584. In People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974), the Michigan Supreme Court also held that, independent of any federal constitutional requirements, "a suspect is entitled to be represented by counsel at a corporeal identification . . . unless the circumstances justify the conduct of an identification procedure before the suspect can be given an opportunity to request and obtain counsel . . . ." *Id.* at 338, 217 N.W.2d at 27 (footnote omitted). The court's rationale was that "the best evidence of whether an eyewitness can identify a suspect is his response at a fairly conducted lineup, . . . and to preserve best evidence eyewitness testimony from unnecessary alteration by unfair identification procedures, the principles developed in and following the announcement of *Wade* . . . shall govern . . . ." *Id.* at 338-39, 217 N.W.2d at 27-28. In Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974), the Pennsylvania Supreme Court, rather than rejecting *Kirby* outright, analyzed its own criminal process and concluded that the "line for determining the initiation of judicial proceedings in Pennsylvania [begins] at the arrest." *Id.* at 171, 320 A.2d at 353. The *Richman* court concluded that all of the policies of *Wade* apply to identification confrontation at any stage in the proceeding and that to postpone the "formal initiation" of the process beyond arrest simply would encourage uncounseled lineups after the suspect was in custody but not yet arraigned. *Id.* In Commonwealth v. Scott, 246 Pa. Super. 58, 369 A.2d 809 (1976), Pennsylvania applied this "arrest" standard to identification procedures in juvenile delinquency prosecutions. In *In re* Holley, 107 R.I. 615, 268 A.2d 723 (1970), decided between the *Wade* and *Kirby* decisions, the Rhode Island Supreme Court applied the *Wade* right to counsel to preindictment juvenile defendants. *Id.* at 619, 268 A.2d at 725-26. The court noted that in a case in which there is an identification issue, "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation" and that to deny the juvenile the right to counsel at that stage would make the right to counsel at trial granted by *Gault* a meaningless one. *Id.* at 623, 268 A.2d at 728 (quoting United States v. Wade, 388 U.S. 218, 235 (1967)).

253. *See* Blue v. State, 558 P.2d 636 (Alaska 1977); People v. Bustamante, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981); People v. Jackson, 391 Mich. 373, 217 N.W.2d 22 (1974); Commonwealth v. Richman, 238 Pa. Super. 413, 357 A.2d 585 (1976).

254. *See* MINN R.P. JUV. CT. 18.04(2)(C) ("A child has the right to have counsel present when placed in a line-up related to an act for which a petition has been filed alleging the child to be delinquent.").

255. *See* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (right to counsel attaches prior to arraignment and exists at time of preliminary hearing); United States v. Wade, 388 U.S. 218, 223-27 (1967) (accused has right to counsel at any

solicitude or concern than adult criminal defendants.[256] Indeed, given the greater likelihood that juveniles will waive their right to counsel,[257] juveniles may in fact be *more* disadvantaged than their adult counterparts.

In addition, Minnesota's Rule 18.04 authorizes police to photograph the lineup for evidentiary purposes or for other investigative purposes provided that a court order is obtained.[258] Rule 18.04 also authorizes police to routinely fingerprint any juvenile charged with a felony, provided that the court is informed that the child was fingerprinted.[259] Moreover, there are no provisions in the Rules or their underlying legislation[260] for the destruction of these photographic and fingerprint identification records if no charges are filed or if the youth is acquitted. The underlying legislation simply requires the police to sequester the records, not seal or destroy them.[261] The Juvenile Jus-

---

critical pretrial confrontation where absence of counsel may derogate right to fair trial).

256. *Cf.* State v. Miles, 296 N.W.2d 437, 439 (Minn. 1980) (adult suspect has no right to counsel at preaccusation lineup); State v. Oksanen, 311 Minn. 553, 553, 249 N.W.2d 464, 465 (1977) (adult suspect has no right to effective assistance of counsel at preprosecution lineup); State v. Carey, 296 Minn. 214, 219-20, 207 N.W.2d 529, 532 (1973) (presence of counsel not constitutionally required as precondition of on-the-scene identification of adult suspect).

257. *See supra* notes 60-64 and accompanying text.

258. The Rule provides:

> A detained child may be photographed only upon order of the court under such terms as the court shall order. An order permitting the child to be photographed shall only be issued:
> (i) when necessary for the welfare of the child, or
> (ii) when necessary for the public safety, or
> (iii) when necessary for the investigation of a delinquent act, or
> (iv) as evidence of a line-up.

MINN. R.P. JUV. CT. 18.04(1)(A).

259. *See* MINN. R.P. JUV. CT. 18.04. Subdivision 3(A) provides that "[a]ll children in custody alleged to have committed an act which would be a felony if it had been committed by an adult may be fingerprinted without court order." MINN. R.P. JUV. CT. 18.04(3)(A); *see also* MINN. R.P. JUV. CT. 18.04(1)(B) ("A report stating the name of the child photographed and the date the photograph was taken shall be filed with the court."); 18.04(2)(D) ("A report stating the name of the child who participated in the line-up and the date of the line-up shall be filed with the court."); 18.04(3)(B) ("A report stating the name of the child fingerprinted and the date of the fingerprinting shall be filed with the court.").

260. The legislation provides that "[p]eace officers' records of children shall be kept separate from records of persons eighteen years of age or older and shall not be open to public inspection or their contents disclosed to the public except by order of the juvenile court." MINN. STAT. § 260.161(3) (1982).

261. *Compare* MINN. STAT. § 260.161(3) (1982), *supra* note 260, *with* OHIO REV. CODE ANN. § 2151.313 (Page 1976) ("Unless otherwise ordered by the court, originals and all copies of such fingerprints or photographs shall be delivered to the juvenile court after use for their original purpose for such further use and disposition as the court directs. Fingerprints and photographs of a child shall

tice Standards, although recognizing that law enforcement needs for identification evidence is the same whether an offender is a juvenile or adult, recommend that, "[i]f the court does not adjudicate the juvenile delinquent for the alleged felony, the fingerprint card and all copies of the fingerprints should be destroyed."[262] Similarly, the Standards recommend that photographs retained by law enforcement agencies for identification purposes should be destroyed if the agency or a juvenile court concludes that the youth did not commit the offense or if a juvenile court concludes that the juvenile is not delinquent.[263] To allow the continued existence of identification records after legitimate law enforcement needs have been satisfied creates a continual danger of subsequent disclosure and stigmatization.

The problem raised by these identification procedures reaches beyond the simple creation of records that may subsequently redound to the disadvantage of the juvenile. More significantly, the procedures subject juveniles, like adult criminal defendants, to routine booking procedures. A major rationale for a separate juvenile court was the elimination of the trappings of the criminal process and the creation of criminal records.[264] As the juvenile process becomes increasingly criminalized, many of the routine features of the handling of adult criminal defendants become ordinary components of the juvenile process as well. The state obviously requires identification evidence and should not be barred from obtaining it, but provisions like the Minnesota Supreme Court's rule authorizing its routine collection simply erode further any distinctions between the juvenile and adult systems.

---

be removed from the file and destroyed if a complaint is not filed or is dismissed after having been filed.").

262. JUVENILE JUSTICE STANDARDS, *supra* note 73, JUVENILE RECORDS AND INFORMATION SYSTEMS, Standard 19.6(A).

263. *See id.* at Standard 19.6(E).

264. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909); *see also* JUVENILE JUSTICE STANDARDS, *supra* note 73, JUVENILE RECORDS AND INFORMATION SYSTEMS, Standard 19.6 commentary at 144-45. The commentary questions the role of confidentiality in juvenile proceedings because confidentiality is premised

> on the theory that the process of fingerprinting (in particular) may be more traumatic for a juvenile than for an adult and that the retention of fingerprints may stigmatize a juvenile and interfere with the historical rehabilitative purposes of juvenile court intervention. Whether these theories are correct is unclear; and, in any case, it is doubtful that the taking of a juvenile's fingerprints is any more traumatic than arresting him or her or that the retention of a juvenile's fingerprints involves any greater risks than the retention of his or her arrest record.

Id.

V. PETITIONS AND PROBABLE CAUSE

A determination of probable cause is the fourth amendment touchstone of the initiation of formal criminal proceedings, as well as its necessary prelude.[265] Probable cause is the constitutional prerequisite for an arrest with[266] or without a warrant,[267] the basis for the continued detention of a person arrested without a warrant,[268] and a necessity for a grand jury indictment[269] or a preliminary hearing to hold a defendant for further criminal proceedings.[270] The finding of probable cause in all of these instances provides the evidentiary weight required to disturb the social equilibrium between the individual and the state. It establishes the factual bases leading to the conclusions that a crime was committed, that the defendant committed it, and that the state is justified in requiring the defendant to answer for it.

Fourth amendment protection from intrusions on liberty and privacy also requires a review of the probable cause determination by a "neutral and detached magistrate."[271] Review of a probable cause statement to ensure actual probable cause

265. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 963-1069 (5th ed. 1980); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46; Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974); Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U. L. REV. 1119 (1967); Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961); Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313 (1981).

266. *See* Payton v. New York, 445 U.S. 573, 583-90 (1980) (arrest in the home requires warrant founded on probable cause).

267. *See* United States v. Watson, 423 U.S. 411, 414-24 (1976) (arrest without a warrant in public place requires probable cause).

268. *See* Gerstein v. Pugh, 420 U.S. 103, 111-19 (1975) (fourth amendment requires judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest). For a discussion of *Gerstein*, see *supra* notes 181-83 and accompanying text.

269. *See* Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965).

270. *See* Coleman v. Alabama, 399 U.S. 1, 8 (1969).

271. *See* Coolidge v. New Hampshire, 403 U.S. 443, 449 (1970). The United States Supreme Court has emphasized on numerous occasions that determinations of probable cause must be justified before an independent judicial official rather than being remitted to law enforcement personnel. *See, e.g.*, Shadwick v. Tampa, 407 U.S. 345, 348 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 453 (1970); Aguilar v. Texas, 378 U.S. 108, 110-15 (1964); Giordenello v. United States, 357 U.S. 480, 483-84 (1957); Johnson v. United States, 333 U.S. 10, 13-14 (1948). Although the Supreme Court has addressed the importance of probable cause determinations by neutral detached magistrates primarily in the context of fourth amendment arrests and searches, it also has acknowledged their impor-

serves a variety of salutary functions in the charging process. It strengthens the initial prosecutorial screening function by requiring a prompt evidentiary review of the underlying factual bases of an action to eliminate those cases that lack prosecutive merit, that may have insuperable evidentiary difficulties, or that may be motivated by malice or negligence.[272] As the Minnesota Supreme Court noted in *State v. Florence*,[273]

> The primary function is that of screening out cases which, for one reason or another, ought not to be prosecuted. . . . "The object or purpose of the preliminary investigation is to prevent the hasty, malicious, improvident and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in a public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."[274]

A probable cause statement also supplies the notice required by *Gault* in juvenile cases[275] by providing the fullest factual and legal notice of charges. A full notice requirement assists the state in framing the issues and aids the defense in preparing to respond to them. The factual information contained in the probable cause statement furnishes avenues for investigation and discovery that assure the fairest determination of ultimate questions of guilt or innocence.[276] Finally, a probable cause requirement in the petition forces prosecutors

---

tance to the charging functions. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 112 (1975); Coleman v. Alabama, 399 U.S. 1, 7 (1969).

272. *See, e.g.*, State v. Florence, 306 Minn. 442, 446-47, 239 N.W.2d 892, 896 (1976) (probable cause hearing serves to secure release of illegally detained person, to relieve defendant from meritless prosecution, and to allow defendant to know in advance of trial the evidentiary basis of state's claims); Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922) (purpose of preliminary examination is to prevent hasty, malicious, improvident, and oppressive prosecutions and to discover whether there are sufficient grounds on which to base prosecution); Davis, *The Efficacy of a Probable Cause Requirement in Juvenile Proceedings*, 59 N.C.L. REV. 723, 729-33 (1981) (probable cause requirement is an essential element of preliminary hearing, establishing basis for arrest and detention).

273. 306 Minn. 442, 239 N.W.2d 892 (1976).

274. *Id.* at 447 n.4, 239 N.W.2d at 896-97 n.4 (quoting Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922)).

275. 387 U.S. at 34 (1967); *see supra* notes 33-48 and accompanying text.

276. In approving the elimination of the preliminary hearing in Minnesota criminal procedure and its replacement by the trial judge's assessment "of probable cause . . . based upon the entire record including reliable hearsay in whole or in part," MINN. R. CRIM. P. 11.03, the Minnesota Supreme Court noted in *Florence* that the collateral discovery functions previously served by preliminary hearings now were more adequately afforded by explicit provisions for discovery. 306 Minn. at 450, 239 N.W.2d at 898. The court pointed out that its adoption of Rule 11.03 had demonstrated its "conviction that the probable cause hearing should not be used as a substitute for disclosure and discovery and

to charge juveniles more realistically, in light of what the prosecutor can reasonably expect to prove, and provides a partial check on prosecutorial practices of overcharging as a prelude to plea bargaining.[277]

Despite the benefits of a judicially reviewed probable cause statement as a threshold charging requirement, the United States Supreme Court has not recently addressed the question of the right of all defendants to a probable cause statement at an early stage in the criminal process,[278] and the earlier cases found no such constitutional right for nondetained defendants.[279] In *Gerstein v. Pugh*,[280] however, a case that examined fourth amendment probable cause requirements for arrested defendants who remain in custody,[281] the Court noted that "even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty."[282] The Court did not consider, however, what burdens on released defendants might entitle them to a judicial probable cause determination. It focused only on detained defendants, holding that they were entitled to a nonadversarial probable cause determination because of the serious impact of prolonged pretrial de-

---

that the legitimate concern of the defendant to know the case against him before trial should be dealt with by other means." *Id.*

The United States Supreme Court in Coleman v. Alabama, 399 U.S. 1 (1969), also observed the collateral discovery functions served by preliminary hearings: "Trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial." *Id.* at 9. The adoption of liberal rules of discovery in criminal cases, however, obviates the need to resort to discovery indirectly via the preliminary hearing. *See, e.g.*, FED. R. CRIM. P. 16; MINN. R. CRIM. P. 9. The discovery provisions included in the Minnesota Rules of Procedure for Juvenile Court likewise contain liberal provisions for reciprocal pretrial discovery. *See* MINN. R.P. JUV. CT. 24.

277. *See, e.g.*, Feld, *Reference of Juvenile Offenders*, *supra* note 77, at 607; Davis, *supra* note 272, at 744.

278. This issue has not come before the courts at least in part because such a right routinely is afforded to all criminal defendants. *See* FED. R. CRIM. P. 5; MINN. R. CRIM. P. 2.01; *see also* Brown v. Fauntleroy, 442 F.2d 838, 839 n.2 (1971) (noting fundamental nature of right to a probable cause statement at an early stage in the criminal process).

279. *See, e.g.*, Ocampo v. United States, 234 U.S. 91, 98 (1914) (neither presentment nor indictment by grand jury are required under the Philippine Bill of Rights or the fourteenth amendment due process guarantee); Lem Woon v. Oregon, 229 U.S. 586, 590 (1913) (direct filing of information by prosecutor without judicial review does not violate fourteenth amendment due process clause); Hurtado v. California, 110 U.S. 516, 538 (1884) (federal constitution does not incorporate fifth amendment requirement that state felony prosecutions be initiated by grand jury indictment).

280. 420 U.S. 103 (1975).

281. *See supra* notes 181-83 and accompanying text.

282. 420 U.S. at 114.

tention on their lives.[283]

State juvenile court procedures generally reflect only this limited constitutional protection, even when adult court procedures go further. For example, Minnesota Juvenile Court Rule 19.03 requires that a delinquency petition state that the child is delinquent, explain concisely and directly the alleged delinquent act, and cite the criminal statute or ordinance allegedly violated.[284] The petition need state probable cause to believe that the child committed a crime *only* if the child is held in detention.[285] In contrast, Minnesota Rule of Criminal Procedure 2.01 requires the prosecuting authority to allege "the facts establishing probable cause to believe that an offense has been committed and that the defendant committed it" in *all* adult criminal complaints.[286] This difference is another instance in which juveniles receive neither the procedural protections given adult criminal defendants nor special consideration for their youth.

The Minnesota Supreme Court's adoption of Rule 19 reaffirms a position, set forth sixteen years earlier in *In re Hitzeman*,[287] that a juvenile petition need only state "the facts which bring the child within the jurisdiction of the court." The juvenile in *Hitzeman* challenged the sufficiency of a petition that alleged only that he and a companion were delinquent because "They did on October 3, 1966, at 8:46 p.m., at Montgomery Ward and Company in Sun Ray Shopping Center, steal two tires val-

283. The Court explained:

> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. . . . We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

Id. at 125 n.26.

284. MINN. R.P. JUV. CT. 19.03(a), (g). The rest of Rule 19.03 requires additional information prescribed by statute. *See* MINN. STAT. § 260.131(3) (1982). The statute requires that the county attorney draft the petition "upon the showing of reasonable grounds." MINN. STAT. § 260.131(2); *see also* MINN. R.P. JUV. CT. 17 (providing that the discretionary charging decision is the function of the county attorney); MINN. R.P. JUV. CT. 19.02(2) (requiring the county attorney to approve the petition as to form and content). Consolidating the charging responsibilities in the county attorney's office is one aspect of the increasing prosecutorial domination of the juvenile justice process. *See* Rubin, *supra* note 87, at 307-10.

285. MINN. R.P. JUV. CT. 19.04(1)(b).

286. MINN. R. CRIM. P. 2.01; *cf.* MINN. R.P. JUV. CT. 19.03(a) (requiring the delinquency petition to contain "a simple, concise and direct statement of the alleged delinquent act").

287. 281 Minn. 275, 277, 161 N.W.2d 542, 543 (1968).

ued at approximately $50.00."[288] The Minnesota Supreme Court, without any citation to *In re Gault*[289] or any analysis of the functions of notice and probable cause, held that the conclusory allegation was sufficient as a matter of law.[290] The court acknowledged that, although a juvenile court proceeding is not a criminal proceeding, "[a] delinquency petition is similar to an indictment or information with respect to the issue of sufficiency and certainty of the charges made."[291] Nevertheless, the court held that the statute prescribing the contents of petitions simply requires petitions to set forth the facts "plainly," insisted that "*plainly*" could not be construed to mean "in detail," and rejected the contention that the petition should state probable cause.[292] Several subsequent challenges to the sufficiency of conclusory allegations in petitions and several requests that petitions state probable cause were similarly rejected by the court, even though the petitions lacked information such as names of witnesses or victims, facts showing that the youth committed a crime, details of physical identification, and even citations to the criminal statutes allegedly violated.[293] Thus, despite the court's insistence that the petition be "sufficiently definite and certain to apprise the juvenile of the alleged violation,"[294] it is questionable whether in application the conclusory allegations consistently approved by the court in case and rule provide a juvenile with enough information to discover prosecution witnesses, prepare a defense, or even determine the nature of the offense alleged.[295]

---

288. *Id.* at 276, 161 N.W.2d at 543.

289. 387 U.S. 1 (1967). In *Gault* the United States Supreme Court required that

> the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described—that is, *notice which would be deemed constitutionally adequate in a civil or criminal proceeding.*

Id. at 33 (emphasis added). The Court insisted that when a youth's liberty and the parents' right to custody are at stake, timely notice "of the specific issues that they must meet" is a constitutional prerequisite. *Id.* at 34.

290. *Hitzeman,* 281 Minn. at 279, 161 N.W.2d at 544.

291. *Id.* at 279, 161 N.W.2d at 545.

292. *Id.*

293. *See, e.g., In re* Welfare of J.B.M., 263 N.W.2d 74 (1978); *In re* Welfare of T.D.F., 258 N.W.2d 774 (Minn. 1977). In *T.D.F.* the court upheld the sufficiency of a petition that in substance alleged only that "[appellant] did enter premises . . . without permission of person in lawful possession therein . . . with intent to commit a crime therein." 258 N.W.2d at 776 n.1.

294. *J.B.M.,* 263 N.W.2d at 75.

