Journal of Criminal Law and Criminology

Volume 78
Issue 3 *Fall*

Article 1

Fall 1987

The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes

Barry C. Feld

0091-4169/87/7803-471
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 78, No. 3
Printed in U.S.A.

CRIMINAL LAW

THE JUVENILE COURT MEETS THE PRINCIPLE OF THE OFFENSE: LEGISLATIVE CHANGES IN JUVENILE WAIVER STATUTES*

BARRY C. FELD**

I. INTRODUCTION

The United States Supreme Court decision *In re Gault*[1] precipitated a procedural revolution that has transformed the juvenile court into a very different legal institution than that envisioned by its Progressive creators.[2] Although the Supreme Court's decisions mandating procedural safeguards in the juvenile process were not explicitly intended to alter the fundamental character of the juvenile court or its therapeutic mission, judicial refinements and legislative changes introduced to bring the juvenile court's administration into harmony with the requirements of the Constitution have substantially modified the purposes, processes, and operations of the juvenile justice system during the past two decades.

A brief description of the Progressives' conception of the juvenile court illustrates how the Supreme Court's decisions and subse-

* This research was supported by the University of Minnesota Law Alumni Association's "Partners in Excellence" program. The author wishes to thank Ms. Susan Pasch for her exceptional research assistance. An earlier version of this Article was presented at the 1986 Annual Meeting of the American Society of Criminology, Atlanta, Georgia.

** Professor of Law, University of Minnesota Law School. Ph.D., Harvard University, 1973; J.D., University of Minnesota Law School, 1969; B.A., University of Pennsylvania, 1966.

1 387 U.S. 1 (1967).

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

quent legislative action have transformed the juvenile court into a very different institution from the one originally proposed. 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 on to the juvenile court's traditional, individualized treatment sentencing schema. As the contemporary juvenile court departs from its original procedural and substantive conception, it has become increasingly criminalized and converged with adult criminal courts.[3] Although the juvenile court's post-*Gault* procedural convergence with criminal courts has been described extensively,[4] its pursuit of the substantive goals of the criminal process have not been thoroughly documented.[5]

This Article analyzes juvenile court waiver statutes as an indicator of the extent to which current juvenile court sentencing practices depart from those envisioned by the Progressive creators. The handling of serious young offenders has received extensive legislative and judicial scrutiny as some of the most troublesome youths in the juvenile justice process are moved to criminal courts for prosecution as adults.[6] A waiver decision is also a sentencing decision which represents a choice between the punitive dispositions of adult criminal courts and the nominally rehabilitative dispositions of the juvenile court.[7] Increasingly, the principle of offense dominates this sentencing decision, as "just deserts" based on the offense, rather than the real needs of the offender, prescribe the appropriate disposition. The waiver of a serious offender into the adult system on the

---

[3] *Criminalizing Juvenile Justice*, *supra* note 2; Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167 (1981) [hereinafter *Dismantling the "Rehabilitative Ideal"*].

[4] McCarthy, *Pre-adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457 (1981); Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656 (1980).

[5] *Criminalizing Juvenile Justice*, *supra* note 2, at 246-66; Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791 (1982).

[6] *See, e.g.*, Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978) [hereinafter *Reference of Juvenile Offenders*]; *Dismantling the "Rehabilitative Ideal"*, *supra* note 3; Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195 (1983) [hereinafter *Delinquent Careers and Criminal Policy*].

[7] *Reference of Juvenile Offenders*, *supra* note 6; *Criminalizing Juvenile Justice*, *supra* note 2, at 269; READINGS IN PUBLIC POLICY 169-377 (J. Hall, D. Hamparian, J. Pettibone & J. L. White eds. 1981); YOUTH IN ADULT COURT: BETWEEN TWO WORLDS (D. Hamparian, L. Estep, S. Muntean, R. Priestino, R. Swisher, P. Wallace & J. L. White eds. 1982); WHITEBREAD & BATEY, *The Role of Waiver in the Juvenile Court: Questions of Philosophy and Function*, in READINGS IN PUBLIC POLICY 207.

basis of his offense rather than an individualized evaluation of the youth's "amenability to treatment" or "dangerousness" is both an indicator of and a contributor to the substantive as well as procedural criminalization of the juvenile court.

II. Historical Background

A. The Progressive Juvenile Court—Procedural Informality and Individualized, Offender-Oriented Dispositions

During the last third of the nineteenth century and the early decades of the twentieth century, rapid industrialization, economic modernization, urbanization, immigration, and social change overwhelmed traditional social stability and posed fundamental new problems of social control.[8] The completion of the railroads fostered economic growth, integrated the economy, and altered the processes of manufacturing, modified the mechanisms of economic socialization, and fundamentally changed the social and legal position of youth during the transition from a rural agrarian society to an urban industrial one.[9] Increased urbanization and immigration and a dramatic shift in the ethnic origins of the immigrants reaching America accompanied the changing economic base.[10] The social organization of cities changed, as poor people from rural America and Europe were concentrated in slums and ethnic enclaves and lived in desperate conditions of poverty in cities unable to provide basic municipal or social services.[11]

A modernizing of the family and a changing cultural conception of childhood accompanied these structural shifts. Demographic changes in the numbers and spacing of children and a shift of economic functions from the family to other work environments modified the roles of women and children.[12] Especially within the upper

---

8 S. Hays, The Response to Industrialism 1885-1914 (1957); R. Hofstadter, The Age of Reform: From Bryan to F.D.R. (1955); D. Noble, America by Design: Science, Technology, and the Rise of Corporate Capitalism (1977); R. Wiebe, The Search for Order, 1877-1920 (1967).

9 J. Kett, Rites of Passage: Adolescence in America, 1790 to the Present 114-16 (1977); R. Wiebe, *supra* note 8; B. Wishy, The Child and the Republic 94-114 (1968).

10 H. Higham, Strangers in the Land: Patterns of American Nativism, 1860-1925 87 (1974).

11 W. Trattner, From Poor Law to Welfare State: A History of Social Welfare in America 135 (3d ed. 1984); H. Wilensky & C. Lebeaux, Industrial Society and Social Welfare 115-32 (1958).

12 C. Degler, At Odds: Women and the Family in America from the Revolution to the Present 178-209 (1980); J. Demos & S. Boocock, Turning Points: Historical and Sociological Essays on the Family (1978); J. Kett, *supra* note 9; C. Lasch, Haven in a Heartless World: The Family Besieged 6-10 (1977).

and middle classes, a more modern conception of childhood emerged. Children were perceived as corruptible innocents whose upbringing required greater physical, social, and moral structure than had previously been regarded as prerequisite to adulthood, and the family, particularly women, assumed a greater role in supervising children's moral and social development.[13]

The Progressive movement emerged around the turn of the century in response to the social problems caused by rapid industrialization, urbanization, and modernization.[14] Progressive reformers prescribed rational and scientific solutions designed by experts and administered by the state.[15] Many Progressive programs shared a unifying child-centered theme, and the changing cultural conception of childhood affected the Progressives' policies embodied in juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws.[16]

The Progressives introduced a number of criminal justice reforms at the turn of the century: probation, parole, indeterminate sentences, and the juvenile court. All emphasized open-ended, informal, and highly flexible policies to rehabilitate the deviant.[17] Because identifying the causes and prescribing the cures for delinquency required an individualized approach which precluded uniformity of treatment or standardization of criteria, a pervasive

---

13 P. ARIES, CENTURIES OF CHILDHOOD 329 (1962); C. DEGLER, *supra* note 12, at 86-110; J. KETT, *supra* note 9, at 109-43; A. PLATT, THE CHILDSAVERS: THE INVENTION OF DELINQUENCY 75-83 (2d ed. 1977); B. WISHY, *supra* note 9, at 116.

14 R. HOFSTADTER, *supra* note 8; G. KOLKO, THE TRIUMPH OF CONSERVATIVISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918 (1968); R. WIEBE, *supra* note 8.

15 *See, e.g.*, S. HAYS, *supra* note 8, at 156; R. WIEBE, *supra* note 8, at 166-70; Stone, *A Spectre is Haunting America: An Interpretation of Progressivism*, 3 J. LIBERTARIAN STUD. 239 (1979). The Progressives' reliance on the state to implement their social reforms reflected their perception of the benevolence of state action, the ability of government to correct social problems, a confidence in their own values, and a belief in the propriety of inculcating these values in others. They expressed no reservations about their attempts to transform immigrants, the poor and their children into sober, virtuous, middle class Americans by means of a variety of agencies of assimilation and acculturation. Rothman, *The State as Parent: Social Policy in the Progressive Era*, in DOING GOOD: THE LIMITS OF BENEVOLENCE 67 (D. Rothman ed. 1978).

16 L. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957 (1961); L. EMPEY, JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS (1979); J. KETT, *supra* note 9, at 226-27; D. ROTHMAN, *supra* note 2, at 206-07; S. TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA (1982); W. TRATTNER, CRUSADE FOR THE CHILDREN: HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM (1970); R. WIEBE, *supra* note 8, at 169 .

17 F. ALLEN, *Legal Values and the Rehabilitative Ideal*, in BORDERLAND OF CRIMINAL JUSTICE 25-27 (1964); D. ROTHMAN, *supra* note 2.

feature of every Progressive criminal justice reform was discretionary decision-making.

The Progressives' reformulation of criminal justice strategies reflected changing ideological assumptions about the causes and cures of crime and deviance. Positivism—the identification of antecedent causal variables producing crime and deviance—challenged the classic formulations of crime as the product of free will.[18] The attribution of criminal behavior to external antecedent forces rather than to deliberately chosen misconduct reduced an actor's moral responsibility for crime and focused efforts on the reform of the offender rather than the punishment of the offense.[19] This new criminology, as distinguished from the old "free will," asserted a scientific determinism of deviance and sought to identify the causal variables producing crime and delinquency.[20] In its quest for scientific legitimacy, criminology at the turn of the century borrowed both methodology and vocabulary from the medical profession, as metaphors such as pathology, infection, diagnosis, and treatment provided popular analogies for criminal justice professionals.[21] These deterministic interpretations of human behavior redirected research efforts to identify the causes of crime by scientifically studying the offender, because the ability to identify the causes of crime also implied the correlative ability to cure criminality.

The conjunction of positivistic criminology, the increasing analogies to the medical profession in the treatment of criminals, and the growth of new social science professions gave rise to the "Rehabilitative Ideal," which was a prominent feature of all Progressive criminal justice reforms.[22] A flourishing rehabilitative ideal required both a belief in the malleability of human behavior and a basic moral consensus about the appropriate directions of human change.[23] It required agreement about ends and means, the goals of change, and the strategies to achieve these goals. The Progressives believed in the virtues of their social order and that the new social sciences provided them with the tools for systematic human change.

---

18 D. MATZA, DELINQUENCY AND DRIFT 5 (1964); D. ROTHMAN, *supra* note 2, at 50-51; F. ALLEN, *supra* note 17.

19 E. RYERSON, *supra* note 2, at 22.

20 D. MATZA, *supra* note 18; A. PLATT, *supra* note 13; D. ROTHMAN, *supra* note 2.

21 A. PLATT, *supra* note 13, at 18; D. ROTHMAN, *supra* note 2, at 56; E. RYERSON, *supra* note 2; F. ALLEN, *supra* note 17.

22 F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 11-15 (1981); F. ALLEN, *supra* note 17, at 25.

23 F. ALLEN, *supra* note 22, at 11-15; Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 150-51 (1978).

The juvenile court was a typical Progressive criminal justice reform: a specialized bureaucratic agency staffed by experts and designed to serve the needs of a specific category of client, namely the child offender. The Progressives envisioned the use of indeterminate procedures by juvenile court professionals who would make discretionary, individualized treatment decisions and who would achieve benevolent goals and social uplift by substituting a scientific and preventative approach for the traditional punitive purposes of the criminal law.[24]

The juvenile court movement attempted to remove children from the adult criminal justice and corrections systems and to provide them with individualized treatment in a separate system of their own. Under the guise of *parens patriae*, an emphasis on treatment, supervision, and control, rather than punishment, allowed the state to intervene affirmatively in the lives of more young offenders.[25] Because the juvenile court formally rejected punishment, its ambit of control encompassed behaviors that were previously ignored as well as youthful activities that betokened precocious adulthood or proto-criminality: smoking, sexuality, truancy, immorality, stubbornness, vagrancy, or living a wayward, idle, and dissolute life.[26] Its status jurisdiction reflected the normative concept of childhood and adolescence that had taken root during the nineteenth century and authorized pre-delinquent intervention to forestall premature adulthood, enforce the dependent conditions of youth, and supervise their moral upbringing.[27] No procedural or substantive distinctions were made among youths on the basis of their criminal or noncriminal conduct, thus providing the rationale that juvenile court proceedings were civil rather than criminal in nature.

By separating children from adult offenders, the juvenile court also rejected the jurisprudence and procedures of criminal prosecutions. Courtroom procedures were modified to eliminate any implication of a criminal proceeding; a euphemistic vocabulary and a physically separate court building were introduced to avoid the

---

24 *See* A. PLATT, *supra* note 13; E. RYERSON, *supra* note 2; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

25 *Ex parte* Crouse, 4 Whart. 9 (Pa. 1838); *See* Cogan, *Juvenile Law, Before and After the Entrance of 'Parens Patriae'*, 22 S.C.L. REV. 147, 181 (1970); Fox, *supra* note 24; Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205, 207-10 (1971).

26 *See* A. PLATT, *supra* note 13; D. ROTHMAN, *supra* note 2; E. RYERSON, *supra* note 2.

27 *See, e.g.*, Schlossman & Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 70, 81 (1978); A. PLATT, *supra* note 13, at 135.

stigma of adult prosecutions.[28] Proceedings were initiated by a petition in the welfare of the child, rather than by a criminal complaint. Juries and lawyers were excluded, since the important issues in juvenile court proceedings were the child's background and welfare, rather than the details surrounding the commission of a specific crime. Judges dispensed with technical rules of evidence and formal procedures in order to obtain all available information. To avoid stigmatizing a youth, hearings were confidential, access to court records was limited, and a child was found to be delinquent rather than guilty of committing a criminal offense.

The juvenile court movement envisioned an expert judge who was assisted by social service personnel, clinicians, and probation officers who investigated the background of the child, identified the sources of the child's misconduct, and developed a treatment plan to meet the child's needs. Because their aims were benevolent, their concern was individualized, and their intervention was guided by science, juvenile court judges enjoyed enormous discretion to make dispositions in the "best interests of the child." The juvenile court's methodology encouraged the collection of as much information as possible about the child, because a rational, scientific analysis of facts presumably would reveal the proper diagnosis and prescribe the cure. Principles of psychology and social work, rather than formal decisional rules, guided decision-makers. In the factual inquiry about the whole child—his life, character, environment, and social circumstances—the court gave minor significance to the specific criminal offense committed by the child because it indicated little about the child's "real needs."

Dispositions were indeterminate, nonproportional, and continued for the duration of the child's minority. The delicts that brought the child before the court affected neither the intensity nor the duration of intervention because each child's "real needs" differed, and no limits could be defined in advance. The individualized justice of the juvenile court was as variable as that administered by the Kadi in the marketplace "who renders his decisions without any reference to rules or norms but in what appears to be a completely free evaluation of the particular merits of every single case."[29] As reflected in juvenile sentencing practices, an extremely wide frame of relevance and an absence of controlling rules or norms characterized this type of decision-making.

---

[28] D. ROTHMAN, *supra* note 2, at 218; E. RYERSON, *supra* note 2; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 92 (1967).

[29] D. MATZA, *supra* note 18, at 118.

From its inception, juvenile court judges also had the discretion to waive serious young offenders from the jurisdiction of the juvenile court to adult criminal courts.

> [L]egislation in many states permitted juvenile court judges to transfer any given case to an adult court, an allowance that they occasionally took advantage of when the charge was especially serious. The Cook County juvenile court, for example, asked grand juries to weigh the merits of a regular indictment in about fifteen cases a year—a figure which represented no more than one percent of its cases but did include the most notorious. Typically these boys were older (sixteen, not twelve) and were arrested for "deeds of violence, daring holdups, carrying guns, thefts of considerable amounts, and rape." These transfers probably muted criticism of the courts for coddling the criminal.[30]

Thus, transfer was always a possible disposition and reflected many of the same sentencing considerations that animate the contemporary debate.

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

When the Supreme Court's *Gault* decision mandated procedural safeguards in the adjudication of delinquency, it focused judicial attention initially on the determination of legal guilt or innocence and necessarily altered the object of the juvenile court's inquiry. Following this "constitutional domestication," an offender's "soul" was no longer at issue; rather the focus was placed on the proof of his commission of a criminal offense as a prelude to individualized sentencing.

In *Gault*, the Court reviewed the history of the juvenile court and the traditional rationales for denying procedural safeguards to juveniles: the non-adversarial nature of the proceedings, the fact that delinquency proceedings were civil, not criminal, and the fact that when the state acted as *parens patriae*, a child was not entitled to liberty, but to custody.[31] In rejecting these assertions, the Court observed that "unbridled discretion, however, benevolently motivated, is frequently a poor substitute for principle and procedure" and concluded that the denial of procedures frequently resulted in arbitrariness rather than "careful, compassionate, individualized treatment."[32] Although the Court hoped to retain the potential benefits of the juvenile process, it insisted that the claims of "the juvenile

---

[30] D. ROTHMAN, *supra* note 2, at 285.

[31] *See Gault*, 387 U.S. at 14-17.

[32] *Id.* at 18.

court process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes" to the realities of recidivism, the failures of rehabilitation, the stigma of a "delinquency" label, the breaches of confidentiality, and the arbitrariness of the process.[33]

Several features of the juvenile justice process were critical to the imposition of procedural safeguards in *Gault*: the fact that juveniles were being adjudicated delinquent for behavior that would be deemed a criminal offense if committed by adults, the attendant stigma of delinquency/criminal convictions, and the realities of juvenile institutional confinement.[34] These realities motivated the *Gault* Court to mandate elementary procedural safeguards such as the right to advanced notice of charges, the right to a fair and impartial hearing, the right to assistance of counsel, which included the opportunity to confront and cross-examine witnesses, and the protections of the privilege against self-incrimination.[35]

Even with the introduction of these procedural safeguards and its critical dicta, the Supreme Court did not consider the entire procedural apparatus of juvenile justice, its jurisdictional reach, or its dispositional consequences. Instead, the Court narrowly confined its decision to the adjudicatory hearing at which a child is determined to be a delinquent.[36] The *Gault* Court noted that the unique procedures for processing and treating juveniles separately from adults would in no way be impaired by its procedural decisions.[37] The Court asserted, however, that the procedural safeguards associated with the adversarial process were essential both to the determination of truth and the preservation of individual freedom through limitations on the power of the state. The dual function of such procedures, namely, factual accuracy and the prevention of governmental oppression, is most clearly exemplified in the Court's determination that the privilege against self-incrimination applies to delinquency adjudications.[38] With this recognition of the applicability of the privilege against self-incrimination, juvenile adjudications could no longer be characterized as either "non-criminal" or "non-adversarial," because this fifth amendment privilege is both the guarantor of an adversarial process and the primary mechanism

---

[33] *Id.* at 21.

