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The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender

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LEGISLATION

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According to recent estimates, one out of every six male youths will be referred to a juvenile court before his eighteenth birthday in connection with a delinquent act (excluding traffic offenses).[1] Such statistics concerning the large proportion of juveniles arrested for serious offences[2] and the high recidivism rate[3] have led to an increasing, if belated, public interest in the problem of the juvenile offender and dissatisfaction with the present juvenile justice system. The proposals for change are numerous and sometimes contradictory. The following list is not exhaustive but merely illustrates the range of current recommendations:

(1) Decrease the maximum age for jurisdiction to fifteen.[4]
(2) Increase the maximum age for jurisdiction to eighteen.[5]
(3) Narrow the jurisdiction of the juvenile court to eliminate acts which would not be crimes if committed by adults.[6]
(4) Expand the jurisdiction of the juvenile court to include divorce,

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1. REPORT BY THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967) [hereinafter cited as NATIONAL CRIME COMM'N].

2. More 15 years olds were arrested for Uniform Crime Report Index Crimes (willful homicide, forcible rape, aggravated assault, robbery, burglary, larceny of $50 and over and automobile theft) plus petty larceny and negligent manslaughter than people of any other age, and 16 year olds were a close second. *Id.* at 5.

3. Studies of adult offenders support these conclusions: the earlier a juvenile is arrested the more likely he is to continue criminal activity as an adult; the more serious the first juvenile offense for which he is arrested, the more likely he is to continue committing serious offenses; and the more a juvenile is processed by the police, court and correctional system, the more likely he is to be arrested, convicted and imprisoned as an adult offender. *Id.* at 46.

4. *See* REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 718-23 (1966) [hereinafter cited as D.C. CRIME COMM'N].

5. REPORT OF THE MARYLAND LEGISLATIVE COUNCIL SPECIAL COMMITTEE ON JUVENILE COURTS 6-9 (1966).

6. NATIONAL CRIME COMM'N, *supra* note 1, at 85.

support, custody, adoption, treatment and commitment of mentally ill and mentally retarded minors.[7]

(5) Create a juvenile criminal court.[8]

(6) Abolish the distinction between delinquent and neglected children.[9]

(7) Sharpen the distinction between neglected and delinquent children.[10]

(8) The juvenile court should administer child care and treatment facilities.[11]

(9) The juvenile court should not have any services which are ministerial or administrative in nature.[12]

(10) The court's decision making power should be limited by transferring the power of disposition to an administrative board.[13]

These contradictory recommendations are a result of disagreement concerning the rehabilitative potential of the juvenile justice system. Although the disagreement is well known and is simply stated, there is no simple resolution. One argument is that the system has failed to fulfill its rehabilitative and preventive promise because of a grossly over-optimistic view of juvenile criminality and because of what even a fully equipped juvenile court can do about it. The answering argument is that the juvenile justice concept has never been tried because some jurisdictions lack a non-punitive system of justice in law, and in most others, which theoretically have a non-punitive approach, it does not exist in fact.

It is possible that there will always be disagreements about both the proper function and rehabilitative potential of the juvenile court, but a great deal of the present controversy results from a lack of comprehensive information about present laws and practices affecting juvenile offenders.

The public is being asked to make many important decisions which will affect the structure, jurisdiction and function of the juvenile justice system. Before making these decisions, it should have more facts about the present system and the proposed changes. The aim of this study, is to provide some of the needed information.[14]

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7. D.C. CRIME COMM'N, *supra* note 4, at 723-25.

8. Seigel, *The Public Image of the Juvenile Court*, 25 JUV. CT. JUDGES J. 7, 8 (1964). *See also* Gardner, *Lets Take Another Look at the Juvenile Court*, 25 JUV. CT. JUDGES J. 13 (1964).

9. S. GLUECK, THE PROBLEM OF DELINQUENCY 328 (1959).

10. Paulsen, *The Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court*, in JUSTICE FOR THE CHILD 44-49 (M. Rosenheim ed. 1962). *See also* D.C. CRIME COMM'N, *supra* note 4, at 700-01; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, THE COOK COUNTY FAMILY COURT AND ARTHUR J. AUDY HOME 7, 8 (1963).

11. W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS (U.S. Children's Bureau Pub. No. 437, 1966).

12. *Id.* at 11 nn.26 & 27.

13. *Id.* at 11 nn.24 & 25.

14. The study is supported by Public Health Service Grant MH 14500 from the National Institute of Mental Health.

This article, the first publication of the study, concerns the juvenile offender's initial contacts with the juvenile system, his relations with the police and the consequences of these relations. Thus far, this stage of the juvenile justice system has received far less attention than any other aspect of the system.

The subject of the juvenile offender's relations with the police includes many topics. It concerns not only police discretion but also such problems as arrest, search and seizure, interrogation, fingerprinting and photographing of juveniles, expungement of police records, confessions, and detention. The last two topics are so large that they will be covered in other articles; the other topics are included in the present article.

I. JUVENILE ARREST STATISTICS

Anyone who has collected, analyzed or read about statistics in the area of crime or delinquency is aware of the deficiencies in our present system. For example, The President's Commission on Law Enforcement and Administration of Justice reported that "such basic facts as the trends of juvenile delinquency, the percent of crimes committed by professional criminals, or the likelihood of recidivism are beyond the capacity of our present statistical resources."[15] Despite the fact that statistics raise at least as many questions as they answer, it is necessary to present some statistics on juvenile arrest in order to provide some information about our current knowledge of the subject.

Juveniles account for a large and ever increasing number of arrests for serious crimes. In 1967, approximately one-half of all persons arrested in the United States for serious crimes were under seventeen years of age while nearly one quarter of these arrestees were under fifteen years of age.[16] Figure 1 illustrates the age distribution of arrestees.

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15. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 123 (1967) [hereinafter cited as CRIME AND ITS IMPACT].

16. J. HOOVER, CRIME IN THE UNITED STATES 121 (1968) [hereinafter cited as HOOVER]. The term "serious crime," as used in HOOVER and this article, refers to the F.B.I. Index of Crime classification. According to this classification, crimes are reported under two major headings: Part I and Part II. Part I crimes make up the Index of Crime or serious crimes and include only the following: criminal homicide, forcible rape, robbery, aggravated assault, burglary and breaking and entering, larceny, theft and auto theft. All other crimes fall under the Part II heading.

