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JUST DESERTS FOR JUVENILES: PUNISHMENT VS. TREATMENT AND THE DIFFERENCE IT MAKES

Barry Feld*

Introduction

The decision in 1967 of the Supreme Court of the United States of America in the matter of Gault 1/ transformed the juvenile court into a very different institution from that which had been envisioned by its progressive creators. 2/ Judicial and legislative efforts to harmonize the juvenile court with Gault's constitutional mandate have modified the purposes, processes and operations of the contemporary juvenile justice system. The progressives envisioned a procedurally informal court with individualized, offender-oriented dispositional practices. The Supreme Court's due process decisions engrafted procedural formality at adjudication onto the juvenile court's traditional, individualized-treatment sentencing schema. As the juvenile court departs from its original rehabilitative model, it now procedurally and substantively resembles adult criminal courts. 3/

This article analyses recent changes in the sentencing practices and policies of juvenile courts. Increasingly, the Principle of Offence rather than an individualized determination of a youth's best interests dominates the sentencing decisions of juvenile courts. Changes in the courts' purpose clauses to emphasize characteristics of the offence rather than of the offender reflect the ascendancy of the Principle of Offence. So, too, does the implementation of a justice model in sentencing, in which just deserts rather than real needs prescribe the appropriate disposition. Recent legislative changes in juvenile sentencing statutes and correctional administrative guidelines emphasize proportional and determinate sentences based on the present offence and prior record and dictate the length, location and intensity of intervention. As a whole, these changes are both an indicator of and a contributor to the substantive as well as the procedural criminalizing of juvenile justice in the United States. However, the elevation of punishment raises fundamental questions about the adequacy of procedural justice in juvenile courts.

Procedural informality and individualized, offender-oriented dispositions in the juvenile court

The juvenile court was one of several criminal justice reforms introduced by progressives early in the twentieth century. These reforms reflected changes in ideological assumptions about the sources of crime and deviance: the philosophy of positivism led to efforts to identify the antecedent variables that cause crime and deviance and thereby challenged the classic formulations of crime as the product of free-will choices. 4/ Attributing criminal behaviour to external forces rather than to deliberately chosen misconduct focused efforts on reforming the offender rather than punishing for the offence. The conjunction of positivistic criminology, medical analogies in the treatment of criminals and the growth of the social science professions gave rise to the so-called "rehabilitative ideal". 5/ Juvenile courts used open-ended, informal and flexible procedures to rehabilitate deviants, since diagnosing the causes of and prescribing cures for delinquency required an individualized approach that precluded uniform treatment or standardized criteria.

Juvenile court professionals hoped to substitute a scientific and preventative approach for the traditional punitive approach of the criminal law. 6/ In separating child offenders from adult offenders, the juvenile court rejected the jurisprudence and procedures of the adult criminal law. The important issues were the child's background and welfare rather than the details surrounding the crime. Juvenile court personnel enjoyed enormous discretion to make dispositions in the best interests of the child and based their assessment on the child's character and life-style. The specific offence that a child had commited was accorded only minor significance in the overall inquiry, since it indicated little about a child's real needs. To facilitate diagnosis and treatment, dispositions were indeterminate and non-proportional, and they continued for the duration of minority.

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The constitutional domestication of the juvenile court: procedural formality and individualized, offender-oriented dispositions

When the decision of the Supreme Court in the matter of Gault mandated procedural safeguards in the adjudication of delinquency, judicial attention focused initially on determining whether the child had committed an offence, as a prerequisite to sentencing. Gault's shift in focus from real needs to legal guilt fundamentally altered the operation of the juvenile court. Although the Supreme Court hoped to retain the potential benefits of the juvenile process, it insisted that the claims of "the juvenile court process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes" to persisting recidivism, the realities of juvenile confinement, the stigma of a "delinquency" label or the arbitrariness of the process. 7/ In subsequent juvenile court decisions, the Supreme Court further elaborated upon the procedural and functional equivalence between criminal and delinquency proceedings. 8/

In McKeiver v. Pennsylvania, 9/ however, the Supreme Court denied juveniles the constitutional right to jury trials in state delinquency proceedings and halted the extension of full procedural parity with adult criminal prosecutions. The McKeiver Court feared the adverse impact that jury trials would have on the traditional informality, flexibility and confidentiality of juvenile court proceedings. It realized that jury trials would make juvenile courts procedurally indistinguishable from criminal courts and would raise more basic questions about the need for a separate juvenile court. 10/

The McKeiver Court justified the differences in procedural safeguards between juvenile and criminal courts on the treatment rationale of the former and punitive purposes of the latter. However, the Court did not analyse the differences between juvenile treatment and adult punishment, simply noting that the ideal juvenile court system is "an ultimate, informal protective proceeding", even while acknowledging that the ideal is seldom, if ever, realized. 11/

Despite the McKeiver Court's retrenchment, its earlier decisions altered the form and function of juvenile justice by shifting attention from the "real needs" of a child to proof of crimes. 12/ Increasingly, the purposes and sentencing framework of juvenile courts reflect the substantive goals of the criminal law as well.

Just deserts in juvenile court sentencing practices

While the criminal law punishes morally responsible actors for making blameworthy choices, the juvenile justice system regards juveniles as less culpable or responsible for their criminal misdeeds. Punishment involves the imposition by the State, for purposes of retribution or deterrence, of burdens on an individual who has violated legal prohibitions. 13/ Treatment, by contrast, focuses on the mental health, status and future welfare of the individual rather than on the commission of a prohibited act. 14/ Punishment and treatment make markedly different assumptions about the sources of criminal or delinquent behaviour. Punishment assumes that responsible, free-will moral actors make blameworthy choices and deserve to suffer the prescribed consequences for their acts. 15/ Most forms of rehabilitative treatment, by contrast, assume some degree of determinism. Whether grounded in psychological or sociological processes, treatment relies upon the existence of external, antecedent causal forces as the source of the individual's conduct and on the availability of appropriate forms of intervention to modify or eliminate the effects of those forces. 16/

Conceptually, punishment and treatment are mutually exclusive penal goals. 17/ Punishment imposes unpleasant consequences because of an offender's past offences, while treatment seeks to alleviate undesirable conditions in order to improve the offender's future welfare. Treatment assumes that certain antecedent factors cause the individual's undesirable condition or behaviour, and that steps can be taken to alter that condition. Indeed, a degree of determinism is one of the central tenets of the positivistic criminology underlying the rehabilitative ideal of the juvenile court.

In analysing juvenile court sentencing practices, it is useful to examine whether the sentencing decision is based on considerations of the past offence or the future welfare of the offender. When a sentence is based on an assessment of past conduct - the present offence and prior criminal record - it is typically determinate and proportional and aims at retribution or deterrence. When a sentence is based on the characteristics of the offender, however, it is typically open-ended, non-proportional and indeterminate and aims at rehabilitation or incapacitation. 18/ The decision is based on a diagnosis or prediction about the effects of intervention on an offender's future course. The non-proportional and indeterminate

length of juvenile dispositions and the rejection of punishment for blameworthy choices are the principal points wherein juvenile courts differ from criminal courts.

In the adult dispositional context, determinate sentences based on the offence increasingly supersede indeterminate sentences as just deserts displace rehabilitation as the underlying sentencing rationale. 19/ The optimistic assumptions of progressives about human malleability are challenged daily by the observation that rehabilitation programmes do not consistently rehabilitate and by the volumes of empirical evaluations that question both the effectiveness of treatment programmes and the scientific underpinnings of those who administer the enterprise. 20/

Proponents of just deserts reject rehabilitation as a justification for intervention for three reasons: (a) the fact that an indeterminate sentencing scheme gives discretionary power to presumed experts, (b) the inability of such clinical experts to justify their differential treatment of similarly situated offenders on the basis of validated classification schemata with objective indicators, and (c) the inequalities, disparities and injustices that result from therapeutically individualized sentences. 21/ Just deserts sentencing, with its strong retributive foundation, punishes offenders according to their past behaviour rather than according to who they are or may become. Similarly situated offenders are defined and sanctioned equally on the basis of relatively objective and legally relevant factors such as seriousness of offence, culpability or criminal history.

