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*Barry C. Feld*

# Juvenile and Criminal Justice Systems' Responses to Youth Violence

## ABSTRACT

Within the past decade, nearly every state has amended its juvenile code in response to perceived increases in serious, persistent, and violent youth crime. These changes diminish the jurisdiction of juvenile courts as judicial decisions and statutory changes transfer more youths from juvenile courts to criminal courts so that young offenders can be sentenced as adults. Amendments to juvenile sentencing laws increase the punitiveness of sanctions available to juvenile court judges. Other strategies attempt to "blend," or merge, juvenile and criminal court jurisdiction and sentencing authority over violent young offenders. These "get tough" policies affect the numbers and types of youths confined in adult and juvenile correctional facilities and pose fundamental problems for administrators in both systems; accelerate procedural, jurisprudential, and substantive convergence between the juvenile and criminal justice systems; and erode the rationale for a separate juvenile court.

Public frustration with crime, fear of the recent rise in youth violence, and the racial characteristics of violent young offenders fuel the desire to "get tough" and provide political impetus to prosecute larger numbers of youths as adults. These initiatives simplify the transfer of young offenders to criminal courts and expose many waived youths to mandatory minimum sentences as adults, or require juvenile court judges to impose determinate or mandatory minimum sentences on youths who remain in the juvenile system. Both approaches deemphasize rehabilitation and individualized consideration of the offender, stress personal and justice system accountability and punishment, and base waiver and

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sentencing decisions on the seriousness of the present offense and prior record. Sentencing young offenders as adults increases the number of chronological juveniles confined in adult prisons and poses substantial challenges for adult correctional officials. Juvenile institutional administrators confront similar challenges as judges confine more serious young delinquents for longer periods of time.

Every jurisdiction uses one or more statutory devices to prosecute some juveniles as adults. The principal devices include judicial waiver, legislative offense exclusion, and prosecutors' choices among concurrent jurisdictions; these allocate to different branches of government the decision whether to prosecute a youth as a criminal or a delinquent. Each reflects different ways of asking and answering similar questions: who are the serious offenders, by what criteria should the state identify them, which branch of government can best make these decisions, and how should the juvenile or adult systems respond to them?

The "simple" question whether a young offender should be handled as a juvenile or an adult poses difficult theoretical and practical dilemmas. For example, judicial waiver legislation that requires a judge to decide whether a youth is amenable to treatment or poses a threat to the public presupposes that juvenile courts can rehabilitate at least some youths, that judges possess diagnostic tools that enable them to classify for treatment, and that judges can predict offenders' future dangerousness. At another level, recent changes in waiver legislation provide an indicator of the jurisprudential shift in emphasis from rehabilitation to retribution, as exclusion statutes increasingly emphasize characteristics of the offense rather than the offender. Jurisdictional waiver policies that define the boundary of adulthood also implicate the relationship between juvenile and criminal court sentencing practices. Finally, criminal prosecution of younger offenders implicates fundamental cultural assumptions about juveniles' criminal responsibility because waiver allows juries and judges to impose the death penalty on at least some youths convicted as criminals.

This essay draws on judicial opinions, statutory amendments, evaluation research, and criminological writings to analyze changes in sentencing policy responses to chronic and violent young offenders in both the criminal and juvenile justice systems. It examines recent revisions of waiver laws and juvenile court sentencing laws that reveal the changing jurisprudence of juvenile courts, empirical research on the relative efficacy of alternative waiver strategies as mechanisms to con-

trol violent and chronic young offenders, and available evidence on the consequences for youths convicted and sentenced in criminal or in juvenile court. Finally, it examines “blended jurisdiction,” a relatively new sentencing option that attempts to bridge the gap between juvenile treatment and adult punishment and to provide graduated and escalating sanctions for serious younger offenders.

Policy toward youthful offenders is balanced precariously between America’s century-old experiment with the paternalistic, individualizing, and rehabilitation-premised juvenile court and a modern movement to punish youthful offenders as if they were adults. Proponents of special procedures for young offenders continue to argue that “kids are different” and less blameworthy than adults, that protection and enhancement of troubled children’s life chances should remain a major youth policy goal, and that modern sentencing policies for adults are too harsh and ham-fisted to apply to young people.

Some critics argue that juvenile courts and correctional agencies provide young offenders the worst of two systems—fewer procedural protections than adults receive in exchange for punitive treatment programs that demonstrate little evidence of effectiveness. Other critics insist that serious youth violence is as seriously damaging as serious adult violence and that concern for public protection requires use of harsh punishments that juvenile courts cannot impose.

Current policy innovations—reducing the maximum age of juvenile court jurisdiction, removing some crimes from the juvenile court regardless of the offender’s age, and making transfers from juvenile to adult courts easier—are premised on retention of the current two-systems approach. This raises a series of perplexing policy issues: perpetuation of two information systems that often prevents adult court judges from learning about prior juvenile offenses; arbitrary and idiosyncratic patterns of discretionary decisions by judges and prosecutors that produce wide inconsistencies in waiver and retention decisions; anomalous punishment patterns in which violent offenders transferred to adult courts receive much harsher sentences than comparable violent offenders who were not transferred, while transferred property offenders often receive less severe sentences than if sentenced in the juvenile court; stark racial disparities in sentencing in the juvenile system that are exacerbated by new transfer policies; and failure of criminal courts to take account of the diminished responsibility and immaturity of many juvenile offenders convicted as adults.

There is a better way, which combines reconceptualized divisions of

function between social welfare and justice system agencies with the creation of a single, integrated criminal justice system that gives youthful offenders the same procedural protections afforded adults while providing systematic reductions of sentence (a “youthful offender discount”) to take account of young people’s lesser responsibility and maturity (Feld 1998). This essay, after documenting the failures of both the traditional and the current transitional approaches, explains what an integrated approach would look like and why it makes sense.

Section I provides a brief overview of the juvenile court, the recent increase in youth violence, and the political impetus it provides for policies that “crack down” on youth crime. Section II analyzes changes in juvenile court jurisdiction and the processes by which states transfer some youths from juvenile to criminal courts. This section also examines the sentences that criminal court judges impose on transferred youths, the use of juvenile delinquency records to enhance the sentences of young adult offenders, and the correctional housing and programming provided for these younger offenders. Section III analyzes changes in juvenile court sentencing laws, their implications for conditions of confinement, and the availability and efficacy of treatment programs for serious young offenders. Section IV analyzes the emergence of blended jurisdiction. Section V concludes that the various changes in both systems erode the foundations for a separate juvenile court and proposes a sentencing policy framework that provides a graduated system of criminal sentencing consistent with the developmental continuum by formally recognizing youthfulness as a mitigating factor.

### I. Juvenile Courts, Youth Violence, and Get Tough Policies

Nineteenth-century changes in cultural conceptions of children and in strategies of social control led to the creation of the juvenile court. The juvenile court movement attempted to remove children from the adult justice and corrections systems and to provide them with individualized treatment. The Progressives envisioned juvenile court professionals using indeterminate procedures and substituting a scientific and preventative approach for the criminal law’s punitive policies. By separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected both the criminal law’s jurisprudence and its procedural safeguards such as juries and lawyers. Under the guise of *parens patriae*, the juvenile court emphasized treatment, supervision, and control rather than punishment. The juvenile court’s “re-

habilitative ideal” envisioned a specialized judge trained in social science and child development whose empathic qualities and insight would enable him or her to make individualized therapeutic dispositions in the “best interests” of the child (Platt 1977; Ryerson 1978; Rothman 1980). Reformers pursued benevolent goals, individualized their solicitude, and maximized discretion to provide flexibility in diagnosis and treatment of the “whole child.” They regarded a child’s crimes primarily as a symptom of his or her “real needs,” and consequently the nature of the offense affected neither the degree nor the duration of intervention. Rather, juvenile court judges imposed indeterminate and nonproportional sentences that potentially continued for the duration of minority.

Progressives situated the juvenile court on a number of cultural and criminological fault lines and institutionalized several binary conceptions for the respective juvenile and criminal justice systems: either child or adult, either determinism or free will, either treatment or punishment, either procedural informality or formality, either discretion or the rule of law. Serious youth crime challenges these dichotomous constructs. Many recent juvenile code revisions represent efforts to modify the Progressives’ bifurcations between these competing conceptions of children and crime control.

The Supreme Court in *In re Gault*, 387 U.S. 1 (1967), began to transform the juvenile court into a very different institution than the Progressives contemplated. In *Gault*, the Supreme Court engrafted some formal procedures at trial onto the juvenile court’s individualized treatment sentencing regime and fostered a procedural and substantive convergence with adult criminal courts (Feld 1993a). *Gault*’s emphasis on procedural formality shifted the focus of delinquency proceedings from a child’s best interests to proof of legal guilt in adversary proceedings, highlighted the connection between a youth’s crime and subsequent sanctions, and ironically may have legitimated more punitive dispositions for young offenders. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), however, the Court denied to juveniles the constitutional right to jury trials in delinquency proceedings. *McKeiver* relied on the contrasts between juvenile courts’ treatment rationale and criminal courts’ punitive purposes to justify the procedural differences between the two systems. Several recent reforms provide some juveniles with a statutory right to a jury in order to expand juvenile courts’ punitive options.

It is a criminological truism that young people commit a disproportional

tionate amount of crime and that their arrest rates for the most serious crimes peak in mid- to late adolescence and then gradually decline (Blumstein 1995). Although violent crimes constitute a smaller component of the overall serious crime index and juveniles constitute a small proportion of all arrests for violence, the arrest rates of juveniles for violence and, especially, homicide surged dramatically beginning in the mid-1980s (see Cook and Laub, in this volume). Not only did the juvenile violence and homicide rates increase at a faster pace than those of adults, but the average age of juvenile arrestees decreased (Blumstein and Cork 1996).

The recent increase in juvenile homicide rates accompanied the proliferation of handguns among youths. Blumstein (1995; Blumstein and Cork 1996) attributes the changing patterns of age-specific homicide rates among adolescents to the availability of guns in conjunction with the crack cocaine drug industry that emerged in the mid-1980s. Blumstein (1995) hypothesizes that the drug distribution industry attracts youths, especially urban, African American males who lack alternative economic opportunities; that youths in the drug industry take more risks than would adults; and that they arm themselves for self-protection and to resolve disputes. Although guns constitute a "tool of the trade" in the drug industry, their diffusion into the broader youth population for self-defense and status accounts for many of the "excess homicides" among urban black males recorded in the late 1980s and early 1990s (Reiss and Roth 1993; Blumstein 1995).

The increases in youth violence and homicide, especially among African American males in the late 1980s, constitutes the proximate cause of recent legislative strategies to "get tough" and "crack down" on youth crime. This served to accelerate punitive policy trends already at work to criminalize juvenile justice (Feld 1984). Even prior to the late 1980s, a discernible trend was evident to transfer more youths to criminal court and to base waiver decisions on the seriousness of the offense rather than the characteristics of the offender (Feld 1987). There was a similar legislative trend to impose determinate or mandatory minimum sentences in juvenile courts based on the seriousness of the offense rather than the real needs of the offender (Feld 1988*b*). Although the rate and scope of statutory changes have accelerated dramatically within the past decade, these developments represent continuations of the prior convergence of juvenile and criminal courts' sentencing policies. Significantly, because of the substantial differences in violent of-

fense arrest rates by race, policies that increase sanctions for youth violence inevitably have a disproportionate effect on young black males.

## II. Changes in Waiver Legislation and Sentencing of Transferred Youths

Transfer of juvenile offenders for adult prosecution provides the nexus between the more deterministic and rehabilitative premises of the juvenile court and the free will and punishment assumptions of the adult criminal justice system. Although juvenile courts theoretically attempt to rehabilitate young offenders, a small but significant proportion of miscreant youths resist their efforts. These are typically older delinquents nearing the maximum jurisdictional age and often recidivists who have not responded to prior intervention and for whom successful treatment may not be feasible during the time remaining to the juvenile court (Podkopacz and Feld 1995, 1996; U.S. General Accounting Office 1995). Politicians and the public perceive these youths as mature and sophisticated offenders. Moreover, these career offenders may account for a disproportionate amount of all juvenile crime and violence. Highly visible, serious, and violent offenses evoke community outrage or fear that politicians believe only punitive adult sanctions can mollify. Mechanisms to prosecute some juveniles as adults provide a safety valve that permits the expiatory sacrifice of some youths, quiets political and public clamor, and enables legislators to avoid otherwise irresistible pressures to lower the maximum age of juvenile court jurisdiction (Feld 1978).

### *A. Jurisdictional Policy Changes*

In response to the resurgence of youth crime in the late 1980s, politicians, juvenile justice personnel, and criminologists debated extensively the relative merits of different strategies to prosecute some serious young offenders in criminal courts (Feld 1987, 1995; Fagan and Deschenes 1990). Jurisdictional waiver represents a type of sentencing decision. Juvenile courts traditionally assigned primary importance to rehabilitation and attempted to individualize treatment. Criminal courts accorded greater significance to the seriousness of the offense committed and attempted to proportion punishment accordingly. All of the theoretical differences between juvenile and criminal courts' sentencing philosophies become visible in transfer proceedings and in legislative policy debates. Transfer laws simultaneously attempt to re-



solve both fundamental crime control issues and the ambivalence embedded in our cultural construction of youth. The jurisprudential conflicts reflect current sentencing policy debates: the tensions between rehabilitation and incapacitation or retribution, between decisions based on characteristics of the offender or the seriousness of the offense, between discretion and rules, and between indeterminacy and determinacy. Waiver laws attempt to reconcile the contradictory impulses engendered when the child is a criminal and the criminal is a child. What processes best enable us to choose between competing conceptions of youths as responsible and culpable offenders and as immature and salvageable children? In the early stages of a criminal career and prospectively, what criteria best differentiate between adolescent-only offenders and life-course persistent offenders?

Although the technical and administrative details of states' transfer legislation vary considerably, judicial waiver, legislative offense exclusion, and prosecutorial choice of forum represent the three generic approaches (Feld 1987; Fritsch and Hemmens 1995; Snyder and Sickmund 1995; U.S. General Accounting Office 1995). They represent different ways to identify which serious young offenders to try as adults, emphasize a different balance of sentencing policy values, rely on different organizational actors or administrative processes, and elicit different information to determine whether to try and sentence particular young offenders as adults or as children.

Judicial waiver represents the most common transfer strategy. A juvenile court judge may waive jurisdiction on a discretionary basis after conducting a hearing to determine whether a youth is amenable to treatment or poses a threat to the public. These assessments reflect the traditional individualized sentencing discretion characteristic of juvenile courts (Feld 1987).

Legislative offense exclusion frequently supplements judicial waiver provisions. This approach emphasizes the seriousness of the offense and reflects the retributive values of the criminal law (Feld 1987; Snyder and Sickmund 1995). Because legislatures create juvenile courts, they can define their jurisdiction and exclude youths from juvenile court on the basis of their age and the seriousness of their offenses. A number of states, for example, exclude youths sixteen or older and charged with murder from juvenile court jurisdiction (Sanborn 1996). Legislative line drawing that sets the maximum age of juvenile court jurisdiction at fifteen or sixteen, below the general eighteen-year-old age of majority, results in the adult criminal prosecution of the largest

numbers of chronological juveniles (U.S. General Accounting Office 1995). This type of line drawing resulted in the criminal prosecution of 176,000 youths below age eighteen in 1991 (Snyder and Sickmund 1995). Two states, Wisconsin and New Hampshire, recently lowered their age of juvenile court jurisdiction from seventeen to sixteen and criminalized large numbers of youth on a wholesale, rather than a retail, basis.

Prosecutorial waiver, the third method, is used in about a dozen states to remove some young offenders from the juvenile justice system. With this strategy, juvenile and criminal courts share concurrent jurisdiction over certain ages and offenses, typically older youths and serious crimes, and prosecutors may, for example, exercise their discretion to select juvenile or adult processing for youths sixteen or older and charged with murder (McCarthy 1994; Snyder and Sickmund 1995). To the extent that a prosecutor's decision to charge a case in criminal courts divests the juvenile court of jurisdiction, prosecutorial waiver constitutes a form of offense-based decision making, like legislative offense exclusion (Thomas and Bilchik 1985).