295. Conclusory allegations foster other procedural abuses as well. In *In re*

Minnesota's decision not to require a probable cause statement in the juvenile petition for nondetained youths[296] is typical of state juvenile procedures.[297] Most states require simply that the juvenile court charging document allege the basis of the court's jurisdiction over the youth, typically by a perfunctory allegation that the child has committed an act that would give the court jurisdiction over the child.[298] This approach stems from a narrow reading of *Gault*'s constitutional notice requirement and a desire to maintain a degree of flexibility and informality or to perpetuate civil/criminal distinctions in juvenile proceedings.[299]

A few states require that the petitioner set forth the factual basis of the allegations against the child and that the intake probation officer screen the case or the prosecutor verify the allegations.[300] These jurisdictions, however, require neither that the factual allegations be set forth with the same probable cause particularity required in a criminal complaint or indictment[301] nor that their sufficiency be reviewed by a court.[302] Although requiring greater factual specificity approaches the

Welfare of Raino, 255 N.W.2d 398 (Minn. 1977), the petition alleged: "On or about 2-11-76 [the defendant] did attempt to take one woman's white jacket . . . and one multi-colored blouse, . . . property of Donaldsons [Department Store], Minneapolis, Minn. without consent and with intent to deprive the owner permanently of said property." *Id.* at 399. In a trial before a referee, the youth was convicted of attempted theft. On appeal the juvenile court judge substituted a finding of disorderly conduct for attempted theft, stating that "disturbing the peace is a concomitant to theft in a public place during business hours and is a frequent result of a thwarted theft to the extent that it may be deemed a lesser included offense." *Id.* The Minnesota Supreme Court reversed the adjudication of delinquency on the grounds that disorderly conduct is not a lesser included offense of attempted theft and that amending the petition after the trial violated constitutional notice requirements. *Id.* at 400.

296. MINN. STAT. § 260.131(3) (1982).

297. *See, e.g.,* ALASKA STAT. § 47.10.020(a) (1979); KY. REV. STAT. § 208.070(1) (1982); MICH. COMP. LAWS ANN. § 712A.11 (West 1968). *See generally* Davis, *supra* note 272, at 726-28 (describing the typical state requirements for juvenile proceedings).

298. *See, e.g.,* MINN. STAT. § 260.131(3)(a) (1982) (requiring that petition "set forth plainly . . . [t]he facts which bring the child within the jurisdiction of the court"); N.M. STAT. ANN. § 32-1-19(A) (1978) (requiring that petition "set forth with specificity . . . the facts necessary to invoke the jurisdiction of the court").

299. *See, e.g., In re* Maricopa County, Juvenile Action No. J-81405-S, 122 Ariz. 252, 255, 594 P.2d 506, 509 (1979); *In re* V.R.S., 512 S.W.2d 350, 355 (Tex. Civ. App. 1974).

300. *See, e.g.,* ARK. STAT. ANN. § 45-423 (1977); IOWA CODE ANN. § 232.36 (West Supp. 1984-1985); KAN. STAT. ANN. § 38-1622 (Supp. 1983); TEX. FAM. CODE ANN. § 53.04 (Vernon 1975).

301. *See* MONT. CODE ANN. § 41-5-501 (1983); OHIO REV. CODE ANN. § 2151.27 (1976); statutes cited *supra* note 300.

302. *See* statutes cited *supra* note 300. Some statutes require that the factual allegations in the petition be stated with the same particularity required in

requirements of probable cause, these statutes fail to take into account the separate role played by the neutral and detached magistrate in evaluating such factual allegations.[303] The intake probation officer and prosecutor hardly provide the neutrality and detachment envisioned by the fourth amendment in the determination of probable cause.[304]

A limited number of states, through either legislation or judicial construction, require a statement of probable cause reviewed by a court as an integral part of a delinquency petition and thereby afford juveniles the same probable cause protections granted to adults.[305] For example, Indiana's preliminary screening procedure provides that "[t]he juvenile court shall consider the preliminary inquiry and the evidence of probable cause. The court shall approve the filing of the petition if there is probable cause to believe that the child is a delinquent child . . . ."[306] The Indiana Court of Appeals examined this probable cause requirement in *Davies v. State*.[307] The juvenile in *Davies*, charged with being "delinquent in that he [was] involved in first degree burglary," moved to dismiss for lack of specificity in the charge.[308] The state argued that, because juvenile proceedings were not criminal, the allegations of juvenile wrongdoing need not provide the particularity required in criminal complaints and that necessary facts could be obtained through discovery.[309] The court rejected both rationales and held that delinquent conduct must be specifically described.[310]

---

a criminal complaint or indictment. *See, e.g.*, MISS. CODE ANN. § 43-21-455 (1972); NEB. REV. STAT. § 43-274 (Supp. 1981).

303. *See supra* note 271 and accompanying text.

304. *Compare* N.C. GEN. STAT. § 7A-531 (Supp. 1983) (stating that "the intake counselor shall make a preliminary determination as to whether the juvenile is within the jurisdiction of the court") *with* Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (holding warrant invalid because not issued by a "neutral and detached magistrate").

305. *See, e.g.*, IND. CODE. ANN. § 31-6-4-9 (Burns 1980 & Supp. 1984); ME. REV. STAT. ANN. tit. 15, § 3302 (1964); N.Y. FAM. CT. ACT § 311.1 (West 1983); WASH. REV. CODE ANN. § 13.40.070 (Supp. 1984); WIS. STAT. ANN. § 48.255 (West 1979).

306. IND. CODE ANN. § 31-6-4-9(b) (Burns Supp. 1984).

307. 171 Ind. App. 487, 357 N.E.2d 914 (1976).

308. *Id.* at 488, 357 N.E.2d at 915.

309. *Id.* at 488, 357 N.E.2d at 915-16.

310. The Indiana Court of Appeals explained:

> It may be thought that the juxtaposition of an informal atmosphere with a strict procedure creates practical difficulties for the litigation process. However we note that the informal aspects of the hearing relate primarily to a relaxing of evidentiary rules . . . . [C]onstitutional rights should not be grudgingly extended in the disposition of juvenile matters under the rubric of informality.

Id. at 491, 357 N.E.2d at 917.

Similarly, Wisconsin requires that a juvenile petition state "facts sufficient to establish probable cause that an offense has been committed and that the child named in the petition committed the offense."[311]

Other jurisdictions also impose the procedural safeguards of criminal hearings on juvenile proceedings, including the requirement of a complaint containing a statement of probable cause.[312] For example, the Circuit Court of Appeals for the Dis-

311. WIS. STAT. ANN. § 48.255 (West 1979). The requirement of probable cause in the juvenile petition reflects a recent legislative amendment. Previously, Wisconsin's charging practices reflected "jurisdictional" pleading, requiring no probable cause allegation. *See* D.M.D. v. State, 54 Wis. 2d 313, 318-19, 195 N.W.2d 594, 597 (1972). Wisconsin now apparently uses the term "probable cause" in two different ways, depending upon the "degree" of probable cause required:

> This court has distinguished between these two degrees of probable cause on the basis of the differences between the functions of the probable cause determinations at the complaint and preliminary examination stages. While a probable cause determination at the complaint stage determines whether the state may conduct further inquiry into the alleged crime, . . . a probable cause determination at the preliminary examination stage is a finding by the court that sufficient evidence exists so that the state may compel the defendant to be bound over for criminal trial. . . . The purpose of determining probable cause in the complaint is to ensure that the document provides a reasonable basis for inferring that "a crime has probably been committed and that the defendant named in the complaint was probably the culpable party. . . . The test under Wisconsin law of the sufficiency of the complaint is one of 'minimal adequacy, not in a hypertechnical but in a common sense evaluation, in setting forth the essential facts establishing probable cause.'"

T.R.B. v. State, 109 Wis. 2d 179, 188-89, 325 N.W.2d 329, 333-34 (1982) (quoting State v. Olson, 75 Wis. 2d 575, 581, 250 N.W.2d 12, 15 (1977)). Presumably, juvenile petitions are judged by the same probable cause complaint standard to ascertain whether there is sufficient evidence to establish that "the charges against the juvenile are not merely capricious and that, assuming the juvenile were an adult, further criminal proceedings would be justified." *Id.* at 189-90, 325 N.W.2d at 334 (1982) (quoting T.R.B. v. State, 105 Wis. 2d 405, 409, 313 N.W.2d 850, 852 (Wis. Ct. App. 1981) (quoting D.E.D. v. State, 101 Wis. 2d 193, 205, 304 N.W.2d 133, 139 (Wis. Ct. App. 1981))).

312. *See, e.g.*, Driskill v. State, 376 So. 2d 678, 679 (Ala. 1979) (noting that "the allegations of a delinquency petition must be tested by the same standards of sufficiency as a criminal complaint for [sic] indictment"); *In re* Dennis, 291 So. 2d 731, 733 (Miss. 1974) (holding that "in those cases where a charge of delinquency is based upon the violation of a criminal law, the petition must charge the offense with the same particularity required in a criminal indictment"); *In re* Jose D., 102 Misc. 2d 907, 909, 424 N.Y.S.2d 674, 675 (N.Y. Fam. Ct. 1980) (holding that "a juvenile respondent is entitled, as a matter of law, to be charged upon a petition that satisfies the sufficiency standards of the Criminal Procedure Law"); N.Y. FAM. CT. ACT § 311.1 (McKinney 1983) (requiring the complaint to contain "a plain and concise factual statement . . . which . . . asserts facts supporting every element of the crime charged and the respondent's commission thereof with sufficient precision to clearly apprise the respondent of the conduct which is the subject of the accusation"); WASH. REV. CODE ANN. § 13.40.040 (Supp. 1984) (requiring a court's finding of probable cause).

trict of Columbia, in *Brown v. Fauntleroy*,[313] required a probable cause determination for a youth even though he was not being held in detention because he had "remained in the status of a person arrested for conduct defined as a crime and [was] subject to trial for that conduct as a juvenile delinquent."[314] The *Brown* court reasoned that the initial arrest of the person implicated the fourth amendment, requiring the state to justify the arrest with a showing of probable cause regardless of any additional incidents of detention or custody.[315] In the same year, following the reorganization of the court system in the District of Columbia, the District of Columbia Court of Appeals overturned the *Brown* decision in *M.A.P. v. Ryan*.[316] *M.A.P.* held that, because there was no constitutional right to a judicial probable cause determination, the prosecutor's decision to file a petition constituted an adequate preliminary screening of charges prior to the trial itself.[317]

The court in *M.A.P.* is clearly correct in its conclusion that the Supreme Court has not found a constitutional right to a probable cause statement in a petition for a nondetained youth. There remains, however, the more basic policy question of whether judicial review of a probable cause statement should be required as a matter of court rule. The Juvenile Justice Standards recommend that every juvenile, whether detained or released pending trial, should receive a prompt judicial determination of probable cause.[318] The Standards propose that the

313. 442 F.2d 838 (D.C. Cir. 1971).

314. *Id.* at 839.

315. *Id.* at 841-42. The court of appeals held that "the right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody. Appellant accordingly has the right to have the validity of the seizure determined since he will be called to trial for conduct which led to the seizure." *Id.* at 842. The court also observed the detrimental consequences of the juvenile's status even if released:

> A juvenile in appellant's situation, released to his mother pending trial, will nevertheless suffer disadvantages from his newly acquired status. There is undoubtedly a certain stigma attached to being accused of a crime. Both school authorities and potential employers will probably have him under close surveillance. Furthermore, neither the United States Army nor the Job Corps ordinarily will accept him while the charge is pending against him.

Id. at 842 n.7. The Supreme Court in Gerstein v. Pugh, 420 U.S. 103 (1974), noted that the burdens imposed on released defendants might entitle them to a judicial determination of probable cause, although it emphasized the importance of a loss of liberty to this requirement. *Id.* at 114.

316. 285 A.2d 310 (D.C. 1971).

317. *Id.* at 313-15. The court simply concluded that since "there is no constitutional right to a probable cause hearing," the contrary holding in *Brown* "was erroneously decided and should not be followed." *Id.* at 313.

318. *See, e.g.*, JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RE-

legal sufficiency of a complaint or petition should be determined in the first instance by an intake officer, whose judgment is then reviewed by the prosecutor with the ultimate authority to determine whether to file a petition.[319] If the prosecutor decides to file a petition, the Standards call for a judicial determination of probable cause at the child's first appearance in court.[320] One commentator, summarizing the probable cause requirements of the Juvenile Justice Standards, concludes that

> These requirements assure that only those cases with prosecutive merit reach the formal adjudicative stage of the proceedings. If an intake officer were allowed to make the final determination to file a petition, such a determination might be nothing more than a therapeutic decision that the child is in need of services, without regard to whether the child committed the alleged act. A prosecutor is more likely to be concerned with the legal sufficiency of the evidence to establish probable cause; therefore the prosecutor is authorized to make the final determination of whether or not to file a petition.
>
> . . . [T]he Standards clearly provide for a final determination of probable cause by the court.[321]

The Standards conclude that the type of administrative screening provided by intake officers or prosecutors is simply inadequate to determine the merit of charges.[322]

Ironically, because Minnesota's new juveniles rules have *statewide* applicability, the state supreme court's decision not to require a factually detailed probable cause statement in the petition represents a retrenchment from the safeguards afforded nonurban juveniles under the prior juvenile court rules. Under the previous rules of procedure applicable in the nonurban counties of the state, a delinquency petition was re-

---

LATING TO ADJUDICATION, Standard 1.1(B); *id.*, STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION, Standard 2.7; *id.*, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 4.1(A); *id.*, STANDARDS RELATING TO PROSECUTION, Standard 4.2, 4.6; *see also* Davis, *supra* note 272, at 727 (summarizing the requirements of the various volumes of the Juvenile Justice Standards regarding the legal sufficiency of a petition).

319. *See* JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION, Standard 2.16.

320. *See id.*, STANDARDS RELATING TO ADJUDICATION, Standard 1.1(B); *id.*, STANDARDS RELATING TO PROSECUTION, Standard 4.6.

321. Davis, *supra* note 272, at 728. In addition to requiring probable cause determinations in connection with the sufficiency of a petition, the Standards also require an initial determination of probable cause in connection with a decision to detain a youth, JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO INTERIM STATUS, Standard 7.6(F); *id.*, STANDARDS RELATING TO PRE-TRIAL COURT PROCEEDINGS, Standard 4.1(B), or to transfer a juvenile for prosecution as an adult, *id.*, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, Standard 2.2(A)(1).

322. *Id.*, STANDARDS RELATING TO PRE-TRIAL COURT PROCEEDINGS, Standard 4.1(A) commentary at 86-87.

quired to include "a clear and particularized statement of the facts on which the petitioner relies for the assertion that the child has violated the law or ordinance."[323] The new Rules used the approach of the urban counties because the urban prosecutors asserted that it was administratively burdensome for them to conform with a practice that was routine in eighty-four of the eighty-seven counties in the state.[324]

However administratively inconvenient thorough prepetition screening may be to the state, the juvenile faces a more onerous imposition. Without such screening, a juvenile must participate in the entire juvenile justice process, all the way through to a trial, without the state ever being required to justify in writing and submit to judicial scrutiny the underlying factual bases for that imposition. As the Minnesota Supreme Court has itself noted with respect to the analogous context of the sufficiency of an *adult* criminal complaint,

> We are and should be concerned if innocent persons can be forced to undergo expensive and demeaning trials only to be found not guilty, or if trial on the merits can be delayed or aborted by excessive formalism. . . . [I]n striking the balance, care should be exercised to avoid overemphasis on judicial efficiency or convenience.[325]

Apparently the court does not consider such an emphasis on efficiency and administrative convenience offensive in juvenile proceedings, even though many petitions containing conclusory allegations are currently dismissed prior to or following trial when prosecutorial investigation finally reveals that the facts alleged do not correspond to the actual event.[326] A rule that re-

323. Minn. Juv. Ct. R. 3-2(1)(a)(iii) (1982). In contrast, the Hennepin County Juvenile Court Rules, which also were superseded by the new rules, allowed petition statements to be based merely on information and belief. Hennepin R. Juv. Ct. 3.1 (1982).

324. *See* Letter from Thomas L. Johnson, Hennepin County Attorney, to Barry Feld (Nov. 8, 1984); Letter from Allen Oleisky, Hennepin County Juvenile Court Judge and Member of Rules Drafting Task Force, to Barry Feld (Nov. 16, 1984) [hereinafter cited as Oleisky letter]; Letter from John O. Sonsteng, Reporter of Rules Drafting Task Force, to Barry Feld (Nov. 6, 1984) [hereinafter cited as Sonsteng letter] (copies of above correspondence on file with the author).

325. State v. Florence, 306 Minn. 442, 458, 239 N.W.2d 892, 902-03 (1976).

326. Accurate statistics on dismissal rates prior to or following trial and the reasons for dismissal are unavailable. Moreover, the national statistics available on rates of dismissal do not distinguish among jurisdictions with different types of pretrial screening processes or petition procedures. On a national basis, however, it appears that over 40% of those cases referred by intake officers to prosecutors are dismissed, primarily due to lack of sufficient evidence. *See* T. BLACK & C. SMITH, REPORTS OF THE NATIONAL JUVENILE JUSTICE ASSESSMENT CENTERS: A PRELIMINARY NATIONAL ASSESSMENT OF THE NUMBERS AND CHARACTERISTICS OF JUVENILES PROCESSED IN THE JUVENILE JUSTICE SYSTEM 53 (1981). As this report notes,

quires the county attorney to draft a full probable cause statement for every petition filed would insure more conscientious preliminary screening of cases. Many insubstantial cases would never be filed and scarce prosecutorial resources would be reserved for meritorious and contested cases.

Another important problem created by Minnesota's failure to require probable cause statements in all delinquency petitions is that discovery provisions[327] allow a court to force nondetained juveniles to participate in pretrial evidence-gathering procedures such as lineups, fingerprinting, photographing, and various physical or medical inspections.[328] If this evidence were obtained from a person in custody, the fourth amendment would require probable cause for arrest or search in order for the evidence to be admissible at trial.[329] Although the acquisition of evidence from people who are not in custody must still be reasonable,[330] there is no juvenile court mecha-

---

> the largest number of offenders referred to juvenile court are dismissed. Some are dismissed summarily . . . while others are dismissed due to insufficient evidence to sustain the allegation that a crime had been committed or to indicate that the child's situation warranted system intervention . . . . Together, these two dismissal categories account for 46.2 percent of all disposition decisions.

Id. at 68-70. Thus, it appears that a large number of juvenile cases penetrate deeply into the juvenile justice process without effective screening. There is no reason to believe that the juvenile process in Minnesota differs in any significant way from the national experience in this regard.

327. MINN. R.P. JUV. CT. 24. The broad discovery provisions afforded under Rule 24 reflect the expansion of criminal discovery practices in the past decade. *See, e.g.,* United States v. Nobles, 422 U.S. 225, 230-32 (1975) (prosecution as well as defense can invoke inherent power of federal judiciary to require production of previously recorded witness statements that facilitate discovery); Wardius v. Oregon, 412 U.S. 470, 473-79 (1973) (Oregon rule requiring disclosure of defendant's alibi witnesses invalid because not reciprocal); Williams v. Florida, 399 U.S. 78, 80-86 (1970) (Florida notice-of-alibi rule upheld); FED. R. CRIM. P. 16 (discovery and inspection); MINN. R. CRIM. P. 9 (discovery in felony and gross misdemeanor cases).

328. MINN. R.P. JUV. CT. 24.02(2)(A). The rule requires the county attorney to advise the child's counsel of the time and place that the identification procedure will be conducted. MINN. R.P. JUV. CT. 24.02(2)(B).

329. *See, e.g.,* United States v. Crews, 445 U.S. 463, 472 (1980) (use of photographic and lineup identification unconstitutional because arrest made without probable cause); Davis v. Mississippi, 394 U.S. 721, 724 (1969) (fingerprint evidence obtained without probable cause inadmissible); Schmerber v. California, 384 U.S. 757, 766-70 (1966) (outlining constitutional requirements for blood tests of persons accused of driving under the influence of alcohol).

330. *See, e.g.,* Davis v. Mississippi, 394 U.S. 721, 728 (1969) (suggesting that fingerprint evidence obtained without probable cause might be admissible if there were "narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest"); Terry v. Ohio, 392 U.S. 1, 20-27 (1968) ("stop and frisk" allowable with lower standard of probable cause than that required for arrest); Camara v. Municipal Court, 387 U.S. 523, 534 (1967) (health

nism that compels a judicial probable cause determination prior to subjecting nondetained youths to the various identification procedures. Perhaps Rule 19, which gives juveniles the right to request a petition stating probable cause by filing a motion that "states sufficient reasons that a probable cause showing is necessary,"[331] can be read to require a probable cause statement as a prerequisite to discovery from the child, but the requirement remains discretionary with the court.