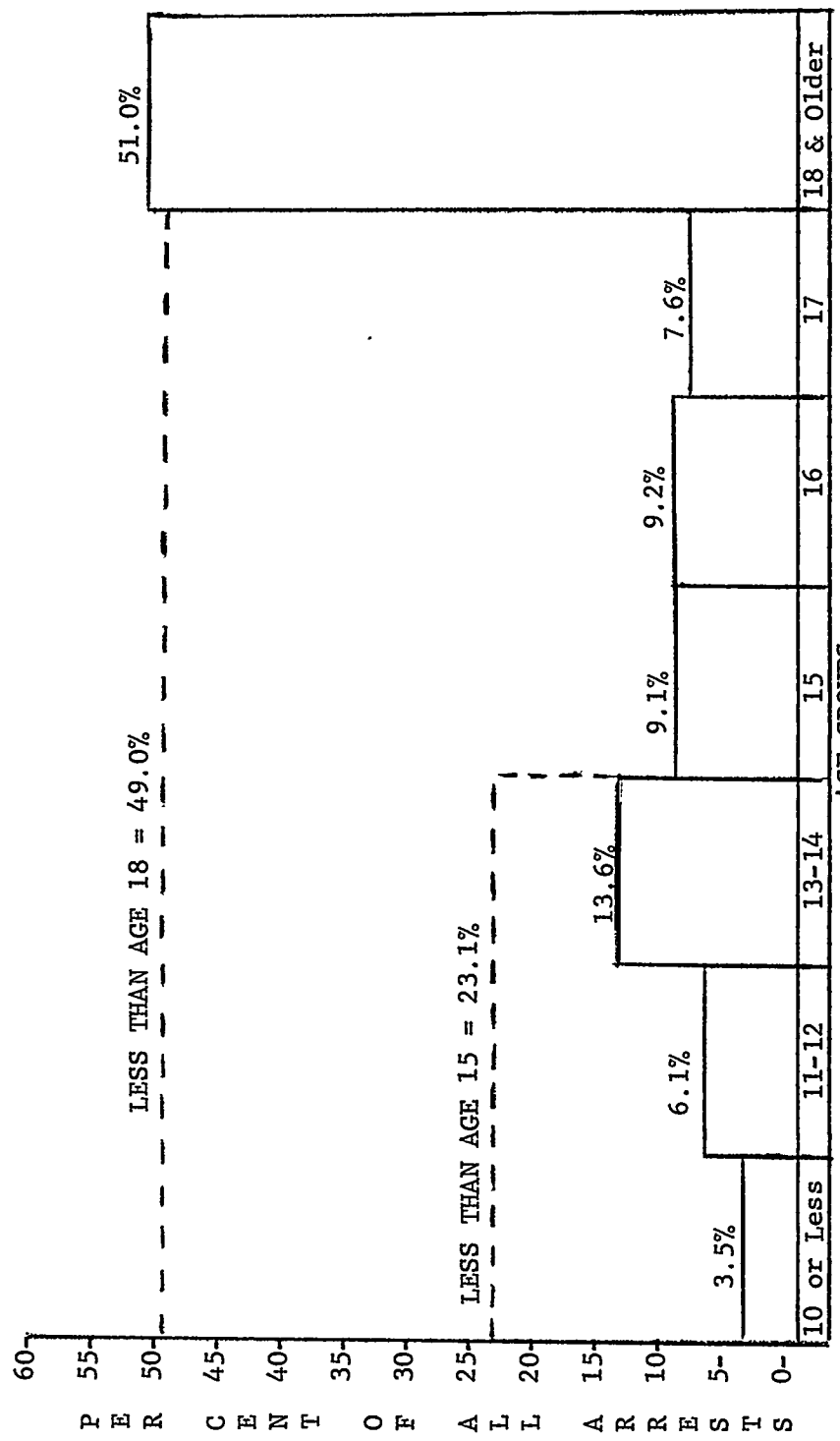

Figure 1: Per Cent of Arrests in the United States during 1967 Accounted for by Selected Age Groups. Index Crimes Only.

Between 1960 and 1967 the arrests of juveniles for serious crimes increased 59 per cent. The increase in arrests cannot be explained solely by a growth in the juvenile population, because it increased only 22 per cent during that time period.[17]

Juvenile arrest rates vary sharply depending on the offense. For example, 62 per cent of those persons arrested for auto thefts were under eighteen years of age but only about 9 per cent of those arrested for homicide were that young.[18] When considering juvenile arrest rates, however, it is important to remember that 75 to 80 per cent of burglaries, larcenies, and auto thefts are unsolved.[19] Consequently, if older persons are more successful at evading arrests, the age figures for arrests may be biased.[20]

Juvenile arrest rates also vary sharply by type of community. Rural rates are far below those for cities and suburbs. Of all arrests for serious crimes in 1967, 24.4 per cent in cities and 24.7 per cent in suburban areas were accounted for by juveniles under fifteen years of age. In rural areas only 11.6 per cent of those arrested were under age fifteen. Examining arrest data for those under eighteen years of age, one finds similar percentages for city and suburban areas, with 50.1 per cent of the arrestees in the former and 52.85 per cent in the latter being under age eighteen. Again, rural areas lie far behind with only 37.3 per cent of all rural arrests being of persons under eighteen years of age.[21] The reason for the lower rural rates is not known; nor is the reason for the recent increase in the suburban rate.[22]

Questions about recidivism of juveniles are exceedingly difficult,

17. *Id.* at 1.

18. *Id.* at 121.

19. CRIME AND ITS IMPACT, *supra* note 15, at 25.

20. *Id.*

21. HOOVER, *supra* note 16, at 130, 139, 147.

22. There are several hypotheses which may be advanced to explain the rural variation. It may be that the social organization of rural communities enables them to control children and youth through informal mechanisms more effectively than urban areas. Urban areas must, of necessity and because of their organization, rely on the formal agents of social control, the police. Another hypothesis is that police agencies in urban communities are more professionalized and specialized, thus being in a better position to detect juvenile delinquency than are rural police. Also, a more professionalized police department may exercise less discretion in the arrest area, going "by the book" more often than rural departments. This rigidity would be reflected in higher arrest percentages. While there is no firm evidence available to support these hypotheses, the latter two gain logical support from research on the organization of police. See text accompanying notes 62 & 63 *infra*. The National Crime Commission points to certain changing characteristics in suburbia. "Suburban rates appear to be going up as business and industry increase—shopping centers are more frequently blamed by local police officials for rises in suburban crimes." CRIME AND ITS IMPACT, *supra* note 15, at 26.

if not impossible, to answer because of the inadequacy of our criminal and delinquency statistical procedures. There is some indication that "the younger a person is when he commits his first offense, the higher the probability that he will commit a second offense . . ."[23] The F.B.I.'s current reporting of crime statistics, based upon a sample of federal offenders, reveals that 70 per cent of criminal repeaters were in the youngest age group (under age twenty).[24] Although these arrest statistics concern offenses which if committed by adults would be considered crimes, there are also "status" offenses which are applicable only to juveniles. It is impossible to determine from the available national statistics just what proportion of juvenile arrests are for "status" offenses. A relatively clear picture of two such "status" offense categories—running away, and curfew and loitering law violations—can, however, be obtained. Arrest of juveniles in these two categories accounted for 17 per cent of all juvenile arrests in 1967.[25]

A more complete picture of arrests for status offenses was obtained for four of the ten largest cities in the country.[26] There were 84,643 juvenile arrests in these four cities during 1967. The status offenses—for example, glue sniffing, beyond control, runaway, possession of intoxicants, vandalism and truancy—accounted for 17,586 or 20.8 per cent of these arrests. The range of arrests for status offenses in the four cities was from 32.9 per cent of all arrests in a southwestern city to 18.4 per cent in a city in the far west.

According to FBI reports, 1,092,981 juveniles were taken into custody in 1967.[27] Of these, 48 per cent were referred to the juvenile courts, 1.5 per cent to the criminal courts, and the remainder were either handled and released by police agencies or referred to welfare agencies. These percentages have remained relatively constant since 1961 despite a large increase in the total number of juvenile arrests.[28] Those juveniles referred to criminal courts were charged with more serious crimes, such as homicide, compared with those referred to juvenile court.

23. E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY 136 (7th ed. 1966).

24. HOOVER, *supra* note 16, at 38.

25. *Id.* at 121. A difficulty in developing better knowledge regarding the status offense situation lies in the FBI category of "all other offenses (except traffic)" which, in 1967, accounted for 14% of all arrests of juveniles. *Id.*

26. The authors sent letters to the chiefs of police of 10 of the 20 largest cities in the United States. The cities were selected to obtain a sample from the various geographic regions of the country. The letters requested the latest data regarding juvenile arrest and disposition statistics. Unfortunately, while all cities replied, the data obtained were not completely comparable. Consequently, discussion of the findings are always to fewer than 10 cities.

