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Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions

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I. INTRODUCTION

The adult criminal justice system presumes responsible actors who make blameworthy choices and punishes those actors in proportion to culpability and the gravity of the offense.[1] By contrast, the juvenile justice system is committed to a "rehabilitative ideal" and individualized treatment of the offender.[2] At least in theory, the best

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1. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

The criminal law jurisprudence reflected in the works of Hart, Morris, and Packer, upon which this Article draws heavily, accepts culpability as a limiting factor on the imposition of penalties and utility as a justification for the deliberate infliction of punishment on blameworthy criminal actors. *See* N. MORRIS, *supra* at 58-84; H. PACKER, *supra* at 62-70. Rehabilitation is rejected as a justification for penal intervention because social change cannot be achieved consistently enough to warrant granting administrators the extensive discretion associated with therapeutic justice and because danger for abuse of discretion exists where administrators are permitted to deal with offenders differently on the basis of assumed, but empirically undemonstrated, differences. *See generally* N. MORRIS, *supra* at 14-20; notes 50-62 *infra* and accompanying text. The rejection of rehabilitation as a purpose for intervention does not, of course, preclude efforts at voluntary offender change. Incapacitation is also rejected as a justification for penal intervention because predictions of future conduct are unreliable and may lead to overincarceration. *See* notes 79-87 *infra* and accompanying text.

2. *See, e.g.*, Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 169:

> [T]he reformers generally rejected deterrence and retribution as adequate notions to justify criminal sanctions. A criminal law based on such principles had failed to suppress crime and was cruel to individuals because of its failure to individualize treatment. Certainly such a harsh, poorly conceived system should no longer be applied to children . . . . The rules of criminal responsibility, based on what seemed to be an outmoded conception of "free will," were thought unsuited to the progress appropriate to the new century,

interests of the child are paramount, and the offense is accorded little significance since it provides scant insight into the social or psychological needs of the individual offender. At a minimum, the existence of a distinct system for dealing with juvenile offenders[3] reflects a societal consensus that youthful law violators should be treated differently from adult offenders because juveniles are both less responsible for their delicts and more responsive to nonpunitive intervention.[4]

At the gateway between the more deterministic and rehabilitative predicates of the juvenile justice process and the free will and punishment assumptions of the adult criminal justice system is a mechanism for transferring juvenile offenders for adult prosecution.[5]

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and certainly could have no proper application to children . . . .

Children were considered educable and reformable.

See generally F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 25-41 (1964).

3. There have been conflicting interpretations as to the development of the juvenile justice system. *See, e.g.*, A. PLATT, THE CHILDSAVERS (1969); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

4. For discussions of various aspects of juvenile jurisprudence and the doctrine of *parens patriae*, see Allen, *The Juvenile Court and the Limits of Juvenile Justice*, 11 WAYNE L. REV. 676 (1965); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 9-10; Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

The doctrine of *parens patriae* has been invoked to justify the "civil" nature of the juvenile court, its less formal procedures, and the role of state intervention as benevolent and therapeutic rather than punitive. As the Supreme Court said in Kent v. United States, 383 U.S. 541, 554-55 (1966),

> [t]he Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.

5. The mechanism for removing juvenile offenders from the jurisdiction of the juvenile court for prosecution as adult offenders is known by a variety of terms, including reference or certification for adult prosecution, waiver, decline, or transfer of juvenile court jurisdiction. The essence of the procedure is movement from a juvenile to an adult forum. Regardless of the local terminology, the mechanism renders a chronological juvenile vulnerable to criminal prosecution as an adult.

Virtually every jurisdiction provides some mechanism to prosecute juveniles in adult criminal proceedings. *See* 18 U.S.C. § 5032 (1976); ARIZ. CONST. art. 6, § 15; ALA. CODE tit. 12, § 15-34 (1977); ALASKA STAT. § 47.10.060 (1975 & Supp. 1977); ARK. STAT. ANN. §§ 45-417, -420 (1977); CAL. WELF. & INST. CODE §§ 707-707.4 (West Supp. 1978); COLO. REV. STAT. §§ 19-1-104, -3-108 (1973 & Supp. 1976); CONN. GEN. STAT. ANN. §§ 51-307 to -308 (West Special Pamphlet 1978) (effective July 1, 1978); DEL. CODE ANN. tit. 10, §§ 938-939 (1975 & Supp. 1977); D.C. CODE § 16-2307 (1973); FLA. STAT. §§ 39.02(5), .09(2) (1975); GA. CODE ANN. § 24A-2501 (1976); HAW. REV. STAT. § 571-22 (1976); IDAHO CODE § 16-1806 (Supp. 1977); Act of Sept. 20, 1977, § 1, ILL. ANN. STAT. ch. 37, § 702-7 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1977); IOWA CODE §§ 232.72-.73 (1977); KAN. STAT. ANN. § 38-808 (Supp. 1977); KY. REV. STAT. § 208.170 (1977); LA. REV. STAT. ANN. § 13:1571.1 (West Supp. 1978);

Although the juvenile court attempts to rehabilitate all the young offenders appearing before it, a small but significant proportion of miscreant youths resist its benevolent efforts. These are typically older delinquents, nearing the maximum age for juvenile court jurisdiction.[6] They are frequently recidivists who have not responded to prior intervention and for whom successful treatment during their minority may not be feasible.[7] Despite their chronological minority, these delinquents are perceived as being as mature and sophisticated in the conduct of criminal activity as adult offenders.[8] Moreover, they

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ME. REV. STAT. ANN. tit. 15, § 2611(3) (West Supp. 1975); MD. CTS. & JUD. PROC. CODE ANN. § 3-817 (Supp. 1977); MASS. ANN. LAWS ch. 119, § 61 (Law. Co-op. Supp. 1977); MICH. COMP. LAWS ANN. § 712A.4 (West Supp. 1977); MINN. STAT. § 260.125 (1976); MISS. CODE ANN. § 43-21-31 (1972); MO. REV. STAT. § 211.071 (1969); MONT. REV. CODES ANN. § 10-1229 (Cum. Supp. 1977); NEB. REV. STAT. § 43-202.01 (Cum. Supp. 1976); NEV. REV. STAT. § 62.080 (1977); N.H. REV. STAT. ANN. § 169:21 (1964); N.J. STAT. ANN. § 2A:4-48 (West Supp. 1977); N.M. STAT. ANN. §§ 13-14-27 to -27.1 (1976); N.C. GEN. STAT. § 7A-280 (1969); N.D. CENT. CODE § 27-20-34 (1974 & Supp. 1977); OHIO REV. CODE ANN. § 2151.26 (Page 1976); OKLA. STAT. ANN. tit. 10, § 1112 (West Supp. 1977); OR. REV. STAT. § 419.533 (1977); PA. STAT. ANN. tit. 11, § 50-325 (Purdon Supp. 1977); R.I. GEN. LAWS § 14-1-7 (Supp. 1977); S.C. CODE § 14-21-10(C) (Law. Co-op. Supp. 1977); S.D. CODIFIED LAWS § 26-11-4 (Supp. 1977); TENN. CODE ANN. § 37-234 (1977); TEX. FAM. CODE ANN. tit. 3, § 54.02 (Vernon 1975 & Supp. 1978); UTAH CODE ANN. § 78-3a-25 (1977); VT. STAT. ANN. tit. 33, § 635 (Supp. 1977); VA. CODE §§ 16.1-269 to -270 (Supp. 1977); WASH. REV. CODE § 13.04.120 (1974); W. VA. CODE § 49-5-10 (Supp. 1977); WIS. STAT. § 48.18 (1975); WYO. STAT. § 14-115.38 (Supp. 1975); ARIZ. R.P. JUV. CT. 14(b).

New York has no provision for juvenile transfer. However, it sets a relatively low maximum age, sixteen, for juvenile court jurisdiction and has youthful offender sentencing provisions for sixteen- to eighteen-year-old offenders sentenced by the adult court. *See* N.Y. CRIM. PROC. LAW § 720.10(1) (McKinney 1971); N.Y. FAM. CT. ACT §§ 712-713 (McKinney 1975 & Supp. 1977).

6. *See, e.g.*, Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 592 (1968); Note, *Problem of Age and Jurisdiction in the Juvenile Court*, 19 VAND. L. REV. 833, 858 (1966); notes 189-90 *infra* and accompanying text.

7. *See* Keiter, *Criminal or Delinquent? A Study of Juvenile Cases Transferred to the Juvenile Court*, 19 CRIME & DELINQUENCY 528 (1973); Schornhorst, *supra* note 6, at 595. Interestingly, in some jurisdictions, treatment of a youth may actually require adult prosecution as a condition precedent. Under the California Youth Authority provisions, for example, a minor adjudicated as a juvenile must be discharged by age 21 or, in some circumstances, age 23, even though he might respond favorably to additional intervention. *See* CAL. WELF. & INST. CODE § 1769 (West Supp. 1978). On the other hand, if the same minor is waived and tried as an adult, he may be committed to the Youth Authority until age 25, thereby assuring an additional two to four years of treatment. *See* CAL. WELF. & INST. CODE § 1771 (West 1972); Note, *Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision*, 23 U.C.L.A. L. REV. 988, 1007-08 (1976).

8. *See* Sargent & Gordon, *Waiver of Jurisdiction: An Evaluation of the Process in the Juvenile Court*, 9 CRIME & DELINQUENCY 121, 122-23 (1963); Stamm, *Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Adminis-*

may account for a disproportionate amount of the total volume of juvenile crime.[9]

Because of their criminal sophistication and the seriousness of their offenses, the continued presence of these troublesome youths within the juvenile justice system conflicts with the presumed immaturity and lesser culpability of juvenile offenders that justify that system. When a youth, by his behavior, experience, or sophistication, evinces criminal maturity and culpability, the justification for rehabilitative juvenile intervention is obviated, and the legitimacy of a retributive sanction is revived. Moreover, it is argued, in light of their persistent delinquencies, further efforts to rehabilitate these hard-core offenders could entail a misallocation of scarce treatment resources vis-à-vis other, more tractable juvenile offenders. It is also suggested that retaining these individuals within the juvenile justice system might have a negative influence on the less criminally sophisticated youths with whom they are housed.[10]

Finally, there is the political reality that highly visible, serious offenses evoke community outrage or fear that only the punitive sanction of an adult conviction can mollify.[11] The availability of a mechanism for prosecuting the hard-core youthful offender as an adult is thus an important safety valve, permitting the expiatory sacrifice of some youths to quiet political and community clamor and to preserve a more benign system for those remaining.[12] In the absence of transfer

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tration of Justice, and a Proposal for the Reform of Kentucky Law, 62 KY. L.J. 122 (1973).

9. *See, e.g.*, HENNEPIN COUNTY OFFICE OF PLANNING AND DEVELOPMENT & COMMUNITY HEALTH AND WELFARE COUNCIL, THE VIOLENT AND HARDCORE JUVENILE OFFENDER IN HENNEPIN COUNTY 4-13 (rev. ed. 1976) [hereinafter cited as HENNEPIN COUNTY STUDY]; M. WOLFGANG, R. FIGLIO, & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 88 (1972) [hereinafter cited as WOLFGANG, FIGLIO, & SELLIN] (reporting that eighteen percent of the delinquents in the birth cohort studied accounted for over half of the total delinquencies of that cohort). *See also* J. PETERSILIA, P. GREENWOOD, & M. LAVIN, CRIMINAL CAREERS OF HABITUAL FELONS (1977); J. WILSON, THINKING ABOUT CRIME (1975).

10. *See* Note, *Youthful Offenders and Adult Courts: Prosecutorial Discretion v. Juvenile Rights*, 121 U. PA. L. REV. 1184 (1973).

11. *See* Sargent & Gordon, *supra* note 8, at 125-26; Stamm, *supra* note 8, at 155; Comment, *Representing the Juvenile Defendant in Waiver Proceedings*, 12 ST. LOUIS U.L.J. 424, 437 (1968). One writer has observed,

> Community fear and outrage in the wake of dramatic increases in violent crimes by juveniles as well as the influence of "law and order" political leaders are undeniably factors which intrude upon the fitness decisions of the juvenile courts. This is true whether a judge shares public sentiments or simply seeks to divert pressure from the entire juvenile justice system by sacrificing the most serious of delinquents through transfer to the criminal courts.

Note, *supra* note 7, at 1008-09 (footnotes omitted).

12. The "safety valve" function of adult prosecution as a means of relieving the

procedures, the pressures to lower the maximum age of juvenile court jurisdiction could be almost irresistible.[13] While lowering the maximum age would reach most of these older, sophisticated juvenile offenders, it would also sweep many youths who might be rehabilitated (or who perhaps are simply less culpable) into the adult criminal process.

Thus, the necessity for creating a transfer mechanism to deal with the serious juvenile offender is obvious. Less obvious are who should decide whether a juvenile offender is to be prosecuted as an adult and on what basis that decision should be made. Resolution of these questions is complicated by the fact that the decision to transfer the difficult juvenile offender to the adult justice system simultaneously raises virtually every other issue associated with juvenile justice, including questions about the efficacy of treatment for these or any offenders and questions about the exercise of broad discretion in the transfer process with the attendant dangers of abuse or discrimination. Furthermore, transferring a juvenile for adult prosecution constitutes an admission of failure by the juvenile system, an admission that, for a system predicated on the "rehabilitative ideal," is difficult, indeed dangerous.[14]

The transfer problem has been as vexatious in Minnesota as in other jurisdictions. In recent years, a number of adult reference cases

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pressures imposed on the juvenile system by the "intractables" has been adverted to by a number of commentators. *See, e.g.,* Sargent & Gordon, *supra* note 8, at 126; Stamm, *supra* note 8, at 147; Note, *supra* note 7, at 1008.

13. It is perhaps instructive that in New York, a jurisdiction without a transfer provision, sixteen is the maximum age for juvenile court jurisdiction. *See* note 5 *supra.* Most jurisdictions with transfer provisions extend juvenile court jurisdiction to age eighteen.

14. *See* Note, *supra* note 7, at 992 ("The [transfer] determination constitutes an institutionalized admission of the system's failure, with the minor often being made to suffer the consequences of inadequate state provision for rehabilitative resources.") (footnotes omitted).

Stamm describes the availability of transfer as a paradox, an internal contradiction within a system committed to rehabilitation but unable to realize that commitment:

> Any transfer of jurisdiction strikes at the most basic philosophical elements of the juvenile court system, for it is an admission that the system cannot or does not want to try to rehabilitate one member of the class of individuals for whom it was created. The very existence of juvenile court is predicated upon recognition of the fact that a child is capable of rehabilitation no matter what he may have done and that he has a *right* to expect no less than that society, through the special establishment of juvenile court, will seek to identify and treat the root causes of the trouble in which he is involved rather than seek retribution against him.

Stamm, *supra* note 8, at 145 (emphasis in original). The failure of rehabilitation efforts may often result from the lack of intervention at a time when it might have been more effective.

have reached the Minnesota Supreme Court,[15] and in response to a felt need to reexamine the theories on which juvenile law is based, the court established the Juvenile Justice Study Commission.[16] Several bills have been introduced in the legislature,[17] and the Governor has appointed a special advisory committee to the Department of Corrections.[18] Finally, public discussion and debate about the appropriate response to youthful criminality has taken place outside government.[19]

This Article and the appended bill propose a marked departure from present approaches to the transfer dilemma. The Article begins by critically examining the present judicial waiver process. Drawing on social science research and empirical evaluations of judicial waiver administration in Minnesota and elsewhere, it contends that judicial waiver statutes require juvenile courts to make individualized determinations as to a youth's amenability to treatment and the danger to society posed by the youth's retention within the juvenile system that, using current methods of clinical prediction, simply cannot be made with an acceptable degree of accuracy. Moreover, because judicial waiver statutes typically give judges broad discretion in making transfer decisions, such statutes invite abuse of discretion and discriminatory application, thus undermining the fairness of the judicial process.

The Article next examines alternative methods of identifying juvenile offenders who should appropriately be processed through the adult criminal justice system. While it is not currently possible to predict clinically a youth's amenability to treatment or dangerousness, actuarial methods based on present offense and past record can be used to identify in rough terms those juveniles likely to recidivate

15. *See, e.g.*, State v. Duncan, 250 N.W.2d 189 (Minn. 1977); *In re* I.Q.S., 244 N.W.2d 30 (Minn. 1976); J.E.C. v. State, 302 Minn. 387, 225 N.W.2d 245 (1975).

16. Address by Chief Justice Robert Sheran, Annual Meeting of the Minnesota State Bar Association (June 25, 1976) (The State of the Judiciary—1976).

17. *See, e.g.*, H.F. 1277, 70th Minn. Legis., 1977 Sess.; H.F. 388, 70th Minn. Legis., 1977 Sess.

18. *See* Address by Governor Rudy Perpich, Rochester, Minnesota (Feb. 15, 1977): "At my request the Commissioner of Corrections has appointed a committee of legislators, police and interested citizens to develop a concrete proposal to identify and control these delinquents. Their recommendations will be the basis for more specific legislative proposals in the near future." *See generally* GOVERNOR'S COMMISSION ON CRIME PREVENTION AND CONTROL, ALTERNATIVE DEFINITIONS OF "VIOLENT" OR "HARDCORE" JUVENILE OFFENDERS (1977) [hereinafter cited as GOVERNOR'S COMMISSION STUDY]. The Governor's Commission on Crime Prevention and Control was replaced by the Crime Control Planning Board. *See* Act of May 25, 1977, ch. 260, § 2, 1977 Minn. Laws 570.

19. *See, e.g.*, CENTER FOR NEW DEMOCRATIC PROCESSES, THE SERIOUS JUVENILE OFFENDER IN MINNESOTA (1977); CITIZENS LEAGUE, REPORT—SUPPRESSING BURGLARY (1976); *Grand Jurors Back New Plan for Juveniles*, Minneapolis Tribune, Mar. 5, 1974, § A, at 1, col. 4.

and, accordingly, to pose a threat to public safety. The Article contends that a legislatively created waiver mechanism that automatically excludes certain youths from the juvenile justice system on the basis of present offense and past record will not only be more accurate in identifying those who should be transferred, but, in eliminating judicial discretion in the transfer decision, will minimize the dangers of inequity and discrimination. The mechanism proposed is a matrix that uses various combinations of present offense and past record to make the waiver decision.

Finally, the Article explores, in a preliminary manner, some of the advantageous changes in the administration of juvenile justice that might be expected to flow from adoption of the proposed waiver mechanism.

II. WAIVER MECHANISMS

There are two principal mechanisms for transferring juvenile offenders to the adult criminal justice process.[20] The more common of

20. *See* Stamm, *supra* note 8, at 138; Whitebread & Batey, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project,* 63 VA. L. REV. 221 (1977); Note, *supra* note 4. A third mechanism for removing serious offenders from the juvenile system is known as prosecutorial waiver. *See* Mlyniec, *Juvenile Delinquent or Adult Convict—Prosecutor's Choice,* 14 AM. CRIM. L. REV. 29 (1976); Stamm, *supra* note 8, at 138. Although legislative waiver, which mandates adult prosecution of juveniles charged with certain offenses, is sometimes referred to as prosecutorial waiver, "pure" prosecutorial waiver vests the prosecutor's office with discretion in making the transfer decision. *See, e.g.,* IOWA CODE § 232.73 (1977); NEB. REV. STAT. § 43-202.01 (Cum. Supp. 1976). *See generally* Comment, *Due Process, Equal Protection and Nebraska's System Allowing the County Prosecutor to Determine Whether a Juvenile Will Be Tried as an Adult,* 7 CREIGHTON L. REV. 223 (1974). Variations on the prosecutorial waiver mechanism exist in a number of states. For example, in Florida, the prosecutor's decision to seek a grand jury indictment rather than filing a juvenile court petition can result in a youth's prosecution as an adult. *See* Johnson v. State, 314 So. 2d 573 (Fla. 1975); FLA. STAT. § 39.02(5)(c) (1975).

Because the prosecutor's discretion is unreviewable and there is a general absence of guidelines for making these jurisdictional determinations, prosecutorial waiver has been criticized extensively. *See, e.g.,* Mlyniec, *supra*; Note, *supra* note 10. Every objection to judicial waiver that will be developed in this Article is equally applicable to prosecutorial waiver decisions. But because this Article focuses on the differences between the juvenile and adult systems, and their respective emphases on offenders and offenses, and because those emphases are reflected in the differences between judicial and legislative waiver, prosecutorial waiver will be analyzed only as an adjunct to legislative waiver provisions.

Fortunately, prosecutorial waiver is the least common transfer mechanism, and its use appears to be in disfavor. Federal delinquency proceedings, which formerly relied on prosecutorial waiver, now employ judicial waiver to deal with serious juvenile offenders. *See* 18 U.S.C. §§ 5031-5032 (1976) (originally enacted as Federal Juvenile Delinquency Act, ch. 645, 62 Stat. 857 (1948)). Under the former provisions, acts punishable by death or life imprisonment were excluded from juvenile court jurisdic-

these—the judicial waiver—involves a hearing at which a juvenile court judge transfers a juvenile on a discretionary basis, considering primarily the youth's amenability to treatment and the public safety. The second mechanism—legislative waiver—involves the legislatively imposed age and offense limitations on juvenile court jurisdiction. By excluding certain categories of offenses, the legislature automatically places youths charged with those offenses into the adult criminal courts.[21]

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tion, and the Attorney General had discretion to transfer any youth not otherwise excluded. *See* Cox v. United States, 473 F.2d 334 (4th Cir.), *cert. denied*, 414 U.S. 869 (1973). Under the revised statute, a judicial transfer hearing is mandated.

21. The procedural and substantive issues raised by prosecution of juvenile offenders as adults have been analyzed in the following articles: Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts: A Policy Statement*, 8 CRIME & DELINQUENCY 3 (1962); Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113; Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 HOUS. L. REV. 709 (1972); Keiter, *supra* note 7; Mountford & Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 U. KAN. L. REV. 55 (1969); Paulsen, *supra* note 2; Resteiner, *Delinquent or Criminal: The Problems of Transfers of Jurisdiction*, 24 JUV. JUST. 2 (1973); Sargent & Gordon, *supra* note 8; Schornhorst, *supra* note 6; Speca & White, *Variations and Trends in Proposed Legislation on Juvenile Courts*, 40 U. MO. KAN. CITY L. REV. 129 (1972); Stamm, *supra* note 8; Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since* Kent v. United States, 26 DE PAUL L. REV. 23 (1976); Whitebread & Batey, *supra* note 20; Note, *Sending the Accused Juvenile to Adult Criminal Court: A Due Process Analysis*, 42 BROOKLYN L. REV. 309 (1975) [hereinafter cited as *Due Process Analysis*]; Note, *supra* note 4; Note, *Juvenile Law: Decision to Refer Juvenile Offenders for Criminal Prosecutions as Adults to Be Made on Basis of "State of the Art" of Juvenile Corrections*, 60 MINN. L. REV. 1097 (1976) [hereinafter cited as *Juvenile Law*]; Note, *Reference for Prosecution in Juvenile Court Proceedings*, 54 MINN. L. REV. 389 (1969) [hereinafter cited as *Reference for Prosecution*]; Note, *Waiver of Juvenile Jurisdiction and the Hard-Core Youth*, 51 N.D.L. REV. 655 (1975) [hereinafter cited as *Waiver of Jurisdiction*]; Note, *Certification of Minors to the Juvenile Court: An Empirical Study*, 8 SAN DIEGO L. REV. 404 (1971) [hereinafter cited as *Certification of Minors*]; Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 STAN. L. REV. 874 (1972); Note, *supra* note 7; Note, *supra* note 6; Note, *Due Process and Waiver of Juvenile Court Jurisdiction*, 30 WASH. & LEE L. REV. 591 (1973) [hereinafter cited as *Due Process and Waiver*]; Note, *Constitutional Law—Juvenile Waiver Statute—Delegation of Legislative Powers to Judiciary*, 1973 WIS. L. REV. 259 [hereinafter cited as *Juvenile Waiver Statute*]; Comment, *Trial of Juveniles as Adults: Past, Present, and Future*, 21 BAYLOR L. REV. 333 (1969); Comment, *Juvenile Delinquency—Transfer of Juvenile Cases to Adult Courts—Factors to be Considered under the Juvenile Delinquents Act*, 48 CAN. B. REV. 336 (1970); Comment, *supra* note 20; Comment, *Juvenile Transfer in Illinois*, 67 J. CRIM. L. & CRIMINOLOGY 287 (1976); Comment, *Waiver of Jurisdiction in Juvenile Courts*, 30 OHIO ST. L.J. 132 (1969) [hereinafter cited as *Waiver in Ohio*]; Comment, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure*, 40 S. CAL. L. REV. 158 (1967); Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 ST. LOUIS U.L.J. 604 (1972) [hereinafter cited as *Juvenile Court Waiver*]; Comment, *Juvenile Court: Due Process, Double Jeopardy and the Florida*

The judicial and legislative mechanisms reflect different ways of asking and answering the same questions: who are the serious, hard-core youthful offenders, on what basis are they identified, and how shall the juvenile and adult systems respond to them? Each mechanism emphasizes different information in determining whether certain juvenile offenders should be handled as adults. Judicial waiver, through its focus on the offender, reflects the rehabilitative values of the juvenile court, while legislative exclusion, with its primary emphasis on the offense, reflects the values of the criminal law. Both approaches suffer from the limitations of treatment technology, the inexactitudes of the social sciences, and the inability to make rational and just predictions about future conduct. The thesis of this Article, however, is that a properly constructed legislative matrix, based on combinations of present offense and prior record, will identify hard-core youths more accurately and objectively than does individualized judicial inquiry. Moreover, because of the administrative advantages of such a mechanism, a properly constructed legislative waiver is clearly superior to clinical or judicial prediction.

A. JUDICIAL WAIVER

Because of the significant philosophical differences between the emphasis of the juvenile system on individualized treatment and the emphasis of the adult system on punishment, waiver is the most drastic disposition available to a juvenile court.[22] Although juvenile

Waiver Procedures, 26 U. FLA. L. REV. 300 (1974); Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal,* 114 U. PA. L. REV. 1171 (1966); Comment, *Waiver of Jurisdiction in Wisconsin Juvenile Courts,* 1968 WIS. L. REV. 551 [hereinafter cited as *Waiver in Wisconsin*]; 53 B.U.L. REV. 212 (1973); 22 DRAKE L. REV. 213 (1972).

Virtually all of these commentators support judicial waiver. Judicial waiver has also been universally endorsed by professional organizations and advisory councils. *See, e.g.,* MODEL PENAL CODE § 4.10, Comment (Tent. Draft No. 7, 1957); INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO TRANSFER BETWEEN COURTS (1977) [hereinafter cited as TRANSFER BETWEEN COURTS]; NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 303-05 (1976); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 24-25 (1967) [hereinafter cited as TASK FORCE REPORT].

22. Forty-six states and the federal courts outside of the District of Columbia employ judicial waiver to make some or all transfer decisions. In 28 states and the federal jurisdictions, judicial transfer is the only mechanism for adult prosecution. *See* 18 U.S.C. § 5032 (1976); ARIZ. CONST. art. 6, § 15; ALA. CODE tit. 12, § 15-33 (1977); ALASKA STAT. § 47.10.060 (Supp. 1977); CAL. WELF. & INST. CODE §§ 707-707.1 (West Supp. 1978); HAW. REV. STAT. § 571-22 (1976); IDAHO CODE § 16-1806 (Supp. 1977); Act of Sept. 20, 1977, § 1, ILL. ANN. STAT. ch. 37, § 702-7 (Smith-Hurd Supp. 1978); KAN. STAT. ANN. § 38-808 (Supp. 1977); KY. REV. STAT. § 208.180 (1977); ME. REV. STAT.

court jurisdiction over an adjudicated offender may continue for the duration of his minority, this period is significantly shorter than the sentence of twenty years to life imprisonment that may be imposed if a juvenile is tried as an adult for a serious felony.[23] Moreover, juveniles, unlike adults, enjoy private proceedings, confidential records, and protection from the stigma of a criminal conviction.[24]

In *Kent v. United States*,[25] the Supreme Court concluded that the loss of these special protections through a waiver decision was a "critically important" action that required a hearing, assistance of counsel, access to social investigations and other records, and written findings and conclusions capable of review by a higher court.[26] "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[27] Although *Kent* was decided in the context of a District of Columbia statute, its language, especially when read in conjunction with such subsequent decisions as In re *Gault*,[28] suggests an underlying constitutional basis for requiring that any judicial waiver decision be accompanied by procedural due process.[29] Recently, in *Breed v. Jones*,[30]

ANN. tit. 15, § 2611(3) (West Supp. 1975); MASS. ANN. LAWS ch. 119, § 61 (Law. Co-op. Supp. 1977); MICH. COMP. LAWS ANN. § 712A.4 (West Supp. 1977); MINN. STAT. § 260.125 (1976); MO. REV. STAT. § 211.071 (1969); MONT. REV. CODES ANN. § 10-1229 (Cum. Supp. 1977); N.J. STAT. ANN. § 2A:4-48 (West Supp. 1977); N.M. STAT. ANN. §§ 13-14-27 to -27.1 (1976); N.D. CENT. CODE § 27-20-34 (1974 & Supp. 1977); OHIO REV. CODE ANN. § 2151.26 (Page 1976); OKLA. STAT. ANN. tit. 10, § 1112 (West Supp. 1977); OR. REV. STAT. § 419.533 (1977); S.C. CODE § 14-21-510(C) (Law. Co-op. Supp. 1977); S.D. CODIFIED LAWS § 26-11-4 (Supp. 1977); TENN. CODE ANN. § 37-234 (1977); TEX. FAM. CODE ANN. tit. 3, § 54.02 (Vernon 1975 & Supp. 1978); UTAH CODE ANN. § 78-32-25 (1977); WASH. REV. CODE ANN. § 13.04.120 (1962); WIS. STAT. § 48.18 (1975); ARIZ. R.P. JUV. CT. 14(b).

23. *See, e.g.*, Anderson v. Commonwealth, 465 S.W.2d 70 (Ky. 1971) (life imprisonment for sixteen year old); Tucker v. State, 482 P.2d 939 (Okla. Crim. App. 1971) (twenty years for fourteen year old).

24. *See* Kent v. United States, 383 U.S. 541, 556-57 (1966); Schornhorst, *supra* note 6, at 586; Stamm, *supra* note 8, at 143; Note, *supra* note 7, at 995.

25. 383 U.S. 541 (1966).

26. *See id.* at 554-57. *See generally* Paulsen, *supra* note 2.

27. 383 U.S. at 554.

28. 387 U.S. 1 (1967) (extending due process procedural safeguards to the adjudicatory hearing of delinquency proceedings).

29. Schornhorst concludes that *Kent* was a decision of constitutional dimension rather than simply a construction of a District of Columbia statute. *See* Schornhorst, *supra* note 6, at 585-88; *accord, In re* Harris, 67 Cal. 2d 876, 878-79, 434 P.2d 615, 617, 64 Cal. Rptr. 319, 321 (1967) (Traynor, C.J.).

In the aftermath of *Kent*, many states revised their waiver procedures. *See, e.g.*, MONT. REV. CODES ANN. § 10-1229(2) (Cum. Supp. 1977); TEX. FAM CODE ANN. tit. 3, § 54.02(f)(1)-(6) (Vernon 1975).

30. 421 U.S. 519 (1975).

the Supreme Court decided that jeopardy attaches to juvenile court proceedings, thereby barring subsequent criminal reprosecution as an adult,[31] and established a requirement that a state determine whether to transfer an offender before proceeding against him.[32]

With the procedural issues essentially resolved,[33] the most significant remaining controversies concern the substantive bases of waiver and the evidentiary showing required to support a waiver decision. Ultimately, a waiving court must balance the admittedly deleterious consequences to the child against an estimate of the probable success of available treatment alternatives and the potential threat that the child poses to society, but jurisdictions vary both as to the substantive considerations deemed appropriate to a waiver decision and as to the specificity with which these considerations are described.

Although *Kent* was decided on procedural grounds, the Supreme Court, in an appendix to its opinion, indicated some of the substantive criteria that a juvenile court might consider.[34] These factors have

31. *See id.* at 541.

32. *See id.* at 539-40.

33. One unresolved procedural issue concerns the requirement of a probable cause determination prior to transfer. While many jurisdictions require such hearings by statute, *see, e.g.*, ME. REV. STAT. ANN. tit. 15, § 2611(3) (West Supp. 1975), where they are not required, appellate courts have declined to find them constitutionally mandated, *see, e.g.*, Breed v. Jones, 421 U.S. 519, 537-38 (1975); Juvenile v. Commonwealth, 347 N.E.2d 677, 682 (Mass. 1976); State v. Duncan, 250 N.W.2d 189, 197 (Minn. 1977). These courts note, however, that if the present offense provides the primary basis for certification, there must be some procedure for connecting the juvenile with it. The American Bar Association and the Institute of Judicial Administration recommend that such a procedure be required as a prerequisite to waiver. *See* TRANSFER BETWEEN COURTS, *supra* note 21, at 35.