A rule requiring a probable cause statement in every petition would have readily solved such problems and placed juveniles on a more equal footing with adult criminal defendants. The current rule permitting conclusory allegations allows unscreened or cursorily reviewed cases to penetrate much further into the process. This, coupled with the reality that a substantial majority of juveniles waive their rights to the assistance of counsel[332] and plead guilty, greatly increases the likelihood of juvenile courts obtaining jurisdiction over youths when a factual basis for such intervention may be lacking.

VI. EVIDENTIARY HEARINGS

The United States Supreme Court established the constitutional procedures for determining the admissibility of a confession at trial in *Jackson v. Denno*.[333] *Jackson* rejected the New York practice of admitting a confession into evidence without any preliminary judicial determination of its voluntariness. The Court reasoned that the procedure, which allowed the jury to decide whether the confession was voluntary and instructed it to disregard an involuntary confession in deciding guilt or innocence, was fraught with too many dangers.[334] It declared the procedure unconstitutional because the procedure failed to provide a reliable determination of the voluntariness of the

inspection allowable without meeting traditional probable cause requirements for a search of private property). In contrast, the Supreme Court in United States v. Dionisio, 410 U.S. 1 (1973), held that a suspect may be compelled to give a voice examplar to a grand jury without a preliminary probable cause determination. The Court asserted that "a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *Id.* at 9. The Court distinguished *Davis* on the grounds that in *Davis* "it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints." *Id.* at 11. Critical to the *Dionisio* decision was the investigative function of the grand jury. *See id.* at 17.

331. MINN. R.P. JUV. CT. 19.04(1)(c)(ii).

332. *See supra* notes 160-64 and accompanying text.

333. 378 U.S. 368 (1964).

334. *Id.* at 381-82.

confession and because there was no way of adequately determining from a general verdict of guilt whether the jury had properly disregarded a confession that it had found involuntary.[335] The Court feared that a jury could not adequately compartmentalize the issue of the voluntariness and admissibility of the confession from the issue of the defendant's guilt. As a result, other evidence of guilt might influence the jury's voluntariness determination, or a reliable but involuntary confession might be depended on to convict.[336] The Court concluded that state procedures must provide a

> reliable and clear-cut determination of the voluntariness of the confession. . . . Whether the trial judge, another judge or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. . . . [T]he states are free to allocate functions between judge and jury as they see fit.[337]

The Minnesota Supreme Court described the procedures necessary to meet the federal constitutional standards of *Jackson* in *State ex rel. Rasmussen v. Tahash*.[338] *Rasmussen* requires the prosecution to advise the court at the time of defendant's arraignment if evidence whose admissibility raises constitutional issues will be offered at trial.[339] The court then advises the defendant's counsel, who may contest the admissibility of the evidence on federal constitutional grounds in a pretrial hearing.[340] Three years later, however, the court limited the *Rasmussen* pretrial hearing requirement to jury trials in *City of St. Paul v. Page*[341] and exempted the juvenile court

---

335. The Court in *Jackson* noted that

> the New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other.

Id. at 379-80.

336. *Id.* at 383. As the Court pointed out,

> It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course that it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.

Id. at 389.

337. *Id.* at 391 & n.19.

338. 272 Minn. 539, 141 N.W.2d 3 (1966).

339. *Id.* at 553, 141 N.W.2d at 13.

340. *Id.* at 554, 141 N.W.2d at 13.

341. 285 Minn. 374, 376, 173 N.W.2d 460, 462 (1969).

from the requirement in *In re Welfare of Spencer*.[342] The *Spencer* court reasoned that, because the purpose of a separate pretrial hearing was to isolate the jury from preliminary constitutional evidentiary questions, juvenile court proceedings do not require such separate pretrial hearings because they do not involve juries.[343]

Minnesota codified this approach in Rule 26, which provides that an evidentiary hearing may be held to determine the admissibility at trial of evidence obtained from search and seizure, admissions, confessions, or identification procedures, as well as evidence of other crimes.[344] This evidentiary hearing "may be held by the court at any time before the trial" and "[a]ny issue not determined prior to trial shall be determined as part of the trial."[345] In most juvenile delinquency trials, however, administrative convenience leads to the litigation of suppression issues in the course of the trial itself rather than in a pretrial evidentiary hearing.[346] The practice under Rule 26 allows the same judge to determine the admissibility of evidence or the voluntariness of a confession and, in the same proceeding, the ultimate guilt or innocence of the juvenile defendant.[347] This is similar to the practice in adult misdemeanor prosecutions in bench trials[348] but differs from the practice in adult felony and gross misdemeanor prosecutions, in which the evidentiary issues must be determined prior to trial, bench trial or not.[349]

342. 288 Minn. 119, 179 N.W.2d 95 (1970).

343. *Id.* at 123, 179 N.W.2d at 97-98.

344. MINN. R.P. JUV. CT. 26.01. Rule 23 requires the county attorney to advise the child's counsel of any evidence that the state intends to introduce that may raise constitutional issues, as well as proof of other crimes. MINN. R.P. JUV. CT. 23. The notice requirements correspond to those of the state rules of criminal procedure. MINN. R. CRIM. P. 7; *see also* State v. Billstrom, 276 Minn. 174, 178-79, 149 N.W.2d 281, 284-85 (1967) (requiring notice of evidence of additional offenses); State *ex rel.* Rasmussen v. Tahash, 272 Minn. 539, 552-56, 141 N.W.2d 3, 12-15 (1965) (requiring notice of evidence obtained from defendant that may raise constitutional issues); State v. Spreigl, 272 Minn. 488, 496-97, 139 N.W.2d 167, 172-73 (1965) (requiring notice of evidence of repeated offenses).

345. MINN. R.P. JUV. CT. 26.01. If an adverse judicial determination is anticipated, the county attorney may obtain a pretrial evidentiary hearing in order to preserve a right to appeal the ruling without having double jeopardy attach. MINN. R.P. JUV. CT. 26.01(b).

346. *See* Letter from Thomas H. Frost, Assistant Hennepin County Attorney, Juvenile Division, to Barry Feld (Nov. 1, 1984); Oleisky letter, *supra* note 324; Sonsteng letter, *supra* note 324 (copies of above correspondence on file with the author).

347. *See* MINN. R.P. JUV. CT. 26.

348. MINN. R. CRIM. P. 12.04(3).

349. MINN. R. CRIM. P. 11.07 ("All issues presented at the Omnibus Hearing shall be determined before trial.").

The current practice in juvenile court thus permits the judge to decide both the admissibility of evidence and the ultimate guilt or innocence of the defendant in the same proceeding.[350] The rationale for allowing judges, but not juries, to decide both voluntariness/admissibility and guilt in the course of the same proceeding is that judges, unlike juries, are, by professional training, temperament, and experience, capable of compartmentalizing inadmissible evidence from admissible evidence in deciding a case.[351] That presumption also underlies a host of interrelated evidentiary doctrines.[352] For example, "ab-

350. Courts generally have held that adult criminal bench trials do not require separate pretrial hearings. *See, e.g.,* United States v. Martinez, 555 F.2d 1269, 1272 (5th Cir. 1977); United States *ex rel.* Placek v. Illinois, 546 F.2d 1298, 1304 (1976); United States v. Greathouse, 484 F.2d 805, 807 (7th Cir. 1973); City of St. Paul v. Page, 285 Minn. 374, 376, 173 N.W.2d 460, 462 (1969); Pinczkowski v. State, 51 Wis. 2d 249, 255, 186 N.W.2d 203, 205 (1971). *See generally* C. McCORMICK, EVIDENCE § 60 (E. Cleary ed. 1972) (discussing admissibility of evidence in adult bench trials).

The same rule also is followed in juvenile proceedings. *See, e.g., In re* Appeal of Maricopa County Juvenile Action No. J-84357, 118 Ariz. 284, 287, 576 P.2d 143, 146 (1978); *In re* Welfare of Spencer, 288 Minn. 119, 123, 179 N.W.2d 95, 97-98 (1970).

351. *See* United States *ex rel.* Placek v. Illinois, 546 F.2d 1298, 1305 (7th Cir. 1976); People v. Fultz, 32 Ill. App. 3d 317, 333, 336 N.E.2d 288, 302 (1975). The New York Court of Appeals has articulated this difference between judge and jury:

> While a jury may sometimes be confused by the legal intricacies of deciding two questions together, a Judge will not be so disoriented. . . . "Errors which loom large to a judge, learned in law and trained to administer justice in strict accordance with the law, may be scarcely visible to the lay juror." . . .
>
> In our own deliberations in this court, we are called upon to objectively consider questions of law and reverse convictions even though upon reading the entire record we are convinced of the defendant's guilt.

People v. Brown, 24 N.Y.2d 168, 172, 247 N.E.2d 153, 156, 299 N.Y.S.2d 190, 193 (1969) (quoting People v. Buchalter, 289 N.Y. 181, 224-25, 45 N.E.2d 225, 247 (1942)).

Although *Brown* was a criminal case, courts in civil cases also have presumed that the judge will disregard all incompetent evidence and base findings solely on admissible evidence. As the Eighth Circuit has observed, "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse . . . unless all of the competent evidence is insufficient to support the judgement . . . ." Builder's Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377, 379 (8th Cir. 1950). For a discussion of the impact of incompetent evidence, see Note, *Incompetent Evidence in Nonjury Trials: Ought We Presume That It Has No Effect?,* 29 IND. L.J. 446 (1954).

352. The Seventh Circuit, in United States *ex rel.* Placek v. Illinois, 546 F.2d 1298 (7th Cir. 1976), noted that

> much that comes to the attention of a judge in a bench trial would be inadmissible in a jury trial. In a bench trial, we presume that evidence admitted for a limited purpose is considered in its proper perspective by the trial judge. Moreover, when evidence has been initially received

sent a clear showing of substantial prejudice, a bench trial judge is presumed to have considered only relevant and admissible evidence in reaching his findings."[353] Appellate courts thus regularly presume that inadmissible evidence that would clearly prejudice a jury does not improperly influence a trial judge exposed to the same evidence, even when the judge erroneously admitted it originally.[354]

There are also practical and administrative considerations that lead courts to treat the impact of evidence differently when the evidence is presented to a judge instead of a jury. It may be administratively inconvenient to require one judge to determine preliminary issues of evidence admissibility and another to sit as the ultimate trier of fact at the adjudication.[355]

---

and later excluded as inadmissible in a bench trial, we assume that the trial judge was not improperly influenced thereby. Indeed, even when we have held that evidence was improperly admitted in a bench trial, we have refused to presume that the trial judge considered it in reaching his verdict. . . . [A] trained, experienced . . . judge, as distinguished from a jury, must be presumed to have exercised the proper discretion in distinguishing between the improper and the proper evidence introduced at trial, and to have based his decision only on the latter, in the absence of a clear showing to the contrary.

Id. at 1305.

353. *Id.* at 1304. For citations of additional authority on this point, see *id.* at 1304 n.3. The New York Court of Appeals has concluded that "there is a critical difference between a jury and nonjury trial and, therefore, . . . the rationale of *Jackson* is inapplicable in the latter situation." People v. Brown, 24 N.Y.2d 168, 173, 247 N.E.2d 153, 156, 299 N.Y.S.2d 190, 194 (1969).

354. Commentators have noted this tendency:

Presumptions of propriety govern, ascribing to the trial judge—so long as he sits without a jury—the wisdom to have disregarded the inadmissible and to have relied solely on the evidence which he later adjudged competent. At times the presumption may appear a bit tenuous, for the very judge who has been found to have erred in favor of admissibility is presumed to have gained new wisdom, if not a measure of sheer omniscience, by the end of the case when he is obliged to weigh and assess the evidence and is presumed to have disregarded that which he earlier erroneously admitted.

Levin & Cohen, *The Exclusionary Rules in Nonjury Criminal Cases,* 119 U. PA. L. REV. 905, 907 (1971). For opinions expressing similar views, see Commonwealth v. Green, 464 Pa. 557, 569, 347 A.2d 682, 688 (1975) (Manderino, J., dissenting); Commonwealth v. Patterson, 432 Pa. 76, 86, 247 A.2d 218, 223 (1968) (O'Brien, J., dissenting); Commonwealth v. Goodman, 221 Pa. Super. 73, 76, 289 A.2d 186, 188 (1972) (Spaulding, J., dissenting), *vacated,* 454 Pa. 358, 311 A.2d 652 (1973). *But cf.* Commonwealth v. Corbin, 447 Pa. 463, 468, 291 A.2d 307, 310 (1972) (finding that a trial judge's denial of defendant's motion to suppress was harmless because the confession was found to be voluntary).

355. In Commonwealth v. Green, 464 Pa. 557, 347 A.2d 682 (1975), the trial judge had found the defendant's confession to be involuntary and had stated that it was not considered in determining the defendant's guilt. *See id.* at 558, 347 A.2d at 683. In response to the defendant's contention on appeal that exposure to the prejudicial evidence was sufficient to nullify the judge's verdict, the Supreme Court of Pennsylvania responded that

Moreover, the suggestion that judges might be adversely influenced by evidence that they have heard but suppressed could jeopardize a number of other presumptions about the role of judges in bench trials.[356] Indeed, some courts regard questioning the ability of trial judges to disregard the prejudicial impact of inadmissible evidence as an attack on the very foundation of the judicial trial process.[357]

One need not attack the foundations of the entire judicial function in bench trials, however, to question whether, as a matter of policy, it might not be preferable to have a judge other than the one who actually tries the case make preliminary determinations of admissibility.[358] For example, the Pennsylvania federal district court has applied the *Jackson* rationale to bench trials by requiring that a judge determine the admissibility of evidence in a separate proceeding prior to trial.[359] It did so because it believed that the finder of fact,

---

> it is of the essence of the judicial function to hear or view proffered evidence . . . and to decide whether or not it should be admitted. . . . For us to accept appellant's contention would be, in effect, to find disqualification of a judge to be a judge; it would go against the time honored practice in our courts . . . , and would add immeasurably to the workload of the trial courts.

Id. at 561, 347 A.2d at 683-84.

356. A Florida appeals court has recognized this danger: "To reverse this trial on the basis that the trial judge, in his capacity as trier of fact, was so prejudicially influenced by his encounter with the incriminating portions of [co-defendants' confessions], would be to cast aspersions on the entire foundation of the judge's role in any court proceeding." Brown v. State, 223 So. 2d 337, 339 (Fla. Dist. Ct. App. 1969).

357. *See* People v. Fultz, 32 Ill. App. 3d 317, 333, 336 N.E.2d 288, 302 ("There is no valid analogy between the jury and the trial judge . . . . There can be no *assumption* that the trial judge cannot make a *reliable* determination of the voluntariness of the confession . . . and there can be no assumption of his inevitable prejudice in making that determination . . . ."); State v. Hutchinson, 260 Md. 227, 231, 271 A.2d 641, 643 (1970) (observing that "the issue before us goes to the very marrow of the role, function, and capacity of the judge in our legal system"); *see also* C. MCCORMICK, *supra* note 350, § 60, at 138 n.87 (suggesting that those who take the position that judges cannot purge inadmissible evidence from their minds do so "misguidedly").

358. *See* United States *ex rel.* Placek v. Illinois, 546 F.2d 1298, 1306 n.8 (7th Cir. 1976) ("Holding a pretrial hearing, or a separate hearing when the voluntariness issue is first raised at trial, seems preferable in order to minimize the possibility that such improper influence might arise."); Commonwealth v. Goodman, 454 Pa. 358, 360, 311 A.2d 652, 653 (1973) (quoting Commonwealth v. Paquette, 451 Pa. 250, 258, 301 A.2d 837, 841 (1973)) (preferred practice is "to have the trial conducted by someone other than the judge who presided over the Suppression Proceedings particularly where there is a waiver of [a] jury").

359. United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691, 695 (E.D. Pa. 1967), *aff'd*, 405 F.2d 1037 (3d Cir. 1969); *see also* United States *ex rel.* Owens v. Cavell, 254 F. Supp. 154, 155 (M.D. Pa. 1966) (questioning but not deciding whether a judge sitting as fact finder would be able to pass on the question of guilt or innocence without being influenced by the voluntariness issue); *cf.*

whether judge or jury, must be absolutely unprejudiced when it decides guilt and that simultaneously determining the voluntariness of a confession and guilt prejudices both decisions.[360] Although some other courts have recognized that "judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the specie,"[361] remarkably few courts have considered testing the dimensions of judicial frailty, and there are no empirical studies directly testing the ability of judges to compartmentalize as a result of their professional training and expertise. Several commentators have questioned this ability,[362] but in most jurisdictions the fiction of judicial blindside precludes further analysis of the issue.[363]

There are several analogous instances of judicial decision making that bear on the propriety of allowing the same judge to determine both suppression issues and a defendant's guilt or innocence. Many courts and commentators have concluded that when a judge knows about a defendant's prior criminal record, the judge may be unable to prevent such knowledge from influencing the judge's determination of the defendant's guilt.[364] The problem of judicial awareness of a defendant's

---

Hutcherson v. United States, 351 F.2d 748, 751-55 (D.C. Cir. 1965) (setting aside conviction because *jury* not properly instructed on its responsibility regarding a confession admitted against a claim of involuntariness). For other cases discussing the admissibility of evidence in nonjury proceedings, see *supra* note 354.

360. United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691, 695-96 (E.D. Pa. 1967), *aff'd*, 405 F.2d 1037 (3d Cir. 1969).

361. State v. Hutchinson, 260 Md. 227, 233, 271 A.2d 641, 644 (1970); *see also* Kovacs v. Szentes, 130 Conn. 229, 232, 33 A.2d 124, 125 (1943) ("A judge has not such control over his mental faculties that he can definitely determine whether or not inadmissible evidence he has heard will affect his mind in making his decision.").

362. For example, commentators have observed:

> Nature does not furnish a jurist's brain with thought-tight compartments to suit the convenience of legal theory, and convincing evidence once heard *does* leave its mark. . . .
>
> . . . If after an evidential objection and argument thereupon, he definitely admits the improper evidence, it requires an appellate Pollyanna with fingers crossed and tongue in cheek, to presume that the trial judge discovered and removed his error before judgment.

Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101, 1115-16 (1927); *see, e.g.*, Levin & Cohen, *supra* note 354; Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407 (1965) [hereinafter cited as Note, *Improper Evidence*]; Note, *supra* note 351.

363. *See, e.g.*, State v. Hutchinson, 260 Md. 227, 233, 271 A.2d 641, 644 (1970).

364. *See* Commonwealth v. Oglesby, 438 Pa. 91, 93-94, 263 A.2d 419, 420-21 (1970); Commonwealth v. Jones, 259 Pa. Super. 103, ___, 393 A.2d 737, 738-40 (1978); AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUS-

criminal past is akin to information obtained in suppression hearings,[365] because in both instances the judges have information that is both inadmissible and prejudicial to the defendant. Kalven and Zeisel's classic study of American juries[366] noted that when judges have facts that are kept from the jury, whether obtained from suppression hearings, withdrawn guilty pleas, or knowledge of the defendant's criminal record, the judges are more likely to convict than are juries because the judges use that additional (albeit inadmissible) evidence in making their decisions.[367] The availability of such evidence to

---

TICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE, Standard 1.7 (1972) (trial judges should excuse themselves whenever they doubt their ability to preside impartially in a criminal case or when their impartiality reasonably could be questioned); Levin & Cohen, *supra* note 354, at 911-17; Note, *Improper Evidence, supra* note 362, at 413-14; *see also* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. REV. 785, 792 (1970) (judges and magistrates who are functionally and psychologically allied with the police determine the fate of a suspect, who usually is a "bad type" and has a criminal record). Professor Wigmore described the problems posed when the judge knows about the defendant's prior criminal record:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charge, any or all of which may be mere fabrications.