[34] *Id.* at 27-28.

[35] *Id.* at 31-57.

[36] *Id.* at 13.

[37] *Id.* at 21.

[38] *Id.* at 49-50. *See Criminalizing Juvenile Justice, supra* note 2, at 154 & n. 46, 155 & n.47, 156.

for maintaining a balance between the state and the individual.[39]

In its subsequent juvenile court decisions, the Supreme Court has elaborated upon the procedural and functional equivalence between criminal and delinquency proceedings. In *In re Winship*,[40] the Court decided that proof of delinquency must be established "beyond a reasonable doubt" rather than by the lower civil standards of proof. Because no explicit constitutional provision regarding the standard of proof exists, the Court in *Winship* first held that proof beyond a reasonable doubt was a constitutional requirement in adult criminal proceedings, and then extended that same requirement to juvenile proceedings.[41] In holding that this highest standard of proof was required, the Court emphasized that not only was the reasonable doubt standard the primary instrument to reduce the risk of conviction based on factual errors, but it was also an important constraint on governmental overreaching. Furthermore, the Court asserted that the seriousness of the consequences in both the adult and juvenile contexts required the highest standard of proof.[42]

In *Breed v. Jones*,[43] the Court held that the protections of the double jeopardy clause of the fifth amendment prohibited the adult criminal reprosecution of a youth following a conviction in a juvenile court. At issue was the applicability of the double jeopardy clause of the fifth amendment to state proceedings, and the Court resolved the question by establishing a functional equivalence between an adult criminal trial and a delinquency proceeding. The Court described the virtually identical interests implicated in a delinquency hearing and a traditional criminal prosecution—"anxiety and insecurity," a "heavy personal strain"—and the increased bur-

---

39 *Compare Gault*, 387 U.S. 1, 50 (1967), *with* Allen v. Illinois, 106 S. Ct. 2988, 2994 (1986)("The Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile offenders. . . .")(emphasis supplied).

40 397 U.S. 358 (1970).

41 *Id.* at 361-67.

42 It is instructive to compare the *Winship* Court's treatment of the standard of proof in delinquency cases with that required for the involuntary civil commitment of the mentally ill, which requires only "clear and convincing" evidence. Addington v. Texas, 441 U.S. 418, 433 (1979). The *Addington* Court continued its equation of criminal and delinquency proceedings by distinguishing both from involuntary commitment proceedings.

> The Court [in *Winship*] saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue—whether the individual in fact committed a criminal act—was the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt.
>
> . . . Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution.

Id. at 427-28.

43 421 U.S. 519 (1975).

dens as the juvenile system has become more procedurally formalized.[44] In light of the potential consequences of a delinquency proceeding, the Court concluded that there was little basis to distinguish it from a traditional adult criminal prosecution.

In *McKeiver v. Pennsylvania*,[45] the Court addressed the issue of whether the Constitution required jury trials in state juvenile court proceedings. The Court halted the extension of procedural parity of juvenile court proceedings with adult criminal prosecutions by holding that the only requirement for "fundamental fairness" in juvenile proceedings is "accurate fact-finding" and reasoned that this requirement could be satisfied as well by a judge as by a jury.[46] In concluding that accurate fact-finding was the only requirement for due process in the juvenile context, the Court departed significantly from its own prior analyses of the dual functions of procedures in juvenile court adjudications. Those earlier decisions were premised on two rationales: accurate fact-finding and protection against governmental oppression.[47]

In its zeal to restrict juveniles' procedural rights, the *McKeiver* Court insisted that the sole purpose of its earlier procedural decisions was factual accuracy, despite the fact that the fifth amendment's privilege against self-incrimination is less relevant to the fact-finding process than to protection against governmental oppression.[48] Justice Brennan belied the majority's assertion that due process was concerned only with accurate fact-finding by arguing that, while the right to a jury trial protected against governmental oppression, a public trial which assured visibility and accountability could also perform that safeguard function.[49] Finally, the *McKeiver* Court rejected the argument that the inbred, closed nature of the juvenile court would prejudice the accuracy of fact-finding by invoking the traditional juvenile court mythology. According to the Court, concern about procedural safeguards, such as jury trials, ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates."[50]

The result in *McKeiver* was clearly dictated by the Court's concern that the right to a jury trial would be the procedural safeguard

---

44 *Id.* at 528-29.

45 403 U.S. 528 (1971).

46 *Id.* at 543.

47 *See, e.g., Winship*, 397 U.S. at 363-64; *Gault*, 387 U.S. at 47; *Reference of Juvenile Offenders*, *supra* note 6, at 601-7.

48 *Criminalizing Juvenile Justice*, *supra* note 2, at 159.

49 *See* McKeiver, 403 U.S. at 553-57 (Brennan, J., concurring in part, dissenting in part).

50 *Id.* at 550-51.

most disruptive of the traditional juvenile court and its adjudicative practices.[51] The Court's stated reason for denying jury trials to juveniles was the adverse impact that this right would have on the informality, flexibility, and confidentiality of juvenile court proceedings. The Court realized that the imposition of this last remaining formality of the criminal process would make the juvenile court virtually indistinguishable from a criminal court and would raise the more basic question of whether there is any need for a separate juvenile court at all.

Unfortunately, the *McKeiver* Court did not analyze the crucial distinctions between treatment in juvenile courts and punishment in criminal courts that justified the differences in procedural safeguards,[52] noting simply that the ideal juvenile court system is "an intimate, informal protective proceeding."[53] Nor did the Court have before it a factual record of dispositional practices to use in deciding whether the intervention to which a youth was subjected was punishment or treatment.[54]

The Progressives who created the juvenile court envisioned a

---

[51] *Id.* The Court's results in *McKeiver* also reflected its disquiet with the incorporation implications of Duncan v. Louisiana, 391 U.S. 145 (1968), which constitutionally required jury trials in state criminal proceedings. In several subsequent decisions, the Court attempted to reduce the administrative impact of juries by authorizing six-person juries, Williams v. Florida, 399 U.S. 78 (1970), and non-unanimous jury verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

[52] In Duncan v. Louisiana, 391 U.S. 145, the Court held that fundamental fairness in adult criminal proceedings required both factual accuracy and protection against governmental oppression. "[A] jury of his peers gave [the defendant] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156.

[53] *See McKeiver*, 403 U.S. at 550.

[54] *See, e.g.*, B. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977)(prison-like conditions of confinement in juvenile correctional facilities); *Criminalizing Juvenile Justice*, *supra* note 2, at 246-62, 259 n.457.

In Allen v. Illinois, 106 S. Ct. 2988, 2994-95 (1986), the Court denied petitioner the protections of the fifth amendment's privilege against self-incrimination in a sexually dangerous person commitment proceeding. Because the privilege is only available if the state purports to "punish," the Court's ruling was based, in part, on petitioner's failure to disprove the state's assertion that it provided treatment, rather than punishment.

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum security prison complex. . . . We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and thus render "criminal" the proceedings which led to confinement.

Id.

benevolent treatment agency staffed by expert judges and assisted by social services personnel. They emphasized informality, flexibility, and discretionary dispositions in the "best interests of the child." Despite the procedural formalization of the juvenile court in *Gault*, the Supreme Court in *McKeiver* remained ideologically committed to the traditional "treatment" rationale of the juvenile court.[55] By uncritically accepting the assertion that juvenile courts are "rehabilitative" rather than punitive, the Court did not inquire further about either the nature of juvenile court treatment that differed from traditional criminal law punishment or the need for procedural protections against governmental oppression.

Despite the Supreme Court's reluctance to hasten the demise of the juvenile court in *McKeiver*, its earlier decisions in *Gault* and *Winship* imported the adversarial model and the primacy of legal guilt as a constitutional prerequisite to coercive intervention and drastically altered the form and function of the juvenile court. By emphasizing procedural regularity in the determination of criminal guilt as a prerequisite to a delinquency disposition, the Court altered the focus of the juvenile court from the Progressive's emphasis on the "real needs" of a child to proof of the commission of criminal acts. Increasingly, the sentencing framework of juvenile courts has also reflected the substantive goals of the criminal law.

III. The Principle Of Offense In Juvenile Court—Just Deserts In Sentencing Practices

Justice White's concurrence in *McKeiver* emphasized the perceived punishment/treatment distinctions between juvenile and criminal proceedings. Whereas the criminal law punishes morally responsible actors for making blameworthy choices, the deterministic assumptions of the juvenile justice system regard juveniles as less culpable for their criminal misdeeds. Justice White stated that the indeterminate length of juvenile dispositions and the "eschewing [of] blameworthiness and punishment for evil choices" satisfied him that "there remained differences of substance between criminal and juvenile courts."[56] Justice Stewart's dissent in *Gault* articulated a similar distinction between the sentencing practices in the juvenile and adult criminal justice systems. Justice Stewart observed that "a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the

55 *See McKeiver*, 403 U.S. at 547.

56 *Id.* at 552-53 (White, J., concurring).

other is conviction and punishment for a criminal act."[57] This perception was reflected in the implicit assumption of the *McKeiver* Court that juveniles receive only positive rehabilitative treatment which requires no further special safeguards against governmental intervention. By contrast, retributive criminal punishment in the adult criminal process requires additional procedural guarantees to prevent governmental oppression.

The fundamental justification in juvenile jurisprudence for denying jury trials and, more basically, for maintaining separate juvenile and adult justice systems is based on the differences between punishment and treatment. Punishment involves state-imposed burdens on an individual who has violated legal prohibitions.[58] Treatment, by contrast, focuses on the mental health, status, or welfare of the individual, rather than on the commission of prohibited acts.[59]

Punishment and treatment can be conceptualized as mutually exclusive goals because of the backward-looking nature of punishment and the forward-looking emphasis of therapy.[60] Punishment imposes unpleasant consequences on offenders because of their past offenses; therapy seeks to alleviate undesirable conditions and thereby improve the offender's life in the future. Treatment assumes that certain antecedent factors are responsible for the individual's undesirable condition and that steps can be taken to alter those factors. Indeed, this tenet is central to the positive criminology underlying the rehabilitative ideal of the juvenile court.[61]

In analyzing juvenile court sentencing practices, it is useful to examine whether the sentencing decision is based on considerations of the offense or of the offender. If the sentence is based on the characteristics of the offense, the sentence is usually determinate and proportional, and has a goal of retribution or deterrence. In the case of waiver to criminal courts for punishment, offense-based considerations dominate if the seriousness of the present offense and prior record control the decision. Such a decision is based on an assessment of past conduct. If a sentence is based on the characteristics of the offender, however, it is typically open-ended, nonproportional and indeterminate, and has a goal of rehabilitation or

---

57 *Gault*, 387 U.S. at 79 (Stewart, J., dissenting).

58 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968).

59 F. ALLEN, *supra* note 22, at 2-3; H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 23-28 (1968); ALLEN, *supra* note 17, at 25.

60 Gardner, *supra* note 5, at 793 n.18, 815-16; *Criminalizing Juvenile Justice*, *supra* note 2, at 248 nn.415-416.

61 D. MATZA, *supra* note 18, at 3.

incapacitation.[62] In the context of waiver decisions, clinical assessments of the individual offender's "amenability to treatment" or "dangerousness" predominate. The decision is based on a prediction of an offender's future course. Thus, waiver statutes reflect the same dispositional tensions between individualized evaluations of the offender and more mechanistic dispositions based on the characteristics of the offense that pervade other sentencing schema.

It is also useful to distinguish the bases on which such dispositions are made. Matza[63] has described the principle of offense as a principle of equality: the treating of similar cases in a similar fashion based on a relatively narrowly defined frame of relevance.

> The principle of equality refers to a specific set of substantive criteria that are awarded central relevance and, historically, to a set of considerations that were specifically and momentously precluded. Its meaning, especially in criminal proceedings, has been to give a central and unrivaled position in the framework of relevance to considerations of *offense* and conditions closely related to offense like prior record, and to more or less preclude considerations of status and circumstance.[64]

By contrast, the principle of individualized justice differs from the principle of offense in two fundamental ways.

> First, [the principle of individualized justice] is much more inclusive: it contains many more items in its framework of relevance.
>
> . . . The principle of individualized justice suggests that disposition is to be guided by a *full understanding* of the client's personal and social character and by his "individual needs."[65]

Rather than being confined to characteristics of the offense, individualization encompasses every characteristic of the offender. In addition, "the kinds of criteria it includes are more diffuse than those commended in the principle of offense. . . . The consequence of the principle of individualized justice has been mystification."[66] By

---

62 "The distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment." *In re* Felder, 93 Misc. 2d 369, 374, 402 N.Y.S.2d 528, 533 (N.Y. Fam. Ct. 1978). *See generally*, N. MORRIS, THE FUTURE OF IMPRISONMENT 13-20 (1974); H. PACKER, *supra* note 59; REPORT OF TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 11-14 (1976); A. VON HIRSCH, DOING JUSTICE 11-26 (1976) [hereinafter DOING JUSTICE]; A. VON HIRSCH, PAST OR FUTURE CRIMES (1986). In analyzing juvenile dispositions, it is useful to contrast offender-oriented dispositions, which are indeterminate and non-proportional, with offense-based dispositions, which are determinate, proportional, and related to characteristics of the offense.

63 D. MATZA, *supra* note 18, at 113-14.

64 *Id* (emphasis supplied).

65 *Id.* at 114-15 (emphasis supplied).

66 *Id.*

deeming all personal and social characteristics as relevant without assigning controlling significance to any one factor, individualized justice relies heavily on the "professional judgment" of juvenile court administrators.[67]

In the adult dispositional framework, determinate sentencing based on the offense has increasingly superseded indeterminate sentencing, and "just deserts" has replaced rehabilitation as the underlying sentencing rationale.[68] The Progressives' optimistic assumptions about human malleability are challenged daily by the observation that rehabilitation programs do not consistently rehabilitate and by the volumes of empirical evaluations that question both the effectiveness of treatment programs and the "scientific" underpinnings of those who administer the enterprise.[69] "Either because of scientific ignorance or institutional incapacities, a rehabilitative technique is lacking; we do not know how to prevent criminal recidivism by changing the characters and behavior of offenders."[70]

"Just deserts" advocates reject rehabilitation as a justification for intervention because of the discretionary power an indeterminate sentencing scheme vests in presumed experts, the inability of such experts to justify their differential treatment of similarly situated offenders, and the inequalities, disparities, and injustices that

---

67 *Id.* at 116.

68 *See* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 45-53 (1971); D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS 260-72 (2nd ed. 1979); N. MORRIS, *supra* note 62, at 45-50 ; R. SINGER, JUST DESERTS (1979); DOING JUSTICE, *supra* note 62, at 49-55.

69 Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22, 25 (1974)("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable affect on recidivism."); L. SECHEREST, S. WHITE & E. BROWN, THE REHABILITATION OF CRIMINAL OFFENDERS (1979); G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL (1971). In another survey of correctional evaluations, Greenberg, *The Correctional Effects of Corrections: A Survey of Evaluations*, in CORRECTIONS AND PUNISHMENT 111, 140 (D. Greenberg ed. 1977), Greenberg concludes:

> This survey indicates that many correctional dispositions are failing to reduce recidivism, and it thus confirms the general thrust of . . . Martinson. . . . Much of what is now done in the name of "corrections" may serve other functions, but the prevention of return to crime is not one of them. Here and there a few modest results alleviate the monotony, but most of these results are modest and are obtained through evaluations seriously lacking in rigor. The blanket assertion that "nothing works" is an exaggeration, but not by very much.
>
> . . . I never thought it likely that most of these programs would succeed in preventing much return to crime. Where the theoretical assumptions of programs are made explicit, they tend to border on the preposterous. More often they are not made explicit, and we should be little surprised if hit or miss efforts fail.

Id.

70 F. ALLEN, *supra* note 22, at 34.

result from individualized sentences. "Just deserts" sentencing, with its strong retributive foundation, punishes offenders according to their past behavior, rather than on the basis of who they are or may be predicted to become. Similarly situated offenders are defined and sanctioned equally on the basis of objective characteristics such as seriousness of offense, culpability, or criminal history.[71]

As the same changes in sentencing philosophy emerge in the juvenile process, the renewed interest in "just deserts" requires a re-examination of the rationale of *McKeiver*. The inability of proponents of juvenile rehabilitation to demonstrate the effectiveness of *parens patriae* intervention has led an increasing number of states to incorporate "just deserts" sentencing principles in their juvenile justice systems. As juvenile courts base sentencing decisions more frequently on the basis of the principle of offense rather than individualized justice, the *McKeiver* Court's "treatment" rationale becomes less tenable, and the continued existence of a separate juvenile court appears more questionable.

The issue of punishment based on characteristics of the offense versus treatment based on consideration of the offender can be addressed, in part, by examining juvenile court sentencing practices in the waiver decision, namely, the substantive bases on which a youth is transferred to criminal court for prosecution and punishment as an adult. This examination reveals that, despite the traditional rhetoric of rehabilitation, there is a very strong legislative trend in which the waiver/sentencing practice of the contemporary juvenile court increasingly reflect the punitive character of the criminal law and the principle of offense.

A. WAIVER OF JUVENILE OFFENDERS FOR CRIMINAL PROSECUTION

The appropriate disposition of persistent or violent young offenders is one of the most difficult sentencing issues confronting the juvenile justice system.[72] The waiver decision is a form of sentencing decision that represents a choice between the explicitly punitive dispositions of adult criminal courts and the nominally rehabilitative dispositions of juvenile courts.[73] Juvenile courts have traditionally assigned primary importance to individualized treatment, whereas the criminal law accords far greater significance to the seriousness of the offense committed and attempts to proportion punishment

---

71 *See supra* notes 62, 68.

72 *See, e.g.*, READINGS IN PUBLIC POLICY, *supra* note 7; YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7; *Reference of Juvenile Offenders*, *supra* note 6; *Dismantling the "Rehabilitative Ideal"*, *supra* note 3.

73 *See, e.g.*, Whitebread & Batey, *supra* note 7, at 207.

accordingly. These differences between juvenile and criminal courts' penal philosophies are most visible in juvenile waiver proceedings.