34. Kent v. United States, 383 U.S. 541, 566-67 app. (1966):

> 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 evidence upon which a Grand Jury may be expected to return an indictment . . . .

been adopted by a number of jurisdictions, through either legislation[35] or judicial gloss.[36] In addition, surveys of waiver decisionmaking disclose that a number of seemingly relevant, albeit contradictory, factors are considered.[37] Despite the wealth of criteria, however, the waiver decision appears to be a function of three principal factors: (1) age; (2) the dangerousness of a youth, gauged in terms of (a) seriousness of the present offense and (b) seriousness and persistence of criminal activity as reflected in the prior record; and (3) the youth's treatment prognosis.

With respect to age, a number of judicial waiver statutes provide for a minimum age as a precondition of adult prosecution.[38] The other

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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.

35. *See, e.g.*, TEX. FAM. CODE ANN. tit. 3, § 54.02(f)(1)-(6) (Vernon 1975).

36. *See, e.g.*, Summers v. State, 248 Ind. 551, 561, 230 N.E.2d 320, 325-26 (1967); State v. Smagula, 377 A.2d 608, 610-11 (N.H. 1977); cases cited note 104 *infra*.

37. *See, e.g.*, Advisory Council of Judges, *supra* note 21, at 5; Children's Bureau, U.S. Dep't of Health, Education, and Welfare, *Survey of Juvenile Courts and Probation Services, 1966*, in TASK FORCE REPORT, *supra* note 21, at 78 app. B, table 5; Note, *supra* note 4, at 314-16. *See generally* Schornhorst, *supra* note 6 at 603; Note, *supra* note 7, at 1012; *Juvenile Court Waiver, supra* note 21, at 609-13; Comment, *supra* note 11, at 426; *Waiver in Wisconsin, supra* note 21.

38. Several states permit waiver at any age. *See, e.g.*, ALASKA STAT. § 47.10.060 (1975 & Supp. 1977); MD. CTS. & JUD. PROC. CODE ANN. § 3-807 (Supp. 1977). A majority of states, however, have established a minimum age requirement. *See, e.g.*, Act of Sept. 20, 1977, § 1; ILL. ANN. STAT. ch. 37, § 702-7(3) (Smith-Hurd Supp. 1978) (thirteen years old); IOWA CODE § 232.72 (1977) (at least fourteen at time of conduct charged); KAN. STAT. ANN. § 38-808 (Supp. 1977) (sixteen at time of conduct); LA. REV. STAT. ANN. § 13.1570(A)(5) (West Supp. 1978) (fifteen at time of charge); MINN. STAT. § 609.055 (1976) (at least fourteen at time of conduct); N.C. GEN. STAT. § 7A-280 (1969) (fourteen at time of charge); WIS. STAT. § 48.18 (1975) (sixteen when charged). Several states have different minimum age requirements for nonserious and serious offenses, with a lower minimum age requirement for more serious offenses. *See, e.g.*, GA. CODE § 24A-2501(a)(4) (1976); MO. REV. STAT. § 211.071 (1969). Other states set a minimum age requirement for less serious offenses, but set no age requirements for very serious offenses. *See, e.g.*, KY. REV. STAT. § 208.170(1) (1977); NEB. REV. STAT. § 43-202(3) (Cum. Supp. 1976). Only one state has set a higher minimum age requirement for serious offenses than for less serious offenses. *See* IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1977).

two factors are set forth in waiver provisions with varying degrees of specificity. Some jurisdictions, such as Minnesota, provide only minimal direction to the judiciary, broadly authorizing waiver if a youth is found "not suitable to treatment" or his retention within the juvenile system poses a threat to the "public safety."[39] Other jurisdictions provide greater guidance, directing the judiciary to assess the offender's amenability to treatment within the time remaining for juvenile court jurisdiction,[40] the success of prior treatment efforts,[41] the availability of treatment facilities within the juvenile justice system,[42] or the possibility of civil commitment as an alternative to

39. MINN. STAT. § 260.125(2)(d) (1976) provides that the juvenile court may refer the child for adult prosecution only if it "finds that the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts." *See* MINN. JUV. CT. R. 8-7(2)(a)-(d) (criteria relevant to determining amenability or dangerousness include (1) the type of offense; (2) whether the offense is part of a repetitive pattern; (3) the record of the child; and (4) the relative suitability of programs and facilities available to the juvenile and criminal courts).

Typically, courts have elaborated on these conclusory standards by specifying factors relevant to fitness assessments. For example, in California, factors that "indicate a relatively poor prognosis for rehabilitation [include] the maturity of the individual, numerous prior contacts with the courts, the seriousness of the offense alleged or proved, the youth's attitude toward treatment, and his general behavior pattern as revealed by the probation officer's report." People v. Smith, 5 Cal. 3d 313, 317-18, 486 P.2d 1213, 1216, 96 Cal. Rptr. 13, 16 (1971).

In Minnesota, the supreme court has enumerated some factors that might support a judgment that retaining jurisdiction would not be consistent with public safety. These factors include

> (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).

40. *See, e.g.*, ALASKA STAT. § 47.10.060(d) (Supp. 1977) ("cannot be rehabilitated by treatment under this chapter before he reaches 20 years of age"); N.J. STAT. ANN. § 2A:4-48(c) (West Supp. 1977) ("no reasonable prospects for rehabilitation of the juvenile prior to his attaining the age of majority by use of the procedures, services and facilities available to the court").

41. *See, e.g.*, ALA. CODE tit. 12, § 15-34 (1977) ("[t]he nature of past treatment efforts and the nature of the child's response to such efforts"); DEL. CODE ANN. tit. 10, § 938(c)(4) (Supp. 1977) ("whether the child has previously been subjected to any form of correctional treatment by the Family Court"); TENN. CODE ANN. § 37-234(b)(2) (1977) ("[t]he nature of past treatment efforts and the nature of the child's response thereto").

42. *See, e.g.*, GA. CODE ANN. § 24A-2501(a)(3)(ii) (1976) ("the child is not amenable to treatment or rehabilitation through available facilities"); KAN. STAT. ANN. § 38-808(b)(6) (Supp. 1977) ("whether the child would be amenable to the care, treatment and training program for juveniles available through the facilities of the court"); TENN.

waiver.[43] Several jurisdictions also include a catch-all amenability factor based on the child's demeanor, home environment, living patterns, or attitude.[44] The "public safety," or dangerousness, criterion is sometimes elaborated to require an examination of the circumstances or seriousness of the present offense,[45] the juvenile's prior record,[46] or simply the "public interest."[47] Even those legislatures and courts

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CODE ANN. § 37-234(b)(5) (1977) ("[t]he possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state").

Several commentators have criticized this limitation, noting that it "could provide a convenient subterfuge for those jurisdictions that choose to provide only the most meager resources for treatment and rehabilitation." Stamm, *supra* note 8, at 158; *see* Note, *supra* note 7, at 1004 (footnotes omitted):

> The most serious limitation on the juvenile court's treatment options is an objective lack of resources. State and local governments have been unwilling or unable to devote necessary legislative energies and funds to the task of rehabilitating juvenile offenders. Particularly inadequate are the programs designed to reach so-called "hard-core" delinquents who suffer from serious emotional illnesses. Since amenability to treatment is, by the terms of the fitness statute, dependent upon "available" programs, the juvenile courts have generally been powerless to avoid transfers of juveniles who could be helped were it not for the absence of appropriate rehabilitative programs.

43. *See, e.g.*, ALA. CODE tit. 12, § 15-34(c) (1977) ("When there are grounds to believe that the child is committable to an institution or agency for the mentally retarded or mentally ill, the court shall proceed as provided in section 12-15-70."); TENN. CODE ANN. § 37-234(a)(4)(ii) (1977) ("[t]he child is not committable to an institution for the mentally retarded or mentally ill").

44. *See, e.g.*, ALA. CODE tit. 12, § 15-34(d)(4)-(5) (1977) ("[d]emeanor" and "[t]he extent and nature of the child's physical and mental maturity"); FLA. STAT. § 39.09(2)(c)(6) (1975) ("[t]he sophistication and maturity of the juvenile, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living").

45. *See, e.g.*, FLA. STAT. § 39.09(2)(C)(2)-(3) (1975) ("[w]hether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner" and "[w]hether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted"); Act of Sept. 20, 1977, § 1, ILL. ANN. STAT. ch. 37, § 702-7(3)(a)(2) (Smith-Hurd Supp. 1978) ("whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner"). Some jurisdictions provide for a consideration of these factors by judicial construction. *See* cases cited notes 36 & 39 *supra* & note 104 *infra*.

46. *See, e.g.*, Act of Sept. 20, 1977, § 1, ILL. ANN. STAT. ch. 37, § 702(3)(a)(4) (Smith-Hurd Supp. 1978) ("previous history of the minor"); KAN. STAT. ANN. § 38-808(b)(5) (Supp. 1977) ("record and previous history of the child"); TENN. CODE ANN. § 37-234(b)(1)(1977) ("extent and nature of the child's prior delinquency records"). An extensive record may be relevant as an indicator of both dangerousness and a need for treatment.

47. *See, e.g.*, ALA. CODE tit. 12, § 15-34(d)(6) (1977) ("interests of the community and of the child requiring that the child be placed under legal restraint or discipline"); Act of Sept. 20, 1977, § 1 ILL. ANN. STAT. ch. 37, § 702-7(3)(a)(6) (Smith-Hurd Supp. 1978) ("whether the best interest of the minor and the security of the public may require that the minor continue in custody . . . for a period extending beyond his minority").

that have indicated the factors to be considered in a waiver decision with some degree of precision, have typically enumerated those factors disjunctively, without rank-ordering or assigning controlling weight to any one.[48] Thus, judges are given wide discretion in assigning weight to each of the various criteria.

1. *Amenability to Treatment*[49]

Assessing a youth's amenability to treatment raises two of the most fundamental issues of juvenile jurisprudence: first, are there any coercive intervention strategies that will systematically bring about improved social adjustment in juvenile offenders, and second, if such strategies exist, does a classification or diagnostic basis exist for separating those youths who are amenable to treatment from

48. *See* note 92 *infra*. Some courts have held, however, that certain factors, taken in isolation and without reference to a youth's treatment potential, are insufficient to justify waiver. As the California Supreme Court ruled in Jimmy H. v. Superior Court, 3 Cal. 3d 709, 714, 478 P.2d 32, 35, 91 Cal. Rptr. 600, 603 (1970), "it is clear from the statute that the court must go beyond the circumstances surrounding the offense itself and the minor's possible denial of involvement in such offense." *But see* P.H. v. State, 504 P.2d 837 (Alaska 1972); Mikulovsky v. State, 54 Wis. 2d 699, 708, 196 N.W.2d 748, 753 (1972) (allowing waiver solely on the basis of the seriousness of offense). Minnesota's statute permits waiver if a youth is *either* not amenable to treatment *or* dangerous. Thus, either a treatable youth who is also dangerous or a nondangerous youth who is untreatable may be waived. *See In re* I.Q.S., 244 N.W.2d 30 (Minn. 1976); J.E.C. v. State, 302 Minn. 387, 225 N.W.2d 245 (1975).

49. Amenability to treatment is a common criterion for the transfer decision in those jurisdictions providing for judicial waiver, *see* TRANSFER BETWEEN COURTS, *supra* note 21, at 37, and despite the discretion it generally affords judges, some commentators have argued that amenability is the only proper consideration, *see, e.g.*, Stamm, *supra* note 8, at 137 ("The only legitimate basis for distinguishing among children, for the purpose of determining who will be extended the protections of the juvenile court and who will be denied its regenerative good will, is whether they are amenable to rehabilitation under the aegis of the court's philosophy and resources.") (footnote omitted); *accord*, Mountford & Berenson, *supra* note 21, at 65 (arguing that if a cessation of the child's deviant behavior can be achieved by either imprisonment or rehabilitation, the emphasis of the juvenile codes on the best interests of the child demands the latter).

On the other hand, inquiry into a youth's amenability to treatment may require courts to engage in essentially subjective and often speculative investigations that may reveal information only tangentially related to the decision finally made. *See, e.g.*, Vitiello, *supra* note 21, at 31 (observing that "[i]t is questionable whether 'amenability to treatment' . . . is sufficiently self-defining to provide the juvenile courts with adequate guidelines"). The "amenability" conclusion required is neither clearly nor readily ascertainable: "The statutorily required conclusion of unsuitability to treatment is at best a nebulous concept . . . . [B]ecause of its vagueness, [it] is open to abuse as a convenient rationalization which may allow a court to refer when it desires to do so for a variety of irrelevant or unarticulated reasons." *Reference for Prosecution, supra* note 21, at 405.

those who are not?

The question of "what works"—whether rehabilitation programs can produce lasting change—is currently one of the most controversial issues in penology. Evaluations and reviews of penal programming tend to be skeptical about the availability of a change technology that can consistently and systematically rehabilitate adult or serious juvenile offenders,[50] and one recent review concluded that, "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[51]

There are several possible explanations for this lack of success. If free will and rational calculation are rejected as explanations for crime and delinquency, as they typically are under a rehabilitative premise, a deterministic "something" must be found that causes offenders to violate laws and upon which treatment can operate.[52]

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50. *See, e.g.*, D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964); D. MANN, INTERVENING WITH CONVICTED SERIOUS JUVENILE OFFENDERS (1976); D. WARD, D. WILNER, & G. KASSEBAUM, PRISON TREATMENT AND PAROLE SURVIVAL (1971); L. WILKINS, EVALUATION OF PENAL MEASURES (1969); Adams, *Evaluative Research in Corrections: Status and Prospects*, 38 FED. PROBATION 14 (1974); Fishman, *An Evaluation of Criminal Recidivism in Projects Providing Rehabilitation and Diversion Services in New York City*, 68 J. CRIM. L. & CRIMINOLOGY 283 (1977); Gold, *A Time for Skepticism*, 20 CRIME & DELINQUENCY 20 (1974); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971). It is this empirical reality—the inability to deliver rehabilitative services—that, more than any other factor, prompted the Supreme Court to impose minimum procedural safeguards. *See In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966). Justice Fortas, writing for the majority in *Kent*, observed,

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the state in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id. at 555-56 (footnotes omitted).

51. Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974); *see* D. LIPTON, R. MARTINSON, & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975).

52. Not all forms of treatment rely upon causal explanations as the basis for intervention. Behavior modifications based on learning theory, for example, can ignore the causes of behavior and treat the symptoms, reinforcing or extinguishing the actual behavior. Most forms of rehabilitative treatment, however, are grounded in psychological or sociological processes and rely upon both the existence of causal forces as a source of "differentness" and appropriate forms of intervention to modify or eliminate those forces.

> [T]herapy for correctional "clients" consists of explicit tactics or procedures deliberately undertaken to change those conditions thought to be responsible for the violator's misbehavior. Treatment implies some rationale or causal argument to the effect that the criminal behavior of the individual stems from some particular set of factors or conditions. In turn, the steps which are taken to "change" or rehabilitate the offender are designed to alter some or all of the conditions specified in the treatment rationale as causally responsible for the person's undesirable behavior.[53]

Unfortunately, social scientists have thus far been unable to identify the causal factors that produce criminal behavior. The factors normally associated with "official delinquency"[54]—poverty, low educational attainment, minority group membership—may in fact be correlates of the official response to the offender rather than causal explanations of the behavior itself. When "hidden delinquency"[55] is examined, rather than officially processed delinquents, many of the factors relied upon as causal explanations for delinquency appear to lose their salience. For instance, although juvenile offenders appear to come disproportionately from the lower social classes and minority groups, middle and upper class youths may engage in hidden delinquencies with virtually the same frequency and degree of seriousness as youths from the lower classes.[56] The significance of this hidden

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53. D. GIBBONS, CHANGING THE LAWBREAKER 130 (1965).

54. It is important to distinguish between "hidden" and "official" delinquent behavior. As Williams and Gold note,

> [D]elinquent behavior is norm violating behavior of a juvenile which, if detected by an appropriate authority, would expose the actor to legally prescribed sanctions. Official delinquency is the identification of and response to delinquent behavior by the police and courts.
>
> . . . .
>
> . . . Official delinquency is defined by official response to alleged delinquent behavior.

Williams & Gold, *From Delinquent Behavior to Official Delinquency*, 20 SOC. PROB. 209, 210 (1972).

55. "Hidden delinquency" is delinquent behavior that receives no official response, either because it is undetected or because, having been detected, it is ignored by the police and other officials within the juvenile justice system.

56. The picture of juvenile crime that emerges from official records reflects in large part the responses of agents of social control to the larger universe of offenders from which official delinquents are culled. *See, e.g.*, WOLFGANG, FIGLIO, & SELLIN, *supra* note 9, at 16.

When self-reporting interviews or surveys are conducted in which respondents are asked whether they have engaged in particular forms of illegal conduct, a different picture of the distribution of delinquent activity emerges. This research suggests that delinquent behavior is much more uniformly distributed throughout the community than official statistics reveal. Black youths and white youths, and lower, middle, and upper class youths engage in many comparable delinquencies, and differential exercises of discretion in official processing may account for the impression that lower class

delinquency research is that if youths from different backgrounds, social classes, and races are actually engaged in comparable types of delinquencies, then the factors that characterize official delinquents, such as poverty, educational deficiencies, or race, cannot cause these delinquencies.[57] Accordingly, the underlying assumption of rehabilitation that official delinquents are somehow different from normal people is subject to question.[58]

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and minority youths are more prone to criminal conduct. *See, e.g.*, T. HIRSCHI, CAUSES OF DELINQUENCY 67 (1969); Clark & Wenninger, *Socio-economic Class and Area as Correlates of Illegal Behavior Among Juveniles*, 27 AM. SOC. REV. 826 (1962); Empey & Erickson, *Hidden Delinquency and Social Status*, 44 SOC. FORCES 546 (1966); Erickson & Empey, *Court Records, Undetected Delinquency and Decision-making*, 54 J. CRIM. L.C. & P.S. 456 (1963); Gold, *Undetected Delinquent Behavior*, 3 J. RESEARCH CRIME & DELINQUENCY 27 (1966); Murphy, Shirley, & Witmer, *The Incidence of Hidden Delinquency*, 16 AM. J. ORTHOPSYCHIATRY 686 (1946); Nye, Short, & Olson, *Socio-economic Status and Delinquent Behavior*, 63 AM. J. SOC. 381 (1958); Reiss & Rhodes, *The Distribution of Delinquency in the Social Class Structure*, 26 AM. SOC. REV. 720 (1961); Short & Nye, *Extent of Unrecorded Juvenile Delinquency*, 49 J. CRIM. L.C. & P.S. 296 (1958); Voss, *Socio-economic Status and Reported Delinquent Behavior*, 13 SOC. PROB. 314 (1966); Williams & Gold, *supra* note 54. A review of foreign research may be found in Doleschal, *Hidden Crime*, 2 CRIME & DELINQUENCY LITERATURE 547, 557-66 (1970).

57. One of the foremost researchers in this area has noted with respect to the relationship between social status and delinquent behavior,

> Real as the relationship *appears* to be, it is slight, and official records have exaggerated it . . . . These data suggest that the relationship between social status and delinquency should be considered a clue—a scant one at that—to the causes of delinquency, and that we need to probe beyond it if we wish to identify the forces which account for much delinquency. They also suggest that treatment and prevention programs aimed exclusively at lower-class targets miss a lot of heavily delinquent youngsters.

M. GOLD, DELINQUENT BEHAVIOR IN AN AMERICAN CITY 76-77 (1970) (emphasis added).

It should be noted, however, that while hidden delinquency research appears to support the conclusion that social or class differences in offenders reflect biases in official processing rather than social or psychological causes of involvement in criminal behavior, recent "victimization" studies—involving interviews with victims of crime—suggest that offender involvement in criminal activity by race may correspond more closely to the official picture of crime than to the "hidden" picture of delinquency. *See, e.g.*, Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93 (1978). These findings tend to support social structural theories predicting differential racial involvement in crime rather than theories emphasizing differential selection processes. *See id.* at 105.

58. Indeed, there is reason to suspect that to the extent differences exist between serious offenders and nonoffenders, they are exacerbated by the labeling process associated with official processing as a delinquent. One study compared self-reported delinquencies of youths with no official records, one court appearance, probation status, and institutionalized status. While this study found that boys who had been institutionalized had greater delinquencies than others in the sample, the authors questioned "whether they were excessively delinquent *prior* to becoming labeled as delinquent or whether the label was self-fulfilling in some way." Empey & Erickson, *supra* note 56, at 550-51.

In the alternative, if offenders really are different from other people, one must still identify the causal forces producing such differences.[59] Typically, the explanations are social structural or social psychological.[60] Treatment, then, attempts to reverse the influence of those forces. Such efforts necessarily assume a degree of plasticity; that people respond to environmental influences and change accordingly. But at the conclusion of penal intervention, offenders are returned to the same criminogenic environments that presumably caused their delinquencies in the first instance. Thus, the assumption of malleability that makes institutional treatment feasible also explains the prompt reversion to criminal involvement that may occur upon release.

If rehabilitative programs are ineffective, whether because of inadequate intervention technologies or inadequate resources,[61] then

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Efforts to test this labeling thesis have lent some support to the inference that official intervention may adversely change life chances and subsequent opportunities and may actually reinforce the delinquency it was intended to prevent. For example, Gold and Williams matched 35 pairs of youths on the basis of comparable hidden delinquency records, one of each pair having been previously apprehended and the other not. A significantly greater number of previously apprehended youngsters committed subsequent offenses than did their nonapprehended counterparts. *See* Gold & Williams, *National Study of the Aftermath of Apprehension,* 3 PROSPECTUS 3 (1969). *See generally* Mahoney, *The Effect of Labeling upon Youths in the Juvenile Justice System: A Review of the Evidence,* 8 LAW & SOC'Y REV. 583 (1974).

59. Behavior that is delinquent and criminal is distinguishable from ordinary behavior only by the fact that it violates norms external to the actor. Efforts to explain the factors internal to the actor that cause criminal behavior, therefore, involve all of the considerations involved in explaining behavior generally. *See, e.g.,* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 71 (9th ed. 1974). Finding causal explanations is complicated by the numerous personal, psychological, historical, social structural, and situational antecedents to any act of delinquency. The process of crime causation is a function of basic social structural variables amplified or suppressed by intervening variables. These intervening variables, in turn, are precipitated by situational factors, which are further amplified by delinquent career contingencies such as labeling and contacts with agents of social control. *See* D. GIBBONS, SOCIETY, CRIME, & CRIMINAL CAREERS 253 (2d ed. 1973); *accord,* M. CLINARD & R. QUINNEY, CRIMINAL BEHAVIOR SYSTEMS 12 (1967); W. RECKLESS, THE CRIME PROBLEM 40 (5th ed. 1973). Because of the multiplicity of factors involved, the complexity of human behavior and criminal behavior, and the fact that delinquencies occur when causal factors are not present and do not necessarily occur when they are present, one can only conclude that "[t]he attempts during the last 150 years to explain crime, to formulate theories of crime, to discover causative factors, have largely been failures. The best that can be said is that certain possible connections have been charted or inferred between criminal behavior and the way a particular factor operates." *Id.*

60. *See generally* R. CLOWARD & L. OHLIN, DELINQUENCY AND OPPORTUNITY (1960); A. COHEN, DELINQUENT BOYS (1955); R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 125 (1949); E. SUTHERLAND & D. CRESSEY, *supra* note 59, at 71-111; Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency,* J. SOC. ISSUES, 1958, No. 3, at 5.

61. In Kent v. United States, 383 U.S. 541 (1966), the Court noted that inadequate resources were a critical shortcoming of the juvenile justice system. *See id.* at

one must question the exercise of broad discretion in reliance on expertise associated with therapeutic justice. The outcome of this reassessment may ultimately be adoption of a system of dispositions based on offense and "just deserts," what has become known in the adult criminal process as the "justice" model.[62] For the present, however, so long as transfer decisions continue to turn on a youth's amenability to treatment, the premise that at least some offenders are treatable remains a necessary presupposition of the waiver process. Thus, for purposes of this analysis only, the rehabilitative premises of the juvenile system will be taken as a given, and the issue framed in terms of reconciling the assumptions of the present system with rational decisionmaking in the waiver process.

Even assuming that coercive intervention may be effective for some individuals, it is nevertheless clear that not all youths are treatable since some youths who have been subjected to treatment persist in criminal conduct. Thus, the juvenile court is left with the problem of determining the amenability to treatment of each individual brought before it. Answering the judicial question of amenability requires the existence of an offender typology that differentiates be-

555-56. The Court reiterated its concern with this problem in McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971). The lack of resources has been a chronic problem. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 279-91 (1967) [hereinafter cited as CRIME IN A FREE SOCIETY]. The social reform implications of the *parens patriae* doctrine have always exceeded the resources available to implement them. *See generally* E. SCHUR, RADICAL NON-INTERVENTION (1973).

62. In the adult criminal process, the failures and abuses of coercive rehabilitation as a justification for intervention have prompted a call for intervention based on "just deserts." *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); D. FOGEL, WE ARE THE LIVING PROOF (1975); N. MORRIS, *supra* note 1; TWENTIETH CENTURY FUND TASK FORCE, FAIR AND CERTAIN PUNISHMENT (1976); A. VON HIRSCH, DOING JUSTICE (1976). *See also* E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); J. WILSON, *supra* note 9; Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781.

The "justice" model rejects individualized treatment and rehabilitation as justifications for coercive intervention because of the discretionary power their use vests in presumed experts, the inability of such experts to justify empirically differential treatment of similarly situated offenders, and the inequalities and injustices resulting from individualized treatment. The justice model, with its retributive groundings, would punish offenders according to their actions rather than according to who they are or whom they may be predicted to become.

The inability of proponents of juvenile rehabilitation to demonstrate the effectiveness of *parens patriae* intervention raises the question whether the juvenile justice system should not be subject to "justice" principles or even eliminated as a separate judicial institution. Washington has recently adopted a revised juvenile justice statute that incorporates substantial justice principles into the juvenile system, with determinate and proportional disposition graded on the basis of an offender's age, present offense, and prior record. Juvenile Justice Act, ch. 291, §§ 55-79, 1977 Wash. Legis. Serv. 892-904 (West).

tween those offenders who will and those who will not respond to intervention. While there are numerous offender typologies, differentiating offenders on the basis of such factors as offense patterns, role-careers, social psychological variables, and societal reactions, they are generally either theoretical or empirical classifications rather than causal explanations.[63] The lack of causal explanations precludes the development of a diagnostic typology that would enable a court to make clinical predictive judgments about treatment effectiveness.

Moreover, even if there were distinct categories of offenders, some of whom could be rehabilitated, there is the further problem of determining into which class any given offender fits. This involves a very subtle social investigation of the youth, his psychological characteristics, family background, social environment, school experiences, prior delinquencies, responsiveness to prior treatment, availability of treatment resources, and the like.[64] The problem of classification is compounded by a lack of reliable indicators or diagnostic measures that can, with any degree of accuracy, differentiate between the amenable and nonamenable categories.

In short, judicial waiver statutes require juvenile court judges to determine a youth's amenability to treatment even though there is little evidence indicating that serious delinquents or criminals respond to coercive intervention, there are no distinct behavioral categories of those who are or are not responsive to intervention, and there are no validated objective indicators that permit individual diagnostic classification of amenable and nonamenable serious offenders.[65]

Aside from the problems inherent in identifying and providing effective treatment for those youthful offenders considered amenable to treatment, a waiver system predicated on the notion that those youths not waived can be successfully treated is likely to generate serious "right to treatment" issues. Incarcerating an individual without treatment is punishment; subjecting a person to punishment requires full criminal procedural safeguards. Thus, incarcerating a juvenile without the benefit of procedural safeguards is justified only if the juvenile is receiving rehabilitative treatment.[66] If a court denies

63. *See, e.g.*, M. CLINARD & R. QUINNEY, *supra* note 59; D. GIBBONS, *supra* note 53; D. GIBBONS, *supra* note 59; Glaser, *The Classification of Offenses and Offenders*, in HANDBOOK OF CRIMINOLOGY 45-84 (D. Glaser ed. 1974).

64. *See generally* Stamm, *supra* note 8, at 161-62.

65. *See, e.g.*, D. MANN, *supra* note 50, at iv ("Most practitioners and most analysts reject both the idea of a behaviorally distinct category of such [serious] offenders (except of course with respect to the presenting offense) and of a distinct set of treatments premised on a category of seriousness.").

66. *Cf.* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial not required for juvenile delinquency adjudication because premise of juvenile court is rehabilitation). The right to treatment has been a topic of extensive commentary, especially in the context of civil commitment of the mentally ill and mentally retarded. *See* Baze-

waiver because it finds that a youth is amenable to treatment and the youth subsequently exhausts available resources or is found actually to be nonamenable, theoretically the offender should be released. Continued incarceration without meaningful treatment would constitute punishment that, if imposed without procedural safeguards, would violate the youth's right to due process.[67] Moreover, if

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lon, *Implementing the Right to Treatment,* 36 U. CHI. L. REV. 742 (1969); Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960); Hoffman & Dunn, *Beyond* Rouse *and* Wyatt*: An Administrative Law Model for Expanding and Implementing the Mental Patient's Right to Treatment,* 61 VA. L. REV. 297 (1975); *Symposium—Observations on the Right to Treatment,* 10 DUQ. L. REV. 553 (1972); *Symposium—The Right to Treatment,* 57 GEO. L.J. 673 (1969); Note, *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1316-57 (1974) [hereinafter cited as *Civil Commitment*]; Note, Wyatt v. Stickney *and the Right of Civilly Committed Mental Patients to Adequate Treatment,* 86 HARV. L. REV. 1282 (1973); Note, *The Nascent Right to Treatment,* 53 VA. L. REV. 1134 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment,* 77 YALE L.J. 87 (1967). For commentary on the right to treatment in juvenile correctional institutions, see sources cited note 67 *infra.* Analytically, the legal issues are very similar in both contexts since both involve involuntary coercive intervention under the *parens patriae* power for the benefit of the individual and both employ less than full criminal procedural safeguards.

The right to treatment follows upon 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—institutions for the mentally ill and the mentally retarded, for example—states incarcerate with fewer and less stringent procedural safeguards than those associated with criminal incarceration for punishment. In all of these settings, it is the promise of benefit that justifies the lesser safeguards. Thus, failure to deliver the promised treatment is a denial of due process. *See generally* Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds,* 422 U.S. 563 (1975); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Wyatt v. Stickney, 325 F. Supp. 781, *enforcement hearing ordered,* 334 F. Supp. 1341 (1971), *enforced,* 344 F. Supp. 373, *supplemental decision,* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

The constitutional rationale of these civil commitment cases has also been invoked to secure treatment for juveniles incarcerated in state training schools. In Nelson v. Heyne, 491 F.2d 352, 358-60 (7th Cir. 1974), the court noted that while the Supreme Court has not yet had occasion to find a constitutional right to treatment for incarcerated juveniles,

> several recent state and federal cases, out of concern—based upon the *parens patriae* doctrine underlying the juvenile justice system—that rehabilitative treatment was not generally accorded in the juvenile reform process, have decided that juvenile inmates have a constitutional right to that treatment
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> We hold that on the record before us the district court did not err in deciding that the plaintiff juveniles have the right under the 14th Amendment due process clause to rehabilitative treatment.

Id. at 359-60 (citations omitted).

67. *See, e.g.,* Pena v. New York State Div. for Youth, 419 F. Supp. 203 (S.D.N.Y. 1976); Robinson v. Leahy, 401 F. Supp. 1027 (N.D. Ill. 1975); Long v. Powell, 388 F.

the youth is released, the Supreme Court's holding in *Breed v. Jones* would bar later prosecution as an adult for the same offense.[68]

The right to treatment issue must also be addressed in evaluating proposals to create a secure juvenile treatment facility for serious offenders as an alternative to waiver for adult prosecution.[69] The proponents of this alternative insist that treatment in a secure juvenile setting is the appropriate response to the serious juvenile offender.[70]

Supp. 422 (N.D. Ga. 1975); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); Baker v. Hamilton, 345 F. Supp. 345 (W.D. Ky. 1972); Lollis v. New York State Dep't of Social Servs., 322 F. Supp. 473 (S.D.N.Y. 1970); M. v. M., 71 Misc. 2d 396, 336 N.Y.S.2d 304 (Fam. Ct. 1972). The right to treatment has been invoked successfully in a number of suits against juvenile institutions, where rehabilitative services were not forthcoming and custodial warehousing or barbaric practices were shown. *See, e.g., In re* Elmore, 382 F.2d 125 (D.C. Cir. 1967); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); J.E.C. v. State, 302 Minn. 387, 225 N.W.2d 245 (1975).