1 J. WIGMORE, EVIDENCE § 194, at 646 (3d ed. 1940).

Compare Commonwealth v. Rivers, 218 Pa. Super. 184, 187, 279 A.2d 766, 768 (1971) (trial judge's knowledge of defendant's prior crimes and pending murder charge "was so prejudicial that the trier of facts, even though he was an able and experienced trial judge, could have come to no other conclusion than that the appellant had a predilection for crime") *with* People v. Robillard, 55 Cal. 2d 88, 99, 358 P.2d 295, 301, 10 Cal. Rptr. 167, 173 (1960) ("A trial judge is much less likely than a jury to be prejudiced by allegedly inflammatory or improper evidence, since his well-trained legal mind will reject such evidence if it is improper and view it in its proper light and for the limited purpose for which it was introduced."), *cert. denied,* 365 U.S. 886 (1961), *overruled on other grounds,* People v. Morse, 60 Cal. 2d 631, 648-49, 388 P.2d 33, 44, 36 Cal. Rptr. 201, 212 (1964).

365. *See* United States *ex rel.* DiGiangiemo v. Regan, 528 F.2d 1262, 1265-70 (2d Cir. 1975) (due process mandates that the granting of a motion to suppress evidence constitutes collateral estoppel barring introduction of that evidence in a subsequent criminal trial), *cert. denied,* 426 U.S. 950 (1976); *cf.* Simmons v. United States, 390 U.S. 377, 389-94 (1968) (defendant's testimony in support of a fourth amendment suppression motion may not thereafter be admitted against him at trial on the issue of guilt).

366. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

367. *Id.* at 105-17, 133. In the 962 sample cases in which the judge and jury disagreed on guilt, the existence of facts that only the judge knew was given as one of the reasons for disagreement seven percent of the time. *Id.* Table 26, at 111. The study concludes that "judges will decide cases differently because they are privy to additional, albeit inadmissible, evidence." *Id.* at 133.

trial judges thus constitutes a significant risk of prejudice to defendants.

A similar problem occurs when a judge trying a criminal case is aware that the defendant pled guilty and later withdrew the plea or that the court rejected a guilty plea.[368] The danger is that the judge "will *in fact* have negated in his mind the presumption of innocence with which each criminal trial is supposed to begin."[369] Indeed, some courts have recognized that withdrawn guilty pleas may so prejudice the tribunal that a fair bench trial thereafter is impossible.[370] Most courts, however, have left it to the trial judge's discretion to withdraw from a case in which the judge has previously participated in plea negotiations or received a plea that was later rejected or withdrawn.[371]

368. *See* Commonwealth v. Conti, 236 Pa. Super. 488, 495-503, 345 A.2d 238, 241-46 (1975) (new trial required when judge learned through testimony that defendant had pleaded guilty at preliminary hearing since evidence of guilt not otherwise overwhelming and prior plea highly prejudicial).

369. Note, *Judicial Plea Bargaining,* 19 STAN. L. REV. 1082, 1089-90 (1967); *see also* Alschuler, *The Trial Judge's Role in Plea Bargaining,* 76 COLUM. L. REV. 1059, 1108-16 (1976) (discussing danger that bargaining judge could not conduct a fair trial after breakdown of plea negotiations); Gallagher, *Judicial Participation in Plea Bargaining: A Search for Standards,* 9 HARV. C.R.-C.L. L. REV. 29, 44 (1974) (noting that a trial judge's impartiality, or at least "the judge's image as an impartial arbiter of justice," may be jeopardized by involvement in pretrial negotiations).

370. *See, e.g.,* Brown v. Peyton, 435 F.2d 1352, 1359 (4th Cir. 1970) (Winter, J., dissenting) (pointing out that "if a plea bargain is rejected, it should be a simple matter for the judge to disqualify himself and send the parties to another judge for consideration of their revised agreement"), *cert. denied,* 406 U.S. 931 (1972); State v. Joyner, 228 La. 927, 930-31, 84 So. 2d 462, 463-64 (1955) (withdrawn guilty plea inadmissible and prejudicial); State v. Reardon, 245 Minn. 509, 511-12, 73 N.W.2d 192, 193-94 (1955) (same); People v. Selikoff, 35 N.Y.2d 227, 239, 318 N.E.2d 784, 792, 360 N.Y.S.2d 623, 634 (1974) (defendant who had withdrawn guilty plea had a right to request that another judge preside over the trial), *cert. denied,* 419 U.S. 1122 (1975); Commonwealth v. Rothman, 222 Pa. Super. 385, 386-87, 294 A.2d 783, 784 (1972) (judicial participation in plea bargaining allowed when judge advised defendant that another judge would try the case if plea withdrawn); *cf.* Scott v. United States, 419 F.2d 264, 269-74 (D.C. Cir. 1969) (trial judge should neither participate in plea bargaining nor create incentives for guilty pleas by using a policy of differential sentencing).

371. *See, e.g.,* People v. Irwin, 47 Mich. App. 608, 609-10, 209 N.W.2d 718, 719 (1973). The Minnesota Supreme Court has stated:

> We do not conceive that the rule . . . should have unvarying application in cases where defendant waives a jury and his guilt or innocence is passed upon by the court. It would not be unusual for a court to be aware of proceedings had in another courtroom in connection with the same prosecution, and it could not be fairly said that in every case the court's knowledge of the prior plea of guilty, either withdrawn or vacated, would prevent him from fairly passing upon the issue of guilt or innocence.

State v. Hayes, 285 Minn. 199, 201, 172 N.W.2d 324, 326 (1969).

Similarly, the Eighth Circuit has observed: "After rejecting a plea [be-

Another analogue to the problem of a judge simultaneously deciding issues of admissibility and guilt arises when a trial court erroneously considers a codefendant's confessions. As with other types of "prejudicial knowledge," the Supreme Court forbids *juries* to possess such information and still decide guilt but allows *judges* to have that knowledge and make the same decision. For example, in *Bruton v. United States*,[372] a codefendant's confession implicating defendant Bruton was admitted into evidence, but the trial judge instructed the jury to consider it only against its maker and to disregard its incriminating character in determining Bruton's guilt.[373] The Supreme Court held that Bruton was entitled to a new trial "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt."[374] The Court

---

cause the presentence report did not support the bargained-for plea], a judge may excuse himself from further involvement in the case and should give serious consideration to doing so. . . . But ultimately, absent a showing of actual prejudice, the choice lies within the discretion of the trial judge." United States v. Gallington, 488 F.2d 637, 639-40 (8th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974). The *Gallington* court recognized the dangers inherent in allowing the same judge to decide the case on the merits after exposure to evidence probative of guilt, *id.* at 639, but it followed the majority practice and allowed the same judge to try the case, *id.* at 640; *see* United States v. Clark, 605 F.2d 939, 942 (1979) (not improper for judge who had read the presentence report after defendant's initial guilty plea to preside over defendant's jury trial). As one commentator summarized the issue,

> Whatever the professionalism and objectivity of most judges, a particular judge may view a defendant's participation in plea discussions as an indication of guilt; he may resent a defendant's refusal of an offer that the judge considered generous; and he may be exposed to evidence and allegations during a bargaining session that make it difficult for him to remain impartial. Moreover, defendants and other observers of the criminal courts may have less confidence in a judge's "trained and disciplined judicial intellect" than the judge does himself. To dissipate the doubt about a judge's objectivity that would inevitably arise from his participation in pretrial bargaining, it seems desirable to assign a case to another judge for trial whenever a defendant rejects a judicial offer and enters a plea of not guilty.

Alschuler, *supra* note 369, at 1111.

372. 391 U.S. 123 (1968).

373. *Id.* at 125 n.2.

374. *Id.* at 126. The Court, applying its reasoning in Jackson v. Denno, 378 U.S. 368 (1964), regarding the inability of juries to compartmentalize evidence, stated:

> "The fact of the matter is that too often such admonition [to the jury] against misuse of the confessor's inculpation of the nonconfessor is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." 352 U.S., at 247. . . . "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Id.*, at 248. To the same effect, and also quoted in the *Jackson*

noted that Bruton had been denied the right to confront and cross-examine his codefendant, who did not testify regarding his own confession.[375] Similar concern about a *judge's* ability to compartmentalize such knowledge, however, is generally lacking for either adult defendants in bench trials or juvenile defendants in juvenile proceedings.[376]

Whenever a judge knows information that is not admissible at trial but is prejudicial to a defendant, the impartiality of the

---

note, . . . : "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Bruton, 391 U.S. at 129 (quoting Delli Paoli v. United States, 352 U.S. 232, 247, 248 (1957) (Frankfurter, J., dissenting); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)). The Court also noted that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. The Court recognized the inadequacy of cautionary instructions: " 'A jury cannot "segregate evidence into separate intellectual boxes." . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.' " *Id.* at 131 (quoting People v. Aranda, 63 Cal. 2d 518, 529, 407 P.2d 265, 272, 47 Cal. Rptr. 353, 360 (1965)).

375. *Id.* at 126.

376. Some state courts have applied the *Bruton* reasoning to juvenile proceedings held before a judge. The California Court of Appeals, for example, ruled that "out-of-court statements made by one juvenile implicating another cannot be admitted in a joint jurisdictional hearing unless the references implicating the nondeclarant have been effectively deleted; if the inculpatory references cannot be effectively deleted, the hearing must be severed if the statement is to be admitted against the declarant." *In re* D.L., 46 Cal. App. 3d 65, 70-71, 120 Cal. Rptr. 276, 279 (1975).

The Maryland Court of Special Appeals also applied *Bruton* in a juvenile court bench trial in which the trial judge not only erroneously admitted the codefendant's confession against the defendant, but also demonstrated on the record his failure to "compartmentalize" the evidence in his findings of guilt. *See In re* Appeal No. 977 from Circuit Court of Baltimore City, 22 Md. App. 511, 515-18, 323 A.2d 663, 666-68 (1974). Although adhering to the general rule that *Bruton* violations are inapposite in a nonjury trial because of the presumption of judicial compartmentalization, the court stated, "The presumption is rebutted, however (or, more properly, it does not even arise), where the judge's instructions to himself are discernibly erroneous." *Id.* at 518, 323 A.2d at 667.

In Mackey v. State, 234 So. 2d 418 (Fla. Dist. Ct. App. 1970), the Florida District Court of Appeals ruled that *Bruton* applied to adult criminal bench trials since "there is a reasonable probability that the trial judge could not evaluate the evidence, as it bore on the guilt or innocence of [one defendant], after hearing the [codefendant's] statement, without to some material extent being influenced thereby." *Id.* at 420. The following year, however, the court reversed its decision in *Mackey* to apply *Bruton* to bench trials. Brown v. State, 252 So. 2d 842, 844 (Fla. Dist. Ct. App. 1971). The confrontation problem in *Bruton*, incidentally, is similar to the voluntariness problem in *Jackson* in that both indicate the danger inherent in exposing the fact finder to certain additional, prejudicial information.

tribunal is open to question.[377] The presumption that judges can successfully compartmentalize admissibility and guilt is a frail reed on which to build an adjudicative apparatus. The presumption against evidentiary "seepage" is particularly troublesome in juvenile court proceedings because the same judge typically handles the same case at different stages.[378] For example, at a detention hearing, a judge may be exposed to a youth's "social history" file and the youth's prior record of police contacts and delinquency adjudications, all of which bear on the issue of the appropriate pretrial placement of the youth.[379] When that same judge is subsequently called on to determine the admissibility of evidence in a suppression hearing and the guilt of the juvenile in the same proceeding, the risks of prejudice become almost insuperable. To whatever degree a judge is unable to compartmentalize, a juvenile is denied the basic right to a fair trial by an impartial tribunal with a determination of guilt based on admissible evidence.[380] The risk

377. *See* authorities cited *supra* note 362.

378. As pointed out in the Juvenile Justice Standards, a juvenile court judge is more likely than his or her counterpart in the criminal justice process to have had contact with a case prior to an adjudication hearing, in a detention hearing or perhaps even a hearing to consider transfer for prosecution in criminal court, in which background information that would be unfairly prejudicial to the respondent at adjudication was properly presented.

JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO ADJUDICATION, Standard 4.1 commentary at 54.

379. A number of courts have condemned juvenile court examination of social reports prior to an adjudication of delinquency. *See, e.g., In re* H., 41 A.D.2d 667, 667, 341 N.Y.S.2d 92, 93 (1973) (directing that "the probation service should not communicate reports to the court concerning the alleged delinquent until the fact-finding hearing is completed"); *cf. In re* R., 1 Cal. 3d 855, 859-62, 464 P.2d 127, 130-32, 83 Cal. Rptr. 671, 674-76 (1970) (reversible error for court to review social study report before jurisdictional hearing); *In re* Lee, 126 Vt. 156, 158, 224 A.2d 917, 919 (1966) (court should not consider the social welfare worker's report in making commitment order).

380. The right to a fair trial before an impartial tribunal is a fundamental due process requirement. *See, e.g.,* Estes v. Texas, 381 U.S. 532, 543 (1965). The Supreme Court in *In re* Murchison, 349 U.S. 133 (1955), explained the importance of an impartial tribunal:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . But to perform its high function in the best way "justice must satisfy the appearance of justice."

Id. at 136 (quoting Offutt v. United States, 398 U.S. 11, 14 (1954)). Moreover, the fact finder must make a determination based only on the evidence in the record in order to ensure effective appellate review. *See, e.g.,* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (noting that "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence").

of prejudice is even more significant in juvenile court proceedings than in adult bench trials because adult defendants can at least avoid the risk by choosing a jury trial.[381] Since juveniles have no right to a jury trial, their risks of prejudice are aggravated by their inability to avoid those risks.

States can avoid this risk for juveniles either by providing for jury trials or by requiring that admissibility determinations be made prior to trial, as is already done in some jurisdictions.[382] In addition to carrying out the policy of "minimiz[ing] the possibility that . . . improper influence might arise,"[383] pretrial suppression hearings provide other advantages. Conducting suppression hearings prior to the trial also protects the state's right to an interlocutory appeal. Once jeopardy has attached, a ruling that evidence is inadmissible may preclude either appellate review[384] or retrial of the defendant.[385] In addition, a pretrial suppression hearing assures that a juvenile

381. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (trial by jury is a fundamental right available to all who, had they been tried in federal court, would have come within sixth amendment jury trial guarantee). *Compare* RLR v. State, 487 P.2d 27, 33 (Alaska 1971) (juvenile jury trial required) *with* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (juvenile jury trial not required) *and In re* McCloud, 110 R.I. 431, 436, 293 A.2d 512, 516 (1972) (same). For a discussion of the jury trial issue in juvenile proceedings, see *infra* notes 389-496 and accompanying text.

382. *See, e.g.,* FLA. R. JUV. P. 8.130(b)(3)(iii); OHIO R. JUV. P. 22(D)(3).

383. United States *ex rel.* Placek v. Illinois, 546 F.2d 1298, 1306 n.8 (7th Cir. 1976). Pennsylvania supports pretrial suppression hearings, preferably before a judge other than the trial judge. *See, e.g.,* United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691, 696 (E.D. Pa. 1967) (voluntariness of confession must be determined prior to admission of evidence by judge other than the trier of fact), *aff'd,* 405 F.2d 1037 (3d Cir. 1969). As the Pennsylvania Supreme Court has indicated, "The better practice in a multi-judge county would be to have the trial conducted by someone other than the judge who presided over the Suppression Proceedings particulary where there is a waiver of jury accepted." Commonwealth v. Paquette, 451 Pa. 250, 258, 301 A.2d 837, 841 (1973). Commentators have reached the same conclusion:

> The importance of the underlying policies together with the risks of prejudice are, in our view, sufficient reason for imposing some measure of added administrative burdens, even to the point of requiring, where feasible, that one judge rule on admissibility of confession at preliminary hearings and a different judge sit to determine guilt or innocence.

Levin & Cohen, *supra* note 354, at 910.

384. The Minnesota juvenile rules allow the county attorney to request a pretrial evidentiary hearing in order to preserve the right to appeal. MINN. R.P. JUV. CT. 26.01(b). If the prosecutor does not anticipate the court's ruling, however, this right may be lost or proceedings substantially delayed pending review.

385. *See* Breed v. Jones, 421 U.S. 519, 528-33 (1975) (because juvenile put in jeopardy when trier of fact in juvenile proceeding hears evidence on whether juvenile had violated criminal law, subsequent criminal prosecution violates double jeopardy clause).

defendant who wants to testify only on issues concerning the voluntariness of the confession or the admissibility of other evidence will be able to do so without prejudice.[386] Finally, conducting the suppression hearing prior to the trial or before a different judge can minimize the possible confusion of the fact finder by separating the defendant's testimony on the preliminary questions of admissibility from any subsequent testimony on the ultimate questions of guilt or innocence.[387]

Minnesota's endorsement of a contemporaneous suppression hearing and trial on the merits is one that places juveniles at a substantial procedural disadvantage compared with adult criminal defendants. The belief that juvenile court judges can successfully compartmentalize prejudicial and inadmissible evidence when deciding questions of guilt or innocence requires a leap of faith. All of the deficiencies of the "totality of the circumstances" as a criterion for determining issues of constitu-

386. Although the Supreme Court in Simmons v. United States, 390 U.S. 377, 389-94 (1968), gave defendants the right to testify at a suppression hearing without that testimony being admissible in their subsequent trial, when the suppression proceeding occurs in the midst of the trial, preservation of the *Simmons* right becomes more difficult. A Michigan appeals court has recognized that

> a defendant who testifies at the trial in chief concerning the voluntariness of his confession does so at the peril of waiving constitutional safeguards. This result is avoided only when he enjoys the special protection expressly afforded at a [pretrial suppression] hearing, i.e., the right to testify for a limited purpose without waiving any rights.

People v. Garza, 13 Mich. App. 189, 192, 163 N.W.2d 813, 814 (1968). A Florida appeals court also has noted this problem: "Holding a separate hearing, even if just prior to trial has several advantages. . . . [A] separate hearing will assure that when the defendant wishes to testify only concerning voluntariness of his confession, there will be less confusion over whether he is submitting his testimony on the merits or simply giving evidence on voluntariness . . . ." M.A. v. State, 384 So. 2d 740, 741-42 n.2 (Fla. Dist. Ct. App. 1980).

In State *ex rel.* Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1966), the Minnesota Supreme Court recognized the importance of allowing the defendant to testify at suppression hearings without waiving the privilege against self-incrimination:

> "At this hearing the defendant may take the stand and testify for the limited purpose of making a record of his version of the facts . . . . By so doing, the defendant does not waive his right to decline to take the stand in his own defense on the trial in chief."

Id. at 554 n.43, 141 N.W.2d at 14 n.43 (quoting State *ex rel.* Goodchild v. Burke, 27 Wis. 244, 265, 133 N.W.2d 753, 764 (1965)).

387. The Minnesota Supreme Court has recognized that a defendant may take the stand to contest the admissibility of an in-court identification "without waiving his right to silence as to matters beyond the scope of that isolated issue." *In re* Welfare of Spencer, 288 Minn. 119, 123, 179 N.W.2d 95, 98 (1970). Despite that possibility, however, the danger of a judge confusing testimony offered in one stage of the proceedings with that offered in another persists.

tional admissibility[388] are further aggravated when these factors are lumped together in one undifferentiated proceeding. To whatever degree the "theory" of compartmentalization is factually invalid—and the various analogies at least raise troubling questions—juveniles are exposed to a serious risk of prejudice. Moreover, the risks that juveniles incur are substantially greater than those incurred by their adult counterparts, both because the same juvenile court judge will likely have had far more contact with the juvenile's case as it wends its way through the process and because the juvenile has no right to a jury trial that would alleviate those risks. The practice approved in Minnesota's Rule 26 unnecessarily raises a host of procedural problems that could readily have been avoided simply by requiring suppression hearings to be conducted prior to trial and with a different judge or by providing for a jury trial.

VII. TRIALS

As noted earlier,[389] the Supreme Court held in *McKeiver* that juveniles do not have the right to a jury trial because the only requirement for "fundamental fairness" in juvenile proceedings is "accurate factfinding," a requirement as well satisfied by a judge as by a jury.[390] Because of Minnesota's legislative and judicial reluctance to go beyond the minimum constitutional requirement established by *McKeiver*, Minnesota's Rule 27, which governs the rights of a juvenile in a delinquency trial and the procedures to be followed there, gives no right to a jury trial.[391]

Rule 27 provides that juvenile courts shall admit "only such evidence as would be admissible in a criminal trial"[392] and implements the *Winship* holding[393] by requiring that allegations

388. *See supra* notes 109-12 and accompanying text.

389. *See supra* notes 57-71 and accompanying text.

390. 403 U.S. 528, 543 (1971). In emphasizing only factual accuracy, however, the Court departed from its prior analysis that also looked to protection against governmental oppression. *See supra* note 47 and accompanying text.

