1991

The Transformation of the Juvenile Court

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I. INTRODUCTION

Ideological changes in the cultural conception of children and in strategies of social control during the nineteenth century led to the creation of the juvenile court. At the dawn of the twentieth century, Progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youth.

The Supreme Court's decision *In re Gault*[1] in 1967, however, began transforming the juvenile court into a very different institution than the Progressives contemplated.[2] Progressives envisioned an informal court whose dispositions reflected the "best interests" of the child. In *Gault*, the Supreme Court engrafted formal trial procedures onto the juvenile court's individualized treatment sentencing scheme. Although the Court did not intend to alter the juvenile court's therapeutic mission, in the past two decades, legislative, judicial, and administrative responses to *Gault* have modified the court's jurisdiction, purpose, and procedures. As a result, juve-

* Centennial Professor of Law, University of Minnesota. This Essay was originally presented as the inaugural lecture for Centennial Professor of Law on September 24, 1990. I am very grateful to Dean Robert Stein and the many generous alumni and donors for the privilege and honor of being named the first Centennial Professor of Law.

I have received a great deal of professional and personal assistance throughout my career. For the past decade, Bob Stein has been unstinting in his support and encouragement. Many colleagues have generously given their time, energy, and insights to improve my work. Finally, words cannot express my gratitude to my wife, Patricia, for her unconditional love, which provides a source of strength and security. I dedicate this Essay to my children, Ari and Julia, with hope for the future of all young people.

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

2. *See* Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141, 141-64 (1984); *see also* D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205 (1980); E. RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 148-62 (1978).

nile courts now converge procedurally and substantively with adult criminal courts.[3]

Three types of reforms — jurisdictional, jurisprudential, and procedural — provide a vehicle for examining the contemporary juvenile court. The Supreme Court's recognition that juvenile courts often failed to realize their benevolent purposes has led to two jurisdictional changes. Status offenses are juvenile misconduct, such as truancy or incorrigibility, which would not be crimes if committed by adults. Recent reforms limit the dispositions that noncriminal offenders may receive or even remove status offenses from juvenile court jurisdiction. A second jurisdictional change is the criminalizing of serious juvenile offenders. Increasingly, courts and legislatures transfer some youths from juvenile courts to criminal courts for prosecution as adults.[4] As jurisdiction contracts with the removal of serious offenders and noncriminal status offenders, the sentences that delinquents charged with crimes receive are now based on the idea of just deserts rather than the child's "real needs." Proportional and determinate sentences based on the present offense and prior record, rather than the "best interests" of the child, dictate the length, location, and intensity of intervention.[5] As punishment assumes a greater role in sentencing juveniles, issues of procedural justice emerge. Although theoretically, juvenile courts' procedural safeguards closely resemble those of criminal courts, in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults.

The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differ-

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3. *See generally* Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U.L. REV. 821 (1988) [hereinafter Feld, *Punishment, Treatment*]; Feld, *supra* note 2, at 169-276. For information on the convergence of juvenile and criminal courts in Minnesota, see Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the Rehabilitative Ideal*, 65 MINN. L. REV. 167, 241-42 (1981) [hereinafter Feld, *Dismantling the Rehabilitative Ideal*].

4. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQUALITY 1, 11 (1990) [hereinafter Feld, *Bad Law Makes Hard Cases*]; Feld, *Dismantling the Rehabilitative Ideal*, *supra* note 3, at 241-42; Feld, *Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 503-19 (1987) [hereinafter Feld, *Legislative Changes*]; Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978).

5. Feld, *Punishment, Treatment*, *supra* note 3, at 832-38.

ences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.

A. THE PROGRESSIVE JUVENILE COURT — PROCEDURAL INFORMALITY AND INDIVIDUALIZED, OFFENDER-ORIENTED DISPOSITIONS

By the end of the nineteenth century, America changed from a rural, agrarian society to an urban, industrial one.[6] Modernization, urbanization, and immigration posed many social problems and a reform movement, the Progressives, emerged to address them.[7] Progressives believed that benevolent state action guided by experts could alleviate social ills; they created agencies to inculcate their middle-class values and to assimilate and "Americanize" immigrants and the poor to become virtuous citizens like themselves.

1. Changing Conception of Children

Changes in family structure and functions accompanied the economic transformation: Families became more private, women's roles more domestic, and a view of childhood and adolescence as distinct developmental stages emerged.[8] Before the

6. *See generally* G. KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916, at 11-56 (1963); R. WIEBE, THE SEARCH FOR ORDER 1877-1920, at 11-75 (1967); J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918, at 3-39 (1968).

7. *See, e.g.*, S. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914, at 72-93 (1957); R. HOFSTADTER, THE AGE OF REFORM: FROM BYRAN TO F.D.R. 94-130 (1955).

8. For information on the evolution of the American family, particularly the roles of women and children, see generally AMERICAN CHILDHOOD (J. Hawes & N. Hiner eds. 1985); P. ARIES, CENTURIES OF CHILDHOOD 404 (1962); J. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT (1977); C. LASCH, HAVEN IN A HEARTLESS WORLD 6-10 (1977); S. ROTHMAN, WOMAN'S PROPER PLACE: A HISTORY OF CHANGING IDEALS AND PRACTICES, 1870 TO THE PRESENT (1978); E. SHORTER, THE MAKING OF THE MODERN FAMILY 22-54, 168-269 (1975); TURNING POINTS: HISTORICAL AND SOCIOLOGICAL ESSAYS ON THE FAMILY (J. Demos & S. Boocock eds. 1978); B. WISHY, THE CHILD

past two or three centuries, age was neither the basis for a separate legal status nor for social segregation. Young people were regarded as miniature adults, small versions of their parents. By the end of the nineteenth century, however, children increasingly were seen as vulnerable, innocent, passive, and dependent beings who needed extended preparation for life. The newer view of children altered traditional child-rearing practices and imposed a greater responsibility on parents to supervise their children's moral and social development. Many Progressive reform programs shared a child-centered theme; the juvenile court, child labor and welfare laws, and compulsory school attendance laws reflected and advanced the changing imagery of childhood.[9]

2. Changing Strategies of Social Control

Changes in ideological assumptions about the causes of crime inspired many Progressive criminal justice reforms. Although classical criminal law attributed crime to free-willed actors, positivist criminology regarded crime as determined rather than chosen. Criminology's attempt to identify the antecedent causes of criminal behavior reduced the actors' moral responsibility and focused on reforming offenders rather than punishing them for their offenses.[10] Applying medical analogies to the treatment of offenders, a growing class of social science professionals fostered the rehabilitative ideal.[11]

Whether their movement was in fact a humanitarian one to save poor and immigrant children[12] or intended to expand so-

AND THE REPUBLIC 115-35, 180-81 (1968); deMause, *The Evolution of Childhood*, in THE HISTORY OF CHILDHOOD 1, 51-54 (L. deMause ed. 1974).

9. *See, e.g.*, L. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957, at 127-28 (1961); J. KETT, *supra* note 8, at 221-27; S. TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 14-33 (1982); W. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 45-47 (1970); R. WIEBE, *supra* note 6, at 169.

10. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 11-15 (1981); D. MATZA, DELINQUENCY AND DRIFT 5-7 (1964); D. ROTHMAN, *supra* note 2, at 50; Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 151-53 (1978) [hereinafter Allen, *American Criminal Justice*]; Allen, *Legal Values and the Rehabilitative Ideal*, in THE BORDERLAND OF CRIMINAL JUSTICE 25-28 (1964) [hereinafter Allen, *Rehabilitative Ideal*].

11. E. RYERSON, *supra* note 2, at 99-100; Allen, *American Criminal Justice*, *supra* note 10, at 154.

12. J. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 1640-1981, at 122 (1988); Hagan & Leon, *Rediscovering Delin-*

cial control over them,[13] progressive "child-savers" described juvenile courts as benign, nonpunitive, and therapeutic. Progressives viewed youthful autonomy as malign; juvenile court jurisdiction over unruly children reinforced parental authority and allowed state intervention when parents were inadequate for the task.[14] The legal doctrine of *parens patriae*, the State as parent, legitimated intervention. Juvenile court personnel used informal, discretionary procedures to diagnose the causes of and prescribe the cures for delinquency. By separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected the jurisprudence of criminal law and its procedural safeguards, such as juries and lawyers. Because the court's jurisdiction encompassed youths suffering from abuse, dependency, or neglect, as well as those charged with criminal offenses and noncriminal disobedience, proceedings were characterized as civil rather than criminal. Theoretically, a child's "best interests," background, and welfare guided dispositions. Because a youth's offense was only a symptom of her "real" needs, sentences were indeterminate, nonproportional, and potentially continued for the duration of minority.

B. THE CONSTITUTIONAL DOMESTICATION OF THE JUVENILE COURT — PROCEDURAL FORMALITY AND INDIVIDUALIZED OFFENDER-ORIENTED DISPOSITIONS

The Supreme Court's *Gault* decision mandated procedural safeguards in delinquency proceedings and focused initial judicial attention on whether the child committed an offense as a prerequisite to sentencing.[15] In shifting the formal focus of juvenile courts from "real needs" to legal guilt, *Gault* identified two crucial disjunctions between juvenile justice rhetoric and reality: the theory versus practice of rehabilitation, and the differences between the procedural safeguards afforded adults and those available to juveniles.

In several later decisions, the Court required delinquency to be proved by the criminal standard "beyond a reasonable doubt" rather than by lower civil standards of proof,[16] applied

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quency: Social History, Political Ideology and the Sociology of Law, 42 AM. SOC. REV. 587, 597 (1977).

13. A. PLATT, THE CHILD SAVERS 75-83, 135 (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1218 (1970).

14. A. PLATT, *supra* note 13, at 135; J. SUTTON, *supra* note 12, at 135.

15. Feld, *Punishment, Treatment, supra* note 3, at 826.

16. *In re* Winship, 397 U.S. 358 (1970).

the ban on double jeopardy to delinquency convictions,[17] and posited a functional equivalence between criminal trials and delinquency proceedings.