Most legislatures have adopted some statutory mechanism to transfer juvenile offenders from the jurisdiction of the juvenile courts to that of adult criminal courts.[74] Two legislative vehicles—judicial waiver and legislative offense exclusion—pose the alternative sentencing policy choices most starkly.[75] The most prevalent practice in virtually all jurisdictions is judicial waiver; a judge may waive juvenile court jurisdiction on a discretionary basis after a hearing on the youth's amenability to treatment or threat to public safety. The juvenile court judge's case-by-case clinical evaluation of a youth's amenability to treatment or his dangerousness reflects the individualized, discretionary sentencing practices that have been the hallmark of the juvenile court.

The other transfer mechanism, in which the legislative definition of juvenile court jurisdiction excludes youths charged with certain offenses from juvenile courts, is termed legislative waiver or offense exclusion. Legislative exclusion reflects the retributive, offense-oriented values of the criminal law.[76]

Both judicial waiver and legislative offense exclusion statutes attempt to answer essentially the same questions: Who are the serious juvenile offenders? How are they identified? Which system will deal with them? Each type of waiver mechanism emphasizes different information in a determination of whether certain juvenile offenders should be handled as adults. According to Matza's paradigm, each mechanism has a different "framework of

---

74 YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7; *Reference of Juvenile Offenders*, *supra* note 6, at 523.

75 A third mechanism for removing juvenile offenders from the juvenile system is prosecutorial waiver, or concurrent jurisdiction between juvenile and criminal courts over certain offenses. *Reference of Juvenile Offenders*, *supra* note 6, at 521 n.20; YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7; Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985). In concurrent jurisdiction states, such as Nebraska, Wyoming, Arkansas, and Florida, the prosecutor's charging decision determines whether a case will be heard in the juvenile or adult forum. Because this Article focuses primarily on the differences between the juvenile and adult justice systems and their respective emphases on offenders and offenses in sentencing, a separate discussion of prosecutorial waiver will be omitted. To the extent that the prosecutor's decision to charge certain offenses in criminal courts divests the juvenile court of jurisdiction, however, this waiver mechanism will be treated as a sub-category of offense based decision making. *Reference of Juvenile Offenders*, *supra* note 6, at 557-61, 558 n.139.

76 *See, e.g.*, *Reference of Juvenile Offenders*, *supra* note 6, at 556-71; *Delinquent Careers and Criminal Policy*, *supra* note 6, at 202-05.

relevance."[77]

The critical reassessment of individualized sentencing practices in adult courts raises troubling questions about the validity of the clinical diagnoses or predictions relied upon in waiver decisions and the propriety of delegating fundamental issues of sentencing policy to the discretionary judgments of social service personnel and judges. Proponents of just deserts in sentencing contend that there is no valid or reliable clinical basis upon which juvenile court judges can make accurate amenability or dangerousness determinations and that the standardless discretion afforded to judges results in inconsistent and discriminatory application.[78] This critique of individualized sentencing in the waiver context has resulted in two types of legislation. One type defines youths below the maximum age of juvenile court jurisdiction as adults by automatically excluding from the juvenile justice system those persons who possess certain combinations of present offense and prior record; the other type of legislation places an increased emphasis on the significance of the offense as a dispositional criterion in a judicial waiver proceeding.

The analysis of waiver as a sentencing decision addresses two interrelated policy issues: the bases for sentencing practices within juvenile courts and the relationship between juvenile court and adult criminal court sentencing practices. The first issue implicates individualized sentencing decisions and the operational tension between discretion and the rule of law. The second issue focuses on rationalizing social control responses to serious or chronic offenders across the two systems. By constraining judicial sentencing discretion and improving the fit between waiver decisions and criminal court sentencing practices through the principle of offense, legislatures are increasingly using offense criteria to deal with both issues simultaneously.

1. Judicial Waiver—Procedural Formality and Individualized Dispositions

In *Kent v. United States*,[79] the Supreme Court mandated that procedural due process must be observed in judicial waiver determinations, thereby formalizing this sentencing decision. The *Kent* Court's formalization of the juvenile waiver hearing anticipated many of the same procedural safeguards afforded by the Court's later formalization of delinquency adjudications in *Gault*.[80] Subse-

77 D. MATZA, *supra* note 18, at 114-15.

78 *Reference of Juvenile Offenders*, *supra* note 6, at 529-56. *See also infra* notes 88-101 and accompanying text.

79 383 U.S. 541 (1966).

80 In *Kent*, the Court concluded that the loss of the special protections of the juvenile

quently, in *Breed v. Jones*,[81] the Court applied the double jeopardy provisions of the Constitution to the adjudication of juvenile offenses, thereby requiring the states to make the juvenile/adult dispositional determination before proceeding against a youth on the merits of the charge.

Although *Kent* and *Breed* provide the formal procedural framework within which the judicial waiver/sentencing decision occurs, the substantive bases of the decisions present the principal difficulty of discretionary judicial waiver. Most jurisdictions provide for discretionary waiver based on a juvenile court judge's assessment of a youth's amenability to treatment or dangerousness, as indicated by age, the treatment prognosis, and the threat to others, as reflected in the seriousness of the present offense and prior record.[82] Legislatures specify waiver factors with varying degrees of precision and typically adopt the substantive criteria appended to the Supreme Court's decision in *Kent*.[83]

---

court private proceedings, confidential records, and protection from the stigma of a criminal conviction through a waiver decision was a "critically important" action that required a hearing, assistance of counsel, access to social investigations and other records, and written findings and conclusions capable of review by a higher court. *Id.* at 553-63. "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554. *See generally* PAULSEN, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167.

[81] 421 U.S. 519 (1975).

[82] *See, e.g., Delinquent Careers and Criminal Policy*, *supra* note 6, at 198; *Reference of Juvenile Offenders*, *supra* note 6.

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

> An offense falling within the statutory limitations . . . will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.
>
> The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:
>
> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment. . . .
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults. . . .
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> 7. The record and previous history of the juvenile, including previous con-

As sentencing criteria, the assessment of a youth's amenability to treatment or dangerousness implicates some of the most fundamental and difficult issues of penal policy and juvenile jurisprudence. The underlying legislative assumptions that there are effective treatment programs for serious or persistent juvenile offenders, classification systems that differentiate the treatment potential or dangerousness of various youths, and validated and reliable diagnostic tools that enable a clinician or juvenile court judge to determine the proper disposition for a particular youth are all highly problematic and controversial.[84] Similarly, legislation authorizing a judge to waive juvenile court jurisdiction because a youth poses a threat to public safety requires the judge to predict the youth's dangerousness despite compelling evidence that the "capacity to predict future criminal behavior [is] quite beyond our present technical ability."[85]

In short, judicial waiver statutes that are couched in terms of amenability to treatment or dangerousness are simply broad, standardless grants of sentencing discretion characteristic of the individualized, offender-oriented dispositional statutes of the juvenile court. The addition of long lists of supposed substantive standards, such as that appended by the Supreme Court in *Kent*, does not provide objective indicators to guide discretion. "[T]he substantive standards are highly subjective, and the large number of factors that may be taken into consideration provides ample opportunity for selection and emphasis in discretionary decisions that shape the outcome of individual cases."[86] Indeed, such catalogues of factors reinforce juvenile court judges' exercise of virtually unreviewable discretion by allowing selective emphasis of one set of factors or another to justify any disposition.[87]

---

tacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

383 U.S. 566-67 app. These factors have been adopted by a number of jurisdictions through either legislation or judicial gloss, as indicated in Table 1.

84 *See, e.g., Reference of Juvenile Offenders, supra* note 6, at 529-56; *Dismantling the "Rehabilitative Ideal", supra* note 3, at 170-84; *Delinquent Careers and Criminal Policy, supra* note 6, at 198-200. *See also supra* note 69 and accompanying text.

85 N. MORRIS, *supra* note 62, at 62. *See also Reference of Juvenile Offenders, supra* note 6, at 540-46; Morris & Miller, *Predictions of Dangerousness*, 6 CRIME & JUSTICE 1 (1985).

86 Zimring, *Notes toward a Jurisprudence of Waiver*, in READINGS IN PUBLIC POLICY, *supra* note 7, at 195.

87 TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 56 (1978), notes that "[c]ollectively, 'lists' of

Like individualized sentencing statutes, the subjectivity inherent in waiver administration allows a variety of inequities and disparities to occur. The empirical reality is that judges cannot administer these discretionary statutes on a consistent, evenhanded basis.[88] Within a single jurisdiction, waiver statutes are inconsistently interpreted and applied from county to county and from court to court.[89] Hamparian's nationwide analysis of waiver in 1978 provides substantial evidence that judicial waiver practices are inherently arbitrary, capricious, and discriminatory.[90] Among the states that rely on judicial waiver for the transfer decision, the rates of waiver vary from a high of 13.5 to a low of .07 per 10,000 youths at risk; youths in Oregon have nearly 200 times the probability of being waived for trial as adults as do youths in Montana.[91] Fagan, Piper, and Forst analyzed waiver decisions involving a sample of violent youths in four different jurisdictions and concluded that there were no uniform criteria guiding the transfer decision.[92]

> What we found was a rash of inconsistent judicial waiver decisions, both within and across sites. Inconsistent and standardless decisions for youth retained in juvenile court are not surprising in a judicial context which cherishes individualized justice. . . . But for youth who may be tried and convicted in criminal court and subjected to years of imprisonment in a secure institution, such subjective decision making is no longer justified.[93]

Fagan and his collegues tested seven offense and offender variables to identify determinants of the transfer decision within a sample of violent youths. They reported that "[n]either multivariate analysis

---

this length rarely serve to limit discretion or regularize procedure. By giving emphasis to one or two of the guidelines, a judge can usually justify a decision either way."

88 *See, e.g.*, YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7; *Reference of Juvenile Offenders*, *supra* note 6, at 546-56.

89 *See, e.g.*, Edwards, *The Case for Abolishing Fitness Hearings in Juvenile Court*, 17 SANTA CLARA L. REV. 595, 611-12 (1977)(county by county disparity); J. P. HEUSER, JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND "REMANDED" TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY 30 (1985)(county by county variation in Oregon—"it appears that some counties may be over- or under-represented in terms of the proportion of cases per unit of risk population."); SUPREME COURT JUVENILE JUSTICE STUDY COMMISSION, REPORT TO THE MINNESOTA SUPREME COURT 61-78 (1976)(waiver is used for three different purposes in different parts of the state); YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7 (Northeast Region; North Central Region; Southeast Region; South Central Region; West Region (county by county disparity within states)).

90 YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 102.

91 *Id.* at 104-05.

92 J. Fagan, E. Piper, & M. Forst, The Juvenile Court and Violent Youth: Determinants of the Transfer Decisions (forthcoming) [hereinafter cited as Juvenile Court and Violent Youth].

93 *Id.* at 21.

nor simple explorations identified strong or consistent determinants of the judicial transfer decision. Except for a relationship between extensive prior offense history and the transfer decision, none of the identified variables could significantly describe differences between youths who were or were not transferred."[94]

In addition to "justice by geography," there is evidence that a juvenile's race may influence the waiver decision.[95] Hamparian reported that, nationally, 39% of all youths transferred in 1978 were Black and that, in eleven states, minority youths constituted the majority of juveniles waived.[96] Eigen reported an interracial effect in transfers; black youths who murder white victims were significantly more at risk for waiver.[97] In their study of transfer of violent youths, Fagan, Forst, and Vivona also found substantial disparities in the rates of minority and white offenders. Although there was no direct evidence of sentencing discrimination, "it appears that the effects of race are indirect, but visible nonetheless."[98]

Bortner concluded that a juvenile court's organizational and political considerations explain more about the waiver decision than does the inherent dangerousness or intractability of a youth.[99]

> [P]olitical and organizational factors, rather than concern for public safety, account for the increasing rate of remand. In evidencing a willingness to relinquish jurisdiction over a small percentage of its clientele, and by portraying these juveniles as the most intractable and the greatest threat to public safety, the juvenile justice system not only

---

94 *Id.* at 19.

95 Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in READINGS IN PUBLIC POLICY, *supra* note 7, at 333; Keiter, *Criminal or Delinquent: A Study of Juvenile Cases Transferred to the Criminal Court*, 19 CRIME & DELINQ. 528 (1973); YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 104-05.

96 YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 104-05. Without being able to control for the seriousness of the present offense and prior record, it is not possible to ascribe the disproportionate overrepresentation of minority youths in waiver proceedings to racial discrimination.

97 Eigen, *supra* note 95. *Cf.* McCleskey v. Kemp, 107 S. Ct. 1756 (1987)(statistical evidence that black defendants whose victims are white are disproportionately at risk for execution does not result in violations of due process or equal protection). Zimring, in *Notes Toward a Jurisprudence of Waiver*, in READINGS IN PUBLIC POLICY, *supra* note 7, at 193, described the waiver of serious juvenile offenders as "the capital punishment of juvenile justice." Zimring observed that "[c]apital punishment in criminal justice and waiver in juvenile justice share four related characteristics: 1) low incidence; 2) prosecutorial and judicial discretion; 3) ultimacy; and 4) inconsistency with the premises that underlie the system's other interventions." *Id. See also infra* notes 172-207 and accompanying text, in which the implications of waiver for capital punishment are addressed directly.

98 Fagan, Forst & Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) [hereinafter *Racial Determinants of Judicial Transfer*].

99 Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juvenile to Adult Court*, 32 CRIME & DELINQ. 53 (1986).

creates an effective symbolic gesture regarding protection of the public but it also advances its territorial interest in maintaining jurisdiction over the vast majority of juveniles and deflecting more encompassing criticisms of the entire system.[100]

Idiosyncratic differences in judicial philosophies and the locale of a waiver hearing are far more significant for the ultimate adulthood decision than is any inherent quality of the criminal act or characteristic of the offending youth.[101] The inconsistency in the interpretation and application of waiver statutes is hardly surprising in view of the inherent subjectivity of the dispositional issue, the lack of effective guidelines to structure the decision, and the latent as well as manifest functions the process serves. In short, judicial waiver statutes reveal all of the defects characteristic of individualized, discretionary sentencing schema.

2. *Legislative Exclusion of Offenses—Offense as a Determinant of Dispositions*

Legislative waiver, the principal alternative to judicial waiver, excludes from juvenile court jurisdiction youths who are charged with specified offenses or who have particular records of prior adjudications in conjunction with a present offense. Because juvenile courts are created solely by statute, legislatures are free to modify the court's jurisdiction in a variety of ways. Despite both due process and equal protection challenges to statutes that exclude youths who commit certain offenses from juvenile court jurisdiction, appellate courts have consistently sustained these legislative classifications.[102]

Statutes mandating the prosecution of a youth as an adult on the basis of the offense charged or offense history are inconsistent with the individualized rehabilitative philosophy of juvenile courts. Although legislatures may subordinate individualized treatment considerations to other social control policy objectives, it is often not apparent which of several alternative sentencing policies are being pursued in the redefining of juvenile court jurisdiction.

Commentators contend that the primary justification for waiver is the need for minimum lengths of confinement substantially in excess of the maximum sanctions available in juvenile court.[103]

---

100 *Id.* at 69-70.

101 YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 105.

102 *Reference of Juvenile Offenders*, *supra* note 6, at 556-71.

103 Zimring, *Notes Toward a Jurisprudence of Waiver*, in READINGS IN PUBLIC POLICY, *supra* note 7, at 201. *See generally*, JUVENILE JUSTICE STANDARDS RELATING TO TRANSFER BETWEEN COURTS 6-7, 39-42 (1980).

> [T]he justification for waiver is singular: transfer to criminal court is necessary when the maximum punishment available in juvenile court is clearly inadequate. . .[T]he standard for making a waiver decision is a determination that the maximum social control available in juvenile court falls far short of the minimum social control necessary if a particular offender is guilty of the serious crime he is charged with.[104]

Fagan reported that the length of time from age at offense to the maximum age jurisdictional limit, rather than prior record, dictates the judicial transfer decision; judges transfer juveniles if the seriousness of the offense requires a longer sentence than that available in the juvenile court.[105]

If the rationale for adult prosecution is the need for minimum lengths of confinement substantially in excess of the juvenile court's maximum age jurisdiction, then the appropriate theories of punishment to structure the choice of waiver criteria are retribution and selective incapacitation. Packer notes the importance of an integrated theory of punishment that emphasizes both culpability and prevention and results in a combination of retributive and utilitarian theories of punishment.[106] For Packer, retributive punishment is a necessary, but not sufficient, condition because it limits the imposition of criminal sanctions to the culpable and blameworthy and introduces a degree of certainty to the process.[107] Equally important, retribution constitutes a limiting factor by confining the issue of waiver to the most serious types of criminal conduct for which the longest terms of confinement are authorized.

Retribution alone, however, is an inadequate theory for the selection of waiver criteria both because it is overly inclusive and because the infliction of harm without any offsetting utilitarian gain is undesirable. Consistent with the underlying rationale for waiver, selective incapacitation is an appropriate theory to couple with retribution because there is a limited class of offenders whose persistent history of wrongdoing is also indicative of the inadequacy of the sanctions available in the juvenile court.[108] A pattern of offenses may evidence greater culpability; the actor was on notice that his behavior was condemned yet repeated it. In the allocation of scarce penal resources, selective incapacitation of persistent offenders constitutes a reasonable rationing strategy and may have the incidental

---

104 Zimring, *Notes Toward a Jurisprudence of Waiver,* in READINGS IN PUBLIC POLICY, *supra* note 7, at 201.

105 The Juvenile Court and Violent Youth, *supra* note 92, at 11.

106 H. PACKER, *supra* note 59, at 62-70.

107 *Id.* at 68.

108 Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls,* 5 CRIME & JUSTICE 1 (1984).

benefit of preventing some future crimes.[109] Although selective incapacitation attempts to identify those offenders with a substantially greater probability of future criminal involvement, juveniles waived pursuant to this strategy are waived not on the basis of a prediction regarding the future, but rather because of their past conduct. By confining the predictor criteria to past criminal history, many of the legitimate civil liberty-oriented objections to over-prediction, false positives, and preventive incarceration may be avoided.[110]

Translating these jurisprudential premises into legislative waiver criteria requires an explicit acknowledgement of the actual sentencing goals being pursued. A legislature could rationally conclude that an older youth who commits a particularly heinous or serious offense deserves to be treated as an adult, and it could exclude such a youth from the juvenile system on the basis of culpability and the seriousness of the present offense.