27. HOOVER, *supra* note 16, at 110.

28. W. LUDEN, STATISTICS ON DELINQUENTS AND DELINQUENCY 189 (1964).

Despite this relatively constant court referral rate of arrested juveniles, the numbers vary widely from jurisdiction to jurisdiction and from year to year within a jurisdiction. Even though approximately one out of two arrested juveniles is referred to court, the percentage may reach as high as 62 per cent in some jurisdictions and as low as 22 per cent in others.[29] A small part of the variation in the disposition of arrests comes from special jurisdictional provisions, such as those having to do with automatic waiver.

The fact that over one-half of all juvenile arrests do not get to juvenile or other courts suggests that the police have a great deal of discretion in whether or not to refer an arrested juvenile to court.

II. Role of Police in Disposition

A. The Range of Dispositional Alternatives Available to the Police

The seven ways police can deal with arrested juveniles, in order of increasing severity, are: (1) release; (2) release accompanied by an official report describing the encounter with the juvenile; (3) an official "reprimand" with release to parent or guardian; (4) referral to other agencies when it is believed that some rehabilitative program should be set up after more investigation; (5) voluntary police supervision used when it is felt that an officer and parent can assist a child cooperatively; (6) referral to the juvenile court without detention; and (7) referral to the juvenile court with detention.[30]

B. Relative Frequency of Police Use of the Various Alternative Dispositions

In determining how frequently police use the various alternatives available, FBI statistical reports indicate that in cities with a population over 250,000, 36 per cent of all arrested juveniles were released without any action and 60.5 per cent were referred to juvenile court jurisdiction.[31] In suburban areas 55 per cent were released following arrest without referral to court while 39.4 per cent were referred to the court.

A survey of several large cities reflects the varying patterns of choices elected by police after a juvenile is arrested. In Philadelphia slightly over 50 per cent of all juveniles apprehended, but only 15 per

29. *See* note 31 *infra* and accompanying text.

30. Piliavin & Briar, *Police Encounters With Juveniles*, 70 Am. J. Sociol. 206 (1964) [hereinafter cited as Piliavin & Briar].

31. Hoover, *supra* note 16, at 110.

cent of those arrested for serious crimes, were handled remedially.[32] The remedial treatment was a program where the juvenile was released to his parents' custody and a referral made to an appropriate social welfare agency.[33] In Los Angeles, 62.3 per cent of those arrested were petitioned to the juvenile court, and 22.2 per cent were "counseled and released."[34] In the city of Chicago, 47.6 per cent of all juveniles arrested were released to parents or other agencies, and less than 40 per cent were referred to the juvenile court.[35] In Oklahoma City, almost 37 per cent of the juveniles arrested were released to parents, 8 per cent were referred to social welfare agencies, and 35 per cent were referred to children's court.[36]

C. *Reasons Why There Are No Stated Rules for Referring Arrested Juveniles to Court*

1. *Statutory Imprecision.*—It is impossible for statutes concerning the referral of arrested juveniles to court to cover all possible contingencies. The language is therefore general in order to allow the police officer to use collateral facts in making a decision. Many cases of juvenile misconduct, such as fighting, were not intended to be covered by court action. The line between vandalism and a prank, and between assault and a childhood squabble is not easily defined by statute.

2. *Volume of Cases.*—Most juvenile systems are not adequately staffed and financed to process all of the juveniles alleged to be involved in delinquent acts, and the continuing increase in the number of juveniles arrested makes it even more impractical. If the number of juvenile court cases increased significantly it would be difficult to give sufficient attention to serious offenses and offenders. The District of Columbia Crime Commission highlighted this problem in its report by stating that:

> The Intake Section of the court closed out 23 per cent of all delinquency referrals in fiscal 1966; a substantial number of these were minor cases which did not require judicial attention. Consideration of such matters 'dilutes the Court's attention to its essential functions and confuses the young offenders and their

32. PHILADELPHIA POLICE DEP'T, STATISTICAL REPORT 10 (1967).

33. PHILADELPHIA POLICE DEP'T, JUVENILE REPORT (no pagination, 3d page, 1967).

34. LOS ANGELES POLICE DEP'T, DISPOSITION OF JUVENILES BOOKED AND NOT BOOKED (1967 statistical report).

35. YOUTH DIVISION, CHICAGO POLICE DEP'T, OFFENSE OFFENDER REPORT 1 (1967).

36. YOUTH CRIME PREVENTION BUREAU, OKLAHOMA CITY POLICE DEP'T, ACTIVITY REPORT (no pagination, 1966).

families as to the Court's role.' The processes of the court should be reserved for serious offenders.[37]

3. *The Philosophy of the Juvenile Court Movement.*—The basic premise upon which the juvenile justice systems operate in the United States has been summarized by Matza in the following statement:

> Individualized justice is the basic precept in the philosophy of the juvenile court. More generally it is commended to all officials who deal with juveniles. We should, it is suggested by enlightened professionals, gear our official dispositions to suit the individual needs of the accused rather than respond in automatic fashion to the offense that he has allegedly committed.[38]

The police agency, as a part in the juvenile justice system, needs to deal with juveniles on a case by case basis. As a general rule, police departments through policy statements and training activities transmit to their members the normative character of discretion in handling juveniles. Piliavin and Briar point out that:

> The practice of discretion was sanctioned by police department training manuals, and departmental bulletins stressed that the disposition of each juvenile was not to be based solely on the type of infraction committed.[39]

In practice, according to Piliavin and Briar, "[t]he official policy justifying the use of discretion serves as a demand that discretion be exercised."[40] In the District of Columbia,

> [P]olice activity in the Youth Division is based on the philosophy that juveniles should be kept out of police custody . . . . Further, every remedial influence should be brought to bear in juvenile cases prior to detention. When these means fail, the case should be promptly submitted to the Juvenile Court. This guidance is contained in the general order of the [Police] Department relating to the handling of juveniles.[41]

D. Formal Criteria for Referring Arrested Juveniles to Court

1. *Police Regulations for Juvenile Cases.*—Many police departments have issued formal regulations establishing criteria which aid in determining whether to refer a juvenile to court.[42] The Youth Aid Division of the District of Columbia requires, under departmental policy, that court referral be based upon the following criteria: (1) the

37. D.C. CRIME COMM'N, *supra* note 4, at 661.

38. D. MATZA, DELINQUENCY AND DRIFT 111 (1964).

39. Piliavin & Briar, *supra* note 30, at 208.

40. *Id.*

41. D.C. CRIME COMM'N, *supra* note 4, at 311.

42. As a part of our request sent to the police departments in the nation's 10 largest cities we asked for copies of any official regulations pertaining to handling of juveniles. To date, we have received only those from the District of Columbia and those applicable for Massachusetts. Discussion of others is based upon secondary sources.

offense committed would amount to a felony if committed by an adult, or it is a serious misdemeanor; (2) the juvenile is a probationer or has been known to the juvenile court, and his record indicates this action would be in the public interest; (3) where there is a pattern of misbehavior indicated by reports received on P.D. 379;[43] (4) the juvenile and his parents have shown themselves unable or unwilling to cooperate with agencies of a non-authoritative character; (5) casework with the juvenile by a non-authoritative agency has failed in the past; and (6) any case in which the juvenile denies the offense and there is sufficient evidence to sustain and justify a petition.[44]

The 1966 Massachusetts *Police and Probation Procedures in Juvenile Cases*[45] states that the police may exercise discretion in handling cases informally when minor offenses are involved. In serious offenses referral to the juvenile court should be the "final" police disposition. Offenders who are consistently involved in minor offenses and those whose personal and family problems need court attention should also be referred to the court.