391. MINN. R.P. JUV. CT. 27; *see also* MINN. STAT. § 260.155 (1982) (providing that "hearings on any matter shall be without a jury and may be conducted in an informal manner").

392. MINN. R.P. JUV. CT. 27.04; *accord* JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO ADJUDICATION, Standard 4.2 (applying evidentiary rules used in criminal trials to contested delinquency adjudication proceedings). The same evidentiary limitations also apply to the suppression hearing, which typically is conducted during the adjudicatory hearing. *See* MINN. R.P. JUV. CT. 26.02.

393. *See supra* notes 49-53 and accompanying text.

of delinquency "must be proved beyond a reasonable doubt."[394] These procedural requirements, which are so similar to those in adult criminal trials, starkly symbolize the juvenile justice system's evolution from an inquiry focusing on the "real needs" and "best interests" of the child into one initially emphasizing the proof of the commission of a specific crime subject to many of the strictures of adult criminal procedure.[395]

Minnesota's uncritical reliance on *McKeiver* in denying juveniles jury trials is unfortunate because it ignores the possibilities that juvenile court judges may not satisfy the "accurate factfinding" standard as well as juries and that juveniles may need as much protection as adults against governmental oppression. As a result, Minnesota again provides juveniles with fewer safeguards than adults while subjecting them to increasingly criminalized proceedings and punitive dispositions.

A. ACCURATE FACT FINDING

The Supreme Court's assertion in *McKeiver* that accurate fact finding does not require juries in juvenile proceedings, like Minnesota's decision in Rule 27, follows neither logic nor the approach of the Court in *Winship*,[396] because it does not take into account the real differences in perception of fact between juries and judges. *Winship* required "proof beyond a reasonable doubt" to convict juveniles alleged delinquent as well as adults charged with criminal offenses.[397] The Court's rationale was that the seriousness of the proceedings and the potential consequences for a defendant, whether juvenile or adult, required the highest standard of proof in order to avoid convicting innocent people.[398] Minnesota necessarily adheres to the

394. MINN. R.P. JUV. CT. 27.05; *accord* JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO ADJUDICATION, Standard 4.3 (government should be required to prove its case beyond a reasonable doubt in contested juvenile trials).

395. As one empirical study of the operation of juvenile courts observed,

> The adjudicatory hearing or trial of a juvenile in Denver so closely resembles an adult criminal trial that, except for the age and size of the "defendant," the legal terminology used, and the numbers of jurors, most lay people and a subtantial number of attorneys would find the two types of proceedings impossible to differentiate.

Hufnagel & Davidson, *Children in Need: Observations of Practices of the Denver Juvenile Court*, 51 DEN. L.J. 337, 387-88 (1974).

396. *In re* Winship, 397 U.S. 358 (1970); *see supra* notes 49-53 and accompanying text.

397. *See Winship*, 397 U.S. at 368.

398. *Id.* at 363-64; *cf.* Addington v. Texas, 441 U.S. 418, 428-29 (1979) (Court's adoption of "clear and convincing" standard of proof in civil commitment proceedings not inconsistent with *Winship* because state power not being used pu-

constitutional standard of "proof beyond a reasonable doubt" in juvenile proceedings in Rule 27.[399] Having the same rigorous proof standard for both adults and juveniles assures the highest possible accuracy, public confidence in decisions, and a similarity of outcomes in juvenile and criminal proceedings.

Minnesota's refusal to require jury trials for juveniles, however, undermines that accuracy and creates the possibility of differing results. 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.[400] Substantive criminal guilt is not just "factual guilt" but a complex assessment of moral culpability.[401] 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.[402] These tendencies are attributable to various factors, including differences in jury-judge evaluations of evidence, jury sentiments about the "law" (jury equity), and jury sympathy for the defendant.[403] Kalven and Zeisel attribute the substantial differences between judge and jury verdicts to the jury's use of a higher evidentiary threshold standard of "proof beyond a reasonable doubt."[404] They conclude, "If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system."[405] Given the importance of juries in this regard, the Supreme Court's decision in *McKeiver* to dispense with juries in juvenile court can be seen as rendering conviction of a youth appearing before a judge in juvenile court somewhat easier than conviction on the basis of the same evidence before a jury of detached citizens in an adult proceeding.

---

nitively in commitment proceedings and mentally ill person not "better off" free than committed).

399. MINN. R.P. JUV. CT. 27.05.

400. *See, e.g.*, H. KALVEN & H. ZEISEL, *supra* note 366, at 58-59; Simon & Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319, 329 (1971). *Contra* Nagel, Lamm & Neff, *Decision Theory and Juror Decision-Making*, in THE TRIAL PROCESS 353, 375-76 (B. Sales ed. 1981).

401. *See* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 214 (1983).

402. *Id.* at 215; *see* Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51.

403. *See* H. KALVEN & H. ZEISEL, *supra* note 366, at 182, 185-90; Comment, *Juveniles and their Right to a Jury Trial*, 15 VILL. L. REV. 972, 992-95 (1970).

404. H. KALVEN & H. ZEISEL, *supra* note 366, at 182, 185-90.

405. *Id.* at 189-90.

The jury-judge "reasonable doubt" distinction is further amplified for juveniles because the youthfulness of the defendant is one characteristic that studies indicate elicits substantial jury sympathy,[406] again suggesting that obtaining convictions in juvenile court trials without a jury may be easier than in adult proceedings with one. Indeed, juvenile court judges may be more predisposed to find jurisdiction than criminal court judges or juries in order to "help" an errant youth. One study of juvenile justice in California compared, among other things, the attrition rates of similar types of cases in juvenile and adult courts and suggests that "it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases."[407]

When the differences between "judge reasonable doubt" and "jury reasonable doubt" and sympathy are coupled with the greater flexibility and informality of nonjury, closed proceedings in juvenile court, the disadvantages to juveniles are further compounded. Juvenile court judges are exposed to far more prejudicial information about a youth in detention proceedings and this influences the likelihood of both conviction and institutional confinement.[408] The absence of a jury also permits suppression hearings to be conducted during the trial, which allows the introduction of additional information with prejudicial consequences for a youth.[409] Finally, in the majority of cases, juveniles are adjudicated delinquent without the presence or assistance of an attorney, which further prejudices the accuracy of the fact-finding process.[410] Thus, it appears that *McKeiver*'s rejection of a jury trial requirement in juvenile cases and Minnesota Rule 27's silence on the issue is inconsistent with *Winship*'s and Minnesota Rule 27.05's affirmative requirement of proof "beyond a reasonable doubt" and with "fundamental fairness."

B. Preventing Government Oppression

The jury's special role in preventing government oppres-

406. *Id.* at 209-13. Although their research was confined to adult proceedings, Kalven and Zeisel concluded that in that context the youthfulness of a defendant was the personal characteristic that engendered the greatest sympathy from jurors. *Id.* at 210.

407. *See* W. Greenwood, A. Lipson, A. Abrahamse & F. Zimring, Youth Crime and Juvenile Justice in California 30-31 (1983) [hereinafter cited as Youth Crime in California].

408. *See supra* notes 204-06 and accompanying text.

409. *See supra* notes 344-88 and accompanying text.

410. *See supra* notes 160-63 and accompanying text.

sion also suggests that the rationale of *McKeiver* is untenable. The *McKeiver* Court uncritically accepted the assertion that juvenile courts are "rehabilitative" rather than punitive and made no further inquiry about the need for procedural protections against governmental oppression.[411] Justice White's concurrence in *McKeiver* emphasizes the perceived distinctions between juvenile and criminal proceedings. Whereas the criminal law punishes morally responsible actors for making blameworthy choices, the deterministic assumptions of the juvenile justice system regard juveniles as less culpable.[412] Justice White observed that the indeterminate length of juvenile dispositions and the "eschewing [of] blameworthiness and punishment for evil choices"[413] satisfied him that "there remained differences of substance between criminal and juvenile courts."[414] This stance assumes that juveniles receive only pos-

411. Rather, the Court noted that concern over the applicability of various procedural safeguards to jury trials ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *McKeiver*, 403 U.S. 528, 550 (1971). In contrast, the Court in Duncan v. Louisiana, 391 U.S. 145 (1968), held that fundamental fairness in *adult* criminal proceedings requires both factual accuracy and protection against governmental oppression:

> 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 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 preferrred 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 trial provisions in the Federal and State Constitutions 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, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 156.

In Baldwin v. New York, 399 U.S. 66 (1970), the Court held that no offense that is punishable by imprisonment of more than six months is petty. *Id.* at 73-74. *Baldwin* has important implications for juveniles because juvenile court dispositional authority may continue for *more* than six months, even beyond the age of majority, *see* MINN. STAT. § 260.181(4) (Supp. 1983) (jurisdictional authority of juvenile court may last until juvenile reaches age of 19), and thus no juvenile proceeding could be deemed "petty."

412. *McKeiver*, 403 U.S. at 551-52 (White, J., concurring).

413. *Id.* at 552 (White, J., concurring).

414. *Id.* at 553 (White, J., concurring). Justice Stewart's dissent in *In re* Gault articulated a similar distinction between 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

itive rehabilitative treatment that requires no further special safeguards against governmental intervention. Retributive criminal punishment, in contrast, requires additional procedural guarantees to prevent governmental oppression.[415]

It is highly questionable, however, whether the contemporary juvenile justice system, either in theory or practice, eschews punishment in favor of rehabilitation. Although the Supreme Court in *McKeiver* did not analyze the distinction between treatment in juvenile courts and punishment in criminal courts,[416] it has in other decisions examined the issue of what

---

the other is conviction and punishment for a criminal act." 387 U.S. 1, 79 (1967) (Stewart, J., dissenting).

415. The fundamental justification in juvenile jurisprudence for denying jury trials and, more basically, for maintaining a juvenile justice system separate from the adult one is based on the difference between punishment and treatment. Punishment, according to Professor Hart's conventionally accepted definition, is the imposition by the state, for the purpose of retribution or deterrence, of burdens on an individual who has violated legal prohibitions. H. HART, *Prolegomenon to the Principles of Punishment,* in PUNISHMENT AND RESPONSIBILITY 4-5 (1968); *see* G. FLETCHER, RETHINKING CRIMINAL LAW 408-20 (1978). Treatment, however, focuses on the mental health, status, or welfare of the individual rather than on the commission of prohibited acts. Hence, it gives rise to open-ended, indeterminate intervention rather than determinate sanctions proportional to the offense.

As one author points out, punishment and therapy often seem to be mutually exclusive goals because of the backward-looking nature of punishment, as opposed to the forward-looking emphasis of therapy. Punishment imposes unpleasant restraints on offenders because of their past offenses, but therapy seeks to alleviate undesirable conditions and thereby improve the patient's life. Gardner, *supra* note 69, at 793 n.18, 815-16. For more on the distinction between punishment and treatment, see F. ALLEN, *Legal Values and the Rehabilitative Ideal,* in BORDERLAND, *supra* note 14, at 25; H. PACKER, *supra* note 88, at 23-28, 54; *see also* Robinson v. California, 370 U.S. 660, 666-67 (1962) (although state may require attendance at compulsory drug treatment programs, it cannot punish people for being addicted to narcotics). Treatment also assumes that certain antecedent facts are responsible for the individual's undesirable condition and that steps can be taken to alter those conditions. *See, e.g.,* F. ALLEN, DECLINE, *supra* note 14, at 2-3; D. GIBBONS, CHANGING THE LAWBREAKER 130 (1965). The difficulty in distinguishing punishment from treatment in the juvenile justice system stems from both a lack of analytical clarity about the conceptual differences between the two justifications for intervention and a deliberate obfuscation of those differences in the redefining of punishment by the Progressives to include reform of the offender. *See supra* notes 17-22 and accompanying text.

416. The Court in *McKeiver* noted only that the ideal of the juvenile court system is "an intimate, informal protective proceeding." 403 U.S. 528, 545 (1970). The juvenile court has been described as a peculiar hybrid institution intermingling both punitive and therapeutic characteristics. *See* Gardner, *supra* note 69, at 793; Schulz & Cohen, *supra* note 42, at 20, 21; *see also* 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); Walkover, *The Infancy Defense in the New Juvenile Court,* 31 U.C.L.A. L. REV.

constitutes punishment.[417] For example, *Kennedy v. Mendoza-Martinez*[418] identified the factors that determine whether a particular state sanction is punitive:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a 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.[419]

The inquiry into the punishment/treatment distinction may be advanced by applying the *Mendoza-Martinez* criteria to a juvenile offender adjudicated delinquent for burglary, conduct that would be a felony if committed by an adult, who is incarcerated in a state training school. Institutional confinement is a restraint that has historically been regarded as punishment, furthers the traditional goals of punishment, and is invoked upon proof of mens rea and criminal behavior.[420] Despite these seemingly penal characteristics, however, incarceration is not punitive if it is done for the "alternative purpose" of treatment and if it is not excessive in relation to that therapeutic purpose.[421]

The sole question, then, in deciding whether *McKeiver* and

---

503 (1984) (urging a central role for the infancy defense in light of courts' recent switch from treatment to blameworthiness as a basis for sentencing).

417. *See generally* Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976) (comprehensive critique of the Court's handling of punishment in various substantive contexts).

418. 372 U.S. 144 (1963).

419. *Id.* at 168-69.

420. *See* Clark, *supra* note 417, at 401-03, 455-56; *see also* Gardner, *supra* note 69, at 809-15 (discussing, in the context of preventive detention, the requirement that confinement have a punitive purpose before being termed punishment); Shepherd, *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS U.L.J. 12, 35-40 (1977) (criticizing indeterminate sentencing scheme 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).

421. *See* Robinson v. California, 370 U.S. 660, 673 (1962) (involuntary confinement of narcotics addicts is valid, but imprisonment for the status of being an addict is cruel and unusual punishment); *see also* Bell v. Wolfish, 441 U.S. 520, 560-61 (1979) ("double-bunking" of pretrial detainees is not punishment because it is done to ensure their presence at trial and to facilitate effective management of detention facility). For a discussion of cases involving alternative nonpunitive purposes for challenged government actions, see *supra* note 176 and accompanying text.

Minnesota's Rule 27 should have provided for jury trials as a protection against governmental oppression is whether a juvenile court's disposition is for purposes of punishment or treatment. One obvious way to determine the purpose of juvenile court intervention is to examine the statute's purpose clause for its stated goal. In 1980, the Minnesota legislature redefined the purpose of the juvenile court, basing its new statement on the Juvenile Justice Standards.[422] The current statute states: "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."[423]

The Juvenile Justice Standards, from which this purpose clause is derived, also recommend that delinquency sanctions should be determinate and proportional in accordance with the seriousness of the offense[424] and, because such sanctions are at least impliedly punitive, that juveniles should have jury trials.[425] Minnesota did not follow these recommendations. In-

422. *See* JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO DISPOSITIONS, Standard 1.1.

423. Act of Apr. 15, 1980, ch. 580, § 3, 1980 Minn. Laws 962, 966 (codified at MINN. STAT. § 260.011(2) (1982)). The statute continues: "This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth." *Id.*

424. JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO DELINQUENCY AND SANCTIONS, Standard 5.2.

425. Specifically, the Standards provide: "Each jurisdiction should provide by law that the respondent may demand trial by jury in adjudication proceedings when respondent has denied the allegations of the petition." JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO ADJUDICATION, Standard 4.1(A). Although recognizing that making jury trials available in juvenile court would effect a substantial change in many jurisdictions, the commentary accompanying this Standard suggests that such a reform "would materially enhance the fairness of the adjudication proceeding." *Id.* Standard 4.1(A) commentary at 52. It notes that the policy arguments supporting jury trials in juvenile proceedings are the same as those "that underlie constitutional provisions authorizing jury trials in criminal cases," *id.*, namely, requiring "the trial court judge to articulate his or her views of the applicable law in the case through jury instructions, thereby facilitating appellate court review of the legal issues involved," *id.* at 53, and reducing the danger that preliminary rulings on admissibility will contaminate the fact-finding processes:

> [M]any significant evidentiary protections in the adjudicative process are based on the assumption that preliminary rulings on admissibility will be made by the trial judge and that a jury will receive the evidence only if it has been ruled admissible. When a jury is not present, the evidentiary questions tend to become blurred and appellate review of evidentiary questions is made extremely difficult by the universal presumption that the trial judge disregarded inadmissible evidence and relied only upon competent evidence in arriving at his or her decision.

stead, it adopted a new purpose that marks a fundamental philosophical departure from the previous rehabilitative purposes of the juvenile justice system in favor of much more explicitly punitive and social control purposes *without* providing the accompanying safeguard of a jury trial.[426]

Other states have also amended their juvenile code purpose clauses to deemphasize rehabilitation in favor of public safety and punishment,[427] changes which raise the issue of a juvenile's right to trial by jury. The state of Washington has undertaken the most extensive revision of its juvenile court of any jurisdiction in the nation, restructuring it along the lines of the "justice" model, which emphasizes retributive punishment and "just deserts" rather than individualized treatment.[428] The new statute's purpose clause, which was amended to reflect these new goals,[429] was involved in *State v. Lawley*,[430] in which

---

Id.; *see also supra* notes 344-88 and accompanying text (procedure for evidentiary hearing).

426. The previous purpose of the law was "to secure for each minor . . . the care and guidance, preferably in his own home, as will serve the . . . welfare of the minor and the best interests of the state." Juvenile Court Act, ch. 685, § 1, 1959 Minn. Laws 1275, 1275 (amended 1980). Under the new legislation, this exclusively benevolent and rehabilitative purpose of the juvenile court applies only to children "alleged or adjudicated neglected or dependent." MINN. STAT. § 260.011(2) (1982); *see* Feld, *supra* note 35, at 197-203; Note, *A Recommendation for Juvenile Jury Trials in Minnesota*, 10 WM. MITCHELL L. REV. 587, 602 (1984). *See generally* Clark, *supra* note 417, at 435-90 (exhaustive analysis of the issue of discerning a "punitive" legislative intent).

427. One author notes that one of the characteristics of the "new" juvenile law is that "in many jurisdictions accountability and punishment have emerged among the express purposes of juvenile justice statutes." Walkover, *supra* note 416, at 523; *see, e.g.*, CAL. WELF. & INST. CODE § 202 (West 1984) ("protect the public from criminal conduct by minors") (enacted 1977); IND. CODE ANN. § 31-6-1-1 (Burns 1980) ("protect the public by enforcing the legal obligations children have to society") (enacted 1979); VA. CODE § 16.1-227 (1982) ("protect the community against those acts of its citizens which are harmful to others and to reduce the incidence of delinquent behavior") (enacted 1977). For additional citations to state "purpose" clauses, see Walkover, *supra* note 416, at 523 n.82.

428. Juvenile Justice Act of 1977, ch. 291, § 55, 1977 Wash. Laws 1023. For discussions of this legislative revision of Washington's juvenile justice system, see A. SCHNEIDER, A COMPARISON OF INTAKE AND SENTENCING DECISION-MAKING UNDER REHABILITATION AND JUSTICE MODELS OF THE JUVENILE SYSTEM (1983); A. SCHNEIDER & D. SCHRAM, A JUSTICE PHILOSOPHY FOR THE JUVENILE COURT (1983); Krajick, *A Step Toward Determinacy for Juveniles*, CORRECTIONS, Sept. 1977, at 37; Walkover, *supra* note 416, at 528-33; *Juvenile Law*, 14 GONZ. L. REV. 285 (1979) (symposium). For an elaboration of "just deserts" sentencing, see *infra* notes 438-53 and accompanying text.

429. The present purpose clause provides:

> 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, as defined by this chapter, 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 juve-

a juvenile argued that the changes had made the proceedings essentially criminal in nature and thus entitled him to a jury trial.[431] The Washington Supreme Court acknowledged that the legislature's new emphasis on accountability for criminal behavior and punishment based on the juvenile's present and past offenses might seem to convert juvenile court proceedings into criminal proceedings but found that the statutory provisions did not treat and sentence juveniles as if they were adult offenders.[432] The court reasoned that "sometimes punishment is 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."[433] The court concluded that a jury trial was not constitutionally mandated because the legislature authorized treatment as well as punishment and because juveniles were incarcerated in facilities separate from adult penal institutions.[434]

---

nile 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. 1984). The revised code, however, denies the right to a jury trial in juvenile proceedings. *Id.* § 13.40.020.