If the legislative goal in redefining juvenile court jurisdiction is to selectively incapacitate chronic offenders, then excluding offenders solely on the basis of the seriousness of their present offense may not be the most effective strategy. Offenders who are both persistent and violent are legislatively distinguishable from their less criminally active peers on the basis of chronic criminal activity, but not on the basis of the seriousness of any given act. From the available evidence on the development of delinquent careers, it appears that many youths engage simultaneously in both trivial and serious violations of the law and that police arrest and process youths primarily as a function of the frequency, rather than the seriousness, of their delinquent behavior.[111] If selective incapacitation is the goal, then a youth initially apprehended for a serious offense may not be different from a youth who is apprehended for a minor offense and whose serious delinquency remains hidden. The seriousness of a first offense provides little basis for distinguishing those youths who are likely to recidivate from those who are not.[112] The number of contacts a young offender has with the juvenile justice system is the most reliable indicator of the likelihood of future criminality.

---

109 A. BLUMSTEIN, J. COHEN & D. NAGIN, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978); P. GREENWOOD, SELECTIVE INCAPACITATION (1982); COHEN, *supra* note 107.

110 *See* DOING JUSTICE, *supra* note 62, at 84; *Delinquent Careers and Criminal Policy*, *supra* note 6; *Reference of Juvenile Offenders*, *supra* note 6.

111 *See, e.g.*, M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972) [hereinafter cited as DELINQUENCY IN BIRTH COHORT].

112 *Id. See also*, Wolfgang, *From Boy To Man—From Delinquency To Crime*, in THE SERIOUS JUVENILE OFFENDER 161 (1977); D. HAMPARIAN, R. SCHUSTER, S. DINITZ & J. CONRAD, THE VIOLENT FEW (1978); P. STRASBURG, VIOLENT DELINQUENTS (1978).

Although most youths desist after one or two contacts, once youths become chronic offenders, there is a substantial probability that they will continue to commit delinquent acts.[113] Studies of the development of delinquent careers suggest that serious offenders are best identified by their persistence rather than by the nature of their initial offense.[114] The criminal career research indicates that young offenders do not "specialize" in particular types of crime, that violence occurs within an essentially random pattern of delinquent behavior, and that a small number of chronic delinquents are responsible for many offenses and most of the violent offenses committed by juveniles.[115] Although it is not possible to predict violence on the basis of prior offense records, a prior record of violence or crime is the best indicator of such behavior in the future.[116] Thus, a legislature attempting to identify serious offenders should emphasize an offender's cumulative record rather than just the seriousness of the current offense.[117]

Legislative defining adulthood requires both an empirical judgment and a value choice. The empirical judgment involves an effort to identify the persistent and serious offender by selecting offense criteria that will differentiate between the relatively few young offenders who should be prosecuted as adults and the vast majority of juveniles who should remain within the jurisdiction of the juvenile court. The most reliable and relevant criteria on which to base these judgments are the present offense and the prior record, which are combined to highlight the differences between the two classes of juvenile offenders.

Selecting the criteria for adulthood also entails an explicit legislative value choice about the quantity and quality of deviance that will be tolerated within the juvenile system before a more punitive response is mandated. In most cases, youths will not receive better rehabilitative services in the adult correctional system than are available in the juvenile system. Therefore, the decision to transfer a youth to the adult process must ultimately be defensible on the grounds of retribution or selective incapacitation. Incarceration is

---

113 *See* CRIMINAL CAREERS AND "CAREER CRIMINALS" (A. BLUMSTEIN, J. COHEN, J. ROTH & C. VISHER EDS. 1986) [hereinafter cited as CRIMINAL CAREERS]; DELINQUENCY IN A BIRTH COHORT, *supra* note 111, at 65-87; Petersilia, *Criminal Career Research: A Review of Recent Evidence*, 2 CRIME & JUSTICE 321, 321-22 (1980).

114 *See supra* notes 111-13.

115 *See supra* notes 111-13.

116 *See, e.g.*, Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Youth Adult Defendants*, 7 CRIME & JUSTICE 164 (1986).

117 *See Delinquent Careers and Criminal Policy*, *supra* note 6, at 195; *Reference of Juvenile Offenders*, *supra* note 6, at 614; Greenwood, *supra* note 116.

necessarily a last resort; some offenders, however, do deserve it, and the community needs a respite from their predation. From the community's perspective, the principal values of exclusion are: enhanced community protection through the greater security and longer sentences available in the adult system, increased general deterrence though greater certainty and visibility of consequences, and reaffirmation of fundamental norms. Because most offenders, adults and juveniles alike, do not require penal incarceration, legislative exclusion is appropriate only when a juvenile offender's record of persistence and the seriousness of his present offense warrant confinement for a substantially longer term than could be imposed on him as a juvenile.

The issue of waiver arises primarily in the context of a concern for public safety. Therefore, legislatures may address the questions of an offender's record of recidivism or the seriousness of the current offense directly, rather than circuitously, through a judicial inquiry into amenability to treatment or dangerousness. The value judgment about whether public safety justifies waiver reflects a tension between retribution and utilitarian prevention. While a retributive choice might dictate the automatic exclusion of any juvenile who committed a serious offense, such as intentional homicide, rape, armed robbery, or assault with a weapon or with substantial injury to the victim, a choice based on prevention would exclude a serious offender only if shown to be a chronic offender.

In addition to defining offense categories or histories, the legislature also needs to prescribe a minimum age of criminal liability for excluded offenders—sixteen, fifteen, or fourteen.[118] At what age is it appropriate to hold a youth who commits a serious crime as responsible for that offense as an eighteen year old adult? "There is no compelling or convincing evidence that persons aged sixteen to eighteen differ significantly from persons aged eighteen and over in their capacity to understand the outcomes and consequences of their acts. . . . Serious crime should be treated seriously regardless of the offender's age."[119]

A legislature can adequately consider all of these policy issues—seriousness, persistence, and age of criminal responsibility—when it defines the outer limits of juvenile court jurisdiction and determines how much serious or repeated juvenile deviance may occur before an adult sanction is sought. Because legislative selection of exclu-

118 *See, e.g., Reference of Juvenile Offenders, supra* note 6, at 609-11.

119 TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 25.

sion criteria involves both empirical and value choices, the particular combinations of present offense and prior record could vary from jurisdiction to jurisdiction in light of prevailing crime rates, the offense characteristics of classes of youthful offenders, the availability of penal bed-space, actual sentencing practices of the adult courts, and the like. Ultimately, the legislature must work backwards from what the probable adult sentence would be for the particular offense or offender.

Zimring has objected to the adoption of mechanistic legislative exclusion criteria on the grounds that the legislature will adopt standards drafted on the basis of the hypothetical "worst case scenario" within various offense categories. The resulting laundry list of excluded offenses and offense histories, Zimring asserts, will quickly multiply and result in far more transfers than would occur within a discretionary system.[120] Using Zimring's own rationale for waiver, however, apart from a very few major offenses against the person, how many even "worst case" offenses by juveniles without prior records are likely to result in adult incarceration for a longer duration than available within the juvenile justice system? And if extended incarceration is not likely, then the rationale for exclusion is obviated.

These issues of public policy and safety should be debated and decided in the open political arena by democratically elected legislators rather than behind closed doors on an idiosyncratic basis by individual judges. Offense categories are necessarily crude and imprecise classifications, and many youths charged and tried as adults will ultimately plead or be found guilty of lesser, nonexcluded offenses. Again, if the rationale of legislative exclusion is that youths who commit certain "worst case" offenses should be sentenced as adults, then, regardless of the initial charge, if an individual is subsequently found not to have committed one of the offenses excluded from juvenile court jurisdiction, he should be returned to juvenile court for disposition.[121]

---

120 Zimring, *Notes Toward a Jurisprudence of Waiver*, in READINGS IN PUBLIC POLICY, *supra* note 7, at 199. Indeed, the experience with California's waiver legislation confirms his prediction. *See* Table 1 n.3, which describes an initially short list of offense criteria expanded by subsequent legislatures.

121 If the rationale for transfer, whether judicial or legislative, is based on the seriousness of the offense and the need for extended confinement, then permanent divestiture of juvenile court jurisdiction should be based on the offense for which a youth is ultimately convicted, not the offense initially charged.

> Return to juvenile court is certainly consistent with the statutory policies providing for differential treatment on the basis of offense committed. Moreover, the policy reasons that militate against subjecting the prosecutor's charging decision to prior judicial review do not preclude examining it after the fact. Finally, in the absence of

B. DISPOSITIONS OF SERIOUS YOUNG OFFENDERS—TOWARDS AN INTEGRATED SENTENCING SYSTEM

Ultimately, the question of waiver involves the appropriate dispositions of serious young offenders who happen to be chronological juveniles. The traditional distinction between "treatment" as a juvenile and "punishment" as an adult is based on an arbitrary legislative line that has no criminological significance other than its legal consequences. The inconsistencies in sentencing policies between the juvenile and adult systems often make any attempt to rationalize social control and the response to serious deviance among the young futile. These inconsistencies arise from the legislative failure to recognize that young people are constantly maturing; they are not irresponsible children one day and responsible adults the next, except as a matter of law. Moreover, there is a strong correlation between age and criminal activity, with the rates of many kinds of criminality peaking in mid- to late-adolescence.[122] Chronic offenders are disproportionately involved in criminal activity, committing their first offenses in their early to mid-teens, persisting in criminal activity into their twenties, and then gradually reducing their criminal involvement.[123] "[T]hose individuals who are arrested as juveniles are three to four times more likely to be arrested as adults than are those who are not arrested as juveniles."[124] An integrated and rational sentencing policy requires coordinated responses to juvenile and young adult offenders and should be based on a standardized means of identifying and subsequently sanctioning the chronic and ultimately serious young criminal.

Despite the criminal career research findings, criminal sentencing policies tend to maximize sanctions for older offenders whose criminal activity is declining, and often withhold sanctions from chronic younger offenders at the point at which their rate of activity is increasing or is at its peak.[125] When juvenile offenders appear in

---

a transfer-back provision, legislative waiver statutes lend themselves to prosecutorial abuse via overcharging.

Reference of Juvenile Offenders, *supra* note 6, at 564.

122 *See supra* note 113.

123 PETERSILIA, *supra* note 113; CRIMINAL CAREERS, *supra* note 113, at 349-50; Greenwood, *supra* note 116.

124 Greenwood, *supra* note 116, at 163.

125 *See generally* Boland, *Fighting Crime: The Problem of Adolescents*, 71 J. CRIM. L. & CRIMINOLOGY; 94 (1980); BOLAND & WILSON, *Age, Crime and Punishment*, 51 PUB. INTEREST 22 (1978); P. GREENWOOD, J. PETERSILIA & F. ZIMRING, AGE, CRIME AND SANCTIONS: THE TRANSITION FROM JUVENILE TO ADULT COURT (1980) [hereinafter AGE, CRIME AND SANCTIONS]; *Delinquent Careers and Criminal Policy*, *supra* note 6.

adult criminal court for the first time as adult offenders, they are typically accorded the leniency given to adult first offenders.

Greenwood, Abrahamse, and Zimring examined dispositions of youths tried as adults in several jurisdictions and found substantial variation in sentencing practices.[126] In New York City and in Franklin County (Columbus), Ohio, it was found that youthful offenders faced a substantially lower chance of being incarcerated than did older offenders; that youthful violent offenders got lighter sentences than older violent offenders; and that, for approximately two years after becoming adults, youths were the beneficiaries of informal lenient sentencing policies in adult courts.[127] This "punishment gap" has appeared in other studies as well.[128] Although the seriousness of a juvenile's offense is the primary determinant of the severity of the adult sentence imposed in Washington, D.C., "youth, at least through the first two years of criminal court jurisdiction, is a perceptible mitigating factor."[129]

In a nationwide study of waived youths sentenced as adults, Hamparian found that the majority of juveniles judicially transferred were subsequently fined or placed on probation. Even among those confined, 40% had maximum sentences of one year or less. In part, these relatively lenient dispositions reflect the fact that less than one-third of the youths waived judicially were convicted of offenses against the person and that the largest proportion were property offenders, primarily burglars.[130] Similarly, Heuser's evaluation of the adult sentences received by waived juvenile felony defendants in Oregon showed that the vast majority were property offenders rather than violent offenders[131] and that, as a consequence, only 55% of the youths convicted of felonies were incarcerated, with the rest receiving probation.[132] Moreover, even of those youths incarcerated as adults, nearly two-thirds received jail terms of one year or less and served an average of about eight months.[133] These disposi-

126 P. GREENWOOD, A. ABRAHAMSE & F. ZIMRING, FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS 12-14 (1984) [hereinafter FACTORS AFFECTING SENTENCE SEVERITY]; AGE, CRIME AND SANCTIONS, *supra* note 125, at 22, 32.

127 *See supra* note 126.

128 *See supra* notes 120, 124-25.

129 TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 63.

130 YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 106-09.

131 J. P. HEUSER, *supra* note 89, at 21-22 (16.7% involved violent crime charges and 83.3% involved property crime charges).

132 *Id.* at 23. Even this rate is inflated by the fact that youths convicted of violent offenses were almost invariably incarcerated. "The incarceration rate is much higher for violent crimes (75.0%) and much lower for property crimes (51.5%)." *Id.*

133 *Id.* at 26-27.

tions were approximately the same ones that juveniles with extensive prior records who are convicted of felonies within juvenile court would receive.

Gillespie and Norman's study of youths waived in Utah between 1967 and 1980 revealed that the majority of juveniles who were transferred were not charged with violent offenses, and the majority of juveniles convicted as adults were not imprisoned.[134] In her evaluation of waiver practices, Bortner reported that less than one-third of the transferred juveniles convicted in adult proceedings were sentenced to prison. She concluded that

> a significant number of juveniles remanded to adult courts are returned to the community immediately or shortly after conviction. The [possible reasons] include their first time offender status in the adult system, the relatively minor nature of their offenses, and the brevity of their offense histories *compared to adult offenders*. . . . [R]emanded juveniles are not being incarcerated uniformly nor for long periods of time.[135]

In analyzing the relationships between the offense for which jurisdiction was waived and the eventual disposition, Hamparian concluded that "[t]here seems to be a direct correlation between low percentage of personal offenses waived and high proportion of community dispositions (as opposed to incarceration)."[136] Moreover, even within the more serious categories of crimes, there are age-related patterns of seriousness that also affect eventual sentences; younger offenders are less likely than adults to be armed with guns, inflict as much injury, or steal as much property.[137] In short, the differences in sentencing philosophies between the juvenile and adult justice systems continue to work at cross-purposes even when youths make the transition from the one system to the other.

The punishment gap, which represents the system's failure to intervene most strongly in the lives of chronic and active criminal offenders, occurs both because of qualitative differences in the nature of juveniles' offenses and because of the failure to integrate juvenile and adult criminal records for sentencing purposes. Adult criminal courts tend to rely on the seriousness of the present offense and the prior adult criminal history in making sentencing decisions. Their failure to include the juvenile component of the offender's

---

134 Gillespie & Norman, *Does Certification Mean Prison: Some Preliminary Findings from Utah*, 35 JUV. & FAM. CT. J. 23 (1984).

135 Bortner, *supra* note 99, at 56-57 (emphasis added).

136 YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 112.

137 *See* AGE, CRIME AND SANCTIONS, *supra* note 125; M. J. MCDERMOTT AND M. J. HINDELANG, JUVENILE CRIMINAL BEHAVIOR IN THE UNITED STATES: ITS TRENDS AND PATTERNS (1981).

criminal history stems from the confidential nature of juvenile court records, the functional and physical separation of the respective court services staffs, and the sheer bureaucratic ineptitude that makes the maintenance of an integrated system for tracking offenders and compiling complete criminal histories extremely difficult.[138] In a recent study of the effects of juvenile offense histories on adult sentencing practices, Greenwood reported that "local sentencing policies have much more of an impact on how young adults are treated, than any modest variations in the availability of juvenile records."[139]

Legislative definition of the criteria for exclusion of offenders from juvenile court can better integrate the juvenile and adult records for sentencing purposes and reduce the gap in intervention. There is a certain anomaly when youths, waived from juvenile court because they presumably require longer sentences than the juvenile system can provide, are placed on probation as adults. With waiver decisions keyed to offense seriousness and criminal history, rather than to amorphous clinical considerations, an adult sentencing court would be in a better position to respond to chronic juvenile violators. Focusing on cumulative criminal activity, whether as a juvenile or an adult, may maximize social control of the chronic offender.

IV. Recent Legislative Changes In Waiver Statutes

The foregoing analysis has identified two primary and interrelated problems posed by judicial waiver practices: the highly discretionary, idiosyncratic nature of this individualized sentencing decision and the lack of integration between the criteria for removal of offenders from juvenile court and the sentencing practices in adult criminal courts. The source of both problems is individualized judicial sentencing discretion. A juvenile court judge who attempts to make a clinical determination of a youth's amenability to treatment or dangerousness must do so even though there is little evidence to indicate that there are forms of treatment to which some serious offenders consistently respond or validated indicators that permit accurate individualized classification of those who may be responsive to intervention. Because waiver decisions are so indeterminate, juvenile courts exercise extraordinarily broad discretion

138 *See* AGE, CRIME AND SANCTIONS, *supra* note 125; Greenwood, *supra* note 116; Petersilia, *Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 1746 (1981).

139 FACTORS AFFECTING SENTENCE SEVERITY, *supra* note 126, at 36.

that exacerbates the potential for discretionary abuse and discrimination.[140] To the extent that organizational or political considerations result in youths being waived for less serious offenses, the inconsistency between juvenile and adult criminal sentencing practices is further aggravated.

In the past fifteen years, there have been extensive legislative modifications of the various transfer mechanisms. These changes reflect the sentencing policy tensions between dispositions within the juvenile court and those within the criminal courts. Table 1 summarizes the legislative changes in judicial waiver statutes. Table 2 summarizes the legislative changes in excluded offense or concurrent jurisdiction waiver statutes. It is necessary to consider both tables together because many states employ more than one type of transfer procedure to deal with different segments of the juvenile offender population. The unifying legislative policy theme reflected in both tables is the elevation of the principle of the offense over traditional, individualized judicial discretion.

A. CONTROLLING JUDICIAL DISCRETION THROUGH OFFENSE CRITERIA

Legislatures have acted to alleviate some of the obvious problems of inconsistency and inequality within the framework of judicial waiver statutes. One of these responses is the adoption of offense criteria to structure judicial discretion. As Table 1 reveals, this is accomplished by legislatively specifying the minimum offenses for which judicial waiver may occur, identifying certain categories of serious present offenses or combinations of present offenses and prior record for special handling, or prescribing the dispositional consequences that follow from proof of serious present offenses or prior records.