The Chicago Police Department Youth Division's *Manual of Procedure* gives six guidelines for its officers making dispositional decisions. These guidelines include the "[t]ype and seriousness of offense," meaning that older juveniles who have committed what amount to felony offenses and other juveniles who have committed several minor offenses should be referred to the court, and "[p]revious behavior history of the juvenile." In the latter instance if there is a "previous history indicating that the juvenile has been involved in a series of minor offenses all of which were adjusted without court filing . . . consideration should be given to the possibility of court intervention no matter how minor the offense charged . . . ."

Other guidelines involve environmental factors, including the disposition and capacity of the juvenile; attitudes of the parents and "their ability to provide the necessary supervision and guidance"; the attitude of the complainant; and community resources.[46]

2. *Empirical Studies to Determine Criteria Used in Police*

43. P.D. 379 is the form employed when an arrest is not made but a record of the involvement of the juvenile under the circumstances is made.

44. D.C. CRIME COMM'N, *supra* note 4, at 638.

45. JOINT COMMITTEE ON GUIDELINES AND RECOMMENDED PRACTICES, COMMONWEALTH OF MASSACHUSETTS, POLICE AND PROBATION PROCEDURES IN JUVENILE CASES 12 (1966).

46. *Reported in* O. KETCHAM & M. PAULSEN, CASES AND MATERIALS RELATING TO JUVENILE COURTS 351 (1967).

Dispositions.—During the last five years, several empirical studies of police discretion have been completed.[47] While these are based on somewhat different methodological approaches,[48] there seems to be agreemcnt as to the basic criteria employed by police in their cxercise of discretion. There is considerable agreement in the literature that the following are used by the police in making disposition decisions about juvenile offenders: severity of delinquent act, frequency of involvement of juvenile in delinquency, community attitude toward its delinquency problem, and demeanor of juvenile in the police-juvenile interactional setting.

The severity of the delinquent act is the only criterion uniformly accepted and applied, and even this uniformity exists only for the most serious acts. Thus, while such offenses as homicide are consistently referred to the courts, there is no general agreement even in the same city on referral of other serious acts which would be felonies if committed by an adult.[49]

Frequency of involvement in delinquency has been called the most important and most frequently employed criterion after seriousness of

47. The studies discussed here are the following: A. CICOUREL, THE SOCIAL Organization of Juvenile Justice (1968); H. GOLDMAN, THE DIFFERENTIAL SELECTION OF JUVENILE OFFENDERS FOR COURT APPEARANCE (1963); P. LICHTENBERG, POLICE HANDLING OF JUVENILES (Office of Juvenile Delinquency and Youth Development, U.S. Dep't of Health, Education & Welfare, 1966); Piliavin & Briar, *supra* note 30; Terry, *The Screening of Juvenile Offenders*, 58 J. CRIM. L. C. & P. S. 173 (1967); C. WERTHMAN & I. PILIAVIN, GANG MEMBERS AND THE POLICE (undated, but internal evidence suggests publication between 1964 and 1966); Wilson, *The Police and the Delinquent in Two Cities*, in CONTROLLING DELINQUENTS 9 (S. Wheeler ed. 1968); Note, *Juvenile Delinquents: The Police, State Court and Individual Justice*, 79 HARV. L. REV. 775 (1966) [hereinafter cited as *Harvard Study*].

In addition to these studies one must add the reports of the President's Commission on Crime in the District of Columbia and National Crime Commission, both of which dealt, in part, with police discretion, and G. WATSON & N. O'CONNOR, JUVENILE DELINQUENCY AND YOUTH CRIME: THE POLICE ROLE (1964) [hereinafter cited as O'CONNOR & WATSON]. The latter is a report of a survey of police departments conducted under the auspices of the International Association of Chiefs of Police.

48. Curiously, if one omits Goldman's study from the group, since his data are from the 1940's and were originally reported in a 1950 dissertation, all the studies of police criteria are based on data no more than 10 years old. Methodologically, the Goldman, Wilson and Cicourel studies involved comparisons of two or more communities, while the others were confined to single cities. The Lichtenberg report was not based upon empirical data, but was a "secondary level analysis that would serve to draw the data [of previously completed empirical studies] together into a comprehensive frame of reference." P. LICHTENBERG, *supra* note 47, preface at unnumbered p. ii.

49. Police in Chicago, for example, are guided in their actions with regard to seriousness of offense by a standard that "older" juveniles are to be referred to court if they commit acts which would be felonies if committed by adults. A "child of tender years" committing the same level of offense may receive a different disposition. O. KETCHAM & M. PAULSEN, *supra* note 46, at 351.

offense.[50] Again, there is no uniformity in application because there is no agreement upon the specific number of offenses which should be used as a cut-off point. One study describes the process of police discretion in the use of this criterion as "sporadic verbal exchanges until such time they [the police] feel it no longer does any good."[51] Once the police tire of this effort on their part they in effect throw up their hands and refer the case to a more formal agent. Thus, juveniles who have not yet progressed to confirmed delinquency are subjected to ineffective control and assistance, then, labelled as delinquents, they are passed on to the formal agents.

The third criterion, community attitude, was first pointed out by Goldman in his pioneering study of police discretion.[52] Observing marked variations in the police dispositions of juvenile cases in several small communities, he noted that a part of this variation was related to the degree to which each community was concerned about delinquency. Police tend to operate with less discretion and more formal dispositions if the community is perceived as having "had it" with juvenile delinquency.

The police are also influenced by the action of the courts in their dispositions of juveniles referred to them. One study described the effect of the court on police behavior as follows:

> The court determines the policeman's behavior and judgment too . . . . [T]he courts, by direct statement or by releasing most juveniles, militate against strict enforcement . . . . [T]he courts exercise constraints on policemen to obscure the demand [for detention] by applying enforcement to only the most extreme offenders. The "leniency" of the court tends to confuse policemen since the criteria for release vary greatly; and it tends to demoralize policemen who need support from the court on the arrests they make.[53]

The fourth criterion which has gained most of the attention of empirical researchers is demeanor, and it is actually a set of criteria. The first significant study of this criterion was undertaken by Piliavin and Briar.[54] In their opinion, for nearly all minor violators and some serious delinquents, dispositions are not based on the substantive offenses but on police assessments of the youths' personal characteristics.

Basing decisions on the personal characteristics of the juveniles is difficult, since in the typical case the officers do not have a great deal

50. Terry, *supra* note 47, at 180.
51. A. CIRCOUREL, *supra* note 47, at 223.
52. H. GOLDMAN, *supra* note 47, at 29.
53. P. LICHTENBERG, *supra* note 47, at 18.
54. Piliavin & Briar, *supra* note 30.

of information; consequently, decisions are based largely on "demeanor," which includes contrition, respect for officers and fearfulness of potential societal sanctions.[55] Youths with these characteristics are frequently assumed to be "basically law abiding or at least salvageable."[56] On the other hand, the police tend to mete out more severe dispositions to Negroes and to boys who look "tough" because from both prejudice and, to some extent, departmental statistics they assume that these juveniles commit crimes more frequently than do other types of youths.[57]

Police attitudes towards demeanor affect not only police discretion but also police surveillance activity. Piliavin and Briar concluded that "these discriminary practices—and it is important to note they are discriminatory—all have self-fulfilling consequences."[58]

Cicourel, in his study of law enforcement practices in two jurisdictions, also concluded that the exercise of police discretion is influenced by self-fulfilling prophecies.[59] He stated that the police make different dispositions of lower-class and middle-class juvenile offenders, the reason for this difference being that police "expect" to have trouble with young people from homes described as "broken, on welfare, etc." Their misbehavior is viewed as criminal, and sometimes they are referred to juvenile court even though there is no substantial evidence.[60] When similar behavior occurs in a middle-class delinquent, the concept of illness is used rather than criminality or delinquency. The parents and the police work together to transform the middle class juvenile offender from "delinquent" to "sick." In addition, the police often compile a substantial body of evidence before referring a middle-class child to court.[61] This is most often done when the family is viewed as a "problem" by the police; in other words, when the family claims that their child is not guilty or not responsible for the act, the police feel they are required to build a very secure case to convince the family. Therefore, when a substantial body of evidence cannot be obtained, many cases involving middle class delinquents will not be referred to court.