There has been extensive commentary on these cases. *See, e.g.*, Renn, *The Right to Treatment and the Juvenile*, 19 CRIME & DELINQUENCY 477 (1973); Silbert & Sussman, *Right of Juveniles Confined in Training Schools*, 20 CRIME & DELINQUENCY 373 (1974); Wald & Schwartz, *Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs*, 12 AM. CRIM. L. REV. 125 (1974); Note, *Establishment of a Constitutional Right to Treatment for Delinquent Children*, 26 BAYLOR L. REV. 366 (1974); Note, *The Courts, The Constitution and Juvenile Institutional Reform*, 52 B.U.L. REV. 33 (1972); Note, *Institutionalized Juveniles Have a Right to Rehabilitative Treatment*, 4 CAP. U.L. REV. 85 (1974); Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles*, 49 NOTRE DAME LAW. 1051 (1974); Note, *A Right to Treatment for Juveniles?*, 1973 WASH. U.L.Q. 157; Recent Development, *Constitutional Right to Treatment for Juveniles Adjudicated to Be Delinquent*—Nelson v. Heyne, 12 AM. CRIM. L. REV. 209 (1974); Recent Development, *Limits on Punishment and Entitlement to Rehabilitative Treatment of Institutionalized Juveniles*: Nelson v. Heyne, 60 VA. L. REV. 864 (1974).

68. *See* Breed v. Jones, 421 U.S. 519, 528-29 (1975), *discussed at* notes 30-32 *supra* and accompanying text (where juvenile adjudicated a delinquent and subsequently found to be unfit for treatment as a juvenile, double jeopardy barred reprosecution as an adult).

69. *See, e.g.*, HENNEPIN COUNTY STUDY, *supra* note 9, at 55-56.

70. Proponents of secure juvenile settings argue that juvenile incarceration is preferable to committing young offenders to adult institutions where they will be schooled in crime. But youthful offenders tried as adults need not be intermingled in facilities with more mature adult offenders. An intermediate youthful offender status and separate dispositional facilities could provide the necessary degree of segregation, with certified youths being allowed to receive rehabilitative services voluntarily as adults rather than coercively as juveniles. *See* notes 229-31 *infra* and accompanying text. This approach is already used in several jurisdictions. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-76b to -76m (West Supp. 1978); N.Y. CRIM. PROC. LAW § 720.10(1) (McKinney Supp. 1977).

A second argument for separate juvenile confinement stems from the concern that young offenders will be victimized in adult institutions. Stamm argues, for example, that placing juveniles in adult facilities is inherently anti-rehabilitative:

On the basis of all available evidence, however, successful treatment does not appear to be a viable prospect for these offenders. Moreover, there appears to be a fundamental organizational incompatibility between pursuing treatment and security goals simultaneously, with an inevitable subordination of rehabilitative concerns to custodial considerations.[71] Consequently, what proponents of secure juvenile treatment are actually advocating is custodial incarceration without the procedural safeguards that adults are afforded prior to receiving the same disposition. A juvenile incarcerated in a secure facility re-

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> This is certainly the case where children are concerned, because it is the youngest who are always victimized in prison; the weakest who are hurt by the strongest; and the most innocent who are defiled by the most depraved. If they are not exploited, they will certainly become more aggressive out of a need for self-protection. . . . And since the best lesson traditionally taught in prisons is how to be a better offender, the use of prisons for anything short of the permanent removal of an individual from the ranks of society is seemingly a most ill-advised action.

Stamm, *supra* note 8, at 146 (footnotes omitted); *see* Sargent & Gordon, *supra* note 8, at 124-25; *Waiver of Jurisdiction, supra* note 21, at 665-67.

Interestingly, however, a study by the Minnesota Department of Corrections of certified youths currently in the State Reformatory for Men challenges this conventional wisdom. This survey reports that, based upon interviews, "[t]here is no conclusive evidence that this population has been seriously victimized by homosexual rape." In light of their extensive juvenile criminal histories, it is perhaps not surprising that "[m]ost staff persons at the reformatory consider certified youths, as a group, to be *aggressors,* not *victims.*" MINN. DEP'T OF CORRECTIONS, A PROFILE OF CERTIFIED JUVENILES COMMITTED TO S.R.M. 1970-1975, at 23 (1976) [hereinafter cited as CORRECTIONS PROFILE] (emphasis added).

If claims of victimization and exploitation are accurate, however, a separate program for certified juvenile offenders is responsive to this concern. Insistence on humane adult facilities is another approach to the same problem. But proponents of juvenile security ignore the extent to which identical victimization takes place in juvenile facilities. Several studies have documented the prevalence of violence, aggression, and homosexual rape in juvenile facilities. *See, e.g.,* C. BARTOLLAS, S. MILLER, & S. DINITZ, JUVENILE VICTIMIZATION (1976); B. FELD, NEUTRALIZING INMATE VIOLENCE (1977); H. POLSKY, COTTAGE SIX (1962). One of the most significant findings of this research is that inmate violence appears to be a function of the degree of security to which inmates are subjected; the greater the imposition of authoritarian controls to facilitate security, the greater the levels of covert inmate violence within the subculture. *See* B. FELD, *supra* at 132-38, 163-69. *See also* D. STREET, R. VINTER, & C. PERROW, ORGANIZATION FOR TREATMENT (1966). In a facility designed to handle a small population of serious, persistent offenders, the necessarily limited mobility, program resources, and intensity of interaction between the most difficult youths in the entire juvenile system could give rise to a warehouse with all of the worst characteristics of adult penal incarceration. *See* Rolde, Mack, Scherl, & Macht, *The Maximum Security Institution as a Treatment Facility for Juveniles,* in JUVENILE DELINQUENCY 437 (J. Teele ed. 1970).

71. *See generally* D. STREET, R. VINTER, & C. PERROW, *supra* note 70; Cressey, *Contradictory Directives in Complex Organizations: The Case of the Prison,* 4 AD. SCI. Q. 1 (1959); Cressey, *Limitations on Organization of Treatment in the Modern Prison,* in THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON 78, 93-101 (1960); Cressey, *Prison Organizations,* in HANDBOOK OF ORGANIZATIONS 1023-70 (J. March ed. 1965).

ceiving so-called treatment of dubious efficacy might challenge his confinement as a denial of due process. Such a challenge would then involve the courts in such uncertain tasks as evaluating the comparative effectiveness of alternative modes of treatment, defining minimally adequate standards of treatment, and assuring the delivery of such treatment. Courts making substantive rulings in these areas have frequently found themselves drawn into the ongoing administration of treatment programs, a role for which they are ill-equipped.[72]

A related problem triggered by the right to treatment/amenability to treatment interface arises if a court concludes that a youth would respond to a particular form of treatment but that treatment is not available. While several jurisdictions avoid this dilemma by tying the amenability decision to available resources,[73] without such a limitation a court could find that a youth is amenable to some treatment but certify him because the appropriate treatment is unavailable. In *J.E.C. v. State,*[74] the Minnesota Supreme Court was presented with this issue. Rather than deciding whether a youth who had been found amenable to some form of treatment had an absolute right to treatment that would preclude certification, however, the court remanded the case for consideration of whether an appropriate and effective method of treatment existed and, if so, why it was not available.[75] Nevertheless, in its consideration of the issues, the Minnesota Supreme Court skirted dangerously close to finding that if a youth could feasibly be rehabilitated as a juvenile, then he

72. *See, e.g.,* Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974); Wyatt v. Stickney, 325 F. Supp. 781, 785, *enforcement hearing ordered,* 334 F. Supp. 1341 (1971), *enforced,* 344 F. Supp. 373, *supplemental opinion,* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971). *See generally* M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977); Note, *Judicial Intervention in Prison Discipline,* 63 J. CRIM. L.C. & P.S. 200 (1972).

73. *See, e.g.,* Jimmy H. v. Superior Court, 3 Cal. 3d 709, 714, 478 P.2d 32, 35, 91 Cal. Rptr. 600, 603 (1970) ("the dispositive question is the minor's amenability to treatment through the facilities available to the juvenile court"); note 42 *supra* and accompanying text.

74. 302 Minn. 387, 225 N.W.2d 245 (1975).

75. *See id.* at 400, 225 N.W.2d at 253. In making this determination, the lower court was directed to consider the following factors:

> (1) whether there is presently any program available for treatment for this and other similar juveniles; (2) if no program is available, whether it is feasible and possible to put together an effective program which could treat this and other similar juveniles; (3) if so, why has the Department of Corrections failed to make such a program available?

Id. On remand, the juvenile court found that no adequate program existed and certified the juvenile for adult prosecution. *See In re* I.Q.S., 244 N.W.2d 30, 40 (Minn. 1976). *See generally Juvenile Law, supra* note 21.

could not be waived for prosecution as an adult.[76] Such a holding, that treatment must be initiated if feasible, would raise extraordinarily difficult issues involving the separation of judicial and legislative powers in allocating scarce resources.[77]

2. *Dangerousness*

Rather than finding that a youth is not amenable to treatment, a juvenile court might transfer a youth for adult prosecution if it concludes that his retention within the juvenile justice system would be inimical to public safety. Virtually every jurisdiction using a judicial waiver mechanism provides this alternative as a basis for adult certification.[78] In the vast majority of cases, waiver is initially sought because of serious or persistent misconduct by a juvenile, and youths are much more likely to be waived because of their criminal activities than because they are considered nonamenable to treatment.

Predictive judgments about an individual's present or potential dangerousness are implicit or explicit in a variety of decisions made in the criminal justice, juvenile justice, and mental health fields.[79]

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76. *See* 302 Minn. at 396-98, 225 N.W.2d at 251-52. The court questioned whether reference was proper in a case "where the finding of lack of amenability to treatment or danger to the public is based upon the correctional authority's failure to provide favorable treatment facilities." *Id.* at 398, 225 N.W.2d at 252. The court faced a choice between two unsatisfactory alternatives:

> to retain jurisdiction over him as a juvenile, with the knowledge that no matter what action is taken the offender will soon again be turned loose on society to continue his depredations, or to refer him as an adult for prosecution and probably subject him to a lengthy sentence with doubtful rehabilitative sources available.

Id. at 395, 225 N.W.2d at 251.

77. *See, e.g., Juvenile Law, supra* note 21, at 1105-11.

Such a finding would also have raised an interesting issue of contributory fault. Even assuming that a minor's treatment prognosis was at present unfavorable, could the minor defend against waiver by arguing that at an earlier phase of his delinquent career he could have responded, but that the juvenile justice system had neglected to provide appropriate resources? In other words, did the prior actions or inactions of the system contribute to the minor's present nonamenability? This kind of argument was properly rejected in People v. Browning, 45 Cal. App. 3d 125, 138, 119 Cal. Rptr. 420, 429 (1975).

78. In its enumeration of reference criteria in Kent v. United States, 383 U.S. 541 (1966), *see* note 34 *supra,* the Supreme Court focused almost exclusively on factors bearing directly on the issue of dangerousness. For instance, the Court emphasized the circumstances of the present offense and the youth's prior record, *see* 383 U.S. at 567 app., two obvious indicators of dangerousness. It also expressed a concern with dangerousness in its inquiry into the "public interest" and the availability of secure facilities within the juvenile system. *See id.*

79. A judgment of dangerousness is involved in many sentencing decisions, in the granting or withholding of parole or release at the conclusion of a period of imprisonment or commitment, in the involuntary civil commitment of the mentally ill, as well

Like the quest to determine who may be amenable to treatment, efforts to identify the currently or potentially dangerous have entailed social science research as well as judicial inquiry.[80] The irresistible conclusion of this research is that identification of the dangerous "presupposes a capacity to predict future criminal behavior quite beyond our present technical ability."[81]

In this regard, one of the leading scholars on the prediction of dangerousness concludes that

> [t]he ability to predict which juveniles will engage in violent crime, either as adolescents or as adults, is very poor.
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> The conclusion of Wenk and his colleagues that "there has been

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as in the transfer of juveniles for adult prosecution. Dangerousness is also a relevant factor in sentencing criminal offenders to enhanced terms. *See, e.g.*, United States v. Stewart, 531 F.2d 326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976) ("dangerous" as basis for increased sentence in 18 U.S.C. § 3575(f) (1976) not unconstitutionally vague); 18 U.S.C. §§ 3575-3578 (1976); MINN. STAT. § 609.155 (1976). For an analysis of the vagueness problems associated with general, predictive statutes, see notes 92-130 *infra* and accompanying text.

80. Discussions of available empirical evidence and the problems of predicting dangerousness include: N. MORRIS, *supra* note 1, at 62-73; D. WEXLER, CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS (U.S. Dep't of Health, Education, and Welfare Pub. No. 76-331, 1976); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1970); 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 TASK FORCE REPORT, *supra* note 21, at 171; Klein, *The Dangerousness of Dangerous Offender Legislation: Forensic Folklore Revisited*, 18 CAN. J. CRIMINOLOGY & CORRECTIONS 109 (1976); Livermore, Mahlmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 81-83 (1968); Monahan & Cummings, *Social Policy Implications of the Inability to Predict Violence*, J. SOC. ISSUES, 1975, No. 2, at 153; Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1164-73 (1974); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCHIVES GENERAL PSYCH. 397 (1972); Shah, *Dangerousness and Civil Commitment of the Mentally Ill: Some Public Policy Considerations*, 132 AM. J. PSYCH. 501 (1975); 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); *Civil Commitment*, *supra* note 66, at 1236-45. *See also* Monahan, *The Prediction of Violence*, in VIOLENCE AND CRIMINAL JUSTICE 17-20 (D. Chappell & J. Monahan eds. 1975); Wenk, Robison, & Smith, *Can Violence be Predicted?*, 18 CRIME & DELINQUENCY 393 (1972). This research raises serious questions about a court's ability to predict human behavior accurately, especially behavior that is unusual or violent.

81. N. MORRIS, *supra* note 1, at 62. Psychiatrists as well as lawyers have criticized the presumption of mental health professionals in making predictions. Rubin, for instance, 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 predictions] may be at a minimum of 60% to 70%." Rubin, *supra* note 80, at 397-98.

> no successful attempt to identify, within . . . offender groups, a subclass whose members have a greater than even chance of engaging again in an assaultive act" is as true for juveniles as it is for adults. It holds regardless of how well trained the person making the prediction is—or how well programmed the computer—and how much information on the individual is provided. More money or more resources will not help. Our crystal balls are simply very murky, and no one knows how they can be polished.[82]

The problem of predicting dangerousness is not merely that it cannot be done with an acceptable degree of accuracy but also that there is a very substantial tendency to overpredict and to identify as potentially dangerous persons who, if subsequently released, would engage in no further violent or even criminal behavior. Thus,

> [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 simple behavioral indicators are used or sophisticated multivariate analyses are employed and whether psychological tests are administered or thorough psychiatric examinations are performed.[83]

The tendency to overpredict dangerousness raises profound moral questions with which society must deal in its treatment of both juvenile and adult offenders. In the context of assessing dangerousness for purposes of parole release, for example, how many false positives—people who would not offend again if released—are we willing to continue to incarcerate in order to ensure that those relatively few but unidentifiable individuals who actually would offend are not released? To what extent are we willing to permit judicial speculation about future violence in the waiver context if to do so means that large numbers of juvenile "false positives" may be prosecuted as adults?

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82. 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). *See generally* Schlesinger, *The Prediction of Dangerousness in Juveniles: A Replication,* 24 CRIME & DELINQUENCY 40 (1978).

83. Monahan, *supra* note 80, at 20 (citation omitted) (emphasis added); *see* Monahan, *The Prevention of Violence,* in COMMUNITY MENTAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM 13 (J. Monahan ed. 1976); Monahan & Cummings, *supra* note 80, at 157; J. Monahan, *supra* note 82; *cf.* Baxstrom v. Herold, 383 U.S. 107 (1966) (ordering the transfer of the "most dangerous mental patients" in New York). Followup studies of those released reported very low incidences of violence, despite the fact that all of the patients were incarcerated as dangerous. *See* H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE 115-18 (1974).

Predicting dangerousness is thus at best an inexact science, the uncertainties of which trigger difficult moral questions. The task, therefore, is to select from among several imperfect methodologies those that are least susceptible to error or abuse. The two principal methods for anticipating behavior are clinical and actuarial prediction. A clinical prediction entails a clinician reviewing whatever information is deemed relevant and making a predictive judgment on the basis of professional training and intuition. Clinical prediction requires an integration of available information about the individual in order to develop "some psychological hypothesis regarding the structure and the dynamics of this particular individual. On the basis of this hypothesis and certain reasonable expectations as to the course of outer events, we arrive at a prediction of what is going to happen."[84]

Actuarial or statistical prediction, on the other hand, entails the development of probability relationships between predictor variables, such as age and prior offenses, and the behavior to be predicted—violence. It requires an examination of the individual only to determine the presence of the predictor variables: "The combination of all of these data enables us to *classify* the subject; and once having made such a classification, we enter a statistical or actuarial table which gives the statistical frequencies of behaviors of various sorts for persons belonging to the class."[85] Whereas a clinical judgment ultimately relies on informed professional expertise, an actuarial prediction employs correlational statistical tables to yield a probability statement.

In view of the uncertainties and inconsistencies typically associated with social science research, the clear-cut superiority of actuarial over clinical methods of predicting future behavior is startling:

> [O]ne should not simply assume that "intensive, clinical, psychological understanding of the individual" leads generally to more trustworthy forecast of behavior than a more behavioristic-actuarial approach to the predictive task. This . . . assumption seems still to be taken blithely for granted by almost all psychiatrists and—surprisingly, given the research evidence—by many clinical psychologists. The comparative efficacy of different methods of predicting behavior is, of course, a factual question; and in spite of the armchair plausibility of the above mentioned assumptions (to be sceptical of "understanding the individual" is rather like being against motherhood), there exists a very sizable body of empirical evidence to the contrary. . . . Of some five dozen published and

84. P. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION 4 (1954).
85. *Id.* at 3 (emphasis in original).

> unpublished research studies known to us, there is only a single study showing, given an acceptable research design, a clearcut superiority of clinical judgment over actuarial prediction. . . . *It would be difficult to mention any other domain of social science research in which the trend of the data is so uniformly in the same direction, so that any psychiatrist or psychologist who disfavors the objective, actuarial approach in a practical, decision-making context should be challenged to show his familiarity with this research literature and invited to rebut the theoretical argument and empirical evidence found therein.*[86]

The inability of clinicians to make reliable predictions about juvenile dangerousness obviously applies as well to judges making waiver decisions. Reliance on psychological testimony to inform the court is both inefficacious and misleading since neither clinical insights nor psychological tests can improve the accuracy of clinical predictions of future violence in juveniles.[87] It is possible, however, to improve somewhat the rationality of waiver decisions by relying on certain social, behavioral, and demographic characteristics associated with probabilities of violence that exceed the base rates for the general population. Even though many juveniles with a history of a violent act will not commit another violent act, research suggests that a record of past violent behavior is still the best predictor of future violent behavior.[88] Factors other than a juvenile's present offense or prior history of offenses also appear to correlate with the probability of future violence or other official criminal misconduct. Age, sex, race, and socioeconomic status are the most obvious correlates with official delinquency. In purely probabilistic predictive terms, lower-class, nonwhite, adolescent males, as an aggregate, have a substantially greater probability of official criminal involvement than do, for example, white, middle-class women aged thirty and over.

For obvious reasons, however, many factors with marginal predictive relevance cannot provide a legal basis for actuarial prediction. There would, for example, be an equal protection problem with certifying a black juvenile but not a white one, even if it were demon-

86. Livermore, Mahlmquist, & Meehl, *supra* note 80, at 76 n.4 (emphasis added).

87. *See, e.g.*, Megargee, *The Prediction of Violence with Psychological Tests*, 2 CURRENT TOPICS CLINICAL & COMMUNITY PSYCH. 97 (1970). *See generally* Schlesinger, *supra* note 82.

88. A person's relevant past behaviors tend to be the best predicators of his future behavior in similar situations. It is increasingly evident that even simple, crude, demographic indices of an individual's past behaviors and social competence predict his future behavior at least as well as, and sometimes better than, either the best test-based personality statements or clinical judgments.

W. MISCHEL, PERSONALITY & ASSESSMENT 135 (1968); *see, e.g.*, WOLFGANG, FIGLIO, & SELLIN, *supra* note 9; Wenk, Robison, & Smith, *supra* note 80.

strated that, statistically, blacks as a class have a greater probability of subsequent criminal involvement than do whites.[89] Moreover, despite the statistical relationships between factors such as sex, age, class, and race and criminal involvement, these factors are all beyond the control of the juvenile. They are not his fault, and it would be inappropriate to punish an individual for that which he cannot change or control.[90]

The only statistical variables that both have predictive validity and can be controlled by the offender are his present offense and cumulative record. Perhaps intuitively, many juvenile court judges already rely on these factors as the principal basis for making reference decisions.[91] But to the extent that the seriousness of the present offense, plus an extensive prior record, provides a rational predictive basis for certification that is more accurate than any clinical judgment, there is no need to conduct a judicial waiver hearing at all. An

89. Monahan suggests that "[o]ne reason clinical prediction persists in juvenile justice is that it allows socially sensitive predictor variables to be hidden." J. Monahan, *supra* note 82, at 14 (emphasis deleted). Assuming that even after controlling for such effects as racial discrimination and social class disparities, a statistically reliable relationship remained between race or class and future violence, reliance on such a "suspect" factor in an actuarial prediction table would presumably still be struck down on equal protection grounds "*even if it could be shown to be statistically accurate.*" *Id.* at 15 (emphasis in original). Monahan concludes, however, that reliance on clinical expertise permits these same factors to be weighted into the "professional" judgment:

> The "virtue" of clinical prediction is that a judge or youth authority board does not have to deal with highly sensitive social questions, but can camouflage the issues by deferring to clinical expertise. The clinician is then free to take all these variables into account . . . if the prediction is to be any good—and no one will be the wiser. The sensitive issues will never be raised because they are hidden in the depths of "professional judgment," while in fact that judgment is made on the basis of the same factors that might be unconstitutional if used in open court. In this sense, clinical prediction represents a "laundering" of actuarial prediction, so that the sensitive nature of the predictor variables cannot be traced.

Id. at 16.

90. This Article proceeds from the premise that retribution and prevention are the principal justifications for penal intervention. It focuses throughout on the seriousness of the offense as evidence of culpability and on persistence of criminal conduct as evidence of the likelihood of future offenses. Because of this emphasis on culpability and the making of blameworthy choices, it does not rely on factors such as age, race, sex, or class, which might aid predictive judgments since they are characteristics for which the actor is not responsible. An unwillingness to punish a person for his status is one of the benchmarks of the criminal law. "Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." Powell v. Texas, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting); *see* Robinson v. California, 370 U.S. 660, 666-67 (1962).

91. According to one source, "[t]he two factors most often cited by juvenile judges deciding whether to waive jurisdiction are the seriousness of the offense and the past history of the juvenile." *Due Process and Waiver, supra* note 21, at 598.

empirically derived actuarial matrix that simply excluded offenders with various combinations of present offenses and prior records from juvenile court jurisdiction could be adopted by a legislature. Such a matrix would be more easily administered and less prone to subjective speculation than present judicial practices.

3. *Discretion, Vagueness, and Discrimination*

In addition to requiring courts to make determinations as to a youth's amenability to treatment or dangerousness that cannot be made with any degree of precision, judicial waiver statutes typically contain broad, standardless grants of discretion to the juvenile courts[92] that create the potential for abuse and discrimination in waiver decisions. The breadth and generality of waiver statutes have led to challenges in a number of jurisdictions on grounds that such statutes are either void for vagueness or unconstitutional delegations of legislative functions to the judiciary. Whether the challenge is couched in terms of vagueness or the delegation doctrine, however, the analytical issue is essentially the same: is the statutory language sufficiently precise to ensure evenhanded administration of the law and meaningful appellate review of its application?[93]

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92. *See* notes 39-48 *supra* and accompanying text. For a general discussion of the scope of judicial discretion in waiver determinations, see Note, *supra* note 7, at 1001-04. Appellate courts, like legislatures, typically refrain from specifying the determinative factors a waiving court must consider or assigning those factors relative weight. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 537 (1975) ("the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court"); Juvenile v. Commonwealth, 347 N.E.2d 667, 684 (Mass. 1976) ("There is no specific requirement that a judge weigh these factors in a certain manner or achieve some predesigned balance.").

93. Underlying the vagueness doctrine is a concern that "a law provide explicit standards for those who apply it, lest there be 'impermissibl[e] delegat[ion of] basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' " Todd, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855, 857-58 (1974). Objective and ascertainable standards reduce the risks of arbitrary and discriminatory enforcement both by eliminating subjective interpretations of the law and by increasing the visibility of abusive applications. *See* Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 229 (1967).

The vagueness doctrine has been invoked in a number of contexts to invalidate overly broad or imprecise statutes. *See generally* Amsterdam, *supra*; Todd, *supra*; Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Although the doctrine is most commonly associated with the invalidation of criminal statutes, it has been successfully invoked in a variety of noncriminal contexts as well. In A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925), the Supreme Court articulated the precision requirement for civil statutes:

At least part of the rationale of the Court's decision in *Kent v. United States* suggests the relevance of the void-for-vagueness doctrine in the context of judicial waivers: "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts."[94] Meaningful review of a waiver decision requires not only procedural regularity in the determination of facts, but substantive standards against which those facts can be evaluated.

> [U]nless statutory clarity exists, other guarantees of procedural due process cannot be meaningful. Typical procedural due process requirements such as written notice of charges, a hearing with an opportunity to present testimony to the hearing body, and a written decision containing the evidence relied upon and the reasons for the decision, may be of little avail when a tribunal is free to apply its own standard of what constitutes reasonable conduct.[95]

Some commentators have suggested that the lack of objective standards is especially critical in legal proceedings from which the public may be absent or in which the subjects may be members of subgroups readily victimized by arbitrary official actions.[96]

> The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

Id. at 239. *See also* Jordan v. DeGeorge, 341 U.S. 223, 230 (1951). Several distinguishable but interrelated rationales have been adduced for the vagueness doctrine: "the concern for fair notice; the concern against uncontrolled and lawless administration of the criminal law, with its potential for arbitrary and discriminatory impositions; and the concern against overreaching of other federal constitutional guarantees, particularly the sensitive 'preferred' guarantees of personal liberty contained in the Bill of Rights." Amsterdam, *supra* at 217. The second rationale has obvious relevance for transfer statutes, which, because of their broad grants of discretion, are susceptible to abuse in their implementation, permit decisions based on extraneous considerations, and do not provide the standards necessary for meaningful judicial review. Thus, reviewing courts are often simply unable to discover whether the law is being administered on the basis of arbitrary and impermissible factors or excessively subjective judgments. *See* Note, *supra* at 80 ("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.").

94. Kent v. United States, 383 U.S. 541, 561 (1966), *discussed at* notes 25-29 *supra* and accompanying text; *accord,* State v. Gibbs, 94 Idaho 908, 916, 500 P.2d 209, 217 (1972); People v. Fields, 391 Mich. 206, 217, 216 N.W.2d 51, 53 (1974).

95. Todd, *supra* note 93, at 858-59; *see* United States *ex rel.* Pedrosa v. Sielaf, 434 F. Supp. 493, 495-96 (N.D. Ill. 1977) (invalidating a transfer statute on ground that "[w]here there are no standards to govern the exercise of . . . discretion, 'the scheme permits and encourages an arbitrary and discriminatory enforcement of the law' ").

96. *See, e.g.,* Todd, *supra* note 93, at 866. Although written in the context of

Before it was overruled, the leading case to invalidate a waiver statute was *People v. Fields*,[97] in which the Michigan Supreme Court held that a completely standardless statute was a fatally defective delegation of legislative power.[98] The statute in question permitted waiver "after investigation," but failed to specify what factors the court was to investigate.[99] The *Fields* court ruled that

> [i]f the legislature is to treat some persons under the age of 17 differently from the entire class of such persons, excluding them from the beneficent processes and purposes of our juvenile courts, the legislature must establish suitable and ascertainable standards whereby such persons are to be deemed adults and treated as such subject to the processes and penalties of our criminal law.[100]

In assessing the statutory criteria that might have been relied upon in this case, the court dismissed the proffered test of "the child's welfare and the best interests of the state" as being "so vague and subject to so many possible interpretations as to be no standard at all."[101]

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prisons or schools, the concern is equally applicable in the context of juvenile court proceedings.

97. 388 Mich. 66, 199 N.W.2d 217 (1972), *aff'd on rehearing*, 391 Mich. 206, 216 N.W.2d 51 (1974). *But see* People v. Peters, 397 Mich. 360, 367-69, 244 N.W.2d 989, 901-02, *cert. denied*, 429 U.S. 944 (1976). Apparently the only other case in which a transfer statute was invalidated for lack of guidelines or standards is United States *ex rel.* Pedrosa v. Sielaf, 434 F. Supp. 493 (N.D. Ill. 1977) (invalidating Act of Aug. 7, 1973, § 1, 1973 Ill. Laws 1099).

98. *See* 388 Mich. at 76, 199 N.W.2d at 222; Stamm, *supra* note 8, at 138:

> The judiciary has been enabled to decide who shall be tried for crimes, traditionally a legislative function, in the absence of any criteria governing this determination. The *Fields* court observed, in part, that the traditional delegation of this power can no longer be upheld because transfer decisions are not being made on the basis of uniform and easily discernible standards. The reasons for transfer vary greatly from one judge to another and therefore the law is not evenly administered.

See generally Juvenile Waiver Statute, supra note 21.

The question of lack of standards arose again in Michigan under the newly enacted waiver rule, MICH. JUV. CT. R. 11, which provided five criteria for consideration in the court's determination whether to waive jurisdiction, among them, the juvenile's prior record and character, the seriousness of the offense, and whether there was a repetitive pattern of offenses. *See id.* 11(1)(b). The Michigan Supreme Court upheld the rule, expressly overruling *Fields* and adopting the reasoning of the *Fields* dissent. *See* People v. Peters, 397 Mich. 360, 367-69, 244 N.W.2d 898, 901-02, *cert. denied*, 429 U.S. 944 (1976).

99. *See* Act of Mar. 6, 1944, no. 54, 1944 Mich. Pub. Acts 1st Ex. Sess. 118, *as amended*, Act of Feb. 26, 1946, no. 23, 1946 Mich. Pub. Acts Ex. Sess. 44.

100. 388 Mich. at 77, 199 N.W.2d at 222.

101. *Id.* at 76, 199 N.W.2d at 222. *Contra, In re* Juvenile, 364 Mass. 531, 536-39, 306 N.E.2d 822, 826-28 (1974) (the "interests of the public" held sufficiently precise); State v. Weidner, 6 Or. App. 317, 323, 487 P.2d 1385, 1386 (1971) ("the best interests

In contrast to the Michigan court's decision in *Fields*, however, most courts have declined to invalidate statutes framed in such general terms as "amenability to treatment" or "the best interests of the child or the public" on vagueness grounds.[102] Some courts have engrafted criteria for the waiver decision on otherwise vague statutes via judicial construction.[103] Frequently, these criteria consist of the factors appended by the Supreme Court to its *Kent* decision.[104] Even

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of the child and the public" sufficiently precise); State *ex rel.* Salas, 520 P.2d 874, 876 (Utah 1974) ("best interests of the child or the public" not unconstitutionally vague).

102. For example, while conceding that the statutory standards "not amenable" to treatment and "not a fit and proper subject" to be handled within the juvenile process "lack explicit definition," the California Supreme Court ruled that " '[t]he factors upon which an unsuitability finding is based are generally those which indicate a relatively poor prognosis for rehabilitation.' " Donald L. v. Superior Court, 7 Cal. 3d 592, 601, 498 P.2d 1098, 1104, 102 Cal. Rptr. 850, 856 (1972) (quoting People v. Smith, 5 Cal. 3d 313, 317, 486 P.2d 1213, 1216, 96 Cal. Rptr. 13, 16 (1971)).

103. *See, e.g.*, State v. Gibbs, 94 Idaho 908, 916, 500 P.2d 209, 217 (1972):

> Jurisdiction ordinarily is waived when (1) the defendant has acquired such a degree of emotional or mental maturity that he is not receptive to rehabilitative programs designed for children; (2) although the defendant is immature, his disturbance has eluded exhaustive prior efforts at correction through existing juvenile programs; or (3) the defendant is immature and might be treated, but the nature of his difficulty is likely to render him dangerous to the public, if released at age twenty-one, or to disrupt the rehabilitation of other children in the program prior to his release.