Forty-nine states and the District of Columbia employ, at least in part, the judicial waiver mechanism. Since 1970, twenty-six have amended their statutes to add either minimum offense limitations or present offense/prior offense criteria to structure judicial sentencing discretion. Although many traditional judicial waiver statutes continue to allow a judge to waive any offense, regardless of its seriousness, several states have acted to limit waiver to felony offenses. Six states—Connecticut, Maine, Montana, New Jersey, Vermont, and West Virginia—have restricted eligibility for waiver to a narrow range of very serious offenses against the person, such as murder,

140 Zimring, *Notes Toward a Jurisprudence of Waiver*, in READINGS IN PUBLIC POLICY, *supra* note 7, at 199.

TABLE 1
JUDICIAL WAIVER STATUTES

STATE	JuvCt. Juris.	Min.Age Adult Pros.	Waiver Criteria (*Kent*)*	Offense Limits Minimum	Offense Prior Offense	Criteria Present Offense	Presume Mandate Waiver	Year Offense Added**
Alabama (ALA.CODE §12-15-34)	18	14	Yes	Felony[1]				1975
Alaska (AK.STAT. §47.10.60)	18	None	Yes	Any[2]				1962
Arizona (ARIZ.REV.STAT.ANN., J.C.R. 12,13,14)	18	None	Yes	Any				[1970]
Arkansas (ARK.STAT.ANN. §45-420)	18	None	Yes	Any				[1911]
California (CAL.WELF.&INST. CODE §707(a)&(b))	18	16 16 16 16	Yes	Any		Murder Rob,Kid Rape[3]	Presume Presume Presume	[1915] 1976 1977 1982
Colorado (COL.REV.STAT. §19-1-104)	18	14		Felony				[1903]
Connecticut (CONN.GEN.STAT. §§46b-126,127)	16	14	Yes	A,B,or C Felony	Serious Juv.[4]	Cl. A,B, or C Felony		1979
Delaware (DEL.CODE.ANN. tit.10 §§938, 921)	18	16 16	Yes	Any		Murder,Rob, Rape[5]		[1946] 1971
District of Columbia (D.C.CODE.ANN. §16-2307(a))	18	15 16	Yes	Felony Prior Commit[6]				[1938] 1970
Florida (FLA.STAT.ANN. §39.02)	18	14 14	Yes Yes	Any	Violence Person	Violence Person[7]		[1911] 1975
Georgia (GA.CODE ANN. §15-11-39, -39.1)	17	15 13 13 13		Any	 Burglary	Cap/life Murder,Rape[8] Kid.,Rob(Arm) Burglary		[1915] 1973 1980 1982
Hawaii (HAW.REV.STAT. §571-22)	18	16 16 16	Yes	Felony	 Cl. A 2 Fel.	 Cl. A Cl. A	 Mand. Mand.[9]	[1965] 1981 1981
Idaho (IDAHO CODE §16-806)	18	14	Yes	Any				[1955]
Illinois (ILL.ANN.STAT. ch.37, §702-7)	17	13	Yes	Any				[1907]
Indiana (IND.CODE ANN. §31-6-2-4)	18	14 10 16 16	Yes	Any		 Murder Cl.A,B Cl. C	 Presum Presum Presum	[1945] 1978 1978 1980
Iowa (IOWA CODE ANN. §232.45)	18	14	Yes	Any				[1967]
Kansas (KAN.STAT.ANN. §38-1636)	18	16	Yes	Any				[1965]
Kentucky (KY.REV.STAT. ANN.§208.170)	18	16 None	Yes Yes	Felony[1]		 Class A/ Capital		[1908] 1974
Louisiana (LA.REV.STAT.ANN. §1571.1)	17 17	15 15	Yes	Any Rob(arm); Agg.Burg. Agg.Kid.			P/C	1974 1980

Table 1 JUDICIAL WAIVER STATUTES continued

STATE	JuvCt. Juris.	Min.Age Adult Pros.	Waiver Criteria (*Kent*)*	Offense Limits Minimum	Offense Prior Offense	Criteria Present Offense	Presume Mandate Waiver	Year Offense Added**
					Felony			1980
Maine (ME.REV.STAT.ANN. tit.15 §3101)	18	None	Yes	Murder Cl.A,B,C		Murder Cl.A,B,C		1977 1977
Maryland (MD.CODEANN. §§3-817)	18	15 None	Yes Yes	Any		Cap/Life		[1945] 1973
Massachusetts (MASS.ANN.LAWS Ch. 119,§61)	17	14 14	Yes Yes	Commit[10] Inflict BodyHarm		Felony		1975 1975
Michigan (MICH.COMP.LAWS §712A.4)	17	15	Yes	Felony				[1946]
Minnesota (MINN.STAT.ANN. §260.125)	18	14 16 16 16 16		Any	 1 Fel. 2 Fel. 2 Burg. 3 Fel.	 Agg.Fel. Murder1 Murd.2,3 Kid,Rape Burglary Felony	 Presume Presume[11] Presume Presume Presume Presume	[1959] 1980 1980 1980 1980 1982 1982
Mississippi (MISS.CODE ANN. §43-21-105)	18	13	Yes	Any[2]				1979
Missouri (MO.ANN.STAT. §211.071)	17	14	Yes	Felony[1]				1983
Montana (MONT.CODE ANN. §41-5-206)	18	12 16	Yes Yes	Murder,Rape Mans.,Agg. Rob,Rape,Kid[12]				1985 1974
Nevada (NEV.REV.STAT.ANN. §62.080)	18	16		Felony[1]				[1949]
New Hamp. (N.H.REV.STAT.ANN. §169-B:24)	18	None	Yes	Felony[1]				[1937]
New Jersey (N.J.STAT.ANN. §2A:4A-26)	18	14 14		Murder,Rob[13] Rape,Kid	 Murder Rob[13]	Murder,Rob Mand. Rape, Kid. Crime	 Mand.	1982 1982
New Mexico (N.M.STAT.ANN. §32-1-29 §32-1-30)	18	16 15 16	Yes	Felony		 Murder Rob,Rape, Agg.Burg		[1943] 1975 1975
No.Carolina (N.C.GEN.STAT. §7A-608)	16	14 14		Felony		 Capital	 Mand.	[1919] 1979
No.Dakota (N.D.CENT.CODE §27-20-34)	18	14		Any				[1967]
Ohio (OHIO REV.CODEANN. §2151.26)	18	15		Felony				[1908]
Oklahoma (OKLA.STAT.ANN. tit.10 §1112)	18	None	Yes	Felony				[1968]
Oregon (OR.REV.STAT. §419.533)	18	16		Any				[1907]
Pennsylvania (42 PA.CONS.STAT. ANN. §6355)	18	14	Yes	Felony[1]				1977

Table 1 JUDICIAL WAIVER STATUTES continued

STATE	JuvCt. Juris.	Min.Age Adult Pros.	Waiver Criteria (*Kent*)*	Offense Limits Minimum	Offense Criteria Prior Offense	Offense Criteria Present Offense	Presume Mandate Waiver	Year Offense Added**
Rhode Island (R.I.GEN.LAWS §14-1-7)	18	16		Felony/Indictable				[1944]
So. Carolina (S.C.CODE ANN. §20-7-430)	17	16 14		Any[2]	 2 Agg.Ass, Burg;Rob[14]	 Agg.Ass. Burg;Rob Murder,Rape		[1936] 1981 1981
So.Dakota (S.D.CODIFIED LAWS ANN. §26-11-4)	18	10	Yes	Any[2]				[1968]
Tennessee (TENN.CODE.ANN. §37-1-134)	18	16 14	Yes Yes	Any Murder,Kid Rape,Rob				[1911] 1970
Texas (TEX.FAM.CODEANN. §54.02)	17	15	Yes	Felony				[1965]
Utah (UTAH.CODE ANN. §78-3a-25)	18	14	Yes	Felony				[1931]
Vermont (VT.STAT.ANN. tit.33 §§632, 635)	16	None 10	Yes Yes	Murder Murder,Rape[15] Rob(Arm),Kid				1981 1981
Virginia (VA.CODE §16.1-269)	18	15 15 15		Imprisonable	 Adult Felony	Murder,Rape[16] Rob(Arm) Felony	 Presume	[1950] 1976 1980
Washington (WASH.REV.CODE ANN. §13.40.110)	18	Any 16 17	Yes		 Cl.A Fel. Rape,Kid. Rob,Ass.			[1977] 1977 1977
West Va. (W.VA. CODE §49-5-10)	18	None None None 16 16	Yes		 Vio.Fel. 2 Fel. Felony	Murder,Rape P/C Rob(Arm),Kid Violent Fel. Felony Violent Fel. Felony		1978 1978 1978 1978
Wisconsin (WIS.STAT.ANN. §48.18	18	16	Yes	Any				[1955]
Wyoming (WYO.STAT. §14-6-237)	19	None	Yes	Any				1971

Legislation current through June 30, 1986.

*For the *Kent* criteria, *see supra* text accompanying note 83.

**For jurisdictions without offense criteria, the date indicated in the brackets—[year]—refers to the year the waiver statute was originally adopted. Dates for later re-enactments are not indicated unless offense criteria were subsequently added by the legislature.

1. Under previous legislation, *any* offense was waivable. As amended, only *felony* offenses are waivable.

2. Under previous legislation, only *felony* offenses were waivable. As amended, *any* offense is waivable.

3. CAL. WELF. & INST. CODE §707(b) contains a twenty (20) item catalogue of primarily major offenses against the person for which adult waiver is presumed. See generally, Feld, *Dismantling Rehabilitative Ideal*, *supra* note 3, at 215-17. §707(b)(1-4, 9-15) was added in 1976; §707(b)(16) in 1977; §707(b)(5-8) in 1979; and §707(b)(17-20) in 1982.

4. "Serious Juvenile Offenses" as defined in CONN. GEN. STAT. §46b-120 include thirty-nine (39) serious offenses such as homicide, assault, sexual assault, kidnapping, and certain categories of burglary and larceny.

5. DEL. CODE ANN. tit. 10 §921 requires a mandatory waiver hearing for any youth aged 16 or older who is charged with one of eight (8) offenses which include murder, robbery, burglary, or arson.

6. D.C. CODE ANN. §16-2307(a)(2) authorizes a waiver hearing for a sixteen year old youth charged with any offense provided the child is "already under commitment to an agency or institution as a delinquent child. . . ."

7. FLA. STAT. ANN. §39.09 defines a violent crime against a person as "Murder, sexual battery, armed or strong-armed robbery, aggravated battery, or aggravated assault. . . ." The offense catalogue was adopted in 1975 with additions and deletions in 1978. For youths charged with those offenses who have a prior conviction of any such offense, a waiver hearing is mandatory. Thomas & Bilchik, *supra* note 75, at 460-66.

8. GEORGIA CODE ANN. §15-11-37 catalogues thirteen "designated felonies" which, if committed by a child thirteen years or older, permit waiver for adult criminal prosecution.

9. HAWAII REV. STAT. §571-22(c) provides that waiver is mandatory for youths charged with Class A offenses who have either a previous Class A conviction or 2 prior felony convictions.

10. MASS. ANN. LAWS Ch. 119, §61 authorize waiver of a child who has "previously been committed to the department of youth services as a delinquent" and whose present offense "would be punishable by imprisonment in the state prison".

11. Under MINN. STAT. §260.125(3), proof of various combinations of present offense and prior record creates a "prima facie" case, or presumption in favor of waiver. *See* Feld, *Dismantling Rehabilitative Ideal*, *supra* text footnote 3, at 207. An analysis of the Minnesota legislation, *see infra* text notes 146-48 and accompanying text.

12. MONT. CODE ANN. §41-5-206 lists nine (9) offenses or attempts to commit those offenses in its waiver provision, including murder, rape, arson, aggravated assault, robbery, and kidnapping.

13. N.J. STAT. ANN. §2A:4A-26 provides for mandatory waiver if there is probable cause to believe that a juvenile committed a homicide or one of six (6) other offenses. In addition, any offense committed after a prior conviction of one of those offenses mandates waiver. Other violent offenses against the person and weapons offenses also mandate waiver.

14. S.C. CODE ANN. §20-7-430(5) provides that any child aged 14 or 15 with two prior and unrelated adjudications for any of nine (9) offenses against the person charged with a third such offense may be waived. Regardless of prior convictions, any youth charged with murder or criminal sexual assault may be waived.

15. VT. STAT. ANN. Ch.12 T.33 §§632, 635a allows discretionary waiver for a child of any age charged with murder, and any child aged ten (10) to fourteen (14) charged with eleven (11) specified violent felonies.

16. VA. CODE §16.1-269 provides for presumptive waiver of youths charged with armed robbery, rape, or murder. In addition, for any offense punishable by death, a life sentence, or a term of twenty years or more, if the juvenile court judge declines to transfer, the prosecutor may have the case reviewed on the record by a circuit court which may then order the case to remain in juvenile court or allow the prosecutor to seek a criminal indictment which terminates the juvenile court's jurisdiction.

criminal sexual conduct, armed robbery, and kidnapping. By narrowing the range of waivable offenses to the most serious violent crimes, such legislation restricts judicial discretion and increases the likelihood of significant adult dispositions for youths waived under these criteria.

Within the past decade, about twenty states have legislatively identified certain serious present offenses and/or prior records for special waiver consideration. Some specify the procedural consequences of alleging certain offenses. One approach, used in Delaware, is to require a mandatory waiver hearing whenever a juvenile is charged with one of the enumerated offenses against the person. Florida requires a waiver hearing for any youth charged with a violent offense who has a prior conviction of an offense against the person. Another procedural consequence, used in North Carolina, is to require the transfer to criminal court of any youth whom there is probable cause to believe committed a capital offense. Upon a showing of probable cause of various combinations of present offense and/or prior record, waiver is presumptive in California, Indiana, and Minnesota and mandatory in Hawaii and New Jersey.

In addition to minimum offense limitations, a second legislative strategy is to identify certain categories of present offenses for special waiver consequences. California legislative amendments place the burden of proving fitness for juvenile court treatment on the

youth if certain enumerated offenses are alleged, rather than requiring the state to prove the youth's nonamenability or dangerousness. Thus, allegations of certain serious offenses create a presumption in favor of waiver, and the youth bears the burden of non-persuasion.[141] Subsequent amendments in 1977, 1979, and 1982 have expanded the catalogue of offenses which create this presumption of adulthood.

Evaluations of the impact of the California legislation indicate that, simply as a result of specifying offense criteria and shifting the burden of proof, there was a dramatic increase in the number of youths who were tried as adults after having been charged with one of the enumerated offenses.[142] After accounting for possible fluctuations in juvenile crime rates, evaluators reported that "Los Angeles County experienced a 318% increase in certification hearings and a 234% increase in certifications" between 1976 and 1977.[143] Moreover, this research indicated that the juveniles who were waived to stand trial as adults were almost as likely to be convicted as youths tried in juvenile court and that, following their convictions, they were more likely to be incarcerated than were their juvenile counterparts.[144] Similarly, although Greenwood, Petersilia, and Zimring reported substantial variation in sentencing practices in several jurisdictions, they found that juveniles tried as adults in Los Angeles were not sentenced more leniently than other offenders, that for more serious crimes the seriousness or violence of the crime, not the age or record of the offender, determined the sentence; and that in sentencing marginal crimes like burglary the prior juvenile record appeared to influence the severity of the first adult sentence.[145] Thus, legislative specification of offense criteria may constrain judicial waiver/sentencing discretion and may increase the likelihood of significant adult dispositions for such offenders.

In addition to California, at least nine other states—Delaware, Georgia, Indiana, Kentucky, Maine, Maryland, New Mexico, Virginia, and Washington—identify in legislation a serious present offense for special waiver consideration. In most of these jurisdictions, the present serious offenses are identified as calling for either capital punishment or life imprisonment, or they are the most serious offenses in the criminal codes, such as murder, armed

141 *Dismantling the "Rehabilitative Ideal"*, *supra* note 3, at 215-17.

142 K. TEILMANN & M. KLEIN, SUMMARY OF INTERIM FINDINGS OF THE ASSESSMENT OF THE IMPACT OF CALIFORNIA'S 1977 JUVENILE JUSTICE LEGISLATION 30-35.

143 *Id.* at 30.

144 *Id.* at 32-35.

145 AGE, CRIME AND SANCTIONS, *supra* note 125, at 22, 32.

robbery, criminal sexual conduct, and kidnapping. This legislative attention to the most serious present offenses reflects the values of retributivism, a belief that certain heinous offenses deserve adult consequences.

Even more elaborate legislative offense strategies are found in nine other states: Connecticut, Florida, Georgia, Hawaii, Minnesota, New Jersey, South Carolina, Virginia, and West Virginia. These states identify prior offenses in combination with a serious present offense as grounds for waiver. The emphases on prior records and present offenses reflect legislative efforts to identify for selective incapacitation those youths with records of chronic persistence as well as present seriousness.

Minnesota legislation provides that if the prosecution charges certain types of present offenses or various combinations of present offenses and prior records, a prima facie case, for waiver is established.[146] Effectively, the statutory offense criteria represent a legislative effort to guide the waiver decision by defining serious juvenile offenders on the basis of age, present offenses, and prior records. Moreover, the combinations of present offense and prior record which create a presumption for waiver vary; as the seriousness of the present offense decreases, the length of the prior record increases. Although first degree murder is presumptively an adult offense, routine felonies require three prior felony adjudications.[147] Despite these changes, however, a study of the waiver process in Minnesota found that less than half of the youths for whom waiver was initially sought by prosecutors and only about one-third of the youths ultimately referred for adult prosecution met the prima facie criteria. Furthermore, if compared with waiver practices prior to the amendments, the adoption of the offense criteria appears to have had a limited impact on the numbers or kinds of youths criminally prosecuted in Minnesota.[148]

In Connecticut, only youths who have prior convictions of "serious juvenile offenses," which are primarily offenses against the person, and who are charged with a serious present felony may be waived. The Florida legislation focuses on youths with repeated violent offenses against the person. The Hawaii legislation identifies for waiver youths charged with Class A felonies who have either a prior Class A conviction or two prior felony convictions. The South Carolina legislation also identifies for waiver youths charged with

146 *Dismantling the Rehabilitative Ideal, supra* note 3.

147 *Id.* at 194-96.

148 Osbun & Rode, *Prosecuting Juveniles as Adults: The Quest for "Objective" Decisions*, 22 CRIMINOLOGY 187 (1984).

serious offenses who have two prior convictions for similarly serious offenses. By emphasizing serious present offenses in combination with significant prior records, these states both constrain judicial discretion and increase the probabilities of significant adult dispositions following waiver.

B. REDUCING THE "PUNISHMENT GAP" BY INTEGRATING JUVENILE WAIVER CRITERIA WITH ADULT SENTENCING PRACTICES

The legislative changes summarized in Table 1 include efforts to prescribe more specific present offense criteria, various combinations of present offenses and prior records, and the waiver/procedural consequences of alleging such offenses in an effort to control judicial sentencing discretion. More fundamental changes, however, have occurred in states that have rejected the traditional offender-oriented juvenile court sentencing philosophy and have emphasized the offense-oriented adult sentencing policies of retribution, deterrence, and selective incapacitation. States have accomplished this goal by legislatively narrowing the scope of juvenile court jurisdiction to exclude youths charged with certain serious offenses.