Before concluding this section on criteria, it is important to note

55. *Id.* at 210.
56. *Id.*
57. *Id.* at 212.
58. *Id.* at 213.
59. A. CICOUREL, *supra* note 47, at 176.
60. *Id.* at 252.
61. *Id.*

two significant variables which, while not criteria, do have considerable impact on the operation of the criteria discussed above. The first variable is the structure of the police department. Wilson's comparison of the organizational structure of two city departments revealed that police discretion is influenced by the degree to which the departments were "professional" or "fraternal."[62]

> A "professional" police department is one governed by values derived from general, impersonal rules which bind all members of the organization and whose relevance is independent of circumstances of time, place or personality. A non-professional department (called a "fraternal department") on the other hand, relies to a greater extent on particularistic judgments—that is, judgments based on the significance to a particular person of his particular relations to particular others.[63]

A professional department is more apt to respond formally to juveniles, exercising relatively little discretion. The fraternal force, however, employs more latitude in its dealings with juveniles. In fact, such a department relies, to a large extent, on the criterion of demeanor described earlier.

The second variable is related to the view police have of the correctional agencies which will deal with offenders who are adjudicated to be delinquent.[64] Where police view the efforts of such agencies as unsuccessful or inappropriate, they may be tempted to exercise dispositional alternatives within their departments. Piliavin and Briar observed in their study that the police maintained a distinctly negative view of the impact or effectiveness of the agencies that would be involved in a juvenile's life should formal court action be undertaken.[65] Thus, where there is no compelling reason, such as

62. Wilson, *supra* note 47, at 9.

63. *Id.* at 15.

64. The following excerpts illustrate some negative views of police officials towards the juvenile court: "At a national meeting a few years ago, the commander of the juvenile bureau of a police department in a large city boasted, publicly, that his men were not even talking to the staff of the juvenile court in his county. Juveniles apprehended during the work day of the court were placed, after hours, at the distant detention home, to be picked up by the court's intake worker the following day, in order that the police officer would not have to undergo the 'red tape' of the court's intake procedure." McHardy, *The Court, The Police, and the School*, 32 FED. PROB. 47, 49 (1968). Rubin feels that the punitive school is represented by the police who usually support measures to diminish the juvenile court's jurisdiction by reduction of the court's exclusive jurisdiction and a reduction in the age of the juveniles who are subject to its jurisdiction. He also quotes a letter from J. Edgar Hoover to all enforcement officials in October 1, 1959, suggesting that the spotlight of public opinion be turned on judges who "persist in endangering the public by unleashing young terrorists apprehended at great risk by law enforcement officers." Rubin, *The Juvenile Court System in Evolution*, 2 VALPARAISO L. REV. 1, 8 nn.24 & 25 (1967-68).

65. Piliavin & Briar, *supra* note 30, at 208.

severity of the delinquent or criminal act, for referral to the court, the police frequently dispose of the case themselves rather than expose the child to what they consider to be ineffective agencies utilized by the juvenile court system. Such considerations may help to explain Cicourel's finding that frequently the regular patrolman or the detective coming into contact with the juvenile offender would not refer him but would "settle for a beating or a night in the City Jail . . . ."[66]

3. Implications of Police Discretion in Dispositions.—Police dispositions of juvenile offenders have substantial impact on both the rule of law and on the individual offender. The National Crime Commission's Task Force on Juvenile Delinquency and Youth Crime has pointed out some of the dangers of police discretion.

> From an administrative perspective the enlargement of discretionary power entails dangers of a different order: inconsistent law enforcement and the resultant evils of disrespect for and distrust of legal institutions.[67]

Empirical studies on police discretion indicate that it can adversely effect juveniles in two different ways. First, when the police do not refer a juvenile offender to the court, little is done except to warn the child, and sometimes his family, of what will happen if he gets into further trouble. This approach continues until the police decide that the warnings have been ineffective. As a result, many juveniles receive no significant services designed to prevent reoccurrence of the delinquent behavior,[68] and by the time the child is referred to court the services may not be as effective as they would have been at an earlier time. Second, the subjective nature of many of the operational criteria employed by police may result in the mislabeling of some childen as delinquent and these juveniles may respond by behaving in accordance with the role they are expected to play.[69] In this way the police behavior and the juvenile's response to it may produce a self-fulfilling prophecy.

Since police discretion is exercised in all communities, the problem is national in scope. There are three possible solutions to the existing problem but as will be shown they too present difficulties.

First, the scope of police discretion could be drastically limited. At the present time most police agencies do not have the capability to

66. A. CICOUREL, *supra* note 47, at 176.

67. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 10 (1967).

68. A. CICOUREL, *supra* note 47, at 223; Terry, *supra* note 47, at 181.

69. P. LICHTENBERG, *supra* note 47, at 18.

exercise discretion on the basis of the subjective criteria described earlier. Their training is not designed to aid them in making assessments of a juvenile's character or the reasons for his behavior; nor are they trained to assess the family's capacity to assist the child with his problems.

A second possibility is to provide more precision and formality. For example, the National Crime Commission recommends:

> The police should have written standards for release, for referral to nonjudicial sources, and for referral to the juvenile court. The standards should be sent to all agencies of delinquency control and should be reviewed and appraised jointly at periodic intervals.[70]

It is questionable whether written standards would alter the way discretion is exercised. As discussed earlier, many police departments have such standards and yet discretion has retained much of its subjectivity.

A third possibility is suggested by the National Crime Commission's recommendation that police be trained to engage in social investigations and have case aides to assist them.[71] Other groups such as the International Association of Chiefs of Police believe, however, that police should not be diverted from their traditional and essential duties of detection and apprehension.[72] The recommendation has also been criticized on the grounds that the police role in crime detection is so inconsistent with social work that they would not be trusted by those they were trying to help.[73] In fact they are described as the "'most punitive, the visible emblem of the 'establishment,' and thus the last agency within the community to which one would freely unburden oneself concerning one's interpersonal relations, private peccadilloes or personal motivations.'"[74]

Police discretion would be indirectly affected by other proposed changes in the juvenile court system. For example, restricting the definition of juvenile delinquents to children over the age of twelve or limiting the juvenile court's delinquency jurisdiction to acts which would be crimes if committed by adults would, or course, limit police discretion. Since such changes would, however, radically alter the juvenile justice system, their total effect must be evaluated and they can not be considered solely in terms of their effect on police discretion.

70. NATIONAL CRIME COMM'N, *supra* note 1, at 82.
71. *Id.*
72. O'CONNOR & WATSON, *supra* note 47, at 45.
73. Fort, *The Juvenile Justice System*, 51 JUDICATURE 208 (1967-68).
74. *Id.* at 211.

Finally it should be noted that the current studies on police discretion were designed to describe practices, not to formulate statutes or new regulations. More information about juvenile offenders is needed before meaningful recommendations can be made about the problem of police discretion. For example, data on the actual behavior of juveniles, not just the legal categories into which the behavior falls, should be obtained. Does "assault," for example, refer to a fight between two ten year old boys as well as an attack on a fifty-year old woman by some members of a juvenile gang? Similarly, the relationship between police criteria and the court criteria needs to be established. How many cases referred by the police to the court are dropped at intake or dismissed by the court upon no finding of delinquency? Are the police and the court using different standards? Little is known about the children the police decide not to refer to court. How many of them are subsequently referred to the court for other offenses?[75]

III. ARREST OF JUVENILES

The preceding portions of this article dealt with situations in which the police are entitled to arrest a juvenile and refer him to court but choose not to do so. This section will deal with situations in which the police do want to arrest the juvenile. In theory, at least, there are limitations on the power of police to arrest children. Until recently, however, little attention was paid to the question of whether the law of arrest, or some different set of rules, governs encounters between the police and juveniles.