Analyzing waiver as a sentencing decision addresses two interrelated policy issues: the bases for sentencing and waiver practices within juvenile courts and the relationship between juvenile and criminal court sentencing practices. The first implicates individualized sentencing decisions and the tension between discretion and the rule of law. The second implicates the contradictory criteria used by juvenile and criminal court judges when sentencing offenders. Formulating rational and consistent social control responses to serious and chronic young offenders requires coordinated justice system responses to youths who make the transition between the two systems. I emphasize serious and chronic young offenders because waiver policies affect two, somewhat different, albeit overlapping, populations of juveniles—violent offenders and persistent offenders. Criminal courts respond differently to violent youths and to chronic offenders currently charged with property crimes when prosecutors try these youths as adults (Podkopacz and Feld 1995, 1996).

It is unfortunate that neither arbitrary age-and-offense lines nor idiosyncratic judicial prosecutorial waiver decisions have any criminological relevance other than their legal consequences. Waiver statutes increasingly use offense criteria in a vain effort to constrain judicial sentencing discretion and to improve the fit between waiver decisions and criminal court sentencing practices. Ultimately, however, they fail

because they embody the binary dichotomies—either treatment or punishment, either child or adult, either offender or offense—that purportedly distinguish juvenile from criminal courts.

1. *Judicial Waiver and Individualized Sentencing Decisions.* From the juvenile court's inception, judges could deny some young offenders its protective jurisdiction and transfer them to adult courts (Rothman 1980). Judicial waiver reflects juvenile courts' traditional individualized approach to decide whether a youth should be treated as a juvenile or punished as an adult (Zimring 1981*a*, 1991). In *Kent v. United States*, 383 U.S. 541 (1966), the United States Supreme Court formalized the waiver process and held that juvenile courts must provide youths with some procedural protections (Feld 1978). In *Breed v. Jones*, 421 U.S. 519 (1975), the Court applied the double jeopardy clause of the Fifth Amendment to delinquency convictions and required states to decide whether to try and sentence a youth as a juvenile or as an adult before proceeding to trial on the merits of the charge.

*Kent* and *Breed* provide the formal procedural framework within which judges make waiver sentencing decisions. But the substantive bases of waiver decisions pose the principal difficulty. Until recent amendments, most states' waiver statutes allowed judges to transfer jurisdiction on the basis of their discretionary assessment of subjective clinical factors, such as a youth's amenability to treatment. The Court in *Kent*, 383 U.S. at 566–67 (1966), appended to its opinion a list of substantive criteria that juvenile court judges might consider. Legislatures specify amenability criteria with varying degrees of precision and frequently adopt the general and contradictory list of *Kent* factors. Although some states limit judicial waiver to felony offenses and establish a minimum age for adult prosecutions, typically sixteen, fifteen, or fourteen, others provide neither offense nor minimum age restrictions (Feld 1987; Snyder and Sickmund 1995).

In practice, judges appear to assess “amenability” and “dangerousness” by focusing on three sets of variables. The first consists of a youth's age and the length of time remaining within juvenile court jurisdiction. Juvenile court judges waive older youths more readily than younger offenders (Fagan and Deschenes 1990; Podkopacz and Feld 1995, 1996; U.S. General Accounting Office 1995). A youth's age in relation to the juvenile court's maximum dispositional jurisdiction limits the court's sanctioning powers and provides the impetus to waive or exclude some older juveniles if the seriousness of the offense deserves a longer sentence than those available in juvenile court. Judges in states

where juvenile court dispositions can continue until age twenty-one waive youths at about half the rate as judges in states where juvenile court jurisdiction ends at ages eighteen or nineteen (Snyder and Hutzler 1981; Vereb and Hutzler 1981; Nimick, Szymanski, and Snyder 1986).

A second constellation of amenability factors includes the youth's treatment prognosis as reflected in clinical evaluations and prior correctional interventions. Once a juvenile exhausts the available correctional resources, transfer becomes increasingly more likely (Podkopacz and Feld 1995, 1996).

Finally, judges assess dangerousness and the threats youths pose to others based on the present offense and prior record. Dangerousness variables include the seriousness of the offense, whether the youth used a weapon, and the length of the prior record (Fagan and Deschenes 1990; Podkopacz and Feld 1995, 1996; Howell 1996). Balancing these factors entails a trade-off between offense seriousness and offender persistence.

Asking a judge to decide a youth's amenability to treatment or dangerousness implicates many of the most fundamental issues of juvenile jurisprudence (Feld 1978). Legislation mandating an amenability or dangerousness inquiry assumes that effective treatment programs exist for at least some serious or chronic young offenders, presupposes that classification systems exist with which to differentiate among youths' treatment potentials or dangerousness, and presumes that clinicians or judges possess valid and reliable diagnostic tools with which to determine the appropriate disposition for a particular youth. Evaluation research challenges the legislative presuppositions, raising questions whether interventions systematically reduce recidivism among chronic or violent young offenders or whether judges or clinicians possess diagnostic tools with which to identify those who will or will not respond to treatment (Feld 1978, 1983, 1987; Sechrest 1987; Lab and Whitehead 1988, 1990). Statutes that authorize judges to waive jurisdiction if a youth poses a threat to the public require judges to predict future dangerousness even though clinicians and jurists lack the technical capacity reliably to predict low base-rate serious criminal behavior (Monahan 1981; Morris and Miller 1985; Fagan and Guggenheim 1996).

Judicial waiver criteria framed in terms of amenability to treatment or dangerousness give judges broad, standardless discretion. Lists of substantive factors such as those appended in *Kent* do not provide adequate guidance (Twentieth Century Fund 1978; Zimring 1981*a*).

Rather, catalogues of contradictory factors reinforce judges' discretion and allow them selectively to emphasize one element or another to justify any decision. Zimring (1981*a*) describes judicial waiver laws as the juvenile equivalent of the standardless capital punishment statutes condemned by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972). Waiver also exposes some transferred juveniles to the possibility of capital punishment.

The subjective nature of waiver decisions, the absence of effective guidelines to structure outcomes, and the lack of objective indicators or scientific tools with which to classify youths allows judges to make unequal and disparate rulings without any effective procedural or appellate checks. Empirical analyses provide compelling evidence that judges apply waiver statutes in an arbitrary, capricious, and discriminatory manner (Hamparian et al. 1982; Fagan and Deschenes 1990; Feld 1990). States' waiver rates for similar types of offenders vary extensively (Hamparian et al. 1982; U.S. General Accounting Office 1995). Even within a single jurisdiction, judges do not administer, interpret, or apply waiver statutes consistently from county to county or court to court (Hamparian et al. 1982; Feld 1987, 1990). Research in several states reports a contextual pattern of "justice by geography" in which where youths lived, rather than what they did, determined their juvenile or adult status (Hamparian et al. 1982; Heuser 1985; Feld 1990, 1995). In some states, for example, rural judges waive jurisdiction over youths more readily than urban judges (Hamparian et al. 1982; Feld 1990; Lemmon, Sontheimer, and Saylor 1991; Poulos and Orchowsky 1994). Even within a single urban county, judges in the same court decide cases of similarly situated offenders differently (Podkopacz and Feld 1995, 1996). These differences influence both the characteristics of youths waived and the sentences they receive.

A youth's race also may affect waiver decisions (Eigen 1981*a*, 1981*b*; Hamparian et al. 1982; Fagan, Forst, and Vivona 1987). In analyses in four states in which the U.S. General Accounting Office (1995) could control for the effects of race on judicial waiver decisions, it found that judges transferred black youths charged with violent, property, or drug offenses more readily than comparable white offenders. Differences in judicial philosophies, the location of a waiver hearing, a youth's race, or organizational politics may explain as much about transfer decisions as do a youth's offense or personal characteristics.

2. *Legislative Exclusion and Prosecutors' Choices.* Legislative waiver provides the primary conceptual alternative to judicial waiver and ex-

cludes from juvenile court jurisdiction youths of certain ages charged with specified offenses or with particular prior records (Feld 1987). Concurrent-jurisdiction laws grant prosecutors the power to choose the forum without justifying that decision in a judicial hearing (McCarthy 1994). Youths have no constitutional right to a juvenile court. Legislatures create them by statute and define their jurisdiction, powers, and purposes. What they create, they also may modify or take away. States freely set juvenile courts' maximum age jurisdiction at seventeen, sixteen, or fifteen years old as a matter of state policy and without constitutional infirmity. If they define juvenile court jurisdiction to include only those persons below a jurisdictional age and whom prosecutors charge with a nonexcluded offense, then, by statutory definition, all other persons are adults.

Critics of offense exclusion question whether legislators can exclude offenses and remove discretion without making the process excessively rigid and overinclusive (Zimring 1981*a*, 1991). In a get tough climate, politicians experience considerable difficulty resisting their own impulses to adopt expansive lists of excluded "crimes *de jour*." Once a legislature adopts an excluded-offense or presumptive waiver statute, the list of offenses often lengthens quickly and results in far more youths being tried as adults than would occur under a more flexible, discretionary system. California amended its' presumptive waiver offense criteria seven times between 1977 and 1993 and increased the initial list of eleven serious violent crimes to twenty-three, including drug crimes, carjacking, and escape from a correctional facility (Feld 1995). Critics of prosecutorial waiver strategies contend that locally elected prosecutors often succumb to the same get tough pressures that influence legislators. Prosecutors often lack the experience or maturity that judges possess, exercise their discretion just as subjectively and idiosyncratically as do judges, and introduce additional geographic variability (Bishop, Frazier, and Henretta 1989; Bishop and Frazier 1991).

In short, excluded-offense and prosecutor-choice waiver legislation may suffer from the rigidity, inflexibility, and overinclusiveness characteristic of mandatory sentencing statutes (Tonry 1995, 1996). In practice, offense exclusion transfers discretion from judges to prosecutors who determine delinquent or criminal status by manipulating their charging decisions. States that use a concurrent-jurisdiction prosecutor-choice strategy simply make the allocation of power and sentencing authority explicit. While a rule-of-law approach can improve on unstructured judicial discretion, offense exclusion and prose-

cutor-choice laws do not provide either a jurisprudentially satisfactory or politically practical solution.

3. *Toward an Integrated Sentencing System.* Judicial waiver, offense exclusion, and prosecutor-choice laws determine the ultimate disposition of serious young offenders. States base the distinctions between treatment as a juvenile and punishment as an adult on waiver decisions or legislative lines that have no criminological significance other than their legal consequences. These jurisprudential antinomies may frustrate attempts to rationalize social control of serious and persistent young offenders. By adopting these policies, legislatures create false dichotomies and fail to acknowledge that young people mature constantly and criminal careers develop over time. Adolescence comprises a developmental continuum; young people do not graduate from irresponsible childhood one day to responsible adulthood the next, except as a matter of law.

Moreover, the strong correlation between age and criminal activity makes the current jurisdictional bifurcation especially problematic. The rates of many kinds of criminality peak in mid- to late adolescence, exactly at the juncture between the juvenile and criminal justice systems (Blumstein et al. 1986; Farrington, in this volume). Criminal careers research indicates that young offenders do not specialize in particular types of crime, that serious crime occurs within an essentially random pattern of persistent delinquent behavior, and that a small number of chronic delinquents commits many of the offenses and most of the violent crimes perpetrated by juveniles (Blumstein et al. 1986). Serious offenders are persistent offenders who simply add violent crimes to their diverse repertoire of active law-breaking. Although we cannot accurately or reliably predict future violence on the basis of an initial offense, a prior record of offending provides the best indicator of similar behavior in the future.

Waiver statutes and youth sentencing policies unsystematically attempt to differentiate between adolescent-only offenders and life-course persistent offenders. For virtually all purposes, most of the significant differences in seriousness of delinquency are between adolescent-only offenders, those juveniles with one or two delinquencies, and chronic offenders, those with five or more justice system involvements (Wolfgang, Figlio, and Sellin 1972; Farrington, in this volume). Age of onset of delinquency provides an important indicator of career criminality (Farrington 1986). Youths who begin delinquent careers early and become chronic offenders as juveniles appear more

likely to continue to engage in serious and violent offending into adulthood (Blumstein, Farrington, and Moitra 1985). While most adolescent-only offenders desist after one or two contacts with the justice system, the probabilities of subsequent criminality for chronic offenders remain high and persist into adulthood (Blumstein et al. 1986). The small subset of chronic offenders account for most of the total delinquencies and even more of the violent offenses and homicides of their cohorts (Petersilia 1980; Blumstein et al. 1986; Tracy, Wolfgang, and Figlio 1990). Moreover, as they age, chronic offenders account for an increasingly larger proportion of the total and violent crimes committed by their cohort.

A rational sentencing policy requires integrated and coordinated penal responses to young career offenders on both sides of the current juvenile-adult line, especially when they make the transition between the two systems. Despite the research on criminal careers, however, juvenile and criminal courts' sentencing policies often may work at cross-purposes and frustrate rather than harmonize responses as serious young offenders move between the two systems (Greenwood 1986; Feld 1995). Until the recent amendments of waiver laws, criminal courts typically imposed longer sentences on older offenders because of their cumulative adult prior records even though their current rate of criminal activity was on the wane and sentenced more leniently chronic younger offenders whose rate of criminal activity was increasing or at its peak.

The lenient responses to many young career offenders when they make the transition to criminal courts occur because the criteria for removal from juvenile court and sentencing practices in adult criminal court lack congruence. A number of studies, primarily in jurisdictions that use judicial waiver, examine the sentences that criminal courts impose on transferred juveniles and consistently report a "punishment gap" (Greenwood, Petersilia, and Zimring 1980; Hamparian et al. 1982; Greenwood 1986; Feld 1995; Podkopacz and Feld 1996). The "lack of fit" between waiver decisions and criminal court sentences allowed many chronic and active young criminal offenders to fall between the cracks of the two systems.

Judicial waiver decisions actually involve two somewhat different but overlapping populations of young offenders, older chronic property offenders and violent youths. Criminal courts respond differently to these two types of offender clusters because of the differences in the nature of their present offense. In earlier times, prosecutors filed



waiver motions against less than 2 percent of all delinquents (Nimick, Szymanski, and Snyder 1986). Even though the number of waiver motions increased by 68 percent between 1988 and 1992, they still constituted less than 2 percent of all delinquency petitions. Although prosecutors sought waiver for a larger proportion of youths charged with crimes against the person (2.4 percent) than with property offenses (1.3 percent), because of their numerical predominance, the largest number and proportion of waived juveniles were property offenders (5,200 and 45 percent of all waivers) rather than person offenders (4,000 and 34 percent of all waivers; Snyder and Sickmund 1995). About a decade ago, juvenile court judges transferred only about one-third (34.3 percent) of youths for offenses against the person and waived the largest proportion of juveniles for property crimes such as burglary (40.3 percent; Nimick, Szymanski, and Snyder 1986). Despite the recent rise in violent youth crime, juvenile court judges continued to transfer the largest plurality of youths for property offenses (45 percent) rather than for violent crimes against the person (34 percent; Snyder and Sickmund 1995). Only in 1993, for the first time, did the proportion of waived violent offenders (42 percent) exceed that of property offenders (38 percent; Snyder, Sickmund, and Poe-Yamagata 1996).

The nature of the offenses for which juvenile courts transferred juveniles and their relative youthfulness affected their first criminal court sentences. Although analyses of dispositions of youths tried as adults in several jurisdictions report substantial variation in sentencing practices, a policy of leniency often prevails. Several earlier studies reported that urban criminal courts incarcerated younger offenders at a lower rate than they did older offenders, youthful violent offenders received lighter sentences than did older violent offenders, and for about a two-year period after becoming adults, youths benefitted from informal lenient sentencing policies in adult courts (Twentieth Century Fund 1978; Greenwood, Abrahamse, and Zimring 1984). More recent research reports that juvenile court judges judicially waived primarily older chronic offenders charged with a property felony like burglary rather than with a violent crime (Snyder and Sickmund 1995), and criminal courts subsequently fined or placed on probation most juveniles judicially transferred (Hamparian et al. 1982; Gillespie and Norman 1984; Heuser 1985; Feld 1995). Moreover, criminal court judges imprisoned these transferred youths at lower rates than they did adults convicted of comparable offenses, and many incarcerated juveniles received sentences of one year or less, often shorter than the sentences

juvenile court judges could impose on “deep-end” delinquents (Hamparian et al. 1982; Heuser 1985; Bortner 1986). Podkopacz and Feld (1995, 1996) compared the sentences received by youths tried as adults and those retained in juvenile court in an urban county and found that the juvenile court judges sentenced delinquent property offenders for terms longer than those ordered by their criminal court counterparts.