Accord, Jimmy H. v. Superior Court, 3 Cal. 3d 709, 478 P.2d 32, 91 Cal. Rptr. 600 (1970); Clemons v. State, 162 Ind. App. 50, 56, 317 N.E.2d 859, 863 (1974), *cert. denied,* 423 U.S. 859 (1975); State v. Halverson, 192 N.W.2d 765 (Iowa 1971); Juvenile v. Commonwealth, 347 N.E.2d 677, 685 (Mass. 1976); State v. Hogan, 297 Minn. 430, 212 N.W.2d 664 (1973); Knott v. Langlois, 102 R.I. 517, 523, 231 A.2d 767, 770 (1967); Mikulovsky v. State, 54 Wis. 2d 699, 704-08, 196 N.W.2d 748, 751-53 (1972).

104. For example, one court filled in a statutory gap with the following pronouncement regarding the considerations appropriate to the waiver decision:

> Though the standards for determining a minor's fitness for treatment as a juvenile lack explicit definition . . . , it is clear from the statute that the court must go beyond the circumstances surrounding the offense itself and the minor's possible denial of involvement in such offense. . . . The court may consider a minor's past record of delinquency . . . and *must* take into account his behavior pattern as described in the probation officer's report. . . .
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> . . . Since the dispositive question is the minor's amenability to treatment through the facilities available to the juvenile court, testimony of experts that the minor can be treated by those facilities is entitled to great weight in the court's ultimate determination. . . .
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> . . . Other factors which may be considered by the juvenile court in the exercise of its discretion in certifying a minor to the superior court as not amenable to treatment as a juvenile are the following: the nature of the crime allegedly committed, the circumstances and details surrounding its commission, the minor's behavior pattern including his past record, if any, of delinquency, his degree of sophistication especially as the same may relate to

these courts, however, decline to ascribe significance to any given factor, insisting that ultimately the decision must be individualized by the trial court's exercise of its sound discretion.

Courts have also avoided invalidating statutes on vagueness grounds by finding that the general purpose statement of the enabling legislation creating the juvenile court provided sufficient statutory guidance.[105] The general purpose clauses, however, typically provide scant guidance for decisionmakers, often providing simply that each child coming within the jurisdiction of the court shall receive "such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state."[106]

While judicial gloss or general authorizing legislation has usually been regarded as sufficient to establish the necessary criteria for decisionmaking, courts have also sustained otherwise vague statutes by finding them as precise as is possible given the inherent uncertainties and multiplicity of factors to be considered in making the final judgment.[107] To justify such holdings, courts note that the statute in ques-

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criminal activities and contradictory opinion testimony.
Jimmy H. v. Superior Court, 3 Cal. 3d 709, 714-16, 478 P.2d 32, 35-36, 91 Cal. Rptr. 600, 603-04 (1970) (citations omitted); *accord,* People v. Moseley, 566 P.2d 331 (Colo. 1977); Clemons v. State, 162 Ind. App. 50, 317 N.E.2d 859 (1974), *cert. denied,* 423 U.S. 859 (1975); State v. Speck, 242 N.W.2d 287, 293 (Iowa 1976) (*Kent* criteria); State v. Smagula, 377 A.2d 608 (N.H. 1977); State v. Doyal, 59 N.M. 454, 459-60, 286 P.2d 306, 310 (1955); State v. Williams, 75 Wash. 2d 604, 453 P.2d 418 (1969); Mikulovsky v. State, 54 Wis. 2d 699, 196 N.W.2d 748 (1972).

105. *See, e.g., In re* Pima County Juvenile Action, 22 Ariz. App. 327, 527 P.2d 104 (1974); Clemons v. State, 162 Ind. App. 50, 317 N.E.2d 859 (1974), *cert. denied,* 423 U.S. 859 (1975); State v. Green, 218 Kan. 438, 544 P.2d 356 (1975); State v. Owens, 197 Kan. 212, 416 P.2d 259 (1966); *In re* Juvenile, 364 Mass. 531, 306 N.E.2d 822 (1974); Lewis v. State, 86 Nev. 889, 893, 478 P.2d 168, 171 (1970); State v. Doyal, 59 N.M. 454, 286 P.2d 306 (1955); *In re* Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974); Sherfield v. State, 511 P.2d 598 (Okla. Crim. App. 1973); State v. Weidner, 6 Or. App. 317, 487 P.2d 1385 (1971); State *ex rel.* Salas, 520 P.2d 874 (Utah 1974); *In re* Burtts, 12 Wash. App. 564, 530 P.2d 709 (1975); *In re* F.R.W., 61 Wis. 2d 193, 212 N.W.2d 130 (1973), *cert. denied,* 416 U.S. 974 (1974). The strategy of saving a vague statute by incorporating an equally vague purpose clause has, however, been rejected by at least one court. *See* United States *ex rel.* Pedrosa v. Sielaf, 434 F. Supp. 493, 496 (N.D. Ill. 1977) ("This particular statement provides little if any guidance and does not compensate for the vagueness in the transfer statute.").

106. IND. CODE ANN. § 31-5-7-14 (Burns 1973), *construed in* Clemons v. State, 162 Ind. App. 50, 52-53, 317 N.E.2d 859, 861 (1974), *cert. denied,* 423 U.S. 859 (1975); *accord,* MINN. STAT. § 260.011 (1976).

107. Thus, one court ruled that the "public interest" standard was not vague because it "opens up for consideration any reasonable argument bearing on the course which treatment of the juvenile should follow," *In re* Juvenile, 364 Mass. 531, 538, 306 N.E.2d 822, 827 (1974), and while additional factors could be specified, "the collective effect of those individual factors, if properly and fully articulated, can only produce a balancing which involves a consideration of the requirements of the interests of the public in the broadest sense." *Id.* at 539, 306 N.E.2d at 828; *accord,* Juvenile v. Commonwealth, 347 N.E.2d 677, 685 (Mass. 1976).

tion is just as precise as those sustained in other jurisdictions. In rejecting a challenge to the Minnesota waiver statute, for example, the court concluded that the Minnesota statute compared favorably with the waiver provisions of the Uniform Juvenile Court Act[108] without addressing the basic issue of whether that statute provided adequate standards.[109]

Even while sustaining waiver standards against vagueness challenges, however, courts have decried the absence of statutory standards. Thus, as one judge remarked, "[i]t is disquieting . . . to learn that judicial action is taken without governing standards available to the public. To me their absence permits judicial decision by whim or caprice and lends [*sic*] to unequal treatment under the law . . . ."[110] As indicated in the earlier analysis of the inherent subjectivity of the amenability and dangerousness decisions, it is doubtful that statutes authorizing waiver on these undefined and undefinable bases provide sufficiently articulated criteria to permit meaningful appellate court review.

One test of the adequacy of statutory standards is whether, if applied in similar factual situations, they will produce similar results. Empirical evaluations of the administration of waiver statutes raise doubts about the evenhandedness with which such statutes are applied, thus calling into question the sufficiency of the standards employed.[111] For example, although the Minnesota Supreme Court

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108. UNIFORM JUVENILE COURT ACT § 34.

109. *See In re* I.Q.S., 244 N.W.2d 30, 36-37 (Minn. 1976). Other courts have adopted a similar strategy of finding the challenged statutes as precise as those sustained in other jurisdictions. *See, e.g.*, People v. Moseley, 566 P.2d 331, 333 (Colo. 1977) ("these guidelines are far more specific than those appearing in transfer statutes which have been upheld in other jurisdictions"); Clemons v. State, 162 Ind. App. 50, 55, 317 N.E.2d 859, 862 (1974) ("Similar general standards have been upheld in other jurisdictions answering attacks on their waiver statutes for being unconstitutionally vague."), *cert. denied*, 423 U.S. 859 (1975); *In re* Juvenile, 364 Mass. 531, 537, 306 N.E.2d 822, 827 (1974) ("Similar general standards contained in comparable statutes in other States have been upheld.").

All of these decisions suffer from the same analytical defect:

> It is common in the cases which sustain a statute against the charge of vagueness to say merely that it is "as definite as" a statute sustained in some earlier case—an argument which, in view of the fact that the earlier case expresses no criterion of definiteness, is singularly unilluminating. Other cases state only their conclusion—that the statute is too uncertain (or not too uncertain)—and cite in support earlier decisions, not dealing with statutes of similar wording or even of similar spheres of operation . . . .

Note, *supra* note 93, at 71 (footnotes omitted).

110. United States v. Caviness, 239 F. Supp. 545, 551 (D.D.C. 1965).

111. *See, e.g.*, Hays & Solway, *supra* note 21; Keiter, *supra* note 7; *Certification of Minors*, *supra* note 21; Note, *supra* note 6; *Waiver in Ohio*, *supra* note 21; *Waiver in Wisconsin*, *supra* note 21; [Minnesota] Supreme Court Juvenile Justice Study

held that the Minnesota waiver statute afforded adequate standards,[112] a study commission appointed by the court to examine certification issues found that in practice the exercise of discretion by the juvenile courts in making waiver decisions frequently yielded disparate results.[113] Specifically, the Commission found pronounced differences in certification practices in urban and rural counties throughout Minnesota.[114] According to the study, the reference or certification process is used for three different purposes or objectives:

> In Hennepin County certifications are requested for youths who, in the judgment of the office of the county attorney, represent substantial threats to the public safety or cannot be effectively handled with the resources currently available through the juvenile court process. This purpose or objective is consistent with legislative intent in enacting the enabling statute. A second purpose for which certification is utilized in a number of courts is to attempt to insure that the offender will be subject to correctional or rehabilitative efforts beyond his 18th birthday. Thus youths who are approaching their 18th birthday at the time of their offense may be certified because some juvenile court judges feel that a youth committed to the Commissioner of Corrections as a juvenile "automatically" will be released from state jurisdiction when he turns 18. A third purpose for which certification is utilized is to allow the imposition of a sanction such as a fine or short jail sentence upon juveniles who committed relatively minor offenses and who, it is felt, are not in need of probation or other treatments available through the juvenile court.[115]

The discretion afforded by this typical waiver statute thus lends itself to a variety of applications, which, in turn, can lead to inequities. For example, analysis of waiver decisions in a sample of counties throughout Minnesota showed that urban offenders considered for certification had generally committed more serious offenses and had more extensive prior records than their rural counterparts.[116] In addition to more recorded offenses, certified urban youths had records extending over a longer period of time and more appearances on delinquency petitions than did rural youths.[117] Yet, despite the substantially greater seriousness of the present offense and the longer and more extensive prior records of urban youths, rural youngsters were much more likely to be certified for adult prosecution.[118]

Commission Report 61-78 (Sept. 15, 1976) [hereinafter cited as Supreme Court Study] (on file with the author).

Report 61-78 (Sept. 15, 1976) [hereinafter cited as Supreme Court Study] (on file with the author).

112. *See In re* I.Q.S., 244 N.W.2d 30, 36-39 (Minn. 1976).

113. *See* Supreme Court Study, *supra* note 111, at 61-79.

114. *See id.* at 67.

115. *Id.* at 20-21.

116. *See id.* at 71, tables 13-14, 73, table 16.

117. *See id.* at 72-73, tables 16-17.

118. *See id.* at 74.

These urban/rural disparities are perhaps understandable in terms of the relative tolerance with which various communities view deviant behavior. Because crime, especially serious crime, is heavily concentrated in urban areas, urban courts are provided with a frame of reference and perspective for responding to serious offenders not available to courts in rural counties, which appear to deal with a qualitatively less serious delinquency problem.[119] Although the substantial urban/rural disparities that emerge under a statute intended to be applied uniformly throughout the state can perhaps be explained on this basis, they are nonetheless disturbing. Despite the Minnesota court's conclusion that the legislative standards are adequate to assure evenhanded administration throughout the state, in reality the statute provides for little more than a subjective exercise of discretion that is the antithesis of a rule of law.[120]

Not only may effectively standardless discretionary waiver statutes occasion improper urban/rural disparities, they may also afford opportunities for invidious discrimination on the basis of race or class. Minority and lower-class youths are overrepresented in the juvenile court population,[121] but the disparity in representation is even more pronounced among those juveniles for whom adult certifi-

119. While differences in the availability of community correctional resources might explain some urban/rural differences, rural counties always have the option of committing delinquent youths to the State Commissioner of Corrections. Thus, the lack of community correctional facilities cannot alone explain the greater propensity to certify juveniles in rural areas. Interestingly, although urban and rural youths were certified on the basis of different considerations, their dispositions following convictions as adults tended to reflect real differences in present offense and prior record. Urban juveniles, who tended to be much more serious offenders, were more likely to be incarcerated as adults than were their rural counterparts. *See id.* at 75 & table 21.

120. A statute explicitly providing for different treatment of youths solely on the basis of urban/rural distinctions would probably violate equal protection. In Long v. Robinson, 316 F. Supp. 22, (D. Md. 1970), *aff'd,* 436 F.2d 1116 (4th Cir. 1971), the federal district court invalidated a Maryland statute that set a statewide juvenile court age limit of eighteen but that restricted the juvenile age limit to sixteen in Baltimore City. As the court noted, this statutory scheme created two classes of sixteen and seventeen year olds: "those who reside outside of Baltimore City and/or who although residing in Baltimore City are not arrested within city limits; and those who whether or not residing within the limits of Baltimore City are arrested therein." *Id.* at 26. While recognizing that geographic distinctions do not necessarily offend equal protection, the court was unable to find a psychological, physical, sociological, or other rational basis for distinguishing between sixteen and seventeen year olds arrested in Baltimore City proper and those arrested throughout the rest of the state. The court invalidated the Baltimore City exception as "arbitrary, unreasonably discriminatory, and not related to any legitimate State objective." *Id.* at 28. It appears, however, that while a legislature could not formally enact the type of urban/rural discrimination found by the Supreme Court Study Commission, the discretion afforded by a broad, general statute permits the same results to occur de facto.

121. *See* CRIME IN A FREE SOCIETY, *supra* note 61, at 44.

cation is sought. The Minnesota Supreme Court Study Commission found that while "15.1% of the offenses referred to Hennepin Juvenile Court in 1975 were committed by black youths, almost three times that percentage (44.8) of the cases considered for certification in Hennepin County in 1975-75 [*sic*] involved black juveniles."[122] It is difficult to provide a nondiscriminatory explanation for this overrepresentation of black youths in the certification population. It is possible, of course, that the overrrepresentation is simply a function of a disproportionate amount of serious delinquent activity by black youths,[123] but the findings of two studies that examined the problems of the violent and hard-core offenders in Hennepin County, when taken together, suggest that the overrepresentation of black youths in the serious offender pool is insufficient to account for their disproportionate presence in the certification pool.[124]

Studies from other jurisdictions raise similar questions about the role of race in certification decisionmaking. An examination of certification procedures in Harris County (Houston), Texas, found that fifteen of the eighteen youths in the sample for whom certification was sought were black.[125] A similar study of certification administration in Cook County (Chicago), Illinois, reported similar disparities.[126] "The ethnic breakdown of the transferred juveniles poses some serious questions. Fifty-nine of the sixty-four boys transferred (92 per cent) were blacks. Of the remaining five, three were Puerto Rican. Unfortunately no overall comparisons can be made because ethnic grouping is not included in 1970 juvenile court statistics."[127]

None of these studies is methodologically rigorous enough to permit a causal inference of racial discrimination. To reach such a conclusion it would be necessary to know also the minority groups' proportion of the general population, their distribution among social classes, and the dispositions received by white offenders while con-

122. Supreme Court Study, *supra* note 111, at 68.

123. *See* WOLFGANG, FIGLIO, & SELLIN, *supra* note 9; note 252 *infra* and accompanying text.

124. *See* HENNEPIN COUNTY STUDY, *supra* note 9, at 56 (45% of all serious crimes committed by nonwhites); Supreme Court Study, *supra* note 111, at 68 (55% of all youths considered for certification in Hennepin County nonwhite).

125. *See* Hays & Solway, *supra* note 21, at 711.

126. Keiter, *supra* note 7, at 537.

127. *Id.* at 531. Keiter also notes,

> Arguably the racial breakdown of the sixty-four transferred youths reveals subtle discrimination since the backgrounds of the nonblacks indicated more serious criminal involvement than the backgrounds of a portion of the removed blacks. But, in general, these data do not clearly establish a pattern of racial discrimination and fail to prove outright abuse of the statutory discretion.

Id. at 537.

trolling for present offense and prior record. Any evidence of a consistent, systematic pattern of racial disparity in the treatment of various offenders, however, raises equal protection questions. In this respect, the gross disparities reported in the certification cases are strikingly similar to the racial disparities in the imposition of capital punishment that led to challenges to the death penalty on equal protection grounds.[128] Writing about the equal protection problems presented by the discriminatory enforcement of vague statutes in another context, Professor Amsterdam noted,

> While any sort of arbitrariness may violate the guarantee [of equal protection], some particular species of distinctions in the treatment of citizens are especially the objects of its concern. Racial discrimination of course is the foremost of these, in view of the overriding purpose of the Fourteenth Amendment to "take away all possibility of oppression by law because of race or color." Differential practices of prosecution for different racial groups would be the plainest sort of violation of the Amendment, and counsel should be awake to the possibility of attempting to show racially discriminatory enforcement patterns . . . . A forceful showing in this regard . . . may help to persuade the courts to invalidate a challenged vagrancy law on its face for vagueness and overbreadth, the enforcement of the law having demonstrated in the flesh the potential for arbitrary use which is the basis for the vagueness contention.[129]

While some of the racial differentials in certification may reflect real differences in offender patterns, one must question whether such overly broad, discretionary statutes can be administered in an even-handed, nondiscriminatory manner.

Even assuming that the statutes could be applied evenhandedly, there is some question whether the clinical inquiry into a youth's amenability can avoid the effect of class or racial differences. Amenability to treatment is theoretically a scientific inquiry, neutral as to race or class. As a practical matter, however, because determinations as to amenability are mediated by white, middle-class professionals, racial and class differences between the psychologist-diagnostician and the youth may distort the objectivity of the inquiry.[130] Because

128. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 249-52 (1972). *See generally* sources cited in Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, ANNALS, May 1973, at 119, 124 n.24. Professor Wolfgang's research demonstrates that the influence of racial bias on the imposition of the death penalty is inescapable. *See id.* at 124.

129. Amsterdam, *supra* note 93, at 229-30 (footnotes omitted).

130. *See, e.g.*, Harari & Chwast, *Class Bias in Psychodiagnosis of Delinquents*, 10 CRIME & DELINQUENCY 145 (1964). In the absence of causal explanations of crime, the diagnostic process is inherently imprecise, *see* notes 54-60 & 63-65 *supra* and accompanying text, and, despite training, clinicians may respond to youths differentially on the basis of conscious or unconscious cues associated with class or race.

of differences in cultural expectations or verbal skills, for example, a middle-class psychologist or judge may make a poorer prognosis for a black youth than for a white youth when the actual differences being reported are more appropriately a measure of social distance.

B. Legislative Waiver

From the preceding discussion, the deficiencies of judicial waiver are apparent. Such a mechanism requires a court to make individual determinations about a youth's amenability to treatment and dangerousness that simply cannot be made with any degree of precision or uniformity. Moreover, perhaps because the answers to these questions are so indeterminate, waiving courts are given an extraordinarily broad range of unguided discretion that creates the potential for discretionary abuse and discrimination. The principal alternative to judicial waiver simply excludes certain categories of offenses from juvenile court jurisdiction by legislative definition. If charged with one of these offenses, youths above a statutory minimum age are treated as adults.[131] Although such statutes are sometimes described as prosecutorial waivers because the decision as to the offense charged determines the forum, it is the legislature and not the prosecutor that makes the policy choice.[132]

The way in which a clinician uses the information obtained is also subject to imprecision:

> How [the clinician] perceives and interprets a given piece of behavior will depend to a great degree on who he is, his own life experience, his value system, and most importantly, perhaps, where he received his training, and within which theoretical system he operates. Today there are a vast variety of such systems and methods which, more or less, contain their own esoteric vocabulary and frame of reference. The proponents of each claim success though each interprets behavior differently. To subject a behavioral scientist to a rigorous cross examination is not merely to question his data collection system and his facts, but also to question all of his basic theoretical assumptions for which he has very little empirical data.

Croxton, *The Kent Case and Its Consequences*, 7 J. Fam. L. 1, 8-9 (1967). Differences in the way a clinician and a youth regard the same information further complicate the diagnostic process. *See generally* H. Polsky, *supra* note 70, at 153-58.

131. *See, e.g.*, La. Rev. Stat. Ann. § 13:1570 A(5) (West Supp. 1978). (adult prosecution of "a child who, after having become fifteen years of age, is charged with having committed a capital crime"). Some states exclude only capital offenses or those punishable by life imprisonment. *See, e.g.*, Fla. Stat. § 39.02(5)(c) (1975); Miss. Code Ann. § 43-21-31 (1972); N.C. Gen. Stat. § 7A-280 (1969); W. Va. Code § 49-5-3 (Supp. 1977). Other jurisdictions exclude broader categories of offenses, *see, e.g.*, D.C. Code § 16-2301(3) (1973), or youths charged with repeat offenses, *see, e.g.*, R.I. Gen. Laws § 14-1-7.1 (Supp. 1977). Several jurisdictions supplement their judicial waiver provisions with legislative offense exclusions. *See, e.g.*, Colo. Rev. Stat. §§ 19-1-103(9), -104, -3-108 (1973 & Supp. 1976).

132. For a discussion of the distinction between "pure" prosecutorial waiver and legislative waiver, see notes 20-21 *supra* and accompanying text. For further analy-

Statutes mandating adult prosecution on the basis of offense charged rather than the characteristics of the offender have been criticized extensively as inconsistent with the rehabilitative philosophy of the juvenile court.[133] They have also been challenged on due process and equal protection grounds by youths tried as adults, who have argued that automatic certification denies the procedural safeguards required by *Kent* and that exclusion on the basis of the offense alleged constitutes an arbitrary legislative classification that violates equal protection.[134] The due process claim is directed at the unreviewability of the charging decision and the prosecutor's exercise of discretion in removing youths from the juvenile court. The equal protection claim attacks the rationality of the legislative decision to treat youths charged with certain offenses as adults rather than juveniles.

In *United States v. Bland,*[135] the leading case on the validity of legislative waiver statutes, a sixteen-year-old youth charged with armed robbery and tried as an adult asserted that the *Kent* procedural safeguards were required as a precondition of waiver because of the critical differences between juvenile and adult treatment. Bland argued that since the ultimate result is the same whether the waiver decision is made by a judge after a hearing, as in *Kent,* or by the legislature and a prosecutor's charging decision, there is no justification for not requiring comparable procedural safeguards.

The argument for procedural parity was strongly endorsed by Judge J. Skelly Wright in dissent. Judge Wright contended that

> the test for when the Constitution demands a hearing depends not on which government official makes the decision, but rather on the importance of that decision to the individual affected. "The extent to which procedural due process must be afforded . . . is influenced

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sis of the distinction, see Whitebread & Batey, *supra* note 20, at 232-35; *Due Process Analysis, supra* note 21, at 339-46.

133. *See* Mountford & Berenson, *supra* note 21, at 62 ("It would be more consistent with the purposes of a juvenile code if waiver were based on findings about the child rather than on findings about the offense."). *See generally* Mylniec, *supra* note 20; Note, *supra* note 10; 53 B.U.L. REV. 212 (1973).

134. *See* Woodard v. Wainwright, 556 F.2d 781 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 1285 (1978); Russel v. Parratt, 543 F.2d 1214 (8th Cir. 1976); United States v. Quinones, 516 F.2d 1309 (1st Cir.), *cert. denied,* 423 U.S. 852 (1975); Cox v. United States, 473 F.2d 334 (4th Cir.), *cert. denied,* 414 U.S. 869 (1973); United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 909 (1973); Myers v. District Court, 184 Colo. 81, 518 P.2d 836 (1974); Johnson v. State, 314 So. 2d 573 (Fla. 1975); People v. Sprinkle, 56 Ill. 2d 257, 307 N.E.2d 161, *cert. denied,* 417 U.S. 935 (1974); State v. Sherk, 217 Kan. 726, 538 P.2d 1390 (1975); Jackson v. State, 311 So. 2d 658 (Miss. 1975); State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974).

135. 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 909 (1973). For discussion of *Bland,* see *Vitiello, supra* note 21, at 47-52; *Due Process Analysis, supra* note 21, at 342; *Due Process and Waiver, supra* note 21, at 601-07.

> by the extent to which [an individual] may be 'condemned to suffer grievous loss.' "[136]

Judge Wright regarded the statute that excluded the defendant from the juvenile court as a transparent effort to evade the procedural requirements of *Kent*[137] and argued that the prosecutor's charging decision should be subjected to the same sort of hearing as was required in the case of judicial waiver.[138]

Judge Wright's argument that the comparable consequences flowing from legislative and judicial waivers necessitate comparable procedural safeguards did not persuade the *Bland* majority, and they declined to impose procedural requirements on the prosecutor's charging decision under the offense exclusion legislation. The majority relied on the well-established doctrine that exercises of prosecutorial discretion are not subject to judicial review or due process constraints except under manifestly discriminatory circumstances.[139]

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136. 472 F.2d at 1345 (quoting Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970)).

137. *See id.* at 1341 ("This blatant attempt to evade the force of the *Kent* decision should not be permitted to succeed.").

138. *See id.* at 1344.

139. *See id.* at 1335-36. In a similar challenge to a "pure" prosecutorial waiver statute, the court in Cox v. United States, 473 F.2d 334 (4th Cir.), *cert. denied,* 414 U.S. 909 (1973), specifically rejected procedural safeguards as a precondition to the exercise of prosecutorial discretion:

> Judicial proceedings must be clothed in the raiment of due process, while the processes of prosecutorial decision-making wear very different garb. It is one thing to hold, as we have, that when a state makes waiver of a juvenile court's jurisdiction a judicial function, the judge must cast about the defendant all of the trappings of due process, but it does not necessarily follow that a state or the United States may not constitutionally treat the basic question as a prosecutorial function, making a highly placed, supervisory prosecutor responsible for deciding whether to proceed against a juvenile as an adult. If it does, as the United States has, the character of the proceeding, rather than its consequences to the accused, are largely determinative of his rights.

Id. at 336.

The most common justification for the unreviewability of prosecutorial decisions is that, according to the constitutional principle of separation of powers, the judiciary lacks the power to compel or control the executive in matters that are essentially discretionary. *See, e.g.,* United States v. Bland, 472 F.2d 1329, 1335 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 909 (1973); Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied,* 382 U.S. 935 (1965). Thus, in the absence of individious discrimination, the prosecutor's decisions about whether and whom to prosecute are beyond the review of the judiciary. *See, e.g.,* Oyler v. Boles, 368 U.S. 448, 455 (1962); Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute,* 75 COLUM. L. REV. 130 (1975) [hereinafter cited as *Reviewability of Prosecutorial Discretion*]; Note, *Prosecutorial Discretion—A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse,* 21 DE PAUL L. REV. 485 (1971). As the court in Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967), noted, "[f]ew subjects are less adapted to judicial review than the exercise

The dissent in *Bland* and those commentators who argue that the comparable consequences of judicial and legislative waivers require the imposition of *Kent* procedures in both cases[140] mistake the basic issue in *Bland*. The issue whether to impose judicial review on a prosecutor's charging decision cannot turn alone, as Judge Wright suggested, on the seriousness of the consequences to the defendant of being tried as an adult rather than a juvenile. Many types of prosecutorial decisions have enormous consequences for defendants—the decision not to charge at all, the decision to charge a course of conduct as a misdemeanor rather than a felony, the decision to invoke only one of several applicable statutes. Yet, as the *Bland* majority pointed out, due process has never been held to require "an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom."[141]

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by the Executive of his discretion in deciding when and whether to institute criminal proceeding, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Id.* at 480.

Judicial reluctance to encumber the prosecutor's discretion stems from a fear of intruding on sensitive legal and policy judgments. Apart from the separation of powers issue, there is concern that judicial review, which presumably would entail the power to compel the presentation or dismissal of a case, could result in a misallocation of enforcement resources by preventing the prosecutor from maximizing its enforcement effectiveness through selective prosecution. *See* United States v. Alarik, 439 F.2d 1349, 1350 (8th Cir. 1971). Nonreviewability is sometimes justified as well by the need to maintain secrecy in the course of investigations. A hearing prior to the filing of charges could divulge confidential sources. Additionally, the factors that influence a prosecutorial decision—legal evaluation of guilt, resource allocation, and other enforcement policies—seldom provide a record in a form that permits meaningful pretrial review. *See Reviewability of Prosecutorial Discretion, supra* at 139.

The United States Supreme Court recently reaffirmed the freedom of prosecutors from judicial constraints in Bordenkircher v. Hayes, 98 S. Ct. 663 (1978), noting that

> so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

Id. at 668 (footnote omitted) (quoting Oyler v. Bowles, 368 U.S. 448, 456 (1962)).

140. The *Bland* majority has been criticized for permitting the legislature to circumvent *Kent* waiver procedures. *See, e.g., Waiver of Jurisdiction, supra* note 21, at 662-64; *Due Process and Waiver, supra* note 21, at 606:

> Because the effect and consequences of the waiver decision to the juvenile are virtually identical whether the decision is made by a judge or a prosecutor, it might follow that the mere form of the waiver statute should be ignored and all waiver decisions, under either a choice of charge statute or a prosecutorial waiver statute, should be subject to review in furtherance of the *Gault* philosophy.

141. 472 F.2d at 1337.

In fact, Judge Wright's real concern in *Bland* seems to have been not simply that the prosecutor's charging decision may have serious consequences for a youthful offender but, more specifically, that in deciding what charge to bring, the prosecutor may foreclose any subsequent consideration of a youth's amenability to juvenile treatment. According to Wright, one of the "immutable" principles of our jurisprudence is that " 'where governmental action seriously injures an individual, and the reasonableness of the action depends on *fact findings,* the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.' "[142] Applying this principle in *Kent,* the Supreme Court had required that before a judge could decide whether a youth was susceptible to juvenile treatment, there had to be a hearing. Wright suggested that the factual determinations at issue in a judicial waiver decision are also at issue when the prosecutor makes his charging decision. Thus, the same procedural safeguards should be required in both situations since the result in each may be to deprive the youth of his "right" to be charged as a juvenile.[143]

Judge Wright's desire to extend the procedural requirements of *Kent* to require review of the prosecutor's charging decision, however, stemmed from a fundamental misunderstanding of what the prosecutor decides. The only factual issues involved in the charging decision relate to probable cause and legal guilt, and the prosecutor's determinations in this regard are subjected to judicial review at trial. The issue of amenability to treatment, which the dissent sought to resolve in an adversary proceeding prior to trial, is not a factor in the prosecutor's decision to charge. Rather, the legislature, in deciding which offenders to exclude from juvenile court jurisdiction, has presumably concluded that youths charged with certain offenses are not amenable to treatment. The legislative classification is conclusive. Accordingly, within the statutory framework, no factual dispute regarding amenability need be resolved.

Judge Wright's dissent notwithstanding, there is no per se right to treatment as a juvenile. To the extent such a right exists, it exists

142. *Id.* at 1345 (quoting Greene v. McElroy, 360 U.S. 474, 496 (1959)) (emphasis added).

143. According to Wright, "a 'guilty' child may, under certain circumstances, have a right to be charged as a juvenile." *Id.* at 1348. Whether that right exists in any given case, however, can only be decided after a factual determination as to factors such as "the maturity of the child and his susceptibility to rehabilitation." *Id.*

One writer who supports Judge Wright's contention notes that "a first degree felony charge signifies only that there was probable cause to believe that juvenile may have committed the offense for which he is charged. It does not bear on the juvenile's prospects for treatment and rehabilitation." *Due Process Analysis, supra* note 21, at 344.

because the legislature has created it, and what the legislature has created, it can take away.[144] The dissent evinced a fundamental unwillingness to recognize that juvenile courts are purely statutory entities, the jurisdiction of which can be modified or abolished by the legislature, and that in defining juvenile court jurisdiction, the legislature is free to subordinate individualized treatment values to other considerations such as public safety. If juvenile court jurisdiction is defined to include only those persons below a jurisdictional age who are charged with a nonexcluded offense, all other persons are *by definition* adults. While offense exclusion represents a departure from more rehabilitative, individualized judicial examinations of the offender, the rehabilitative ideal is not writ in stone—nor in the Constitution.[145]

If, as Judge Wright lamented, under a legislative waiver statute, "many impressionable 16- and 17-year-olds . . . will be packed off to adult prisons where they will serve their time with hardened criminals,"[146] without any juvenile court inquiry into their potential for rehabilitation, that is a result of the legislature's definition of children, not of the prosecutor's decision to file a particular charge. It is the legislature that determines that youths charged with certain offenses should not be afforded juvenile treatment—because they are not amenable to treatment, because they are too dangerous, or simply because it would be too costly to attempt to rehabilitate them.[147]

144. *See* 472 F.2d at 1335. The majority noted, "Congress easily could have established 16 as the age cutoff date (it is not clear what constitutional infirmities our dissenting colleague would have found in that less sympathetic approach) . . . ." *Id.* at 1332.