The confusion about whether the law of arrest applies to juveniles stems from the language used in many of the juvenile codes. The phrase "taking into custody," instead of "arrest," is used in thirty-six jurisdictions.[76] Fifteen of these laws specifically say that the

75. The authors, as part of their study of the juvenile justice system, intend to gather and publish information and data relevant to these problems in a county located in a large metropolitan area.

76. ARIZ. REV. STAT. ANN. § 8-221 (1956); CAL. WELFARE INST'NS CODE § 625 (West Supp. 1968-69); COLO. REV. STAT. ANN. § 22-2-1 (Supp. 1967); D.C. CODE ANN. § 16-2306 (1967); FLA. STAT. ANN. § 39.03 (Supp. 1968); GA. CODE ANN. § 24-2416 (1959); HAWAII REV. LAWS § 333-16 (Supp. 1965); IDAHO CODE ANN. § 16-1811 (Supp. 1967); ILL. ANN. STAT. ch. 37, § 703-1 (Smith-Hurd 1967); IND. ANN. STAT. § 9-3212 (1956); IOWA CODE ANN. § 232.15 (Supp. 1969); KAN. GEN. STAT. ANN. § 38-815 (Supp. 1968); KY. REV. STAT. ANN. § 208.110 (1963); MD. ANN. CODE art. 26, § 58 (1966); MICH. STAT. ANN. § 27.3178(598.14) (Supp. 1968); MINN. STAT. ANN. § 260.165 (Supp. 1969); MO. ANN. STAT. § 211.131 (1959); MONT. REV. CODES ANN. § 10-609 (1968); NEB. REV. STAT. § 43-205.01 (Supp. 1967); NEV. REV. STAT. § 62.170 (1967); N.H. REV. STAT. ANN. § 169:6 (1964); N.J. STAT. ANN. § 2A:4-33 (1952); N.M. STAT. ANN. § 13-8-42 (1968); N.Y. FAMILY CT.

process does not constitute an arrest.[77] These provisions are used so the child can state on school and employment applications, armed forces enlistment papers, and similar forms that he has not been arrested.[78] This terminology is consistent with the allegedly non-punitive orientation of the juvenile justice system. Unfortunately legislation concerning the rules which should govern taking juveniles into custody was almost non-existent until the mid-1960's.[79]

Juveniles may be taken into custody not only for committing acts which would be crimes if committed by adults but also for "status" offenses, such as running away, and for being in "situations" which may endanger their welfare. The various legal problems which result from taking a juvenile into custody for criminal and non-criminal conduct will be discussed separately. Police and public attitudes concerning criminal as opposed to non-criminal conduct are also quite different.

The typical statute provides in part that a peace officer may take into custody "any child who is found violating any law or ordinance." During the last few years, numerous states have amended their juvenile laws, and in fifteen it is now clear that the law of arrest applies to juveniles.[80] In the remaining states either the statute is not

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ACT §§ 721, 722 (McKinney Supp. 1968-69); OHIO REV. CODE ANN. § 2151.31 (Baldwin 1964); OKLA. STAT. ANN. tit. 10, § 1107 (Supp. 1968-69); ORE. REV. STAT. § 419.569 (1967); R.I. GEN. LAWS ANN. §§ 14-1-22, 14-1-25 (1956); S.C. CODE ANN. §§ 15-1291.18, 15-1321.31 (1962); S.D. LAWS 220. ch. 164, § 43.0323 (1968); TEX. REV. CIV. STAT. ANN. art. 2338-1 (Supp. 1968-69); UTAH CODE ANN. § 55-10-90 (Supp. 1967); VT. STAT. ANN. tit. 33, § 639 (Supp. 1968); VA. CODE ANN. § 16.1-194 (1950); WASH. REV. CODE ANN. § 13.04.120 (1962); WIS. STAT. ANN. § 48.28 (1957); WYO. STAT. ANN. § 14-102 (1965); NAT'L COMM'N ON CRIME AND DELINQ., STANDARD FAMILY COURT ACT § 16 (1959); NAT'L COMM'N ON CRIME AND DELINQ., STANDARD JUVENILE COURT ACT § 16 (1959). All references to arrest statutes in this section are to the statutory provisions cited in this footnote.

77. Colorado, Georgia, Idaho, Illinois, Iowa, Kentucky, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, Oregon, South Dakota, Wisconsin and Wyoming. Two of these states, Colorado and Illinois, also provide that taking into custody shall not constitute a police record. The Uniform Juvenile Court Act also includes such a provision with the qualification "except for the purpose of determining its validity under the constitution of this State or of the United States." UNIFORM JUVENILE COURT ACT § 13(b).

78. INSTITUTE OF GOVERNMENTAL AFFAIRS, UNIV. EXTENSION, UNIV. OF WIS., LAW ENFORCEMENT AND JUVENILE JUSTICE IN WISCONSIN 35 (1965) [hereinafter cited as LAW ENFORCEMENT AND JUVENILE JUSTICE].

79. R. MYREN & L. SWANSON, POLICE WORK WITH CHILDREN 36 (1962) [hereinafter cited as MYREN & SWANSON].

80. The statutes of Georgia, Iowa, Kentucky, Minnesota, New York, Oregon, South Dakota, and Vermont say specifically that the law of arrest applies. The Uniform Juvenile Court Act provides that a child may be taken into custody "pursuant to the laws of arrest" unless under court order or in status situations. UNIFORM JUVENILE COURT ACT § 13(a)(2). The statutes of Colorado, Hawaii, Idaho, Nebraska, Utah, Virginia, and Wisconsin provide that the

clear or the statute or cases show that the law of arrest is inapplicable to juveniles.[81]

Arizona, one of the states whose statute contains the language set out above, does not apply the law of arrest to juveniles. In a landmark case[82] Gerald Gault was taken into custody as the result of a neighbor's verbal complaint concerning a lewd telephone call she had received. Gerald's parents contended that he was taken into custody unlawfully because the Arizona Code allows arrest for a misdemeanor without a warrant only if it is committed in the presence of an officer. The Arizona Supreme Court however disagreed, saying merely that:

> The general law of arrest is usually held to be inapplicable in juvenile proceedings. . . . Furthermore, A.R.S. § 8-221 provides the procedure for arrest of a child. It states that a police officer shall forthwith notify the probation officer upon arresting a child and shall make such disposition of the child as the probation officer directs. . . . The article also states that this "shall not be construed to prohibit a peace officer from taking into custody a child who is found violating a law or ordinance, who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or welfare unless immediate action is taken.[83]

This aspect of the proceedings was not reviewed by the United States Supreme Court in its opinion in the case[84], nor did the Court comment on arrest standards in *Kent v. United States*.[85]

The reasons for and against using procedures applicable to adults for juvenile offenders usually center around the conflict between need for adequate law enforcement and the desire to prevent children from being treated as criminals. Applying the law of arrest to juveniles may hamper law enforcement but no more so than does applying the law of arrest to adults. Consequently, the need to reduce crime has not been advanced as an argument for applying different rules to

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offense must have been committed in the presence of the officer or he must have reasonable grounds to believe that the juvenile has committed an act which would be a felony if committed by an adult.

81. For example, in Florida a child may be taken into custody if he is alleged to have violated a law. FLA. STAT. ANN. § 39.03 (Supp. 1969).

82. *In re* Gault, 99 Ariz. 180, 407 P.2d 760 (1965), *rev'd*, 387 U.S. 1 (1967).