Other factors also contribute to the justice systems’ failure to sentence persistent young offenders consistently when they make the transition to criminal court. Qualitative differences between juveniles’ and adults’ offenses and youths’ group participation may contribute to the anomalous breach in social control. Juveniles’ crimes may differ qualitatively from those committed by adults even within serious offense categories. Younger offenders may be less likely to be armed with guns, to inflict as much injury, or to steal as much property as adults charged with comparable offenses, and these age-related differences may affect the eventual sentences criminal courts impose (Greenwood, Petersilia, and Zimring 1980; McDermott and Hindelang 1981; Greenwood 1986). In a similar manner, juveniles commit their crimes in groups to a much greater extent than do adult offenders, and criminal court judges typically sentence accessories more leniently than principals (Zimring 1981*b*; Greenwood 1986). Because police arrest juveniles as multiple perpetrators of a single crime more frequently than adults, arrest statistics tend to overstate youths’ contribution to the overall amount of violent crime. Juvenile robberies involve two or more actors about twice as often as do adult robberies (Greenwood, Petersilia, and Zimring 1980). About half of all juveniles arrested for homicide were involved in crimes with more than one criminal actor (Snyder, Sickmund, and Poe-Yamagata 1996). Thus qualitative differences in youths’ offenses or their degree of participation may affect their eventual sentences.

4. *Recent Changes in Waiver Statutes.* State legislatures in the past two decades have extensively modified their transfer laws. Legislatures use offense criteria as a form of sentencing guidelines to limit judicial discretion, to guide prosecutorial charging decisions, or to exclude automatically certain youths from juvenile court jurisdiction (Feld 1987; Snyder and Sickmund 1995; Torbet et al. 1996). These amendments use offense criteria to integrate juvenile transfer and adult sentencing practices and reduce the punishment gap. Waiver statutes that focus on offense seriousness and criminal history, whether committed as a juvenile or an adult, rather than amorphous clinical considerations bet-

ter enable adult courts to respond more consistently to chronic and violent young offenders and to maximize social control of young career offenders. One cannot overemphasize either the amount and scope of legislative activity or the rapidity with which these changes spread (Snyder and Sickmund 1995; U.S. General Accounting Office 1995). Since 1992, forty-eight of the fifty-one states and the District of Columbia have amended provisions of their juvenile codes, sentencing statutes, and transfer laws to target youths who commit chronic, serious, or violent crimes (Torbet et al. 1996). The overarching legislative theme is a shift from the principle of individualized justice to the principle of offense, from rehabilitation to retribution (Feld 1987, 1988b).

*a. Judicial Waiver.* Although judicial waiver remains the predominant method of transfer, about three dozen states recently have amended waiver statutes to reduce their inconsistent application, to lessen intrajurisdiction disparities, and to improve the fit between waiver decisions and criminal sentencing practices (Fristch and Hemmens 1995; Snyder and Sickmund 1995). Lawmakers use offense criteria as a type of sentencing guideline to control judicial discretion, to focus on serious offenders, and to increase the numbers of youths waived. Reflecting these statutory changes, the numbers of youths judicially waived in the United States each year increased by 68 percent between 1988 and 1992, from about 7,000 cases to about 11,700 (Snyder and Sickmund 1995). During this same period, the numbers of youths judicially transferred for violent crimes increased 100 percent, from about 2,000 to 4,000 cases. In 1993, judges transferred about 11,800 juveniles, of whom 5,000 were charged with violent crimes (Snyder, Sickmund, and Poe-Yamagata 1996).

By focusing on serious crimes, often in combination with prior records, these amendments restrict judicial discretion and increase the probabilities that criminal courts will impose significant sentences following waiver. These amendments use offense criteria to limit judicial waiver only to certain serious offenses, to identify certain offenses alone or in combination with prior record for special procedural handling, or to prescribe the dispositional consequences that follow from proof of serious offenses or prior records. Some states use offense criteria to make transfer hearings mandatory for certain categories of offenses or to create a presumption for transfer and to shift to the youth the burden of proof to demonstrate why the juvenile court should retain jurisdiction (Feld 1987, 1995). Other states have enacted "once waived, always waived" provisions so that criminal courts decide

all subsequent cases involving transferred chronological juveniles (Torbet et al. 1996). About twenty states have lowered from sixteen to fourteen or even twelve the age at which judges may transfer youths charged with serious offenses to criminal courts (Fritsch and Hemmens 1995; Torbet et al. 1996). Recent changes also shift the jurisprudential focus of waiver hearings from the offender to the offense. States have rejected amenability to treatment as the waiver criteria in favor of “public safety,” defined on the basis of the present offense, prior record, and the youth’s culpability (Feld 1995).

*b. Offense Exclusion.* Nearly two-thirds of the states now exclude some serious offenses from juvenile court jurisdiction (Snyder and Sickmund 1995; U.S. General Accounting Office 1995). These exclusion statutes typically supplement judicial waiver statutes. While some states exclude only youths charged with capital crimes, murder, or offenses punishable by life imprisonment, others exclude longer lists of offenses or youths charged with repeat offenses (Feld 1987; Snyder and Sickmund 1995). Because most excluded-offense legislation targets serious violent offenses—murder, rape, kidnapping, or armed robbery—youths identified by such provisions face the prospects of substantial sentences if convicted as adults. Since 1992, nearly half the states have expanded the lists of excluded offenses, lowered the ages of eligibility for exclusion from sixteen to fourteen or thirteen years of age, or granted prosecutors authority to direct file more cases in criminal court (Fritsch and Hemmens 1995; U.S. General Accounting Office 1995; Torbet et al. 1996). As a result, increasing numbers of young offenders charged with very serious crimes find themselves automatically in criminal court. However, as legislators expand lists of excluded offenses to encompass less serious crimes or lesser included offenses and lower the ages at which prosecutors may charge youths as adults, they also reduce the certainty that criminal court judges will impose significant adult sentences. Moreover, legislation in several excluded-offense jurisdictions allows criminal court judges to “transfer back” some youths for disposition in juvenile court (Snyder and Sickmund 1995). Because chronological juveniles charged with excluded offenses begin as “automatic adults,” we have virtually no data on the numbers of youths in criminal courts below the general jurisdictional age, the subsequent sentences they receive, or the numbers or dispositions of those youths transferred back to juvenile courts (Snyder and Sickmund 1995; U.S. General Accounting Office 1995).

Under concurrent-jurisdiction statutes, legislatures also grant prose-

cutors more authority to charge youths directly in criminal courts. Again, the number of states that authorize this waiver strategy has more than doubled within the past decade (Feld 1987; Fritsch and Hemmens 1995; Snyder and Sickmund 1995). A few states employ charging guidelines based on the *Kent* criteria or other offense factors to structure prosecutorial direct-file decisions, although most leave the decision to individual prosecutors. As with excluded-offense legislation, we lack extensive data on the numbers of youths against whom prosecutors directly filed in criminal court. However, the U.S. General Accounting office (1995) estimates that prosecutors in some jurisdictions may charge as many as 10 percent of chronological juveniles in adult court. Indeed, by some calculations, prosecutors in Florida alone may direct file as many juveniles into criminal courts in that state as judges waive judicially nationwide (Bishop, Frazier, and Henretta 1989; Bishop and Frazier 1991; U.S. General Accounting Office 1995).

*c. Criminal Court Careers of Targeted Juvenile Offenders.* Judicial waiver statutes that use offense criteria explicitly to target serious violent offenders and laws that grant prosecutors discretion to choose the forum or that exclude violent offenses from juvenile court jurisdiction increase the likelihood that young offenders will receive significant sentences as adults. Recall that until the recent spate of statutory amendments, prosecutors typically charged most judicially waived juveniles with property offenses, not violent crimes, and that criminal courts neither imprisoned most of these adult first offenders nor imposed sentences longer than those available in juvenile courts. The limited research on the adult sentences received by violent youths produces mixed results (Snyder and Sickmund 1995).

Restricting waiver to serious offenses and specifying special procedures apparently increases the likelihood that juvenile courts will waive and that criminal courts will impose significant adult sentences. Several studies examine the sentences that waived or excluded youths receive when tried as adults in jurisdictions that target them as serious offenders and found that their probabilities of significant adult sanctions increased. In 1976, California amended its judicial waiver statute, created a presumption that juvenile courts should waive youths charged with certain serious crimes, and shifted the burden of proof to the juvenile defendant (Cal. Welf. and Inst. Code § 707[b] [1976]; Feld 1981*a*). Initial evaluations indicated that the changes increased the number of youths tried, convicted, and sentenced as adults after being charged with one of the enumerated offenses (Teilmann and Klein n.d.). Crim-

inal court judges in Los Angeles did not sentence juveniles tried as adults more leniently than they did other offenders, the gravity or violence of the crime rather than the age or record of the offender determined the sentence for more serious crimes, and the prior juvenile record influenced the severity of the first adult sentence for marginal crimes like burglary (Greenwood, Petersilia, and Zimring 1980). A study in a northern California county reported that prosecutors filed waiver motions for four presumptive-transfer violent offenses for every one property offense, and judges waived about half the youths. Youths transferred and convicted as adults for crimes against the person received substantially greater punishment based solely on the seriousness of the present offense than did youths retained in juvenile court or transferred as chronic property offenders (Barnes and Franz 1989). As a result of the legislative changes, in 1990 and 1991 California juvenile courts waived the vast majority of youths (85.1 percent) to adult courts for violent offenses (U.S. General Accounting Office 1995).

A number of studies have analyzed prosecutorial waiver practices in Florida. The majority of youths whom prosecutors direct filed in Dade County (Miami), Florida, consisted of older males with multiple felony charges, primarily property crimes (55 percent burglary), and prior delinquency convictions, and criminal courts sentenced approximately two-thirds of them to substantial terms of imprisonment (Thomas and Bilchik 1985). Bishop, Frazier, and Henretta (1989) and Bishop and Frazier (1991) examined a broader sample of Florida direct-file cases and reported that between 1979 and 1987 the percentage of youths transferred increased from 1.29 percent to 7.35 percent of all delinquency petitions, and the proportion of transfers directly filed by prosecutors increased from 48 percent to 88 percent of all waivers. They found that prosecutors charged a majority (55 percent) of direct-file youths with property felonies and less than one-third of youths with crimes against the person. Moreover, as legislative amendments expanded prosecutors' authority to direct file, the proportion of violent offenders transferred actually declined from 30 percent in 1981 to 20 percent in 1984 (Bishop, Frazier, and Henretta 1989). Prosecutors apparently transferred many youths simply because they neared the age jurisdictional limits of juvenile courts. Frazier (1991) compared the characteristics of youths against whom prosecutors direct filed with those retained and confined in the deep end of the juvenile system and found that the latter youths appeared to be more serious offenders than the transferred youths in terms of their present offense, amount and

quality of prior records, and prior correctional dispositions. Bishop et al. (1996) compared the postconviction recidivism of youths whom prosecutors direct filed in 1987 for noncapital or life offenses with a matched sample of retained juveniles and found that, by all measures, the youths whom prosecutors tried as adults did worse—they committed additional and more serious offenses more quickly than did those youths retained in juvenile jurisdiction.

The transfer decision has profound consequences for waived violent youths even though the decision itself lacks any apparent or consistent rationale. A study of the dispositions received by waived and retained youths in four urban sites whom prosecutors charged with a violent offense and who had a prior felony conviction reported that criminal courts incarcerated over 90 percent and imposed sentences five times longer than those given to youths with similar offense characteristics but who remained in juvenile court (Rudman et al. 1986). However, analysts could not identify the factors that juvenile court judges used initially to distinguish between the juveniles whom they waived or retained within this sample of violent youths (Fagan and Deschenes 1990).

A natural quasi-experiment compared young robbery and burglary offenders in New York, whose excluded offenses placed them in criminal court, with a similar sample of fifteen- and sixteen-year-old youths in matched counties in New Jersey whose age and offenses placed them in juvenile courts (Fagan 1995, 1996). The New York criminal courts convicted and incarcerated a somewhat larger proportion of youths, but both justice systems imposed sentences of comparable length. Although burglary offenders in both jurisdictions recidivated at about the same rate, adult robbery offenders in New York reoffended more quickly and at a higher rate than did the juveniles in New Jersey. Criminalizing adolescent crimes provides only symbolic benefits but allows youths to acquire criminal records earlier and thereby receive more severe sentences for subsequent adult offenses (Fagan 1995).

Several studies consistently indicate that criminal courts imprison more often and impose longer sentences on violent youths tried as adults than do juvenile courts. Although violent offenders constituted a small subset of all juveniles judicially waived in Oregon, criminal courts incarcerated 75 percent of the violent juveniles and imposed prison sentences in excess of six years (Heuser 1985). In Hennepin County (Minneapolis), Minnesota, criminal courts convicted and incarcerated transferred youths at higher rates than juvenile courts did

the retained juveniles (Podkopacz and Feld 1995, 1996). Although juvenile courts imposed longer sentences on young property offenders than did criminal courts, the latter sentenced the violent young adults to terms about five times longer than those received by violent juveniles sentenced as delinquents (Podkopacz and Feld 1996). In Arizona, criminal court judges incarcerated only 43 percent of all transferred juveniles but imprisoned youths convicted of violent crimes almost three times as often as they did youths convicted of other types of offenses (McNulty 1996).

*d. Persistent and Violent Young Offenders.* Waiver laws, in all their guises, appear to confront two somewhat different but overlapping populations of offenders—persistent and violent youths. One group consists of chronic offenders currently charged with property crimes, but whose extensive delinquency histories, prior correctional exposures, and advancing age in relation to juvenile courts' maximum jurisdiction render them eligible for adult prosecution (Podkopacz and Feld 1995; U.S. General Accounting Office 1995). A second group consists of violent offenders. While some violent youths also are chronic offenders, others have less extensive prior records or exposure to juvenile court correctional treatment. Judges appear more likely to waive violent offenders at younger ages than to waive property offenders (Podkopacz and Feld 1995; McNulty 1996). For example, while 71.9 percent of all youths whom Arizona juvenile court judges waived were seventeen years of age, prosecutors charged three-quarters (75 percent) of the youths transferred at age fourteen with violent crimes but only 43.7 percent of the oldest waived juveniles (McNulty 1996).

Because of differences in rates and types of offending by race, laws that target violent offenses for presumptive judicial waiver or for automatic exclusion indirectly have the effect of identifying larger proportions of black juveniles than white youths and exposing them to more severe adult penal consequences. As the number of judicially waived cases increased from 1988 onward and the proportion of violent offenses among waived cases increased, the percentage of black juveniles judicially waived to criminal court increased from 43 percent to 50 percent of all transferred youths. Although juvenile court judges waived an equal proportion of black and white youths (49 percent) in 1989, by 1993 the proportion of waived white youths decreased to 45 percent while black youths made up 52 percent of all waived juveniles (Snyder, Sickmund, and Poe-Yamagata 1996).

The inconsistencies in criminal court sentencing practices—shorter



adult sentences for waived property offenders than for those tried as juveniles and dramatically longer sentences for violent youths tried as adults—reflect jurisdictional bifurcation and the interplay between the differing characteristics of these two types of waived youths. How should both justice systems strike the balance between persistence and seriousness or respond when a youth who commits a serious crime manifestly is a child?

### *B. Criminal Court Processing and Sentencing of Waived and Excluded Juveniles*

The recent changes in waiver laws increase the number of chronological juveniles charged, tried, detained, and sentenced in criminal courts. It is unfortunate that many states amended their waiver statutes without analyzing their systemic effect on various components of the juvenile or criminal justice systems (Torbet et al. 1996). An influx of serious young offenders in criminal courts may impose greater demands on prosecutorial and judicial resources without corresponding increases in criminal justice personnel. In many states, waived juveniles' pretrial detention status remains ambiguous and may result in lengthy confinement pending an appeal by the youth or by a prosecutor if a judge denies a waiver motion (Torbet et al. 1996). During site visits to evaluate conditions of confinement, researchers found "a growing percentage of the detainees were juveniles waiting transfers. These juveniles were often detained for many months, straining the capacity of the [detention] centers, which were designed for short-term confinement, to provide effective programming" (Parent et al. 1997, p. 3). In a similar manner, as criminal courts impose more severe sentences on young offenders, prison populations may increase without any corresponding increases in bed space or age-appropriate programs.