145. As the Illinois Supreme Court stated in People v. Jiles, 43 Ill. 2d 145, 148, 251 N.E.2d 529, 531 (1969),

> [w]hile there would probably be almost universal agreement that it is desirable for a State to maintain a juvenile court and to establish special facilities for the treatment of a separate category of "juvenile delinquents", we are aware of nothing in the constitution of the United States or of this State that requires a State to do so.

Accord, People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697, *cert. denied,* 409 U.S. 912 (1972); State v. Green, 218 Kan. 438, 442, 544 P.2d 356, 361 (1975) ("[T]he legislature could . . . withhold the protection of the doctrine of *parens patriae* from all juveniles exceeding fifteen years of age. What the legislature may do absolutely, it may do conditionally . . . .").

146. 472 F.2d at 1349.

147. The exact rationale of legislative waiver is unclear. Offense exclusion could be viewed as a conclusive presumption that persons who allegedly engage in certain conduct cannot be treated or are extraordinarily dangerous. The *Bland* court indicated that " 'experience has shown that in certain crime categories, juvenile treatment is unworkable.' " *Id.* at 1332 (quoting Department of Justice memorandum to the Senate Committee on the District of Columbia). If the classification reflects an "irrebuttable presumption," however, it may be vulnerable:

> An "irrebuttable presumption" analysis would appear to provide procedural

In addition to challenges based on the absence of procedural safeguards in connection with the prosecutor's charging decision, legislative waiver statutes have been challenged as violations of equal protection by youths claiming that the statutory distinction between those committing serious and minor offenses is arbitrary.[148] The courts have uniformly rejected such claims, noting that classification on the basis of offense involves neither an inherently suspect class nor invidious discrimination and that loss of juvenile court treatment does not violate one of the fundamental rights or "preferred liberties" that require stricter judicial scrutiny.[149] As the majority in *Bland* noted, a legislative classification is entitled to a strong presumption of constitutional validity as a means of dealing with a problem uniquely within the legislative purview and should be invalidated only if there is no rational basis to justify it:[150]

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts

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protections for those juveniles who have been legislatively excluded from the juvenile justice system. It might be argued in the case of the *Bland* statute, for example, that Congress conclusively presumed that youths charged with certain offenses are not amenable to treatment as juvenile delinquents. Because such a presumption may not be "necessarily or universally true in fact," the statute creates an overinclusive burdening classification when reasonable alternative means are available—a *Kent*-type waiver hearing—to make the "critical decision" whether a particular juvenile might benefit from juvenile treatment even though he is charged with a serious offense . . . . If a State so purports to be concerned with rehabilitation of juveniles, then it may not, consistent with due process, conclusively presume without a hearing that a particular juvenile is incapable of rehabilitation solely from the fact that the juvenile is charged with a first degree felony.

Due Process Analysis, supra note 21, at 343-44 (footnotes omitted).

Offense exclusion may also reflect a legislative judgment that juvenile treatment might undercut the seriousness of the norm violated. Such a judgment, however, is contrary to the philosophical premises of the juvenile court, which emphasize the needs of the offender rather than the seriousness of the offense.

Whatever the rationale, offense exclusion is clearly at odds with the rehabilitative philosophy of the juvenile court. Stamm notes that

> if all offenses are not initially subject to management within the juvenile justice system, there is an inherent incompatibility with the avowed philosophy of the juvenile court. It is tantamount to saying that children who commit certain offenses cannot be rehabilitated and must be sent to criminal court to protect the public safety and common good.

Stamm, *supra* note 8, at 139 (footnote omitted).

148. *See* cases cited note 134 *supra.*

149. *See, e.g.,* United States v. Bland, 472 F.2d 1329, 1336-37 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 909 (1973). The *Bland* court noted that "[s]everal states have similarly excluded certain crimes in defining the jurisdiction of their respective systems of juvenile justice." *Id.* at 1334.

150. *See id.* at 1333-34.

> may not declare a legislative discrimination invalid unless, *viewed in the light of facts made known or generally assumed,* it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators."[151]

Consistent with this analysis, a factual question for any court faced with a challenge to a legislative waiver statute is whether *"facts known or generally assumed"* provide a rational basis for treating serious offenders differently from minor offenders. Since the challenger bears the burden of showing that a statute that classifies offenders according to offense is arbitrary and irrational, it is not surprising that these equal protection challenges have uniformly failed. It appears that a statute discriminating between serious and minor offenders will be sustained if it comports with a generally held societal belief that serious offenders ought to be treated differently because, as a class, they are beyond the rehabilitative reach of the juvenile court or because their presence within the juvenile justice system is detrimental to the rehabilitation of others.[152]

Legislatures appear to assume, and courts to accept without further elaboration, that youths who commit serious offenses are different from minor offenders. The *Bland* court, for instance, adverted to the exclusion by other jurisdictions of certain classes of offenses from the juvenile court as justifying its own assumption that offenders can be differentiated on the basis of their offenses.[153]

While legislative waiver statutes have uniformly been sustained against due process and equal protection challenges, the courts have not addressed several potentially more significant problems presented by these statutes. For instance, if the rationale of the legisla-

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151. *Id.* at 1334 (quoting Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935) (footnote omitted)) (emphasis added).

152. As Vitiello observes, however,

> it is not clear whether a juvenile who commits a serious offense is *ipso facto* less amenable to treatment than one who commits a trivial offense. In general, courts have glossed over that possibility and pointed to the seriousness of the offense as indicative of nonamenability. The problem appears to be far more complex than courts have recognized. For example, one study indicated that juvenile murderers are model prisoners and low rate recidivists. There is also an indication that juvenile offenders can be categorized not by seriousness of the offense but by the motivational need that the crime fills.

Vitiello, *supra* note 21, at 39; *see* notes 161-81 *infra* and accompanying text (questioning the legislative rationality of distinguishing first offenders on the basis of seriousness of offense).

153. *See* 472 F.2d at 1334. The factual assumption legitimating classification on the basis of offense appears contrary to the basic rationale of the juvenile court that offenders differ and that there is no direct or even necessary relationship between what they did and what they need.

tive waiver classification is that juvenile court treatment is inappropriate for those who commit certain offenses, then regardless of the initial charge, if an individual is subsequently found not to have committed one of the offenses excluded from juvenile court jurisdiction, he should be returned to that court.[154] Return to juvenile court is certainly consistent with the statutory policies providing for differential treatment on the basis of offense committed. Moreover, the policy reasons that militate against subjecting the prosecutor's charging decision to prior judicial review do not preclude examining it after the fact. Finally, in the absence of a transfer-back provision, legislative waiver statutes lend themselves to prosecutorial abuse via overcharging.[155]

Yet, despite the desirability of a transfer-back provision, statutes such as that at issue in *Bland*[156] typically base adult court jurisdiction on the prosecutor's initial charge rather than on the youth's ultimate conviction;[157] the juvenile court is thus divested of jurisdiction without any opportunity to assess the correctness of that decision.

A second, more significant problem with most legislative waiver statutes is that the offense classification employed may not adequately reflect all the policy goals of the legislature. Consistent with one legislative purpose, a classification based on purely retributive values presumably could exclude from the juvenile process, solely on

154. The Senate Committee on the District of Columbia, in considering one of the bills that underlay the statute ultimately challenged in *Bland*, addressed the issue of transferring back to juvenile court jurisdiction those juveniles who were ultimately convicted of offenses not falling within the statutory exclusion.

> Family Division jurisdiction must be restored where the basis of transfer has been invalidated. The Committee recognized that the ultimate finding, regarding the reasonable prospects of rehabilitation, consists of a prediction as to the nature of the child's social character at the time of disposition. So too, the committee recognized that of great revelance [*sic*] to this prediction is the nature of the misconduct which, at the time of any dispositional hearing, the child will have been found to have committed. Yet, in the committee's opinion, *it follows logically—from the fact that the transfer finding amounts to prediction and from the assumption in that prediction that the child has committed the acts alleged—that a child who is found* not *to have committed the acts may well* not *suffer from the lesser prospects of rehabilitation predicted, and ought to be returned to the juvenile system.*

S. REP. No. 620, 91st Cong., 1st Sess. 12 (1969) (emphasis added).

155. A district attorney is traditionally more likely than a judge to be responsive to political pressure, and thus more likely to seek transfer of jurisdiction in response to society's demand for retribution and to ignore the rehabilitative considerations upon which the juvenile justice system is premised. Further, as an adversary, a prosecutor is less likely than a judge to consider the welfare of the accused.

Vitiello, *supra* note 21, at 48.

156. D.C. CODE § 16-2301(3)(A) (Supp. 1970).

157. *See* note 131 *supra* and accompanying text.

the basis of culpability, an older youth who committed a serious first offense. Exclusion grounded only in retribution, however, is backward-looking, keyed to the commission of one serious offense. Under a retributive system, some acts are judged to be so heinous and atrocious that the perpetrator deserves punishment without regard to any other considerations. To the extent that the legislation proposed in this Article focuses on serious offenses as the most significant policy concern of the legislature, it clearly contains retributive features.

A basic premise of this Article, however, is that legislative exclusion should reflect more than past culpability or the commission of one serious offense. Rather, the principal function of a legislative exclusion statute should be rationally to distinguish between those serious offenders who will continue to recidivate and those who are likely to desist from future delinquencies. In short, a legislative waiver statute may be in part retributive, but it should also be utilitarian in terms of the underlying premises of the juvenile justice system. In this regard, the legislative exclusion statute in *Bland* properly attempted to use information about past offenses not simply as a basis for punishment, but also to improve judgments about the likelihood of future delinquencies. That statute excluded youths charged with certain serious offenses from juvenile court jurisdiction on the basis of congressional findings that offenders between the ages of sixteen and eighteen who had committed certain serious crimes were simply "beyond rehabilitation in the juvenile justice system,"[158] "too well formed or sophisticated for . . . mere juvenile therapy if [they had] already been exposed . . . to the juvenile system,"[159] and different from "first offenders charged with minor offenses . . . [because] in certain crime categories, juvenile treatment is unworkable."[160] In short, the statute purported to make a prediction concerning amenability and recidivism. Unlike the similar prediction involved in judicial waivers, however, the legislative prediction was based on the seriousness of the offense rather than on the characteristics of the offender.

158. United States v. Bland, 472 F.2d 1329, 1332 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

159. S. REP. No. 620, 91st Cong., 1st Sess. 8-9 (1969). There were apparent conflicts between the House and Senate "findings," and the final version of the statute is a compromise between the Senate's requirement of prior juvenile treatment and the House's extensive catalogue of excluded offenses. The final compromise "eliminates the previous finding of delinquency required under the initial Senate version and shortens the list of serious crimes contained in the initial House version." United States v. Bland, 472 F.2d 1329, 1333 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

160. *Crime in the National Capital: Hearings on S. 2981 Before the Senate Comm. on the District of Columbia*, 91st Cong., 1st Sess. pt. 7, at 1816 (1969).

Whether the legislative policy objectives and findings relied upon in *Bland* can be translated into an offense classification that successfully differentiates between those juvenile offenders who will recidivate and those who will not depends, in part, upon whether serious first offenders differ from minor offenders in their likelihood of recidivating (or, as Congress viewed it, their amenability to treatment) and whether a serious first offense alone is a sufficient basis for distinction. The statute involved in *Bland,* however, is significant in that it attempts to use the commission of a past serious offense in a predictive rather than purely retributive fashion.

As suggested in the earlier discussion of amenability to treatment, there is reason to question whether any significant differences in amenability to treatment can be found among offenders classified solely on the basis of present offense.[161] Despite the congressional findings noted in *Bland,* there is little empirical evidence to justify the conclusion that a youth whose first offense is a serious one is any more difficult to rehabilitate than a youth whose first offense is minor. Congress apparently assumed that a youth progresses through a delinquent career, starting with minor delinquencies and culminating with serious felonies, and that juvenile court intervention typically occurs at an intermediate point in such a progression.[162] This conception assumes that a youth charged with a serious felony has come into contact with the juvenile system earlier in his "career" and that juvenile therapy has already proven unsuccessful in bringing about rehabilitation.

While such progression from minor to serious offenses may occur, it is certainly not inevitable. From the available evidence regarding hidden delinquency and the development of delinquent careers,[163] it appears that many youths engage in both trivial and serious law violations at the same stage of their careers and that police arrest and process youths primarily as a function of the frequency rather than

161. *See* notes 52-65 *supra* and acccompanying text.

162. The committee has concluded that a juvenile can reliably be considered too well formed or sophisticated for, and beyond the reach of, mere juvenile therapy if the particular juvenile has already been exposed, in years of relative discretion, to the juvenile system and treated to the extent that his case required (as suggested by a prior finding of delinquency), and has nevertheless returned to serious misconduct (as suggested by a serious felony charge).

S. REP. No. 620, 91st Cong., 1st Sess. 8-9 (1969). *See generally* Emerson, *Role Determinants in Juvenile Court,* in HANDBOOK OF CRIMINOLOGY 621, 631-38 (D. Glaser ed. 1974). The presumption of a progressive escalation in seriousness of sequential offenses does not appear to be borne out in fact. *See* notes 170-76 *infra* and accompanying text (indicating that, regardless of the number of prior violations, the probability that the next violation will be more serious remains fairly static).

163. *See* notes 54-58 *supra* and accompanying text.

the seriousness of an individual's delinquent involvements.[164] Apprehension thus appears to be random, resulting primarily from a youth's persistence. If this is true, then the fact that a youth is apprehended for a serious offense may not distinguish him from a youth apprehended for a minor offense whose hidden serious delinquency simply did not result in apprehension. Thus, the seriousness of an offense provides little basis for distinguishing those youths who are not susceptible to rehabilitation and are likely to recidivate from those for whom disposition as a juvenile is appropriate.

Consistent with this conclusion are the findings contained in Wolfgang's *Delinquency in a Birth Cohort,* which indicate that a first offense, even a serious one, is predictive of neither the probability nor the seriousness of future offenses.[165] *Delinquency in a Birth Cohort*

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164. Williams and Gold report that

> [t]he frequency of teenagers' delinquent behavior is positively associated with their getting caught . . . . To a lesser degree, so is the seriousness of their behavior . . . . [T]he frequency of delinquent behavior is more predictive of getting caught by the police than the seriousness of that behavior . . . . [G]etting caught is to a great extent a chance occurrence.

Williams & Gold, *supra* note 54, at 219; *see id.* at 219-25.

165. *See* WOLFGANG, FIGLIO, & SELLIN, *supra* note 9, at 159-61. This study is a very valuable contribution to an understanding of delinquency and the responses of legal agencies to it. In examining the official delinquent careers of the birth cohort, the authors conducted a search of police records and other data sources to determine whether a juvenile in the sample was ever arrested. Delinquents were defined as those with officially recorded delinquencies known to the police. Such delinquencies covered a range of juvenile law violations, and a severity index was used to permit qualitative comparisons of delinquent events.

Obviously, there are difficulties in relying on official police arrest data as the criterion for delinquency. Official records cannot reflect the extensiveness of hidden delinquencies or the relationship between hidden and known activity. Furthermore, because official statistics may reflect some preliminary exercises of discretion in the compilation of records, undiscernible biasing of the statistics may have occurred. Relying on arrest statistics may also include youths who are factually innocent, hence nondelinquent. In light of the relationship between hidden and official delinquency, however, while "there is a slight chance that an offense of which [a juvenile] is not guilty may be recorded against him, . . . there is a much greater likelihood that the records of the police inadequately show his real involvement in delinquency." *Id.* at 22. Moreover, relying on court adjudications rather than arrest as a criterion of delinquency would reflect one or two additional screening decisions and exercises of discretion. While all of those who are formally adjudicated are delinquents, many whose cases were closed by the police or court intake also committed delinquencies. For purposes of understanding delinquency, official arrest records are the closest to the actual universe of delinquent activities, albeit still a conservative estimate.

There may be some question whether the results reported by Wolfgang can be generalized beyond the location of the study—Philadelphia—or its time frame, covering boys born in 1945 and becoming delinquent in the late 1950's and early 1960's. While the extent to which the findings apply elsewhere can be determined only by replication studies in other locales and from other time periods, *Delinquency in a Birth*

reports the results of a study of the official delinquent careers of all males born in 1945 and residing in Philadelphia from their tenth until their eighteenth birthday. Based on this study, Wolfgang concludes that for virtually all purposes most of the significant differences in frequency and seriousness of delinquency occur between those juveniles with one or two delinquencies and those with five or more.[166] The study found that while one-third (34.9%) of all of the boys in the Philadelphia cohort were involved in at least one delinquency, nearly half (46.4%) of the offender group desisted after initial contact with the police and committed no further delinquences.[167] Of those offenders committing a second delinquency, an additional one-third (34.9%) desisted from committing a third.[168] Offenders inflicting personal injury were nearly as likely to desist after one offense (43%) as other types of offenders.[169] As a policy matter, then, the severe adult intervention in the life of a serious first offender that occurs under most legislative waiver statutes appears unnecessary since in many cases these youths will not persist in delinquent behavior.

These findings raise other policy issues regarding legislative exclusions of serious first-time offenders. One question concerns the probability that a person who commits an initial injury offense will commit a second offense, and if so, the probability that it will also be an offense against the person. A second concerns the extent to which the probabilities of a subsequent offense against the person for those who commit an initial injury offense differ from the probabilities for prior offenders. The Philadelphia study found some evidence indicating a tendency toward offense specialization in delinquent careers—the probability of committing a second offense of the same type as a prior offense—but such tendencies were relatively weak.[170] The probability that a youth whose first offense involved personal injury would subsequently be arrested for another injury offense was less than ten percent (9.2%). A recidivating offender who had previously committed a property damage offense was almost as likely as an injury offender to be arrested the next time for an injury offense

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Cohort is a pioneering attempt to "note the age of onset and the progression or cessation of delinquency," the relationship between delinquency and "certain personal or social characteristics of the delinquents," and the difference between delinquents and those who "did not have official contact with the law." *Id.* at 4-5. Whatever its shortcomings may be, it provides some of the best available evidence on many delinquency and social policy issues.

166. *See id.* at 88-105.

167. *See id.* at 159-60. While two-thirds of these first offenses were less serious (nonindex) types of offenses, the remainder were more serious (index) delinquencies. Nearly eight percent of first arrests were for injury offenses. *See id.*

168. *See id.* at 163.

169. *See id.* at 160.

170. *See id.* at 188-90.

(8.8%).[171] Thus it appears that youths initially arrested for serious offenses are scarcely more likely to be rearrested for such offenses than are those whose initial violation was less serious.

While a retributive-utilitarian legislative exclusion should be designed to prevent serious offenses from recurring, the likelihood that an initial serious offender will commit a second serious offense is low and not significantly different from the likelihood that a minor offender's second offense will be serious.[172] Generalizing about the probabilities that, given prior violations, particular types of subsequent violations will occur, Wolfgang concludes that

> the typical offender is most likely to commit a *nonindex* [*i.e.*, nonserious] *offense* next, *regardless* of what he did in the past. If he does not commit a nonindex type next, is most likely *to desist from further delinquency.* If he were to commit an index [*i.e.*, serious] offense next, it would most likely be the theft of property . . . . With the exception of the moderate tendency to repeat the same type of offense, this pattern obtains *regardless* of the previous offense.[173]

While a first offense provides a slight indicator of the type of second offense, the number and type of offenses prior to the last offense provide no additional aid in predicting the type of the next offense.[174] Moreover, the probability of committing a particular type of offense remains approximately the same regardless of the number of prior offenses, and there does not appear to be a progressive increase in the seriousness of the offenses committed as the number of prior involvements rose.[175]

> [T]he probability of being involved in a particular type of offensive behavior is independent of the number of offenses that a juvenile may have committed. We may state simply, as an example, that a boy is no more likely at, say, the eleventh offense to be involved in a violent act than he was at the fifth.[176]

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171. *Id.* at 188. The likelihood of an injury offender *ever* committing another injury offense, regardless of other intervening offenses, was .2138. *Id.* at 190, table 11.10. Unfortunately, the data do not include the probability of other types of recidivists *ever* committing an injury offense.

172. *See id.* at 183, matrix 11.9. The probabilities of committing particular types of offenses did not change appreciably with the number of offenses. Wolfgang generated a transition matrix indicating the probabilities of injury offense, *inter alia,* given a prior offense. The probability of an injury offense following a prior injury offense was .0920, while the probability of an injury offense following a nonindex violation was .0685; following theft, .0530; following damage, .0882; following combination, .0703. *See id.*

173. *Id.* at 189 (emphasis in original).

174. *See id.* at 206.

175. *See id.* at 165.

176. *Id.* at 175.

Finally, Wolfgang reports that, in terms of persistence, the most significant offender differences occur between those juveniles with one or two delinquencies and those arrested five or more times.[177] The probability that a chronic offender will be involved in a sixth or subsequent delinquency is about .80.[178] Although the likelihood that any given delinquent act will be a serious offense is low, the relatively small group of chronic delinquents accounts for a disproportionately large amount of the total volume of serious youth crime.[179] In summarizing the differences between most offenders and the chronic delinquents, Wolfgang reports,

> These chronic offenders represent only around 6 percent of the entire birth cohort and 18 percent of the delinquent group; yet, this small group of 627 were responsible for 5,300 delinquencies, or 52 percent of all such acts committed by the entire birth cohort. They were heavily represented among those who committed violent offenses; *about 55 percent of all the offenses we designated violent were committed by this small group of 627. They were responsible for 71 percent of the robberies and for all the homicides.* The other offenses committed by most of the other delinquents in the birth cohort were relatively trivial, and when we tried to grade them (i.e., weight them in some way by a seriousness score that we had worked out earlier), the differences between the hard core—the chronic small group of 627—and the others became even more dramatic.[180]

While most youngsters desist after one or two delinquencies, for those few youths who persist, the probability of significant recidivism stabilizes.[181]

The only valid basis for distinguishing chronic offenders from their less persistent counterparts is the number of prior involvements. The seriousness of the offense alone is no indicator of the likelihood of repetition. Thus a statute that excludes a juvenile who commits a *single* serious offense subsumes many juveniles who probably would not be involved in subsequent serious misconduct. Focusing on one offense alone, such statutes cannot rationally distinguish between the random serious offender and those relatively few persistent youths who ultimately account for most of the serious delinquencies.

These findings of the Philadelphia study have important implications for the construction of rational legislative waiver categories. They suggest that a *first* offense, even a serious one, is not indicative of either future offenses or their seriousness since most first offenders,

177. *See id.* at 65, 88.

178. *Id.* at 162, table 10.3.

179. *See id.* at 88.

180. Wolfgang, *Contemporary Perspectives on Violence*, in VIOLENCE AND CRIMINAL JUSTICE 7 (D. Chappell & J. Monahan eds. 1975) (emphasis added).

181. *See* WOLFGANG, FIGLIO, & SELLIN, *supra* note 9, at 163.

including serious ones, are likely either to desist from further criminal involvement entirely or to commit a nonindex, nonserious offense next. They suggest that while the commission of an offense is the best indicator of the likelihood of a subsequent offense of the same type, it is a weak indicator, and the probabilities of offense switching are nearly as great. They suggest that the probability that a particular type of violation will occur remains approximately the same regardless of the number of prior violations. Finally, they suggest that, regardless of the type of initial offenses, youths who will be persistent, chronic violators can be identified only after they have recidivated several times. Even though the probability of a serious offense at any given delinquent event is low, persistent offenders commit more delinquencies and thus have a better "chance" of eventually committing serious ones. Thus, utilitarian legislative waiver classifications must be designed to *identify persistent delinquents who are also serious*, rather than initially serious delinquents who may ultimately be neither serious nor persistent offenders.

Some jurisdictions attempt to account for persistence as well as seriousness by legislatively waiving only repeat offenders. Rhode Island, for example, legislatively excludes only youths aged sixteen or over who are currently charged with felonies and who have been convicted of felonies twice since becoming sixteen.[182] The prerequisite of two felony convictions after sixteen clearly addresses the serious and persistent offender identified by the Wolfgang study. Within a judicial waiver framework, a Colorado statute provides that two prior felony convictions create a prima facie case for waiver.[183] The Juvenile Justice Standards Project recommends an even more stringent criterion, a previous adjudication for a violent crime, as a prerequisite to judicial waiver.[184]

Legislative exclusion on the basis of a present serious offense combined with a significant prior record is much more likely than the "one-shot" statutes to identify the persistent juvenile offenders who ultimately pose the serious threat to the community. A reference matrix combining various present offenses with prior records could explicitly incorporate the actuarial prediction methods on which the courts implicitly rely in making amenability/dangerousness determinations. A legislatively promulgated matrix, based on retributive-utilitarian assumptions, could identify serious and persistent delinquents at least as accurately as the most sophisticated clinical-judicial methods and with much greater objectivity, fairness, and ease of administration.

182. R.I. GEN. LAWS § 14-1-7.1 (Supp. 1977).
183. COLO. REV. STAT. §§ 19-3-108(2)(c) (1973).
184. *See* TRANSFER BETWEEN COURTS, *supra* note 21, § 2.2 C(2).

III. THE LEGISLATIVE ALTERNATIVE TO JUDICIAL WAIVER

Selecting the criteria to construct a legislative matrix entails both an empirical judgment and a value choice. The empirical judgment involves an effort to identify the persistent and serious offender statistically on the basis of the available, albeit inadequate, social science data and information concerning present waiver administration. The task is to select criteria that will identify serious and persistent recidivists with as little overprediction as possible and to discriminate between the relatively few youths who should be handled as adults and the vast majority of juvenile offenders who appropriately belong within the jurisdiction of the juvenile court. As the preceding discussion indicates, the most reliable and relevant criteria on which to base these judgments are the present offense and the prior record, combined so as to maximize the differences between the two classes of juvenile offenders.

Selecting the matrix criteria also entails an explicit value choice about the quantity and quality of youthful deviance that will be tolerated within the juvenile system before a more punitive adult response is mandated. Since youths will normally not receive better rehabilitative services in the adult correctional system than are available in the juvenile system, the decision to transfer a youth to the adult process must ultimately be defensible on either retributive or general preventive grounds. From the community's perspective, the principal values of exclusion are enhanced community protection through the greater security and longer sentences available in the adult system, increased general deterrence through greater certainty of consequences, and reaffirmation of fundamental societal norms regarding intolerable deviance. Since most offenders, adults and juveniles alike, do not require penal incarceration, however, legislative exclusion is appropriate only when an offender's past record of persistence and the seriousness of his present offense appear to society to warrant confinement. The value judgment as to when this situation is reached reflects a tension between retribution and utility. While a retributive value choice might dictate automatic exclusion of those who commit a serious, heinous offense, a choice based on utility requires that the serious offender be excluded only if shown to be a chronic recidivist.

The proposed matrix, in requiring convictions for prior offenses in addition to a present serious offense, attempts to reconcile the retributive and utilitarian bases for excluding serious and persistent offenders. The choices embodied in the matrix define the outer limits of juvenile court intervention and determine how much repeated juvenile deviance may occur before an adult sanction is sought.

A. The Legislative Matrix

The proposed matrix[185] draws upon available empirical data and existing legislative judgments about age, persistence, and seriousness. Because the matrix reflects value choices, others may disagree with the categories proposed. On balance, however, especially when considered in conjunction with the anticipated beneficial systemic changes that may occur from "counting offenses,"[186] use of a matrix is a realistic approach toward identifying the serious and persistent offender.

The proposed matrix establishes a minimum age of fourteen years as a precondition for adult prosecution. It then creates four categories that combine different degrees of offense seriousness with different measures of persistence. These categories attempt to reconcile the tension between retribution and utility. While utility and predictive validity increase with persistence, retribution increases with seriousness. Thus, as the seriousness of the present offense increases, the number of prior convictions required declines. As the seriousness of the present offense decreases, the number of prior convictions required increases. Seriousness is determined by legislative classifications and authorized penalties. While using legislative offense categories as a basis for classification may not be the most sensitive measure of an act's seriousness, it is the only measure available that can be administered uniformly throughout the jurisdiction.

The matrix attempts to identify the relatively small proportion of the juvenile population that accounts for a significant proportion of the overall volume of serious offenses committed. The underlying assumption is that, although predicting who will be a serious offender in the future is an extremely imprecise enterprise, the most reliable indicators available are the seriousness of the present offense and the extensiveness of the prior record. Moreover, since the issue of waiver arises primarily in the context of a concern for public safety, it seems appropriate to address the issue of an offender's seriousness and persistence directly rather than circuitously through an amenability inquiry.

1. *Minimum Age of Fourteen Years*

For purposes of the matrix, a youth must have attained a minimum age of fourteen years at the time of the act as a precondition for adult prosecution, and only offenses committed after a youth has attained the age of fourteen will be counted among the offenses included in the prior record within the exclusion matrix. Fourteen is a

185. *See* Appendix, pp. 617-18 *infra*.

186. *See* notes 234-74 *infra* and accompanying text.

minimum age commonly used in waiver statutes and is presumably a reflection of the policies underlying the common law infancy defense.[187] There is ample reason to believe that most youths aged fourteen or older possess the necessary criminal culpability to be regarded as being as responsible for their criminal misconduct as adults. Moreover, the Minnesota legislature has already made the policy judgment that youths aged fourteen or older may be prosecuted as adults.[188]

Any minimum age is necessarily arbitrary, and most youths currently referred for adult prosecution are older than fourteen. In a Minnesota study, nearly ninety percent of the youths for whom adult reference was sought were sixteen or older, and more than seventy percent were seventeen or eighteen at the time of their reference hearing.[189] This heavy weighting toward the older end of the juvenile client spectrum is consistent with studies of waiver practices in other jurisdictions.[190] Since the matrix entails consideration of prior record as well as present offense, it is likely that those excluded will continue to be among the older delinquents. Nevertheless, a minimum age higher than fourteen would be unresponsive to the occasional youth whose delinquent career begins at a relatively early age. Especially in urban counties, youthful involvement in serious crime at a relatively young age is unfortunately common. Approximately 25% of the adult reference petitions filed in Hennepin County, for example, involved youths who were either fourteen or fifteen.[191] The present legislative judgment regarding the minimum age for adult prosecution is retained to reach these more youthful offenders.

2. *Previously Adjudicated a Delinquent After Attaining the Age of Fourteen Years on the Basis of Conduct That Would Be a Felony If Committed by an Adult and Charged with Murder in Any Degree*

The killing of another human being without justification or excuse is the most serious offense in the criminal code. The authorized penalties for murder are significantly greater than those for any other

187. *See, e.g.*, IOWA CODE § 232.72 (1977); MINN. STAT. § 609.055 (1976). For a discussion of the infancy defense and its relationship to juvenile court jurisprudence, see note 308 *infra*.

188. *See* MINN. STAT. § 609.055 (1976).

189. *See* Supreme Court Study, *supra* note 111, at 69, table 12.

190. *See, e.g.*, Note, *supra* note 6, at 854 (All of the youths waived during the seventeen months surveyed in the study were seventeen-year-old males with prior court adjudications; 88% had previously been committed to the state's training school.); *Waiver in Wisconsin*, *supra* note 21, at 553 (survey of juvenile court judges, who reported that they were "more likely to waive, the closer the juvenile is to 18").

191. *See* Supreme Court Study, *supra* note 111, at 69, table 12. Only two percent were still fourteen at the time of their reference hearing.

offense, ranging from 25 years to life imprisonment.[192] To treat juveniles who commit murder as a separate class of extraordinary seriousness seems appropriate. Many jurisdictions treat murder as a special class,[193] and even states employing judicial waiver may legislatively exclude juvenile murderers.[194]

Under the matrix, in order for a juvenile charged with murder to be excluded from juvenile court jurisdiction, he must have been adjudicated a delinquent after attaining fourteen years of age on the basis of conduct that would be a felony if committed by an adult.[195] Although the seriousness of homicide may reduce the necessary showing of persistence, a prior felony adjudication based on conduct arising out of a transaction separate from the present offense is still required.[196] At least one separate involvement in serious misconduct seems necessary to warrant a conclusion that the juvenile's seriousness and persistence require adult disposition. It is important to reemphasize that a serious first offense alone is indicative of neither future seriousness nor persistence.[197]

Homicide is a relatively uncommon juvenile offense.[198] It may be committed by a sophisticated young offender for whom it is the culmination of a career encompassing several delinquency adjudications. On the other hand, the murder of a parent, for example, may be the only discordant note in the life of an adolescent otherwise free of contact with the juvenile system. Requiring a prior felony adjudication after reaching fourteen years of age as a condition precedent to adult prosecution for murder is an attempt to legislatively distinguish between the persistent serious offender and the isolated serious

192. Murder in the first degree, MINN. STAT. § 609.185 (1976) (life imprisonment); murder in the second degree, *id.* § 609.19 (forty years); murder in the third degree, *id.* § 609.195 (25 years).