In many states, the excluded offenses summarized in Table 2 have been supplemented by judicial waiver statutes that also allow for the discretionary transfer of juveniles charged with other non-excluded offenses. Some states exclude only youths charged with offenses punishable by capital punishment or life imprisonment. In addition to excluding youths charged with murder, some jurisdictions also exclude youths charged with other serious offenses, such as criminal sexual conduct, armed robbery, and kidnapping. Still other jurisdictions exclude youths charged with repeat offenses.

Table 2 summarizes the legislation of the twenty-four states that use either legislatively excluded offenses and/or concurrent juvenile/criminal court jurisdiction over certain offenses as vehicles to make the adulthood determination. In three states, Arkansas, Nebraska, and Wyoming, juvenile and criminal courts have concurrent jurisdiction over all offenses, and the prosecutor's charging decision determines the forum in which the case is heard. Because jurisdiction is determined by the prosecutor's filing of criminal charges rather than by a judicial waiver/sentencing hearing, these concurrent jurisdiction statutes are tabulated with excluded offense legislation. The Nebraska and Wyoming statutes, however, include *Kent* criteria, which purport to guide the prosecutor's discretion.[149]

[149] For discussion of *Kent* criteria, see *supra* notes 75-83 an accompanying text.

TABLE 2
LEGISLATIVELY EXCLUDED OFFENSES*
CONCURRENT JURISDICTION**

STATE	Minimum Age	Concur Juris	Excluded Offenses: Cap/Life	Excluded Offenses: Offense Catalogue	Excluded Offenses: Prior Conviction	Year Adopted***
Arkansas (ARK.STAT.ANN. §41-617)	15	Yes		Any		1975
		Yes		Murder 1,2 Rape		1981
Colorado (COL.REV.STAT. §19-1-104(B))	14	Yes		Cl. I		1973
	16		Yes[1]	Cl. II,III	Felony	1973
Connecticut (CONN.GEN.STAT. §46b-127)	14			Murder		1979
	14			Class A	Class A	1979
	14			Class B	2 A or B	1979
Delaware (DEL.CODE.ANN. tit.10 §921)	None			Murder 1, Rape, Kidnap		1971
District of Columbia (D.C.CODEANN. §16-2301(3)	16			Murder, Rape, Burglary(1), Rob(Armed)		1970
Florida (FLA.STAT.ANN. §§39.02, 39.04)	None	Yes----Indict			Felony[2]	[1951]
	16	Yes		Any (Inform)		1978
Georgia (GA.CODE.ANN. §15-11-5)	None	Yes----Yes				[1915]
Idaho (ID.CODE §16-1806A)	14			Murder, Rob Rape, Mayhem		1981 1984
Illinois (ILL.ANN.STAT. ch.37, §702-7)	15			Murder, Agg. Crim.Sex, Rob(Armed)		1982 1983
Indiana (IND.CODEANN. §31-6-2-1(d))	16			Murder[3] Rob(Armed), Kidnap,Rape		1975 1981
Kansas (KAN.STAT.ANN. §38-1602(b)(3))	16			1 Felony	2 Felony Agg.Juv. Delinquent[4]	1983
Louisiana[5] (LA.REV.STAT.ANN. §1570(A)(5))	15			Murder 1,2 Mans.,Agg.Rape		1978
	16			Rob(Armed),Agg. Burg.,Agg.Kid.		1978
Maryland (MD.CODEANN. §3-804(d))	14		Yes			[1945]
	16			Rob(Armed)		1973
Mississippi (MISS.CODE ANN. §43-21-105)			Yes			[1946]
Nebraska (NEB.REV.STAT. §43-247)	None	Yes[6]		Any		[1974]
Nevada (NEV.REV.STAT. §62.040)	None			Murder or Att. Murd.		1977

Table 2 LEGISLATIVELY EXCLUDED OFFENSES: CONCURRENT JURISDICTION continued

STATE	Minimum Age	Concur Juris	Excluded Offenses Cap/Life	Offense Catalogue	Prior Conviction	Year Adopted***
New York (N.Y.PENALLAWS §30.00(2))	13 14 13			Int.Murder Kid,Arson,Rape, Burg,Att.Murder Felony Murder		1978 1978 1979
Ohio (OH.REV.CODEANN. §2151.26)	15			Murder,Agg. Fel. 1, 2, Fel. 1, 2	Murder,Agg. Fel. 1, 2, Fel. 1, 2[7]	1981 1983
Oklahoma (OK.STAT.ANN. tit.10 §1104.2)	16			Murder,Kid,Rob, Rape,Arson[6]		1978
Pennsylvania (42 PA.CONS.STAT. ANN. §6302)	None			Murder		[1933]
Rhode Island (R.I.GEN.LAWS §14-1-7.1)	16			Any Felony	2 Felonies	1972
Utah (UTAHCODEANN. §788-3a-25(6))	16	Yes----------		Murder,Agg. Rob,Rape,Kid[9]		1981
Vermont (VT.STAT.ANN. tit. 33 §§632,635(a))	14			Murder,Mans. Rob(Arm),Rape[10]		1981
Wyoming (WY.STAT. §14-6-203(c))	13	Yes----------		Any		1971

Legislation current through June 30, 1986.

*Does not include minor offenses such as traffic offenses, fish and game violations, or the like which also may be excluded from juvenile court jurisdiction.

**Concurrent jurisdiction statutes grant prosecutors nonreviewable discretion to file charges against chronological minors in either juvenile or adult courts. The jurisdictions of juvenile and criminal courts overlap on certain categories of offenses, and the charging decision determines the forum in which the case is heard. *See supra* text footnote 75. Where concurrent jurisdiction is restricted only to certain offenses, those offenses limitations are indicated in the Excluded Offenses (Offense Catalogue) portion of Table 2.

***The date in the brackets—[year]—refers to the year the concurrent jurisdiction or offense exclusion statute was originally adopted in its present form. Dates for later re-enactments are not indicated unless offenses were subsequently excluded by the legislature. Unbracketted dates refer to recent legislation adding or expanding offense criteria exclusions.

1. Colorado's originally excluded capital offenses from juvenile court jurisdiction in 1923. It adopted the current criteria which expanded the scope of exclusion in 1973.

2. FLORIDA STAT.ANN. §39.04(2)(e)(4) allows the prosecutor to file an information against any youth 16 or older that the prosecutor determines requires an adult sanction. However, if the youth is charged with a misdemeanor, upon motion of the child, the case will be returned to the juvenile court unless the child has two prior delinquency determinations, at least one of which involved a felony offense. Thomas & Bilchik, *supra* note 75, at 463-64.

3. Indiana legislation excluded capital offenses from juvenile court jurisdiction in 1945. In 1975, the capital offense legislation was amended to exclude murder, and additional offenses were excluded in 1981.

4. KAN.STAT.ANN. §21-3611 defines an aggravated juvenile delinquent as any child 16 or older, confined in a correctional facility, who burns facilities, assaults guards, or absconds repeatedly. Kan.Stat.Ann. §38-1602(b)(6) defines any person previously convicted of an aggravated juvenile delinquency as an adult.

5. Louisiana exlcuded capital offenses from juvenile court jurisdiction in 1950. In 1975, armed robbery was also excluded. The 1980 legislation reported in Table 2 excludes several degrees of homicides as well as aggravated rape, robbery, kidnapping and burglary.

6. Nebraska is a "pure" prosecutorial waiver jurisdiction. NEB.REV.STAT. §§43-247, -276 grants juvenile courts and district courts concurrent jurisdiction over juveniles of any age charged with felonies, and those 16 or older charged with misdemeanors. The prosecutor's choice of a juvenile or adult forum is nominally guided by *Kent* waiver criteria.

7. OHIO REV. CODE ANN. §2151.26 excludes from juvenile court jurisdiction any youth who was previously wavied for adult prosecution, tried and convicted of murder or aggravated murder or an aggravated felony of the first or second degree or a felony of the first or second degree, who is charged with any of those offense on a subsequent occasion.

8. OKLA.STAT.ANN. Code tit. 10 §1104.2(A) legislatively excludes ten (10) offenses against the person from juvenile court jurisdiction, including murder, rape, kidnapping, armed robbery, and arson.

9. UTAH CODE ANN. §78-3a-25(6) gives concurrent jurisdiction to juvenile and criminal courts over youths aged 16 or older who are charged with any degree of murder or attempted murder, and six (6) other major offenses against the person, including aggravated robbery, burglary, arson, kidnapping, or rape. Indicting or criminally charging a youth with one of those offenses divests the juvenile court or jurisdiction.

10. VT.STAT.ANN. tit. 33 §§632, 635a excludes eleven (11) major person offenses from the jurisdiction of the juvenile court including murder, kidnapping, robbery causing injury, rape or burglary, but permits the criminal court to "transfer back" the defendant for juvenile court proceedings. Under its original juvenile code, Vermont had excluded capital offenses from juvenile court jurisdiction since 1912.

Moreover, unlike judicial waiver/sentencing discretion, which is subject to appellate review, the prosecutor's charging decision is not subject to any type of judicial review.[150] Every objection to the discretionary and discriminatory aspects of judicial waiver is also applicable to these prosecutorial waiver statutes.

The other concurrent jurisdiction states, Colorado, Florida, Georgia, and Utah, restrict their jurisdictional overlap to those offenses calling for capital punishment or life imprisonment or to the most serious offenses, such as murder, aggravated robbery, criminal sexual conduct, and kidnapping. Because prosecutors are more likely than juvenile court judges to be responsive to political pressures and the visibility of serious offenses, more likely to emphasize retributive considerations over rehabilitative ones, and, as adversaries, less likely to consider the welfare of the accused, their charging decisions will more frequently emphasize considerations of the offense, such as probable cause and provable legal guilt, than considerations of the offender.[151] Thus, to the extent that these concurrent jurisdiction statutes are confined to the most serious offenses carrying a high probability of adult incarceration, they also serve to integrate juvenile and criminal sentencing practices.

The principal conceptual alternative to judicial waiver is legislation which simply excludes certain categories of serious offenses and/or prior records from juvenile court jurisdiction. If charged with one of these offenses, youths above a statutory minimum age are tried as adults. While such statutes are sometimes characterized

150 *See, e.g., Reference of Juvenile Offenders, supra* note 6, at 558-61; Thomas & Bilchik, *supra* note 75, at 478.

151 *Reference of Juvenile Offenders, supra* note 6, at 564; THOMAS & BILCHIK, *supra* note 75.

as prosecutorial waivers because the decision as to the offense charged determines the forum, it is the legislature, not the prosecutor, which makes the policy choice. By legislatively focusing on characteristics of the offense rather than the offender, such legislation precludes any consideration of an individual's characteristics.

Of the eighteen states with excluded offense legislation, fourteen exclude, at least in part, on the basis of a serious present offense alone. These offenses either result in capital punishment or life imprisonment—Maryland and Mississippi—or are the most serious felony offenses in the criminal code (murder, criminal sexual conduct, armed robbery, and kidnapping)—Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Louisiana, Nevada, New York, Oklahoma, Pennsylvania, and Vermont.

In the home of the original Cook County Juvenile Court, for example, the Illinois legislature redefined the jurisdiction of the juvenile court in 1982 to exclude entirely from its jurisdiction any youth aged fifteen or older who was charged with murder, armed robbery, or rape.[152] Such youths, regardless of their age, appear automatically in the adult courts for criminal prosecution. In the seven years prior to the offense exclusion legislation, Cook County averaged approximately forty-seven judicially-waived youths per year. In the first two years following the enactment of the offense exclusion legislation, the rates of adult criminal prosecution of juveniles more than tripled to 170, 151 of which resulted from the automatic transfer provision.[153]

Similar catalogues of very serious present offenses against the person are found in many other jurisdictions as well. New York, which had no judicial waiver provisions and where juvenile court jurisdiction ends at age sixteen, adopted juvenile offender legislation in 1978 which excludes thirteen-year-olds charged with murder, and fourteen-year-olds charged with kidnapping, arson, rape, and the like.[154] By increasing the certainty of adult prosecution, the rationale of the legislation was crime deterrence.[155] Evaluations of the impact of the legislation, however, did not find any systematic decline in juvenile arrests for the excluded offenses. "An organiza-

152 ILL. ANN. STAT. ch. 37, para. 702-7 (Smith-Hurd 1982).

153 CHICAGO LAW ENFORCEMENT STUDY GROUP, JUVENILES TRIED AS ADULTS: COOK COUNTY 1975-1984 (1986).

154 N.Y. PENAL LAW § 30.00(2) (McKinney 1978).

155 Hariston, *Black Crime and the New York State Juvenile Offender Law: A Consideration of the Effects of Lowering the Age of Criminal Responsibility*, in READINGS IN PUBLIC POLICY, *supra* note 6, at 295; S. Singer & D. McDowall, Organizing for Deterrence and Juvenile Justice: The Impact of New York's Juvenile Offender Law on Rates of Juvenile Crime (1986)(paper presented at the American Society of Criminology).

tional change and an increase in the severity of punishment does not necessarily lead to reductions in violent juvenile crime."[156]

In a similar attempt to measure deterrent effects, Ruhland, Gold, and Hekman compared rates of offending between juveniles and young adults in states with different maximum age jurisdictions.[157] Although they reported lower official and self-reported rates of offending for youths in states in which seventeen-year-olds are "adults" rather than juveniles, it is also suggested that police may be more reluctant to treat younger "adults" as formally as somewhat older youths.

> [T]he data may reflect the practice of the justice system of taking age into account in determining whether offenders will be formally processed and, more specifically become recorded arrests. The system appears less strict with 16- and 17-year-old adults, especially the former. . . [T]his greater leniency may be known to 16-year-olds, so adult 16s are not deterred from committing even felonies by the spectre of criminal prosecution and are as delinquent as their juvenile counterparts in other states.[158]

In part, then, the impact of offense exclusion legislation may be vitiated by informal system responses, and "attempts to use the greater severity of punishment inherent in adult status to deter juvenile crime could backfire if the minimum age for adult status is set too low."[159]

Another five states emphasize a juvenile's prior record in addition to the present offense in defining juvenile court jurisdiction. Typically, these statutes balance the seriousness of the present offense with the length of the prior record. Thus, Connecticut excludes youths charged with a Class A felony who have a prior Class A felony conviction. For youths charged with Class B offenses, however, two prior convictions of Class A or B offenses are required. Kansas and Rhode Island exclude youths charged with any felony

---

156 S. Singer & D. McDowall, *supra* note 155, at 20. *But see*, Glassner, Ksander & Berg, *A Note on the Deterrent Effect of Juvenile vs. Adult Jurisdiction*, 31 SOC. PROBS. 219 (1983), in which it is noted that, for many youths who appear to reduce or cease their delinquent involvements in mid-adolescence, "this change is a conscious decision based on their perceptions of differences in the criminal justice system's treatment of juvenile and adult criminals." The authors conclude that:

> most of the adolescents studied reported that they curtail involvements in criminal activities at age 16, because they feared being jailed if apprehended as adults. They treat the period prior to age 16 as one for experimenting with criminal behaviors, while viewing late adolescence as a time for giving up such involvement unless one is ready to make a longterm commitment and face substantial risks in so doing.

Id. at 221.

157 Ruhland, Gold & Hekman, *Deterring Juvenile Crime: Age of Jurisdiction*, 13 YOUTH AND SOC'Y 353 (1982).

158 *Id.* at 373.

159 *Id.* at 374.

who have two prior felony convictions. By legislatively emphasizing an offender's cumulative persistence, rather than just the current seriousness, these statutes reflect a balance between retributive and selective incapacitative policies.[160]

The dates when these offense exclusion statutes were adopted are especially significant. Although the capital/life sentence exclusions have been in the statutes for more than forty years in states such as Colorado, Indiana, Louisiana, Maryland, Mississippi, and Vermont, thirteen of the present offense exclusion states have adopted or have expanded this strategy within the past fifteen years. Beginning in 1970, and in direct response to the Supreme Court's *Kent* decision, Congress excluded a catalogue of offenses from the jurisdiction of the juvenile courts of the District of Columbia.[161] By 1975, four other states followed suit, and, by 1980, nine states excluded serious present offenses from juvenile court jurisdiction. The remaining states have acted similarly since 1980. Thus, there is a very strong trend to legislatively excise the most serious young offenders from juvenile court jurisdiction solely on the basis of their offense.

Regardless of the statutory details, the thrust of these laws is to remove sentencing discretion from judges with respect to the juvenile or adult disposition and to base the sentencing decision explicitly on some aspects of the offenses charged. Whether the dispositional determination is made directly by the legislature via offense exclusion or on a discretionary basis by the prosecutor via concurrent jurisdiction, the net effect is a reduction in both judicial discretion and the juvenile court's clientele.

In addition to reducing judicial sentencing discretion, legislation which targets the most serious offenses or which couples serious present offenses with prior records also increases the likelihood of significant adult sentences for serious young offenders. Hamparian's survey of waived youths showed that the largest group was property offenders and that the majority of all waived offenders received non-incarcerative dispositions.[162] This "punishment gap" has been reported in other studies as well.[163]

It is instructive to compare the sentencing of juveniles tried as

160 *Delinquent Careers and Criminal Policy*, *supra* note 6; *Reference of Juvenile Offenders*, *supra* note 6.

161 *See Reference of Juvenile Offenders*, *supra* note 6, at 558-66.

162 YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 106.

163 AGE, CRIME AND SANCTIONS, *supra* note 125; Bortner, *supra* note 99; TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME.

adults in jurisdictions in which they are targeted as serious offenders with the sentences received in more discretionary jurisdictions. In their study of waived youths' dispositions in Florida, a concurrent jurisdiction/direct file state, Thomas and Bilchik reported that the majority of youths tried as adults were older males with prior delinquency adjudications and multiple present felony charges, typically property offenses.[164] Unlike Hamparian's findings, however, approximately two-thirds of these Florida juveniles were sentenced to substantial terms of imprisonment.[165]

Rudman, Hartstone, Fagan, and Moore studied the processing and dispositions of "violent juvenile offenders," who are youths with a present violent offense and a prior felony adjudication, tried and sentenced as juveniles or as adults in several jurisdictions.[166] Of the youths targeted as violent and convicted in criminal courts, over ninety percent were incarcerated, and their sentences were five times longer than those youths retained in juvenile court. They concluded that "because the criminal justice system is not limited by the jurisdictional age considerations of the juvenile justice system, violent youths convicted and sentenced in criminal court receive considerably longer sentences, in adult secure facilities, than their counterparts retained by the juvenile court."[167]

In his study of transferred juvenile felony defendants in Oregon, Heuser reported that seventy-five percent of the youths convicted of violent offenses were incarcerated and that youths committed to prison received average sentences in excess of six years.[168] Greenwood, Abrahamse, and Zimring compared the sentences of young adult armed robbers and burglars with the sentences of juveniles and older adults to determine the prevalence of a "leniency gap."[169] Although not directly comparable to the studies of dispositions of waived juveniles, they reported that young adult armed robbers were sentenced as severely as younger and older offenders on the basis of the seriousness of their present offense. The effects of prior juvenile records on young adult dispositions, however, were found to be inconsistent across jurisdictions. In sum, these studies suggest that when waiver is confined to a nar-

164 Thomas & Bilchik, *supra* note 75, at 470-74.

165 *Compare id.* at 474 *with* YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, *supra* note 7, at 112.