Despite legislative efforts to transfer more youths to criminal courts, surprisingly few analysts compare the rates of conviction or sentences of waived or excluded youths with those of retained juveniles or similar adult defendants. The few studies of waived juveniles' conviction rates in criminal courts suggest that criminal courts convict them at higher rates than do juvenile courts and perhaps more readily than they do other adult defendants (U.S. General Accounting Office 1995). Of course, these findings may reflect prior prosecutorial and judicial screening decisions and the sample selection bias of youths waived to criminal court. Fagan (1995, 1996) reports that criminal courts convicted youths charged with robbery at a significantly higher rate than

did juvenile courts. Podkopacz and Feld (1995, 1996) reported higher rates of conviction and some type of incarceration for waived youths in criminal courts than for those retained in juvenile courts. The U.S. General Accounting Office (1995) analyzed conviction rates of waived youths in seven states and found that, although conviction rates varied from state to state and by type of offense, criminal courts convicted waived juveniles at about the same rates as other young adult offenders.

Adult criminal courts sentence waived young offenders primarily on the basis of the seriousness of their present offense. The emphasis on the present offense reflects ordinary criminal sentencing practices as well as the failure to include juvenile convictions systematically in young adults' criminal histories. As a result, criminal courts often sentence violent and persistent young offenders significantly differently. The former may receive substantial sentences of imprisonment, including life without parole or the death penalty. As noted above, many studies report that waived violent youths receive sentences four or more times longer than do their retained juvenile counterparts. Moreover, violent youths often receive these disparate consequences simply because judges or prosecutors idiosyncratically or legislators arbitrarily decided to try them as adults rather than as juveniles. Persistent offenders, by contrast, often receive more lenient sentences as adult first offenders than do their retained juvenile counterparts. Young property offenders sentenced in criminal court benefit from the comparative leniency accorded to property offenders generally, to younger offenders specifically, and to those without substantial adult prior criminal histories. As a result, chronic property offenders sentenced as juveniles often receive longer sentences than youths whom judges waived because they were not amenable to treatment or posed a threat to the community.

1. *Use of Juvenile Records to Enhance Youths' Criminal Sentences.* Juvenile and adult criminal courts' failure to maintain centralized repositories of offenders' prior records of arrests and convictions or to integrate them across both justice systems may frustrate sentencing of persistent career offenders when they make the transition between the two systems. Although extensive juvenile criminality provides the most reliable indicator of the onset of a criminal career, the failure to combine criminal histories across both systems creates a disjunction that "serious offenders can exploit to escape the control and punishment their chronic or violent offenses properly deserve" (Farrington, Ohlin,

and Wilson 1986, p. 126). Criminal courts often lack access to the juvenile component of offenders' criminal histories because of the confidentiality of juvenile court records, the functional and physical separation of juvenile and criminal court staff who must collate and combine these records, sheer bureaucratic ineptitude, and the difficulty of maintaining an integrated system to track offenders and compile complete criminal histories across both systems (Petersilia 1980; Greenwood 1986). The juvenile court practice of sealing or purging records to avoid stigmatizing offenders impedes the use of juvenile court records to identify young career offenders and to enhance their subsequent sentences.

Despite the traditional confidentiality of and restricted access to juvenile courts records, states increasingly use prior juvenile convictions to enhance adult sentences (Miller 1995; Torbet et al. 1996). Several states' sentencing guidelines and the United States Sentencing Commission's guidelines include some juvenile prior convictions in an adult defendant's criminal history score (Feld 1995; *U.S. Sentencing Guidelines Manual* § 4A1.2 [1995]). Under California's three-strikes sentencing law, a juvenile adjudication can constitute a prior felony conviction for purposes of sentence enhancements (Cal. Penal Code § 667[d][3] [1994]). A survey of state statutes reports that about half of the states systematically consider juvenile records in setting adult sentences (Miller 1995). Sentencing judges often assert the importance of access to defendants' prior records of juvenile convictions (e.g., *United States v. Davis*, 48 F.3d 277, 280 [7th Cir. 1995]).

Some states include the juvenile record as a discretionary factor to consider when available while others formally include some component of a juvenile record in calculating a youth's criminal history score (Miller 1995). Most states' sentencing guidelines weight juvenile prior offenses less heavily than comparable adult convictions and include, for example, only juvenile felonies committed after age sixteen (Feld 1981a, 1995). However, a few states do not distinguish qualitatively between juvenile and adult prior convictions and include both equally in an offender's criminal history score (e.g., Kan. Stat. Ann. § 21-4170[a] [1995]).

States' expanded uses of juveniles' prior records to integrate the justice systems' responses to career offenders and to enhance the sentences of young adult offenders raise sometimes troubling issues in light of the quality of procedural justice by which juvenile courts obtain those original convictions. Juvenile courts in some states may adju-

dicating as many as half of all youths delinquent without the assistance of counsel (Feld 1988a, 1989, 1993b), and most states deny juveniles access to a jury trial (Feld 1984, 1995). The Supreme Court denied juveniles a constitutional right to a jury trial in juvenile courts because delinquents supposedly received treatment rather than punishment (*McKiver*, 403 U.S. 528 [1971]; Feld 1995). States use those delinquency convictions obtained with less stringent procedures to *treat* youths as juveniles in order subsequently to *punish* them more severely as adults (*United States v. Williams*, 891 F.2d 212 [9th Cir. 1989]). The courts reason that the subsequent use for enhancement of a conviction valid at the time it was obtained does not violate due process (*United States v. Johnson*, 28 F.3d 151 [D.C. Cir. 1994]). However, it does seem contradictory to provide youths with less procedural justice in the name of rehabilitation and then to use those convictions to sentence them more severely as adults. Although rational sentencing policy supports systematic use of juvenile records of convictions, justice and fairness require adult criminal procedural safeguards to assure the quality and legitimacy of their use.

The increased use of juvenile court records to enhance criminal sentences reflects a more widespread erosion of confidentiality in juvenile court proceedings. Recent juvenile code amendments increase public access to juvenile court proceedings, expand centralized repositories of juveniles' fingerprints and arrest records, and broaden the dissemination of information about juvenile delinquency adjudications (Torbet et al. 1996). Between 1992 and 1995, ten states expanded public access to delinquency proceedings; now nearly half of all states permit or require public access to juvenile proceedings involving youths charged with violent, serious, or repeat offenses (Torbet et al. 1996). About half the states maintain a central repository to hold juvenile arrest and disposition records (Miller 1995). Forty-six states and the District of Columbia allow police to fingerprint juveniles for at least some types of offenses (Miller 1995; Torbet et al. 1996). States increasingly authorize information sharing among juvenile courts, law enforcement, schools, and youth-serving agencies to coordinate services and social control (Torbet et al. 1996).

2. *Proportionality and Capital Punishment.* Waiver of youths to criminal courts for sentencing as adults implicates legal and cultural understandings of juveniles' criminal responsibility. For example, waiver legislation that excludes capital offenses from juvenile court jurisdiction exposes some youths to the possibility of execution for of-

fenses they committed as juveniles (Streib 1987). Imposing sentences of life without parole on waived youths for crimes they committed at thirteen or fourteen years of age and executing them for crimes they committed at sixteen or seventeen years of age challenges the social construction of adolescence and the idea that juveniles are less criminally responsible than adults.

Questions about young people's criminal responsibility arise in the broader contexts of differing views about culpability and deserved punishments, tensions between retributive and utilitarian sentencing policies, and ambiguities concerning the social and legal construction of childhood. Laws that expose children to mandatory life terms or to the death penalty constitute a political and cultural judgment that young people may be just as blameworthy and culpable as their somewhat older counterparts (Van den Haag 1975).

*a. The Death Penalty.* Both historically and at present, some states have executed people for crimes committed while they were children (Streib 1987). States have executed nearly three hundred people for crimes committed as chronological juveniles, and courts currently impose about 2 percent of death penalties on minors (Streib 1987). Since the reinitiation of capital punishment in 1973 after *Furman v. Georgia*, 408 U.S. 238 (1972), states have executed nine offenders for crimes they committed as juveniles, six since 1990 (Streib 1995). During this period, judges have pronounced death sentences on 140 offenders for crimes committed as juveniles, or 2.6 percent of all capital sentences (Streib 1995).

The Supreme Court considered the culpability of young offenders on several occasions in the 1980s in the context of death penalty litigation. In *Thompson v. Oklahoma*, 486 U.S. 815 (1988), the Court pondered whether a state violated the Eighth Amendment prohibition on cruel and unusual punishments by executing an offender for a heinous murder he committed when he was fifteen years old. A plurality of the Court overturned the capital sentence and concluded that "a young person is not capable of acting with the degree of culpability [as an adult] that can justify the ultimate penalty" (*Thompson*, 486 U.S. at 823 [1988]). The following year in *Stanford v. Kentucky*, 492 U.S. 361 (1989), a different plurality upheld the death penalty for murders committed by juveniles sixteen or seventeen years of age at the time of their offense. Of the thirty-eight states that authorize the death penalty, twenty-one states allow the execution of offenders for crimes committed at age sixteen, and an additional four permit their execution

for crimes committed at age seventeen (Streib 1987, 1995; Snyder and Sickmund 1995). Thus *Stanford* left to state legislatures the task of formulating a death penalty sentencing policy for older juveniles.

*b. Proportionality and Youthfulness.* The Supreme Court gives even greater constitutional deference to states' sentencing policy decisions outside of the context of capital punishment, upholds mandatory life sentences even for drug crimes, and eschews proportionality analyses (*Harmelin v. Michigan*, 111 S. Ct. 2680 [1991]). The Court's deference to states' criminal policy judgments grants state legislatures virtually unreviewable authority to prescribe penalties for crimes. The Court's rejection of proportionality as a constitutional limit on states' criminal sentences has special significance for juveniles tried as adults. Sound bites of contemporary politics—"adult crime, adult time" or "old enough to do the crime, old enough to do the time"—convey current youth sentencing policy. Many of the most serious crimes for which criminal courts convict youths carry substantial sentences, mandatory minima, or even life without parole. Exclusion statutes without minimum age restrictions expose even very young offenders to such harsh penalties. Although section 5H.1 of the federal sentencing guidelines explicitly rejects youthfulness as a justification to mitigate sentences outside of the guidelines range, several state laws recognize youthfulness as a mitigating factor. These statutes typically enumerate mitigating factors that include some recognition of youthfulness.<sup>1</sup> Under such aggravating-mitigating sentencing laws, trial court judges regularly consider youthfulness both de jure and de facto; appellate courts remand them for resentencing if they do not (e.g., *State v. Strunk*, 846 P.2d 1297 [Utah 1993]). However, states that recognize youthfulness as a mitigating factor simply treat it as one element to weigh with other factors when sentencing (*State v. Adams*, 864 S.W.2d 31 [Tenn. 1993]).

In most jurisdictions, whether a trial judge treats youthfulness as a mitigating factor rests within his or her sound discretion, and failure to exercise leniency does not constitute reversible error or an abuse of discretion. Appellate courts regularly affirm mandatory sentences of life without parole for thirteen-year-old juveniles convicted as adults and reject any special consideration of the youth's age (e.g., *State v. Massey*, 803 P.2d 340 [1990]; *State v. Furman*, 858 P.2d 1092 [1993]).

<sup>1</sup> Typical mitigating factors include "the defendant's age, immaturity, or limited mental capacity" (N.C. Gen. Stat. § 15A-1340.16[e][4]), "the defendant was too young to appreciate the consequences of the offense" (Fla. Stat. § 921.0016[4][k]), or simply "the youth of the offender at the time of the offense" (La. Stat. § 905.5[f]).

In a singular exception, the Nevada Supreme Court ruled that a mandatory term of life without parole imposed on a fourteen-year-old convicted of murder constituted cruel and unusual punishment under the state constitution (*Naovarath v. State*, 779 P.2d 944 [Nev. Sup. Ct. 1989]). Because the waiver statute excluded murder from juvenile court jurisdiction without any minimum age restriction (Nev. Rev. Stat. § 62.040 [1979]), the Nevada court held that there must be some very young age at which a criminal sentence of life without parole would constitute a cruel and unusual punishment (*Naovarath*, 779 P.2d 944 [1989]). The court concluded that even for the most serious crimes, a sentence of life without parole constituted a disproportionately cruel and unusual penalty because of “the undeniably lesser culpability of children for their bad actions, their capacity for growth and society’s special obligation to children” (*Naovarath*, 779 P.2d at 948 [1989]). Although the Nevada court affirmed proportionality analyses and juveniles’ reduced culpability, it provided virtually no practical protections or limitation on the legislature’s power to prescribe severe penalties for youths. By a three to two vote, the court held only that, in order to pass state constitutional muster, a youth must receive a parole hearing at some time in the distant future.

3. *Correctional Consequences of Sentencing Youths as Adults.* As a result of recent changes in waiver laws, criminal courts sentence increasing numbers of youths to adult correctional facilities. It is unfortunate that we lack reliable data on the number of incarcerated juveniles because most states do not classify young inmates on the basis of the process that brought them to prison. Many youths who committed their crimes as chronological juveniles may be adults by the time courts have waived, convicted, and sentenced them to prison. Because of the recency of many changes in waiver statutes, correctional administrators have not yet fully experienced the population or programming implications of these policy changes.

A 1991 survey of state correctional administrators reported that convicts seventeen years old or younger constituted less than 1 percent of 712,000 prisoners but did not distinguish between waived or excluded youths and those in states in which juvenile court jurisdiction ended at fifteen or sixteen years of age (U.S. General Accounting Office 1995). Another recent survey reported that offenders younger than eighteen years of age constituted about 2 percent of new court commitments to prisons in thirty-five states and the Federal Bureau of Prisons and that about three-quarters of those youths were seventeen at the time of

their confinement (Snyder and Sickmund 1995). In 1993, criminal courts sentenced about 5,200 youths seventeen years old or younger to adult prisons (Parent et al. 1997).

Recall that criminal courts sentenced juveniles waived for property and for violent crimes differently as adults and that recent waiver legislative amendments increasingly target violent youths. As a result, among persons sentenced to prison, a substantially larger proportion of younger offenders are committed for violent crimes than is true for adult prison commitments. For example, for violent crimes of youths under age eighteen sentenced to prison, 50 percent had been convicted of violent crimes, compared with 29 percent of adults admitted to prison. The percentages of youths committed to prison who had been convicted of serious violent crimes exceeded the proportions for sentenced adults for murder (7 percent vs. 3 percent), robbery (22 percent vs. 10 percent), and assault (13 percent vs. 8 percent). Moreover, because of the disparities in rates of violent offending by race, criminal courts sentenced a majority of black youths (54 percent) to prison for violent offenses and a majority of white youths (57 percent) for property crimes. Because of the differences in lengths of sentences imposed for violent and property offenses, racial disparities in prison inmate populations will grow over time.

The infusion of juvenile offenders poses a challenge to corrections officials to develop more programming and age-appropriate conditions of confinement for young or more vulnerable inmates (Torbet et al. 1996). Adult correctional administrators anticipate "increased pressure on an already burdened state corrections system" (LIS 1995, p. 2). Half the agencies responding to a recent survey expect increases of 10 percent or more, and a quarter expected increases of more than 50 percent in their inmate population under age eighteen over the next five years (LIS 1995).

Subject to variations in state laws and available facilities, correctional options for handling juveniles include straight adult incarceration with minimal differentiation between juveniles and adults other than routine classification of inmates by age, offense, size, or vulnerability; graduated incarceration in which youths begin their sentences in a juvenile or separate adult facility and then serve the remainder of their sentence in the adult facility; or age-segregated incarceration either in separate facilities within the prison or in separate youth facilities for younger adults (LIS 1995; Torbet et al. 1996). Recent analyses of correctional policies reported that nearly all states confine juveniles sen-



tenced as adults in adult correctional facilities either with younger adult offenders or in the general population if the juvenile is of a certain age, for example, sixteen (Torbet et al. 1996). "In 1994, thirty-six states dispersed young inmates in housing with adult inmates (half as a general practice and half only in certain circumstances). Nine states housed young inmates with those ages eighteen to twenty-one but not with older inmates. Only six states never housed young inmates with people eighteen and older; they either have transferred young inmates to their state juvenile training schools until they reached the age of majority or have housed them in segregated living units within an adult prison" (Parent et al. 1997, p. 5). Prison officials generally regarded juveniles convicted in criminal courts as adults and employed the same policies, programs, and conditions of confinement for waived youths as for other adult inmates (U.S. General Accounting Office 1995). A few states house younger criminal offenders in facilities separate from adults. A one-day count on June 30, 1994, reported approximately 250 inmates ages thirteen to fifteen and 3,100 ages sixteen to seventeen housed in separate adult correctional facilities (Torbet et al. 1996).