The same changes in sentencing philosophy are now appearing in the juvenile justice process. However, just deserts sentences for juveniles have important implications for McKeiver's therapeutic rationale and its procedural correlates. The inability of proponents of juvenile rehabilitation to demonstrate the effectiveness of therapeutic intervention has led an increasing number of states to incorporate just deserts sentencing principles into their juvenile justice systems. The premises of just deserts are that a juvenile's personal characteristics or social circumstances do not provide a principled basis for determining the length or intensity of coercive intervention and that "only a principle of proportionality (or 'deserts') provides a logical, fair and humane hinge between conduct and an official, coercive response". 22/

In the United States, juvenile justice administration is almost exclusively within the purview of the states, subject only to the minimum federal constitutional standards announced in Gault and McKeiver. States' legislative statements of purpose in juvenile codes and juvenile court sentencing statutes provide indicators of whether a juvenile's disposition is punishment for her or his past offence or treatment based on her or his personal characteristics. 23/ Despite persisting rhetoric from proponents of rehabilitative methods, the dispositional practices of the contemporary juvenile court increasingly are based on the Principle of Offence and reflect the punitive character of the criminal law.

The purpose of the juvenile court: distinguishing punishment from treatment

The juvenile codes of most states contain a purpose clause or preamble that sets forth the rationale for the legislation; such a purpose clause is intended to help courts interpret the legislation. Since the first juvenile court was created in Cook County, Illinois, in 1899, the purpose of juvenile court law has been as follows:

> "... to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should be given by his parents ..." 24/

Many states include this original statement of purpose in their juvenile court preambles. 25/ They often include the additional purpose of "remov(ing) from a minor committing a delinquency offence the taint of criminality and the penal consequences of criminal behaviour, by substituting therefor an individual programme of counselling, supervision, treatment, and rehabilitation". 26/

Although the juvenile codes of 42 states contain a statement of legislative purpose or preamble, 27/ within the past decade, 10 state legislatures have redefined the purposes of their juvenile courts. 28/ These recent amendments de-emphasize the exclusive role of rehabilitation in the child's best interest and acknowledge the importance of public safety, punishment and individual and juvenile justice system accountability. One of the distinguishing characteristics of this new juvenile law is that "in many jurisdictions accountability and punishment have emerged among

the express purposes of juvenile justice statutes". 29/

The State of Washington restructured its entire juvenile code along the lines of the justice model to emphasize retributive punishment and just deserts rather than individualized treatment. 30/ The purpose clause of the statute reflects these new goals, 31/ although the law still denies jury trials in juvenile proceedings. 32/ Minnesota redefined the purpose of its juvenile courts "to promote public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behaviour and by developing individual responsibility for lawful behaviour". 33/ However, while that new punitive purpose marks a departure from the previous rehabilitative purpose, the state's legislation fails to provide for jury trials. 34/

Like the legislative changes in Washington and Minnesota, the purposes of juvenile courts in other states have become increasingly punitive, as shown by the following examples: "correct juveniles for their acts of delinquency"; 35/ "provide for the protection and safety of the public"; 36/ "protect society ... (while) recognizing that the application of sanctions which are consistent with the seriousness of the offence is appropriate in all cases"; 37/ "render appropriate punishment to offenders"; 38/ "protect the public by enforcing the legal obligations children have to society"; 39/ "protect the welfare of the community and ... control the commission of unlawful acts by children"; 40/ "protect the community against those acts of its citizens which are harmful to others and ... reduce the incidence of delinquent behaviour"; 41/ and "reduce the rate of juvenile delinquency and provide a system for the rehabilitation or detention of juvenile delinquents and protect the welfare of the general public". 42/

Some courts have recognized that these amended purpose clauses signal basic changes in philosophical direction, "a recognition that child welfare cannot be completely 'child centered'". 43/ Courts as well as legislatures increasingly acknowledge that punishment is an acceptable juvenile court disposition. In State v. Lawley, 44/ for example, the Supreme Court of the State of Washington reasoned that "sometimes punishment is treatment" and upheld the legislature's conclusion that "accountability for criminal behaviour, 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". 45/ Similarly, in In re Seven Minors, 46/ the Supreme Court of Nevada endorsed punishment as a legitimate purpose of its juvenile courts: "By formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offences, 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." 47/

However, many of these legislatures and courts failed to consider adequately whether a juvenile justice system can punish explicitly without also providing criminal procedural safeguards such as a jury trial. Although a legislature certainly may conclude that punishment is an appropriate strategy for controlling young offenders, it should, when it chooses to shape behaviour by punishment, provide the procedural safeguards of the criminal law. Any ancillary social benefit or individual reformation resulting from punishment is irrelevant to the need for procedural protections.

Just deserts dispositions: legislative/ administrative changes in the sentencing framework of juvenile courts

For most of the twentieth century, sentencing practices were dominated by the philosophy of positivism and by utilitarian, preventive or rehabilitative penal policies. 48/ As long as the views prevailed that offenders should be treated, not punished; that the duration of confinement should relate to rehabilitative needs; and that penal therapists possessed the scientific expertise to determine an offender's progress towards reform, indeterminacy reigned unchallenged. The precipitous decline of support for the rehabilitative ideal in the 1970s reawakened the quest for penal justice by sentencing similarly situated offenders similarly, on the basis of relatively objective factors, such as their offences. In a justice process in which the systematic reform of individual offenders remains an elusive goal, the quest for equality, uniformity and consistency in sentences acquires greater salience.

Analysing the sentencing statutes of juvenile courts provides another indicator of whether a disposition is for punishment or treatment. When the sentence is based on the characteristics of the offence, the sentence is usually determinate and proportional, with a goal of retribution or deterrence. When the sentence is based on the characteristics of the offender, however, it is typically indeterminate, with a goal of rehabilitation or incapacitation. 49/ Thus, it is useful to contrast offender-oriented dispositions, which are indeterminate and non-proportional, with offence-based

dispositions, which are determinate, proportional and related directly to characteristics of the past offence.

Historically, juvenile court sentences were indeterminate and non-proportional and were aimed at securing the best interests of the offender for the future. Rather than punishing a youth's past offences, the system tried to develop a programme to alleviate the conditions that caused the delinquency. Like other clinical endeavours, a delinquency disposition entails diagnosis, classification, prescription and prognosis: the sources of the delinquency; its likely course if left untreated; the appropriate forms of intervention to alter those conditions; and the ultimate prospects of success.

The contemporary juvenile sentencing provisions of a substantial majority of states mirror their progressive origins. Following an adjudication of delinquency, such statutes typically describe a range of sentencing alternatives - dismissal, probation, out-of-home placement or institutional confinement - and give the juvenile court judge broad discretion to impose an appropriate disposition. 50/ In choosing among dispositional options, some legislatures instruct the court to consider the "least restrictive alternative". 51/ Typically, juvenile dispositions are indeterminate; confinement may be for only one day, it may last until the offender has reached the age of majority or it may have some other statutory termination. 52/ Within this substantial range, the judge's authority is formally unrestricted.

Even states that use indeterminate sentences recognize the significance of the Principle of Offence as a dispositional constraint. For example, North Carolina law states that within the range of alternative sentences, "the judge shall select the least restrictive disposition ... that is appropriate to the seriousness of the offence, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile". 53/ Similarly, Iowa legislation instructs the sentencing judge to consider "the seriousness of the delinquent act, the child's culpability as indicated by the circumstances of the particular case, the age of the child and the child's prior record". 54/

Determinate sentences in juvenile court

About one-third of the states now use either legislative or administrative offence-based criteria - determinate or mandatory minimum sentencing statutes, or administrative sentencing guidelines - to regulate some or all of the juvenile institutional commitment and release decisions. These determinate or mandatory minimum sentencing provisions attend to the seriousness of the present offence, the nature of the prior record, or both.

The most dramatic departure from traditional juvenile justice occurred in 1977, when the State of Washington enacted just deserts sentencing legislation. 55/ That legislation sought individual and system accountability through presumptive sentencing guidelines. 56/ The legislative guidelines emphasize uniformity, consistency, equality, proportionality, fairness and accountability rather than the traditional goal of rehabilitation. Under the statute and administrative sentencing guidelines, presumptive sentences for juveniles are determinate and proportional, based on age, the seriousness of the present offence and the prior record. 57/

Recent New Jersey legislation instructs juvenile court judges to consider the offence and the criminal history when sentencing juveniles, and it provides enhanced sentences for certain serious or repeat offenders. 58/ The code revision of New Jersey reflects a desire "to promote where possible uniformity of sentencing term and rationale for similar delinquent acts throughout the State". 59/ Although the juvenile court judge retains the discretion whether or not to incarcerate a youth, the legislation provides "aggravating and mitigating" offence criteria to guide that decision. 60/ The New Jersey legislation creates a "presumption of non-incarceration" for minor offences by juveniles who do not have prior adjudications but prescribes harsher penalties for serious offenders. 61/

In 1987, Texas adopted determinate sentencing legislation for some juvenile offenders. 62/ A prosecutor may submit very serious offences to a grand jury and, if the petition is approved and the youth is convicted, "the court or jury may sentence the child to commitment in the Texan Youth Commission with a transfer to the Texas Department of Corrections for any term of years not to exceed 30 years". 63/ Because of the length of the sentences authorized, the Texas law provides juveniles with a jury trial at adjudication and sentencing. 64/

Mandatory minimum terms of confinement based on offence

While some states experiment with determinate sentences, other jurisdictions use either offence criteria as sentencing guidelines 65/ or mandatory minimum sentences for certain offences. 66/ Regardless of the details of the legislative stra-

tegy, the formal use of offence criteria as the determinant of dispositions precludes individualized consideration of a juvenile's real needs.