430. 91 Wash. 2d 654, 591 P.2d 772 (1979).

431. *Id.* at 656, 591 P.2d at 772.

432. *Id.* at 656-58, 591 P.2d at 773-74.

433. *Id.* at 656-57, 591 P.2d at 773.

434. *Id.* A strong dissent in *Lawley* argued that a jury trial is required because juvenile court proceedings first adjudicate the alleged offense and then punish the offender in proportion to the offense adjudicated. *Id.* at 662-64, 591

The courts in *Lawley* and similar cases[435] failed to consider adequately whether a juvenile justice system could punish explicitly without providing criminal procedural safeguards. Although a legislature certainly may conclude that punishment is an appropriate goal and legitimate strategy for controlling young offenders, when it chooses to shape behavior by punishment, it should provide the procedural safeguards of the criminal law. Any ancillary social benefit or individual reformation resulting from such punishment is irrelevant to the need for procedural protection. Confinement of juveniles for determinate sentences based on the nature of the offense still entails a loss of liberty imposed to punish violations of the criminal law, even though the length of confinement may be shorter than an adult's and the place of incarceration is not called a prison.[436]

P.2d at 775-76 (Rosellini, J., dissenting). The dissent's analysis of the Washington purpose clause differed 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. . . .
>
> No longer is the punishment geared to fit the needs of the child, rather it is related to the seriousness of the offense. . . . Thus, the system has been converted from one which was or ostensibly was designed to protect and rehabilitate the child to one which is designed to protect society. The present act focuses upon the purposes which are generally served by adult criminal law.

Id. at 662, 591 P.2d at 775-76 (Rosellini, J. dissenting). The dissent reasoned that although the Supreme Court in *McKeiver* was reluctant to impose the requirement of jury trials on states that were attempting to achieve some sort of rehabilitative ideal in their juvenile system, 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. *Id.* at 663-64, 591 P.2d at 776 (Rossellini, J., dissenting).

435. Other courts also have subscribed to the notion that "punishment is treatment" and an acceptable component of a juvenile court's therapeutic dispositions. For example, in *In re* Seven Minors, 99 Nev. 427, 664 P.2d 947 (1983), 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." *Id.* at 432, 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." *Id.* at 436, 664 P.2d at 953. Such sanctions might include restitution, compensation for crime victims, and punitive detention in detention facilities and jails. *Id.* at 436 n.8, 664 P.2d at 953 n.8.

436. Juvenile offenders in Washington receive determinate sentences proportional to their age, the seriousness of their offense, and their prior criminal history. *See* WASH. REV. CODE ANN. § 13.40.030 (Supp. 1984). A study of the

Besides looking at the stated legislative purpose to determine the purpose of a juvenile's disposition, courts may look at whether the sentence is based on considerations of the offense or of the offender. When the sentence is based on the offense, the sentence is usually determinate and proportional, with a goal of retribution or deterrence. When the sentence is based on the offender, however, it is typically indeterminate, with a goal of rehabilitation or incapacitation.[437]

In the adult dispositional framework, determinacy increasingly supersedes indeterminacy as "just deserts" replaces rehabilitation as the underlying sentencing rationale.[438] The Progressives' optimistic assumptions about human malleability are challenged daily by the observation that rehabilitation programs do not consistently rehabilitate and by the volumes of empirical evaluations that question both the effectiveness of treatment programs and the "scientific" underpinnings of those who administer the enterprise.[439] The "just deserts" advocates

---

Washington code revision concludes that it had a positive impact on 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 sentences in the rehabilitation system which existed before 1978." A. SCHNEIDER, *supra* note 428, at 76.

437. As explained by a New York court, "The 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." *In re* Felder, 93 Misc. 2d 369, 374, 402 N.Y.S.2d 528, 533 (N.Y. Fam. Ct. 1978). *See generally* N. MORRIS, *supra* note 189, at 13-20 (discussing historical evolution from retributive to rehabilitative goal); H. PACKER, *supra* note 88, at 149-248 (comparing sentencing under Due Process Model with that under Crime Control Model); TWENTIETH CENTURY FUND TASK FORCE, FAIR AND CERTAIN PUNISHMENT 11-14 (1976) (noting that individualized sentencing grants too much discretion to judiciary); A. VON HIRSCH, DOING JUSTICE 11-26 (1976) (comparing "rehabilitative disposition" and "predictive restraint" models).

438. The movement in the adult criminal process away from rehabilitation as a justification for intervention and toward dispositions based on "just deserts" has had both academic support and legislative success. *See* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 45-53 (1971); D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS 260-72 (2d ed. 1979); N. MORRIS, *supra* note 189, at 45-50, 73-77; R. SINGER, JUST DESERTS (1979); A. VON HIRSCH, *supra* note 437, at 49-55; *infra* note 512 (describing "modified just deserts" policy of Minnesota Sentencing Guidelines).

439. In the view of one commentator, "Either because of scientific ignorance or institutional incapacities, a rehabilitative technique is lacking; we do not know how to prevent criminal recidivism by changing the characters and behavior of offenders." F. ALLEN, DECLINE, *supra* note 14, at 34. For other studies discussing the ineffectiveness of treatment, see D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964); D. MANN, INTERVENING WITH CONVICTED SERIOUS JUVENILE OFFENDERS (1976); L. SECHEREST, S. WHITE & E.

reject rehabilitation as a justification for intervention because of the discretionary power an indeterminate sentencing scheme vests in presumed experts, the inability of such experts to justify their differential treatment of similarly situated offenders, and the inequalities, disparities, and injustices that result from individualized sentences.[440] "Just deserts" sentencing, with its strong retributive foundation, punishes offenders according to their past behavior rather than who they are or may be predicted to become. Similarly situated offenders are defined and sanctioned equally on the basis of objective characteristics such as seriousness of offense, culpability, or criminal history.[441]

As the same sentencing philosophy changes appear in the juvenile process, the renewed interest in "just deserts" for adults acquires important implications for the rationale of *McKeiver*. The inability of proponents of juvenile rehabilitation to demonstrate the effectiveness of parens patriae intervention led the state of Washington to modify its juvenile justice system to incorporate "just deserts" sentencing principles. Under the statute and administratively developed sentencing guidelines, sentences for juveniles in Washington are determinate and proportional, based on age, the seriousness of the present offense, and the length of the prior record.[442] An evaluation of the process that produced the legislation concluded that the primary legislative goal was to emphasize uniformity, proportionality, equality, fairness, and accountability, rather than rehabilitation.[443] These conclusions make the *Lawley* court's

---

BROWN, THE REHABILITATION OF CRIMINAL OFFENDERS (1979); D. WARD, D. WILNER & G. KASSENBAUM, PRISON TREATMENT AND PAROLE SURVIVAL (1971); L. WILKINS, EVALUATION OF PENAL MEASURES (1969); Gold, *A Time for Skepticism*, 20 CRIME & DELINQ. 20 (1974); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67 (1971). *Compare* Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974) ("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivisim.") *with* Gendreau & Ross, *Effective Correctional Treatment: Bibliotherapy for Cynics*, 25 CRIME & DELINQ. 463, 469 (1979) (studies reported show indirect contribution of treatment to reduced criminality). *See generally* D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT 25-298 (1975) (summarizing 18 studies on the effect of corrections on recidivism).

440. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 438, at 34-47; authorities cited *supra* note 438.

441. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 438, at 145-53; Shichor, *Historical and Current Trends in American Juvenile Justice*, JUV. & FAM. CT. J., Aug. 1983, at 61, 64.

442. WASH. REV. STAT. ANN. § 13.40.010(2)(c), (d) (Supp. 1984); *see supra* notes 429 & 436.

443. A. SCHNEIDER & D. SCHRAM, *supra* note 428, at 2.

holding that juveniles are not entitled to a jury trial because they are not being punished all the more perplexing, because juvenile dispositions are determinate and proportioned according to the seriousness of the present offense and prior record rather than based on "real needs."[444]

Washington is not alone in repudiating the individualized, offender-oriented dispositions of traditional parens patriae juvenile justice in favor of offense-based dispositions. The Minnesota Department of Corrections administratively implemented a plan providing for determinate sentences in juvenile institutions based on a juvenile's present offense and prior record to "provide a more definite and distinct relationship between the offense and the amount of time required to bring about positive behavior change."[445] The Department of Corrections calculates a juvenile's length of stay on the basis of the severity of the most serious offense committed and the weight of "risk of failure" factors that are "predictive to some degree of future delinquent behavior."[446] The recidivism risk factors considered include prior felony adjudications and probation and parole failure.[447] Minnesota's Sentencing Guidelines for adult offenders, which are explicitly punitive and expressly designed to achieve "just deserts," rely on these same factors.[448] Several other states have altered their juvenile

444. The Washington courts have been treading a fine line in trying to uphold the traditional procedural aspects of the juvenile justice system while staying within the bounds of the recent legislative changes. After the Washington Supreme Court's holding in *Lawley* differentiating the adult and juvenile systems with respect to the right to a jury trial, *see supra* notes 428-34 and accompanying text, a Washington juvenile claimed that her disposition violated the thirteenth amendment's prohibition against involuntary servitude "except as a punishment for crime." *In re* Erickson, 24 Wash. App. 808, 604 P.2d 513 (1979). After noting certain due process protections available to juvenile offenders and statutory references to the criminal nature of juvenile offenses, the Washington Court of Appeals concluded that "the juvenile disposition order did constitute 'punishment for crime' sufficient to fall within the constitutional exception to involuntary servitude." *Id.* at 810, 604 P.2d at 514. Similarly, the Washington Supreme Court in *In re* Trambitas, 96 Wash. 2d 329, 635 P.2d 122 (1981), held that the requirement that time spent in pretrial detention count toward the sentence received following conviction applied to juvenile as well as adult detainees, reiterating that "[t]he restrictions on a person's liberties suffered by pretrial detention is [sic] no less 'punishment' than that imposed by the disposition order." *Id.* at 333, 635 P.2d at 124 (citing Reanier v. Smith, 83 Wash. 2d 342, 351, 517 P.2d 949, 954 (1974)).

445. MINNESOTA DEPARTMENT OF CORRECTIONS, JUVENILE RELEASE GUIDELINES 2-3 (1980).

446. *Id.* at 7.

447. *Id.* at 5.

448. The "purpose and principles" section of the Minnesota Sentencing Guidelines specifically mentions severity of the offense and past criminal his-

sentencing practices to emphasize characteristics of the offense rather than the offender as the determinant of dispositions. This has been accomplished through the adoption of either offense-based determinate sentences or mandatory minimum sentences for certain offenses, both of which preclude consideration of a juvenile's "real needs."[449]

Evaluations of juvenile sentencing practices also indicate the extent to which "just deserts" principles influence disposi-

---

tory as factors in determining sentencing. MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY at I.2 (1983) [hereinafter cited as MINNESOTA SENTENCING GUIDELINES]. The Guidelines also add points to the sentencing scale whenever the defendant committed the offense while on probation or parole. *Id.* at II.B.2.

449. The New Jersey legislature instructed courts making dispositional decisions regarding juveniles to assign weight to the characteristics of the offense and the criminal history of the offender and provided for enhanced sentences for certain serious or repeat offenders. N.J. STAT. ANN. §§ 2A:4A-43(a), -44(a), (d) (West Supp. 1984-1985) (enacted 1982); *see also* Walkover, *supra* note 416, at 524 n.86 (citing this New Jersey statute and others emphasizing the nature of the crime in sentencing guidelines).

Ohio has adopted mandatory minimum terms of confinement based on the seriousness of the offense for which a youth is committed. The mandatory minimum terms are six months, one year, or until age 21, depending on the seriousness of the crime. OHIO CODE § 2151.355(A)(4), (5), (6) (Page Supp. 1983) (enacted 1981). One commentator has noted that the legislation

> tends to focus more on retribution for the offense committed as opposed to the needs of the juvenile offender. The minimum sentence requirements seem to focus on punishing rather than rehabilitating the youth offender. This is contrary to the basic philosophy that the juvenile justice system ideally should emphasize rehabilitation over retribution or punishment.

Comment, *H.B.440: Ohio Restructures Its Juvenile Justice System*, 8 U. DAYTON L. REV. 237, 245 (1982).

Delaware has adopted legislation that provides that any youth who is adjudicated delinquent for conduct that would be a felony within one year of a prior felony adjudication must serve a mandatory minimum term of confinement. DEL. CODE ANN. tit. 10, § 937(c)(1) (Supp. 1982) (enacted 1976). 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.

Gardner, *supra* note 69, at 835-36. *But see* State v. J.K., 383 A.2d 283, 289 (Del. 1977) (noting underlying rehabilitative purpose of juvenile sentencing requirements).

Finally, Colorado recently adopted determinate sentencing provisions for "aggravated juvenile offenders"—youths with prior felony adjudications who subsequently commit a crime of violence—whereby convicted juveniles may receive determinate sentences of five years. Act of Apr. 12, 1984, ch. 142, §§ 1, 3, 1984 Colo. Sess. Laws 566, 566, 568 (Hein microfiche) (to be codified at COLO. REV. STAT. §§ 19-1-103(2.1)(b), 19-3-113.2(1)).

tional decision making.[450] These studies report that, to the extent that variations in dispositional patterns can be accounted for, offense characteristics explain most of the variance.[451] 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.[452] The study concludes that

> these 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.[453]

Viewed as a whole, these legislative and administrative changes and operational practices 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 revisions in juvenile court purpose clauses, placing greater emphasis on the integrity of the substantive criminal law or the need to protect public safety, eliminate even rhetorical support for the traditional rehabilitative goals of juvenile justice.

Looking to the reality of juvenile correctional dispositions is also helpful in the quest to determine whether institutional confinement constitutes punishment or a therapeutic "alterna-

450. *See* Clarke & Koch, *supra* note 156, at 276-88; Cohen & Kluegel, *Determinants of Juvenile Court Dispositions: Ascriptive and Achieved Factors in Two Metropolitan Courts,* 43 AM. SOC. REV. 162, 166, 174-75 (1978); Cohen & Kluegel, *Selecting Delinquents for Adjudication,* 16 J. RES. CRIME & DELINQ. 143, 159 (1979); Feld, *Reference of Juvenile Offenders, supra* note 77, at 585-601; Marshall & Thomas, *Discretionary Decision-Making and the Juvenile Court,* JUV. & FAM. CT. J., Aug. 1983, at 47, 51.

451. *See* authorities cited *supra* note 450. Nonetheless, the research also indicates that present offense and prior record, although the best indicators, account for only about 25% of the variance in sentencing, leaving an enormous amount of dispositional variation unexplained. *See* Feld, *Reference of Juvenile Offenders, supra* note 77, at 598-99; Thomas & Cage, *The Effects of Social Characteristics on Juvenile Court Dispositions,* 18 SOC. Q. 237, 244 (1977). Commentators have observed with respect to this unexplained variation 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." Marshall & Thomas, *supra* note 450, at 57.

452. YOUTH CRIME IN CALIFORNIA, *supra* note 407, at 38-40, 51.

453. *Id.* at 51.

tive purpose," since it was this reality that motivated the Court to afford juveniles procedural safeguards in *Gault*.[454] In *Gault*, the Court belatedly recognized conditions that had long persisted.[455] One study of the early juvenile training schools describes institutions that not only failed to rehabilitate but were scarcely distinguishable from their adult penal counterparts.[456] The criticism of the adequacy of juvenile correctional efforts in *Gault* is not simply an analysis of the historical record, however; a number of evaluations of juvenile correctional facilities in the years since *Gault* reveal a continuing gap between rhetoric and reality.[457] The author's study of juvenile institutions in Massachusetts describes a number of facilities in which staff physically abused inmates themselves and were frequently powerless to prevent the worst aspects of inmate abuse by other inmates.[458] A study in Ohio reveals a similarly violent and oppressive institutional environment for the "rehabilitation" of young delinquents.[459] 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 custodial incarceration with all of its attend-

---

454. *In re* Gault, 387 U.S. 1, 27-28 (1967); *see supra* note 41.

455. As the Court observed,

> So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide. . . . "The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines."

Id. at 29-30 (quoting S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL 35 (1966)).

456. D. ROTHMAN, *supra* note 2, at 261-89. For a similarly pessimistic account of the reality of juvenile correctional programs under the aegis of Progressivism, see S. SCHLOSSMAN, *supra* note 2.

457. *See, e.g.*, C. BARTOLLAS, S. MILLER & S. DINITZ, JUVENILE VICTIMIZATION (1976); B. FELD, NEUTRALIZING INMATE VIOLENCE (1977); R. GIALLOMBARDO, THE SOCIAL WORLD OF IMPRISONED GIRLS (1974); H. POLSKY, COTTAGE SIX (1962); D. STREET, R. VINTER & C. PERROW, ORGANIZATION FOR TREATMENT (1966); K. WOODEN, WEEPING IN THE PLAYTIME OF OTHERS (1976); Feld, *A Comparative Analysis of Organizational Structure and Inmate Subcultures in Institutions for Juvenile Offenders*, 27 CRIME & DELINQ. 336 (1981); Poole & Regoli, *Violence in Juvenile Institutions: A Comparative Study*, 21 CRIMINOLOGY 213 (1983); Rolde, Mack, Scherl & Macht, *The Maximum Security Institution as a Treatment Facility for Juveniles*, in JUVENILE DELINQUENCY 437 (J. Teele ed. 1970).

458. The study described the conditions as follows:

> In sum the 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.

B. FELD, *supra* note 457, at 160.

459. C. BARTOLLAS, S. MILLER & S. DINITZ, *supra* note 457, at 153, 158.

ant punitive consequences.[460]

During the period of these evaluations, a number of lawsuits challenged the conditions of confinement in juvenile correctional facilities, alleging that the conditions violated the committed inmates' "right to treatment."[461] These "right to treatment" and "cruel and unusual punishment" cases provide another outside view of the reality of juvenile corrections. In

460. *See* authorities cited *supra* note 457.

461. The right to treatment follows from the state's invocation of its parens patriae power to intervene for the benefit of the individual. In a variety of settings other than juvenile corrections, such as institutionalization of the mentally ill and mentally retarded, states confine individuals without affording them the procedural safeguards associated with criminal incarceration for punishment. In all of these settings, it is the promise of benefit that justifies the less stringent procedural safeguards. Thus, failure to deliver the promised treatment is a denial of due process. *See* Donaldson v. O'Connor, 493 F.2d 507, 513 (5th Cir. 1974), *vacated on other grounds,* 422 U.S. 563, 577 (1975); Rouse v. Cameron, 373 F.2d 451, 461 (D.C. Cir. 1966); Welsch v. Likins, 373 F. Supp. 487, 491 (D. Minn. 1974); Wyatt v. Stickney, 325 F. Supp. 781, 786 (M.D. Ala. 1971), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305, 1319 (5th Cir. 1974). For commentary on these cases and the issue of treatment generally, see Birnbaum, *The Right to Treatment,* 46 A.B.A. J. 499 (1960); *The Right to Treatment,* 57 GEO. L.J. 673 (1969) (symposium); *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1316-57 (1974).

The constitutional rationale of the civil commitment cases also has been invoked to secure treatment for juveniles incarcerated in state training schools. *See, e.g.,* Pena v. New York State Div. for Youth, 419 F. Supp. 203, 211 (S.D.N.Y. 1976); Robinson v. Leahy, 401 F. Supp. 1027, 1034 (N.D. Ill. 1975); Long v. Powell, 388 F. Supp. 422, 432 (N.D. Ga. 1975), *vacated,* 423 U.S. 808 (1975); Morales v. Turman, 383 F. Supp. 53, 64 (E.D. Tex. 1974), *rev'd on other grounds,* 535 F.2d 864 (5th Cir. 1976); Nelson v. Heyne, 355 F. Supp. 451, 459 (N.D. Ind. 1972), *aff'd,* 491 F.2d 352 (7th Cir. 1974); Martarella v. Kelley, 349 F. Supp. 575, 602 (S.D.N.Y. 1972); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1363 (D.R.I. 1972); Baker v. Hamilton, 345 F. Supp. 345, 350-52 (W.D. Ky. 1972); Lollis v. New York State Dep't of Social Serv., 322 F. Supp. 473, 482 (S.D.N.Y. 1970); Neil M. v. Gregory M., 71 Misc. 2d 396, 400-01, 336 N.Y.S.2d 304, 308-09 (N.Y. Fam. Ct. 1972).