The influx of younger offenders poses management, programming, and control challenges for correctional administrators. Young peoples' dietary and exercise needs differ from those of older inmates (Parent et al. 1997). Younger inmates may engage in more institutional misconduct, and management techniques appropriate for adults may be less effective when applied to juveniles. Evaluations of the prison adjustment of serious or violent youthful offenders are mixed. A few states report that young offenders pose special management problems or commit more disciplinary infractions than do older inmates while other states report few differences (LIS 1995). One systematic study of the prison adjustment of young offenders in Texas compared a sample of waived youths convicted of violent crimes committed before the age of seventeen with a matched sample of incarcerated inmates ages seventeen to twenty-one at the time of their offenses (McShane and Williams 1989). The waived violent youths adapted less well, experienced more difficulty adjusting to institutional life, accumulated more extensive disciplinary histories, earned less good time, and received higher custody classifications (McShane and Williams 1989).

### III. Sentencing in the Juvenile Justice System

The jurisprudential and policy shifts that altered waiver policies also affect the sentences that juvenile court judges impose on serious delin-

quents (Feld 1988*b*; Torbet et al. 1996). Some changes represent symbolic responses, like relabelling “dispositional” hearings as “sentencing” hearings (Idaho Stat. § 20-520 [1995]) or renaming a “department of youth treatment and rehabilitation” as a “department of juvenile corrections” (Ariz. Code § 8-241 [1995]). It is ironic that *Gault*’s extension of procedural rights legitimated the imposition of more severe sanctions by providing delinquents with a veneer of due process.

For the Supreme Court in *McKeiver*, the differences between juvenile treatment and criminal punishment provided the primary rationale to deny jury trials in delinquency proceedings and to maintain a juvenile court separate from the adult system (Gardner 1982; Feld 1988*b*). Although most people readily understand that punishment involves involuntary and coerced loss of personal liberty or autonomy because a person committed a crime (Hart 1968), those elementary features eluded the Supreme Court in *McKeiver*. Rather, the indeterminate and nonproportional length of juvenile dispositions and the “eschewing [of] blameworthiness and punishment for evil choices” satisfied the Court that “there remained differences of substance between criminal and juvenile courts” (*McKeiver*, 403 U.S. at 551–52).

Perhaps the Court’s failure to distinguish between treatment and punishment stemmed from its own constitutional uncertainty about the conceptual differences between the two. Maybe it refrained from systematically analyzing the differences because it realized that, practically, none might exist for youths charged with crimes. Perhaps, more charitably, the Court possessed less information about juvenile justice reality than we do today. The President’s Commission on Law Enforcement and Administration of Justice (1967*a*, 1967*b*) had only begun to reveal the bankruptcy of juvenile courts’ treatment ideology when the landmark juvenile court decisions were made.

This section analyzes juvenile sentencing laws and policy, judicial administration, and correctional practices. Statutes and practices that base a youth’s sentence on past conduct—present offense or prior record—typically impose determinate and proportional, or mandatory minimum, sanctions for purposes of retribution or deterrence. Statutes and practices that sentence offenders to improve their future welfare—diagnoses or predictions about the effects of intervention on a person’s future conduct—typically impose indeterminate and nonproportional dispositions for purposes of rehabilitation or incapacitation. Many states have recently enacted determinate and mandatory minimum statutes to regulate judicial sentencing discretion, to enhance the cer-

tainty and predictability of juvenile sanctions, and to displace rehabilitative, indeterminate sentences with more punitive ones (Feld 1988*b*). In practice, a youth's present offense and prior record dominate juvenile court sentencing decisions. Evaluations of juvenile court sentencing practices, treatment effectiveness, and conditions of confinement reveal increasingly punitive juvenile court and corrections systems. These various indicators strongly suggest that despite juvenile courts' persisting rehabilitative rhetoric, the reality of *treating* juveniles closely resembles *punishing* adult criminals. This jurisprudential and administrative convergence erodes *McKeiver's* constitutional rationale and the justifications for a separate criminal system for young offenders.

### A. Punishment and Treatment

Most states' juvenile court statutes contain a purposes clause or preamble that articulates the underlying rationale of the legislation to aid courts in interpreting the statutes (Walkover 1984; Feld 1988*b*). The traditional purpose of juvenile courts was benevolent: "to secure for each minor . . . such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" (Ill. Ann. Stat. chap. 37, paras. 701–2 [Smith-Hurd 1972]) and to remove "the taint of criminality and the penal consequences of criminal behavior, by substituting therefore an individual program of counseling, supervision, treatment, and rehabilitation" (N.H. Rev. Stat. Ann. § 169-B:1 II [1979]). In the decades since *Gault* and *McKeiver*, however, more than one-quarter of the states have revised their juvenile codes' statement of legislative purpose, deemphasized rehabilitation and the child's best interest, and asserted the importance of public safety, punishment, and accountability in the juvenile justice system (Feld 1988*b*).<sup>2</sup> Some courts recognize that these changes signal basic changes in philosophical direction and acknowledge that "punishment" constitutes an acceptable purpose of juvenile courts' dispositions. In *State v. Lawley*, the Washington Supreme Court reasoned in Orwellian fashion that "sometimes punishment is treatment" and upheld the legislature's conclusion that

<sup>2</sup> States' redefined juvenile code purposes include objectives such as "the protection and safety of the public" (Cal. Welf. & Inst. Code § 202 [West Supp. 1988]), "the application of sanctions which are consistent with the seriousness of the offense" (Fla. Stat. Ann. § 39.001[2][a] [West Supp. 1988]), to "render appropriate punishment to offenders" (Haw. Rev. Stat. § 571-1 [1985]), and to "promote public safety [and] hold juvenile offenders accountable for such juvenile's behavior" (Kan. Stat. § 38-1601 [1997]).

“accountability for criminal behavior, the prior criminal activity and punishment commensurate with age, crime, and criminal history does as much to rehabilitate, correct, and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile” (91 Wash. 2d at 656–57, 591 P.2d at 773 [1979]). In a similar manner, the Nevada Supreme Court endorsed punishment as an appropriate function of juvenile courts. “By formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses juvenile courts will be properly and somewhat belatedly expressing society’s firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population” (*In re Seven Minors*, 99 Nev. at 432, 664 P.2d at 950 [1983]).

1. *Juvenile Court Sentencing Statutes and Dispositional Practices.* Originally, juvenile courts fashioned indeterminate and nonproportional sentences to meet the child’s real needs (Mack 1909; Rothman 1980). In principle, a youth’s offense constituted only a diagnostic symptom, and treatment personnel released the offender once they determined that rehabilitation had occurred. By contrast, when courts punish offenders, they typically impose determinate or mandatory sentences based on the gravity of the past offense. Contrasting indeterminate, nonproportional, and offender-oriented dispositions with determinate, proportional, and offense-based sentences provides another indicator of juvenile courts’ increasing reliance on punishment as a response to delinquency.

*a. Indeterminate and Determinate Sentences.* Most states’ juvenile codes authorized courts to impose indeterminate sentences because penal therapists cannot predict in advance the course or duration of treatment necessary to attain success (Mack 1909; Ryerson 1978; Rothman 1980). While some statutes instruct judges to consider the “least restrictive alternative,” most allow the court to confine a delinquent within a range for a period of years or until the offender reaches the age of majority or some other statutory limit (Feld 1988*b*). Traditionally, juvenile court judges exercised virtually unrestricted discretion to dismiss, place on probation, remove from home, or institutionalize a youth.

In many states, once a judge sentences a youth to the state’s juvenile correctional agency, the judge loses authority over the youth, and the correctional authority or parole board determines when to release the juvenile (Krisberg and Austin 1993). Indeterminate sentencing statutes typically provide for an unspecified period of confinement and a wide

range between the minimum and maximum terms available. Corrections officials base their release decisions, in part, on youths' behavior during confinement and progress toward rehabilitative goals rather than on formal standards or the committing offense (Coates, Forst, and Fisher 1985).

By contrast, when judges sentence juveniles under a determinate or presumptive sentencing framework, they typically impose proportional sanctions within a relatively narrow dispositional range based on the seriousness of the offense, offense history, and age. In several states, courts impose mandatory minimum sentences based on the offense for which they convicted the youth. In other states, correctional administrators determine youths' presumptive length of institutional stay or eligibility for parole shortly after their commitment based on formal standards that prescribe terms proportional to the seriousness of the offense or prior record (Coates, Forst, and Fisher 1985).

Currently, nearly half of the states use some type of determinate or mandatory minimum offense-based sentencing provisions to regulate aspects of juvenile dispositions, institutional commitment, or release (Sheffer 1995; Torbet et al. 1996). As with legislative changes in waiver statutes, amendments to juvenile court sentencing statutes allocate to the judicial, legislative, and executive branches the power to make institutional commitment and release decisions (Guarino-Ghezzi and Loughran 1996). Determinate sentencing provisions restrict judicial sentencing discretion, mandatory minimum statutes reflect legislative sentencing decisions, and correctional or parole release guidelines enable the executive branch to determine lengths of confinement. And, as with waiver, these provisions use offense criteria to rationalize sentencing decisions, to increase the penal bite of juvenile court sanctions, and to enable legislators symbolically to demonstrate their "toughness" regardless of the effect on juvenile crime rates (Altschuler 1994). It is difficult to attribute the various statutory responses exclusively to youth violence, but rather to the political "felt need" to punish serious and persistent offenders.

*b. Determinate Sentences in Juvenile Courts.* In 1977, the state of Washington departed dramatically from traditional rehabilitative dispositions, revised its juvenile code to emphasize "just deserts," and became the first state to enact a determinate sentencing statute for delinquents (Schneider and Schram 1983; Castellano 1986). The Washington law used presumptive sentencing guidelines to achieve offender and system accountability and based youths' sentences on the

seriousness and persistence of their offending rather than their real needs. The Washington guidelines created three categories of offenders—serious, middle, and minor—and imposed presumptive, determinate, and proportional sentences based on a juvenile's age, present offense, and prior record (Fisher, Fraser, and Forst 1985). The statute provided standard dispositional ranges that include both upper and lower limits, specified aggravating and mitigating factors for sentencing within the range, and allowed a judge to depart from the standard range only when imposing the presumptive sentence would result in a manifest injustice. The guidelines prohibited confinement of a first or minor offender and provided that serious offenders serve sentences ranging from 125 weeks to three years. The Washington code revisions significantly increased the proportionality of sentences and produced a stronger relationship between the seriousness of youths' offenses and their lengths of institutional stay than prevailed under the previous, indeterminate regime (Schneider and Schram 1983; Fisher, Fraser, and Forst 1985). Despite greater equality and uniformity in sentencing, social structural and geographic variations continued to produce higher rates of referral and confinement for minority youths than for white delinquents (Bridges et al. 1995).

Other jurisdictions also employ offense-based sentencing principles in juvenile courts. In New Jersey, juvenile court judges consider offense, criminal history, and statutory aggravating and mitigating factors to sentence juveniles (New Jersey Juvenile Delinquency Disposition Commission 1986; N.J. Stat. Ann. §§ 2A:4A-43[a], 4A-44[a], 4A-44[d] [West 1993]). Recently, Oklahoma adopted a serious and habitual juvenile offender law that targets violent youths and those persistent offenders with three separate felony adjudications and creates a mechanism to develop determinate sentencing guidelines (Okla. Stat. Ann. tit. 10 § 7303.5.3 [West. 1995]). In 1994, the Arizona legislature mandated the Arizona Supreme Court to promulgate dispositional guidelines that focused on the seriousness of a youth's present offense and prior record in order to regularize judges' institutional commitment decisions (McNulty and Russell 1995). In 1996, Texas adopted "progressive sanctions guidelines" to "ensure . . . uniform and consistent consequences and punishments that correspond to the seriousness of each offender's current offense, prior delinquent history . . . [and] balance public protection and rehabilitation while holding juvenile offenders accountable" (Tex. Fam. Code Ann. § 59.001 [Vernon Supp. 1996]). The Texas guidelines assign a youth to one of seven

sanction levels based on the seriousness of the offense and attach dispositional consequences to each severity level. For some proponents of a more traditional rehabilitative juvenile court, concepts like “progressive sanctions” or “graduated sanctions” represent an effort to enlist punitive principles like determinacy and proportionality in the service of treatment goals (Wilson and Howell 1995). Combining “risk assessment” with “needs assessment” permits immediate, intermediate, and increasing intervention based on seriousness and persistence (Krisberg et al. 1995).

*c. Legislative Sentencing Decisions—Mandatory Minimum Terms of Confinement.* Nearly half (twenty-two) of the states use some type of offense-based guidelines to regulate judicial sentencing discretion. These statutes typically include age and offense criteria to define serious or persistent offenders and prescribe their sentences (Sheffer 1995). Juvenile codes in a number of states allow or require judges to impose mandatory minimum sentences for certain serious crimes or designated felonies (Feld 1988*b*; Sheffer 1995). Under some laws, judges retain discretion whether or not to impose the mandated sanctions, whereas others require a judge to commit a youth convicted of a defined offense for the mandatory minimum period (Feld 1988*b*; Torbet et al. 1996). In Delaware, for example, judges “shall” sentence any youth convicted of any second felony within one year to a minimum term of six months confinement (Del. Code. tit. 10 § 1009).

While states’ nomenclatures differ, these mandatory minimum sentencing laws typically apply to “violent and repeat offenders,” “mandatory sentence offenders,” “aggravated juvenile offenders,” “habitual offenders,” “serious juvenile offenders,” or “designated felons” (e.g., Ala. Code § 12-15-71.1 [1990]; Colo. Rev. Stat. § 19-1-103 [1993]; Feld 1988*b*). The statutory criteria target those violent and persistent juvenile offenders over whom juvenile courts do not waive jurisdiction either because of their youthfulness or lesser culpability. Youths charged with violent crimes like murder, rape, robbery, aggravated assault or those who have prior felony convictions constitute the primary legislative concerns. Recent amendments add to these lists of serious offenders youths charged with crimes involving firearms or who commit violent or drug crimes on school grounds (e.g., Ark. Stat. § 9-27-330[c] [1989]). And, as with changes in waiver laws, the rate of legislative change accelerates. “Since 1992, fifteen states and the District of Columbia have added or modified statutes that provide for a manda-

tory minimum period of incarceration of juveniles committing certain violent or other serious crimes” (Torbet et al. 1996, p. 14).

Most of these mandatory minimum sentencing statutes target youths similar to or only somewhat less serious or younger than those considered eligible for waiver or exclusion to criminal court. In the event that juvenile courts retain jurisdiction over serious young offenders, legislators use mandatory minimum sentences to assure that judges and corrections officials confine these youths for significant terms. For youths convicted of these serious offenses, the statutes prescribe mandatory minimum terms of confinement that range from twelve to eighteen months, to age twenty-one, or to the adult limit for the same offense (Feld 1988*b*). For example, in Georgia, juvenile court judges may sentence a youth convicted of a designated felony to the Department of Youth Services for a term of five years with a minimum period of confinement of twelve months or eighteen months, depending on the offense, in a “youth development center” (Ga. Code § 15-11-37[2] [1994]). In 1990, Alabama enacted a serious juvenile offender law that provided mandatory minimum sentences—“shall be committed”—for youths convicted of a Class A felony or felonies involving physical injury or the use of a firearm (Ala. Code § 12-15-71.1[a] and [b] [1990]). In 1993, Louisiana enacted a mandatory sentencing statute that targeted youths convicted of violent felonies, for example, rape, kidnapping, and armed robbery, and provided that the juvenile “court *shall commit* the child . . . [to] *a secure detention facility* until the child attains the age of twenty-one years *without benefit* of parole, probation, suspension of imposition or execution of sentence” (emphasis added; La. Children’s Code art. 897.1 [1993]). Regardless of the statutory details, mandatory minimum sentences based on youths’ serious or persistent offending preclude individualized consideration of their real needs. Moreover, mandating extended minimum terms of confinement for serious offenders increases the average length of stay, increases institutional populations, and exacerbates overcrowding (Krisberg and Austin 1993).