In *McKeiver v. Pennsylvania*,[18] however, the Supreme Court denied juveniles the constitutional right to jury trials and halted the extension of full procedural parity with adult criminal prosecutions. The Court feared that jury trials would adversely affect traditional informality, render juvenile courts procedurally indistinguishable from criminal courts, and call into question the need for a separate juvenile court.[19] The *McKeiver* Court justified the procedural differences between juvenile and criminal courts on the basis of the former's *treatment* rationale and the latter's *punitive* purposes, although it did not analyze the differences between treatment and punishment that warranted the differences in procedural safeguards.[20]

II. THE TRANSFORMATION OF THE JUVENILE COURT

Since those decisions, legislative, judicial, and administrative actions have transformed the juvenile court. Four developments — removal of status offenders, waiver of serious offenders to the adult system, increased punitiveness in sentencing delinquents, and more formal procedures — provide the impetus for criminalizing the juvenile court. Because these reforms have not been implemented as intended and have not had their expected effects, the juvenile court has been transformed but remains unreformed.

A. JUVENILE COURT JURISDICTION OVER NONCRIMINAL STATUS OFFENDERS

The historical changes in normative assumptions about the nature of children and the social control of youth resulted in juvenile court jurisdiction over status offenses.[21] Status jurisdiction allowed intervention to prevent predelinquent misconduct such as disobedience or immorality from escalating into full-blown criminality.

Although helping troubled children is inherently attractive, the definition and administration of status jurisdiction has

17. Breed v. Jones, 421 U.S. 519 (1975).
18. 403 U.S. 528 (1971).
19. *Id.* at 550-51.
20. Feld, *Punishment, Treatment, supra* note 3, at 832-33.
21. J. KETT, *supra* note 8, at 256; Fox, *supra* note 13, at 207-08.

been criticized extensively in the post-*Gault* decades.[22] Beginning with the 1967 President's Crime Commission, many professional organizations have advocated reform of status jurisdiction.[23] Critics focused on its adverse impact on children, its disabling effects on families, schools, and other agencies that refer status offenders to juvenile courts, and the legal and administrative issues it raises for juvenile courts.

Prior to recent reforms, status offenses were a form of delinquency; status delinquents were detained and incarcerated in the same institutions as criminal delinquents even though they had committed no crimes.[24] Parental referrals overloaded juvenile courts with intractable family disputes, diverted scarce judicial resources from other tasks, and exacerbated rather than ameliorated family conflict. Social agencies and schools used the court as a "dumping ground" to impose solutions instead of addressing the sources of conflict. Judges enjoyed broad discretion to prevent unruliness or immorality from ripening into crime, and intervention often reflected their values and prejudices. The exercise of standardless discretion had a disproportionate impact on poor, minority, and female juveniles,[25] and raised legal issues of "void for vagueness," equal protection, and procedural justice.[26]

Three recent trends — diversion, deinstitutionalization, and decriminalization — reflect judicial and legislative disillusionment with the courts' treatment of noncriminal youths and subsequent efforts to respond to these criticisms. The Federal Juvenile Justice and Delinquency Prevention Act of 1974 re-

22. For information on treatment of status offense by juvenile courts, see generally BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT (L. Teitelbaum & A. Gough eds. 1977) [hereinafter BEYOND CONTROL]; STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM (R. Allinson ed. 1983).

23. *See, e.g.*, T. RUBIN, JUVENILE JUSTICE 56-58 (2nd ed. 1985) (reform proposals included abolishing status jurisdiction entirely; separating noncriminal from delinquent youths; prohibiting the detention and incarceration of status offenders with criminal delinquents; and limiting the scope of intervention).

24. I. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 4 (1989).

25. Chesney-Lind, *Girls and Status Offenses: Is Juvenile Justice Still Sexist?*, 20 CRIM. JUST. ABSTRACTS 144, 151-53 (1988); Sussman, *Sex-Based Discrimination and the PINS Jurisdiction*, in BEYOND CONTROL, *supra* note 22, at 180-86.

26. *See* S.S. v. State, 299 A.2d 560, 568 (Me. 1973) (holding that a Maine statute providing juvenile court jurisdiction over youths "living in circumstances of manifest danger of falling into habits of vice or immorality" was unconstitutionally vague); E.S.G. v. State, 447 S.W.2d 225, 227 (Tex. Civ. App. 1969) (upholding the constitutionality of a Texas statute giving the juvenile court jurisdiction over a youth who "habitually so deports himself as to injure or endanger the morals of himself or others"); T. RUBIN, *supra* note 23, at 62.

quired states to begin a process of removing noncriminal offenders from secure detention and correctional facilities.[27] The federal and state[28] restrictions on commingling status and delinquent offenders in secure institutions provided the impetus to divert some status offenders from juvenile courts and decarcerate those who remained in the system.[29]

1. Diversion

Since *Gault*, virtually every state has redefined its status jurisdiction. One strategy focuses on providing services on an informal basis through diversion programs.[30] Just as the original juvenile court diverted youths from adult criminal courts, now diversion shifts away from juvenile court youths who would otherwise enter that system. It is questionable whether diversion programs have been implemented coherently or have been effective when attempted.[31] Theoretically intended to reduce the court's client population, diversion has had the opposite effect of "widening the net of social control."[32] The number of juveniles referred to court remains relatively constant despite a declining youth population, while juveniles who previously would have been released now are subjected to other forms of intervention. Diversion provides a rationale for shifting discretion from the core of the juvenile court where it is subject to a modicum of procedural formality, to its periphery, which continues to operate on an informal pre-*Gault* basis with no accountability.[33]

2. Deinstitutionalization

The federal and state bans on commingling status and de-

27. 42 U.S.C. §§ 5601-5778 (1988) (removal of status offenders from juvenile justice system).

28. *In re* Ellery C. v. Redlich, 32 N.Y.2d 588, 591, 300 N.E.2d 424, 425, 347 N.Y.S.2d 51, 53 (1973) (cannot confine status offenders in same institutions with delinquents); *see, e.g.*, State *ex rel.* Harris v. Calendine, 160 W. Va. 172, 181, 233 S.E.2d 318, 321 (1977) (removal of status offenders from institutions).

29. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, 1 CRIME & JUST.: ANN. REV. 145, 146 (1979).

30. *Id.* at 150.

31. *Id.* at 157.

32. *Id.* at 184; Polk, *Juvenile Diversion: A Look at the Record*, 30 CRIME & DELINQ. 648, 651 (1984).

33. Effectively, diversion "sanctified and encouraged a strategy for circumventing due process, assured that programs would stay in the discretionary hands of local officials, and encouraged the privatization of long-term social control." J. SUTTON, *supra* note 12, at 215.

linquent offenders in secure institutional confinement led to the decarceration of noncriminal youths. Although the numbers of status offenders in secure facilities declined somewhat by the mid-1980s, only a small proportion of status offenders ever were sent to secure institutions and most remain eligible for commitment to "forestry camps" and other medium security facilities, albeit with fewer procedural rights than those afforded delinquents. Furthermore, 1980 amendments to the Federal Juvenile Justice Act weakened even the restrictions on secure confinement; status offenders who ran away from nonsecure placements or violated valid court orders may be charged with contempt of court, a delinquent act, and incarcerated.[34] Many courts now charge juveniles with minor criminal offenses instead of status offenses, for which there are no dispositional limits.

3. Decriminalization

Historically, status offenses were classified as a form of delinquency. Now, almost every state has separated conduct that is only illegal for children — incorrigibility, runaway, truancy — into new nondelinquency classifications such as Persons or Children in Need of Supervision (PINS/CHINS).[35] Such label changes simply shift youths from one jurisdictional category to another without significantly limiting courts' authority. Using a label of convenience, former status offenders may be relabeled downward as dependent or neglected youths, upward as delinquent offenders, or laterally into the private sector.[36]

Many former status offenders, especially those who are middle-class and female, now are shifted into the private mental health or chemical dependency treatment systems by diversion, court referral, or voluntary parental commitment.[37] The Supreme Court in *Parham v. J.R.*[38] ruled that the only process due to juveniles when parents commit them to secure treatment facilities is a physician's determination that it is medically appropriate.[39] Although some children's psychological

34. Juvenile Justice Amendments of 1980, Pub. L. No. 96-509 § 11(a)(13), 94 Stat. 2750, 2757 (codified at 42 U.S.C. § 5633(a)(12)(A) (1988)). *See* Comment, *The Federal Circle Game: The Precarious Constitutional Status of Status Offenders*, 7 COOLEY L. REV. 31, 33 (1990).

35. T. RUBIN, *supra* note 23, at 57.

36. Klein, *supra* note 29, at 183.

37. I. SCHWARTZ, *supra* note 24, at 131.

38. 442 U.S. 584 (1979).

39. *Id.* at 607.

dysfunctions or substance abuse require medical attention, many commitments result from status-like social or behavioral conflicts, self-serving parental motives, and medical entrepreneurs coping with underutilized hospitals. With no meaningful judicial supervision, insurance coverage for inpatient mental health care, and malleable diagnostic categories, medicalizing deviance and incarcerating troublesome children is attractive.[40] Data on commitments to private psychiatric facilities indicate that the number of juveniles entering the "hidden system" of social control has increased dramatically as the confinement of status offenders and nuisance juveniles has declined.[41] Efforts to deinstitutionalize inadvertently have resulted in "transinstitutionalization," as some juveniles are transferred from publicly funded facilities to private institutions. Whether incarceration is for their "best interests," for "adjustment reactions" symptomatic of adolescence, or for "chemical dependency," these trends revive the imagery of diagnosis and treatment on a discretionary basis without regard to formal due process considerations.

The appropriate response to minor, nuisance, and noncriminal youngsters goes to the heart of the juvenile court's mission and the normative concept of childhood upon which it is based. The debate polarizes advocates of authority and control of youth and those who view intervention as discriminatory and a denial of rights.[42] Although a few states have eliminated status jurisdiction entirely and allow noncriminal intervention only in cases of dependency or neglect, juvenile court judges strongly resist jurisdictional divestiture, because any contraction of their authority over children leads to further convergence with criminal courts.[43]

B. SENTENCING JUVENILES

Historically, juvenile court sentences were discretionary, indeterminate, and nonproportional to achieve the offender's "best interests." The post-*Gault* era has witnessed a fundamental change in the jurisprudence of sentencing as considerations of the offense, rather than the offender, dominate the decision.

40. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 808 (1988); *see also* Schwartz, Jackson-Beeck & Anderson, *The Hidden System of Juvenile Control*, 30 CRIME & DELINQ. 371 (1984) (describing this trend in Minnesota).

41. I. SCHWARTZ, *supra* note 24, at 136.

42. T. RUBIN, *supra* note 23, at 58.

43. Klein, *supra* note 29, at 172.

A shift in sentencing philosophy from rehabilitation to retribution is evident both in the response to serious juvenile offenders and in the routine sentencing of delinquent offenders.

1. Waiver of Juvenile Offenders to Criminal Court

Whether persistent or violent young offenders should be sentenced as juveniles or adults poses difficult theoretical and practical problems. Relinquishing juvenile court jurisdiction over a youth represents a choice between sentencing in nominally rehabilitative juvenile courts or in punitive adult criminal courts. The decision implicates both juvenile court sentencing practices and the relationship between juvenile and adult court sentencing practices. Virtually every state has a mechanism for prosecuting some chronological juveniles as adults.[44] While numerically few, these youths challenge juvenile courts' rehabilitative assumptions and the appropriateness of nonpunitive, short-term social control. David Brom, the sixteen-year-old axe-murderer from Rochester, Minnesota, dramatically illustrated the problems.[45]

Two types of statutes, judicial waiver and legislative offense exclusion, highlight the differences between juvenile and criminal courts' sentencing philosophies.[46] Because juvenile courts emphasize individualized treatment of offenders, with judicial waiver a judge may transfer jurisdiction on a discretionary basis after a hearing to determine whether a youth is amenable to treatment or a threat to public safety. With legislative offense exclusion, by statutory definition, youths charged with certain offenses simply are not within juvenile court jurisdiction.

Judicial waiver's focus on the offender and legislative exclusion's focus on the offense illustrate the contradictions between treatment and punishment. Conceptually, rehabilitation and retribution are mutually exclusive penal goals. Punishment is retrospective and imposes unpleasant consequences for past offenses, while therapy is prospective and seeks to improve

44. Feld, *Bad Law Makes Hard Cases*, *supra* note 4, at 4; Feld, *Legislative Changes*, *supra* note 4, at 472; Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 516 (1978) [hereinafter Feld, *Reference of Juvenile Offenders*].

45. *See* Feld, *Bad Law Makes Hard Cases*, *supra* note 4, at 4.

46. Feld, *Legislative Changes*, *supra* note 4, at 472; Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 457 (1985).

offenders' future welfare.[47] Sentences based on the offense are typically determinate and proportional,[48] while sentences based on the offender are nonproportional and indeterminate.[49] When youths are transferred to criminal court, legislative exclusion uses the seriousness of the offense to control the adulthood decision whereas judicial waiver relies upon clinical assessments of amenability to treatment or dangerousness to decide.

Viewed this way, waiver statutes present the same issues that indeterminate or determinate sentencing guidelines for adults raise. In the adult context, determinate sentences based on just deserts provide an alternative sentencing rationale to indeterminate sentences.[50] Just deserts sentencing emphasizes equality, uses offense and prior record to define similar cases, and precludes consideration of individual status or circumstance.[51] By contrast, individualized justice includes all personal characteristics as relevant and relies heavily on professional discretion to weigh each factor.[52] Proponents of just deserts reject individualization because treatment programs are ineffective,[53] individualization vests broad discretion in presumed experts who cannot justify treating similarly-situated offenders differently, and clinical subjectivity often produces unequal and unjust results.[54]

The just deserts sentencing philosophy has influenced sev-

47. Feld, *Punishment, Treatment, supra* note 3, at 832; Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 815 (1982).

48. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 139-45 (1968); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 19 (1976); A. VON HIRSCH, DOING JUSTICE 98 (1976) [hereinafter A. VON HIRSCH, JUSTICE]; A. VON HIRSCH, PAST OR FUTURE CRIMES 31-46 (1985) [hereinafter A. VON HIRSCH, CRIMES].

49. A. VON HIRSCH, CRIMES, *supra* note 48, at 39.

50. AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 145 (1971); A. VON HIRSCH, JUSTICE, *supra* note 48, at 102; Petersilia & Turner, *Guideline-based Justice: Prediction and Racial Minorities*, 9 CRIME & JUST.: ANN. REV. 151, 155 (1987).

51. D. MATZA, *supra* note 10, at 113-14.

52. *Id.* at 114-15.

53. Lab & Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 CRIME & DELINQ. 60, 61 (1988); Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 47 (1974).

54. AMERICAN FRIENDS SERV. COMM., *supra* note 50, at 124; A. VON HIRSCH, JUSTICE, *supra* note 48, at 27; A. VON HIRSCH, CRIMES, *supra* note 48, at 5; Feld, *Punishment, Treatment, supra* note 3, at 832; Feld, *Bad Law Makes Hard Cases, supra* note 4, at 15.

eral states' juvenile waiver and sentencing statutes.[55] As a critique of discretionary judicial waiver, proponents of just deserts contend that judges cannot validly or reliably predict clinically whether a youth will be amenable to treatment or dangerous and that the standardless discretion they exercise results in inconsistent and discriminatory applications.[56]

a. *Judicial Waiver*

Judicial waiver embodies the juvenile court's approach to individualized sentencing. Although two Supreme Court decisions formalized waiver procedures,[57] the substantive bases of the waiver decision pose the principal difficulties. Asking a judge to decide whether a youth is amenable or dangerous involves fundamental questions of criminal and juvenile jurisprudence.[58] Although the Progressives assumed that juveniles are especially amenable to treatment, the question of "what works" — whether rehabilitation programs systematically produce lasting change — remains highly controverted. Evaluation research counsels skepticism about the availability of programs that consistently or systematically rehabilitate adult or serious juvenile offenders. The general conclusion that "nothing works" in juvenile or adult corrections has not been persuasively refuted.[59] Clearly, some offenders do persist in crime despite treatment and valid and reliable clinical tools are lacking with which to predict whether a particular individual will be a recidivist. Similarly, asking a judge to decide whether a youth poses a threat to public safety requires judges to predict future

55. Feld, *Legislative Changes*, *supra* note 4, at 487; Feld, *Punishment, Treatment*, *supra* note 3, at 821-22. *See generally* D. ROTHMAN, *supra* note 2 (describing state waiver and sentencing statutes).

56. Feld, *Legislative Changes*, *supra* note 4, at 486; Feld, *Reference of Juvenile Offenders*, *supra* note 44, at 534; *see also* D. FOGEL, WE ARE THE LIVING PROOF (1975) (arguing in favor of just deserts).

57. Breed v. Jones, 421 U.S. 519, 541 (1975) (prohibition against double jeopardy requires states to decide whether to proceed against a youth as a juvenile or as an adult before reaching the merits of the case); Kent v. United States, 383 U.S. 541, 542-43 (1966) (due process safeguards in waiver hearings).

58. Feld, *Legislative Changes*, *supra* note 4, at 491; Feld, *Reference of Juvenile Offenders*, *supra* note 44, at 529.

59. *See* 8 CORRECTIONS AND PUNISHMENT 140 (D. Greenberg ed. 1977); L. SECHREST, S. WHITE & E. BROWN, THE REHABILITATION OF CRIMINAL OFFENDERS 50-51 (1979) [hereinafter L. SECHREST, S. WHITE]; Lab & Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 CRIME & DELINQ. 60, 77 (1988); Martinson, *supra* note 53, at 49; Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 161 n.84 (1989) (quoting L. SECHREST, S. WHITE, *supra*, at 50-51).

dangerousness even though the technical capacity to clinically predict future criminal behavior is lacking.[60]

Legislation that focuses on amenability or dangerousness makes the dubious assumptions that there are effective treatment programs for at least some serious or persistent juvenile offenders, that clinical tools exist with which to diagnose a particular youth's treatment potential or threat, and that judges can differentiate among various juveniles.[61] Effectively, judicial waiver statutes give judges broad, standardless discretion.[62] Although some legislation includes lists of amorphous, subjective, and contradictory factors,[63] those lists do not guide discretion but rather reinforce it by allowing judges selectively to emphasize one factor or another to justify any decision.[64]

Like individualized sentencing, the subjectivity of waiver decisions produces inequities and disparities. Judges cannot administer discretionary statutes on an evenhanded basis. Within a single jurisdiction, "justice by geography" prevails as courts interpret and apply the same law inconsistently.[65] National evaluations of judicial waiver provide compelling evidence that it is arbitrary, capricious, and discriminatory.[66] A youth's race, as well as geographic locale, affects waiver decisions.[67] Idiosyncratic differences in judicial philosophy or the location of the hearing are more important than the nature of the crime. In

60. N. MORRIS, THE FUTURE OF IMPRISONMENT 62 (1974).

61. Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195, 198 (1983) [hereinafter Feld, *Delinquent Careers*]; Feld, *Dismantling the Rehabilitative Ideal*, *supra* note 3, at 179.

62. Such legislation is the juvenile equivalent of the capital punishment statutes condemned by the Supreme Court in Furman v. Georgia, 408 U.S. 238, 240 (1972).

63. Kent v. United States, 383 U.S. 541, 566-67 (1966); Zimring, *Notes Toward a Jurisprudence of Waiver*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING 195 (1982).

64. TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUNG CRIME 56 (1978) [hereinafter TWENTIETH CENTURY FUND TASK FORCE].

65. D. HAMPARIAN, L. ESTEP, S. MUNTEAN, R. PRIESTINO, R. SWISHER, P. WALLACE & J. WHITE, YOUTH IN ADULT COURTS 22 (1982) [hereinafter D. HAMPARIAN, L. ESTEP]; Feld, *Bad Law Makes Hard Cases*, *supra* note 4, at 25-46; Feld, *Legislative Changes*, *supra* note 4, at 492; Feld, *Reference of Juvenile Offenders*, *supra* note 44, at 546.