The right to treatment has been invoked successfully against juvenile institutions in a number of cases in which rehabilitative services were not forthcoming and custodial warehousing or barbaric practices were shown. *See, e.g., In re* Elmore, 382 F.2d 125, 127 (D.C. Cir. 1967); Creek v. Stone, 379 F.2d 106, 112 (D.C. Cir. 1967). The First Circuit, however, rejected any "right to treatment," holding that "there is no legally cognizable quo to trigger a compensatory quid. . . . [A]lthough rehabilitative training is no doubt desirable and sound as a matter of policy and, perhaps, of state law, plaintiffs have no constitutional right to that rehabilitative training." Santana v. Collazo, 714 F.2d 1172, 1177 (1st Cir. 1983). For commentary on these and other related cases, see Renn, *The Right to Treatment and the Juvenile,* 19 CRIME & DELINQ. 477 (1973); Wald & Schwartz, *Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs,* 12 AM. CRIM. L. REV. 125 (1974); Note, *The Courts, The Constitution and Juvenile Institutional Reform,* 52 B.U.L. REV. 33 (1972); Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles,* 49 NOTRE DAME LAW. 1051 (1974); *Constitutional Right to Treatment for Juveniles Adjudicated to be Delinquent*—Nelson v. Heyne, 12 AM. CRIM. L. REV. 209 (1974); *Limits on Punishment and Entitlement to Rehabilitative Treatment of Institutionalized Juveniles:* Nelson v. Heyne, 60 VA. L. REV. 864 (1974).

Nelson v. Heyne,[462] 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.[463] In *Inmates of Boys' Training School v. Affleck*,[464] the court found inmates confined in dark and cold dungeonlike cells in their underwear, routinely locked in solitary confinement, and subjected to a variety of antirehabilitative practices.[465] In *Morales v. Turman*,[466] the court found numerous instances of physical brutality and abuse, including hazing by staff and inmates, staff-administered beatings and tear-gassings, homosexual assaults, extensive use of solitary confinement, repetitive and degrading make-work, and minimal clinical services.[467] In *Morgan v. Sproat*,[468] the court found youths confined in padded cells with no windows or furnishings and only flush holes for toilets, denied access to all services or programs except a Bible.[469] In *State v. Werner*,[470] the court found that inmates were locked in solitary confinement, beaten, slapped, kicked, and sprayed 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.[471] Unfortunately, these cases are not atypical, as the list of judicial opinions documenting institutional abuses demonstrates.[472] Rehabilitative euphemisms and a therapeutic "alternative purpose" cannot disguise the reality of punitive confinement as a fundamental characteristic of juvenile institutionalization. Although juvenile correctional facilities are not as uniformly bad as adult prisons, they are not so consistently good that they provide an unquestionably therapeutic "alternative purpose."

Against this background, it is hard to understand the decision in *McKeiver* to deny juveniles jury trials in order not to impede further experiments "to seek in new and different ways the elusive answers to the problems of the young."[473] It is also

462. 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974).
463. *Id.* at 454.
464. 346 F. Supp. 1354 (D.R.I. 1972).
465. *Id.* at 1357.
466. 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976).
467. *Id.* at 77-78.
468. 432 F. Supp. 1130 (S.D. Miss. 1977).
469. *Id.* at 1138.
470. 242 S.E.2d 907 (W. Va. 1978).
471. *Id.* at 909.
472. See authorities cited *supra* note 461.
473. *McKeiver*, 403 U.S. at 528, 547 (1971); *see also* Gardner, *supra* note 69, at

difficult to understand Minnesota's uncritical acceptance of the Court's position. In contrast, the Alaska Supreme Court, in *RLR v. State*,[474] held that the Alaska state constitution requires jury trials in juvenile court in order to provide a protective buffer between the juvenile and the state.[475] The court rejected the notion that "the benevolent social theory supposedly underlying juvenile court acts justifies dispensing with constitutional safeguards"[476] and emphasized that the safeguards of a jury are required when a juvenile is charged with criminal behavior and subjected to the possibility of incarceration.[477] Although the majority of states, like Minnesota, deny juveniles the right to a trial by jury, the experiences of those jurisdictions that allow juveniles jury trials[478] show that *McKeiver*'s fear of delay, formality, and the clamor of the adversary process appears to be unfounded.[479]

Justice Brennan's concurring-dissenting opinion in *McKeiver* was based upon his perception that a public trial provided a protection against governmental oppression functionally equivalent to a jury trial by assuring the visibility and

---

823-33 (noting failure of courts to use concept of punishment in analyzing juvenile cases).

474. 487 P.2d 27 (Alaska 1971).

475. *Id.* at 32. For cases *denying* juveniles the right to a jury trial, see *In re* Dino, 359 So. 2d 586, 598 (La. 1978); State v. Gleason, 404 A.2d 573, 585 (Me. 1979); *In re* McCloud, 110 R.I. 431, 436, 293 A.2d 512, 516 (1972).

476. *RLR*, 487 P.2d at 30.

477. *Id.* at 33.

478. *See, e.g.*, ALASKA STAT. § 47.10.070 (1979); COLO. REV. STAT. § 19-1-106(1)(a) (Supp. 1983); KAN. STAT. ANN. § 38-808(a) (1981) (restricted to certain felonies); MASS. ANN. LAWS ch. 119, § 55A (Michie/Law. Co-op. Supp. 1984); MICH. COMP. LAWS ANN. § 712A.17 (West Supp. 1984); MISS. CODE ANN. § 43-23-15 (1972); MONT. CODE ANN. § 41-5-522 (1983); N.M. STAT. ANN. § 32-1-31 (1981); OKLA. STAT. ANN. tit. 10, § 1110 (West Supp. 1984); TEX. FAM. CODE ANN. tit. 3, § 54.03 (Vernon 1975).

479. Despite the fears of the majority in *McKeiver* that delays could result from requiring juvenile jury trials, 403 U.S. 528, 550 (1971), Justice Douglas argued that "there is no meaningful evidence that granting the right to jury trials will impair the function of the court." *Id.* at 564 (Douglas, J., dissenting). Similarly, commentators have noted that

> where a jury trial is available by statute it is seldom used and creates no burden on the juvenile court system, nor does it interfere with the rehabilitative program for the juvenile. None of the data collected indicates that the extension of this right to the remaining states would significantly affect the efficiency of the operation of the juvenile courts.

Burch & Knaup, *The Impact of Jury Trials upon the Administration of Juvenile Justice*, 4 CLEARINGHOUSE REV. 345, 360 (1970); *see also* Comment, *supra* note 403, at 995 n.134 (observing that the right to a jury trial would not be used as often in juvenile trials as it is in criminal trials, at least in part because attorneys concerned for the juveniles realize that its overuse would delay the rehabilitative process).

accountability of the process.[480] Although the possibility of public trial was one of the factors that led the *McKeiver* plurality to deny juveniles the right to jury trials,[481] several states grant juveniles the right to a public trial as well.[482] The majority of states, however, including Minnesota, exclude the general public from delinquency hearings.[483]

Although the imposition of jury trials and public trials on juvenile proceedings is inconsistent with traditional informality and confidentiality, concepts of fairness require questioning the extent to which "benevolent social theory" ought to be invoked to deny fundamental constitutional rights. Minnesota's Rule 27 itself evidences that informality in the adjudicative process is already a thing of the past. The Juvenile Justice Standards commentary notes that "the adjudication hearings should be conducted in a careful, formal manner to assure accurate findings of fact. Contested adjudication hearings should be formal proceedings whether or not there is a jury present."[484] The Standards also recommend that juveniles should have a right to public trial.[485] The Standards emphasize that the current practice of allowing attendance by students, social workers, lawyers, social scientists, and other observers of the court without any specific "interest" in the particular child or case already vitiates the promise of confidentiality without affording the benefits of a public hearing.[486] They also question whether the "benefits" of confidentiality have been elevated over those of a public trial without adequate appraisal of what the benefits

480. *McKeiver*, 403 U.S. 528, 553-55 (1971) (Brennan, J., concurring and dissenting); *see supra* note 62 and accompanying text.

481. 403 U.S. at 550; *see supra* note 70 and accompanying text.

482. *See, e.g.*, ALASKA STAT. § 47.10.070 (1982); CAL. WELF. & INST. CODE § 676 (West 1984); OR. REV. STAT. § 419.498(1) (1983); S.D. CODIFIED LAWS § 26-8-32 (1976). Commentators recognize that many states do not provide public trials for juveniles because of a fear that public trials threaten the informality, flexibility, and confidentiality of juvenile proceedings. *See* McLaughlin & Wisenand, *Jury Trial, Public Trial and Free Press In Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force, and NAC Standards*, 46 BROOKLYN L. REV. 1, 10-11 (1979); Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1540 n.3 (1983).

483. MINN. STAT. § 260.155(1) (1982) ("The court shall exclude the general public from these hearings and shall admit only those persons who, in the discretion of the court, have a direct interest in the case or in the work of the court."); *see also* MINN. R.P. JUV. CT. 8.01 (specifying who is permitted to attend the juvenile hearings).

484. JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO ADJUDICATION, Standard 4.1(A) commentary at 54.

485. *Id.* Standard 6.1.

486. *Id.* Standard 6.1 commentary at 71.

of a public trial are.[487]

Over three decades ago, the United States Supreme Court, in *In re Oliver*,[488] held that a defendant had a right to a public trial and condemned secret criminal proceedings:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[489]

The *Oliver* Court also noted that public trials are needed because they may bring the matters at issue to the attention of an unknown witness who can then voluntarily come forward to provide testimony, they provide citizens with information about the administration of justice, and they promote confidence in the judiciary.[490] Public trials, like jury trials, provide a check on potential abuses of judicial power. One commentator has suggested that such uses of public trials are even more beneficial in juvenile than in adult criminal court proceedings,[491] and another has emphasized that the public's need for information about the administration of the juvenile justice system is at least as acute as in the case of adult defendants.[492] Even some courts acknowledge that juvenile cases exhibit far more procedural errors than comparable adult cases and suggest that secrecy may foster a judicial casualness toward the law that

---

487. *Id.* Standard 6.1 commentary at 71-72.
488. 333 U.S. 257 (1948).
489. *Id.* at 270.
490. *Id.* at 270 n.24.
491. McLaughlin & Wisenand, *supra* note 482, at 3.
492. Note, *supra* note 482, at 1549-53. Specifically, the commentator asserts:

> [A]ccess to juvenile delinquency hearings would function as a check on the abuse of power by judges, probation officers, and other public officials. The nature of the juvenile justice system, even more than the criminal system, suggests a compelling need to check the exercise of government power. Juvenile court judges, for example, exercise more discretion than their criminal trial counterparts. . . . Such a system relies heavily on subjective judgments, making the "compliant, biased, or eccentric judge" a particular hazard. Juvenile court judges, moreover, are often less qualified and less competent than other judges. As a result, juvenile courts often commit "much more extensive and fundamental error than is generally found in adult criminal cases." Because juvenile cases are only rarely appealed, public scrutiny of the juvenile justice system takes on added importance as a check against official misconduct. Finally, judges, not juries, decide most delinquency cases. Thus, the juvenile is unable to appeal to the community conscience, as embodied in the jury, to protect against abuse of government power.

Id. at 1550-51 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968); RLR v. State, 487 P.2d 27, 38 (Alaska 1971)).

visibility might constrain.[493] Thus, although public access would marginally vitiate the confidentiality of the process,[494] it could simultaneously assure that the daily administration of juvenile courts adheres more closely to the formal procedures that are now required.

Again, procedures like Minnesota's Rule 27, which denies juveniles in Minnesota both jury trials and public trials,[495] meet constitutional due process requirements. They do not, however, take into account the reality of contemporary juvenile justice, the extent to which invocations of "informality" are contradicted by the close formal resemblance between juvenile and adult criminal proceedings, or the need to protect juveniles as well as adults from the coercive and punitive power of the state.[496] It is clear, however, that by adhering to the traditional

493. *See, e.g.,* RLR v. State, 487 P.2d 27, 38 (Alaska 1971); *In re* Dino, 359 So. 2d 586, 597 (La. 1978).

494. Although confidentiality in juvenile court proceedings has been justified by some courts and commentators "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past," *In re* Gault, 387 U.S. 1, 24 (1967), and to avoid labeling juveniles and thereby either limiting their chances of success later in life or reinforcing their conception of themselves as criminals, *see, e.g.,* E. SCHUR, LABELING DEVIANT BEHAVIOR (1971); Lemert, *The Juvenile Court—Quest and Realities,* in JUVENILE DELINQUENCY AND YOUTH CRIME, *supra* note 30, at 91, 92, it is not clear to what extent eliminating confidentiality actually would aggravate these dangers. Commentators have questioned whether the absence of confidentiality would intensify the dangers of labeling beyond those already inherent in the legal proceedings themselves:

> Similarly, it is unclear that access to juvenile hearings would decrease the occupational and educational opportunities of the juvenile offender. The FBI, the military, government agencies and private employers currently may obtain information about an individual's juvenile court contacts. . . .
>
> Publicity of juvenile court proceedings may also prove beneficial to both the juvenile and society. First, the public has an interest in learning the identity of the juvenile offender. . . . Second, publicity of juvenile delinquency hearings may deter juvenile delinquency. Such publicity may also alert the juvenile's parents, as well as others, to their responsibilities toward their children.

Note, *supra* note 482, at 1558; *see also* Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence,* 8 LAW & SOC'Y REV. 583, 589-90 (1974) (noting ways in which court experience may be perceived positively by youths despite negative label).

495. *See* MINN. R.P. JUV. CT. 27.03(2)(A) (granting the child's counsel and the county attorney the right to present evidence, present and cross-examine witnesses, and present arguments supporting or attacking allegations in the petition).

496. As one commentator has noted, it is

> both inaccurate and deceptive to describe the operation of the juvenile court in this area as the exercise of a rehabilitative or therapeutic function. . . . The primary function being served in these cases . . . is the temporary incapacitation of children found to constitute a threat to the community's interest. . . . In a great many cases the juvenile court

procedures of the juvenile court, the Minnesota Supreme Court chose to treat juveniles worse procedurally than adult criminal defendants.

VIII. REFERENCE OF DELINQUENCY MATTERS

A final issue concerns the procedure by which a juvenile court waives jurisdiction for a youth, allowing the prosecution of the youth as an adult. The procedures and criteria used are critical because such a waiver of jurisdiction subjects the youth directly to all the consequences of adult criminal prosecution. Two United States Supreme Court decisions, *Kent v. United States*[497] and *Breed v. Jones*,[498] constrain this judicial waiver process. *Kent* mandates that procedural due process must be observed in judicial waiver determinations,[499] and *Breed* requires a state to make its dispositional determination—whether to proceed against an offender as a juvenile or an adult—before reaching the merits of the complaint.[500] Dicta in *Kent* also note some of the substantive criteria a juvenile court judge might properly consider in deciding whether to waive jurisdiction.[501]

---

must perform functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous and disturbing behavior.

F. ALLEN, *The Juvenile Court and the Limits of Juvenile Justice*, in BORDERLAND, *supra* note 14, at 43, 53; *see also The Administration of Juvenile Justice—The Juvenile Court and Related Methods of Delinquency*, in JUVENILE DELINQUENCY AND YOUTH CRIME, *supra* note 30, at 1, 8 (the policies supporting the application of the criminal law to adult offenders, namely, retribution, condemnation, deterrence, and incapacitation, also support its application to juvenile offenders).

497. 383 U.S. 541 (1966).

498. 421 U.S. 519 (1975).

499. *Kent*, 383 U.S. at 554-57.

500. *Breed*, 421 U.S. at 539-41.

501. The Court explained its criteria as follows:

> An offense falling within the statutory limitations . . . will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.
>
> The determinative factors which will be considered by the judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:
>
> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> 4. The prosecutive merit of the complaint, i.e., whether there is

Minnesota's waiver procedures and criteria are typical of the way that a large majority of states decide to prosecute a chronological juvenile in an adult criminal court, subject to the requirements of *Kent* and *Breed*.[502] Minnesota's Rule 32 governs the process for waiving juvenile court jurisdiction and prosecuting a young offender as an adult if the court concludes that the child is "not suitable for treatment" or that "public

---

evidence upon which a Grand Jury may be expected to return an indictment . . . .

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent, 383 U.S. at 566-67 app. For a general review of the implications of *Kent*, see Paulsen, *Constitutional Context*, *supra* note 35.

502. Forty-six states employ judicial waiver in making transfer decisions. *See* Feld, *Reference of Juvenile Offenders*, *supra* note 77, at 523 n.22. For an overview of state statutes defining juvenile and criminal court jurisdiction, see D. HAMPARIAN, L. ESTEP, S. MUNTEAN, R. PRIESTINO, R. SWISHER, P. WALLACE & J. WHITE, YOUTH IN ADULT COURTS: BETWEEN TWO WORDS 43-86 (1982) [hereinafter cited as D. HAMPARIAN]; *see also* JUVENILE JUSTICE STANDARDS, *supra* note 73, STANDARDS RELATING TO TRANSFER BETWEEN COURTS (proposed waiver guidelines).

Until 1980, Minnesota provided only minimal substantive guidance to juvenile courts in making the critically important discretionary decision of whether to waive jurisdiction. Waiver was authorized if the court concluded either that the youth was "not suitable to treatment" or that a dispostion within the juvenile system would pose a threat to public safety. MINN. STAT. § 260.125(2)(d) (1963) (amended 1980). *Compare* Feld, *Reference of Juvenile Offenders*, *supra* note 77, at 523-46 (describing Minnesota waiver requirements before 1980 amendment) *with* Feld, *supra* note 35, at 203-30 (describing postamendment waiver provisions). The Minnesota Supreme Court found the problems of judicial discretion in waiver decisions substantial enough to call on the legislature to review and revise the statute. *See In re* Welfare of Dahl, 278 N.W.2d 316, 319 (Minn. 1979). It was in response to the court's request in *Dahl* for "a reevaluation of the existing certification process," *id.*, that the Minnesota legislature adopted offense criteria to help structure the waiver decision under the statute.

Judicial waiver decisions, products of the courts' unbridled discretion in this area, have been criticized for their dissimilar treatment and occasional discrimination and abuse. *See* D. HAMPARIAN, *supra*, at 15-40 (review and digest of the waiver literature); *Youth in Adult Courts*, in READINGS IN PUBLIC POLICY 169-377 (J. Hall, D. Hamparian, J. Pettibone & J. White eds. 1981) (compilation of 10 articles considering policy implications and specific problems involved in prosecuting juveniles in adult courts) [hereinafter cited as READINGS IN PUBLIC POLICY]; *see also* Feld, *Reference of Juvenile Offenders*, *supra* note 77, at 522 n. 21 (listing citations to recent waiver literature).

safety is not served" by retention in juvenile court.[503] Under the rule, the county attorney initiates a reference proceeding by filing a motion for adult prosecution.[504] Following a finding of probable cause, the juvenile court may order a social study of the child[505] and, within thirty days of the filing of the motion, must conduct a hearing to determine whether the youth meets the waiver criteria.[506] The prosecution may prove its case for waiver either by direct proof of nonamenability to treatment or dangerousness under subdivision 2 of the statute[507] or by indi-

503. MINN. R.P. JUV. CT. 32.05(2); *see* MINN. STAT. § 260.125(2)(d) (Supp. 1983). For general discussions of the waiver procedure in Minnesota, see Feld, *supra* note 35; Feld, *Reference of Juvenile Offenders, supra* note 77.

504. Rule 32 provides: "Proceedings to refer a delinquency matter . . . may be initiated only upon motion of the county attorney after a delinquency petition has been filed." MINN. R.P. JUV. CT. 32.01; *see In re* Welfare of Sweats, 293 N.W.2d 67, 70 (Minn. 1980) (decision whether to prosecute as an adult is within discretion of prosecutor).

505. The rule provides: "If probable cause has been shown, pursuant to Rule 19.03 or Rule 32.05, Subd. 1, the court, on its own motion or on the motion of the child's counsel or the county attorney, may order a social, psychiatric or psychological study concerning the child who is the subject of the reference." MINN. R.P. JUV. CT. 32.03. The rule also provides that the social report is to be paid for "at public expense," shall be filed 48 hours before the time scheduled for the hearing, and must be made available to both parties. *Id.*

506. MINN. R.P. JUV. CT. 32.01.

507. MINN. STAT. § 260.125(2)(d)(2) (Supp. 1983). When proving amenability to treatment or dangerousness directly, the State will introduce evidence pertaining to the nature of the juvenile's present offense and prior record as well as evidence bearing on the treatment prognosis of the youth.