*d. Executive Sentencing Decisions—Correctional or Parole Release Guidelines.* A number of states’ departments of corrections have adopted administrative security classification and release guidelines that use offense criteria to specify proportional or mandatory minimum terms of institutional confinement (Forst, Friedman, and Coates 1985; Feld 1988*b*). These guidelines constitute still another form of



offense-based sentencing. Unlike presumptive or mandatory sentencing statutes that attempt to regulate judicial sentencing discretion, administrative or parole guidelines affect only those youths whom judges commit to state correctional agencies. Except when constrained by presumptive or mandatory minimum sentencing statutes, judges in most states retain discretion over the “in-out” decision whether to commit a youth.

The Arizona legislature required its department of corrections to adopt length of confinement guidelines; the agency created five categories based on the seriousness of the commitment offense and specified mandatory minimum terms that range in length from three to eighteen months to govern juvenile release decisions (Arizona Department of Corrections 1986; Ariz. Rev. Stat. Ann. § 8-241 [1987]). Minnesota’s department of corrections adopted determinate length of stay guidelines based on the present offense and other risk factors, such as the prior record and probation or parole status (Minnesota Department of Corrections 1980; Feld 1995). Georgia’s Division of Youth Services employs a “uniform juvenile classification system” that classifies committed delinquents into one of five categories of “public risk” with corresponding correctional consequences primarily based on the seriousness of the present offense (Forst, Friedman, and Coates 1985). The California Youthful Offender Parole Board decides the release eligibility of juveniles committed to the Youth Authority on the basis of a seven category scale of offense seriousness (Forst and Blomquist 1991). Other states use similar offense-based classification systems to determine institutional lengths of stay and security levels of committed youths (Guarino-Ghezzi and Loughran 1996). All of these *de jure* sentencing provisions—determinate as well as mandatory minimum laws and correctional as well as parole release guidelines—share the common feature of offense-based dispositions. They represent different strategies to relate the duration and intensity of a youth’s sentence to the seriousness of the offense and prior record.

2. *Empirical Evaluations of Juvenile Court Sentencing: Principle of Offense and Racial Disparities.* Several actors in the juvenile justice process—police, intake social workers, detention personnel, prosecutors, and judges—make dispositional decisions; their decisions cumulate and affect the judgments that others make subsequently (McCarthy and Smith 1986; Bishop and Frazier 1988). Juveniles’ prior records reflect the discretionary decisions that people in the justice process make over time, and previous dispositions affect later sentences (Hen-

retta, Frazier, and Bishop 1986). Despite recent changes in sentencing laws, juvenile court judges exercise greater sentencing discretion than do criminal court judges because juvenile courts' *parens patriae* ideology still presumes a need to look beyond the offense to the child's best interests.

Within this flexible dispositional process, minority youths are disproportionately overrepresented at every stage of the juvenile justice process (Krisberg et al. 1987; Pope and Feyerherm 1990*a*, 1990*b*). An analytic review of the juvenile court sentencing research literature concluded that "there are race effects in operation within the juvenile justice system, both direct and indirect in nature" (Pope and Feyerherm 1992, p. 41). Studies consistently report racial disparities in case processing after controls for offense variables, that inequalities occur at various stages of the process in different jurisdictions, and that discriminatory decisions amplify minority overrepresentation as youths proceed through the system (e.g., Bishop and Frazier 1996).

The discretion inherent in a *parens patriae* system raises concerns that the cumulative effect of individualized decisions contributes to the substantial overrepresentation of minority youths (McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987; Krisberg et al. 1987; Kempf-Leonard, Pope, and Feyerherm 1995). What methodologists call sample selection bias others might view as racial discrimination. Quite apart from overt discrimination, juvenile justice personnel may view black youths as more threatening or more likely to recidivate than white youths and process them differently (Sampson and Laub 1993; Singer 1996). More benignly, if juvenile courts sentence youths on the basis of social circumstances that indirectly mirror socioeconomic status or race, then minority youths may receive more severe dispositions than white youths because of their personal characteristics or real needs.

Minority overrepresentation may also reflect racial group differences in involvement in criminal activity. If court personnel and judges base their screening decisions and youths' sentences on the seriousness of juveniles' offenses and criminal history, then minority overrepresentation may result from real differences in the incidence and prevalence of offending by race (Wolfgang, Figlio, and Sellin 1972; Hindelang 1978). Or, the structural context of juvenile justice decision making may redound to the detriment of minority juveniles. For example, urban courts tend to be more formal and to sentence all juveniles more severely (Kempf, Decker, and Bin 1990; Feld 1991, 1993*b*). Urban

courts also have greater access to detention facilities, and youths held in pretrial detention typically receive more severe sentences than do those who remain at liberty (Feld 1993*b*; Bishop and Frazier 1996). A larger proportion of minority youths reside in urban settings, and police disproportionately arrest and detain them for violent and drug crimes (Snyder and Sickmund 1995). Thus crime patterns, urbanism, “underclass threat,” and race may interact to produce minority overrepresentation in detention and institutions (Sampson and Laub 1993).

*a. The Principle of the Offense.* Despite sometimes discrepant findings, two general conclusions emerge clearly from the research evaluating juvenile court sentencing practices. First, the “principle of offense”—present offense and prior record—accounts for virtually all of the variance in juvenile court sentences that can be explained. Every methodologically rigorous study of juvenile court sentencing practices reports that judges focus primarily on the seriousness of the present offense and prior record when they impose sentences; these legal and offense variables typically explain about 25–30 percent of the variance in sentencing (Clarke and Koch 1980; McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987; Bishop and Frazier 1996). In short, juvenile court judges attend to the same primary sentencing factors as do criminal court judges. Second, after controlling for legal and offense variables, the individualized justice of juvenile courts produces racial disparities in the sentencing of minority offenders (McCarthy and Smith 1986; Krisberg et al. 1987; Bishop and Frazier 1996). Other than the principle of offense—present offense, prior record, previous disposition—and age, gender, and detention status, youths’ race appears as a significant factor in most multivariate sentencing studies (Pope and Feyerherm 1992; Bishop and Frazier 1996).

While youths’ chronic or serious offending may indicate greater treatment needs, courts necessarily respond to their criminal behavior regardless of their ability to change it. Practical administrative and bureaucratic considerations induce juvenile court judges to give primacy to offense factors when they sentence juveniles. Organizational desire to avoid public exposure, unfavorable political and media attention, and “fear of scandal” constrain judges to impose more restrictive sentences on more serious offenders (Matza 1964; Cicourel 1968; Emerson 1969). Moreover, present offense and prior record provide efficient organizational tools with which to classify youths on the basis of the risk they pose to the public and of the scandal to the court and provide a court with a means to rationalize, defend, and legitimate its decisions.

*b. Racial Disparities.* The second consistent finding from juvenile court sentencing research is that, after controlling for the present offense and prior record, individualized sentencing discretion is often synonymous with racial discrimination (McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987; Krisberg et al. 1987; Pope and Feyerherm 1990*a*, 1990*b*, 1992). In 1988, Congress amended the Juvenile Justice and Delinquency Prevention Act to require states receiving federal funds to assure equitable treatment on the basis, *inter alia*, of race and to assess the sources of minority overrepresentation in juvenile detention facilities and institutions (42 U.S.C. § 5633[a][16] [1993 Supp.]). In response to this mandate, a number of states examined and found racial disparities in their juvenile justice systems (e.g., Bishop and Frazier 1988, 1996; Pope and Feyerherm 1992; Krisberg and Austin 1993; Bridges et al. 1995; Kempf-Leonard, Pope, and Feyerherm 1995). A summary of these evaluation studies reported that, after controlling for legal variables, forty-one of forty-two states found minority youths overrepresented in secure detention facilities, and all thirteen of thirteen states that analyzed other phases of juvenile justice decision making found evidence of minority overrepresentation (Pope 1994).

Discretionary decisions at various stages of the justice process amplify racial disparities as minority youths proceed through the system and result in more severe dispositions than for comparable white youths. The research emphasizes the importance of analyzing juvenile justice decision making as a multistage process rather than focusing solely on the final dispositional decision. For example, dramatic increases in referral rates of minority youths to juvenile courts in seventeen states result in corresponding increases in detention and institutional placement (McGarrell 1993). Juvenile courts detain black youths at higher rates than they do white youths charged with similar offenses, and detained youths typically receive more severe sentences (Bortner and Reed 1985; Frazier and Cochran 1986; Feld 1989, 1993*b*; Krisberg and Austin 1993). A national study of incarceration trends reported confinement rates for minority youths three to four times greater than those of similarly situated white juveniles and that judges sentenced proportionally more minority youths to public secure facilities and committed more white youths to private facilities (Krisberg et al. 1987). By 1991, juvenile courts confined less than one-third (31 percent) of non-Hispanic white juveniles in public long-term facilities; minority youths made up more than two-thirds (69 percent) of confined youths (Snyder and Sickmund 1995). Juvenile courts committed

black juveniles at a rate nearly five times higher than that for white youths, and blacks made up half (49 percent) of all youths in institutions (Snyder and Sickmund 1995).

Juvenile courts, as extensions of criminal courts, give primacy to offense factors when they sentence youths. To the extent that *parens patriae* ideology legitimates individualization and differential processing, it also exposes "disadvantaged" youths to the prospects of more extensive state intervention. Of course, if states provided exclusively benign and effective treatment services to youths, then this might mute some of the concerns about racial disparities.

### *B. Conditions of Confinement and Evaluations of Effectiveness*

Examining juvenile correctional facilities and evaluating their effectiveness provides another indicator of the shift from treatment to punishment in juvenile justice. Juvenile courts intervene extensively in the lives of many young offenders. Juvenile court judges removed from their homes more than one-quarter (28 percent) of youths petitioned and adjudicated delinquent and placed them in group homes, privately operated facilities, ranches, camps, "boot camps," or training schools (Snyder and Sickmund 1995). Courts and correctional administrators confined about three-quarters of youths placed in public long-term facilities in training schools (Snyder and Sickmund 1995). Between 1979 and 1989, the rate of juvenile confinement increased 45 percent, and the absolute numbers of youths in confinement increased 30 percent, despite an 11 percent decline in the number of eligible youth in the population during the decade (Altschuler 1994). Another study reported that the rate of confinement of juveniles increased from 241 per 100,000 juveniles in 1975 to 353 per 100,000 in 1987, and the number of children confined in public facilities increased by 19 percent (National Research Council 1993). Reflecting the racial disparities in juvenile court sentencing practices, minority youths now constitute the majority of all offenders confined in training schools (Snyder and Sickmund 1995).

The Supreme Court in *Gault* correctly perceived incarceration as a severe penalty, a substantial deprivation of autonomy, and a continual reminder of one's delinquent status, all of which constitute elements of punishment (387 U.S. at 26-27). The contradictions between the rhetoric of rehabilitation and the reality of institutional conditions of confinement motivated the *Gault* Court to grant juveniles some procedural safeguards. Punitive delinquency institutions have characterized

the juvenile justice system from its inception. Historical analyses of the early training schools under the aegis of Progressivism described institutions that failed to rehabilitate and scarcely differed from their adult penal counterparts (Schlossman 1977; Rothman 1980).

1. *Conditions of Confinement.* Evaluations of juvenile correctional facilities in the decades following *Gault* reveal a continuing gap between the rhetoric of rehabilitation and its punitive reality (Bartollas, Miller, and Dinitz 1976; Wooden 1976; Feld 1977; Lerner 1986). Research in Massachusetts described violent and punitive facilities in which staff physically punished inmates and frequently failed to prevent inmates' physical abuse and homosexual rape by other inmates (Feld 1977, 1981*b*). A study in Ohio revealed a similarly violent and oppressive institutional environment for treating young delinquents (Bartollas, Miller, and Dinitz 1976). A study of the Texas juvenile correctional system found extensive staff and inmate violence, degrading make-work tasks, beating and hazing of "fresh fish" by other boys and by staff, "picking" for hours at a time with heavy picks, and "grass pulling" by hand for six hours per day (Guggenheim 1978). Although the California Youth Authority (CYA) aspired to realize the juvenile court's rehabilitative ideal (Krisberg and Austin 1993), by the 1980s youths committed to CYA institutions clearly experienced punishment rather than treatment in overcrowded and dangerous youth prisons (Lerner 1986; Forst and Blomquist 1991). An evaluation of the Louisiana training schools described institutions populated predominantly by black juveniles whom guards regularly physically abused, kept in isolation for long periods of time, restrained with handcuffs, and confined in punitive facilities surrounded by high chain-link fences topped with coiled razor wire (Human Rights Watch 1995).

A study sponsored by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), *Conditions of Confinement: Juvenile Detention and Corrections Facilities*, used nationally recognized professional standards to assess the quality of 984 juvenile detention centers and training schools that housed more than two-thirds (69 percent) of all the confined delinquents in the nation (Parent et al. 1994). It reported endemic institutional overcrowding. In 1991, almost half (44 percent) of all long-term public institutions operated above their design capacity, as did more than three-quarters (79 percent) of the largest facilities, those that housed more than 350 inmates (Snyder and Sickmund 1995). Nearly two-thirds (62 percent) of all delinquent inmates resided in overcrowded facilities operating well above their design capacity. As

states sentenced more youths to juvenile institutions, they increased their prison-like character, relied more extensively on fences and walls to maintain perimeter security, and used surveillance equipment to provide internal security (Snyder and Sickmund 1995). The OJJDP evaluation classified nearly half (46 percent) the training schools as medium or maximum security facilities with perimeter fences, locked internal security, or both (Parent et al. 1994).

Coinciding with these post-*Gault* evaluation studies, lawsuits challenged conditions of confinement in juvenile correctional facilities and alleged that they denied inmates' their Fourteenth Amendment due process right to treatment or violated the Eighth Amendment's prohibition on cruel and unusual punishment (Feld 1978, 1988*b*). When a state incarcerates a person for purpose of treatment or rehabilitation, due process requires that conditions of confinement bear some reasonable relationship to the purpose for which the state commits the individual (*Youngberg v. Romeo*, 457 U.S. 307 [1982]). These right to treatment, cruel and unusual punishment, and conditions of confinement cases provide an impartial judicial view of the reality of juvenile corrections. Judicial opinions and investigative reports from around the country report routine staff beatings of inmates, the use of drugs for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs.<sup>3</sup>

Despite extensive judicial findings of deplorable conditions of confinement, juvenile correctional facilities probably remain less harsh or abusive than most adult prisons. Interviews with violent juvenile offenders in training schools and comparable waived youths in adult correctional facilities indicate that the juveniles rated their training school treatment, programs, services, and institutional personnel more posi-

<sup>3</sup> Illustrative recent cases highlight the continuing severity of the problem. In *D.B. v. Tewksbury*, 545 F. Supp. 896 (D.C. Ore. 1982), the court found that the conditions of juvenile pretrial detainees who were incarcerated in an adult jail were deliberately punitive and worse than those experienced by adult convicts. Reports of abusive practices in the press and in other opinions describe youths shackled spread-eagled to their bed frames, locked in isolation for "mouthing off" or swearing, and restrained with handcuffs, leather straps, or leg irons (Krisberg et al. 1986; Alexander S. v. Boyd, 876 F. Supp. 773 [D.S.C. 1995]). Nearly two-thirds (65 percent) of all juveniles confined in training schools reside in facilities subject to a court order or consent decree governing conditions of confinement or decrying the adequacy of their treatment programs (Parent et al. 1994). It is unfortunate that these cases are not atypical, as the list of judicial opinions documenting institutional abuses demonstrates (Krisberg et al. 1986; Alexander S. v. Boyd, 876 F. Supp. 773 [D.S.C. 1995]; Feld 1995). In a review of additional, unreported cases litigating conditions of confinement around the country, Krisberg et al. (1986, p. 32) conclude that there is "growing evidence that harsh conditions of confinement continue to plague juvenile detention centers and training schools."

tively than did the youths in prisons (Forst, Fagan, and Vivona 1989). Even large training schools do not typically house as many inmates locked in individual cells as do adult maximum security prisons. Moreover, youths incarcerated in the juvenile correctional system may exhibit lower recidivism rates than comparable waived youths incarcerated in adult prisons. Fagan (1995, 1996) compared recidivism rates of fifteen- and sixteen-year-old robbery and burglary offenders processed as adult offenders in two southeastern counties in New York with comparable youths processed as juveniles in two contiguous counties in northern New Jersey. Fagan found that the New York adult robbery offenders had higher rates and frequency of reoffending than did those processed in New Jersey as juveniles, although the outcomes for the burglary offenders did not differ between the two systems. Bishop et al. (1996) compared juveniles whom prosecutors waived to criminal court in Florida with a matched set of equivalent cases retained in the juvenile justice system and found that the transferred youths reoffended more often, more quickly, and more seriously than did those youths confined in the juvenile correctional system. Despite these apparent comparative advantages, however, juvenile correctional institutions certainly do not provide such benign and therapeutic facilities as to justify depriving those confined in them adequate procedural safeguards. Rehabilitative euphemisms, such as "provid[ing] a structured treatment environment," should not disguise their punitive reality (Office of Juvenile Justice and Delinquency Prevention 1993, p. 21).