66. D. HAMPARIAN, L. ESTEP, *supra* note 65, at 104.

67. Fagan, Forst & Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 263 (1987).

short, judicial waiver exhibits all the characteristic defects of discretionary sentencing.

Ultimately, waiver involves the appropriate disposition of offenders who chronologically happen to be juveniles. The distinction between treatment as a juvenile and punishment as an adult is based on an arbitrary line that has no criminological significance other than its legal consequences. There is a strong relationship between age and crime; crime rates for many offenses peak in mid- to late-adolescence.[68] Rational sentencing requires a coordinated response to young offenders on both sides of the juvenile/adult line using a standardized means to identify and sanction serious young criminals.[69]

Because young people are not irresponsible children one day and responsible adults the next, except as a matter of law, juvenile and adult courts pursue inconsistent sentencing goals. A "punishment gap" occurs when juveniles make the transition to criminal courts. Most juveniles judicially waived are charged with property crimes like burglary, and not with serious offenses against the person. When they appear in criminal courts as adult first-offenders, typically they are not imprisoned.[70] Because prior records cumulate, criminal courts sentence older offenders more severely when their rate of criminal activity is declining and sentence younger offenders more leniently even

68. Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Young Adult Defendants*, 7 CRIME & JUST.: ANN. REV. 151, 153-54 (1986); Petersilia, *Criminal Career Research: A Review of Recent Evidence*, 2 CRIME & JUST.: ANN. REV. 321, 358 (1980).

69. Chronic offenders are disproportionately involved in criminal activity, committing their first offenses in their early to mid-teens, persisting in criminal activity into their twenties, and then gradually reducing their criminal involvement. Greenwood, *supra* note 68, at 163.

70. P. GREENWOOD, J. PETERSILIA & F. ZIMRING, AGE, CRIME, AND SANCTIONS: THE TRANSITION FROM JUVENILE TO ADULT COURT 32-39 (1980) [hereinafter P. GREENWOOD, J. PETERSILIA]; D. HAMPARIAN, L. ESTEP, *supra* note 65, at 112. *But see* P. GREENWOOD, A. ABRAHAMSE & F. ZIMRING, FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS 56 (1984) (arguing young adults are sentenced as severely as other offenders). The failure to intervene most strongly in the lives of chronic and active young criminal offenders occurs because of qualitative differences in the nature of juveniles' offenses, differences between the criteria for juvenile court removal and criminal court sentences, and the failure to integrate juvenile and adult criminal records for sentencing purposes. P. GREENWOOD, J. PETERSILIA, *supra*, at ix-xii.

Even within comparable crime categories, age-related patterns of offending affect criminal sentencing. Young offenders are less likely than adults to be armed with guns, to inflict as much injury, or to steal as much property. *Id.* at vi.

though they are at the peak of their criminal careers.[71]

Although the differences between juvenile and adult courts' sentencing practices work at cross-purposes when youths make the transition, judicial waiver serves important political and organizational functions for juvenile courts. By relinquishing a small fraction of its clientele and portraying these juveniles as the most intractable and dangerous in the system, juvenile courts create symbolic scapegoats, appear to protect the public, preserve their jurisdiction over the vast bulk of juveniles, and deflect more comprehensive criticisms.[72]

b. *Legislative Exclusion of Offenses*

In contrast to judicial waiver, legislative waiver simply excludes from juvenile court jurisdiction youths charged with certain offenses.[73] Because legislatures create juvenile courts, legislatures may modify the courts' jurisdictions as they please. Legislatures often fail to make explicit their sentencing goals when they require some youths to be prosecuted as adults.[74] Defining adulthood entails a value choice about the quantity and quality of crime that will be tolerated before punishment is mandated.[75] Exclusion could be justified if the minimum pe-

71. Boland, *Fighting Crime: The Problem of Adolescents*, 71 J. CRIM. L. & CRIMINOLOGY 94, 96 (1980); Feld, *Dismantling the Rehabilitative Ideal*, *supra* note 3, at 233-37.

72. Bortner, *Traditional Rhetoric, Organizational Realities: Removal of Juvenile to Adult Court*, 32 CRIME & DELINQ. 53, 69-70 (1980); Feld, *Legislative Changes*, *supra* note 4, at 493-94; Feld, *Reference of Juvenile Offenders*, *supra* note 44, at 546.

73. Feld, *Legislative Changes*, *supra* note 4, at 494.

74. A legislature must recognize the sentencing goals it seeks in order to translate jurisprudential criteria into waiver legislation. A legislature seeking retribution could conclude that older youths who commit heinous offenses *deserve* to be treated as adults. A legislature seeking to selectively incapacitate chronic offenders must emphasize cumulative persistence, however, because a first offense, even if a serious one, does not provide a basis for distinguishing between those who will or will not re-offend. D. HAMPARIAN, R. SCHUSTER, S. DINITZ & J. CONRAD, THE VIOLENT FEW 102 (1978); M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 87-88 (1972) [hereinafter M. WOLFGANG, R. FIGLIO]. The most reliable indicator of the likelihood of future criminality is the number of prior contacts a youth has with police and the courts. Greenwood, *supra* note 68, at 164. Although most youths desist after one or two contacts, the small group of chronic offenders continue to commit delinquent acts. M. WOLFGANG, R. FIGLIO, *supra*, at 88; Petersilia, *supra* note 68, at 369.

75. A legislature also needs to establish a minimum age for criminal liability for excluded offenders — sixteen, fifteen, or fourteen. At what age is it appropriate to hold a juvenile as responsible for a serious crime as an eighteen-year-old adult?

riod of appropriate confinement exceeds the maximum sentence available to a juvenile court.[76] For example, sixteen-year-old David Brom, convicted of four murders, could not be confined "long enough" if sentenced as a juvenile.

Yet community protection is enhanced, deterrence increased, and fundamental norms reaffirmed only if longer adult sentences actually are imposed consistently. Using the present offense and prior record to structure waiver decisions rather than amorphous clinical considerations can integrate juvenile and adult sentencing practices and enable criminal courts to sentence violent or chronic juveniles more consistently.[77]

Within the past decade, just deserts rather than clinical assessments has come to dominate this sentencing decision.[78] Legislatures use offense criteria either as dispositional guidelines in judicial waiver to limit discretion and improve the fit between waiver decisions and criminal court sentencing practices, or to automatically exclude certain youths.[79] More than twenty states have amended their judicial waiver statutes to reduce their inconsistency and to reconcile the contradictions between juvenile and adult sentencing practices.[80] Some states specify that only serious offenses such as murder, rape, or robbery may be waived.[81] Restricting waiver to serious offenses

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> There is no compelling or convincing evidence that persons aged sixteen to eighteen differ significantly from persons aged eighteen and over in their capacity to understand the outcomes and consequences of their acts. . . . [S]erious crime should be treated seriously regardless of the offender's age.

TWENTIETH CENTURY FUND TASK FORCE, *supra* note 64, at 25 (Wolfgang, dissenting).

76. As one commentator explained:

> [T]he justification for waiver is singular: transfer to criminal court is necessary when the maximum punishment available in juvenile court is clearly inadequate . . . . [T]he standard for making a waiver decision is a determination that the maximum social control available in juvenile court falls far short of the minimum social control necessary if a particular offender is guilty of the serious crime he is charged with.

Zimring, *supra* note 63, at 201.

77. Feld, *Bad Law Makes Hard Cases*, *supra* note 4, at 96-99; Feld, *Delinquent Careers*, *supra* note 61, at 208-10; Feld, *Reference of Juvenile Offenders*, *supra* note 44, at 572.

78. Feld, *Legislative Changes*, *supra* note 4, at 487. *See generally* D. ROTHMAN, *supra* note 2 (describing the emergence of the just deserts sentencing philosophy).

79. Feld, *Legislative Changes*, *supra* note 4, at 504.

80. *Id.* at 508.

81. Legislatures also use offense criteria to modify waiver procedures, making transfer hearings mandatory if one of the enumerated offenses is

limits judicial discretion and increases the likelihood that significant adult sanctions will be imposed if waiver is ordered.

More importantly, about half of the states have rejected, at least in part, the juvenile court's individualized sentencing philosophy, emphasized policies of retribution or incapacitation, and excluded youths charged with serious offenses from juvenile court jurisdiction.[82] Although some states only exclude youths charged with capital crimes, murder, or offenses punishable by life imprisonment, others exclude longer lists of offenses such as rape or armed robbery.[83] Regardless of the details, these statutes remove judicial sentencing discretion entirely and base the decision to try a youth as an adult exclusively on the offense. These statutes provide one indicator of the shift from an individualized treatment sentencing philosophy in juvenile court to a more retributive one, and reflect legislative distrust of judges' exercises of discretion. Using offenses to structure or eliminate judicial discretion repudiates rehabilitation, narrows juvenile court jurisdiction, reduces its clientele, and denies it the opportunity even to try to treat certain youths.

2. Punishment in Juvenile Courts — Offense-Based Sentencing Practices

States apply principles of just deserts to the routine sentencing of juveniles as well as to waiver.[84] The *McKeiver* Court rejected procedural equality between juveniles and adults because juvenile courts purportedly treated rather than punished youths. Increasingly, however, juvenile courts pursue the substantive goals of criminal law.[85] Courts and legislatures use offense criteria to regulate sentencing because individualization neither reduces recidivism nor provides a principled basis for coercive intervention. Moreover, it produces unequal results among similarly situated offenders and punishes minor offenders excessively and serious ones leniently.[86]

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alleged or shifting to the juvenile the burden of proof to establish his or her amenability to treatment, rather than to require the state to prove nonamenability. *Id.* at 508-09.

82. *Id.* at 511.

83. *Id.* Still others exclude youths charged with repeat offenses, or supplement judicial waiver provisions with offense exclusions.