166 Rudman, Hartstone, Fagan & Moore, *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 5 (1986) [hereinafter *Violent Youth in Adult Court*].

167 *Id.* at 89.

168 J. P. HEUSER, *supra* note 89, at 24, 28-29.

169 *See, e.g.*, FACTORS AFFECTING SENTENCE SEVERITY, *supra* note 126, at 52; Greenwood, *supra* note 116.

row category of violent and/or repetitive offenders, the sentences that they receive as adults are substantial. It must be emphasized, however, that violent and repetitive juvenile offenders are a small subset of the group of juveniles typically waived in most discretionary jurisdictions.

V. Implications of Waiver for Juveniles and Justice

Public and political concern about chronic and serious young offenders has spawned a variety of "get tough" legislative responses. "Get tough" waiver legislation seldom addresses the consequences for youths of incarceration in adult correctional facilities, the quality or effectiveness of programs available to them, or the comparative effects of juvenile versus adult dispositions on recidivism.[170] Such legislation is, however, indicative of the contemporary sentencing policy debate between proponents of individualized, offender-oriented dispositions and advocates of just deserts offense-based dispositional practices.

The juvenile court, as originally conceived, was an exemplar of offender-oriented individualization at sentencing. Discretionary judicial waiver statutes reflected the same philosophical predeliction. Within the span of fifteen years, however, an erosion of support for the "rehabilitative ideal"[171] has occurred in juvenile waiver/sentencing practices as well. Concern about the exercise of judicial discretion and the integration of sentencing practices between juvenile and criminal courts has animated much of the legislative activity summarized in Tables 1 and 2.

Legislative modifications of judicial waiver statutes (Table 1) and the exclusion of offenses from juvenile court (Table 2) represent significant challenges to the underlying philosophy of therapeutic individualization. The specification of present offense and/or prior record criteria reflects legislative disquiet with judicial sentencing practices. The addition of presumptive or mandatory waiver requirements for youths meeting offense criteria removes a significant element of judicial sentencing discretion. These reflect the same presumptive sentencing practices increasingly prevalent in the adult criminal justice system as well.

The legislative exclusion of serious present offenses, with or without prior records, has even more significant implications for the juvenile court as an institution. Offense exclusion represents a re-

170 Thomas & Bilchik, *supra* note 75, at 475-78; *Violent Youth in Adult Court*, *supra* note 166, at 93.

171 *See* F. Allen, *supra* note 22.

pudiation of the traditional, offender-oriented treatment dispositions characteristic of the juvenile court in favor of mechanistic, offense-oriented decisions. Exclusion also represents an expression of legislative distrust of juvenile court judges' discretionary decision-making. If legislators perceived juvenile court judges as properly and consistently responding to serious juvenile offenders, there would be less legislative impetus to take those decisions out of the judges' hands. In light of the substantial research from many jurisdictions showing the inherent arbitrariness of juvenile court's waiver decisions in juvenile courts, there is ample support for the legislatures' disquiet.

The simple removal of certain categories of offenses represents a narrowing of the juvenile courts' jurisdiction and a subsequent diminution in the number of youths appearing before the court. Moreover, exclusion on the basis of offenses represents a legislative repudiation of the courts' philosophical premise that it can aid those appearing before it by denying the courts the opportunity to try, without even an inquiry into the characteristics of the offending youth. Finally, to the extent that the *McKeiver* Court denied the provision of jury trials in juvenile court to juveniles because juveniles received sympathetic and compassionate intervention from the court, the repudiation of individualization in favor of the principle of offense calls into question the premises upon which many of the procedural characteristics of the juvenile court are based.

A. JUVENILES' CRIMINAL RESPOSIBILITY—WAIVER, CAPITAL PUNISHMENT, AND CULPABILITY

Waiver of youths from juvenile court to criminal court requires a reassessment of the criminal responsibility of juveniles. While juvenile court jurisdiction over an adjudicated offender may continue for the duration of minority, this disposition is significantly shorter than the sentences that may be imposed if a juvenile is tried and convicted as an adult for a serious felony. Indeed, when waiver legislation explicitly excludes capital offenses or their functional equivalents, juveniles tried in criminal courts are exposed to the possibility, indeed the reality, of execution for offenses committed while they were juveniles.[172] Executing youths convicted of crimes

[172] The issue of youthful criminal responsibility is most explicit in the context of capital punishment for juveniles convicted of serious crimes. *See, e.g.*, Eddings v. Oklahoma, 616 P.2d 1159 (Okla. Crim. App. 1980), *rev'd sub nom.* Eddings v. Oklahoma, 455 U.S. 104 (1982); Thompson v. Oklahoma, 724 P.2d 780 (Okla. Crim. App. 1986), *cert. granted*, 107 S. Ct. 1281 (1987). *See generally*, F. ZIMRING, CHANGING LEGAL WORLD OF ADOLESCENCE (1982); Hill, *Can the Death Penalty be Imposed on Juveniles: The Unanswered Question in*

committed while they were juveniles challenges the basic understanding about the criminal responsibility of adolescents. "The spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children."[173]

The juvenile court, as originally conceived, was premised on the immaturity and irresponsibility of children. The deterministic assumptions of positivism and the view of juveniles as lacking criminal capacity resulted from the earlier common law's infancy mens rea defense.[174] Since criminal liability is premised on rational actors who make blameworthy choices and are responsible for the consequences of their acts, the common law recognized and exempted from punishment categories of persons who lacked the requisite moral and criminal responsibility. Children less than seven years of age were conclusively presumed to be without criminal capacity, while those fourteen years of age and older were treated as fully responsible. Between the ages of seven and fourteen years, there was a rebuttable presumption of criminal incapacity.[175] Juvenile court legislation simply extended upward by a few years the general presumption of youthful criminal incapacity.

Eddings v. Oklahoma, 13 CRIM. L. BULL. 5 (1984); Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983); Note, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY 1471 (1983) [hereinafter *Capital Punishment of Minors*]; Note, *Executing Youthful Offenders: The Unanswered Question in Eddings v. Oklahoma*, 13 FORD. URB. L.J. 471 (1985) [hereinafter note, *Executing Youthful Offenders*]. Zimring states succinctly:

> [T]he question of whether a 16-year-old accused of murder will stay in juvenile court, or be tried in the criminal courts for a capital crime, will depend on an individual judge assessing whether that 16-year-old is "mature" and "sophisticated." If he is found to be "sophisticated," his reward can be eligibility for the electric chair.

F. ZIMRING, CHANGING LEGAL WORLD OF ADOLESCENCE xii.

173 Streib, *supra* note 172, at 637.

174 *See generally* FOX, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659 (1970); McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REF. 181 (1977); Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503 (1984); Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DEN. L.J. 485 (1983).

175 *See, e.g.*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 351 (1972); Fox, *supra* note 174; McCarthy, *supra* note 174; Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAM. L. 121 (1965); Weissman, *supra* note 174; Walkover, *supra* note 174, at 512. Walkover notes that:

> At common law the infancy defense was grounded in an unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts. Linked to that normative imperative was the common sense judgment that punishment cannot deter an individual from commission of future wrongful acts where he is in fact incapable of knowing right from wrong.

Id. (citations omitted).

The emergence of the principle of offense in waiver statutes, coupled with the possibility of capital punishment following conviction as an adult, challenged the juvenile courts' basic assumptions about young peoples' lack of criminal responsibility. Making juveniles eligible for capital punishment constitutes a legislative judgment that young people are just as responsible, culpable, and blameworthy as their somewhat older counterparts and, therefore, are just as deserving of punishment.[176] Both historically and presently, children have been executed,[177] and the constitutionality of executing offenders for crimes committed as juveniles will be reconsidered by the United States Supreme Court during its 1987 term in *Thompson v. Oklahoma*.[178]

The extent to which young offenders are as deserving of punishment as their adult counterparts hinges in a fundamental way on an assessment of culpability and the extent to which youthfulness is, or should be, a formal mitigating factor which bars execution. The underlying rationale of "deserved" punishments, or just deserts, derives from von Hirsch's writings in moral philosophy.[179] Central to the contemporary deserts theory, which is addressed explicitly only to adult offenders, is the notion of punishment as censure, condemnation, and blame. "[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it."[180] Proportioning penalties to the seriousness of the crime reflects the connection between the nature of the conduct and its blameworthiness.[181]

---

176 *See, e.g.*, E. VAN DEN HAAG, PUNISHING CRIMINALS (1975), in which the author asserts that:

> There is little reason left for not holding juveniles responsible under the same laws that apply to adults. The victim of a fifteen-year-old mugger is just as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen-year-old murderer or rapist is as dead or as raped as the victim of an older one. The need for social defense or protection is the same.

Id. at 174. *See also supra* note 119 and accompanying text.

177 *See, e.g.*, Note, *Executing Youthful Offenders: The Unanswered Question in Eddings v. Oklahoma*, 13 FORD. URB. L.J. at 472 (287 of the known 14,029 criminals executed in American history were juveniles under the age of eighteen).

178 724 P.2d 780 (Okla. Crim. App. 1986), *cert. granted*, 107 S. Ct. 1284 (1987). The constitutionality of executing juveniles is reviewed in several articles. *See supra* note 172. *See also*, Streib, *Capital Punishment of Children in Ohio: "They'd Never Send a Boy of Seventeen to the Chair in Ohio, Would They?"*, 18 AKRON L. REV. 51 (1984). As of October 2, 1986, there are thirty-six juveniles currently sentenced to death. *See* V. Streib, Death Penalty for Juveniles: Last Gasps of a 344-Year-Old American Practice? (1986)(paper presented at the Annual Meeting of the American Society of Criminology, Atlanta, Georgia).

179 *See, e.g.*, DOING JUSTICE, *supra* note 62; PAST OR FUTURE CRIMES, *supra* note 62.

180 DOING JUSTICE, *supra* note 62, at 48. *See also* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

181 DOING JUSTICE, *supra* note 62, at 66. "Severity of punishment should be commen-

Although the principle of commensurate desert apportions the sanctions, condemnation, and blame to the seriousness of the offense, it shifts the analytical focus to the meaning of "seriousness." The seriousness of an offense is the product of two components: harm and culpability.[182] Evaluations of harm focus on the degree of injury inflicted, risk created, or value taken.[183] In assessing the harmfulness of a criminal act, the age of the perpetrator is of little consequence.

Assessments of seriousness, however, also include the quality of the actor's choice to engage in the conduct that produced the harm.[184] "The other major component of seriousness is the degree of the offender's culpability: that is, the degree to which he may justly be held to blame for the consequences or risks of his act."[185] It is with respect to the culpability of choices, or the blameworthiness of acting in a particular harm-producing way, that the fact of youthfulness becomes especially troublesome.

Psychological research concerning legal socialization indicates that young people move through a developmental sequence of stages of cognitive functioning with respect to legal reasoning, internalization of social and legal expectations, and ethical decision-making.[186] This developmental sequence and the changes in cognitive processes are strikingly parallel to the imputations of responsibility associated with the common law infancy defense and indicate that by about age fourteen a youth has acquired most of the legal and moral values and reasoning capacity that will guide his behavior

---

surate with the seriousness of the wrong. Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments." *Id.* Von Hirsch notes further that:

> The severity of the penalty carries implications of degree of reprobation. The sterner the punishment, the greater the implicit blame: sending someone away for several years connotes that he is more to be condemned than does jailing him for a few months or putting him on probation. In the allocation of penalties, therefore, the crime should be sufficiently serious to merit the implicit reprobation.

Id. at 72.

182 *Id.* at 79.

183 *Id. See generally* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 212-22 (2nd ed. 1960).

184 The whole criminal law construct of mens rea—purposely, knowingly, recklessly, negligently—reflects the view that the same harm may result from very different quality of choices, which, in turn, are reflected in the overall assessment of seriousness.

185 DOING JUSTICE, *supra* note 62, at 80.

186 *See, e.g.*, J. PIAGET, THE MORAL JUDGEMENT OF THE CHILD (1932); Kohlberg, *Stage and Sequence: The Cognitive Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347 (D. Goslin ed. 1969); Tapp & Kohlberg, *Developing Senses of Law and Legal Justice*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 90 (J. Tapp & F. Levine eds. 1977); Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974).

through later life.[187]

If a youth age fourteen years or older knows "right from wrong" and, therefore, possesses the requisite mens rea, then both at common law and under most waiver statutes he is as fully criminally responsible as any adult offender. In the mens rea-as-capacity formulation, if he is criminally responsible for making blameworthy choices, then he deserves the same punishment as any other criminal actor making comparable choices.[188] Mens rea as a criminal law grading principle is characteristically binary; it is either present or absent.[189] In the absence of some "diminished responsibility" doctrine,[190] there are no special doctrinal protections for youths tried in criminal courts.

The immaturity and irresponsibility doctrines that underlie the traditional juvenile court have implications for juveniles tried as adults. Punishing juveniles as if they were as responsible as adult criminal actors requires a closer examination of culpability and the impact of youthfulness on blameworthiness. Mens rea as a grading principle assumes knowledge of "right from wrong," an awareness of the consequences of acting, and an ability to choose among the

---

187 *See, e.g.*, Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11, 16 (1963)(By the age of fourteen, most people employ the same or nearly the same level of moral reasoning as they will as adults.) Tapp notes that "crystallization occurs during the adolescent years and . . . substantial consistency is demonstrated during adulthood." Tapp, *Psychology and the Law: An Overture*, 27 ANN. REV. PSYCHOLOGY 359, 374 (1976).

188 *See, e.g.*, J. HALL, *supra* note 183. Hall notes that "'Capacity'. . . means the competence to form correct valuations, which are assumed to be those represented in the penal code." *Id.* at 98. While explicating the "objective" meaning of mens rea as goal directed conduct, *id.* at 76, Hall notes that assessing culpability requires knowledge not only of the harm committed but the motive for the harm producing conduct. Although an actor's motive cannot excuse violations of penal prohibitions, it is clearly relevant to culpability and sanctions.

> [A]lthough motivation is carefully considered in modern criminal law systems, the preservation of the objective meaning of the principle of *mens rea* and of legality requires that motive be excluded from the definition of criminal conduct. A sound division of relevant functions implements the consequent allocation of the issues concerning culpability—*mens rea* to the substantive legal, and motive to the administrative, discretionary phase of the process of adjudication.

Id. at 102.

189 Apart from the infancy defense, the presence or absence of criminal responsibility, i.e., the knowledge of right from wrong, is typically litigated in the context of an insanity defense. *See generally* H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972); A. GOLDSTEIN, THE INSANITY DEFENSE (1967); N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982); Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 779 (1985).

190 *See, e.g.*, Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977); Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

alternative courses of action.[191] Although developmental psychological research indicates that adolescents may know right from wrong as an abstract proposition, whether they are sufficiently aware of the consequences of their actions and as capable of making mature choices as older offenders is questionable.[192] Indeed, it is this "developmental fact" that accounts for many of the legal disabilities imposed on children.[193]

Even if it is acknowledged that juveniles are capable of inflicting harms identical to those of older offenders, the question whether they are as culpable for those harms is more difficult. The developmental psychological research suggests that, even with an awareness of "right from wrong," minors are less capable than adults of making sound judgments or moral distinctions.[194] In part, this reduced capacity stems from the lower appreciation by juveniles of the consequences of their acts than by adults.

> [A]dolescents, 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.[195]

---

191 *See, e.g.*, Walkover, *supra* note 174, at 539, in which the author notes that:

> [W]e will punish where the accused has the capacity to understand the substantive nature of acts we consider right or wrong, to generate an internalized set of moral values and, in most jurisdictions, to exercise control over impulses that conflict with such values. The infancy defense rests on the assumption that a child's capacity to make moral judgments is substantially different from his adult counterpart.

Id. (citations omitted). *See also*, Morse, *supra* note 190, at 6.

192 *See, e.g.*, Walkover, *supra* note 174, at 508 n.13. Walkover asserts that punishing juveniles equivalently as adults "ignores the fact that children committing crimes have less of a capacity to be culpable than adults and thus are less blameworthy." *Id.*

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

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

Lewis v. State, 259 Ind. 431, 437-38, 288 N.E.2d 138, 141-42 (1972)(citations omitted).

194 *See supra* notes 186-87. *See also*, G. MANASTER, ADOLESCENT DEVELOPMENT AND THE LIFE TASKS (1977); M. RUTTER, CHANGING YOUTH IN A CHANGING SOCIETY 238 (1980); Kohlberg, *Development of Moral Character and Moral Ideology*, in REVIEW OF CHILD DEVELOPMENT RESEARCH 404-05 (M. Hoffman & L. Hoffman eds. 1964).

195 TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME, *supra* note 87, at 7. One commentator has

Moreover, the crimes of juveniles are seldom their fault alone; society shares at least some of the blame for their offenses as a result of juveniles' limited opportunities to learn to make correct choices.[196] Indeed, even though the ability to make responsible choices is learned behavior, the dependent status of juveniles systematically deprives them of opportunities to learn to be responsible.[197] Finally, even if a youth is aware of the abstract criminal prohibition, juveniles are more susceptible to peer group influences and group process dynamics than are their older counterparts.[198]

The question of a youth's criminal capacity and culpability is most apparent in the context of capital punishment. For chronological juveniles tried and convicted in criminal courts for capital offenses, youth is recognized as a mitigating factor in the death penalty decision.[199] In *Eddings v. Oklahoma*, for example, the Supreme Court noted that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."[200] A small minority

---

noted that "[t]he responsibility of minors also is diminished because they are in a developmental stage characterized by defiance of authority and conducive to criminal activity." *Capital Punishment for Minors*, *supra* note 172, at 1494.

196 "[Y]outh 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." TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7. *See generally Capital Punishment for Minors*, *supra* note 172, at 1495-98.

197 *See, e.g.*, F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982).