While incarcerating youths in the general population in adult facilities holds little appeal, the well-documented prevalence of staff violence, inmate aggression, and homosexual rape in juvenile prisons provides scant consolation (Bartollas, Miller, and Dinitz 1976; Feld 1977, 1981*b*). Evaluations of juvenile institutions consistently attribute violent inmate subcultures to staff security arrangements. Authoritarian efforts to impose control and maintain internal security tend to alienate inmates from staff and increase levels of covert inmate violence within the subculture (Bartollas, Miller, and Dinitz 1976; Feld 1977; Lerner 1986). As states confine more youths in overcrowded facilities, staff security policies to manage larger groups of youths aggravate the violent character of the inmate subculture. Thus organizational imperatives may frustrate even well-intended corrections personnel.

The recent changes in juvenile court sentencing legislation exacerbate the deleterious side effects associated with institutional overcrowding (Krisberg et al. 1986). Youths confined under get tough sen-



tencing laws to long terms often make up the most serious and chronic delinquent population. Yet the institutions that house them often suffer from overcrowding, limited physical mobility, and inadequate program resources. Overcrowding also contributes to higher rates of inmate violence and suicide (Parent et al. 1994). These juvenile correctional "warehouses" exhibit most of the negative features of adult prisons and function as little more than youth prisons in which inmates "do time" (Greenwood and Zimring 1985). The large custodial institutions enable politicians to demonstrate their toughness, provide the public with a false sense of security, afford employment for correctional personnel, and minimize the demands placed on custodial staff to maintain institutional order but do little to improve the life chances of troubled youths (Greenwood and Zimring 1985; Bernard 1992).

Evaluation research indicates that incarcerating young offenders in large, congregate juvenile institutions does not effectively rehabilitate and may affirmatively harm them (Bartollas, Miller, and Dinitz 1976; Feld 1977; Andrews et al. 1990; Office of Juvenile Justice and Delinquency Prevention 1993). By contrast, experiments with supervision and treatment in the community suggest that many confined youths do not require institutional restraints (Coates, Miller, and Ohlin 1978). The Massachusetts experiment and some other research suggests that small, community-based, intensive supervision programs may reduce or postpone some delinquents' likelihood or rate of reoffending (Greenwood and Zimring 1985; Steele, Austin, and Krisberg 1989; Office of Juvenile Justice and Delinquency Prevention 1993). Promising programs provide a continuum of services from early secure care in small, nondebilitating settings with a maximum of fifteen to twenty residents, individualized treatment, accountability, and case management, followed by community reintegration with extensive aftercare supervision and intervention (Fagan 1990; Krisberg and Austin 1993; Altschuler 1994). A few states' juvenile sentencing laws attempt to integrate punishment with treatment for serious and habitual offenders by combining a period of confinement with a period of aftercare that uses multiagency case-management techniques to facilitate a youth's reentry into the community (e.g., Cal. Welf. & Inst. Code § 501[a] [West 1995]).

Despite the manifest failures of large institutions to rehabilitate young offenders or reduce recidivism, the apparent success in Massachusetts with closing training schools (Coates, Miller, and Ohlin 1978; Guarino-Ghezzi and Loughran 1996), the relative superiority or cost-

effectiveness of small, community-based facilities over congregate facilities as humane living environments, and the feasibility of dealing with many youths in their communities rather than in confinement (Fagan 1990; Krisberg and Austin 1993; Altschuler 1994), the correctional pendulum currently swings toward incarcerating more delinquents for longer periods in institutions. We possess considerable evaluation research and knowledge about the types of correctional environments conducive to adolescent growth and development. And a century of experience with training schools and youth prisons demonstrates that they constitute the one extensively evaluated and clearly ineffective method to treat delinquents (Office of Juvenile Justice and Delinquency Prevention 1993).

2. *Treatment Effectiveness.* Progressive reformers expressed considerable optimism that delinquents' youthfulness and greater malleability would enable them to respond more readily to treatment. By contrast, a comprehensive assessment of rehabilitation research conducted by the National Academy of Sciences questioned both the efficacy of juvenile justice interventions and the assumption that youths manifest greater treatment responsiveness (Sechrest, White, and Brown 1979). "The current research literature provides no basis for positive recommendations about techniques to rehabilitate criminal offenders. The literature does afford occasional hints of intervention that may have promise, but to recommend widespread implementation of those measures would be irresponsible. Many of them would probably be wasteful, and some would do more harm than good in the long run" (Sechrest, White, and Brown 1979, p. 102).

Evaluations of juvenile institutional programs provide little evidence that they effectively treat youths or reduce their recidivism rates (Lab and Whitehead 1988; Whitehead and Lab 1989). Evaluations of training schools, the most common form of institutional treatment for the largest numbers of serious and chronic delinquents, report consistently negative findings. Most state training schools "fail to reform . . . [and] make no appreciable reductions in the very high recidivism rates, on the order to 70 to 80 percent, that are expected for chronic offenders" (Greenwood and Zimring 1985, p. 40). An analysis in Minnesota of recidivism rates of youths released from state correctional and private facilities in 1985 and 1991 found that between 53 percent and 77 percent continued their criminal careers into adulthood (Feld 1995; Minnesota Legislative Auditor 1995). Analyses of recidivism among 926 males released from Washington state's residential facilities in 1982 re-

ported that over half (58.8 percent) reoffended within one year and more than two-thirds (67.9 percent) reoffended within two years (Steiger and Dizon 1991). A study of 527 males released from ten residential facilities in Pennsylvania in 1984 reported that police rearrested more than half (57 percent) and courts recommitted to residential facilities or prisons about one-quarter (23 percent) within two years (Goodstein and Sontheimer 1987).

Despite these generally negative results, evaluation researchers continue the quest for the elusive rehabilitative grail. One methodological strategy to identify “what works” entails metaanalyses, or studies of studies. By coding each evaluation study on a number of variables (e.g., characteristics of the research design, subjects studied, type of treatment applied, and outcome measures) and combining and reanalyzing the studies, metaanalyses attempt to separate treatment effects from differences due to uncontrolled characteristics of the subjects or other limitations of research design (Logan and Gaes 1993). One meta-analysis of juvenile correctional treatment evaluations appearing in the professional literature between 1975 and 1984 and meeting certain criteria of methodological rigor concluded that “the results are far from encouraging for rehabilitation proponents” (Lab and Whitehead 1988, p. 77).

Proponents of treatment reject Martinson’s (1974) suggestion that “nothing works” and offer literature reviews, metaanalyses, or program descriptions that report that some interventions may produce positive effects on selected clients under certain conditions (Greenwood and Zimring 1985; Gendreau and Ross 1987; Fagan 1990). Metaanalyses of evaluation studies of delinquents in residential treatment concluded that some programs produce positive results (Garrett 1985; Andrews et al. 1990; Izzo and Ross 1990; Roberts and Camasso 1991; Lipsey 1992). It is typical for positive treatment effects to occur in small, experimental programs that provide an intensive and integrated response to the multiplicity of problems—educational deficits, family dysfunction, inadequate social and vocational skills, and poverty—that delinquent youths present. In general, positive treatment effects occur only under optimal conditions, such as high treatment integrity in an established program with services provided by non-criminal justice personnel (Lipsey 1996).

Research on the elements of effective correctional programs suggest some promising directions either to provide more humane short-term correctional experiences or to improve youths’ long-term life chances.

Some model intervention programs may work for some offenders under appropriate conditions. However, most states do not elect to provide these programs or services to delinquents generally. Rather, they continue to confine most incarcerated juveniles in euphemistically sanitized, youth prisons. If either consistently favorable outcomes or universal access remain far from certain, it seems difficult to justify confining most youths with fewer procedural safeguards than those provided to adults.

#### IV. Blended Jurisdiction: Groping toward an Integrated Sentencing Framework

Although states' adoption of determinate and mandatory juvenile sentencing laws reflect the influence of just deserts jurisprudence and punitive politics, delinquency sentences invariably differ from criminal sentences because juvenile courts' maximum age jurisdiction limits their potential duration. Because juvenile courts lose authority over offenders when they attain the age of majority or some other statutory termination date, they cannot achieve proportionality when sentencing either older chronic juveniles or those youths convicted of very serious offenses. The jurisdictional limits heighten public and political perceptions that juvenile courts inadequately punish or control some youths and provide impetus either to increase juvenile courts' sanctioning powers further or to transfer more youths to criminal courts.

Statutes that increase juvenile courts' punitive capacity or give criminal courts a juvenile sentencing option represent another offense-based sentencing strategy to respond to violent and persistent young offenders. These blended jurisdiction laws attempt to meld the sentencing authority of juvenile with criminal courts, to provide longer sentences for serious crimes than otherwise would be available to the juvenile court, or to increase the rehabilitative sentencing options available to criminal courts (Feld 1995; Torbet et al. 1996). These blended sentences provide juvenile courts with the option to punish as well as to treat and criminal courts with therapeutic alternatives to imprisonment for youths of certain ages charged with serious or repeated offenses. Several variants of youthful offender, blended, or extended jurisdiction sentences exist. The nature of the sanctions depend on whether the prosecutors try the youth initially in juvenile or in criminal court.

##### *A. Convicted in Criminal Court and Sentenced as Youthful Offender*

For decades, states and the federal government have used a "youthful offender" status to preserve therapeutic sentencing options in crim-

inal courts following the trial of young offenders as adults. A “youthful offender” status constitutes an intermediate category of chronological juveniles sentenced as adults as well as young adult offenders, typically sixteen to twenty-one years of age at the time of sentencing. Youthful offender laws separate this group by age, either in separate facilities or in age-segregated sections within adult facilities; limit the maximum penalty that criminal courts may impose to a period shorter than that authorized for adults; and provide for some relief from disabilities of conviction following successful completion of the sentence. Under the Federal Youth Corrections Act, subsequently repealed with the adoption of the federal sentencing guidelines, federal judges had discretion to commit convicted offenders between the ages of sixteen and twenty-two to special facilities as youth offenders if they determined that the youth would benefit from treatment (18 U.S.C. §§ 5005–5026 [1976]). The California Youth Authority Act provides criminal court judges with the option of sentencing young adults and waived youths convicted as adults to the CYA for housing and programs, rather than to prison, and the CYA’s jurisdiction continues until age twenty-five (Cal. Welf. & Inst. Code § 1731.5 [West 1995]). Because Florida prosecutors direct file many chronological juveniles in criminal court (Bishop, Frazier, and Henretta 1989; Bishop and Frazier 1991), the state’s Youthful Offender Act provides criminal court judges with an alternative to sentencing them all as adults (Fla. Stat. § 958 [1995]). On the basis of a presentence investigation report and statutory *Kent*-like criteria, a criminal court judge may sentence a youth either as a youthful offender or to prison. In New York, criminal court jurisdiction begins at age sixteen, but youths as young as thirteen years of age charged with murder or youths fourteen or fifteen years old charged with other violent crimes may be prosecuted as juvenile offenders (JO). Criminal courts may give youths sixteen to nineteen years old a youthful offender (YO) status. Youths sentenced as JOs or YOs may receive a closed hearing, sealed record, or shorter sentence in a separate facility operated by the Division for Youth rather than a straight sentence to the Department of Corrections (Singer 1996). Criminal sentencing laws in several other states also give judges the option to sentence youths convicted as adults to some type of youthful status rather than an adult prison commitment (Torbet et al. 1996).

#### *B. Convicted in Juvenile Court but Sentence Increased*

A second variant of blended sentencing begins with a youth’s trial in juvenile court and then authorizes the judge to impose enhanced sen-

tences beyond those used for ordinary delinquents (Feld 1995; Torbet et al. 1996). New Mexico, Minnesota, and Texas provide three different versions of these enhanced sanctions for youths whom judges have not transferred to criminal court for prosecution as adults.

In 1993, New Mexico created a three-tier classification of “delinquent offender,” “youthful offender,” and “serious youthful offender” (N.M. Stat. Ann. § 32A-2-3[C], [H], [I] [Michie 1993]; Mays and Gregware 1996). The prosecutor selects which category to charge a young offender based on age and offense. A youth sixteen or seventeen years of age and charged with first degree murder constitutes a “serious youthful offender,” and the court must sentence the youth as an adult. “Youthful offenders” consist of juveniles fifteen to eighteen years of age charged with legislatively designated aggravated or violent crimes, such as second degree murder, assault, rape, or robbery, or youths charged with any felony who have three prior felony adjudications within the previous two-year period. All delinquents and youthful offenders in New Mexico enjoy a statutory right to a jury trial in juvenile court, and the same judge would preside over a case whether it was tried as a juvenile or criminal proceeding (Mays and Gregware 1996). Following conviction as a youthful offender, the juvenile court judge conducts a quasi-waiver sentencing hearing to decide whether to sentence the juvenile as an adult or as a youthful offender. Depending on the judge’s assessment of a youth’s amenability to treatment or rehabilitation (N.M. Stat. Ann. § 32A-2-20[B][1] [1993]), the court may impose either an adult criminal sentence or a juvenile disposition with jurisdiction extended until age twenty-one (N.M. Stat. Ann. § 32A-2-20 [1993]). Essentially, New Mexico tries youths in juvenile court with adult criminal procedural safeguards and then, after a finding of guilt, allows the judge either to impose an extended juvenile sentence or to sentence the youth as an adult.

In 1995, Minnesota created an intermediate category for serious young offenders called extended jurisdiction juvenile (EJJ) prosecutions (Feld 1995; Minn. Stat. Ann. § 260.126 [1995]). The statutes restrict eligibility for EJJ prosecutions to youths sixteen years of age or older and charged with presumptive commitment to prison offenses like murder, rape, aggravated robbery, and assault; to youths whom judges decline to waive to criminal courts and sentence instead as EJJ; and to younger juveniles whom judges determine in an EJJ hearing meet offense-based public safety criteria (Feld 1995). Juvenile courts try these EJJ youths in juvenile courts but provide them with all of the adult criminal procedural safeguards, including the right to a jury trial.

The right to a trial by jury constitutes an essential component of this quasi-adult status because the judge imposes both a juvenile delinquency disposition and an adult criminal sentence, the execution of which is stayed, pending compliance with the juvenile sentence (Feld 1995; Minn. Stat. Ann. § 260.126 [1995]). Juvenile court dispositional jurisdiction continues until age twenty-one for EJJ youths rather than terminating at age nineteen as it does for ordinary delinquents. If the EJJ youth violates the conditions of the juvenile sentence, then the court may revoke the probation and execute the adult criminal sentence (Feld 1995). Trying youths in juvenile courts with adult criminal procedural safeguards preserves access to juvenile correctional resources, provides longer periods of correctional supervision and control, and retains the possibility of adult incarceration if youths fail on probation or reoffend. Several other states have emulated this blended sentencing strategy (Torbet et al. 1996).