84. Feld, *Punishment, Treatment, supra* note 3, at 832-96.

85. *See id.*

86. AMERICAN FRIENDS SERV. COMM., *supra* note 50, at 124-44; A. VON HIRSCH, CRIMES, *supra* note 48, at 171-74; A. VON HIRSCH, JUSTICE, *supra* note 48, at 29-32; Cohen, *Juvenile Offenders: Proportionality vs. Treatment,*

An examination of legislative purpose clauses, juvenile court sentencing statutes and actual sentencing practices, and conditions of institutional confinement consistently reveals that treating juveniles closely resembles punishing adult criminals.[87] Punishing juveniles, however, has constitutional consequences, because the *McKeiver* Court posited a therapeutic juvenile court as the justification for its procedural differences.

a. *The Purpose of the Juvenile Court*

Forty-two states' juvenile codes contain a statement of legislative purpose to aid courts in interpreting the legislation.[88] Since the creation of the original juvenile court in 1899, the traditional purpose has been "to secure for each minor . . . such care and guidance . . . as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community."[89] In the past decade, about one-quarter of the states have redefined their courts' purposes.[90] These amendments de-emphasize rehabilitation and the child's "best interests," and emphasize the importance of protecting public safety,[91] enforcing children's obligations to society,[92] applying sanctions consistent with the seriousness of the offense,[93] and rendering appropriate punishment to offenders.[94] For example,

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CHILDREN'S RTS. REP., May 1978, at 1, 2; Feld, *Punishment, Treatment, supra* note 3, at 836 n.6.

87. Feld, *Legislative Changes, supra* note 4, at 519; Feld, *Punishment, Treatment, supra* note 3, at 889-91.

88. Feld, *Punishment, Treatment, supra* note 3, at 842 n.83 (listing statutes).

89. ILL. ANN. STAT. ch. 37, ¶ 801-2 (Smith-Hurd 1990). Many juvenile codes supplement that original statement of purpose with the additional goal of removing "the taint of criminality and the penal consequences of criminal behavior, by substituting therefore an individual program of counselling, supervision, treatment, and rehabilitation." N.H. REV. STAT. ANN. § 169-B:1 II (Supp. 1989); OHIO REV. CODE ANN. § 2151.01 (Anderson 1990); TENN. CODE ANN. § 37-1-101 (1984); VT. STAT. ANN. tit. 33, § 631 (1981).

90. Feld, *Punishment, Treatment, supra* note 3, at 842 n.84 (listing statutes).

91. CAL. WELF. & INST. CODE § 202(a) (West Supp. 1990) ("provide for the protection and safety of the public"); *see also* PRIVATE SECTOR TASK FORCE ON JUVENILE JUSTICE, FINAL REPORT iii (1987) [hereinafter PRIVATE SECTOR TASK FORCE].

92. IND. CODE ANN. § 31-6-1-1 (Burns 1987) ("protect the public by enforcing the legal obligations children have to society").

93. FLA. STAT. ANN. § 39.001(2)(a) (West 1988) ("protect society . . . [while] recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases").

94. HAW. REV. STAT. § 571-1 (1985). *See generally* Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 523-28 (1984).

the purpose of Minnesota's juvenile courts now is "to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior."[95]

Courts recognize that these changes in purpose clauses signal a basic philosophical reorientation, even as they approve punishment in juvenile courts.[96] The state of Washington adopted a juvenile code that emphasizes just deserts rather than treatment.[97] Confronted with a request for a jury trial, the Washington Supreme Court reasoned that sometimes punishment is treatment and held that "accountability for criminal behavior, the prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate . . . an errant youth as does the prior philosophy of focusing upon . . . characteristics of the individual juvenile."[98] Similarly, the Nevada Supreme Court endorsed punishment, stating that "[b]y formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population."[99]

b. *Just Deserts Dispositions — Legislative and Administrative Changes in Juvenile Courts' Sentencing Framework*

Sentencing statutes provide another indicator of whether a juvenile court is punishing or treating delinquents. Originally, juvenile court sentences were indeterminate and nonproportional to achieve the child's "best interests." Although most juvenile sentencing statutes mirror their Progressive origins,

95. MINN. STAT. § 260.011(2)(c) (1990).

96. *In re* D.F.B., 430 N.W.2d 476, 478 (Minn. Ct. App. 1988), *aff'd*, 433 N.W.2d 79 (Minn. 1988); State *ex rel.* D.D.H. v. Dostert, 165 W. Va. 448, 456-59, 269 S.E.2d 401, 408-09 (1980).

97. WASH. REV. CODE ANN. § 13.40.010(2) (Supp. 1990); *see also* Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289, 307-08 (1979) (part of symposium on the revised Washington juvenile code); Feld, *Dismantling the Rehabilitative Ideal*, *supra* note 3, at 200-03; Walkover, *supra* note 94, at 528-33.

98. State v. Lawley, 91 Wash. 2d 652, 656-57, 591 P.2d 772, 773 (1979); *see also* State v. Schaaf, 109 Wash. 2d 1, 16-17, 743 P.2d 240, 247 (1987) (changes in the Juvenile Justice Act did not require recognition of right to jury trial).

99. *In re* Seven Minors, 99 Nev. 427, 432, 664 P.2d 947, 950 (1983).

even states that use indeterminate sentences emphasize the offense as a dispositional constraint. Several states instruct judges to consider the seriousness of the offense and the child's culpability, age, and prior record when imposing a sentence.[100]

i. Determinate Sentences in Juvenile Court

Despite the court's history of indeterminate sentencing, about one-third of the states now use the present offense and prior record to regulate at least some sentencing decisions through determinate or mandatory minimum sentencing statutes or correctional administrative guidelines.[101] The clearest departure from traditional juvenile court sentencing practices occurred in 1977 when Washington state enacted just deserts legislation that based presumptive sentences on a youth's age, present offense, and prior record.[102] In New Jersey, juvenile court judges consider offense, criminal history, and statutory aggravating and mitigating factors when sentencing juveniles, and enhance sentences for serious or repeat offenders.[103] Texas uses determinate sentences for juveniles charged with serious offenses.[104]

ii. Mandatory Minimum Terms of Confinement Based on Offense

Several states impose mandatory minimum sentences for certain offenses such as "designated felonies."[105] Some mandatory minimum statutes give judges discretion whether or not to institutionalize a juvenile, and prescribe the minimum term only if incarceration is ordered.[106] Other mandatory minimum sentencing statutes are nondiscretionary, and the court

100. *E.g.*, N.C. GEN. STAT. § 7A-646 (1989) ("appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile").

101. *See* Feld, *Punishment, Treatment, supra* note 3, at 850-62 (Table I and discussion).

102. *See supra* note 97 and accompanying text.

103. N.J. STAT. ANN. § 2A:4A-43(a) (West Supp. 1990).

104. TEX. FAM. CODE ANN. § 54.04 (Vernon Supp. 1991).

105. *E.g.*, OHIO REV. CODE ANN. § 2151.355 (Anderson 1990); N.Y. FAM. CT. ACT §§ 301.2(8)-(9), 352.2, 353.5 (McKinney Supp. 1990). For a comprehensive comparison of state juvenile codes, see Feld, *Punishment, Treatment, supra* note 3, at 862-79 (Table I and discussion).

106. *E.g.*, COLO. REV. STAT. §§ 19-3-113, -113.1, -113.2 (1986); KY. REV. STAT. ANN. § 208.194 (Michie/Bobbs-Merrill 1988); VA. CODE ANN. § 16.1-285.1 (Supp. 1990).

must commit the youth for the minimum period.[107] Nondiscretionary mandatory minimum terms apply for serious, violent,[108] or repeated offenses.[109] These therapeutic sentencing laws are addressed to "violent and repeat offenders," "aggravated juvenile offenders," "serious juvenile offenders," or "designated felons."[110] These statutes prescribe the level of security and the length of confinement, which may range from twelve to eighteen months,[111] to age twenty-one,[112] or to the adult term for the same offense.[113] Basing mandatory minimum sentences on the offense precludes any individualized consideration of the offender's "real needs."

iii. Administrative Sentencing and Parole Release Guidelines

Another form of just deserts sentencing appears in the adoption by several states' department of corrections of offense guidelines to structure institutional confinement and release decisions. While adult prison and parole authorities have used guidelines for decades, their use for juveniles is more recent. Minnesota's Department of Corrections adopted determinate "length of stay" guidelines based on the present offense and other "risk" factors.[114] The juvenile risk factors are the same

107. *E.g.*, DEL. CODE ANN. tit. 10, § 937 (Supp. 1988).

108. *E.g.*, ILL. ANN. STAT. ch. 37, ¶ 805-35 (Smith-Hurd 1990); N.Y. FAM. CT. ACT §§ 301.2(8)-(9), 352.2, 353.5 (McKinney Supp. 1990).

109. *E.g.*, DEL. CODE ANN. tit. 10, § 937 (Supp. 1988).

110. Colorado uses special provisions for sentencing "violent" and "repeat juvenile offenders," "mandatory sentence offenders," and "aggravated juvenile offenders" that include mandatory minimum out of home placements. COLO. REV. STAT. §§ 19-3-113, -113.1, -113.2 (1986). "[S]erious juvenile offenders" in Connecticut receive offense-based sentences which include mandatory minimum out-of-home placement. CONN. GEN. STAT. § 46b-141(a) (1989). "[D]esignated felony" legislation in Georgia, GA. CODE ANN. § 15-11-37 (Supp. 1989), and New York, N.Y. FAM. CT. ACT §§ 301.2(8)-(9), 352.2, 353.5 (McKinney Supp. 1990), prescribes the length of confinement and level of security for juveniles convicted of enumerated offenses and includes provisions for nondiscretionary mandatory sentences. Seven other states impose mandatory minimum sentences on serious or repeat juvenile offenders. DEL. CODE ANN. tit. 10, § 937 (1986); ILL. ANN. STAT. ch. 37, ¶ 805-35 (Smith-Hurd 1990); KY. REV. STAT. § 208.194 (Michie/Bobbs-Merrill 1988); N.C. GEN. STAT. § 7A-652(b)(2) (1987); OHIO REV. CODE ANN. § 2151.355 (Anderson 1990); TENN. CODE ANN. § 37-1-137 (Supp. 1990); VA. CODE ANN. § 16.1-285.1 (Supp. 1990).