193. *See, e.g.*, IND. CODE ANN. § 31-5-7-4.1(a)(1) (Burns Supp. 1977).

194. *See, e.g.*, MISS. CODE ANN. § 43-23-29 (1972) (excluding those charged with crimes punishable by life imprisonment or death).

195. While technically juveniles cannot be convicted for committing crimes, MINN. STAT. § 260.211(1) (1976), they can be adjudicated delinquents on the basis of conduct which would be criminal if committed by an adult, *id.* § 260.015(5)(a)-(b).

196. Section 609.035 of the Minnesota Statutes requires that all offenses arising out of one course of conduct be charged and tried at the same time or they will be barred by double jeopardy. The matrix requirement of a prior felony from a separate transaction emphasizes the persistence element by precluding a juvenile's exclusion on the basis of another felony occurring concurrently with the homicide, such as a felony-murder. *See id.* § 609.195(2).

197. *See* notes 165-81 *supra* and accompanying text.

198. Youths under eighteen account for less than ten percent of the murders and nonnegligent homicides committed. FEDERAL BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1975: UNIFORM CRIME REPORTS 190, table 37 (1976) [hereinafter cited as UNIFORM CRIME REPORTS].

offender. While the youth for whom a murder is an isolated event may be significantly disturbed, such an offender is more appropriately treated within the juvenile justice or mental health system than by adult prosecution.[199] When the youth has had a prior delinquency adjudication for a felony, however, a subsequent homicide may properly be regarded as evidence of persistence and seriousness.[200]

3. *Previously Adjudicated to Be Delinquent on Two Prior Occasions After Attaining the Age of Fourteen Years on the Basis of Conduct That Would Be a Felony If Committed by an Adult, or on One Prior Occasion After Attaining the Age of Fourteen Years on the Basis of Conduct That, If Committed by an Adult, Would Be Murder in Any Degree or One of the Felonies Listed Herein, and Charged with Manslaughter in the First Degree, Arson in the First or Second Degree, Criminal Sexual Conduct in the First or Second Degree, Sodomy, Aggravated Assault, Aggravated Robbery, Robbery, or Kidnapping*

All offenses listed in the second category share similar characteristics. They are crimes against the person, involving violence or the threat of violence, and carry maximum penalties ranging from ten to forty years imprisonment.[201] With murder, they constitute what are regarded as the most serious offenses. Juveniles account for a significant proportion of these offenses.[202]

Under the matrix provisions, a youth charged with one of these offenses will be excluded for adult prosecution only if, after reaching fourteen years of age, he has been previously adjudicated guilty of murder or one of the other offenses against the person included in this category or has been twice adjudicated a delinquent on the basis of

199. *See generally* Mikulovsky v. State, 54 Wis. 2d 699, 708, 196 N.W.2d 748, 753 (1972) (the court rejected as irrelevant the fact that a seventeen-year-old juvenile who had murdered his parents had no prior record and that the act was unique in his life).

200. Obviously, an adjudication for a felony such as unauthorized use of a motor vehicle, MINN. STAT. § 609.55 (1976), does not suggest that the youth will subsequently commit a more serious crime such as murder, but it might be assumed that most youths who commit murder will have prior adjudications for other felonies. This is an impression gleaned from various waiver studies. *See* sources cited note 111 *supra*.

201. Manslaughter in the first degree, MINN. STAT. § 609.20 (1976) (fifteen years); arson in the first degree, *id.* § 609.561 (twenty years); arson in the second degree, *id.* § 609.562 (ten years); criminal sexual conduct in the first degree, *id.* § 609.342 (twenty years); criminal sexual conduct in the second degree, *id.* § 609.343 (fifteen years); sodomy, *id.* § 609.293 (thirty years); aggravated assault, *id.* § 609.225 (ten years); aggravated robbery, *id.* § 609.245 (twenty years); simple robbery, *id.* § 609.24 (ten years); kidnapping, *id.* § 609.25 (forty years).

202. In 1975, youths under eighteen years of age committed about eighteen percent of the rapes and aggravated assaults and 34% of the robberies. UNIFORM CRIME REPORTS, *supra* note 198, at 190, table 37.

other felony charges. Youths who have been previously adjudicated for an offense against the person or who have two previous felony adjudications and who are now charged with an offense against the person are serious and persistent offenders. While an isolated instance of serious misconduct may indicate neither seriousness nor persistence, repetition of such behavior supports an inference that it is no longer atypical, and although even a second incident is not strongly predictive, the seriousness of the conduct in this category requires a more immediate response. The Juvenile Justice Standards Project required a prior adjudication of an offense against the person as a prerequisite to reference for adult prosecution:

> [T]he juvenile [must] have been previously adjudicated on charges of threatening or inflicting serious bodily injury. The presumption in favor of juvenile court jurisdiction is strong. Only juveniles who pose genuine threats to community safety should be waived and exposed to the greater sanctions of the criminal court. A prior record of violent acts is evidence of that threat.[203]

The matrix incorporates this recommendation through its requirement of a prior offense against the person. It provides, in the alternative, that two prior felony adjudications coupled with a present offense against the person also warrant exclusion, since two prior felony adjudications provide greater evidence of persistence, offsetting their lesser seriousness.

4. *Previously Adjudicated a Delinquent on Three Prior Occasions After Attaining the Age of Fourteen Years on the Basis of Conduct That Would Be a Felony If Committed by an Adult and Charged with Burglary*

Burglary is an offense committed primarily by youths and is one at which they become highly specialized.[204] It is not uncommon for youths embarking on a career of burglary to become highly recidivistic.[205] Moreover, although burglary is arguably only a property crime, there is often the possibility of a violent encounter between the bur-

203. TRANSFER BETWEEN COURTS, *supra* note 21, at 39.

204. Youths below eighteen years of age committed 53% of all burglaries in 1975. UNIFORM CRIME REPORTS, *supra* note 198, at 190, table 37. The problem is especially acute in the Minneapolis-St. Paul area, where, in 1975, of all persons arrested for burglary, 78% in Minneapolis and 69.1% in St. Paul were juveniles. CITIZENS LEAGUE, *supra* note 19, at 4.

205. The highest probability of ever committing the same offense again occurs for theft offenders. The likelihood that another theft will be committed in a delinquent career is between .3349 and .4722, the highest probabilities of any major crime. WOLFGANG, FIGLIO, & SELLIN, *supra* note 9, at 190.

glar and the victim. The seriousness of burglaries of dwellings is reflected in the fact that such burglaries are punishable by as much as twenty years imprisonment.[206]

Constructing a matrix requires that prevalent or persistent forms of youthful misconduct be taken into account, even if they are not as serious as offenses against the person. The matrix attempts to balance the somewhat lesser seriousness of burglary, as compared to offenses against the person, and to identify only those significant career burglars who specialize in this offense by requiring three prior felony adjudications as a precondition for exclusion.

5. *Previously Adjudicated a Delinquent on Four Prior Occasions After Attaining the Age of Fourteen Years on the Basis of Conduct That Would Be a Felony and Charged with a Felony*

This is a residual category designed to include a persistent offender who is involved in a large amount of significant criminal misconduct even though none of it is as serious as that reflected in the preceding categories. Felonious conduct subjects an adult to imprisonment of more than one year and is, by legislative definition, a serious departure from the community norm. Persistent felonious misconduct, as manifested by four previous adjudications in juvenile court and a fifth felony arrest, is likely to continue. Wolfgang's research indicates that a youth with five arrests for any type of offense has a probability of approximately .80 of being involved in a subsequent offense, and there is a nearly one-in-three chance that any subsequent offense will be a felony.[207] These probabilities of additional violations remain relatively stable for any number of offenses thereafter. While Wolfgang's research is based on all offenses, the matrix counts only felonies and is thus a relatively conservative estimator of the likelihood of recidivism. Given the high probability of recidivism by persistent offenders and the likelihood that a subsequent crime will be felonious, this residual category effectively limits the jurisdiction of the juvenile court over repeat offenders who have already demonstrated by their lengthy record that they are not responsive to the intervention of the juvenile court.

206. *See* MINN. STAT. § 609.58 (1976).

207. *See* WOLFGANG, FIGLIO, & SELLIN, *supra* note 9, at 162, table 10.3, 163; *cf.* M. Wolfgang, From Boy to Man—From Delinquency to Crime 9, table V (paper presented at National Symposium on the Serious Juvenile Offender in Minneapolis, Minnesota, Sept. 19-20, 1977) (tracing the offense patterns of the delinquent cohort into adulthood and reporting that after the fourth offense, the probability of additional offenses ranges between .771 and .955, and the probability that any additional offense will be a felony ranges between .300 and .722).

B. A Comparison of the Matrix to Judicial Waiver

As indicated earlier, the object of the matrix is to identify youths whose behavior can be characterized as serious and persistent and to differentiate between that group and other juveniles appearing before the court. While a comparison of the youths who would be identified by the matrix with those for whom judicial waiver has been sought would be informative, the absence of an automated, statewide offender tracking system and a lack of complete data on certified youths prevent a thorough comparison of the legislative and judicial approaches to the identification of serious and persistent offenders. Several studies of various aspects of certification administration, however, provide information bearing on these questions.[208]

The Governor's Commission on Crime Prevention and Control compared some alternative definitions of violent and hard-core offenders that might be included in a legislative matrix to determine the number of youths that would be excluded by different criteria and the extent to which such youths differed from other juveniles in terms of the frequency or seriousness of their involvements.[209] Although the matrix proposed in this Article was not among those tested, many of its components were included in other definitions that were. The study found that more restrictive definitions—those that required serious offenses and prior records—provided the greatest discrimination between persistent and serious offenders and the remainder of the juvenile population.[210] The more restrictive definitions identified fewer youths as "violent" and "hard-core," but those who were identified had more extensive records, greater seriousness per sustained offense, and the greatest differences from the remaining juvenile population in terms of frequency and severity.[211] The definition that the

208. *See, e.g.*, Governor's Commission Study, *supra* note 18; Hennepin County Study, *supra* note 9; Corrections Profile, *supra* note 70; Supreme Court Study, *supra* note 111.

209. Governor's Commission Study, *supra* note 18, at 12. The study sampled juvenile court records in selected counties in Minnesota, coding age, present offense, prior record, and other information. The data collected permitted estimates based on the entire Minnesota juvenile population. The alternative definitions employed were then tabulated to determine how many youths in the sample fit within each definition (and by extrapolation how many youths in the state met each definition) and to what extent the records of youths so identified differed from the remainder of the sample in terms of seriousness and persistence. *See id.* at 15, table 1.

210. *See id.* at 16-20.

211. A subsequent analysis indicates that the matrix definition proposed in this Article would exclude approximately 182 youths out of a total juvenile court population in Minnesota exceeding 13,000. *Id.* at 15, table 1. This is a significantly lower number than would be excluded under most of the other definitions of violent or hard-core offenders tested by the Governor's Commission on Crime Prevention and Control. *See id.* The author greatly appreciates the assistance of Ann Jaede, Cynthia Turner, and

study concluded discriminated most effectively between serious offenders and other delinquents was also the one that was most similar to the proposed matrix.[212] As the study noted,

> [a]lthough the . . . definition appears to be relatively complicated, (1) it does differentiate between violent or hard-core and other offenders, (2) it results in a relatively small proportion of the total juvenile offender population, (3) it does characterize serious offense histories indicated by the relatively high mean severity scores, and (4) the definition does encompass both violent and hard-core behavior.[213]

Thus, it appears that the proposed matrix identifies serious and persistent offenders in such a way as to maximize distinctions between them and their less delinquent peers.

Another study conducted in Hennepin County (Minneapolis) compared the characteristics and delinquent careers of violent and hard-core offenders with other juveniles handled by the juvenile court.[214] In that study, violent and hard-core youths were defined as those with two arraignments for offenses against the person or three arraignments for major property crimes.[215] The report also included summaries of the case files of youths for whom waiver for adult prosecution was sought in 1974.[216] On the basis of the information contained in those summarized files, every case that the juvenile court actually certified for adult prosecution would also have been excluded from the juvenile system by the matrix criteria. It appears, however, that the certified youths would have been excluded somewhat earlier by the matrix, thereby "saving" at least some of the additional offenses that they committed prior to waiver. Of the cases that the court declined to transfer, some would have been excluded by the matrix, while others would have remained within the juvenile system. Thus, it appears that the urban juvenile offender would be marginally more likely to be referred for adult prosecution under the proposed matrix and that, on the whole, the matrix identifies serious recidivists as well as does the juvenile court. As the Minnesota Supreme Court's Study

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Linda Biele of the Minnesota Crime Control Planning Board for their assistance in providing and analyzing data about serious juvenile offenders in Minnesota.

212. This definition, as modified, identified youths aged fourteen and over who had been convicted of: (a) homicide, kidnapping, aggravated arson, or criminal sexual misconduct, first or third degree; (b) manslaughter, aggravated assault, aggravated robbery, with a prior felony conviction within the preceding 24 months; (c) two separate adjudications for major property offenses. *See id.* at 20.

213. *Id.* at 19.

214. HENNEPIN COUNTY STUDY, *supra* note 9.

215. *See id.* at 5. Arraignment was used as the criterion in order to reduce the effects of subsequent plea bargaining.

216. *See id.* at 62-85.

Commission noted, however, certification is apparently reserved for serious and persistent offenders only in urban counties.[217] One probable consequence of exclusion by a legislative matrix is that rural youths who often are waived for fewer and less serious offenses than their urban counterparts would remain within the juvenile justice system longer than they do under the present discretionary waiver.

C. The Administration of the Matrix

1. *Determinations of Jurisdiction*

The proposed matrix uses an offender's age, present offense, and prior record to exclude certain youths from juvenile court. Those chronological minors that fit the proposed criteria would be tried as adults with all of the procedural and substantive rights available to adult criminal defendants.

The prosecutor's charging decision would initially determine whether a case is subject to juvenile or adult court jurisdiction. If a prosecutor involved in juvenile proceedings evaluated a juvenile's present offense and found probable cause to believe that the juvenile had committed a particular felony, he would then consult the youth's prior juvenile court record to determine whether this juvenile could be appropriately prosecuted as an adult. In the event that a juvenile's age, present offense, and prior record excluded him from juvenile court jurisdiction, the case would be transferred for adult prosecution.

Once the juvenile's case was transferred, there would be a prompt probable cause determination as part of the normal adult criminal process.[218] If probable cause were found that the youth's conduct was an excluded felony, then the youth could be properly

217. *See* notes 113-19 *supra* and accompanying text. This observation is partially confirmed by a study by the Research Unit of the Minnesota Department of Corrections, which indicates that 75% of the certified youths committed to the State Reformatory for homicide and 72% of those committed for other offenses against the person were from the metropolitan area, while 65% of those committed for burglary and unauthorized use of a motor vehicle were from more rural counties. Corrections Profile, *supra* note 70, at 1.

218. An initial probable cause determination will be made on the basis of a sworn complaint. This complaint must set forth "the facts establishing probable cause to believe that an offense has been committed and that the defendant committed it." Minn. R. Crim. P. 2.01. The contents of an adult complaint must provide much greater specificity and particularity than that required for juvenile court petitions. *Compare* Minn. R. Crim. P. 2, *with* Minn. Juv. Ct. R. 3-2; State v. Burch, 284 Minn. 300, 170 N.W.2d 543 (1969), *with In re* Hitzemann, 281 Minn. 275, 161 N.W.2d 542 (1968). Although an adult may move for a probable cause hearing, *see* Minn. R. Crim. P. 11.03, a juvenile who is not being held in detention receives no probable cause determination prior to the trial itself.

prosecuted as an adult. If probable cause was not found or was found only for a lesser offense that would not fit within the matrix given the prior record, then the case would be referred back to the juvenile court. Similarly, if a juvenile's prior record in conjunction with the present offense did not mandate exclusion, a motion raising the jurisdictional defect could result in a transfer back to the juvenile court.[219]

If the juvenile was convicted in an adult proceeding of offenses that excluded him from juvenile court jurisdiction, the juvenile court would thereafter have no jurisdiction over him. Accordingly, if the juvenile, while still a minor, were subsequently involved in further criminal conduct that in itself would not automatically exclude him from juvenile court jurisdiction, he would still be prosecuted as an adult rather than as a juvenile because of his past record.[220] By contrast, under present judicial waiver procedures, a juvenile must be certified for adult prosecution for every new offense, with a hearing conducted each time to determine his amenability and dangerousness, despite prior findings on these issues.

If the youth was acquitted or convicted of a lesser offense that would not exclude him as an adult under the legislative criteria, the jurisdiction of the juvenile court over the offender would be revived, and the case would be transferred back to the juvenile court for disposition. The provision for "rejuvenating" young offenders not convicted of excluded offenses by basing dispositional jurisdiction on convictions rather than on initial charges provides an important additional check on the prosecutor's charging discretion.[221] Transferring juveniles whose convictions do not fit the legislative criteria back to the juvenile court for disposition avoids one of the most serious potential abuses of present legislative waiver provisions.

2. *Young Adult Dispositions*

One policy problem associated with juveniles waived for adult prosecution that could exist as well with legislative exclusion is a reluctance by district court judges to impose penalties on young offenders tried and convicted as adults. Judicial reluctance to impose sanctions stems in part from the appearance and demeanor of juveniles. Despite their convictions for serious felony offenses, these young offenders still look like "kids," and because of a justifiable concern about the possible physical victimization of younger offenders at the hands of adult inmates,[222] many judges hesitate to incarcer-

219. *See, e.g.*, MINN. R. CRIM. P. 11.04.

220. *See* subdivision 3 of the Proposed Act in Appendix at pp. 617-18 *infra*.

221. *See* notes 156-57 *supra* and accompanying text.

222. *See* note 70 *supra*.

ate them with hardened adults.[223]

A related aspect of the sentencing problem stems from the practice of sentencing most first-time adult offenders to less restrictive conditions of confinement or probation rather than to prison.[224] The Minnesota Supreme Court's Study Commission found that of the juveniles prosecuted and convicted as adults in Hennepin County, only 46% were sentenced to jail terms of more than ninety days, and only 27% were subjected to terms of confinement in state penal institutions.[225] The Hennepin County juveniles were also the most serious and persistent offenders in the sample, and the rates of institutional confinement from the nonurban parts of the state were substantially lower.[226] If a juvenile who is tried as an adult receives only a nominal disposition, "one is finally compelled to ask what logic there is in the use of probation or a minimum security facility for a child who was transferred out of court because he was too 'dangerous' and a 'security risk'?"[227] For those youths certified as adults, these constraints on significant dispositions may actually reinforce the youth's long-term deviance by indicating that the adult system is as nonpenal as the juvenile process from which he was just evicted.

While an analysis of the problems of sentencing is beyond the scope of this Article,[228] there are some useful models that the legislature might consider in seeking to overcome some present obstacles to sentencing. One is the creation of an intermediate sentencing category—a youthful offender status—comprised of those chronological juveniles sentenced as adults. Segregating this group by age,[229] either in separate facilities or in segregated sections within existing adult facilities, and limiting the maximum penalty that could be imposed on such offenders to either a fraction of that authorized for adult offenders or a definite period such as that contained in the Federal Youth Corrections Act[230] might encourage the courts to incarcerate

223. *See* Stamm, *supra* note 8, at 143-44.

224. As a general sentencing policy, this is appropriate. The arguments developed earlier regarding the likely desistance of serious first offenders are as applicable to adults as to juveniles. Most offenders do not need to be incarcerated, and as a rational allocation of scarce resources, the decision not to imprison most first offenders is sensible.

225. *See* Supreme Court Study, *supra* note 111, at 75, table 21.

226. *See id. See also* notes 116-18 *supra* and accompanying text.

227. Stamm, *supra* note 8, at 147.

228. An adequate examination would initially require an articulation of the justifications for coercive intervention in the lives of offenders and an elaboration of principles for implementing these policies. For a discussion of one form that sentencing policies might assume, see sources cited note 62 *supra.*

229. *See, e.g.,* Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976); CAL. WELF. & INST. CODE § 1771 (West 1972); CONN. GEN. STAT. § 54-76b (West Supp. 1978); N.Y. CRIM. PROC. LAW § 720.10 (McKinney Supp. 1977).

230. 18 U.S.C. §§ 5005-5026 (1976). Under the Federal Youth Corrections Act

youthful offenders with extensive juvenile histories. Similarly, prosecuting juveniles as adults via a legislative matrix and making the juvenile court records available to the adult sentencing authorities would help to emphasize to these authorities that such "first" offenders are actually repeat offenders with extensive prior involvements.

The legislative creation of a youthful offender status might also encourage experimentation to develop more appropriate treatment for the serious, persistent juvenile offender. Although present rehabilitative efforts have proved unsuccessful, such efforts should not necessarily be abandoned. The hope of treatment, however, should not be used to justify imprisonment when there is little basis for optimism about successful intervention. Thus, in the case of serious, persistent juvenile offenders, it seems inappropriate to rely on the

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(FYCA), federal judges have discretion to commit convicted offenders below the age of 22 to the custody of the Attorney General for special treatment as youth offenders. *See id.* § 5010. In the event of such a commitment, regardless of the penalty for the criminal statute violated, the youth must be conditionally released within four years of the date of conviction and unconditionally discharged no later than six years from the date of conviction, *see id.* § 5017(c), unless the maximum period is extended at the time of initial sentence because the judge determines that additional time for treatment and supervision is required, *see id.* 5010(c). Insofar as is practical, youths sentenced under the Act are to be segregated from other federal offenders and housed in special facilities designed to provide "treatment," *id.* § 5011, defined as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders," *id.* § 5006(f). When a youth is unconditionally discharged, his criminal conviction is set aside. *See id.* § 5021. For general analysis of this provision, see Schornhorst, *supra* note 6, at 595; Note, *Sentencing Under the Federal Youth Corrections Act: The Interpretive Conflict Concerning Judicial Discretion,* 23 CATH. U.L. REV. 574 (1974); Note, *Appellate Review of Federal Youth Corrections Act Sentences in the Aftermath of* Dorszynski v. United States, 45 FORDHAM L. REV. 110 (1976); Note, *An Approach to 'No Benefit' Findings Under the Federal Youth Corrections Act,* 62 IOWA L. REV. 1173 (1977); Comment, *Sentencing Under Section 5010(d) of the Federal Youth Corrections Act,* 1974 WASH. U.L.Q. 741.

Unfortunately, the FYCA suffers from some defects similar to those associated with judicial waiver. A youth may be sentenced under the statute unless the sentencing judge concludes that the youth would derive "no benefit" from commitment. 18 U.S.C. § 5010(d) (1976). A "no benefit" determination is functionally equivalent to a decision with respect to amenability to treatment and suffers from the same uncertainties. Nevertheless, in Dorszynski v. United States, 418 U.S. 424 (1974), the Supreme Court held that, while 18 U.S.C. § 5010(d) (1976) requires an explicit finding that a youth would derive no benefit from receiving a sentence under the FYCA, a supporting statement of reasons was unnecessary. *See* 418 U.S. at 441.

Interestingly, judges making a "no benefit" finding are aided by a salient factor score, an *actuarial* parole prognosis aid. A youth is sentenced on the basis of the severity of his offense and his parole prognosis, which incorporates actuarial predictors such as prior record, prior incarceration, and age at first commitment. *See* U.S. PAROLE COMMISSION, SALIENT FACTOR SCORING MANUAL (rev. ed. 1977). Although the salient factor score is not binding, it is an encouraging use of actuarial tables to make clinical judgments.

treatment rationale to deny the procedural safeguards currently afforded adults. On the other hand, if these offenders are tried as adults, with indictments, jury trials, and all of the other procedural safeguards of the criminal law, no barrier exists to incarcerating them, as a means of punishment, upon conviction since in such circumstances, failure to provide successful treatment would not open the door to charges by these youths that they were being subjected to punishment without due process. Obviously, successful rehabilitation is preferable to simple custodial confinement. But, since voluntary participation and self-motivation are important components of successful rehabilitation, an adult treatment program that is based on voluntary participation and that is available to incarcerated youths as an alternative to simply "doing time" might be more effective than involuntary intervention.[231]

Another sentencing consequence for youths excluded from juvenile court jurisdiction is the loss of protections traditionally associated with adjudication as a delinquent, including confidentiality of proceedings and records, sealing of records after attaining majority, and the avoidance of civil disabilities imposed on those convicted of crimes. As the Supreme Court noted in *Kent,* juvenile court jurisdiction "confers special rights and immunities. [The youth] . . . is shielded from publicity. . . . [He] is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualifications for public employment."[232] A mechanism to reduce the consequences of a first-time adult conviction for excluded juveniles sentenced as youthful offenders might be considered. Several jurisdictions currently provide for expungement of records or removal of disabilities for waived youths following the completion of their adult sentences.[233]

IV. THE SYSTEMIC IMPLICATIONS OF OFFENSE-BASED EXCLUSION FOR JUVENILE JUSTICE ADMINISTRATION

A. Dispositional Decisionmaking

A legislative matrix that excludes on the basis of offenses has systemic implications for the administration of a juvenile justice system that historically has based disposition decisions on the characteristics of the offender. A shift of emphasis from the offender to the offense reflects an undercurrent that has been developing within ju-

231. *See, e.g.,* D. Mann, *supra* note 50, at viii-ix; N. Morris, *supra* note 1, at 94-99.

232. Kent v. United States, 383 U.S. 541, 556-57 (1966).

233. *See, e.g.,* Alaska Stat. § 47.10.060(e) (1975); Iowa Code § 232.72 (1977).

venile justice jurisprudence for over a decade. The juvenile justice system is a peculiar hybrid of the criminal law on the one hand, and the mental health and welfare systems on the other, reflecting impulses toward both punitive social control and benevolent intervention, but firmly grounded in neither.[234] Nowhere has this unresolved tension between crime and mental health, between punishing and helping, been more acute than in the response to the persistent or serious offender.

More than a decade ago the President's Commission on Law Enforcement and the Administration of Justice suggested that the juvenile justice system might ultimately develop into a two-track system separating the control and welfare functions. In such a system most minor offenders and status delinquents would be diverted and handled informally. More serious offenders would be referred to the juvenile court for formal adjudication, thus acknowledging that an important purpose of intervention is social control rather than treatment.[235] Specifically, the Commission proposed that

> [t]he formal sanctioning system and pronouncement of delinquency should be used only as a last resort.
>
> In place of the formal system, dispositional alternatives to adjudication must be developed for dealing with juveniles. . . .
>
> The range of conduct for which court intervention is authorized should be narrowed with greater emphasis upon consensual and informal means of meeting the problems of difficult children.
>
> The cases that fall within the narrowed jurisdiction of the court and filter through the screen of pre-judicial, informal disposition methods would largely involve offenders for whom more vigorous measures seem necessary. *Court adjudication and disposition of those offenders should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection. While rehabilitative efforts should be vigorously pursued in deference to the youth of the offenders and in keeping with a general commitment to individualized treatment of all offenders, the incapacitative, deterrent, and condemnatory aspects of the judgment should not be disguised.*[236]

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234. *See, e.g.*, Schults & Cohen, *Isolationism in Juvenile Court Jurisprudence*, in PURSUING JUSTICE FOR THE CHILD 21 (M. Rosenheim ed. 1976).

235. *See* TASK FORCE REPORT, *supra* note 21, at 2.

236. *Id.* (emphasis added). The President's Commission on Law Enforcement and Administration of Justice noted,

> The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitation of offenders through individualized handling is one way of providing protection, and appropriately the primary way of dealing with children. But the guiding considerations for a court of law that deals with the threatening

Recognition that most juvenile offenses are trivial and not symptomatic of a need for formal intervention has increased pressures toward "judicious non-intervention,"[237] or even "radical non-intervention,"[238] in an effort to avoid stigmatizing juveniles who will outgrow their delinquencies. The decarceration of status delinquents[239] and the growth of diversionary alternatives to adjudication[240] in the case of nonserious offenders reflect this process. The other thread in the development of a two-track juvenile justice system is reflected in the imposition of criminal procedural safeguards on the adjudication of the true, hard-core juvenile offender.[241]

The emergence of a dual-track juvenile justice system raises previously submerged questions about the criteria and screening processes by which youngsters are routed to informal or formal dispositions. The traditional "rehabilitative ideal" affords juvenile justice personnel such enormous discretion to make decisions in the "best interests of the child" that there has been no need to formalize diversionary criteria. These individuals enjoy even greater discretion than do their adult process counterparts because of the presumed need to look beyond present offense and consider individual circumstances in deciding appropriate treatment and because paternalistic assumptions about children and their control allow for more extensive discretionary intervention than would be permitted in the lives of adults.[242] With this greater discretion comes a greater potential for abuse.

There are no simple solutions to the problems caused by the extensive, unregulated, and unreviewable discretion that currently characterizes the juvenile justice system. Any solution requires a

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conduct is nevertheless protection of the community. The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. *What should distinguish the juvenile from the criminal courts is their greater emphasis on rehabilitation, not their exclusive preoccupation with it.*

CRIME IN A FREE SOCIETY, *supra* note 61, at 81 (emphasis added).

237. *See, e.g.*, Lemert, *The Juvenile Court—Quest and Realities*, in TASK FORCE REPORT, *supra* note 21, at 91, 96.

238. *See, e.g.*, E. SCHUR, *supra* note 61.

239. *See, e.g.*, Ellery C. v. Redlick, 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 68 (1973); Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977); 18 U.S.C. § 5035 (1976) (institutional separation of delinquents adjudicated on the basis of "status" and crimes).

240. *See, e.g.*, E. LEMERT, INSTEAD OF COURT (U.S. Dep't of Health, Education, and Welfare Pub. No. 72-9093, 1971); Nejelski, *Diversion: The Promise and the Danger*, 22 CRIME & DELINQUENCY 393 (1976); Nejelski, *Diversion: Unleashing the Hound of Heaven?*, in PURSUING JUSTICE FOR THE CHILD 94 (M. Rosenheim ed. 1976).

241. *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970).

242. *See, e.g.*, Bittner, *Policing Juveniles: The Social Context of Common Practice*, in PURSUING JUSTICE FOR THE CHILD 69 (M. Rosenheim ed. 1976).

forthright recognition of the magnitude of the task assumed, the limitations of intervention, the fallibility of professional expertise, and the negative as well as positive consequences of helping. As a starting point, however, where differences in treatment of similarly situated offenders cannot be empirically and objectively justified, discretionary judgments should be subordinated to uniform dispositional principles and the rule of law.[243]

The proposed matrix has both direct and indirect effects on the exercise of discretion within the juvenile justice system. First, and most obviously, the matrix eliminates all discretion with respect to the decision to refer for adult prosecution. Once the decision to proceed against the offender has been made and the appropriate charge determined, the decision whether to proceed in the juvenile court or the district court is made mechanically by reference to the matrix. But because the matrix emphasizes the present offense and the prior record, every decision influencing the disposition of the present offense, as well as every decision associated with each prior contact with the system, increases in significance. Thus, the matrix may well have an influence far beyond its literal scope, affecting dispositional decisions at every stage of the process, whether or not the offender is potentially eligible for transfer on any particular occasion.[244]

Most generally this influence arises out of bureaucratic imperatives and the desire of juvenile and criminal justice agencies to avoid scandal and unfavorable political attention.[245] A matrix combining

243. There has been a call for administrative rulemaking to constrain the excessive, unnecessary, and unjustifiable discretion in the adult and juvenile justice systems. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE (1969); K. DAVIS, POLICE DISCRETION (1975).

244. The juvenile justice system involves dispositions at every step in the process. Police officers may refer a juvenile to intake for formal processing or may adjust the case informally on the street, at the station-house, or by diversion. Intake, in turn, may refer a youth to the juvenile court for formal adjudication or dispose of the case through informal supervision or diversion. Finally, even after formal adjudication, the juvenile court has a wide choice of dispositional alternatives, ranging from a continuance without a finding to probation and to commitment to state training school.

For a general overview of the juvenile justice process and the alternative dispositions available, see S. FOX, CASES AND MATERIALS ON MODERN JUVENILE JUSTICE (1972); F. MILLER, R. DAWSON, G. DIX, & R. PARNAS, THE JUVENILE JUSTICE PROCESS (1976); TASK FORCE REPORT, *supra* note 21, at 4-40; J. SENNA & L. SIEGEL, JUVENILE LAW (1976); Note, *Juvenile Justice in Arizona*, 16 ARIZ. L. REV. 235 (1974); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

245. The constraint that "fear of scandal" imposes on juvenile court dispositions has been noted by a number of observers. *See, e.g.*, A. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE (1968); R. EMERSON, JUDGING DELINQUENTS (1969). Such constraint is a reflection of basic organizational processes and the limitations that an organization's environment imposes on its freedom of action. *See generally* P. SELZ-

present and prior offenses increases the significance, visibility, and vulnerability of all decisions made by the bureaucracy. If a youth had previously committed a felony and was not processed by the system, a subsequent serious offense could draw attention not only to his present situation but also to the prior failure to intervene.[246] The safe bureaucratic decision—the one that avoids the threat of scandal—is the restrictive one to formally process the juvenile accused of a felony. An alternative is to have sufficient supporting documentation to defend a nonformal disposition. Bureaucracies could gradually develop internal rules and formal or informal guidelines to shape the exercises of discretion either to make the safe decision to process a juvenile

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NICK, TVA AND THE GRASS ROOTS (University of California Publication in Culture and Society No. 3, 1949).