In 1987, Texas adopted a determinate sentencing law for juveniles convicted of certain violent crimes or as habitual offenders to provide an alternative to sentencing them either as ordinary delinquents or waiving them for adult prosecution (Dawson 1988, 1990; Tex. Fam. Code Ann. §§ 53.045, 54.04[d][3] [Vernon Supp. 1988]; Fritsch, Hemmens, and Caeti 1996). To invoke the determinate sentencing law, the prosecutor may submit a petition to a grand jury and allege one of the enumerated violent or habitual crimes. If the indicted youth is convicted, “the court or jury may sentence the child to commitment to the Texas Youth Commission with a possible transfer to the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice for a term of not more than” forty years for a capital or first degree felony, twenty years for a second degree felony, or ten years for a third degree felony (Tex. Fam. Code Ann. § 54.04[d][3] [Vernon Supp. 1995]). Juveniles receive the same procedural rights as do adult criminal defendants including the right to a jury trial. Juveniles begin their determinate sentences in juvenile facilities, and at age eighteen, a court conducts a sentencing review hearing, using *Kent*-like statutory criteria, to decide whether to retain them within the juvenile correctional system for the duration of their minority, until age twenty-one, or to complete their determinate sentence in the adult correction system (Tex. Fam. Code Ann. § 54.11[k] [Vernon 1995]). The Texas law greatly increases the power of juvenile courts to impose substantial sentences on youths below fifteen years of age, the minimum age to transfer juveniles to criminal courts, as well as on older

juveniles, and gives prosecutors a powerful plea bargaining tool and alternative to adult prosecution (Dawson 1988, 1990; Fritsch, Hemmens, and Caeti 1996). In 1995, the Texas legislature increased from the original list of six to thirteen the number of offenses for which youths could receive determinate sentences and increased the maximum length of determinate sentences from thirty to forty years (Tex. Fam. Code Ann. §§ 53.045, 54.04[d][3] [Vernon 1995]). Determinately sentenced youths served actual terms considerably longer than those of youths sentenced as ordinary delinquents (Fritch, Hemmens, and Caeti 1996). A few other states, for example, Colorado and Massachusetts, have enacted provisions like Texas's that enable a juvenile court judge to impose a sentence on a youth convicted of a serious crime that extends beyond the maximum age of the juvenile court dispositional jurisdiction with completion of the sentence in adult correctional facilities (Torbet et al. 1996).

Although the New Mexico, Minnesota, and Texas statutes differ in many details, the blended jurisdiction strategy shares several common features. Because they provide these intermediate offenders with adult criminal procedural safeguards, they can acknowledge the reality of juvenile punishment. Once a state gives a juvenile the right to a jury trial and other criminal procedural safeguards, then it retains the option to punish without apology and thereby gains greater flexibility to treat a youth as well. These various enhanced sentencing strategies recognize that age jurisdictional limits of juvenile courts create binary forced choices, either juvenile or adult, either treatment or punishment. By trying a juvenile with criminal procedural rights, these states preserve the option to extend jurisdiction for a period of several years or more beyond that available for ordinary delinquents. Finally, these statutes recognize the futility of trying to rationalize social control in two separate systems. These blended provisions embody the procedural and substantive convergence between juvenile and criminal courts, provide a conceptual alternative to binary waiver statutes, and recognize that adolescence constitutes a developmental continuum that requires an increasing array of graduated sanctions.

#### V. Toward an Integrated Justice System

Juvenile courts initially depicted young offenders as not criminally responsible and proposed to treat them. By contrast, lawmakers now view even very young people as just as criminally responsible as adults and propose to punish them as adults. Neither formulation adequately



addresses adolescent developmental continuities, the progression of criminal careers, or gradations of criminal responsibility.

Several sentencing policy dilemmas, contradictions, and discontinuities result from maintaining separate criminal justice systems for juveniles and adults. Justice system bifurcation produces a lack of integrated criminal career record keeping, arbitrary or inflexible waiver processes, sentencing disparities based on the system that convicts a youth rather than the nature of the offense, a lack of proportionality in both systems, and failure to recognize youthfulness as a mitigating factor in sentencing. Waiver strategies represent legal attempts to reconcile the irreconcilable. Judicial waiver laws allow judges to decide which children are criminals but do not define adequately the criteria by which to make that determination. Judicial discretion results in disparate decisions for similarly situated offenders, a lack of fit between judicial waiver and criminal court sentencing practices, and a punishment gap. Prosecutorial waiver suffers from all of the vagaries of individualized discretion and without even the redeeming virtues of formal criteria, written reasons, an evidentiary record, or appellate review. Legislative offense exclusion suffers from rigidity, overinclusiveness, and politicians' demagogic tendency to get tough.

Legislatures and courts transfer youths to criminal court so that they may receive longer sentences as adults than they could in the juvenile system. However, chronic property offenders constitute the bulk of juveniles judicially waived in most states; they may receive shorter sentences as adults than as property offenders retained in juvenile court. By contrast, youths convicted of violent offenses in criminal courts may receive substantially longer sentences than their juvenile counterparts, although they still may benefit from an informal policy of leniency vis-a-vis adult violent offenders. For juveniles and youths tried as adults and convicted of comparable crimes, both types of disparities raise issues of sentencing policy fairness and justice. Some youths experience dramatically different sanctions than do other, similarly situated offenders simply because of the disjunction between two separate criminal justice systems. Because jurisdictional bifurcation occurs around the peak of youths' criminal careers, it may undermine the ability of the criminal justice system to respond adequately either to persistent or violent offenders. Without an integrated criminal record system, chronic offenders may "slip through the cracks" and receive inappropriately lenient sentences as "first-time" adults.

The simultaneous shift from treatment to punishment in juvenile

courts further erodes many sentencing policy differences between the two systems and the rationale for a separate criminal justice system for youths. The various blended sentencing statutes reflect a convergence between the juvenile and criminal justice systems, an effort further to blur the edges and tighten the seams between the two. But juvenile courts must provide youths with all adult criminal procedural safeguards in order fairly explicitly to punish, to enhance sanctions, or to preserve adult sentencing options. Thus efforts to enhance juvenile courts' sanctions further reduce their procedural differences with criminal courts.

Once youths make the transition to criminal court, current sentencing laws typically treat them as if they possess the same degree of criminal responsibility as any other adult offender. The Eighth Amendment's prohibition of cruel and unusual punishments bars only the execution of youths fifteen years of age or younger at the time of their offense and provides no additional proportionality requirements. Although state legislatures have the task of formulating a youth sentencing policy, once states prosecute youths as adults, most adult sentencing statutes reject juvenile courts' deterministic premises that youths' crimes are "not their fault" and ignore differences between adolescents' and adults' criminal responsibility or culpability.

The existence of juvenile courts and resistance to their abolition reflect a cultural consensus that young people somehow differ from adults and should receive more lenient sentences. Shorter sentences for younger offenders enable them to survive the mistakes of adolescence with their life chances intact (Zimring 1982). But, shorter sentences for young people do not require a separate juvenile court simply to determine their guilt. Explicit recognition of youthfulness as a mitigating factor in sentencing would enable criminal courts to dispense appropriately shorter sentences for younger offenders on the basis of their reduced culpability.

Assessments of culpability are normative and evaluative and represent legal, moral, and social judgments. While younger offenders may be less criminally responsible than more mature violators, they do not differ as inherently or fundamentally as the legal dichotomy between juvenile and criminal courts suggest. The distinction between infant and adult that provides the jurisprudential premise for the juvenile court ignores the reality that adolescent development is a continuum. In contrast to get tough policies that endorse a youth-blind justice system and treat fourteen-year-olds as the moral equivalents of adults, we

can devise a youth sentencing policy more responsive to the adolescent and criminal career developmental continuum and still protect public safety.

Shorter sentences for reduced responsibility provides a more modest rationale to sanction young people differently than adults than did the rehabilitative claims advanced by Progressive child savers. In this context, an assessment of responsibility represents a global judgment about the degree of youths' deserved punishment, rather than a technical legal judgment about whether the youth possessed the requisite *mens rea* or mental state defined in the criminal statute (Morse 1984, 1985). Adolescents characteristically may exercise poorer judgment than do adults, but the social costs of their criminal choices affect both their victims and themselves (Cauffman and Steinberg 1995). While the justice system can do nothing to alleviate the harm already done to their victims, legal policies can reduce the long-term harm that adolescents cause to themselves (Scott 1992). Protecting young people from the full penal consequences of the criminal law reflects a policy to preserve their life chances for the future when they presumably will learn to make more responsible choices. Even though young offenders possess sufficient culpability to hold them accountable, their choices remain less blameworthy than those of adults.

Criminal courts in some jurisdictions already consider youthfulness in the context of aggravating and mitigating factors and may impose shorter sentences on a discretionary basis. However, states that recognize youthfulness as a mitigating factor simply treat it as one element to be weighed with many other aggravating and mitigating factors in determining what sentence to impose. A preferable sentencing policy would provide youths with categorical fractional reductions of adult sentences. Attempting to individualize adolescent culpability assessments carries all of the risks of discretionary subjectivity inherent in amenability determinations with no greater likelihood of success. Rather, because youthfulness constitutes a universal form of diminished responsibility, sentencing regimes should treat it categorically as a mitigating factor without regard to nuances of individual developmental differences. Recognizing youthfulness as a mitigating sentencing factor represents a social, moral, and criminal legal policy judgment, not a clinical or psychiatric one about culpability.

This categorical approach might take the form of an explicit "youth discount" at sentencing. A fourteen-year-old offender would receive, for example, 25 percent of the adult penalty; a sixteen-year-old defen-

dant, 50 percent; and an eighteen-year-old, the adult penalty, as is presently the case. The “deeper discounts” for younger offenders correspond to the developmental continuum of responsibility (Scott 1992). A youth discount based on diminished responsibility functions as a sliding scale. Just as we regard adolescents as less criminally responsible than adults, fourteen-year-old youths should enjoy a greater mitigation than seventeen-year-olds.

Several policy groups implicitly endorsed the concept of a youth discount or sliding scale of criminal responsibility for younger offenders. The Juvenile Justice Standards (American Bar Association 1980, p. 35) emphasized the relationship between age and sanctions. “The age of the juvenile is also relevant to the determination of the seriousness of his or her behavior. In most cases, the older the juvenile, the greater is his or her responsibility for breaking the law.” The Twentieth Century Fund Task Force on Sentencing Policy toward Young Offenders (1978, pp. 6–7) also concluded that most young offenders, by age thirteen or fourteen, should be held accountable, at least to some degree, for their criminal harms and “the older the adolescent, the greater the degree of responsibility the law should presume.” The sentencing principles of frugality or parsimony of punishment (Morris 1974) and the least restrictive alternative also provide rationale for a youth discount.

Discounted sentences that preserve young offenders’ life chances require that the maximum sentences that youths receive remain considerably below those imposed on adults. “The principle of diminished responsibility makes life imprisonment and death penalties inappropriate,” for example, even in cases of intentional murder by juveniles (Twentieth Century Fund 1978, p. 17). Several serious juvenile offender or designated felony statutes provide examples of sentence lengths for young offenders that are considerably shorter than the sentences their adult counterparts receive and some policy guidance about the degree of discount.

The specific discount value—the amount of fractional reduction—reflects several empirical and normative considerations. It requires a judgment about adolescent development. To what extent do specific physical and psychological characteristics of youth—depreciation of future consequences, risk taking, peer influences, lack of self-control, hormonal changes, and the like—induce them to engage in behavior that reasonable adults would avoid simply because they are young (Steinberg and Cauffman 1996)? How much developmental difference

does sentencing policy require for what degree of moral and legal mitigation? To what extent will severe, unmitigated adult penalties permanently and irrevocably alter youths' life chances (Zimring 1982)?

Explicit fractional reductions of youths' sentences can only occur under realistic, humane, and determinate adult sentencing regimes (Tonry 1987, 1995; Frase 1991). One can only know the value of a discounted sentence in a criminal sentencing system in which we know in advance the standard, or "going rate," for adults. In many jurisdictions, implementing a youth discount would require significant modification of the current criminal sentencing statutes used for adults, including presumptive sentencing guidelines with strong upper limits on punishment severity, elimination of all mandatory minimum sentences, and some judicial flexibility to mitigate penalties (Tonry 1995). In short, the adult sentencing system must reflect elements of equality, equity, desert, and proportionality (von Hirsch 1976). Efforts to apply a youth discount within the flawed indeterminate sentencing structures that prevail in many jurisdictions will simply reproduce all of the existing inequities and inconsistencies.

Youthful development is highly variable, and chronological age provides a crude and imprecise indicator of criminal maturity. However, a categorical youth discount that uses age as a conclusive proxy for reduced culpability and a shorter sentence remains preferable to an individualized inquiry into each young offender's criminal responsibility. Developmental psychology does not possess reliable indicators of moral development that equate readily with criminal responsibility or accountability. Thus for administrative and functional convenience, age alone remains the most useful criterion on which to allocate mitigation. Once we find young actors criminally responsible, it hardly seems worth the administrative burden and diversion of resources to try to precisely tailor sanctions on the basis of clinical testimony. Moreover, a policy of mitigation for youthful offenders avoids the undesirable forced choice between either inflicting undeservedly harsh punishments on less culpable actors or "doing nothing" about the manifestly guilty (Bernard 1992). Mitigation avoids the historical pressures on judges and juries to nullify and acquit the "somewhat guilty." A formal commitment to mitigation provides a buffer against political pressure to increase penalties every time a young offender subsequently commits a serious offense.

A number of advantages follow from trying all offenders in an integrated criminal justice system. A graduated age-culpability sentencing

system avoids the binary “either/or” inconsistency and injustice that occurs currently depending on whether a state tries and sentences a particular youth as a juvenile or adult. Depending on which forum tries a youth, the same offender’s sentence can differ by orders of magnitude, if not by life and death. Because of the differences in consequences, waiver hearings consume a disproportionate amount of judicial time and resources ultimately to no point. Youths are not irresponsible children one day and responsible adults the next, except as a matter of law. Sentencing policy requires a graduated social control system that responds consistently to the developmental continuum. Trying youths in one integrated court eliminates the need for transfer hearings, avoids the inconsistencies produced by offense exclusions or prosecutorial direct files, obviates any punishment gap, and assures comparable sentences for similarly situated offenders. A single criminal justice system allows for an integrated criminal history record-keeping system to identify and enhance the sentences of chronic career offenders. Because states confine juveniles because they commit crimes, incarceration constitutes punishment and requires criminal procedural safeguards that juvenile courts simply do not provide. Eliminating a separate juvenile court does not require incarcerating youths in adult jails and prisons. Existing training schools and institutions provide the option of separate age-segregated dispositional facilities. And evaluation research provides some support for a juvenile rather than adult correctional placements of younger offenders (Fagan 1995, 1996; Bishop et al. 1996; Guarino-Ghezzi and Loughran 1996).

One of the principal virtues of the insanity defense, Goldstein (1967) argues in his seminal work, is that it dramatically affirms the idea of individual responsibility. The idea of personal responsibility and holding people accountable for their behavior provides an important counterweight to a popular culture that endorses the idea that everyone is a victim, that all behavior is determined and no one is responsible, and that therefore wrongdoers cannot be blamed (Packer 1968). The rehabilitative ideal of the juvenile court elevated determinism over free will and characterized delinquent offenders as victims rather than perpetrators. Progressives attempted to design the therapeutic juvenile court to resemble more closely a preventive, forward-looking civil commitment process than a criminal court. While the paternalistic stance of the traditional juvenile courts rests on the humane desire to protect young people from the adverse consequences of bad decisions, protectionism simultaneously disables young people from the opportunity to learn to

make choices and to bear responsibility for their consequences. By denying youths' responsibility, juvenile justice ideology reduces offenders' obligation to learn and exercise self-control and erodes their need to change.

The pendulum now has swung to the opposite extreme. State juvenile and criminal justice policies currently emphasize accountability, responsibility, and punishment virtually to the exclusion of individual considerations. Especially in criminal courts, states' sentencing policies treat young offenders as if they were adults, make the same blameworthy choices, and possess the same level of culpability as adult offenders. Get tough politicians adopt youth-blind public policies that disregard the entire social construct of childhood (Ainsworth 1991, 1995).

By contrast, an integrated criminal court that formally recognizes youthfulness as a mitigating factor at sentencing avoids these polar extremes and binary dichotomies and permits a nuanced response to youth crime. A youth discount recognizes the greater competence of young people, but simultaneously incorporates an appropriately protective element into criminal justice policy. Because a criminal conviction represents an official condemnation, the idea of blame reinforces for the public and provides for the defendant the incentive to develop individual responsibility. But a criminal law that disproportionately punishes according to the culpability of the offender undermines its own legitimacy.

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