111. GA. CODE ANN. § 15-11-37 (Supp 1989).

112. ILL. ANN. STAT. ch. 37, ¶ 805-35 (Smith-Hurd 1990).

113. KY. REV. STAT. ANN. § 208F.030 (Michie/Bobbs-Merrill 1982) (repealed 1984).

114. *See* MINNESOTA DEP'T OF CORRECTIONS, JUVENILE RELEASE GUIDELINES 3-8 (1980).

as those used in Minnesota's Adult Sentencing Guidelines that are designed to achieve just deserts.[115] Georgia[116] and Arizona[117] employ administrative guidelines that use offense categories to specify proportional mandatory minimum terms. Juveniles committed to the California Youth Authority are released by a Parole Board that uses offense guidelines to establish release eligibility.[118]

c. *Empirical Evaluations of Juvenile Court Sentencing Practices*

Juvenile court judges decide what to do with a child, in part, by reference to statutory mandates. Practical bureaucratic considerations influence their decisions as well.[119] Because of paternalistic assumptions about children and the need to look beyond the present offense to their "best interests," judges enjoy greater discretion than do their adult-court counterparts.[120]

The exercise of broad discretion associated with individualized justice raises concerns about its discriminatory impact.[121] Poor and minority youths are disproportionately over-repre-

115. Feld, *Punishment, Treatment, supra* note 3, at 874; *see* MINN. STAT. ANN. § 244 app. I.2., II.B. (West Supp. 1991) (Minnesota Sentencing Guidelines and Commentary).

116. M. FORST, E. FRIEDMAN & R. COATES, INSTITUTIONAL COMMITMENT AND RELEASE DECISION-MAKING FOR JUVENILE DELINQUENTS: AN ASSESSMENT OF DETERMINATE AND INDETERMINATE APPROACHES, GEORGIA — A CASE STUDY 9-11 (URSA Inst. 1985).

117. ARIZONA DEP'T OF CORRECTIONS, LENGTH OF CONFINEMENT GUIDELINES FOR JUVENILES (1986).

118. CALIFORNIA JUVENILE COURT PRACTICE § 10.14-.16 (1981) (outlining parole guidelines based on the severity of offense).

119. *See* M. BORTNER, INSIDE A JUVENILE COURT 38-58 (1982); A. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE 292-327 (1968); R. EMERSON, JUDGING DELINQUENTS 29-56 (1969).

120. *See* M. BORTNER, *supra* note 120, at 243 (discussing the broad sentencing discretion afforded juvenile court judges); Barton, *Discretionary Decision-Making in Juvenile Justice*, 22 CRIME & DELINQ. 470, 471 (1976) (discussing the paternalistic assumptions underlying the juvenile court treatment ideal).

121. *See* Dannefer & Schutt, *Race and Juvenile Justice Processing in Court and Police Agencies*, 87 AM. J. SOC. 1113, 1129-30 (1982); Fagan, Slaughter & Hartstone, *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224, 250-51 (1987) [hereinafter Fagan, Slaughter]; Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173, 200 (1987) [hereinafter Krisberg, Schwartz]; McCarthy & Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41, 58 (1986); Pope & Feyerherm, *Minority Status and Juvenile Justice Processing:*

sented in juvenile correctional institutions.[122] Does basing discretionary sentences on social characteristics or race rather than legal variables result in differential processing and more severe sentencing of minority youths?[123] Or, despite the theoretical commitment to individualized justice, are sentences based on offenses, and does the racial disproportionality result from real differences in rates of offending by race?[124] In short, to what extent do legal, offense or social variables influence juvenile court judges' sentencing decisions?

Although evaluations of juvenile court sentencing practices are sometimes contradictory,[125] two general findings emerge. First, the present offense and prior record account for most of the variation in sentencing that can be explained.[126] Second, after controlling for offense variables, individualized discretion is often synonymous with racial disparities in sentencing.[127]

Practical bureaucratic considerations provide an impetus to base sentences on the offense. The desire to avoid scandals and unfavorable political and media attention constrains juvenile court judges to impose more formal and restrictive sentences

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An Assessment of the Research Literature (pt. 2), 22 CRIM. JUST. ABSTRACTS 527, 528 (1990).

122. *See* Krisberg, Schwartz, *supra* note 121, at 174.

123. *See id.* at 200; Fagan, Slaughter, *supra* note 121, at 250; McCarthy & Smith, *supra* note 121, at 58.

124. *See* M. WOLFGANG, R. FIGLIO, *supra* note 74, at 248; Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93, 103-06 (1978). *But see* Huizinga & Elliott, *Juvenile Offenders: Prevalence, Offender Incidence, and Arrest Rates by Race*, 33 CRIME & DELINQ. 206, 221 (1987) (difference in incarceration rates cannot be explained by differing rates of offending).

125. *See* Fagan, Slaughter, *supra* note 121, at 225; McCarthy & Smith, *supra* note 121, at 41.

126. *See* Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 276-86 (1980); Horowitz & Wasserman, *Some Misleading Conceptions in Sentencing Research: An Example and Reformulation in the Juvenile Court*, 18 CRIMINOLOGY 411, 416 (1980); McCarthy & Smith, *supra* note 121, at 52; *see also* Barton, *supra* note 120, at 476-77 (prior record and present offense, second and first most important dispositional criteria, respectively); Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1224-32 (1989) (past record and present offense have the highest correlations of any variables with disposition decisions); Phillips & Dinitz, *Labelling and Juvenile Court Dispositions: Official Responses to a Cohort of Violent Juveniles*, 23 SOC. Q. 267, 276 (1982) (same).

127. *See* Fagan, Slaughter, *supra* note 121, at 241-50; Krisberg, Schwartz, *supra* note 121, at 194; McCarthy & Smith, *supra* note 121, at 53-61; Pope & Feyerherm, *supra* note 121, at 528.

on more serious delinquents.[128] Moreover, organizations that pursue contradictory goals must develop bureaucratic strategies to simplify individualized assessments.[129] Because juvenile courts routinely collect information about present offenses and prior records, such data provide bases for decisions. Despite claims of individualization, juvenile and adult sentencing practices are more similar in their emphasis on present offense and prior record than their statutory language suggests.[130]

Although there is a relationship between offenses and dispositions, most of the variation in sentencing juveniles remains unexplained.[131] The recent statutory changes reflect legislative disquiet with the underlying premises of individualized justice, the idiosyncratic exercises of discretion, and the inequalities that result.[132]

d. *Conditions of Juvenile Confinement*

Another way to determine whether juvenile courts are punishing or treating young offenders is to examine the correctional facilities to which they are sent. It was the deplorable conditions of confinement that motivated the Court in *Gault* to insist upon minimal procedural safeguards for juveniles.[133] Since their inception, the reality of custodial institutions has contradicted the juvenile court's rhetorical commitment to rehabilitation. Historical studies of Progressive juvenile correctional programs provide dismal accounts of training schools and institutions that were scarcely distinguishable from their adult penal counterparts.[134]

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128. *See* A. CICOUREL, *supra* note 119, at 170-242; R. EMERSON, *supra* note 119, at 29-56; D. MATZA, *supra* note 10, at 120-23; Bortner, *supra* note 72, at 68-71.

129. *See* D. MATZA, *supra* note 10, at 120-22; Marshall & Thomas, *Discretionary Decision-Making and the Juvenile Court*, 34 JUV. & FAM. CT. J. 47, 55-56 (1983).

130. P. GREENWOOD, A. LIPSON, A. ABRAHAMSE & F. ZIMRING, YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 51 (Rand Report No. 3016-CSA, 1983) [hereinafter P. GREENWOOD, A. LIPSON].

131. *See* Horowitz & Wasserman, *supra* note 126, at 416; Thomas & Fitch, *An Inquiry Into the Association Between Respondents' Personal Characteristics and Juvenile Court Dispositions*, 17 WM. & MARY L. REV. 61, 75, 82 (1975).

132. *See* Feld, *Legislative Changes*, *supra* note 4, at 487; Feld, *Punishment, Treatment*, *supra* note 3, at 836, 852.

133. 387 U.S. 1, 27 (1967).

134. *See* D. ROTHMAN, *supra* note 2, at 261-89; S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE 1825-1920, at 81-123 (1977). The juvenile court's lineage of punitive confinement in the name of rehabilitation can be traced to its institu-

Inadequate correctional programs are not simply historical artifacts. Contemporary evaluations of juvenile institutions reveal a continuing gap between rehabilitative rhetoric and punitive reality.[135] Research in Massachusetts describes violent and punitive institutions in which staff physically abused inmates and were frequently powerless to prevent inmate violence.[136] Several studies in other jurisdictions report similar staff and inmate violence, physical abuse, and degrading make-work.[137] The daily reality for juveniles confined in many so-called treatment facilities is one of violence, predatory behavior, and punitive incarceration.

Coinciding with these post-*Gault* evaluations, lawsuits challenged conditions of confinement, alleged that they violated inmates' "right to treatment" and inflicted "cruel and unusual punishment," and provided another outside view of juvenile corrections.[138] Federal judges found that staff routinely beat juveniles with fraternity paddles, injected them with psychotropic drugs for social control purposes, and deprived them of minimally adequate care or individualized treatment.[139] Other courts found numerous instances of physical abuse, staff-administered beating and tear-gassing, homosexual assaults, extended solitary confinement in dungeon-like cells, repetitive and degrading make-work, and minimal clinical services.[140] Unfortunately, these cases are not atypical, as the many decisions

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tional precursor, the House of Refuge. *See* J. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN 19TH CENTURY AMERICA 27-60 (1971); R. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825-1840, at 83, 86 (1973); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 221-36 (1971).

135. *See* C. BARTOLLAS, S. MILLER & S. DINITZ, JUVENILE VICTIMIZATION 17-31 (1976) [hereinafter C. BARTOLLAS, S. MILLER]; B. FELD, NEUTRALIZING INMATE VIOLENCE 62-64 (1977); S. LERNER, BODILY HARM: THE PATTERN OF FEAR AND VIOLENCE AT THE CALIFORNIA YOUTH AUTHORITY 11-46 (1986); Feld, *A Comparative Analysis of Organizational Structure and Inmate Subcultures in Institutes for Juvenile Offenders*, 27 CRIME & DELINQ. 336, 346-61 (1981).

136. *See* B. FELD, *supra* note 135, at 62-64; Feld, *supra* note 135, at 346-47, 361.