83. 99 Ariz. at 194, 407 P.2d at 769-70.

84. 387 U.S. 1 (1967). "The Court in Gault did not deal specificially with arrest and detention, except to note that Arizona did not follow the common law of arrest with respect to juveniles." Dorsen & Rezneck, *In re Gault and the Future Juvenile Law*, 1 FAM. L.Q. No. 4, 1, 31-32 (1967) [hereinafter cited as Dorsen & Rezneck].

85. 383 U.S. 541 (1966). "The Court in Kent had reserved questions as to the constitutionality of the extraordinary arrest and detention powers asserted by many states over juveniles." Dorsen & Rezneck, *supra* note 84, at n.120.

juveniles. Instead, it has been argued that because the purpose of the juvenile justice system is to help, not punish, the juvenile, technicalities should not impede reaching him quickly when the need for help exists.

The more recent statutes, however, have adopted the law of arrest when the juvenile is charged with committing an act which would be a crime if performed by an adult. One of the principal reasons for this change is probably the realization that a juvenile who is taken into custody for a law violation will not necessarily be dealt with by the juvenile justice system. In many states the juvenile courts do not have jurisdiction over a variety of offenses, while in others both the juvenile court and the criminal court have jurisdiction over the offense. In addition, in many situations the juvenile may be waived to the adult court. The trend is toward amending juvenile court acts to apply the law of arrest to juveniles even if this change is not required by court decisions.[86]

Violation of a law or ordinance, however, is only one of the reasons which justify taking a juvenile into custody. Most of the states which permit a juvenile to be taken into custody when he violates a law or ordinance also allow him to be taken into custody when he is in a situation which endangers his welfare.[87] Three recent cases illustrate some of the problems which may occur when a juvenile is taken into custody under such a provision. In each case the youth was referred to court and charged with some violation of law.

The first incident, *In re James L._____, Jr.*,[88] took place in Ohio and began when the police went to a playground to investigate a complaint that some older boys were using obscene language and preventing the younger children from using playground equipment. An attempt was made to take James L., aged seventeen, into custody. When James tried to run away, both he and the officer were injured in the scuffle which ensued. Subsequently, he was adjudicated delinquent for resisting arrest and assaulting a police officer. His counsel argued that the officer had no right to arrest without a warrant because James

86. Some commentators believe that it is unlikely that the Supreme Court will regard application of the law of arrest to juveniles as a constitutional question. Dorsen & Rezneck, *supra* note 84, at 32.

87. Arizona, Colorado, District of Columbia, Hawaii, Indiana, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington and Wisconsin.

88. *In re* James L.____, Jr., 25 Ohio Op. 2d 369, 194 N.E.2d 797 (Juv. Ct. Cuyohoga County 1963).

was not committing a misdemeanor in his presence nor was there any probable cause to believe he had committed a felony. The juvenile court held that the law of arrest did not apply to juvenile proceedings because they are not criminal in nature nor are they conducted with the objective of convicting a minor and punishing him.[89] The purpose of the proceedings is to determine whether the child needs intervention of the state as his guardian. The court pointed out that the Ohio statute allows a peace officer to take into custody any child "whose surroundings are such as to endanger his health, morals, or welfare" and said: "Certainly, the minor herein was found in such surroundings as to endanger his welfare."[90]

The second case, *In re Garland*,[91] involved a fifteen year old boy named Murray Garland, who was taken into custody by the police at 3:15 A.M. The officers had no reason to suspect him of any burglary or robbery and, in fact, had no reason to apprehend him other than his presence on the street at that inappropriate hour. The youth was questioned for six hours and confessed to thirteen burglaries, three attempted burglaries, and four acts of vandalism. A petition alleging burglary and theft was then filed in the juvenile court. Garland was adjudicated a delinquent and committed to the Louisiana Training Institute for an indefinite period of time.

The Louisiana Court of Appeals reversed the adjudication on the basis that the confession was inadmissible because Garland's apprehension and interrogation were unlawful.[92] It said that the policeman would have had no right to apprehend an adult merely because of his presence on the streets at a late hour, and he had no more authority in the case of a minor.[93] The court distinguished between proper police action when a juvenile commits a law violation and when he is in a situation dangerous to his welfare by saying:

> We desire here to observe that we do not consider inappropriate under certain circumstances the action of the police taking a 15 year old child into custody when found upon the street at 3:15 o'clock in the morning. . . . It would we say, have been quite proper and conducive to Garland's welfare to have taken

89. *Id.* The petition was dismissed because the evidence did not sustain the allegations but the court indicated that a new petition could be filed.

90. *Id.*

91. 160 So. 2d 340 (La. Ct. App. 1964).

92. 160 So. 2d at 342. The Court also reversed, on the same grounds, the delinquency adjudication of Garland's 15 year old friend Larry White. Larry was awakened from his sleep at 5:15 A.M. and taken to the police station for questioning. He was charged with the same offenses as Garland. *In re* White, 160 So. 2d 344 (La. Ct. App. 1964).

93. 160 So. 2d at 342.

> him off the street and to his home. But the police had no authority to *arrest* Garland without a warrant for his arrest just as they would have had no authority to arrest a major under the same circumstances . . . .[94]

It is interesting to note that the court, in an effort to protect the juvenile's reputation, also said this is not a case where the criminal is to go free because the constable had blundered; the confessions were false in at least two important particulars.[95]

In the third case, *People v. Kjar*,[96] although the boy was taken into custody under a provision of the juvenile code which would not justify the arrest of an adult, proceedings ended with the boy being tried for murder in the criminal court.[97]

The case began in response to a call that two men were throwing rocks at cars passing on the highway. Two officers proceeded to the designated place. Upon arriving about 11:00 P.M. they observed a 1951 blue Mercury, which had been described as being near the scene. Approaching the car, they observed two juveniles lying on the seats. One of the officers recognized the occupants as juveniles to whom he had previously issued a citation for possession of alcohol.

The youths were apprehended under a section of the juvenile code which allows a peace officer to take a child under 18 years of age into custody when he has reasonable cause for believing that he is a dependent child.[98] California law defines a dependent child as a person:

> Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care and control.[99]

The court dismissed the argument that the "arrest" was improper by saying only that the "officer quite properly decided that these juveniles should be taken into custody."[100]

The reasons for and the consequences of allowing a child to be taken into custody for his own welfare are pertinent to any conclusions about the rules which should govern the process.

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94. *Id.*

95. *Id.* at 344.

96. 46 Cal. Rptr. 440 (1965).

97. The action was tried in the superior court after the juvenile court determined that he was not a proper subject to be dealt with under juvenile law. *Id.* at 441 n.1.

98. CAL. WELFARE & INST'NS CODE § 625 (West Supp. 1968-69).

99. CAL. WELFARE & INST'NS CODE § 600 (West Supp. 1968-69).

100. 46 Cal. Rptr. at 441. The case was reversed because the defendant was not advised of his constitutional rights before making a confession.

The principal reason for this provision is to allow a temporary disposition to be made of a neglected or battered child. For example, in *State v. Hunt*,[101] the sheriff removed a five year old girl from her home after receiving information from a houseworker and visiting the home. Although the houseworker said that she had been in the house all day without seeing the girl, late in the afternoon she found the child in the dark furnace room, her head underneath the hot water heater. Her hands were tied behind her back and her face was bloody, and there appeared to be strap marks on her face. When the sheriff arrived he found the girl in the same condition and noticed that her face was bruised and that her nose was flattened. He also saw black and blue marks on her back. He took her to his office and then to the hospital for medical attention. The court held that the sheriff had not only the right to remove the girl from her home but the duty to do so under section 8-221 (B) of the Arizona Code.[102] This section provides that a child may be taken into custody when his surroundings are such as to endanger his health, morals or welfare unless immediate action is taken."[103]

It has been suggested that reason to believe a juvenile is within a category of noncriminal juvenile court jurisdiction and that it is necessary for his own welfare to take him into custody should be a tolerable constitutional standard.[104] It is difficult to quarrel with this standard when the child's health and perhaps life is endangered, as in *State* v. *Hunt*.[105] The standard also seems reasonable if a child, found in a situation dangerous to his welfare, is taken into custody merely for the purpose of returning him home.[106]

However, the standards may not seem tolerable when the result of being taken into custody for one's welfare is prosecution for murder in a criminal court. The solution may be that the standard should depend not on the criminal or non-criminal nature of the act which is the basis for custody, but rather on the possible consequences to the child of being taken into custody.