The Minnesota Supreme Court has emphasized that the facts of the crime are relevant to the determination of whether prosecution as an adult is proper. State v. Duncan, 312 Minn. 17, 32-33, 250 N.W.2d 189, 198-99 (1977). It has indicated that the following factors are relevant to the question of whether the child is a threat to public safety:

> 1) the seriousness of the offense in terms of community protection; 2) the circumstances surrounding the offense; 3) whether the offense was committed in an aggressive, violent, premeditated or willful manner; 4) whether the offense was directed against persons or property; 5) the reasonably foreseeable consequences of the act; and 6) the absence of adequate protective and security facilities available to the juvenile treatment system.

State v. Hogan, 297 Minn. 430, 438, 212 N.W.2d 664, 669-70 (1973).

Also, in determining the amenability of a juvenile to treatment, the court has emphasized the role of psychological and psychiatric evaluations and described the procedure by which those evaluations are to be prepared and submitted to the court. S.R.J. v. State, 293 N.W.2d 32, 36 (Minn. 1980). As a result, the prosecution is encouraged

> to introduce whatever social, psychological, or psychiatric evidence it has available to bolster its case. Similarly, defense attorneys, obligated to effectively assist their juvenile clients, are likely to introduce substantial evidence of their clients' redeeming social value. Following this morass of evidence, juvenile court judges will continue to decide on a discretionary basis if a youth is amenable to treatment or dangerous despite the absence of clinical tests or objective validated indicators that accurately predict such traits.

rect proof of offenses establishing a prima facie case under subdivision 3.[508]

It is important to note that such a waiver decision is also a *sentencing* decision that represents a choice between the punitive disposition of adult criminal court and the "rehabilitative" disposition of the juvenile court.[509] Consistent with the view of waiver as a sentencing decision, Minnesota added offense criteria to guide the waiver decision when it revised its waiver statute in 1980.[510] Under the new waiver statute, the prosecution can establish a prima facie case for waiver by proving that the juvenile is at least sixteen years of age, the present offense charged is serious, and the combination of the present crime charged and the prior record bring the case within one of the clauses of the subdivisions.[511] The use of such offense criteria to create a presumption of adulthood reflects a legislative effort to provide some objective guidance to juvenile court judges making the waiver decision. It also reflects the Minnesota Sentencing Guidelines' repudiation of traditional, individualized discretionary sentencing practices in favor of "just deserts" de-

---

Feld, *supra* note 35, at 213-14.

508. Subdivision 3 provides: "A prima facie case that the public safety is not served or that the child is not suitable for treatment shall have been established if the child was at least 16 years of age at the time of the alleged offense," is alleged to have committed one of various specified serious present offenses, and, for all but the most serious offenses, has a record of prior offenses. MINN. STAT. § 260.125(3) (1982). The various combinations of present offense and prior record create a rebuttable presumption for waiver. Feld, *supra* note 35, at 207-14. If the defendant does not introduce rebuttal evidence, establishment of the prima facie case alone will support a waiver decision. *See, e.g., In re* Welfare of Givens, 307 N.W.2d 489, 490 (Minn. 1981) (reference based on an unrebutted prima facie case).

509. *See In re* Welfare of Hartung, 304 N.W.2d 621, 624 (Minn. 1981) ("A reference hearing is a dispositional type hearing which is forward looking . . . ."); *In re* Welfare of S.R.J., 293 N.W.2d 32, 35 (Minn. 1980) ("A reference hearing is a dispositional hearing . . . ."); *see also In re* Welfare of T.D.S., 289 N.W.2d 137, 140 (Minn. 1980) (reference hearing is properly distinguished from adjudicative hearing). For a discussion of the punitive aspects of a waiver decision, see Whitebread & Batey, *The Role of Waiver in the Juvenile Court: Questions of Philosophy and Function,* in READINGS IN PUBLIC POLICY, *supra* note 502, at 207.

510. Act of Apr. 15, 1980, ch. 580, § 7, 1980 Minn. Laws 962, 967-69 (codified at MINN. STAT. § 260.125 (1982)); *see also* Feld, *supra* note 35, at 192-97 (describing 1980 changes in the Minnesota juvenile code).

511. MINN. STAT. § 260.125(3) (1982). The legislative addition of offense criteria was responsive to the issues raised by the Minnesota Supreme Court in *In re* Welfare of *Dahl,* 278 N.W.2d 316, 319 (Minn. 1979), *see supra* note 502, and other decisions. For example, the court in *In re* Welfare of J.B.M., 263 N.W.2d 74 (Minn. 1978), indicated that a waiver decision is based on more than just the seriousness of the offense: "Although the nature of the offense is certainly a factor to be considered in this determination and may serve as a basis for statutory reference . . . , this court has not held that reference is mandatory when a serious crime is involved." *Id.* at 76.

cision making, in which the primary determinants of an offender's sentence are the severity of the present offense and the length of the prior record.[512]

The legislative goal of greater waiver uniformity has not been achieved through the use of offense criteria, however, because youths may introduce evidence of amenability to treatment and lack of dangerousness to rebut the prima facie case[513] and thus may have the case decided under the general waiver provisions.[514] A recent evaluation of the Minnesota waiver process found that less than one-half of the youths for whom prosecutors sought waiver met the prima facie offense criteria and only about one-third of the youths actually referred for adult prosecution met them.[515] Furthermore, the adoption of prima facie offense criteria for waiver seems to have had little impact on the numbers or kinds of youths criminally prosecuted in Minnesota.[516] Thus, notwithstanding the 1980 legislative amendments specifying offense criteria to structure judicial discretion, certification for adult prosecution remains a highly idiosyncratic procedure.

Rule 32 was promulgated against this background of persistent judicial discretion despite the legislature's predilection for

512. The "purpose and principles" section of the Minnesota Sentencing Guidelines reflects the "modified just deserts" sentencing philosophy of the Sentencing Guidelines Commission: "The purpose of the sentencing guidelines is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history." MINNESOTA SENTENCING GUIDELINES, *supra* note 448, at I.2. Two articles from a recent symposium on determinate sentencing explore the impact of the "just deserts" philosophy on the Minnesota Sentencing Guidelines. *See* Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices,* 5 HAMLINE L. REV. 237 (1982); Von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Commission,* 5 HAMLINE L. REV. 164 (1982).

513. *See* MINN. R.P. JUV. CT. 32.04(2).

514. *See* Feld, *supra* note 35, at 213-14, 239-40.

515. Osbun & Rode, *Prosecuting Juveniles As Adults: The Quest for "Objective" Decisions,* 22 CRIMINOLOGY 187, 194-95 (1984). As the authors note, however, "Following enactment of the revised statute, there was a slight increase in the proportion of transferred cases which did satisfy the [offense] criteria—from 22.2% before enactment to 34.5% after enactment." *Id.* at 195.

516. *Id.* at 197-98. The ineffectiveness of the "objective guidelines" promulgated by the legislature is in part attributable to their failure to single out those "serious" offenders who often are better identified on a discretionary basis. As a result, as Osbun and Rode conclude, "Despite its defects and potential for abuse, the traditional discretionary process used by prosecutors and juvenile court judges to make waiver decisions appears to be more successful than the objective criteria alone in identifying the more serious juvenile offenders." *Id.* at 199-200.

"just deserts" sentencing and its adoption of offense criteria to structure the waiver decision. Rule 32.05 elaborates a non-exclusive list of the "totality of the circumstances" that a juvenile court may consider in determining a youth's dangerousness or amenability to treatment:

> (a) the seriousness of the offense in terms of community protection,
> (b) the circumstances surrounding the offense,
> (c) whether the offense was committed in an aggressive, violent, premeditated or willful manner,
> (d) whether the offense was directed against persons or property, the greater weight being given to an offense against persons, especially if personal injury resulted,
> (e) the reasonably foreseeable consequences of the act,
> (f) the absence of adequate protective and security facilities available to the juvenile treatment system,
> (g) the sophistication and maturity of the child as determined by consideration of the child's home, environmental situation, emotional attitude and pattern of living,
> (h) the record and previous history of the child,
> (i) whether the child acted with particular cruelty or disregard for the life or safety of another,
> (j) whether the offense involved a high degree of sophistication or planning by the child, and
> (k) whether there is sufficient time available before the child reaches age nineteen (19) to provide appropriate treatment and control.[517]

These factors are already part of the controlling case law[518] and statutory grounds[519] for waiver, and their inclusion in the rules without any attempt to rank, order, or weight them is, at best, simply redundant. Indeed, this catalogue of factors allows juvenile court judges to retain their wide and virtually unreviewable discretion in evaluating the significance of the various

517. MINN. R.P. JUV. CT. 32.05(2).

518. These criteria largely are drawn from the eight factors announced by the United States Supreme Court in Kent v. United States, 383 U.S. 541, 566-67 app. (1965), quoted *supra* note 501, and the six considerations listed by the Minnesota Supreme Court in State v. Hogan, 297 Minn. 430, 438, 212 N.W.2d 664, 670 (1973), quoted *supra* note 507. Subsequent Minnesota cases generally have echoed these factors. *See, e.g., In re* Welfare of S.R.J., 293 N.W.2d 32, 35 (Minn. 1980) (citing *Hogan* factors); *In re* Welfare of K.P.H., 289 N.W.2d 772, 725 (Minn. 1980) (same); *In re* Welfare of W.J.R., 264 N.W.2d 391, 393 (Minn. 1978) (extensive prior offenses relevant to public safety determination); *In re* Welfare of J.B.M., 263 N.W.2d 74, 75 (Minn. 1978) (considering extensive record of assaultive and violent behavior); State v. Duncan, 312 Minn. 17, 22-25, 250 N.W.2d 189, 194-96 (1977) (reference based on aggravated robbery); *In re* Welfare of L.Q.S., 309 Minn. 78, 91-92, 244 N.W.2d 30, 40 (1976) (juvenile's rejection of treatment justifies reference); *cf. In re* Welfare of Dahl, 278 N.W.2d 316, 321 (Minn. 1979) (*Hogan* factors, although relevant, are not conclusive); *In re* Welfare of J.E.C., 302 Minn. 387, 394-98, 225 N.W.2d 245, 251-52 (1975) (unavailability of adequate treatment does not per se justify reference).

519. *See* MINN. STAT. § 260.125(3)(1) (1982) (factors determining suitability for reference include age, seriousness of offense, manner of offense, and history of repeated offenses).

criteria and making the ultimate dispositional decision. As a study of such catalogues has noted, "Collectively, 'lists' of this length rarely serve to limit discretion or regularize procedure. By giving emphasis to one or two of the guidelines, a judge can usually justify a decision either way."[520]

Commentators concerned about excessive judicial discretion have emphasized that "waiver of juvenile court jurisdiction requires a central guiding principle."[521] The catalogue of miscellaneous factors promulgated by the Minnesota Supreme Court provides neither a "central guiding principle" nor much practical guidance to juvenile court judges struggling with this difficult sentencing decision. Instead, Rule 32's emphasis on vague, discretionary, and ultimately unquantifiable factors simply compounds all the preexisting problems of the process and submits the most important dispositional decision in the juvenile court to the subjective reaction of each individual juvenile court judge. Rather than maximizing discretion, the Minnesota Supreme Court would have been much better advised to reinforce the legislature's own "just deserts" philosophical sentencing preferences through greater emphasis on offense criteria. By failing to do so, the court endorses a sentencing philosophy that has been legislatively repudiated for adult offenders and subjects juvenile offenders to a much less "just" dispositional process.[522]

IX. CONCLUSION

The decades since *Gault* have witnessed a substantial procedural convergence between juvenile courts and adult criminal courts. The recent Rules of Procedure for Juvenile Court promulgated by the Minnesota Supreme Court reflect the ex-

520. TWENTIETH CENTURY FUND, TASK FORCE ON SENTENCING POLICY TOWARDS YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 56 (1978).

521. *Id.* at 57; *see also* Whitebread & Batey, *The Role of Waiver in the Juvenile Court*, in READINGS IN PUBLIC POLICY, *supra* note 502, at 207, 211 (waiver decisions historically have been made in atmosphere of informal procedure and unfettered discretion); Zimring, *Notes Toward a Jurisprudence of Waiver*, in READINGS IN PUBLIC POLICY, *supra* note 502, at 193, 194-95 (discretion in waiver decision inevitable absent legislative and judicial agreement on substantive standards).

522. *See, e.g.*, SUPREME COURT JUVENILE JUSTICE STUDY COMMISSION, REPORT TO THE MINNESOTA SUPREME COURT 71-73 (1976) (documenting enormous urban/rural disparities in the seriousness of the present offenses and prior records of youths waived in different counties in the state); *see also* D. HAMPARIAN, *supra* note 502, at 205 (reporting that county-by-county variations in waiver decisions throughout the country cannot be accounted for by any objective or offense criteria).

tent to which many of the 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 also reflect the attenuation between the court's therapeutic mission and its social control functions, which has increased as the relative emphases on rehabilitating offenders and protecting the public have shifted.[523] The many instances in which the Minnesota Supreme Court chose to treat juvenile offenders procedurally like adult criminal defendants is one aspect of this process.

Despite the criminalization of the juvenile court, it remains nearly as true today as two decades ago that "the child receives the worst of both worlds: that [the child] gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[524] This Article has 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. 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 the necessary prerequisite to the invocation of every other procedural safeguard. Similarly, preventive detention, deplorable in its own right, further disadvantages a youth at adjudication and disposition. The inadequate screening and charging practices in juvenile court result in more youths being drawn more deeply into the process. The absence of counsel to challenge deficient petitions leads many youths to admit allegations that could not be proved. Combining the suppression hearing with the trial on the merits is also a highly prejudicial practice that increases the likelihood of erroneous determinations of guilt. The denial of jury trials and public trials raises troubling questions about the factual accuracy of delinquency adjudications. At the same time, analysis of sentencing practices and condi-

523. *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 81 (1967) (observing that protection of the community is the guiding consideration for a court dealing with threatening conduct); JUVENILE DELINQUENCY AND YOUTH CRIMES, *supra* note 30, at 2 (proposing that adjudication and disposition of juvenile offenders should be recognized as expressing society's claim to self-protection rather than being solely rehabilitative).

524. Kent v. United States, 383 U.S. 541, 556 (1966).

tions of institutional confinement indicates 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. Although this Article has analyzed these procedural deficiencies separately, their prejudicial consequences are cumulative—the whole is far worse than the sum of its parts.

In promulgating its Rules of Procedure, the Minnesota Supreme Court provided 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, the court increased the likelihood that juveniles will continue to "receive the worst of both worlds" by treating juvenile offenders just like adult criminal defendants when formal equality redounds to their disadvantage and yet providing less effective juvenile court procedures when those procedural deficiencies redound to the advantage of the state. At a number of critical junctures, the court had the option of promulgating per se rules and providing real substantive guidance but chose instead to encourage unstructured and discretionary decision making. The most fundamental shortcoming of the court's entire endeavor was its subordination of the rule of law to the discretion of each juvenile court judge.[525]

The court's policy choices also reflect a basic philosophical ambivalence about the continued role of the juvenile court. As juvenile courts become increasingly criminalized and converge with their adult counterparts, there may be little reason to maintain a separate juvenile criminal court whose sole distinguishing characteristic is its persisting procedural deficiencies.[526] This is a philosophical issue that cannot be answered by reference to simplistic treatment versus punishment formulations, since there are no practical or operational differences between the two—"sometimes punishment is treatment."[527]

525. In this respect, the value and policy choices embodied in the Court's Rules of Procedure are those of Packer's Crime Control Model rather than those of the Due Process Model. *See supra* note 88.

526. For articles discussing whether there still is any reason for maintaining a separate juvenile court system, see, e.g., Feld, *supra* note 35; McCarthy, *Should Juvenile Delinquency Be Abolished?*, 23 CRIME & DELINQ. 196 (1977); McCarthy, *supra* note 87; Wizner & Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

527. *See supra* note 433 and accompanying text.

If the fundamentally criminal character of juvenile court proceedings is conceded, perhaps the strongest argument that can be advanced for its preservation is that the sentences a juvenile delinquent receives are typically shorter than those received by adult felony offenders for comparable crimes. It is highly desirable that young offenders have an opportunity to survive adolescence with their life chances intact, and this policy goal is threatened by the draconian sentences frequently inflicted on eighteen-year-old "adults." Several commentators have urged that developmental differences render youths less culpable or criminally responsible than their adult counterparts, and the common law mens rea infancy defense and "diminished responsibility" doctrines provide a conceptual justification for a separate juvenile court.[528] Shorter sentences for reduced culpability is a much more modest justification for the juvenile court than those advanced by the Progressive child savers and recognizes the punitive realities of juvenile court intervention. Recognizing that punitive reality, however, carries with it a concomitant obligation to provide appropriate procedural safeguards, since "the condition of being a [child] does not justify a kangaroo court."[529]

If full procedural parity is afforded young offenders, then the *McKeiver* Court's fear of sounding the death-knell of the juvenile court[530] could well be realized. From both juveniles' and society's point of view, however, abolishing the juvenile court's jurisdiction over criminal and noncriminal misconduct may be desirable. A therapeutic "alternative purpose" is an untenable justification for this coercive institution. If shorter sentences are the primary rationale for the current juvenile court, providing youths with fractional reductions of adult sentences could just as easily meet that goal.[531] Providing for the expunction of

528. *See, e.g.*, Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 664-74 (1970); McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REF. 181, 214-16 (1977); Walkover, *supra* note 416, at 533-47; Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DEN. L.J. 485, 495-501 (1983). *See generally* F. ZIMRING, CONFRONTING YOUTH CRIME 66-67 (1978) (immaturity is widely held to limit responsibility for one's behavior).

529. *In re* Gault, 387 U.S. 1, 28 (1967).

530. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

531. For example, a 14-year-old might receive 33/50% of the adult penalty, a 16-year-old 66/75%, and an 18-year-old the full penalty, which presently is the case. For youths below the age of 14, the common law mens rea infancy defense probably would acquire new vitality. *See supra* note 528 and accompanying text. This proposal for fractional reductions can be made only against the backdrop of realistic, humane, and determinate adult sentencing practices. Adult presumptive sentences in Minnesota are specified in terms of months

criminal records following the successful completion of a sentence could afford equivalent relief from an isolated youthful folly.[532] Revitalizing the common law infancy mens rea defense could emphasize a youth's lack of criminal responsibility at least as much as does the current juvenile court.[533] Trying young people in criminal courts with full procedural safeguards does not necessarily require sentencing them to adult jails and prisons. The existing training schools and institutions assure the availability of age-segregated dispositional facilities, and insisting explicitly on humane conditions of confinement could do at least as much to improve the lives of incarcerated youths as has the "rehabilitative ideal."[534]

Although it is possible to provide alternative safeguards for children, the case for abolishing the juvenile court rests on the experience of two decades of procedural reform and "constitutional domestication." The juvenile court has demonstrated a remarkable ability to deflect, co-opt, and absorb ameliorative reform virtually without institutional change. Abolishing the juvenile court would shift an enormous volume of cases into an already overworked and inadequate adult criminal process. Overloading the criminal justice system would force it to rationally allocate scarce social control resources. This should focus those scarce resources on the small proportion of serious and chronic young offenders and decriminalize the "kid stuff" that is the current grist of the juvenile court mill. This, in turn, would provide a real moratorium for youthful deviance and allow most young people to survive adolescence with their life chances intact.

---

rather than years, and "truth in sentencing" prevails. MINNESOTA SENTENCING GUIDELINES, *supra* note 448, at IV (sentencing grid); *see* Knapp, *supra* note 512, at 239, 243; Von Hirsch, *supra* note 512, at 188-89, 191-92. Not only are Minnesota sentences realistic and determinable in advance, but Minnesota has one of the lowest rates of incarceration of any state in the nation. *See* BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1983, at 2 (1984).

532. *See* Feld, *supra* note 35, at 233-35.

533. *See supra* note 528 and accompanying text.

534. *Cf. supra* notes 456-72 and accompanying text (current inadequate conditions of juvenile confinement); *see also* B. FELD, *supra* note 457, at 197-205 (concluding that a primary goal of correctional programs must be the minimization of brutalization and victimization of inmates).