137. *See* C. BARTOLLAS, S. MILLER, *supra* note 135, at 33-47; Guggenheim, *A Call to Abolish the Juvenile Justice System*, CHILDREN'S RTS. REP., June 1978, at 6-8. A recent review of California Youth Authority (CYA) institutions concluded that "a young man . . . cannot pay his debt to society safely. The hard truth is that the CYA staff cannot protect its inmates from being beaten or intimidated by other prisoners." S. LERNER, *supra* note 135, at 12.

138. Feld, *supra* note 2, at 142.

139. Nelson v. Heyne, 491 F.2d 352, 354-60 (5th Cir. 1974).

140. Morales v. Turman, 535 F.2d 864, 867-69 (5th Cir. 1976); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1358-65 (D.R.I. 1972).

documenting inhumane conditions in juvenile institutions and even adult jails where juveniles also are held demonstrate.[141] Rehabilitative euphemisms such as "providing a structured environment" cannot disguise the punitive reality of juvenile confinement. Although juvenile institutions are not as uniformly bad as adult prisons, the prevalence of violence, aggression, and homosexual rape in juvenile facilities is hardly consoling.[142] Evaluations of these rehabilitation programs provide scant support for their effectiveness.[143]

3. Summary of Changes in Juvenile Court Sentencing Practices

A strong, nationwide movement, both in theory and in practice, is repudiating therapeutic, individualized dispositions in favor of punitive sentences. When the Court decided *McKeiver* in 1971, no states used determinate or mandatory minimum sentences or administrative guidelines. In the middle to late 1970s, several states adopted "designated felony"[144] and serious offender[145] laws and sentencing guidelines.[146] Since 1980, at least eleven more states have adopted determinate or mandatory minimum sentence laws or administrative guidelines, so that now about one-third of the states explicitly use punitive sentencing strategies.[147] These formal changes and actual practices eliminate most of the differences between juvenile and adult sentencing. Imposing mandatory or determinate sentences on the basis of offense and prior record contradicts any therapeutic purposes and precludes consideration of a youth's "real needs." Revised juvenile purpose clauses and court decisions eliminate even rhetorical support for rehabilitation. As a result, "the purposes of the juvenile process have become more punitive, its procedures formalistic, adversarial and public, and the consequences of conviction much more

141. Krisberg, Schwartz, Lisky & Austin, *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5, 30-36 (1986); Soler, *Litigation on Behalf of Children in Adult Jails*, 34 CRIME & DELINQ. 190, 194-97 (1988).

142. C. BARTOLLAS, S. MILLER, *supra* note 135, at 73-83; B. FELD, *supra* note 135, at 131-38.

143. *See supra* note 59 and accompanying text.

144. N.Y. FAM. CT. ACT § 301.2(8)-(9) (Consol. 1987); KY. REV. STAT. ANN. § 208.170 (Michie/Bobbs-Merrill 1988) (repealed 1989).

145. COLO. REV. STAT. §§ 19-1-103(28), (23.5), (19.5), (2.1), 19-3-113, -113.1 (1986); CONN. GEN. STAT. § 46B-141(a) (1986); ILL. ANN. STAT. ch. 37 ¶ 805-35 (1990); N.C. GEN. STAT. § 7A-652(b)(1)-(2) (1989).

146. WASH. REV. CODE § 13.40.0357 (Supp. 1990).

147. Feld, *Punishment, Treatment, supra* note 3, at 842-87.

harsh."[148] All these changes repudiate the original assumptions that juvenile courts operate in a child's "best interests," that youths should be treated differently than adults, and that rehabilitation is an indeterminate process that cannot be limited by fixed-time punishment.[149]

C. THE PROCEDURAL CONVERGENCE BETWEEN JUVENILE AND CRIMINAL COURTS

These changes contradict the *McKeiver* Court's premise that therapeutic juvenile dispositions require fewer procedural safeguards and raise questions that the Court avoided about the quality of justice. Since *Gault*, the formal procedures of juvenile and criminal courts have converged.[150] There remains, however, a substantial gulf between theory and reality, between the law on the books and the law in action. Theoretically, delinquents are entitled to formal trials and the assistance of counsel. In actuality, the quality of procedural justice is far different. More than two decades ago, the Supreme Court decried that "the child receives the worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[151] Despite the criminalizing of juvenile courts, most states provide neither special procedures to protect juveniles from their own immaturity nor the full panoply of adult procedural safeguards. Instead, states treat juveniles just like adult criminal defendants when equality redounds to their disadvantage and use less adequate juvenile court safeguards when those deficient procedures provide an advantage to the state.[152]

1. Jury Trials in Juvenile Court

The right to a jury trial and the assistance of counsel are two critical procedural safeguards when sentences are punitive rather than therapeutic. In denying juveniles a jury trial, the

148. *In re* Javier A., 159 Cal. App. 3d 913, 963-64, 206 Cal. Rptr. 386, 421 (1984).

149. *See* R. COATES, M. FORST & B. FISHER, INSTITUTIONAL COMMITMENT AND RELEASE DECISION-MAKING FOR JUVENILE DELINQUENTS: AN ASSESSMENT OF DETERMINATE AND INDETERMINATE APPROACHES — A CROSS STATE ANALYSIS 1-3 (1985).

150. Feld, *supra* note 2, at 141-42; *see* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187-88 (1970).

151. Kent v. United States, 383 U.S. 541, 596 (1966).

152. Feld, *supra* note 2, at 141-42.

McKeiver Court posited virtual parity between the factual accuracy of juvenile and adult adjudications. But juries provide special protections to ensure factual accuracy and acquit more readily than do judges.[153] Based on the same evidence, it is easier to convict a youth appearing before a judge in juvenile court than it would be to convict before a jury in a criminal proceeding.[154]

Moreover, *McKeiver* simply ignored that constitutional procedures also prevent governmental oppression.[155] In *Duncan v. Louisiana*,[156] the Court held that adult criminal proceedings required a jury to assure both factual accuracy *and* protection against governmental oppression. *Duncan* emphasized that juries protect against a weak or biased judge, inject the community's values into law, and increase the visibility and accountability of justice administration.[157] These protective functions are even more crucial in juvenile courts that labor behind closed doors, immune from public scrutiny.

Few of the states that sentence juveniles punitively provide jury trials; several have rejected constitutional challenges.[158] Even in states where juries are available in the juvenile court, their symbolic significance far outweighs their practical impact because they are seldom used.[159] As a symbol, the jury requires candor and honesty about the punishment that is imposed in the name of treatment and the need to protect against even benevolent governmental coercion. Rehabilitation is an expansive concept that widens nets of social control and promotes abuse through self-delusion.[160] Punishment, by contrast, frankly ac-

153. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 43-44 (1966). Guilt is not just a factual determination but an assessment of culpability; juries provide the nexus between statutory language and the community's sense of justice in applying the law to the facts of a particular case. Feld, *supra* note 2, at 245 n.402.

154. P. GREENWOOD, A. LIPSON, *supra* note 130, at 29-54; Feld, *supra* note 2, at 245 n.400.

155. Feld, *supra* note 2, at 244; Feld, *Punishment, Treatment, supra* note 3, at 832-33.

156. 391 U.S. 145 (1968).

157. *Id.* at 150-55.

158. The increased punitiveness of juvenile justice raises a dilemma of constitutional dimensions: "Is it fair, in the constitutional sense, to expose minors to adult sanctions for crimes, without granting them the same due process rights as adults?" PRIVATE SECTOR TASK FORCE, *supra* note 91, at 6.

159. Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1553 (1983).

160. Allen, *Rehabilitative Ideal*, *supra* note 10, at 32-35; *see* Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the govern-

knowledges that coercion is harmful and requires proportional limits and procedural protections.[161]

2. The Right to Counsel in Juvenile Court

Procedural justice hinges on access to and the assistance of counsel. *Gault* established a constitutional right to an attorney in delinquency proceedings.[162] Prior to *Gault*, lawyers appeared in perhaps five percent of delinquency cases. Shortly after *Gault*, observers reported that juveniles were neither adequately advised of their rights nor had counsel appointed for them.[163] In most proceedings where counsel appeared, they did nothing.[164]

In the decades since *Gault*, the promise of counsel remains unrealized. Despite legal changes, the actual delivery of legal services lags behind the constitutional mandate. A few studies of individual counties in a handful of states in the early 1980s reported rates of representation ranging from twenty-two percent to forty-five percent.[165] The only research that reports statewide data and makes interstate comparisons, found that in three of the six states surveyed, one-half or less of the juveniles had counsel.[166] Another study reported that in 1986, the majority of youths in Minnesota were unrepresented and that variations in rates of representation ranged from one-hundred

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ment's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding."); F. ALLEN, *supra* note 10, at 33-47.

161. Cohen, *supra* note 86, at 5.

162. *In re* Gault, 387 U.S. 1, 34-42 (1967).

163. Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491, 505-16 (1969) [hereinafter Lefstein, Stapleton].

164. Ferster & Courtless, *Pre-dispositional Data, Role of Counsel and Decisions in a Juvenile Court*, 7 LAW & SOC'Y REV. 195, 207 (1972).

165. Recent evaluations indicate that lawyers still appear less often than might be expected. Clarke and Koch found that only 22.3% and 45.8% of juveniles were represented in two sites in North Carolina. Clarke & Koch, *supra* note 126, at 297. Aday found rates of representation of 26.2% and 38.7% in a southeastern state. Aday, *Court Structure, Defense Attorney Use, and Juvenile Court Decisions*, 27 SOC. Q. 107, 112-14 (1986). Only 32% of juveniles in a large north central city were represented. Walter & Ostrander, *An Observational Study of a Juvenile Court*, 33 JUV. & FAM. CT. J., Aug. 1982, at 53, 59. Bortner reported that only 41.8% of juveniles in a large, midwestern county's juvenile court had an attorney. Bortner, *supra* note 72, at 139.