Under many of the mandatory minimum sentencing statutes, the juvenile court judge retains discretion whether or not to commit a juvenile to the state's department of corrections. 67/ If the judge does decide to incarcerate a youth, however, she or he may also prescribe the minimum sentence to be served for the offence. 68/ In several jurisdictions, the mandatory sentence is non-discretionary, and the judge must commit the juvenile for the statutory period. 69/ These non-discretionary mandatory minimum sentences are typically imposed on juveniles charged with serious or violent present offences 70/ or those who have prior delinquency convictions. 71/ The mandatory minimum sentences may range from 12 to 18 months; 72/ they may be until age 21; 73/ or they may be the same as the adult maximum sentence for the same offence. 74/

While its dispositions are generally indeterminate, Colorado has several statutes governing the dispostions of violent and repeat juvenile offenders, 75/ mandatory sentence offenders 76/ and aggravated juvenile offenders. 77/ For juveniles sentenced as violent, repeat or mandatory offenders, out-of-home placement for a minimum of one year is mandatory. 78/ If the offender is committed to an institution, the judge also specifies the minimum term that must be served. When a youth is sentenced as an aggravated juvenile offender, the court may impose a determinate sentence of five years. 79/

Connecticut uses offence-based sentencing laws for serious juvenile offenders. Serious juvenile offences include 39 serious crimes, such as homicide, assault, sexual assault, kidnapping and the like. 80/ If a juvenile is convicted of a serious juvenile offence, "the court may set a period of time up to six months during which (the Department of Corrections) shall place such child out of his town of residence at the commencement of such child's commitment". 81/

Georgia's serious delinquent statute, the Designated Felony Act, first identifies "designated felonies". 82/ If a juvenile is sentenced as a designated felon, then the Department of Corrections retains custody over the youth for an initial period of five years and the judge may order the child to be confined in training school for "not less than 12 nor more than 18 months". 83/ Moreover, if a juvenile commits a designated felony that inflicts serious physical injury on a person aged 62 years or older, or commits a burglary following two prior burglary adjudications, the court must sentence the youth as a designated felon for the mandatory 12-18 month term. 84/

New York's designated felony legislation provides mandatory sentences for youths convicted of certain offences. 85/ If a youth is convicted of a class A designated felony act and a restrictive placement is ordered, the juvenile is committed to the Department for Youth for an initial period of five years, the first 12-18 months of which must be spent in a secure facility. 86/ If the designated felony involved serious physical injury or a victim who is 62 years or older, secure confinement is mandatory. 87/ If the youth is convicted of any other designated felony act, the initial placement is for three years, with the first 6-12 months spent in secure confinement. 88/ Finally, if a youth convicted of a designated felony act has a prior conviction for a designated felony, then the court must sentence under the five-year class A provisions rather than the three-year provisions. 89/

Ohio has adopted mandatory minimum sentences based on the seriousness of the offence. The purpose of the Ohio law was to decarcerate minor offenders, reduce overcrowding and reserve the institutions for the more serious offenders. 90/ While the judge retains discretion whether or not to commit a youth convicted of a felony, if confinement is ordered, then the mandatory minimum terms are six months, one year, or until age 21, depending on the seriousness of offence. 91/ Moreover, if a youth is convicted of murder or a first- or second-degree felony, the commitment must be served in a secure facility. 92/

A number of other states, including Delaware, 93/ Illinois, 94/ Kentucky, 95/ North Carolina, 96/ Tennessee 97/ and Virginia, 98/ have laws providing mandatory minimum sentences for serious or repetitive juvenile offenders.

Administratively adopted determinate/presumptive or mandatory minimum sentencing guidelines

A third form of just deserts sentencing occurs when state departments of corrections adopt length-of-confinement guidelines for juveniles. These administrative guidelines use offence criteria to structure institutional release decisions. While adult corrections and parole agencies have used release guidelines for several decades, their use in the juvenile process is more recent.

In 1980, the Minnesota Department of Corrections adopted administrative determinate sentencing guidelines. Under them, a juvenile's length of

stay is based on the most serious offence committed and "risk of failure" factors that are "predictive to some degree of future delinquent behaviour". 99/ The recidivism risk factors include prior felony adjudications and probation and parole failures. The plan "provide(s) a more definite and distinct relationship between the offence and the amount of time required to bring about positive behaviour change". 100/ This state's sentencing guidelines for adult offenders, which are explicitly punitive and expressly designed to achieve just deserts, rely on the same factors.

Arizona's Department of Corrections has adopted length-of-confinement guidelines to govern juvenile release decisions. 101/ The object of the administrative guidelines is to assure that a juvenile "shall be retained in institutional confinement for a period which is proportionate to adult sentences for the same crimes". 102/ To achieve the goals of deterrence, public protection and proportionality, the guidelines create five categories of offence and specify corresponding mandatory minimum terms of confinement of 18, 12, 9, 6 and 3 months. There is no maximum limit on institutional confinement other than a youth's eighteenth birthday. 103/

In addition to its designated felony statute, Georgia also uses an administrative determinate sentencing framework that was adopted by the Division of Youth Services in 1981. 104/ Under the Division's uniform juvenile classification system, committed delinquents are placed in one of five levels based on "public risk", the primary determinate of which is the seriousness of the present offence. 105/ The length of time that a juvenile will spend in institutional confinement is based on the offence classification level and other aggravating factors, such as being a habitual or multiple offender. 106/ Georgia's decision to adopt determinate sentencing guidelines was influenced, in part, by the just deserts guidelines of the State of Washington, the recommendations of the Juvenile Justice Standards Project 107/ and a desire to forestall any determinate sentencing legislation. 108/

In California, a juvenile court judge may commit a juvenile to the Youth Authority, a division of the Department of Corrections. 109/ The Youth Authority, which is responsible for running the state's training schools, receives juvenile offenders committed by juvenile courts and young adult offenders (ages 18-21) sentenced by criminal courts. The majority of Youth Authority commitments come from juvenile courts, and many of these offenders did not commit violent crimes. 110/ Once a juvenile is sentenced to the Youth Authority, however, the release decision is made by a youthful offender parole board, whose members are appointed by the state governor. 111/ At an initial hearing, the board establishes a parole consideration date. While that date is neither "a fixed term or sentence, nor ... a fixed parole release date", it represents the time by which a youth "may reasonably and realistically be expected to achieve readiness for parole". 112/ In establishing a parole consideration date, the board uses seven categories to reflect its assessment of the "seriousness of the specific offences and the degree of danger those committed to the Youth Authority pose to the public". 113/ While the maximum length of confinement is limited by the jurisdiction of the Youth Authority, 114/ within that range, the primary determinant of a youth's length of stay is the seriousness of the offence. 115/

Changes in juvenile court sentencing practices

There is a very strong movement in the United States, both in theory and in practice, away from therapeutic, individualized juvenile sentencing practice towards determinate or mandatory sentences based on the Principle of Offence. This trend has emerged only since the McKeiver decision. When McKeiver was decided, in 1970, no states used determinate sentences, mandatory minimum sentences or administrative sentencing guidelines for serious juvenile offenders. Today, about one third of the states employ one or more of these sentencing strategies. In 1976, New York and Kentucky adopted designated felony legislation. In 1977, the State of Washington adopted determinate sentencing guidelines for juveniles and Colorado passed the first of a series of serious juvenile offender laws. The State of Washington experiment, with its extensive evaluation research, provided a model for other jurisdictions. Serious offender sentencing legislation was adopted in 1979 in Connecticut, Illinois and North Carolina. Since 1980, 11 more states - Arizona, Arkansas, California, Delaware, Georgia, Minnesota, New Jersey, Ohio, Tennessee, Texas and Virginia - have adopted either mandatory minimum serious juvenile offender laws, determinate sentence laws or administrative guidelines.