198 Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867 (1981)(juveniles' group participation in criminal activity overstates the age contribution to overall crime rates). In *Thompson v. Oklahoma*, for example, Thompson, age 15, was the youngest of the four participants in the brutal homicide. *See supra* notes 172, 178 and accompanying text for discussions of *Thompson v. Oklahoma*.

199 *See generally* Lockett v. Ohio, 438 U.S. 586, 604-05 (1978)(full consideration of all mitigating factors). The *Lockett* Court noted that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis supplied). The Court invalidated the Ohio death penalty statutes because "consideration of defendant's . . . age, would generally not be permitted, as such, to affect the sentencing decision." *Id.* at 608. *See also* Eddings v. Oklahoma, 455 U.S. at 117 (application of *Lockett* mitigating factors to youthfulness).

200 *Eddings*, 455 U.S. at 116. The four *Eddings* dissenters, however, saw no constitutional bar to the imposition of the death penalty for a crime committed at age sixteen. *Id.* at 128 (Burger, C.J., dissenting)(joined by JJ. White, Blackmun, and Rehnquist). Moreover, Justice O'Connor noted in her concurrence that "I, however, do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16." *Id.* at 119 (O'Connor, J., concurring).

of jurisdictions explicitly prohibit the execution of offenders for crimes committed while the offenders were juveniles.[201] Others simply weigh youthfulness as a mitigating factor offsetting aggravating factors in the decision to impose the death penalty.[202] Although all capital jurisdictions must formally consider youthfulness as a mitigating factor, the majority of such states still authorize the execution of juveniles.

Even though this Article strongly supports the use of offense criteria to structure the waiver decision, it does not follow that youths transferred pursuant to such a scheme are as criminally responsible as their adult counterparts. Quite the contrary, to the extent that traditional waiver legislation focuses primarily on a youth's amenability to treatment or dangerousness or, more recently, on patterns of offenses, there is simply no occasion for comparing a youth's culpability for crimes committed while a juvenile with that of an adult.[203]

If, as contended, juveniles who cause substantial harms may be less culpable than their adult counterparts, then a necessary corollary of waiver statutes that increase the probability of transfer to criminal courts of juveniles who commit the most serious offenses is an absolute prohibition against executing offenders for crimes committed while under the age of eighteen. Although this is presently

---

201 *See, e.g.*, MODEL PENAL CODE AND COMMENTARIES § 210.6(1)(d) (1980)(if a murder defendant was under eighteen years of age at the time of the commission of the crime, the court shall impose a sentence of a first-degree felony instead of capital punishment). The Code drafters reasoned that "civilized societies will not tolerate the spectacle of execution of children." *Id.* § 133. *See also* CAL. PENAL CODE § 190.5 (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5)(2) (1978); TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1985); Streib, *supra* note 172, at 635 nn.91-93.

202 *See, e.g.*, ALA. CODE § 13A-5-51(7) (1975); FLA. STAT. ANN. § 921.141(6)(g) (West 1984); UTAH CODE ANN. § 76-3-207(2)(E) (Supp. 1983). As one commentator has noted, however:

> These states allow the jury to decide whether the defendant's youth is a sufficiently significant factor to commute the death penalty to life imprisonment. However, they do not specify how old the defendant must be for his age to be considered as a mitigating factor nor do they suggest that a lower age must lead to a greater mitigation; they simply state that the youth of the defendant may be considered in determining the length of his sentence.

Note, *Executing Youthful Offenders*, *supra* note 172, at 496. *See also* Streib, *supra* note 172, at 635 nn.94-95.

203 *See Capital Punishment for Minors*, *supra* note 172, at 1499:

> Nor do the criteria used in making transfer decisions indicate that transferred minors are as accountable for their crimes as adults are for theirs. Under legislative waiver, minors are transferred solely on the basis of the crime they allegedly committed. . . . But just because a minor commits murder or rape or any other violent offenses does not indicate that society is less responsible for the minor's act. Nor is it evidence that the minor is more mature than his peers or is able to control his conduct and understand the consequences of his actions.

the law in a limited number of capital states, the Supreme Court has not ruled that the Constitution prohibits the execution of juveniles. Furthermore, there is at least an intimation that *Thompson v. Oklahoma* will provide the Court with an opportunity to endorse the practice.[204] If the Supreme Court does constitutionally endorse this practice, it will put the United States in conflict with the sound policy judgment of a number of its states,[205] most foreign countries,[206] and the United States' own international treaty obligations.[207]

B. THE QUALITY OF PROCEDURAL JUSTICE—THE CONSEQUENCES OF "MAKING OFFENSES COUNT" IN JUVENILE COURT

One consequence of the legislative changes in waiver statutes described earlier is the increased significance of a juvenile's prior record of delinquency adjudications in addition to the seriousness of the present offense. Whether a record of prior convictions presumptively requires judicial waiver or results in a youth's automatic exclusion from juvenile court, the effect of "making offenses count" is to increase the significance of every prior contact with the juvenile justice system. Although emphasizing prior offenses may help to structure discretionary decision-making throughout the juvenile jus-

---

204 In *Eddings v. Oklahoma*, the Court reversed Eddings' capital sentence by a five-to-four margin on the procedural ground that the trial court had failed to consider Eddings' youthfulness and "family background" as a mitigating factor. The four dissenting justices, Burger, White, Blackmun, and Rehnquist, would have addressed the issue on which the case was initially presented, namely, whether the eighth amendment prohibits the execution of young offenders, and would have ruled that it did not. Although Justice Scalia has replaced Chief Justice Burger since the *Eddings* decision, Justice Scalia has voted with the five-to-four majorities in upholding capital punishment in two recent death penalty cases. *See* Tison v. Arizona, 107 S. Ct. 1676 (1987); McCleskey v. Kemp, 107 S. Ct. 1756 (1987).

205 *See supra* note 172 and accompanying text. At its Annual Meeting in Atlanta, Georgia, in August, 1983, the American Bar Association adopted the following resolution:

> Be it resolved, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offenses committed while under the age of eighteen (18).

ABA Opposes Capital Punishment for Persons Under 18, 69 A.B.A.J. 1925 (1983).

206 *See, e.g.*, Streib, *supra* note 172, at 631. Streib notes that:

> More than three-fourths of the nations of the world (73 of 93 reporting countries) have set age eighteen as the minimum age for execution. The United Nations endorsed this position in 1976. . . . Contrast this benevolent international attitude with the current "get tough" attitude toward violent juvenile offenders that seems to be sweeping legislatures and the judiciary in the United States.

Id. See also Hill, *supra* note 170, at 18.

207 On October 5, 1977, President Jimmy Carter signed the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. *See* Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978). Article six of the covenant on Civil and Political Rights prohibits the imposition of the death penalty on either pregnant women or children under the age of eighteen. *Id.* at 72.

tice process,[208] it also raises some submerged questions about the quality of procedural justice in juvenile court.

The decades since *Gault* have witnessed a substantial procedural convergence between juvenile courts and adult criminal courts. Many of the formal procedural attributes of criminal courts are now routine aspects of the administration of juvenile justice as well. The greater procedural formality and adversarial nature of the juvenile court also reflect the attenuation of the juvenile court's therapeutic mission and the increased emphasis of its social control functions as the relative emphases on rehabilitating offenders and protecting the public have shifted. The many instances in which states choose to treat juvenile offenders procedurally similarly to adult criminal defendants is one aspect of this process.[209]

Despite the criminalization of the juvenile court, it remains nearly as true today as two decades ago that "the child receives the worst of both worlds: that [the child] gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[210] Most state juvenile codes provide neither special procedural safeguards to protect juveniles from the

---

208 *See, e.g., Reference of Juvenile Offenders, supra* note 6, at 585-601. One consequence of emphasizing prior convictions as a prerequisite to waiver would be to exert significant pressure at each level of the system—police, intake, prosecutor, and court—to objectify the criteria upon which dispositional decisions are made. In turn, such a result would give more weight to such legally relevant factors as offense and prior history and less to factors that create dangers of discrimination and inequity in the exercise of discretion such as race, class, and attitude. *Id.* at 590.

209 *See generally Criminalizing Juvenile Justice, supra* note 2. *See also supra* notes 3-4.

210 Kent v. United States, 383 U.S. 541, 55 (1966). In an earlier article, *Criminalizing Juvenile Justice, supra* note 2, identified a number of instances in which the procedural safeguards afforded to juvenile offenders are not comparable either formally or functionally to those provided to adult criminal defendants. Juveniles were found to waive their *Miranda* rights and their right to counsel under a standard that, in practice, is unlikely to discern whether they adequately understand the rights they relinquished. *Id.* at 169-90. The high rate of waiver of counsel, in particular, is an indictment of the entire juvenile adjudicative apparatus because the effective assistance of counsel is the necessary prerequisite to the invocation of every other procedural safeguard. *Id.* at 186-90. Similarly, preventive detention, deplorable in its own right, further disadvantages a youth at adjudication and disposition. *Id.* at 191-208. The inadequate screening and charging practices used in juvenile court result in more youths being drawn more deeply into the process. *Id.* at 217-29. The absence of counsel to challenge deficient petitions leads many youths to admit allegations that cannot be proved. Combining the suppression hearing with the trial on the merits is also a highly prejudicial practice that increases the likelihood of erroneous determinations of guilt. *Id.* at 229-43. The denial of jury trials and public trials raises troubling questions about the factual accuracy of delinquency adjudications. *Id.* at 243-46. At the same time, an analysis of sentencing practices and conditions of institutional confinement indicates that whatever the rehabilitative justifications for these procedural deficiencies may have been, such justifications are increasingly untenable in a juvenile court system that is explicitly punitive and offense-oriented rather than rehabilitative and offender-oriented. *Id.* at 246-66.

consequences of their own immaturity nor the full panoply of adult criminal procedural safeguards to protect them from punitive state intervention. Instead, they increase the likelihood that juveniles will continue to receive the worst of both worlds by treating juvenile offenders just like adult criminal defendants when formal equality redounds to their disadvantage, yet provide less effective juvenile court procedures when those procedural deficiencies redound to the advantage of the state.

Two procedural aspects of juvenile justice administration are critical when making offenses count both for removal from juvenile court and for sentencing as an adult. Although the Supreme Court's decision in *McKeiver*, which denied juveniles a constitutional right to jury trial, emphasized "factual accuracy" and posited virtual parity between juvenile and adult adjudications,[211] the validity of that equation is subject to question. Judges and juries apply the *Winship* Court's "proof beyond a reasonable doubt" standard differently.[212]

> Juries serve special protective functions in assuring the accuracy of factual determinations, and studies show that juries are more likely to acquit than are judges. Substantive criminal guilt is not just "factual guilt" but a complex assessment of moral culpability. The power of jury nullification provides a nexus between the legislature's original criminalization decision and the community's felt sense of justice in the application of laws to a particular case. These tendencies are attributable to various factors, including jury-judge evaluations of evidence, jury sentiments about the "law" (jury equity), and jury sympathy for the defendant (of which youthfulness garnered the greatest support).[213]

The *McKeiver* Court's decision to deny the provision juries in juvenile court proceedings makes it easier to convict a youth appearing before a judge in juvenile court than to convict a youth, on the basis of the same evidence, before a jury of detached citizens in a criminal proceeding.[214] Furthermore, the subsequent use of qualitatively in-

---

Moreover, while these procedural deficiencies were analyzed separately, the prejudicial consequences are cumulative, and the whole is far worse than the sum of its parts.

211 *See supra* notes 45-57 and accompanying text.

212 *Criminalizing Juvenile Justice*, *supra* note 2, at 244-46.

213 *Id.* at 245. *See generally* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY (1983).

214 *See* P. GREENWOOD, A. LIPSON, A. ABRAHAMSE & F. ZIMRING, YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 30-31 (1983). Greenwood, Lipson, Abrahamse, and Zimring analyzed juvenile justice administration in California, compared the attrition rates of similar types of cases in juvenile and adult courts, and concluded that "it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases." *Id.*

ferior convictions to waive juvenile court jurisdiction and enhance sentences as adults raises profound issues of procedural justice.

Once waiver is analyzed as a sentencing decision, the propriety of enhancing adult penalties based on juvenile convictions obtained without jury trials or counsel becomes even more troublesome. There is a substantial problem with using prior convictions to enhance subsequent penalites if the prior convictions were obtained without the assistance of counsel or an adequate waiver of counsel. Although juveniles have been constitutionally entitled to the right to counsel since *Gault*,[215] it is a right which is more honored in the breach than in the observance.

In the two decades since *Gault*, the promise of counsel remains unrealized; in most states, less than 50% of the juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled.[216] In the immediate aftermath of *Gault*, evaluation research examined institutional compliance and found that juveniles were neither adequately advised of their right to counsel nor appointed counsel.[217] Although national statistics are not available, surveys of representation by counsel in several jurisdictions suggest that "there is reason to think that lawyers still appear [in juvenile court] much less often than might have been expected."[218] Indeed, the one inescapable fact of juvenile justice administration in those states in which data is available is that the majority of all youths prosecuted as delinquents are not represented by counsel during the process.[219] While there are several possible

---

215 *See supra* note 35 and accompanying text. *See generally Criminalizing Juvenile Justice*, *supra* note 2, at 186-90.

216 *See Criminalizing Juvenile Justice*, *supra* note 2, at 187-90.

217 *See, e.g.*, Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491 (1969); V. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972).

218 D. HOROWITZ, THE COURTS AND SOCIAL POLICY 185 (1977). Although the rates of representation vary widely from county to county within a state, Horowitz' survey of the available data failed to find one state in which even 50% of the juveniles were represented by counsel.

219 In an evaluation of legal representation in North Carolina, Clarke and Koch reported that the Juvenile Defender Project provided representation for 22.3% of the juvenile offenders in Winston-Salem, N.C. and 45.8% of the juvenile offenders in Charlotte, N.C. Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 297 (1980). In a recent survey, Bortner evaluated a large midwestern county's juvenile court and reported that "[o]ver half (58.2 percent) [of the juveniles] were not represented by an attorney." M. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEA OF INDIVIDUALIZED JUSTICE 139 (1982). Evaluations of rates of representation in Minnesota also show that a majority of youths go unrepresented. *Criminalizing Juvenile Justice*, *supra* note 2, at 189; K. FINE, OUT OF HOME PLACEMENT OF CHILDREN IN MINNESOTA: A RESEARCH REPORT 48 (1983)("In the major-

explanations for why so many youths are unrepresented despite *Gault*'s promise of the right to counsel,[220] most juveniles face potentially coercive state action without seeing a lawyer, waive their right to counsel without consulting with an attorney or appreciating the legal consequences, and, thereby, face the prosecutorial power of the state alone and unaided.[221] Although waiver of the right to counsel is the most common explanation, the variations in rates of representation within a state suggest that nonrepresentation reflects judicial policies, especially juvenile court judges' continuing hostility toward lawyers, rather than any systematic differences in youthful competence.[222]

Using prior convictions to enhance subsequent penalties implicates the quality of procedural justice in juvenile court, especially if the prior convictions were obtained without the assistance of counsel or an adequate waiver of counsel. In *Scott v. Illinois*,[223] the Supreme Court upheld the denial of counsel as constitutionally valid if the uncounselled conviction did not result in incarceration. In *Baldasar v. Illinois*,[224] the defendant was denied counsel, convicted of a misdemeanor, and fined and placed on probation.[225] The defendant in *Baldasar* was convicted a second time for a similar offense, and, under an enhanced penalty statute, the prior uncounselled conviction was used to convert the second conviction into a felony for

---

ity of delinquency/status offense cases (62%) there is not representation.") As in virtually all juvenile justice research, these evaluations report enormous county-by-county variations in the rates of nonrepresentation, ranging from a high of over 90% to a low of less than 10%. *Criminalizing Juvenile Justice*, *supra* note 2, at 190 n.162.

220 The high rate of waiver of counsel is an indictment of the entire juvenile adjudicative apparatus because the effective assistance of counsel is the necessary prerequisite to the invocation of every other procedural safeguard. Typically proffered explanations for the nonrepresentation of youth include: parental reluctance to retain an attorney; inadequate public-defender legal services in rural areas; a judicial encouragement of and readiness to find waivers of the right to counsel in order to ease courts' administrative burdens; a continuing judicial hostility to an advocacy role in a traditional treatment-oriented court; and a judicial predetermination of dispositions with nonappointment of counsel if probation is the anticipated outcome. *See, e.g.*, *Criminalizing Juvenile Justice*, *supra* note 2, at 190; M. BORTNER, *supra* note 219, at 136-47.

221 Juveniles are permitted to "waive" their constitutional rights, including the right to counsel, providing that their waiver is "knowing, intelligent, and voluntary" under the "totality of the circumstances." *See generally Criminalizing Juvenile Justice*, *supra* note 2, at 169-90. Although the competence of children to fully understand and waive their rights has been questioned by researchers, courts reviewing waivers of rights assume that children are capable of "knowingly, intelligently, and voluntarily" relinquishing their constitutional rights and that trial courts are capable of discerning when they do not. *See id.* at 174 n.113, 176 n.121.

222 *See supra* notes 217-21 and accompanying text.

223 404 U.S. 367 (1979).

224 446 U.S. 222 (1980).

225 *Id.* at 223.

which the defendant was imprisoned. In a per curiam opinion, the Supreme Court reversed the defendant's felony conviction.[226] The Court's decision in *Baldasar* is consistent with an earlier line of cases in which the Court held that an uncounselled felony conviction could not be used in a later trial to enhance punishments under recidivist statutes.[227]

Although *Gault* granted juveniles the right to counsel, most juveniles are routinely adjudicated or enter guilty pleas without the assistance of counsel, an opportunity to consult with counsel, or, arguably, a valid waiver of counsel.[228] Before a juvenile's prior convictions can be used to enhance punishment, whether through presumptive waiver, legislatively excluded jurisidiction, or for sentencing as an adult, it must be established that the prior uncounselled convictions were validly obtained. The most expedient way to prevent prior convictions from invalidating later waiver decisions or adult sentences is to assure that juveniles either have counsel appointed automatically or that they at least consult with counsel prior to waiver. Short of that, all of the procedural deficiencies of the juvenile court simply cumulate until the ultimate sanction is imposed.

---

226 *Id.* at 222. Justice Stewart condemned the increased penalty, noting that the defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Id.* at 224 (Stewart, J., concurring)(emphasis in original). Justice Marshall stated that a defendant's "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." *Id.* (Marshall, J., concurring).

227 *See* United States v. Tucker, 404 U.S. 443, 448 (1972); Burgett v. Texas, 389 U.S. 109, 114 (1967). In *Burgett*, the Supreme Court noted that because it was unconstitutional to convict a person for a felony without benefit of a lawyer or the valid waiver of that benefit

> [t]o permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

389 U.S. at 115.

228 *See generally Criminalizing Juvenile Justice*, *supra* note 2, at 169-90.