166. In Nebraska, the rate of representation was 52.7%; in Minnesota, 47.7%; in North Dakota, only 37.5%. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 400-02 (1988).

percent in one county to less than five percent in several others.[167] Nearly one-third of juveniles removed from their homes and more than one-quarter of those confined in institutions never saw a lawyer.[168] Although juveniles charged with serious offenses are more likely to be represented,[169] they constitute a small part of juvenile court dockets. It is the far larger group of youths charged with minor offenses who are most likely to be incarcerated without representation.[170]

The most common explanation for why so many juveniles are unrepresented is that they waive their right to counsel.[171] Courts use the adult standard, "knowing, intelligent, and voluntary" under the "totality of the circumstances," to assess the validity of juveniles' waivers of constitutional rights.[172] The crucial issue for juveniles, as for adults, is whether a waiver of counsel can be "knowing, intelligent, and voluntary" if it is made without consulting with an attorney. The problem is exacerbated when judges seek waivers of counsel as a predetermined result. They give cursory and misleading advisories that suggest waiver is a meaningless technicality and then become responsible for interpreting the juvenile's response.

The "totality" approach to juveniles' waivers of rights has been criticized as a prescription for injustice and an example of treating juveniles just like adults when equality puts them at a

167. Feld, *supra* note 2, at 190 n.162; Feld, *supra* note 166, at 402; Feld, *supra* note 126, at 1214 nn.142-43.

168. Feld, *supra* note 126, at 1238.

169. Feld, *supra* note 166, at 401-02; Feld, *supra* note 126, at 1220-21.

170. Feld, *supra* note 126, at 1239-40.

171. There are a variety of possible explanations for why so many youths are unrepresented: parental reluctance to retain an attorney; inadequate public-defender services in nonurban areas; judicial encouragement of waivers of counsel in order to ease their administrative burdens; cursory and misleading judicial advisories that suggest that waiver is simply a meaningless technicality; continuing judicial hostility to an advocacy role in juvenile court; or judicial predetermination of dispositions and denial of counsel where probation is anticipated. Whatever the reasons, most juveniles in most states never see a lawyer, waive their right to counsel without consulting with or appreciating the consequences of relinquishing counsel, and confront the power of the State alone and unaided. Bortner, *supra* note 72, at 139; W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 36 (1972); Feld, *supra* note 2, at 40; Feld, *supra* note 126, at 1323; Lefstein, Stapleton, *supra* note 163, at 537-38.

172. Fare v. Michael C., 442 U.S. 707, 725 (1979); Feld, *supra* note 2, at 169; Feld, *supra* note 126, at 1323-25. The Supreme Court has held that an adult defendant could waive counsel and appear *pro se* in state criminal trials so long as he or she chooses to do so. Faretta v. California, 422 U.S. 806, 834 (1975); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938).

disadvantage.[173] Juveniles simply are not as capable as adults to waive their constitutional rights in a knowing and intelligent manner.[174] While several states recognize this developmental fact,[175] most states, including Minnesota, allow juveniles to waive counsel without consultation and confront the power of the State alone and unaided.

The questionable validity of juvenile waiver raises collateral legal issues. Absent a valid waiver, the appointment of counsel is a constitutional prerequisite to any sentence restricting liberty.[176] Despite this doctrine, one-third of the Minnesota juveniles removed from their homes and more than one-quarter of those confined in institutions were unrepresented. It is also unconstitutional to use prior convictions obtained without counsel to enhance later sentences.[177] Every time juvenile court judges use prior uncounseled convictions to sentence juveniles, to impose mandatory minimum or enhanced sentences, to waive juveniles to criminal court, or to "bootstrap" status offenders into delinquents through the contempt power,[178] they compound the injustice of the original denial of counsel.

III. THE TRANSFORMATION OF THE JUVENILE COURT: REFORMED BUT NOT REHABILITATED

The recent changes in juvenile court jurisdiction, sentenc-

173. Feld, *supra* note 2, at 173-76; *see* Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1138-40 (1980) (the totality approach may not comport with *Gault* if "the great majority of juveniles do not understand or appreciate their rights, yet are deemed to have waived those rights").

174. T. GRISSO, JUVENILES' WAIVER OF RIGHTS 128-30 (1981); Grisso, *supra* note 173, at 1166.

175. IOWA CODE ANN. § 232.11 (West 1985) (prohibiting either waivers of counsel or incarceration of unrepresented delinquents); WIS. STAT. ANN. § 48.23 (West 1987 & Supp. 1990) (same). *See generally* INSTITUTE OF JUDICIAL ADMIN., ABA, JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL (1980) (guidelines for lawyers in dealing with juvenile cases).

176. Scott v. Illinois, 440 U.S. 367, 374 (1979).

177. Baldasar v. Illinois, 446 U.S. 222, 222, 224 (1980) (per curiam); United States v. Tucker, 404 U.S. 443, 449 (1972); Burgett v. Texas, 389 U.S. 109, 115 (1967). Courts have applied this principle to juvenile prior convictions as well. *See* Rizzo v. United States, 821 F.2d 1271, 1274 (7th Cir. 1987); Grant v. White, 579 F.2d 48, 49 (8th Cir. 1978); *see also In re* J.W., 164 Ill. App. 3d 826, 830, 518 N.E.2d 310, 313 (1987) (uncounseled juvenile convictions may not be used to adjudicate a juvenile as a habitual offender).

178. *In re* Walker, 282 N.C. 28, 38, 191 S.E.2d 702, 709 (1972).

ing, and procedures reflect ambivalence about the role of juvenile courts and the control of children. As juvenile courts converge procedurally and substantively with criminal courts, is there any reason to maintain a separate court whose only distinctions are procedures under which no adult would agree to be tried?

The juvenile court is at a philosophical crossroads that cannot be resolved by simplistic formulations, such as treatment versus punishment. In reality, there are no practical or operational differences between the two. Acknowledging that juvenile courts punish, imposes an obligation to provide all criminal procedural safeguards because, in the words of *Gault*, "the condition of being a boy does not justify a kangaroo court."[179] While procedural parity with adults may sound the death-knell of the juvenile court, to fail to do so perpetuates injustice. To treat similarly situated juveniles differently, to punish them in the name of treatment, and to deny them basic safeguards fosters a sense of injustice that thwarts any efforts to rehabilitate.[180]

Abolishing juvenile courts is desirable both for youths and society. After more than two decades of constitutional and legislative reform, juvenile courts continue to deflect, co-opt, ignore, or absorb ameliorative tinkering with minimal institutional change. Despite its transformation from a welfare agency to a criminal court, the juvenile court remains essentially unreformed. The quality of justice youths receive would be intolerable if it were adults facing incarceration. Public and political concerns about drugs and youth crime foster a "get tough" mentality to repress rather than rehabilitate young offenders. With fiscal constraints, budget deficits, and competition from other interest groups, there is little likelihood that treatment services for delinquents will expand. Coupling the emergence of punitive policies with our societal unwillingness to provide for the welfare of children in general, much less to those who commit crimes, there is simply no reason to believe that the juvenile court can be rehabilitated.

Without a juvenile court, an adult criminal court that administers justice for young offenders could provide children with all the procedural guarantees already available to adult defendants and additional enhanced protections because of the

179. *In re* Gault, 387 U.S. 1, 28 (1967).
180. Melton, *supra* note 59, at 168.

children's vulnerability and immaturity.[181] The only virtue of the contemporary juvenile court is that juveniles convicted of serious crimes receive shorter sentences than do adults.[182] Youthfulness, however, long has been recognized as a mitigating, even if not an excusing, condition at sentencing.[183] The common law's infancy defense presumed that children below age fourteen lacked criminal capacity, emphasized their lack of fault, and made youthful irresponsibility explicit. Youths older than fourteen are mature enough to be responsible for their behavior, but immature enough as to not deserve punishment commensurate with adults.[184] If shorter sentences for diminished responsibility is the rationale for punitive juvenile courts, then providing an explicit "youth discount" to reduce adult sentences can ensure an intermediate level of just punishment.[185] Reduced adult sentences do not require young people to be incarcerated with adults; existing juvenile prisons allow the segregation of offenders by age.

Full procedural parity in criminal courts coupled with mechanisms to expunge records, restore civil rights, and the like can more adequately protect young people than does the current juvenile court. Abolishing juvenile courts, however, should not gloss over the many deficiencies of criminal courts such as excessive case loads, insufficient sentencing options, ineffective representation, and over-reliance on plea bargains. These are characteristics of juvenile courts as well.

Ideological changes in strategies of social control and the conception of children produced the juvenile court. One of these ideas, strategies of social control, no longer distinguishes juvenile from criminal courts. Despite their inability to prevent or reduce youth crime, juvenile courts survive and even prosper. Despite statutory and judicial reforms, official discretion arguably has increased rather than decreased. Why, even

181. *See* Feld, *supra* note 2, at 275-76; Melton, *supra* note 59, at 152; Rosenberg, *Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 671 (1980).

182. Zimring, *supra* note 63, at 197.

183. Thomson v. Oklahoma, 487 U.S. 815, 823 (1988) ("a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty"); Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) ("chronological age of a minor is itself a relevant mitigating factor of great weight"); Melton, *supra* note 59, at 152-53.

184. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J. L. & PSYCHIATRY 129, 148-50 (1987); Melton, *supra* note 59, at 152.

185. Feld, *Punishment, Treatment*, *supra* note 3, at 912.

without empirical support, does the ideology of therapeutic justice persist so tenaciously?

The answer is that the social control is directed at children. Despite humanitarian claims of being a child-centered nation, our cultural conception of children supports institutional arrangements that deny the personhood of young people. In legal doctrine, children are not entitled to liberty, but to custody. We care less about other people's children than we do our own, especially when those children are of other colors or cultures.[186]

Children, especially by adolescence, are more competent than the law acknowledges.[187] We can recognize young people's competence as a basis for greater autonomy without equating it with full criminal responsibility. Many social institutions — families, schools, the economy, and the law — systematically disable adolescents, deny them opportunities to be responsible and autonomous, and then use the resulting immaturity to justify imposing further disabilities. Rejecting the juvenile court's premise that young people are inherently irresponsible can begin a process of reexamining childhood that extends to every institution that touches their lives.

186. J. SUTTON, *supra* note 12, at 257.
187. Melton, *supra* note 59, at 153.