These laws and administrative guidelines have eliminated virtually all of the significant distinctions between sentencing practices in juvenile and adult criminal courts. The use of determinate sentences based on the present offence and prior record challenges the traditional therapeutic rationale for juvenile dispositions. Mandatory minimum sentences based on the seriousness of the offence avoid any reference to an offender's real needs or best interests. The revisions in juvenile

court purpose clauses, in placing greater emphasis on punishment, accountability or public safety, eliminate even rhetorical support for the rehabilitative goals of juvenile justice.

Implications of changing sentencing practices for juveniles and justice

The shift in juvenile sentencing strategies from the offender to the offence and from treatment to punishment has profound implications for the juvenile court as an institution. The explicit emphasis on punishment contradicts prevailing assumptions about the lack of culpability and criminal responsibility on the part of young offenders. Because punishment is playing an increasing, if not a dominant, role in juvenile court sentencing, issues of procedural justice are being raised that the Supreme Court avoided in the matter of McKeiver.

Offence-based sentencing and youthful criminal responsibility

The shift from indeterminate sentences requires a reassessment of the criminal responsibility of young people. The impositions described above, as well as the execution of juveniles waived to and convicted in criminal courts, are a stark indicator of changes in attitudes about the criminal responsibility of adolescents. 116/

The premise of the original juvenile court was the immaturity and irresponsibility of children. The view of juveniles as lacking criminal capacity followed from the mens rea defence of early common law. 117/ Since the premise of criminal liability is rational actors who make blameworthy choices and are responsible for the consequence of their acts, the common law recognized and exempted from punishment categories of persons who lacked the requisite moral and criminal responsibility. 118/ Children less than 7 years of age were conclusively presumed to lack criminal capacity, while those 14 years of age and older were treated as fully responsible. Between the ages of 7 and 14 years, there was a rebuttable presumption of criminal incapacity. 119/ Juvenile court legislation simply extended upwards by a few years the general presumption of youthful criminal incapacity.

The emergence of the Principle of Offence in sentencing statutes challenges these basic assumptions about the lack of criminal responsibility of young people. 120/ Such legislation constitutes a legislative judgement that the young people are just as responsible, culpable and blameworthy as their somewhat older counterparts and therefore just as deserving of punishment. 121/

The extent to which young offenders, like their older counterparts, deserve punishment hinges on the meaning of culpability. The underlying rationale of deserved punishments - just deserts - derives from Von Hirsch's writings in moral philosophy. 122/ Central to the contemporary deserts theory, which addresses itself explicitly only to adult offenders, is the notion of punishment as censure, condemnation and blame. Proportioning penalties to the seriousness of the crime reflects the connection between conduct and its blameworthiness.

Because the principle of commensurate desert proportions sanctions, that is, condemnation and blame, to the seriousness of the offence, the analysis shifts to the meaning of "seriousness". The seriousness of an offence is the product of two components, harm and culpability. 123/ Evaluations of harm focus on the degree of injury inflicted, risk created or value taken. 124/ When the harmfulness of a criminal act is being assessed, the age of the perpetrator is of relatively little consequence.

However, assessments of seriousness also depend on the quality of the actor's choice (the intent or mens rea) to engage in the conduct that produced the harm. It is with respect to the culpability of choices, that is, the blameworthiness of acting in a particular harm-producing way, that the fact of youthfulness become especially troublesome.

Even if it is acknowledged that juveniles are capable of inflicting harms identical to those inflictable by older offenders, whether the juveniles are as culpable is a more difficult question. Developmental psychological research suggests that while youths of 14 or more may be abstractly aware of right from wrong, they are less capable than adults of making sound judgements or moral distinctions. 125/ "Juveniles are less mature - less able to form moral judgements, less capable of controlling their impulses, less aware of their acts. In a word, they are less responsible, hence less blameworthy, than are adults; their diminished responsibility means that they 'deserve' a lesser punishment than does an adult who commits the same crime." 126/ In part, lessened capacity stems from a lesser appreciation of the consequences of their acts than adults. 127/ Moreover, the crimes of children are seldom their fault alone; society shares at least some of the blame for their offences because it has truncated their opportunities to learn to make correct choices. 128/ Indeed, to the extent that the ability to make responsible choices is learned behaviour, the dependent status of youth systematically deprives

them of opportunities to learn to be responsible. 129/ Finally, even when juveniles are aware of the general criminal prohibition, they are more susceptible to peer group influences and group process dynamics than their older counterparts. 130/

The changes in sentencing legislation analysed above ignore many of the apparent differences in culpability between adolescents and young adults. By punishing juveniles for criminal choices as if they were as criminally responsible as adults, such legislation denies the deterministic premises of the juvenile court that a juvenile's crime is not his "fault". While juvenile sentences may be shorter than the adult sentences, they are substantial nonetheless.

The quality of procedural justice in juvenile courts: the consequences of acknowledging punishment

Basing the sentence of a juvenile on the seriousness of the present offence and prior record also raises questions about the quality of procedural justice in juvenile courts. In the decades since Gault, there has been a substantial convergence between the formal procedural attributes of criminal courts and juvenile courts. The greater procedural formality of the juvenile courts and the fact that they are now more adversary in nature reflect the attenuation of their therapeutic missions and social control functions.

Despite the criminalization of juvenile justice, it remains nearly as true today as it was two decades ago that "the child receives the worst of both worlds: that (the child) gets neither the protections accorded to adults nor the solicitious care and regenerate treatment postulated for children". 131/ Most state juvenile codes provide neither special procedural safeguards to protect juveniles from the consequences of their own immaturity nor the full panoply of adult criminal procedural safeguards to protect them from punitive state intervention. Instead, they employ procedures that assure that juveniles continue to receive the worst of both worlds: they treat juvenile offenders just like adult criminal defendants when formal equality redounds to their disadvantage and use the less effective juvenile court procedures when those procedural deficiencies redound to the advantage of the state.

Jury trials in juvenile court

Two procedural aspects of juvenile justice administration are critical when sentences are dictated by the characteristics of the offence rather than the offender. Although the Supreme Court in McKeiver denied juveniles the right to a jury trial and posited virtual parity between the quality of juvenile and adult adjudications, it is easier to convict a youth appearing before a judge in juvenile court than to convict him or her, on the basis of the same evidence, before a jury of detached citizens in a criminal proceeding. 132/

The increased punitiveness of juvenile justice raises a dilemma of constitutional dimensions: "Is it fair, in the constitutional sense, to expose minors to adult sanctions for crimes, without granting them the same due process rights as adults? ... The campaign to impose adult-type sanctions on children will collide with advocates who argue that children exposed to adult sanctions must have the same due process rights as adults." 133/ Very few of the states that sentence juveniles on the basis of the Principle of Offence provide jury trials, 134/ and several of those states have explicitly rejected requests for jury trials. 135/ For juvenile justice operatives, the jury trial has symbolic implications out of all proportion to its practical impact. 136/ Jury trials require candor and honesty about the punitive reality of juvenile justice and engender a corresponding need to provide safeguards against even benevolently motivated governmental coercion.

Rights to counsel in juvenile court

A second issue of procedural justice hinges on access to and the competence of legal counsel in the juvenile court. While juveniles have been constitutionally entitled to representation by counsel since Gault, the right to counsel appears to be honoured more in the breach than in the observance. In many states, fewer than half the juveniles adjudicated delinquent receive the assistance of counsel, to which they are constitutionally entitled. 137/ Surveys in several jurisdictions give "reason to think that lawyers still appear (in juvenile court) much less often than might have been expected". 138/ The most comprehensive study to date reports that in half the states, "nearly half or more of delinquent and status offenders did not have lawyers, including many youths who received out-of-home placement and secure confinement dispositions". 139/ The one inescapable fact of juvenile justice administration is that in many states, the majority of youths prosecuted as delinquents are not represented by counsel during the process. 140/ While there are several possible explanations for the fact that so many youths are unrepresented, these juveniles face potentially coercive state action without an attorney or without appreciating the legal consequences, and face the prosecutorial power of the

state alone and unaided. As juvenile courts become more punitive, the right to counsel acquires even greater salience. 141/

The punitive juvenile court

Historical justifications for the procedural deficiencies of the juvenile court are untenable in an institution that is increasingly punitive. Legislative and administrative changes in juvenile sentencing practices reflect a philosophical ambivalence about the continued role of the juvenile court. 142/ As juvenile courts converge with adult criminal courts, is there any reason to maintain a separate juvenile court whose sole distinguishing characteristic is its persisting procedural deficiencies? 143/

The juvenile court is at a philosophical crossroads, with the future direction unresolvable by simplistic treatment-versus-punishment formulations. In reality, there are no practical or operational differences between the two dispositions: "sometimes punishment is treatment". Once having recognized the punitive reality of juvenile court intervention, there is a concomitant obligation to provide appropriate procedural safeguards, since "the condition of being a (child) does not justify a kangaroo court". 144/ While providing young offenders with full procedural parity may, as the Supreme Court had feared, sound the death-knell of the juvenile court, 145/ failing to do so is to perpetuate injustice.