Emerson, *supra* note 162, at 623-28, notes that as a result of political considerations and media publicity,

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

Id. at 624 (emphasis in original). For a similar observation that the effect of public pressures and "those specialists in indignation—newspapermen" create a demand for severity in disposition, see D. MATZA, DELINQUENCY AND DRIFT 122 (1964).

The possibility of scandal pervades every decision that the court makes, no matter how innocuous.

> [E]ven where the current offense is not particularly violent or serious, the court becomes vulnerable should the delinquent commit such a highly visible act in the future. Thus, any particular disposition, no matter how obvious, appropriate, and defensible it was at the time, can subsequently become evidence of the court's "coddling," overleniency in failing to "protect the community," or outright gullibility, if and when the youth involved commits a newsworthy and sensational offense.
>
> The kinds of pressures analyzed above often introduce a fundamental restrictiveness into the court's handling of its cases. Particular decisions have to anticipate possible adverse public and political reaction. Decisions that might open the court to criticism constitute risks and may well be avoided. Indeed, "risk" specifically reflects the court's vulnerability to criticism for having failed to control and restrain.

Emerson, *supra* note 162, at 624.

246. Matza notes that the juvenile court judge is

> ultimately responsible to the public. He will have to explain . . . why the 17-year-old murderer of an innocent matron was allowed to roam the streets, on probation, when just last year he was booked for mugging. This is no easy question to answer. Somehow, an invoking of the principle of individualized justice and a justification of mercy on the basis of accredited social-work theory hardly seems appropriate on these occasions.

D. MATZA, *supra* note 245, at 122.

felon formally or to adequately document and justify a departure from that norm on a publicly and politically defensible basis. It is in reliance on the bureaucratic quest to avoid scandal that many of the systemic changes in dispositional decisionmaking are anticipated.

Because of this scandal avoidance impulse, the emphasis that the matrix places on prior felony adjudications as a prerequisite to adult prosecution could have two beneficial effects. First, use of the matrix would reinforce the two-track aspects of the juvenile justice process by encouraging a more formal response to more serious forms of juvenile deviance. A distinction among offenders on the basis of their offenses, with diversion of the less significant from the formal process, is consistent with the policies of the President's Commission[247] and would foster more rational resource allocation by both narrowing the range of children served formally and increasing the intensity of intervention.

Second, and more important, adoption of the matrix would exert significant pressure at each level of the system—police, intake, prosecutor, and court—to objectify the criteria upon which dispositional decisions are made, giving more weight to such legally relevant factors as offense and prior history and less to such factors as race, class, and attitude that create dangers of discrimination and inequity in the exercise of discretion. It is in this latter respect that the matrix may have its most significant beneficial and rationalizing effects.

At the outset, however, it should be noted that the degree to which this pressure would force a change in present practices is not at all clear. It is a common observation that lower-class and nonwhite youths are overrepresented in the populations of criminal and juvenile justice systems.[248] Less clear are the causes of this overrepresentation. Moreover, ascertaining these causes with regard to the juvenile system is fraught with difficulty since the criteria for decisions—"individualized justice" and "the best interests of the child"—are so obscure and entail such a broad inquiry.[249] It has been argued that this obscurity tends greatly to amplify whatever differ-

247. *See* note 236 *supra* and accompanying text.

248. *See* CRIME IN A FREE SOCIETY, *supra* note 61, at 44. *See generally* UNIFORM CRIME REPORTS, *supra* note 198, at 192-94, table 39; Short & Nye, *Reported Behavior as a Criterion of Deviant Behavior*, 5 SOC. PROB. 207 (1957).

249. One author has observed,

> The principle of individualized justice is more inclusive than the principle of offense. It contains many more criteria in its framework of relevance . . . . The principle of individualized justice suggests that disposition is to be guided by a *full understanding* of the client's personal and social character and by his "individual needs."

D. MATZA, *supra* note 245, at 114-15 (emphasis in original).

ences in criminal activity may actually exist between races and classes because discretionary judgments on the basis of social characteristics redound to the disadvantage of the poor and minorities. According to this theory, "individualized justice" permits decisions to be made on the basis of social characteristics rather than legal variables, and such subjective decisions lend themselves to abuse and discrimination.[250] Thus, within the unlimited framework of individualized justice, the poor and blacks may receive harsher discretionary dispositions because of who they are or whom they may become rather than because of what they have done.

An alternative explanation, however, has suggested that despite the juvenile system's outward commitment to individualized justice, dispositional decisions with respect to individual offenders are frequently made not on the basis of an assessment of individual needs but by reference to the principle of offense and the accompanying threat of scandal: "[W]hether a juvenile goes to some manner of prison or is put on some manner of probation . . . depends first, on a traditional rule-of-thumb assessment of the total risk of danger and thus scandal evident in the juvenile's current offense and prior record of offenses . . . ."[251] If this is the case, the overrepresentation of minority and lower-class youths in the juvenile system can be attributed to a proportionately higher volume of serious crimes committed by such youths.[252] Proponents of this position infer from available

250. *See, e.g.*, Chiricos, Jackson, & Waldo, *Inequality in the Imposition of a Criminal Label*, 19 SOC. PROB. 553 (1972); Green, *Race, Social Status, and Criminal Arrest*, 35 AM. SOC. REV. 476 (1970).

251. D. MATZA, *supra* note 245, at 125. Reliance on offense as a decisional basis is grounded in a principle of equality—treating similar cases similarly. The substantive basis for deciding whether cases are indeed alike is the "offense and conditions closely related to offense like prior record, and . . . more or less preclude[s] considerations of status and circumstance." *Id.* at 113-14 (emphasis deleted).

252. The research findings in WOLFGANG, FIGLIO, & SELLIN, *supra* note 9, indicate that "official delinquents," those whose contacts with law enforcement personnel have resulted in official records, are disproportionately concentrated in poor and minority communities and that in every socioeconomic category black youths are engaged in delinquency to a greater extent than their white counterparts. Even this research, however, relies on official statistics that may already reflect selection biases and discretionary decisions by police officers prior to the creation of official records. *See also* Hindelang, *supra* note 57; 11 CRIMES OF VIOLENCE 267-86, tables 3-17 (Staff Report submitted to the National Commission on the Causes & Prevention of Violence, 1969). Hindelang's research compared the racial composition of offenders reported in the FBI's *Uniform Crime Reports* with the racial composition of offenders as reported by victims of crime in a victimization panel study. He found that the racial composition of offenders as reported by victims was considerably more consistent with that revealed in the official records than it was with the research on hidden delinquency. His research provides some of the strongest evidence that racial differentials in the popula-

data that controlling for present offense and prior record eliminates most class and racial disparities. Thus, this research implies that both adult and juvenile systems operate relatively fairly, responding primarily to legally relevant criteria like offense and recidivism, and that the client population disparities reflect real differences in criminal activity among groups.

The crucial issue in assessing the probable impact of the matrix on dispositional decisionmaking is whether dispositions are currently based primarily on legally relevant factors, such as present offense and prior record, or on more diffuse variables, such as social characteristics. If dispositions are already grounded in the principle of offense, then the model proposed here would tend to reinforce existing practices. If, however, decisionmaking is actually based on social characteristics, the increased salience of the principle of offense under the matrix might foster a refocusing on more objective, legally relevant criteria, thereby reducing the potential for discrimination and abuse of discretion that results from subjective assessment of social factors.

To determine the basis upon which dispositions in the juvenile process are currently made, it is necessary to ascertain, for each level at which such decisions are made, the relationship between legal variables—present offense and prior record—and disposition, and social characteristics—for example, race and social class—and disposition. One can begin by assessing the research on dispositional decisionmaking by police, intake, and the courts, but "even a superficial review of the relevant literature leaves one with the rather uncomfortable feeling that the only consistent finding of prior research is that there are no consistencies in the determinants of the decisionmaking process."[253] The studies, conducted in different jurisdictions at different times, and employing different methodologies and theoretical perspectives, yield contradictory results. Nonetheless, from this research a number of useful insights into dispositional decisionmaking within the juvenile justice system can be gleaned.

Police officers encounter juveniles involved in a variety of legal and illegal activities and have an enormous amount of discretion and a wide range of dispositional alternatives with which to resolve the

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tions of juvenile and criminal justice agencies reflect real differences in behavior rather than discretionary decisionmaking.

253. Thomas & Sieverdes, *Juvenile Court Intake: An Analysis of Discretionary Decision-making*, 12 CRIMINOLOGY 413, 416 (1975). The contradictory results of the research on discretionary decisionmaking have been adverted to by others. *See, e.g.*, Thomas & Cage, *The Effects of Social Characteristics on Juvenile Court Dispositions*, 18 Soc. Q. 237, 239 (1977); Thornberry, *Race, Socioeconomic Status and Sentencing in the Juvenile Justice System*, 64 J. CRIM. L. & CRIMINOLOGY 90 (1973).

encounter. While reprimand and release may be the only appropriate response to trivial incidents, and serious felonies may practically mandate taking the child into custody, in the wide intermediate category of encounters, officers are encouraged to exercise their discretion.[254] Unless they have had prior contacts with the child or are familiar with the child's home situation, school record, and prior offenses, however, they have very little information with which to make these determinations other than the circumstances of the present involvement, which include the nature of offense and the responses of the youth in his interactions with the police.

There is some research indicating that field dispositions are frequently made on the basis of the child's attitude or demeanor and the youth's response to adult authority. These studies suggest that social and behavioral cues contribute to the disproportionate number of minority and lower-class youths referred by police to the juvenile court.[255] Other studies, however, have questioned whether the police

254. Analyses of various aspects of the resolution of police encounters with juveniles may be found in Bittner, *supra* note 242; Black & Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970); Ferdinand & Luchterhand, *Inner-City Youth, the Police, The Juvenile Court, and Justice*, 17 SOC. PROB. 510 (1970); Hohenstein, *Factors Influencing the Police Disposition of Juvenile Offenders*, in DELINQUENCY: SELECTED STUDIES 138 (T. Sellin & M. Wolfgang eds. 1969); McEachern & Bauzer, *Factors Related to Disposition in Juvenile Police Contacts*, in JUVENILE GANGS IN CONTEXT 148 (M. Klein & B. Myerhoff eds. 1964); Piliavin & Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206 (1964); Terry, *Discrimination in the Handling of Juvenile Offenders by Social-Control Agencies*, 4 J. RESEARCH CRIME & DELINQUENCY 218 (1967); Terry, *The Screening of Juvenile Offenders*, 58 J. CRIM. L.C. & P.S. 173 (1967) [hereinafter cited as *Screening of Juvenile Offenders*]; Thornberry, *supra* note 253; Weiner & Willie, *Decisions by Juvenile Officers*, 77 AM. J. SOC. 199 (1970); Werthman & Piliavin, *Gang Members and the Police*, in THE POLICE 56 (D. Bordua ed. 1970); Williams & Gold, *supra* note 54.

255. Piliavin and Briar report that black youths are twice as likely as white youths to display an unsatisfactory demeanor. *See* Piliavin & Briar, *supra* note 254, at 212. A more recent study also has found that police discriminate among offenders on the basis of demeanor and resistance to authority. This study compares the attitudes of black and white delinquents and finds that while black youths have more positive attitudes on a number of dimensions than do whites, they are also more likely to respond negatively to authority figures. It concludes that while first-time

> black offenders are less anti-social and less aggressive than white offenders . . . they are also more rejecting of public authority and more likely to come from incomplete families. In spite of the rather promising picture black offenders generally present, however, the factors that seem to weigh most heavily upon the police in making their dispositions of black youths are their level of Authority Rejection and the structure of their families.

Ferdinand & Luchterhand, *supra* note 254, at 520. The study finds that this discretionary discrimination is only significant for first offenders and minor offenders and that "when a youth's delinquency is rather pronounced, his disposition is made primarily in terms of factors immediately relevant to his case; but when delinquency is relatively mild, racial membership is a factor in his disposition." *Id.* at 521. Perhaps the most

themselves are prone to discriminate against minority and lower-class youths and instead have attributed the racial and class disparities in police handling of juveniles to pressure from complaining victims or witnesses for a more stringent disposition of these offenders.[256] Still another line of studies reveals no disparities in the police treatment of black and white delinquents when legally relevant factors are taken into account.[257]

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critical study in this line of research reports that

> [e]ven when the seriousness of the offense is held constant, blacks are more likely than whites to receive a more severe disposition . . . . [T]he seriousness of the offense does not explain the relationship between race and disposition.
>
> This finding is essentially the same when the number of previous offenses is held constant . . . .

Thornberry, *supra* note 253, at 95. Controlling for present offense and prior record simultaneously still reveals differences in disposition by race. *See id.*

Reliance on demeanor as a dispositional variable is justifiable, it is argued, because a youth who is disrespectful to police officers may be even more obstreperous or delinquent when they are not present. *See, e.g.*, Bittner, *supra* note 242, at 82-85. However, the conflict between police and minority youths may represent a form of institutionalized class struggle, and a hostile demeanor may therefore be part of a ritualistic exchange, reflecting interactional expectations rather than providing insight into a youth's moral character. *See id.*

256. Black and Reiss report that differences in demeanor were not significant to racial disparities in police dispositions. *See* Black & Reiss, *supra* note 254, at 74. They attribute the racial disparities in police handling of juveniles to situational variables and suggest that most offenses were intraracial and that the racial disparities in dispositions can be accounted for by the more punitive responses sought by black victim-complainants than by white victim-complainants. *See id.* at 70-74. The role of victim-complainants in constraining police discretion and contributing to racial disparities in dispositions has been noted by other researchers as well. *See, e.g.*, Hohenstein, *supra* note 254.

257. Williams and Gold report that apprehension by the police is essentially a chance occurrence reflecting frequency of violation and that similar proportions of black and white teenagers were apprehended. *See* Williams & Gold, *supra* note 54, at 219. They also find that, of those apprehended, equal proportions of black and white offenders are likely to receive official police records as a result of the contact, a fact that suggests that race is not a significant factor in the police handling of these delinquents. *See id.* at 223. Another study has analyzed screening decisions by police officers and has found a strong relationship between "the seriousness of the offense committed, the number of previous offenses committed, and the age of the offender and the severity of sanctions" imposed. *Screening of Juvenile Offenders, supra* note 254, at 177. Social characteristics such as ethnicity, socioeconomic status, and area of residence are insignificant factors in dispositional decisions. The study concludes that

> [t]he police appear to utilize basically legalistic criteria in making disposition decisions. The variables that are regarded as criteria are the same as those which could be expected to guide their handling of adult offenders as well. In other words, the police appear to interpret the "best interests of the child" in terms of criteria also used when dealing with adult offenders.

Id. at 179. McEachern and Bauzer have analyzed the factors that lead police officers to request petitions for delinquent youngsters and have reported that the most signifi-

Despite differences in the conclusions reached by the authors of these various studies, the research taken as a whole tends to suggest that, if one controls for the influence of the offense committed, prior record, and the age of the offender, social characteristics such as ethnicity, socioeconomic status, and area of residence are secondary factors in dispositional decisions. Studies of decisionmaking by juvenile officers as opposed to patrol officers have also failed to demonstrate any systematic or consistent differences in handling youths of different races or classes, once the legal variables are controlled.[258] Thus, the thrust of this research appears to be that, while the exercise of discretion by police in dealing with nonserious offenders may reflect extraneous social considerations, dispositions for serious offenders are primarily a function of the present offense and the prior record.

The tendency of police to base dispositional decisions regarding serious offenders on considerations of past record and present offense can be explained in terms of general police orientation. To a greater extent than other personnel within the juvenile justice process, police are responsive to public safety concerns and the effects of youthful crime on the community. Socialized initially as police officers rather than juvenile officers, they are more inclined to respond to offenses than offenders. This crime control orientation is consistent with law enforcement ideology and accepted police practices in dealing with adult offenders and extends readily to juvenile felony offenders.

By requiring a felony adjudication as a precondition to a waiver decision, the proposed matrix would reinforce police decisionmaking on the basis of offense. Formal departmental rules, developed to effectuate the legislative goals of referring juveniles involved in felonies to the district court, would further buttress general police attitudes and encourage rational decisionmaking on legally defensible grounds and reduce the likelihood of invidious discrimination on the basis of nonlegal considerations.

If following a juvenile's encounter with the police, his case is referred to juvenile court, it will normally be screened by an intake

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cant factor in seeking a petition is the youth's offense, with some additional influence exerted by age and the number of offenses in the youth's delinquent history. There do not appear to be any systematic or consistent differences in handling youths of different races, once the legal variables are controlled. *See* McEachern & Bauzer, *supra* note 254.

258. In a study of decisions by juvenile officers rather than patrolmen, Weiner and Willie report that "the race of an individual youth has no influence on the disposition decisions of the juvenile officer, nor does the race of his neighborhood." Weiner & Willie, *supra* note 254, at 208-09. They conclude that juvenile officers emphasize "fairness" as a dispositional guide, which presumably means treating similarly situated offenders similarly. *See id.*

unit to decide whether the case requires formal court adjudication and intervention or whether it can be resolved informally or diverted. A preliminary social investigation typically results in the closing or informal adjustment of about half of the cases referred by police.[259] The intake social worker, like the police officer in the field, has an enormous amount of discretion and a wide range of dispositional alternatives. As a result, all of the problems of individualized justice, discretion, and discrimination manifest at the police level are also present at intake.

Again, the research findings are contradictory as to the basis on which dispositional decisions are made. Some research suggests that intake discretion is more likely to be influenced by a child's social characteristics and demeanor than by the reasons for the child's referral, which, in turn, is likely to amplify the racial and class disparities of youths referred to juvenile court.[260] Others report that both legal and social variables determine whether a juvenile is referred to juvenile court, but that some social characteristics—whiteness, middle-class background, stable family—may insulate some offenders from referral.[261] Still other research concludes that the seriousness of the present offense, the extensiveness of the prior record, and the age of the offender are related to the severity of intake dispositions but that the relationship between these legalistic criteria and dispositions is not as strong as at the police level.[262] Again, while the studies are

259. In 1974, the most recent year for which national juvenile court statistics are available, 53% of the delinquency cases disposed of by juvenile courts were handled nonjudicially. NATIONAL INSTITUTE FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE COURT STATISTICS 14 (1974).

260. Thornberry reports that "at the intake hearing the racial differences are not as great [as at police referral], but are still in the same direction. Blacks are less likely . . . than whites . . . to have their cases adjusted, but are more likely . . . than whites . . . to be referred for a court hearing." Thornberry, *supra* note 253, at 94. Although the results were somewhat equivocal, the differences in dispositions could not be accounted for by the present offense or the prior record. Similarly, Williams and Gold report that black repeat-offenders were more likely than white recidivists to be referred to juvenile court. *See* Williams & Gold, *supra* note 54, at 226.

261. Thomas and Sieverdes report that the prior record had relatively little influence on intake dispositions; that seriousness of the present offense was the most powerful single variable in explaining case dispositions; that social characteristics also affected dispositions; and that

> the relative importance of seriousness of offense in the determination of case dispositions is greatest when the alleged offender is male, has a prior offense record, is black, comes from a lower social class background, is in an unstable family setting, had one or more co-defendants, and when the age at first and most recent offense was between 16-17. Under all other conditions, the seriousness of the offense was not so relevant in the determination of the appropriate case disposition.

Thomas & Sieverdes, *supra* note 253, at 425-26.

262. *See Screening of Juvenile Offenders, supra* note 254, at 177, 179.

inconclusive, it appears that decisionmaking currently is based either on legally relevant criteria or on subjective factors that result in a disproportionate number of formal referrals of minority youths. In either case, explicit reliance on formal legal criteria would have a desirable impact on the decisionmaking process.

Encouraging intake probation officers to use formal legal criteria more extensively could also reduce some of the present conflicts between police, intake, and the court. Police officers refer juveniles to intake to reinforce their own authority. Their efforts to maintain order on the street may, in turn, require coercive intervention by the juvenile court.[263] When intake closes a case that the police refer, the police are likely to perceive the closing as a failure to consider prior encounters of the juvenile with the police that were informally adjusted.[264] Administrative rules that rationalize police referrals would clarify the status of the juvenile at intake. Structuring police referrals would also increase the pressures on intake to process the juvenile for formal adjudication. Initially, pressures in this direction may emanate from the police bureaucracy, which may require intake to justify the informal closing of a case. The threat of scandal if an informally adjusted juvenile felon is subsequently involved in an excluded offense might also increase court referrals and could eventually lead to administrative guidelines, promulgated by intake or the juvenile court, mandating the referral of certain categories of offenses. Since police and intake would thus share a common frame of reference—the offense and prior record—the various components of the system should respond to offenders more consistently.

As in the case of decisionmaking by the police and intake officials, research evaluations of present dispositional decisionmaking at the juvenile court level reveal inconsistencies in the way the courts act. Some studies of the relative effects of social and legal factors on dispositions indicate that blacks receive more severe dispositions than whites.[265] Other research found racial or class bias only in the dispositions of minor offenders, while for recidivating felons, the so-

263. *See, e.g.*, A. CICOUREL, *supra* note 245; R. EMERSON, *supra* note 245, at 42-45; Bittner, *supra* note 242, at 85-88; Emerson, *supra* note 162, at 621.

264. *See, e.g.*, Bittner, *supra* note 242, at 87-88.

265. *See* Arnold, *Race and Ethnicity Relative to Other Factors in Juvenile Court Dispositions*, 77 AM. J. SOC. 211 (1971) (minority group members are likely to receive greater punishment than whites for the same offense); Thomas & Cage, *supra* note 253, at 250 (when the legal considerations are held constant, juvenile court's individualized justice "typically applies harsh sanctions to blacks, those who have dropped out of school, those in single parent or broken homes, [and] those from lower socioeconomic backgrounds"); Thornberry, *supra* note 253, at 97-98 (even after controlling for the present offense and the prior record, black offenders were significantly more likely than white offenders to be committed to institutions by the juvenile court).

cial characteristics were essentially irrelevant.[266] Other studies have suggested, contrary to expectations, that white youths receive more severe dispositions than blacks.[267] Still other research indicates that dispositional decisions are based principally on legal criteria and that as the seriousness of the offense increases, discrepancies between races decline.[268] Taken together, these studies, while indicating that the juvenile court appears to use a broader range of dispositional criteria than do decisionmakers at earlier stages, are generally consistent with the findings of a recent study of juvenile court dispositional decisionmaking in Minnesota, which indicate that the severity of the present offense and the number of prior involvements are the most significant factors in dispositions of juveniles.[269]

It appears, then, that a stronger statistical relationship exists between legal variables and dispositions than between social variables and dispositions at all levels of the dispositional process. At the same time, however, these variables only partially explain dispositions, and even when the relationship between legal characteristics or social characteristics and disposition is statistically significant, a separate question exists as to the strength of the relationship. Although statistically significant, most of the relationships between legal or social factors and juvenile dispositions were found to be only weak to moderate.

The question of the strength of the relationship is important to a full understanding of dispositional decisionmaking and to predicting a probable disposition. The question is the extent to which knowledge about a particular independent variable improves predictive

266. *See, e.g.*, Thomas & Cage, *supra* note 253.

267. Scarpitti and Stephenson report that while present offense appeared to be associated with the court disposition, "black boys had to exhibit a much greater degree of delinquency commitment than whites before the most punitive alternative [disposition] was selected." Scarpitti & Stephenson, *Juvenile Court Dispositions: Factors in the Decision-Making Process*, 17 CRIME & DELINQUENCY 142, 148 (1971). Ferster and Courtless also report lack of a relationship between offense seriousness and disposition and that "more lenient dispositions were given non-whites than whites." In addition, they have found that nonwhites were more likely than whites to enjoy adjudications without formal findings of delinquency. None of these differences could be explained in terms of differences in the present offense, prior delinquency records, or age. *See* Ferster & Courtless, *Pre-Dispositional Data, Role of Counsel and Decisions in a Juvenile Court*, 7 LAW & SOC'Y REV. 195, 212 (1972).

268. Ferdinand and Luchterhand report that despite earlier discrimination by the police, dispositional decisionmaking by the court did not appear consistently to differentiate among offenders on the basis of race. Moreover, as the seriousness of the offense increased, discrepancies between races declined. Ferdinand & Luchterhand, *supra* note 254, at 521; *accord, Screening of Juvenile Offenders, supra* note 254.

269. *See* GOVERNOR'S COMMISSION ON CRIME PREVENTION AND CONTROL, A PRELIMINARY ANALYSIS OF THE JUVENILE OFFENDER WITHIN THE MINNESOTA JUVENILE COURT SYSTEM 43 (tent. ed. 1976).

accuracy about variation of the dependent variable. Where the relationship between offense and disposition is very strong, for example, .80, knowledge of an individual's offense would enable us to predict a probable disposition accurately eighty percent of the time, a considerable improvement over chance. Where the relationship is weak, albeit statistically significant, however, knowledge of the relationship may not appreciably improve predictive accuracy.

All of the dispositional studies report only weak to moderate relationships between the independent variables and the dispositions. In the Minnesota Governor's Crime Commission study, despite the relationship between the present offense, prior record, and disposition, variations of the first two factors accounted for only 24% of the variation in disposition.

> The statement that the number of prior involvements of the juvenile and the severity of the offense are the two strongest determinants of disposition must be tempered by the fact that over 75% of the variation in disposition is not explained by these variables. In other words, even though we have included the variables which would seem to be logically the most relevant to disposition, they in fact do little to explain how the court arrives at its decisions.[270]

While the methodologies of the various studies differed and it is difficult to generalize from them, it would be accurate to conclude that even those factors that appear to be related to dispositions account for only about 25% of the variation in disposition.[271] In short, there appears to be enormous variation in dispositions that cannot be explained consistently by reference to either legal or social factors.

The absence of any powerful, explanatory relationship between predictor variables and dispositions may be interpreted as true "individualized justice"; that is, every child is the recipient of a unique disposition tailored to his or her individual needs. An equally plausible interpretation, however, is simply that dispositional decisionmaking is not rational at all, but instead consists of little more than hunch, guesswork, and hopes, minimally constrained by the youth's present offense and prior record.[272]

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270. *Id.* at 44.

271. *See, e.g.*, Thomas & Cage, *supra* note 253, at 244.

272. *See id.*:

> [T]he levels of association between both general types of predictor variables and case disposition are weak to moderate. This suggests that no single factor exerts a major independent influence on judicial decisions. Given the philosophy of the juvenile court system, this finding might be interpreted as quite positive in the sense that it could imply that judges consider a broad spectrum of both legal and social variables in their attempt to individualize decisions. On the other hand, these findings also suggest the possibility that those who share various social characteristics will be treated in a signifi-

The adoption of an offense-based matrix could contribute to rationalization of the dispositional decisionmaking process. At present, since waiver is discretionary and may occur only after an extensive record has accumulated, a court has no initial incentive to intervene in the life of serious offenders. The lack of relationship between offense and disposition means that a serious offender could receive probation repeatedly.[273] An offense-based matrix, by contrast, imposes a finite outer limit on the length of juvenile court jurisdiction and places both the youth and the court on notice that continued criminal involvement will eventually lead to prosecution as an adult. For example, both the court and the youthful offender would be aware the first time a youth is convicted of an aggravated offense against the person that a repetition will result in adult prosecution. Knowing this, the court presumably would maximize its intervention in order to avoid the subsequent adult consequences. A similar impetus would exist in the case of any youth with several felony convictions. As noted earlier, the proposed matrix encompasses virtually all youths presently certified as serious offenders, but it identifies them at an earlier point in their delinquent careers than does the present discretionary practice.[274] The net effect would be an increased focus on the serious juvenile offender because courts would be encouraged to pay greater attention to the offense and to maximize their intervention in the lives of youths whose records otherwise suggest a limited future within the juvenile court.

The preceding discussion of dispositional decisionmaking assesses some systemic changes that could occur in response to the adoption of an offense-based matrix. It would be necessary to evaluate and monitor the system to determine whether these changes actually occur. If they do, it will be necessary periodically to readjust the categories included in the certification matrix to reflect changes in current operations. If the various dispositional decisionmakers—police, intake, and the court—begin to respond earlier and more

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cantly different fashion from those drawn from other categories in the population; those against whom complaints are filed by one type of complainant will be treated differently than those who have engaged in comparable behavior, but whose offense has been brought to the attention of social control agencies by a different complainant; and those who come before one judge will be disposed of differently than those who appear before another judge, regardless of who they are or what their present and past offense record might be.

273. A study in Hennepin County of serious juvenile offenders reported that more than eighty percent of these youths were placed on probation at least once and that thirty percent had been on probation from four to ten times. *See* HENNEPIN COUNTY STUDY, *supra* note 9, at 12-13.

274. *See* notes 214-17 *supra* and accompanying text.

formally to serious offenders than they do now, it will be necessary to adjust upward the number of offenses in the matrix categories. This upward adjustment is required since the matrix is designed to address the problem of the serious and repetitive offender. A youth fitting the present matrix criteria will probably have had extensive hidden delinquencies, a number of police contacts, intake adjustments, or court adjudications without findings before compiling a record warranting exclusion under the matrix. If the system begins to respond formally to these offenders at an earlier point in their careers, it may be necessary to modify the matrix accordingly.

B. Lawyers in Juvenile Courts

The influence of an offense-based matrix may engender systemic changes other than those involving criteria for dispositional decisionmaking. Specifically, the adoption of an offense-based matrix has implications for the adversariness of juvenile court litigation, the burden of proof and legal outcomes in juvenile trials, and the role of counsel in such proceedings.

1. *Burden of Proof and Prosecutorial Decisionmaking*

As has been suggested, fundamental differences in the operational philosophies of the adult and juvenile courts translate into differing administrative practices and procedures. The Supreme Court's concern in *McKeiver v. Pennsylvania*[275] that the imposition of jury trials would detract from the flexibility and informality of juvenile court proceedings is an acknowledgment of one aspect of this difference.[276] Similarly, the difference is reflected in the fact that attorneys functioning in a legal system that serves benevolent as well as punitive goals are likely to view their role somewhat differently from attorneys acting within the adult criminal justice system.[277]

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275. 403 U.S. 528 (1970).

276. 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.

277. *See, e.g.*, Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 Geo. L.J. 1401, 1410 (1973):

> In adult criminal trials [the obligation to represent a client "zealously within the bounds of the law"] demands that, within the bounds of professional ethics, the lawyer use all his skill and resources in order to establish his client's innocence. It is not at all clear that the attorney is under a similar duty to work as single-mindedly against a finding of delinquency for his client in juvenile proceedings.

The differences in attorney roles are attributed to the more clearly adversary nature of adult proceedings, institutional pressures that reinforce the more cooperative pro-

These and other differences in the operation of the two systems of justice notwithstanding, however, the Supreme Court in In Re *Winship*[278] indicated that the same standard of proof is required to convict a juvenile of an offense that would be a crime if committed by an adult as to convict an adult similarly charged.[279] The Court's rationale was that the seriousness of the proceedings and the potential consequences for the defendant require the highest standard of proof in both contexts in order to avoid convicting innocent people.[280]

The requirement of comparable standards of proof seemed logically to portend that prosecutors, in deciding what charges to bring, would treat juveniles and adults alike, given similar facts. In *McKeiver,* however, the Court appears to have undermined this expectation when it refused to extend the constitutional right to a jury trial to juvenile court proceedings.[281]

In *McKeiver,* the Court held that the only requirement for "fundamental fairness" in juvenile court proceedings is "accurate factfinding" and reasoned that this requirement could be as well satisfied by a judge as by a jury.[282] But in suggesting that nothing more than accurate factfinding was required to satisfy the requirements of due process in the juvenile context, the Court departed significantly from its own prior analysis of the dual function of procedures in juvenile court adjudications,[283] for earlier decisions actually

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cess of the juvenile court, the more serious consequences that follow adult convictions, and basic differences in adult and juvenile client characteristics. *See id.*

278. 397 U.S. 358 (1970).

279. *See id.* at 365.

280. The Court reasoned that the reasonable doubt standard plays a fundamental role in American criminal procedure:

> It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." . . .
>
> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction . . . .
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are condemned.