Notes

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

2/ B. Feld, "Criminalizing juvenile justice: rules of procedure for juvenile court", 69 Minnesota Law Review 141 (1984) (hereinafter cited as "Criminalizing juvenile justice"); E. Ryerson, The Best-laid Plans: America's Juvenile Court Experiment (New York, Hill and Wang, 1978) (hereinafter cited as Best-land Plans); and D. Rothman, Conscience and Convenience: The Asylum and its Alternatives in Progressive America (Boston, Little, Brown, 1980) (hereinafter cited as Conscience and Convenience).

3/ Feld, "Criminalizing juvenile justice"; "Juvenile court legislative reform and the serious young offender: Dismantling the 'rehabilitative ideal'", 65 Minnesota Law Review 167 (1981) (hereinafter cited as "Juvenile court legislative reform").

4/ D. Matza, Delinquency and Drift (New York, Macmillan, 1964), p. 5; F. Allen, "Legal values and the rehabilitative ideal", in Borderland of Criminal Justice (Chicago, University of Chicago Press, 1964) (hereinafter cited as "Legal values"); D. Rothman, Conscience and Convenience, pp. 50-51.

5/ Allen, "Legal values"; Allen, "The decline of the rehabilitative ideal in American criminal justice", 27 Cleveland State Law Review 147, 150-151 (1978); and Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (New Haven, Yale University Press, 1981), pp. 11-15 (hereinafter cited as Decline of the Rehabilitative Ideal).

6/ Fox, Juvenile Justice Reform; Mack, The Juvenile Court; Platt, The Childsavers; Ryerson, Best-laid Plans.

7/ Idem. at 21.

8/ In In re Winship, 397 U.S. 358 (1970), the Court decided that proof of delinquency must be established by the criminal standard of proof "beyond a reasonable doubt" rather than by the lower civil standards of proof. In Breed v. Jones, 421 U.S. 519 (1975), the Court prohibited adult criminal re-prosecution of a youth after a prior conviction in juvenile court, positing a functional equivalence between an adult criminal trial and a delinquency proceeding.

9/ 403 U.S. 528 (1971).

10/ 403 U.S. 551 (1971).

11/ 403 U.S. 528, 547-548, 550 (1971).

12/ See, e.g. In re Javier A., 206 Cal. Rptr. 386, 419 (1984): "Juvenile proceedings now feature the same contests over admission of evidence as adult proceedings since only proof admissible in a criminal trial can be used to support a finding the juvenile committed the criminal offense."

13/ H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (New York, Oxford University Press, 1968), pp. 4-5 (hereinafter cited as Punishment and Responsibility).

14/ Allen, "Legal values", p. 25; Allen, Decline of the Rehabilitative Ideal, pp. 2-3; H. Packer, Limits of the Criminal Sanction (Stanford, California, Standford University Press, 1968), pp. 23-28 (hereinafter cited as Limits).

15/ See, for example, A. Von Hirsch, Doing Justice: The Choice of Punishments (Boston, Northeastern University Press, 1976), pp. 49 and 51 (hereinafter cited as Doing Justice); Hart, Punishment and Responsibility.

16/ D. Gibbons, Changing the Lawbreaker: The Treatment of Delinquents and Criminals (Totowa, New Jersey, Allanheld, 1965), p. 130. See, generally, Feld, Reference of Juvenile Offenders, pp. 530-540, for a discussion of the underlying assumption of treatment in juvenile justice.

17/ Gardner, Punishment and Juvenile Justice, p. 739 n. 18, 815-816; Feld, "Criminalizing juvenile justice", p. 248, n. 415-416.6.

18/ In re Felder, 93 Misc. 2d 369, 374, 402 N.Y.S. 2d 528, 533 (N.Y. Fam. Ct. 1978): "The distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment." See, generally, N. Morris, The Future of Imprisonment (Chicago, University of Chicago Press, 1974), pp. 13-20 (hereinafter cited as Future), Packer, Limits; Twentieth Century Fund, A. M. Dershowitz, Fair and Certain Punishment (New York, McGraw-Hill, 1976), pp. 11-14; Von Hirsch, Doing Justice, pp. 11-26; Von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals (New Brunswick, New Jersey, Rutgers University Press, 1986) (hereinafter cited as Past or Future Crimes).

19/ Petersilia and Turner, "Guideline-based justice: prediction and racial minorities", in Crime and Justice: An Annual Review of Research, N. Morris and M. Tonry, eds. (Chicago, University of Chicago Press, 1987), p. 152, report that: "By 1985, at least fifteen states had enacted determinate sentencing statutes, ten states had abolished their parole boards, and thirty-five states had mandatory minimum-sentence laws ... Many states and jurisdictions had established formal guidelines for sentencing decisions (e.g. prison vs. probation, length of sentence) for determining supervision levels for parolees and probationers, and for parole release." See, generally, Struggle for Justice (Philadelphia, American Friends Service Committee, 1971). pp. 45-53; D. Fogel, We Are Living Proof: The Justice Model for Corrections, 2nd ed. (Cincinnati, Anderson Publishing, 1979), p. 260; Morris, Future, pp. 45-50; R. Singer, Just Deserts: Sentencing Based on Equality and Desert (Cambridge, Massachusetts, Ballinger, 1979); Von Hirsch, Doing Justice, pp. 49-55.

20/ See Martinson, "What works? Questions and answers about prison reform", 35 Public Interest 22,25 (1974): "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable affect on recidivism"; National Research Council, The Rehabilitation of Criminal Offenders: Problems and Prospects, L. Secherest, S. White and E. Brown, eds. (Washington, D.C., National Academy Press, 1979); D. Glaser, The Effectiveness of a Prison and Parole System (1964); D. Ward, D. Wilner and G. Kassebaum, Prison Treatment and Parole Survival (1971); Robinson and Smith, "The effectiveness of correctional programs", 17 Crime and Delinquency 67 (1971); Fishman, "An evaluation of criminal recidivism in projects providing rehabilitation and diversion services in New York City", 68 Journal of Criminal Law and Criminology 283 (1977); Greenberg, "The correctional effects of corrections", in Corrections and Punishment, D. Greenberg, ed. (1977), p. 111.

21/ See, for example, American Friends Service Committee, Struggle for Justice; Lopez, "The crime of criminal sentencing based on rehabilitation", 11 Golden Gate University Law Review 533 (1981); Greenberg and Humphries, "The cooptation of fixed sentencing reform", 26 Crime and Delinquency 206, 207-208 (1980).

22/ Cohen, Juvenile Offenders, p. 3.

23/ Elsewhere, I have used a just deserts framework to analyse the sentencing decision whether a youth should be transferred from juvenile court to criminal court for prosecution and punishment as an adult. See Feld, "Juvenile court meets the Principle of Offense: legislative changes in juvenile waiver statutes", 78 Journal of Criminal Law and Criminology 471 (Fall, 1987) (hereinafter cited as "Juvenile court meets Principle of Offense").

24/ Ill. Ann. Stat. ch. 37 sect. 701-702 (Smith-Hurd, 1972). The original Illinois Statute sect. 21 (1899) provided simply: "This act shall be liberally construed, to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an improved family home and become a member of the family by legal adoption or otherwise."

25/ See, for example, Iowa code Ann. sect. 232.1 (1904); Or. Rev. Stat. sect. 419.474 (2) (1919); R.I. Gen. Laws sect. 14-1-2 (1944); Utah Code Ann. sect. 78-3a-1 (1931). See, generally, Feld, "Criminalizing juvenile justice", p. 250.

26/ See, for example, N.H. Stat. Ann. sect. 169-B:1 II; N.D. Cent. Code sect. 27-20-01 (1969); Ohio Rev. Code Ann. sect. 2151.01 (1969); Tenn. Code Ann. sect. 37-1-101 (1970); Vt. Stat. Ann. tit. 33 sect. 631 (1967).

27/ See, for example, Ark. Stat. Ann. sect. 45-402 (1975); Calif. Welf. & Inst. Code sect. 202 (1976); Fla. Stat. Ann. sect. 39.001 (1951); Ga. Code Ann. sect. 15-11-1 (1971); Ind. Code Ann. sect. 31-6-1-1 (1978); Me. Rev. Stat. Ann. tit. 15 sect. 3002 (1977); Md. Code Ann. sect. 3802 (1969); Mont. Code Ann. sect. 41-5-102 (1947); Neb. Rev. Stat. sect. 43-246 (1905); Nev. Rev. Stat. Ann. sect. 62.031 (1949); N.H. Rev. Stat. Ann. sect. 169B:1 (1937); Ohio Rev. Code Ann. sect. 2151.01 (1969); Okla. Stat. Ann. tit. 10 sect. 1129 (1968); R.I. Gen. Laws sect. 14-1-2 (1944); S.C. Code Ann. sect. 20-7-470 (1942); S.D. Codified Laws Ann. sect. 26-8-2 (1909). Wash. Stat. sect. 13.40.010 (1977); Wisc. Stat. sect. 48.01 (1955). (Note: Date refers to the year that the current juvenile code purpose clause was adopted.)

28/ See, for example, Ark. Stat. Ann. sect. 45-402.1 (1979); Cal. Welf & Inst. Code sect. 202 (West 1984); Fla. Stat. Ann. sect. 39.001 (2) (a) (1978); Hawaii Rev. Stat. sect. 571-1 (1976); Ind. Code Ann. sect. 31-6-1-1 (Burns 1980); Minn. Stat. sect. 260.011 (2) (1982); Tex. Family Code sect. 51.01 (2) (1974); Va. Code sect. 16.1-227 (1982); Wash. Rev. Code Ann. sect. 13.40.010 (2) (1977); W. Va. Code, 49-1-1 (a) (1978).

29/ Walkover, The New Juvenile Court.

30/ See, for example, A. Schneider, A Comparison of Intake and Sentencing Decision-Making Under Rehabilitation and Justice Models of the Juvenile System (1983); A. Schneider and D. Schram, A Justice Philosophy for the Juvenile Court (1983) (hereinafter cited as Justice Philosophy); Walkover, The New Juvenile Court, pp. 528-533; "Juvenile law", a symposium on the new Washington juvenile code, 14 Gonzaga Law Review 285 (1979).

31/ Wash. Rev. Code. Ann. sect. 13.40.010 (2) (Supp. 1984).

32/ Wash. Rev. Code. Ann. sect. 13.40.020.

33/ Minn. Stat. sect. 260.011(2)(1982). See Juvenile Justice Standards relating to Dispositions, Standard 1.1. See, generally, Feld, "Juvenile court legislative reform", pp. 197-203.

34/ See, for example, Feld, "Juvenile court legislative reform".

35/ Ark. Stat. Ann. sect. 45-402.1 (1979).

36/ Cal. Welf & Inst. Code sect. 202 (West 1984). An earlier version of the California purpose clause, adopted in 1976, also provided that the purpose was to "protect the public from criminal conduct by minors; to impose on the minor a sense of responsibility for his or her own acts". The current version of the purpose clause also authorizes "punishment that is consistent with the rehabilitative objectives" and enjoins juvenile courts to "consider the safety and protection of the public" as well as the best interests of the minor in making its decisions. A task force examining juvenile justice administration concluded that "the Juvenile Court Law of California, founded on the concept of rehabilitation, has been amended to emphasize punishment and accountability as legitimate goals of the system". (Private Sector Task Force on Juvenile Justice, Final Report (1987), p. 3).

37/ Fla. Stat. Ann. sect. 39.001 (2) (a) (1978).

38/ Hawaii Rev. Stat. sect. 571-1 (1976).

39/ Ind. Code Ann. sect. 31-6-1-1 (Burns 1980).

40/ Tex. Family Code Ann. sect. 51.01 (2).

41/ Va. Code sect. 16.1-227 (1982).

42/ W. Va. Code, 49-1-1 (a) (1978).

43/ See, for example, State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 at 409, n. 8 (1980); In In re Javier A., 206 Cal. Rptr. 386 at 417 (Cal. App. 1984).

44/ 91 Wash. 2d 654, 591 P.2d 772 (1979).

45/ 91 Wash. 2d 656-57, 591 P.2d 773-774.

46/ 99 Nev. 427, 664 P.2d 947 (1983).

47/ 99 Nev. 427, 436, 664 P.2d 947, 953 (1983).

48/ See, for example, A. Dershowitz, "Indeterminate confinement: letting the therapy fit the harm", 123 University of Pennsylvania Law Review 297 (1974); Zalman, "The rise and fall of the indeterminate sentence", 24 Wayne Law Review 45, 857 (1977).

49/ See, for example, Packer, Limits, pp. 23-28; Morris, Future; American Friends Service Committee, Struggle for Justice; Allen, "Legal values", p. 25.

50/ See, for example, Fla. Stat. Ann. sect. 39.11; Hawaii Rev. Stat. sect. 571-48 (1980); Iowa Code Ann. sect. 232.52 (1985); S.C. Code Ann. sect. 20-7-1330 (1984).

51/ See, for example, Ark. Stat. Ann. sect. 45-436 (3) (1985); Iowa Code Ann. sect. 232.52 (1) (1985).

52/ See, for example, Ark. Stat. Ann. sect. 45-43 (age 18); Fla. Code Ann. sect. 39.11 (c) (age 19); Nev. Rev. Stat. Ann. sect. 62.21 (age 20); D.C. Code sect. 16-2322 (f) (age 21).

53/ N.C. Gen. Stat. sect. 7A-646.

54/ Iowa Code Ann. sect. 232.52 (1).

55/ See Wash. Rev. Code sect. 13.40.0. See also Schneider and Schram, Justice Philosophy, p. 7: "The Washington juvenile justice code is one of the truest applications of a justice philosophy that exists in the United States"; "Juvenile law", a symposium on the new Washington juvenile code, 14 Gonzaga Law Review 285 (1979); Krajick, "A step toward determinacy for juveniles", Corrections Magazine, Sept. 1977, p. 37.

56/ Schneider and Schram, Justice Philosophy, p. 2; Becker, "Washington State's new juvenile code: an introduction", 14 Gonzaga Law Review, 289 at 308 (1979).

57/ Wash. Rev. Stat. Ann. sect. 13.40.010 (2) (c), (d) (Supp. 1984); "Juvenile law", a symposium on the new Washington juvenile code, 14 Gonzaga Law Review 285 (1979); Schneider and Schram, Justice Philosophy; B. Fisher, M. Fraser and M. Forst, Institutional Commitment and Release Decision-Making for Juvenile Delinquents: An Assessment of Determinate and Indeterminate Approaches, Washington State - A Case Study (1985).

58/ N.J. Stat. Ann. sect. 2A:4A-20 (1982) Senate Judiciary Committee Statement at sect. 25. See also Juvenile Delinquency Disposition Commission, The Impact of the New Jersey Code of Juvenile Justice (1986), p. 14.

59/ Ibid.

60/ N.J. Stat. Ann sect. 2A:4A-43 (a) (1986).

61/ N.J. Stat. Ann. Sect. 2A:4A-43 (b) (1).

62/ Tex. Fam. Code sect. 53.045; 54.04 (1987). Determinate sentences may be imposed on youths charged with and convicted of murder, capital murder, aggravated kidnapping, aggravated sexual assault, deadly assault on a law enforcement official or attempted capital murder.

63/ Tex. Fam. Code sect. 54.04 (d) (3) (1987).

64/ Tex. Fam. Code sect. 54.03 (b) and (c) (1987).

65/ See, for example, Colo. Rev. Stat. sect. 19-3-113, -113.1, -113.2 (1977).

66/ See, for example, Del. Code Ann. tit. 10 sect. 937; N.Y. Fam. Ct. Act sect. 352.2, 353.5 (1976); Ohio Rev. Code Ann. sect. 2151.353, -.355 (1981).

67/ See, for example, Ark. Stat. Ann. sect. 45-436 (1975); Ky. Rev. Stat. Ann. sect. 208.200, .194 (1976).

68/ See, for example, Ark. Stat. Ann. sect. 45-436 (1981).

69/ See, for example, Del. Code Ann. tit. 10 sect. 937 (felony conviction after prior felony conviction within one year).

70/ See, for example, N.Y. Fam. Ct. Act. sect. 352.2 (1976).

71/ See, for example, Del. Code Ann. tit. 10 sect. 937.

72/ Ga. Code Ann. sect. 15-11-33 (1980) (burglary with two prior burglaries or designated felony with a prior designated felony).