Id. at 363-64 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)); *see id.* at 368 (Harlan, J., concurring).

281. 403 U.S. at 545.

282. *Id.* at 543.

283. *See, e.g.,* Breed v. Jones, 421 U.S. 519, 528-31 (1975); *In re* Winship, 397 U.S. 358, 363 (1970). *See generally The Supreme Court, 1970 Term,* 85 HARV. L. REV.

appear to have been premised on *two* rationales—accurate factfinding *and* protection against governmental oppression.[284]

Thus, in its preoccupation with the impact of jury trials on the informality and flexibility of juvenile court proceedings,[285] the Court failed to acknowledge the protective functions that juries serve beyond the accuracy of their factual findings.[286] The jury is the carrier

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38, 118 (1971); Comment, *Constitutional Law—Due Process: No Constitutional Right to Trial by Jury for Juveniles in Delinquency Proceedings,* 56 MINN. L. REV. 249, 257 (1971).

284. This dual function of procedures was clearly recognized, for example, by the Supreme Court in *In re* Gault, 387 U.S. 1 (1967), when it held, *inter alia,* that juveniles must be accorded the fifth amendment privilege against self-incrimination in connection with juvenile court adjudications of delinquency. *See id.* at 55. 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—for example, a requirement that all confessions be shown to have been made voluntarily—would have sufficed. *See id.* at 75-78 (Harlan, J., concurring in part and dissenting in part). The Court, however, recognized that fifth amendment safeguards were not required simply to ensure accurate fact finding or reliable confessions, but to serve as a fundamental bulwark of the adversary system and a means of maintaining a 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 the 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.
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> . . . .
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> It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the grounds 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."

Id. at 47-50 (footnotes omitted).

285. 403 U.S. at 550.

286. By contrast, in Duncan v. Louisiana, 391 U.S. 145 (1968), the Court, in holding that jury trials were constitutionally required in state criminal proceedings, had clearly acknowledged that the rationale for juries involved more than accurate fact finding, which could be accomplished without providing a jury. *See id.* at 149 n.14. The Court concluded that in an Anglo-American system of criminal jurisprudence, factual accuracy was not determinative of fundamental fairness. After reviewing the

of the community's norms and functions as a barrier between the state and the defendant. When judges and juries differ about the outcome of a trial, juries are more likely to acquit than are judges.[287] This tendency is attributable to basic differences in jury-judge evaluations of evidence, as well as to such factors as jury sentiments about the "law" (jury equity) and jury sympathy for the defendant.

One of the most significant functions of juries is to uphold the reasonable doubt standard.[288] After accounting for other sources of disagreement, it appears that juries employ a higher evidentiary threshold standard of "proof beyond a reasonable doubt" than do judges.[289] As Kalven and Zeisel 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."[290] 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 it somewhat easier to convict a youth appearing before a judge in juvenile court than to convict him on the basis of the same evidence before a jury of detached citizens in an adult proceeding.[291] Thus, *McKeiver* appears to undercut the Court's mandate in *Winship* that the same standard of proof beyond a reasonable doubt is constitutionally required in both juvenile and adult proceedings.

The difference between "judge-reasonable doubt" and "jury-reasonable doubt," coupled with the greater flexibility and informality of the juryless closed proceedings in juvenile court, may produce some important differences between juvenile and adult prosecutors' evaluations of cases and may result in adjudicatory outcomes in juvenile court that could not be obtained in corresponding adult proceed-

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history of the right to jury trial, the Court justified requiring states to provide juries "in order to prevent oppression by the Government. . . . 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." *Id.* at 155-56.

It is instructive to compare the Court's reasoning in *McKeiver* with that of the Alaska Supreme Court in R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (holding that the state constitution required jury trials in juvenile court because of the protective buffer they provide between the individual and the state).

287. *See, e.g.*, H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1971).

288. *See id.* at 182, 185-90.

289. *See id.*

290. *Id.* at 189-90.

291. Kalven and Zeisel found that one characteristic eliciting jury sympathy was the youthfulness of the defendant. While their research was confined to adult proceedings, they concluded that in that context the youth of a defendant was the personal characteristic that engendered the greatest jury sympathy. *See id.* at 209-13. This finding buttresses the conclusion that it is easier to obtain convictions in juvenile court without a jury than in adult proceedings with one.

ings. For example, the difference between charging a simple assault,[292] a misdemeanor, and an aggravated assault,[293] a felony, is the factual difference between "bodily harm"[294] and "great bodily harm."[295] To the extent that the reasonable doubt standard is lower for judges than for juries, a juvenile might be convicted of an aggravated assault in juvenile court on the basis of facts and circumstances that would produce only a conviction of simple assault in an adult proceeding.

An offense-exclusion matrix, however, may encourage greater equality in prosecutorial decisionmaking and in adjudication outcomes. For example, aggravated assault is one of the offenses for which a youth could be excluded by the legislative matrix, whereas simple assault is an offense that remains within the juvenile court's original and exclusive jurisdiction. Prosecutors evaluating a case and deciding whether to issue a complaint that excludes a youth from juvenile court jurisdiction must also assess the probability of obtaining a conviction if the case is tried before a jury in adult court. If a juvenile prosecutor fails to evaluate correctly whether the evidence is sufficient to satisfy the reasonable doubt of a jury, the adult prosecuting authority may refer the case back with the notation, "not sufficient evidence to take this case before a jury." The adult authorities are likely to be reluctant to spend prosecutorial time and resources on cases that will ultimately result in convictions for nonexcluded, lesser offenses, which will require that the case be transferred back to the juvenile court for disposition. Consequently, under the matrix, juvenile prosecutors would have to become more cognizant of adult charging standards and jury-reasonable doubt evidentiary standards in order to apply them to cases subject to adult prosecution. Cases initially referred to the adult court for prosecution but transferred back to the juvenile court for insufficient evidence or because of convictions for lesser included offenses would educate juvenile prosecutors about adult case evaluations and charging standards and would thus promote greater parity in the legal decisions made by prosecutors in both systems.

2. *Juvenile Court Litigation and Plea Bargaining*

A second, indirect effect of adoption of the matrix could be to encourage a more aggressive defense of the legal interests of juveniles by their attorneys. Because exclusion from juvenile court jurisdiction

292. *See* MINN. STAT. § 609.22 (1976).
293. *See id.* § 609.225.
294. *See id.* § 609.02(7).
295. *See id.* § 609.02(8).

under the matrix is based on the present offense and the prior record, a juvenile's every contact with the system acquires greater significance. Since one or more felony convictions will trigger automatic exclusion for adult prosecution under the matrix, defense attorneys have a strong incentive to be vigorous advocates for their clients. Moreover, as a youth's prior record of even nonserious felonies accumulates, the imperative to resist each additional conviction increases correspondingly.

To some extent, an increased emphasis on adversariness represents a departure from present practices. Professional cooptation and informal accommodation to the system tend to reduce the aggressiveness of many defense attorneys.[296] Lawyers appearing regularly in juvenile court may have a greater stake in maintaining their relationships with the prosecutors and with the court and its personnel than they do in representing their own clients.[297] Aside from bureaucratic pressures, an attorney's cooperative attitude is fostered by the perceived lack of consequences of juvenile court adjudications since most offenders receive probation. A matrix may change this by increasing

296. The cooptation 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,* 1 LAW & SOC'Y REV. 15 (1967). 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 on-going 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.

The same analysis has been applied to the role of attorneys in juvenile court. *See, e.g.,* A. PLATT, *supra* note 3, at 163-75. *See generally* Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court,* 7 CRIM. L. BULL. 544 (1971); Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court,* 116 U. PA. L. REV. 1156 (1968); Platt, Schechter, & Tiffany, *In Defense of Youth: A Case Study of the Public Defender in Juvenile Court,* 43 IND. L.J. 619 (1968). Other studies have questioned whether lawyers can actually perform as adversaries in a system rooted in *parens patriae* and benevolent rehabilitation. *See, e.g.,* V. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH (1972); Lefstein, Stapleton, & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation,* 3 LAW & SOC'Y REV. 491 (1969); Lemert, *Legislating Change in the Juvenile Court,* 1967 WIS. L. REV. 421.

297. *See, e.g.,* A. PLATT, *supra* note 3, at 165; Blumberg, *supra* note 296.

Platt notes that lawyers are generally more inclined to extend themselves for "good kids." He suggests that an attorney decides whether a client is "good" or "bad" on the basis of "criteria which positively indicate moral and social propriety. 'Badness' is a residual category applied to clients who do not meet these wholesome criteria. His decision relies primarily upon the demeanor of his client and secondarily upon the demeanor of his client's parents." A. PLATT, *supra* note 3, at 168-69 (footnotes omitted). Reliance on demeanor as a decisionmaking criterion pervades the juvenile justice system. *See, e.g.,* Bittner, *supra* note 242; Emerson, *supra* note 162, at 636-37.

the significance of each felony adjudication. Because of the cumulative impact of felony convictions, juvenile court practitioners will have to be an effective adversary with respect to every felony, regardless of the probable disposition.

Similarly, the increased significance of each conviction may subject the plea bargaining process in juvenile court to greater constraints, controls, and supervision. Under the present practice, there is no necessary relationship between the offense for which a juvenile pleads or is adjudicated a delinquent and the ultimate disposition. As a consequence, there is a relatively cavalier attitude on the part of prosecutors and defense attorneys in plea bargaining, since an admission of even one offense provides the court with all the legal authority it needs for maximum intervention. Where each offense now acquires independent significance as part of the prior record within the matrix, prosecutors may be less inclined to dismiss some charges in return for admissions on others. Similarly, defense attorneys may be less willing to allow their clients to admit to charges. With increased significance now attached to each offense, the inability to strike deals as readily may foster a greater degree of adversariness both in negotiation and ultimately in litigation.

C. DETERRENCE

Deterrence or general prevention is the restraining influence that punishment of an offender has on other potential offenders.[298] In addition to the overt compliance resulting from the threat of punishment, the imposition of sanctions also has a moralizing, educating, and socializing influence on others by expressing societal condemnation of the prohibited acts and reinforcing habitual conformity.[299] Within the juvenile court, the elevation of rehabilitation over the other justifications for punishment has tended to undermine the general preventive effects of coercive intervention by characterizing dispositions as treatment rather than sanctions, by preventing the communication of the threat of punishment to other potential offenders because of closed proceedings and restricted publicity, and by individualizing disposition, thereby, reducing any certainty of application of sanc-

298. *See, e.g.*, Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & CRIMINOLOGY 338, 341-43 (1975). *See generally* J. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE (1975); F. ZIMRING, PERSPECTIVES ON DETERRENCE (Public Health Service Pub. No. 2056, 1971); F. ZIMRING & G. HAWKINS, DETERRENCE—THE LEGAL THREAT IN CRIME CONTROL (1973).

299. *See, e.g.*, Andenaes, *supra* note 298, at 341; Andenaes, *The Moral or Educative Influence of Criminal Law*, 27 J. SOC. ISSUES 17 (1971); Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects*, 1969 WIS. L. REV. 550.

tions and obscuring any relationship between an act and its consequences. As faith in the rehabilitative ideal has declined, there has been an enormous upsurge of interest and research in the preventive effects of punishment.[300] Although a review of these studies is beyond the scope of this Article, some of their insights are relevant to this discussion.

With the exception of the research findings on capital punishment,[301] the research supports the intuitively obvious proposition that penal sanctions and the threat of imprisonment have a deterrent

300. *See, e.g.*, Andenaes, *Deterrence and Specific Offenses*, 38 U. CHI. L. REV. 537 (1971); Andenaes, *Does Punishment Deter Crime?*, 11 CRIM. L.Q. 77 (1968); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URB. L. 145 (1973); Antunes & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 64 J. CRIM. L. & CRIMINOLOGY 486 (1973); Bailey & Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L.C. & P.S. 530 (1972); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Buikhuisen, *General Deterrence: Research and Theory*, 14 ABSTRACTS CRIMINOLOGY & PENOLOGY 285 (1974); Chambliss, *The Deterrent Influence of Punishment*, 12 CRIME & DELINQUENCY 70 (1966); Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703; Chauncey, *Deterrence: Certainty, Severity, and Skyjacking*, 12 CRIMINOLOGY 447 (1975); Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence*, 18 SOC. PROB. 200 (1970); Erickson & Gibbs, *Further Findings on the Deterrence Question and Strategies for Future Research*, 4 J. CRIM. JUST. 175 (1976); Gibbs, *Crime, Punishment, and Deterrence*, 48 SW. SOC. SCI. Q. 515 (1968); Logan, *General Deterrent Effects of Imprisonment*, 51 SOC. FORCES 64 (1972); Schwartz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 59 J. CRIM. L.C. & P.S. 509 (1968); Tittle, *Crime Rates and Legal Sanctions*, 16 SOC. PROB. 409 (1969); Tittle & Logan, *Sanctions and Deviance: Evidence and Remaining Questions*, 7 LAW & SOC'Y REV. 371 (1973); Tittle & Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis*, 52 SOC. FORCES 455 (1974); Tittle & Rowe, *Moral Appeal, Sanction, Threat, and Deviance: An Experimental Test*, 20 SOC. PROB. 488 (1973); sources cited notes 298-99 *supra*.

301. *See, e.g.*, Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 MINN. L. REV. 743 (1977); Schuessler, *The Deterrent Influence of the Death Penalty*, ANNALS, November 1952, at 54; Zimring, Eigen, & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976).

The most conspicuous research purporting to find that capital punishment has a deterrent effect is that of Isaac Ehrlich. *See* Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975). The research reporting such a deterrent effect, however, has been strongly challenged on both methodological and substantive grounds. *See, e.g.*, Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61 (1975).

effect on potential offenders. While the amount of prevention differs by offense, there is generally an inverse relationship between frequency of sanctions and crime rates. Although the classical deterrence paradigm was formulated in terms of swiftness, certainty, and severity of punishment, most research suggests that certainty of punishment is the primary source of preventive restraint:[302] "With regard to *certainty* of punishment the research up to now, seen in its totality, has given support to the common sense assumption that increased certainty of sanction will tend to reduce the amount of crime."[303] The certainty of punishment has to be credible before this effect appears, however, suggesting a minimum threshold of certainty below which the threat of punishment may be inefficacious.[304] Research on the effect of severity of sanctions is more equivocal. When sanctions are already severe, increasing the penalty still further apparently has little marginal influence.[305] Moreover, the effect of penal severity may be mediated by the certainty of punishment, so that until the certainty is credible, the independent influence of severity may be reduced. As the level of certainty increases, however, the degree of severity may decrease with relatively little loss of preventive effect.[306]

Although virtually all of the deterrence research involves analyses of adult statistics, adolescents may well be as responsive as their elders to a realistic threat of punishment. Psychological research concerning legal socialization indicates that youngsters move through a developmental sequence of stages of cognitive functioning with respect to legal reasoning, internalization of social and legal expectations, and ethical decisionmaking.[307] This developmental sequence is

302. *See, e.g.*, Gibbs, *supra* note 300; Tittle, *supra* note 300.

303. Andenaes, *supra* note 298, at 362.

304. *See, e.g.*, Tittle & Rowe, *supra* note 300.

305. *See, e.g.*, Schwartz, *supra* note 300.

306. *See, e.g.*, Bailey & Smith, *supra* note 300.

> [T]he research suggests that very long prison sentences give a small payoff. . . . It seems likely that increasing severity yields diminishing returns and that a given number of prison years will produce more by way of general prevention if distributed as short sentences to a greater number of offenders rather than as long sentences to a small number of offenders.

Andenaes, *supra* note 298, at 362.

307. Developmental psychology describes and explains changes that occur in human behavior as a result of maturation and experience. *See generally* DEVELOPMENTAL PSYCHOLOGY TODAY 5 (1971). Although there are several theories of psychological and moral development, the one most relevant to this discussion is cognitive-development theory. *See generally* R. BROWN, SOCIAL PSYCHOLOGY 350-414 (1965); Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347 (D. Goslin ed. 1969). This theory of psychological development assumes that an individual's cognitive structure or coding process intervenes between environmental stimulus and individual response. The cognitive structure undergoes changes over time as a result of an individ-

strikingly parallel to the imputations of responsibility associated with the common law infancy defense,[308] indicating that by about age four-

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ual's interactions with his environment. *See id.* at 348. Changes in coding processes reflect new ways of ordering and interpreting information rather than cumulative increases in knowledge. Essential to this theory is the concept of a sequence of development. Coding processes differ at each stage of development, and every succeeding stage builds upon and conceptually reorganizes the stage preceding it.

> Stage and structure are core concepts of the moral development position. Each stage represents a qualitatively different organization of thought, not a set of specific beliefs. Cognitive structures are the rules for processing information, i.e., connecting experiences. Stages, basically ideal-typological constructs, represent different psychological organizations of thought. The order of the stages is always the same. Culture may accelerate or retard movement through the stages but not change the quality or order. While movement through all the developmental stages is not inevitable, each stage is characterized by increasing differentiation and integration, extending the individual's ability to resolve conflicts. In sum, this cognitive stage model is characterized by a distinctive response form in modes of thinking; situational generality; stage consistency across core aspects or categories; differentiative and integrative hierarchical functioning; invariant sequence; and a sequential rate only affected by environmental conditions . . . .

Tapp & Kohlberg, *Developing Senses of Law and Legal Justice,* in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 90 (J. Tapp & F. Levine eds. 1977). Among other behavioral developments, cognitive theory is concerned with the ways in which individuals learn to make ethical choices and acquire and internalize legal values. *See id.* Much of the contemporary research on cognitive development and legal socialization is based on the moral developmental theories of Piaget. *See generally* J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932). An excellent introduction to this literature may be found in Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality,* 27 STAN. L. REV. 1 (1974). Piaget posited three periods in the development of a child's sense of justice: an initial conformity to the dictates of adult authority, followed by the development of autonomy, and, finally, the development of a feeling of equity. *See* J. PIAGET, *supra* at 314-25. *See generally id.* at 224-31. Each stage reflects a different orientation toward the nature, source, and purpose of rules, the observance of rules, and the proper punishment for their violation. *See* Tapp & Levine, *supra* at 12-13. Researchers following in this developmental tradition have refined the steps in the progression, but have confirmed a sequence of stages of moral reasoning from simple to more complex. *See generally* Kohlberg, *supra* at 375-89; Tapp & Kohlberg, *supra.*

308. Crimes consist of socially harmful actions accompanied by the requisite state of mind. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960). Since criminal liability is premised on rational actors who make blameworthy choices and are responsible for the consequences of their acts, the common law recognized and exempted from punishment categories of persons who lacked the requisite moral and criminal responsibility. Children less than seven years of age were conclusively presumed to be without criminal capacity, while those fourteen years of age and older were treated as fully responsible. Between the ages of seven and fourteen years, there was a rebuttable presumption of criminal incapacity. *See, e.g.,* W. LAFAVE & A. SCOTT, CRIMINAL LAW 351 (1972); Fox, *Responsibility in the Juvenile Court,* 11 WM. & MARY L. REV. 659 (1969); Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey,* 54 CALIF. L. REV. 1227 (1966); Westbrook, *Mens Rea In the Juvenile Court,* 5 J. FAM. L. 121 (1965). The doctrine that children below the age of seven are

teen a youth has acquired most of the legal and moral values and reasoning capacity that will guide his behavior through later life.[309] There is, therefore, reason to assume that the deterrence research indicating a preventive influence has applicability for adolescents as well as for adults.

Although the conjunction of adult deterrence research and studies of cognitive development indicates that youths may respond to a threat of punishment having enough certainty to be credible, the juvenile court as an institution has virtually ignored its potential role in achieving that credibility. Sanctions imposed in juvenile court are defined as treatment rather than punishment, addressed to what the offender needs rather than what he did, and administered so as to prevent the communication of the threat to its relevant audience—other potential juvenile offenders. The unwillingness to acknowledge explicitly that one purpose of juvenile court intervention is social control has seriously detracted from the potential deterrent effect that such intervention might have. By insisting that it is not punishing a juvenile, the court virtually eliminates the word "threat" from its vocabulary, and closed and confidential proceedings with individualized dispositions limit the communication of whatever threat of punishment may remain.

Perhaps more significantly, the juvenile court may actually give misleading messages to the youths who appear before it. Juveniles are brought before the court for committing crimes. Recognizing that they have "done wrong," their reasonable expectation is that unpleasant consequences will follow. Instead of punishment, however, the court's intervention is defined as treatment, thus introducing a degree of confusion in the child's mind.[310] If, despite committing a

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conclusively presumed incapable of crime and those below the age of fourteen are rebuttably presumed to be incapable of crime has continuing validity despite the development of the juvenile court and its departure from common law concepts of crime. Juvenile court jurisdiction based on delinquency requires a consideration of the child's capacity to commit a crime. *See, e.g., In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970); *In re* Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966).

309. The research findings of Kohlberg and others reporting an age-developmental sequence of legal socialization, *see* note 307 *supra*, correspond closely to the ages recognized in the common law infancy defense, *see* note 308 *supra*. Although individuals may progress through a developmental sequence at different rates, most children of a particular age will tend to use similar types of cognitive processes in legal reasoning. *See* Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11 (1963). By the age of fourteen, most people employ the same or nearly the same level of moral reasoning as they will as adults. *See id.* at 16. Surveying these findings, Tapp notes that "crystallization occurs during the adolescent years and . . . substantial consistency is demonstrated during adulthood." Tapp, *Psychology and the Law: An Overture*, 27 ANN. REV. PSYCH. 359, 374 (1976).

310. As Matza notes, "[e]veryone is encouraged to believe that the basis of disposition is individualized justice. Thus, whenever a glimmering appears that this

crime, a child is "treated" rather than punished because he is "dependent and immature," the court may actually reinforce the irresponsible behavior it is attempting to prevent. If the treatment is only a nominal intervention that the child perceives as inconsequential, it may foster disrespect for the court and the laws it attempts to uphold. Conversely, if the sanction is severe enough to be perceived as unpleasant, then the child may regard the court as hypocritical, disguising punishment with claims of benevolence.

Judicial waiver practices have contributed to the erosion of the deterrence associated with the imposition of criminal sanctions. There can be no degree of certainty in a discretionary certification system since every decision is necessarily individualized. A youth may appear in juvenile court on numerous occasions, and there is no way to anticipate whether the next appearance will produce yet another juvenile disposition or a waiver proceeding. Indeed, many waived youths have been the subjects of previous, unsuccessful certification proceedings.

The legislative matrix introduces a measure of certainty into the process. Both the youth and the court can reliably predict the consequences of serious and persistent behavior. Upon a youth's first felony conviction, he could receive a copy of the matrix and the admonition that repetition can automatically result in adult prosecution. Moreover, the certainty and predictability of legislative waiver, coupled with the initial publicity associated with trial as an adult rather than as a juvenile, may convey the message to potential offenders that they too are in jeopardy if they persist in their delinquencies.

V. CONCLUSION

The retention of serious and persistent juvenile offenders within the juvenile justice system challenges the fundamental rehabilitative premises of juvenile justice. Removing these individuals from the juvenile system for prosecution as adults, however, raises equally difficult questions of both procedure and substance: who decides which juveniles to prosecute as adult offenders, and on what substantive and evidentiary bases? Ultimately, the issue is one of discretion: who shall exercise it and on what basis. Although both present waiver alternatives—judicial and legislative—suffer from conceptual and administrative deficiencies, the defects of legislative exclusion can be remedied, whereas those of judicial waiver cannot. Accordingly, this Article proposes that the discretionary value choices be made by the legislature.

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is not a basis for decision, the stage is set for the imputation of hypocrisy, favoritism, or whimsical inconsistency." D. MATZA, *supra* note 245, at 133.

Under a judicial waiver system, youths are designated for adult prosecution on the basis of a juvenile court judge's assessment as to their amenability to treatment or dangerousness. Unfortunately, judicial waiver statutes requiring judges to identify the amenable or dangerous necessitate the asking of questions that cannot be answered. There is no clinical basis on which a judge can reliably predict whether a youth will respond to a particular form of treatment. Similarly, there is no clinical basis on which a judge can reliably predict whether a particular youth will be dangerous. But the problem is more than just an inability to answer the questions that the legislature poses. Within the broad discretionary framework, a variety of abuses occur. Standardless discretion results in discrimination. Within an individualized justice framework, in which decisions are based on multiple criteria, there is virtually no way to prevent this from occurring. And in this society, discretionary, discriminatory judgments bear disproportionately and unfairly on the disadvantaged.

On the basis of the available social science research, it appears that legislative waiver—a form of actuarial prediction—can provide a more reliable basis for making judgments about future conduct and a more just and more easily administered method for deciding which youths to prosecute as adults. Using a legislative waiver system, it is possible to exclude from the jurisdiction of the juvenile court those relatively few juveniles who are exceptionally sophisticated on a rational and legally defensible basis—their present offense and prior record. By focusing on the seriousness and persistence of a youth's delinquent career, a legislature can differentiate between the hardcore offenders and the vast majority of juveniles who are unlikely to repeat and who are therefore appropriately handled by the juvenile court. By stressing the more objective records rather than subjective, impressionistic clinical factors, juveniles can be separated on a basis that avoids many of the dangers of abuse of discretion and discrimination inherent in judicial sorting.

In terms of the concerns addressed in this Article, legislative exclusion as currently practiced suffers from two defects, both of which can be corrected. The first problem, that of prosecutorial overcharging, can be remedied by divesting the juvenile court of jurisdiction on the basis of final convictions rather than initial charges. The second defect, the tendency of legislative waiver statutes to exclude all serious first offenders rather than focus on the chronic repeat offender, can be remedied by expressly acknowledging past misconduct as the best indicator of future misconduct and by stipulating that prior record be considered as a factor in any waiver determination. The specific combinations of present offense and prior record that warrant exclusion are ultimately legislative value judgments.

This Article proposes a statute that addresses both of the deficiencies just mentioned. The suggested matrix incorporates various combinations of present offense and prior record to identify serious and persistent offenders and to maximize the differences between these youths and other delinquents. It attempts to balance seriousness and persistence, recognizing that while persistence is the most reliable basis for differentiation, the seriousness of the misconduct of some offenders may not always allow that luxury. In every case, however, the matrix requires some indication of recidivism before a youth is waived. Thus, regardless of the present offense, a youth must have been previously convicted of an offense that would have been a felony if committed by an adult to warrant adult prosecution. The requirement of a prior serious offense underscores the belief advanced in this Article that only the serious offender who is likely to repeat should properly be excluded from the jurisdiction of the juvenile court.

Beyond providing a rational basis for discriminating between juvenile and adult offenders, the proposed matrix may also foster a number of desirable changes in the administration of other components of the juvenile justice system. The requirement of a prior felony conviction could significantly influence dispositional decisionmaking by police officers, intake probation officers, and the juvenile court in their handling of juvenile offenders. While the present criteria for dispositional decisionmaking are not self-evident, bureaucratic defensiveness to avoid scandal may increase the significance of the offense as a dispositional factor. This would rationalize the decisionmaking process, maximize intervention with the serious offender, and reinforce the dual-track structure of juvenile justice.

Increasing the emphasis placed on the offense could have salutary consequences for lawyers practicing in juvenile court by reducing the acceptability of accommodation and compromise in the representation of youthful clients. Given the present lack of connection between what juveniles do and the dispositions they receive, attorneys have little incentive to litigate every issue vigorously. The cumulative impact of felony convictions could provide this incentive. The same process could increase adversariness and provide a needed check on plea bargaining practices.

In addition, the proposed legislation may foster more consistent charging decisions by juvenile and adult prosecutors and, in so doing, may ultimately contribute to a greater equality of result in juvenile and adult proceedings. As a result of the requirement that youths who are initially excluded under the matrix but whose convictions do not warrant exclusion be returned to juvenile court, juvenile prosecutors will become familiar with the standard of proof required in adult proceedings and should learn to apply the same standard in evaluating juveniles subject to waiver.

Perhaps most important, however, legislation that focuses attention on the offense rather than the offender may introduce a measure of accountability for both the juvenile justice system and the juveniles it processes. The rehabilitative ideal has minimized the significance of the offense as a dispositional criterion. The emphasis on the "best interests of the child" has weakened the connection between what a person does and the consequences of that act on the theory that the act is at best only symptomatic of real needs. Yet, in view of its lack of success to date, it is highly questionable whether coercive intervention can meet real needs and rehabilitate. It is also questionable whether a legislature would gamble the enormous resources that a real commitment to such an endeavor entails. Finally, it is doubtful whether the standardless discretionary judgments associated with individualized treatment are compatible with equal justice and the rule of law. The results of efforts to treat offenders in the absence of an effective change technology, in the face of inadequate resources and a lack of social commitment to provide them, and through a process that grants discretion with no rational, objective basis for its exercise suggest that juveniles still receive the worst of both worlds.

By contrast, a system of justice that responds to people on the basis of what they do, rather than who someone else thinks they are, or what someone else believes they need or predicts they will become, can be held accountable by the community. A measure of proportionality and determinacy, and a relationship between the seriousness of an act and its consequences, can be evaluated much more readily than can confidential, individualized dispositions. Personnel within the juvenile justice system are currently unaccountable because of a lack of criteria for evaluation and a dearth of information about performance. Since they have no functional dispositional standards, evaluations of their decisions founder in a morass of assumed individualized needs. Legislation like the proposed matrix can increase the significance of the offense as a dispositional criterion, encourage intervention at the serious end of the spectrum, and provide an objective basis for evaluating the performance of decisionmakers.

Furthermore, a system of justice and social control that responds explicitly to youthful offenders because of their antisocial behavior rather than their perceived needs may instill an accountability on the part of these youths that is currently lacking. By insisting that it is treating the whole child, the present system may actually encourage the conduct it seeks to prevent. Inconsequential sanctions may teach children the rhetoric of determinacy, provide additional rationalizations to neutralize social obligations, and unwittingly undermine social norms by minimizing the seriousness of the offense and weakening the condemnation of criminal behavior. Harsh sanctions justified

as treatment may foster perceptions of hypocrisy and further delegitimize legal institutions. On the other hand, holding people responsible for their misconduct and strengthening the relationship between act and consequence may encourage responsible behavior and foster accountability.

The juvenile court as an institution is currently at a crossroads. The fundamental challenge to the rehabilitative ideal has not been stilled by a modicum of due process since the failure is ultimately one of substance, not procedure. The real issue of juvenile jurisprudence is not due process hearings or lawyers. Rather, the question is whether the modest successes of rehabilitation can continue to justify coercive intervention, with its accompanying reliance on professional expertise and the exercise of a standardless discretion having little rational basis. It is the question of whether individualized justice is compatible with the basic principle of equal justice under law. Whether the juvenile court can reconcile its promise of rehabilitation with the rule of law before the entire enterprise is abandoned is the yet unanswered question.

APPENDIX

A bill for an act

relating to corrections and juveniles; removing certain juveniles from the jurisdiction of the juvenile court; amending Minnesota Statutes 1976, Sections 260.015, by adding a subdivision, 260.111, by adding a subdivision, and 260.125, by repealing.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1976, Section 260.015, is amended by adding a subdivision to read:

Subd. 5a. Notwithstanding the provisions of subdivision 5, the term "delinquent child" does not include a person who:

a) has attained the age of fourteen years; and

b) has been adjudicated to be delinquent after attaining the age of fourteen years on the basis of conduct that would be a felony if committed by an adult and is charged with murder in any degree; or

c) has been adjudicated to be delinquent on two prior occasions after attaining the age of fourteen years on the basis of conduct that would be a felony if committed by an adult, or on one prior occasion after attaining the age of fourteen years on the basis of conduct that, if committed by an adult, would be murder in any degree or one of the felonies listed herein, and is charged with manslaughter in the first degree, arson in the first or second degree, criminal sexual conduct in the first or second degree, sodomy, aggravated assault, aggravated robbery, robbery, or kidnapping; or

d) has been adjudicated to be delinquent on three prior occasions after attaining the age of fourteen years on the basis of conduct that would be a felony if committed by an adult, and is charged with burglary; or

e) has been adjudicated to be delinquent on four prior occasions after attaining the age of fourteen years on the basis of conduct that would be a felony if committed by an adult, and is charged with any felony.

Notwithstanding any general or special law to the contrary, the district court shall have original jurisdiction of persons described in this subdivision.

Sec. 2. Minnesota Statutes 1976, Section 260.111, is amended by adding a subdivision to read:

Subd. 3. No person described in section 260.015, subdivision 5a, who is convicted as an adult of any of the offenses enumerated therein shall thereafter be subject to the jurisdiction of the juvenile court, provided, however, that any person described in subdivision 5a

who is acquitted or, although charged with a felony, is convicted of a lesser included offense not included in subdivision 5a, shall be subject to juvenile court jurisdiction for disposition and for subsequent unlawful conduct other than that governed by subdivision 5a.

Sec. 3. Minnesota Statutes 1976, Section 260.125 is repealed.