73/ Ill. Stat. Ann. sect. 705-10 (1979) (violent offence with two prior adjudications).

74/ Tenn. Code Ann. sect. 37-1-131 (1985).

75/ Colo. Rev. Stat. sect. 19-3-113.1, sect. 19-1-103 (28) and sect. 19-1-103 (23.5).

76/ Colo. Rev. Stat. sect. 19-1-103 (19.5).

77/ Colo. Rev. Stat. sect. 19-1-103 (2.1).

78/ Colo. Rev. Stat. sect. 19-3-113.1 (1) and (2).

79/ Colo. Rev. Stat. sect. 19-3-113.2 (1).

80/ Conn. Gen. Stat. sect. 46B-120.

81/ Conn. Gen. Stat. sect. 46b-140 (e) (1).

82/ Ga. Code Ann. sect. 15-11-37 (a) (2) (1980): "'Designated felony act' means an act which, if done by an adult would be one or more of the following crimes:

"(A) Murder, rape, kidnapping, or arson in the first degree, if done by a juvenile 13 or more years of age;

"(B) Aggravated assault, voluntary manslaughter, aggravated sodomy, arson in the second degree, aggravated battery, robbery, or armed robbery, if done by a juvenile 13 or more years of age; or

"(C) Attempted murder or kidnapping, if done by a juvenile 13 or more years of age; or

"(D) Burglary, if done by a juvenile 13 or more years of age who has previously been adjudicated delinquent at separate court appearances for an act which, if done by an adult, would have been the crime of burglary."

83/ Ga. Code Ann. sect. 15-11-37 (e) (1) (A-B) (juvenile court judge retains discretion whether to sentence as a designated felon or as a delinquent). See, generally, M. Forst, E. Friedman and R. Coates, Institutional Commitment and Release Decision-making for Juvenile Delinquents: An Assessment of Determinate and Indeterminate Approaches, vol. VIII, Georgia - A Case Study (1985), p. 5 (herinafter cited as Sentencing - Georgia).

84/ Ga. Code Ann. sect. 15-11-37 (d): "...the court shall order restrictive custody in any case ..." (emphasis supplied).

85/ See N.Y. Cons. Laws, Fam. Ct. Act sect. 301.2 (8) (9) defining "designated felony act" and "designated class A felony act". The statutes define designated felonies as offences by a 14- or 15-year-old that, if done by an adult, would constitute the crimes of murder and attempted murder, manslaughter, robbery, kidnapping, arson, burglary, assault, rape or sodomy. See, generally, Woods, New York's Juvenile Offender Law: An Overview and Analysis (1980); Whisenand and McLaughlin, Completing the Cycle: Reality and the Juvenile Justice System in New York State (1982), p. 47.

86/ See N.Y. Fam. Ct. Act sect. 353.5 (4).

87/ N.Y. Fam. Ct. Act sect. 353.5 (3).

88/ N.Y. Fam. Ct. Act. sect. 353.5 (5).

89/ At the request of DFY, these secure placements can be extended by court order for one-year intervals until the juvenile's twenty-first birthday (N.Y. Fam. Ct. Act sect. 353.5 (d)). The designated felony legislation also provided special procedures for its enforcement (N.Y. Fam. Ct. Act sect. 731 (2); 254-a; 117 (b) (i) and (ii) (McKinney Supp. 1979)).

90/ For a discussion of the Ohio legislation, see Note, "H.B. 440: Ohio restructures its juvenile justice system", 8 University of Dayton Law Review 237 (1982). See also, Federation for Community Planning, "Juveniles in institutions of the Ohio Department of Youth Services" (May 1982); Federation for Community Planning, "Juveniles in institutions of the Ohio Department of Youth Services: the early impact of Ohio H.B. 440" (September 1982); Federation for Community Planning, "Juveniles in institutions of the Ohio Department of Youth Services: the 1st year's impact of Ohio H.B. 440" (December 1982).

91/ Ohio Code sect. 2151.355(A)(4), (5), (6) (Page Supp. 1983) (enacted 1981).

92/ Ohio Rev. Code Ann. sect. 2151.355 (5) and (6): "...institutionalization in a secure facility for an indefinite term consisting of a minimum period of one year and a maximum period not to exceed the child's attainment of the age of twenty-one years."

93/ Delaware law requires any youth who is adjudicated delinquent for conduct that would be a felony within one year of a prior felony adjudication to serve a mandatory term of confinement (Del. Code Ann. tit. 10 sect. 937 (c) (1) (Supp. 1982)).

94/ Under Illinois' Habitual Juvenile Offender statute, if a juvenile who has two prior felony convictions is subsequently convicted of one of the listed violent or serious felonies, then he must be committed to the Department of Corrections until age 21 without any possibility of parole (Ill. Ann. Stat. sect. 705-12).

95/ Kentucky legislation provides that any child aged 16 years or older who is adjudicated delinquent for a capital offense or class A or B felony may be institutionalized for a mandatory minimum term of not less than six months (Ken. Rev. Stat. sect. 208.194 (2)).

96/ North Carolina uses special legislation for sentencing repeat offenders (N.C. Gen. Stat. sect. 7A-652 (b) (2)). If a delinquent is 14 years of age or older, has two or more prior felony adjudications and has been previously committed to a facility of the Department of Corrections, the juvenile court may impose a definite term not to exceed two years.

97/ Tennessee has special determinate sentencing provisions for serious and/or repetitive offenders (Tenn. Code Ann. sect. 37-1-131, -137). While normally an order committing a juvenile to the Tennessee Department of Corrections "shall be for an indefinite time", if the juvenile is adjudicated delinquent for a class X felony, Tenn. Code Ann. sect. 39-1-702 (murder, aggravated rape, robbery with a deadly weapon and the like) or has three prior delinquency adjudications for felony offences at least one of which resulted in institutional confinement, or is within six months of his 19th birthday, then the "commitment may be for the same offense and the juvenile's 21st birthday" (Tenn. Code Ann. sect. 37-1-137).

98/ Virginia has special provisions for sentencing "serious offenders". A "serious offender" is a child 16 years of age or older who is convicted of a felony and has a recent prior record (Va. Code sect. 16.1-281.1). While the judge retains discretion whether or not to sentence under this statute, if she or he does commit the child to the department of corrections, "the court may specify a minimum period of commitment, not less than six nor more than twelve months" (Va. Code sect. 16.1-285.1 (C)).

99/ See Minnesota Department of Corrections, Juvenile Release Guidelines, 7 (1980).

100/ Minnesota Department of Corrections, Juvenile Release Guidelines, 2-3 (1980).

101/ See State of Arizona, Department of Corrections, Length of Confinement Guidelines for Juveniles, Rev. ed. (April 1986).

102/ Idem., 1.

103/ Idem., 3.

104/ See Georgia Division of Youth Services, Policy and Procedure Manual sect. 901, et seq. (1985); Forst, Friedman and Coates, Sentencing - Georgia.

105/ Georgia Division of Youth Services, Classification Profile 1, rev. ed. (1986):

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

106/ A "habitual offender" is defined as a delinquent youth who committed a level 2-4 offence and who is recommitted within 30 months of a prior commitment for a level 2-4 offense (Idem., p. 24). A "multiple offender" is defined as a youth convicted of four or more separate offences at the time of his commitment to DYS (Idem.).

107/ See A.B.A.-I.J.A., Juvenile Justice Standards Relating to Delinquency and Sanctions.

108/ See Forst, Friedman and Coates, Sentencing - Georgia, pp. 9-10.

109/ Cal. Welf. & Inst. Code sect. 731.

110/ See Private Sector Task Force on Juvenile Justice, Final Report (1987), p. 39.

111/ Ibid., p. 40. See Cal. Administrative Code sect. 4941 et. seq.

112/ Cal. Welf. & Inst. Code sect. 4945 (a).

113/ Cal. Welf. & Inst. Code sect. 4945 (a).

114/ Cal. Welf. & Inst. Code sect. 1769 (a).

115/ Private Sector Task Force on Juvenile Justice, Final Report (1987), p. 71: "Terms for wards in the CYA are set by the Youthful Offender Parole Board (YOPB), using guidelines that are based almost exclusively on the seriousness of the commitment offence. The average parole consideration date assigned by YOPB in 1985 was 15.7 months, and the range was from 70.4 months (Murder 1) to 12.6 months (crimes in Category VII)" (emphasis supplied). Statutorily defined aggravating and mitigating factors provide some discretionary basis for deviations from and modification of parole consideration dates. See Cal. Administrative Code sect. 4945 (h) (j).

116/ The question of youthful criminal responsibility arises most dramatically in the context of capital punishment for juveniles convicted in adult courts of serious crimes. See, for example, Eddings v. Oklahoma and Thompson v. Oklahoma. See, generally, V. Streib, Death Penalty for Juveniles (1978); Feld, "Juvenile court meets Principle of Offense".

117/ See, generally, Fox, "Responsibility in the juvenile court", 11 William and Mary Law Review 659 (1970) (hereinafter cited as "Responsibility"); McCarthy, "The role of the concept of responsibility in juvenile delinquency proceedings," 10 University of Michigan Journal of Law Reform 181 (1977) (hereinafter cited as "Concept of responsibility"); Walkover, The New Infancy Defense; Weissman, "Toward an integrated theory of delinquency responsibility", 60 Denver University Law Review 485 (1983).

118/ See, for example, Kadish, "The decline of innocence", 26 Cambridge Law Journal 273, 274 (1968) (hereinafter cited as "Decline of innocence"): " ... (mens rea) referred to the choice to do a blameworthy act. The requirement of mens rea was rationalized on the common sense view of justice that blame and punishment were inappropriate and unjust in the absence of that choice."

119/ See, for example, W. LaFave and A. Scott, Criminal Law (1972), p. 351; Fox, "Responsibility"; Westbrook, "Mens rea in the juvenile court", 5 Journal of Family Law 121 (1965); McCarthy, "Concept of responsibility"; Weissman, Integrated Theory of Delinquency Responsibility; Kadish, "Decline of innocence", p. 275.

120/ The issue of youthful criminal responsibility should be seen in the broader context of deserved punishments and the tension between retributivist and utilitarian rationales. See, generally, Greenwalt, "Punishment", 74 Journal of Criminal Law and Criminology 343 (1983); Weinreb, "Desert, punishment, and criminal responsibility", 49 Law and Contemporary Problems 47 (1986); Levenbrook, "Responsibility and the normative order assumption", 49 Law and Contemporary Problems 81 (1986); Packer, Limits, pp. 35-70; Hart, Punishment and Responsibility; N. Morris, Madness and the Criminal Law (Chicago, University of Chicago Press, 1982).

121/ See, for example, E. van den Haag, Punishing Criminals (1975) p. 174.

122/ See, for example, Von Hirsch, Doing Justice, and Past or Future Crimes.

123/ Idem., at 79.

124/ Idem., See, generally, J. Hall, General Principles of Criminal Law, 2nd ed. (1960), pp. 212-222.

125/ See, for example, G. Manaster, Adolescent Development and the Life Tasks (1977); M. Rutter, Changing Youth in a Changing Society (1980), p. 238; Kohlberg, "Development of moral character and moral ideology", in Review of Child Development Research, M. Hoffman and L. Hoffman, eds. (1964), pp. 404-405.

126/ C. Silberman, Criminal Violence, Criminal Justice (New York, Random House, 1978), p. 355.

127/ Twentieth Century Fund. Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime (New York, 1978), p. 7: "... adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults."

128/ Ibid.: "Youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." In Criminal Violence, Criminal Justice, p. 355, Silberman also notes that the socialization of the young is an obligation of the whole society, not just of the parents involved: school attendance is compulsory, and courts have the power to take children away from parents who neglect or abuse them. Thus society bears a responsibility for youth crime that it does not have in the case of adults.

129/ See, for example, F. Zimring, The Changing Legal World of Adolescence (New York, Free Press, 1982).

130/ F. Zimring, "Kids, groups and crime: some implications of a well-known secret", 72 Journal of Criminal Law and Criminology 867 (1981).

131/ Kent v. United States, 383 U.S. 541, 55 (1966).

132/ See, for example, P. Greenwood and others, Youth Crime and Juvenile Justice in California (1983), pp. 30-31. See, generally, H. Kalven and H. Zeisel, The American Jury (Boston, Little, Brown, 1966), pp. 182, 185-190, 209-213.

133/ Private Sector Task Force on Juvenile Justice, Final Report (1987), p. 7.

134/ Currently, about a dozen states provide for jury trials in juvenile court: Alaska Stat. sect. 47.10.070 (Supp. 1983); Colo. Rev. Stat. sect. 19-1-106 (1) (a) (1983); Mass. Ann. Laws ch.

119 sect. 55A (Michie/Law Co-op Supp. 1984); Mich. Comp. Laws. sect. 712A.17; Mont. Code Ann. tit. 10 sect. 1110 (West Supp. 1983); S.D. Codified Laws Ann. sect. 265-8-31 (1976); Tex. Fam. Code Ann. sect. 54.03 (c) (Vernon Supp., 1983); W. Va. Code sect. 49-5-6 (1980); Wis. Stat. Ann. sect. 48.243 (g) (West, 1977); and Wyo. Stat. sect. 14-6-224 (a) (1977).

135/ For example, Washington, Delaware, California and Minnesota.

136/ While opponents of jury trials in juvenile court argue that the right would substantially disrupt juvenile proceedings, there is apparently no basis for that objection, as evidenced by the dozen jurisdictions that provide juvenile juries and empirical studies. See Burch and Knaup, "The impact of jury trials upon the administration of juvenile justice", 4 Clearinghouse Review 345 (1970): juries requested in less than 2 per cent of cases, and actually used in less than 0.5 per cent; Note, "The right to a jury under the Juvenile Justice Act of 1977", 14 Gonzaga Law Review 401, 420-21 (1977): rate of jury trials ranged between 0.5 per cent and 3 per cent of total petitions.

137/ See Feld, "Criminalizing juvenile justice", pp. 187-190. See also Feld, "In re Gault revisited: a cross-state comparison of the right to counsel in juvenile court", 34 Crime and Delinquency (1988) (hereinafter cited as "Gault revisited"): in half of the jurisdictions studied, a majority of juveniles were unrepresented.

138/ D. Horowitz, The Courts and Social Policy (Washington, D.C., Brookings, 1977), p. 185. Although the rates of representation vary widely from county to county within a state, Horowitz' survey of the available data failed to find one state in which even 50 per cent of the juveniles were represented by counsel.

139/ Feld, "Gault revisited".

140/ Clarke and Koch, "Juvenile court: therapy or crime control, and do lawyers make a difference?", 14 Law and Society Review 263, 297 (1980): only 22.3 per cent of juveniles in Winston-Salem, N.C., and 45.8 per cent in Charlotte, N.C., were represented; M. Bortner, Inside a Juvenile Court: the Tarnished Ideal of Individualized Justice (New York, New York University Press, 1982), p. 139: "Over half (58.2 per cent) (of the juveniles) were not represented by an attorney"; Feld, "Criminalizing juvenile justice", p. 189; K. Fine, "Out of home placement of children in Minnesota", a research report (1983) p. 48: "In the majority of delinquency/ status offense cases (62 per cent) there is not representation".

141/ Cohen, Juvenile Offenders, p. 6, notes the relationship between proportionality of sanctions and the importance of counsel: "By adopting a system which responds to harm-producing conduct and which frankly recognizes that deprivations of liberty are painful sanctions, we can legally recognize the adversary stance of the parties, emphasize the importance of fact-finding and diminish the scientific jargon which parades as expertise; we can bring some visibility to decision-making, further tighten procedures, and give some focus to the requisite training of system functionaries."

142/ A number of commentators have questioned the justification for a separate juvenile court. See, for example, Feld, "Juvenile court legislative reform"; McCarthy, "Should juvenile delinquency be abolished?", 23 Crime and Delinquency 196 (1977); McCarthy, "Delinquency dispositions under the juvenile justice standards: the consequences of a change in rationale", 52 New York University Law Review 1093 (1977); Wizner and Keller, "The penal model of juvenile justice: Is juvenile court delinquency jurisdiction obsolete?", 52 New York University Law Review 1120 (1977); Guggenheim, "A call to abolish the juvenile justice system", 9 Children's Rights Report 1 (1978); Wolfgang, "Abolish the juvenile court system", California Lawyer 12 (November 1982); Shepard, "Challenging the rehabilitative justification for indeterminate sentencing in the juvenile justice system", 64 California Law Review 984 (1976).

143/ On the procedural deficiencies of the juvenile court, see Feld, "Criminalizing juvenile justice"; Rosenberg, "The constitutional rights of children charged with crime: proposal for a return to the not so distant past", 27 UCLA Law Review 656 (1980); McCarthy, "Pre-adjudicatory rights in juvenile court: an historical and constitutional analysis", 42 University of Pittsburgh Law Review 457 (1981).

144/ In re Gault, 387 U.S. 1, 28 (1967).

145/ See McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).