IV. SEARCH AND SEIZURE

Search and seizure are not treated explicitly by statutes providing for juvenile courts, but there is a specific provision on the subject in

101. 2 Ariz. App. 6, 406 P.2d 208 (1965).
102. *Id.* at 12, 406 P.2d at 214.
103. ARIZ. REV. STAT. ANN. § 8-221(B) (1956).
104. Dorsen & Rezneck, *supra* note 84, at 33.
105. State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965).
106. *In re* Garland, 160 So. 2d 340 (La. Ct. App. 1964).

the recently adopted Uniform Juvenile Court Act. The Act provides "that evidence illegally seized or obtained shall not be received over objection to establish the allegations made against him."[107]

The recent cases also indicate a trend toward applying to juveniles the fourth amendment guarantee against unreasonable searches and seizures.[108] The courts which have adopted this view have based their decisions primarily on one or both of the following reasons: (1) The fourth amendment is not limited in its language to criminal cases but is a "right of the people" to be secure against unreasonable searches and seizures. To argue that the fourth amendment does not apply in juvenile court, one would have to argue that juveniles are not "people;"[109] (2) The rehabilitative goal of the juvenile court is to instill respect for law and order. Such a goal is best realized if the police are required to deal fairly and legally with juveniles.

Several important issues about search and seizure as it applies to juveniles have not yet been considered by the courts. One of these issues was mentioned by Judge Schapira in his opinion in *State v. Lowry*:[110]

> Difficulty arises by not differentiating procedures adequate with respect to acts of juvenile delinquency noncriminal in nature, such as truancy or incorrigibility, from procedures dealing with conduct that would be criminal had it been committed by an adult . . . . The problem not presently passed upon, i.e., what rights, procedures and rules which are applicable to children of more tender years who have engaged in noncriminal behavioral patterns, invites further research, analysis, discussion and promulgation of legislation and court rules which would redefine rights of a juvenile and outline a procedure whereby they could be protected.[111]

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107. UNIFORM JUVENILE COURT ACT § 27(b). "The phrase, 'to establish the charge against him' is consistent with the qualification in Walder v. United States, 347 U.S. 62 (1954), holding that illegally seized evidence may be used to impeach a defendant who 'went beyond a mere denial . . . .' The exact scope of the qualification is not clear." UNIFORM JUVENILE COURT ACT, § 27(b), Comment.

108. Two Bros. & a Case of Liquor, Nos. 66-2652-J, 66-2653-J (Juv. Ct. D.C. Dec. 28, 1966). *See also* Matter of Lang, 44 Misc. 2d 900, 255 N.Y.S.2d 987 (Family Ct. New York City 1965) in which Judge Polier held that the fourth amendment's prohibition against unlawful search and seizure does apply in the family court under New York case law which allows police to stop and frisk adults. *In re* Marsh, 40 Ill. 2053, 237 N.E.2d 529 (1968); Urbasek v. People, 76 Ill. App. 2d 375, 222 N.E.2d 233 (1966); State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907 (Super. Ct. 1967); *In re* Williams, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (Family Ct. Ulster County 1966); Choate v. State, 425 S.W.2d 706 (Tex. Civ. App. 1968).

109. *E.g.*, Two Bros. & a Case of Liquor Nos. 66-2652-J, 66-2653-J (Juv. Ct. D.C. Dec. 28, 1966).

110. 95 N.J. Super. 307, 230 A.2d 907 (1967).

111. *Id.* at 317, 230 A.2d at 912.

A closely related issue is the right of the juvenile when the search is made when he is taken into custody for his own welfare and the fruits of the search are used subsequently to substantiate allegations that he has committed an unlawful act. This problem was illustrated in the cases discussed in Part III.[112]

Another problem is determining the validity of a juvenile's consent to search and seizure. It has been pointed out that the child may not have the maturity and judgment necessary to intelligently waive his rights by consenting to a search.[113] A related problem is obtaining the parent's consent instead of the child's when a search of the juvenile's belongings is desired. A Wisconsin manual on law enforcement points out that such a search is not good practice because it may be unreasonable. The manual recommends that the police should not be satisfied with parental consent but should insist on obtaining consent of both the parents and the juvenile before searching.[114]

The recent case of *In re Williams*[115] illustrates an awareness of the special problems involved in obtaining a juvenile's consent to a search. Williams, a fifteen year old boy, was turned over to a state trooper by a security guard who found him lurking between two cottages at a resort. Williams took the trooper to his cottage and showed him jewelry he had stolen. In holding that the search and seizure were invalid, the court said:

> The reasonableness of the search of the respondent's bungalow depends entirely upon the reality of his consent . . . the consent of this 15 year old boy given at 2 o'clock in the morning while in police custody under a charge of third degree burglary and after he had been questioned for several hours without the presence of his parents or any other adult friend cannot be held to be a consent that was given freely and intelligently without any duress or coercion, express or implied. Unless we are prepared to say that because this boy is charged with juvenile delinquency and not a crime he has no right to be secure in his person, papers, house and effects against unreasonable searches and seizure the jewelry discovered in his bungalow is inadmissible against him and must be suppressed.[116]

V. INTERROGATION AND RIGHT TO COUNSEL

The opposing views about the advantages of applying the standards governing the interrogation of adults to juveniles are well

112. See text accompanying notes 91 & 94 and accompanying text.

113. LAW ENFORCEMENT AND JUVENILE JUSTICE, *supra* note 78, at 33.

114. *Id.*

115. 49 Misc. 2d 154, 267 N.Y.S.2d 91 (Family Ct. Ulster County 1966).

116. *Id.* at 169-70, 267 N.Y.S.2d at 110.

stated in the following quotations from Judge Alexander and Justice Fortas:

> Which is the greater justice to the child: to teach him honesty and encourage him to reveal the truth or to pave the way for him to lie and conceal the truth? Doctors diagnose and treat the child whose body is sick. The child is never encouraged to deceive the doctor or to evade his question. Must there be a different ethic when the child's behavior is sick?[117]
>
> [E]vidence is accumulating that confessions by juveniles do not aid "individualized treatment" . . . and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose.[118]

The *Miranda* warning is applicable to juveniles by statute in California,[119] Colorado,[120] and Oklahoma.[121] The Colorado and Oklahoma statutes give juveniles the additional protection of requiring that the parents also receive the *Miranda* warning and that they be present during the questioning.[122] Three other states—Hawaii,[123] New

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117. Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A. J. 1206, 1209 (1960).

118. *In re* Gault, 387 U.S. 1, 51 (1967).

119. "In any case where a minor is taken into temporary custody . . . the officer shall advise such minor that anything he says can be used against him and shall advise him of his constitutional rights, ineluding his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel." CAL. WELFARE & INST'NS CODE § 625 (West Supp. 1968).

120. COLO. REV. STAT. ANN. § 22-2-2 (Supp. 1967).

121. OKLA. STAT. ANN. tit. 10, § 1109 (Supp. 1968).

122. "No statements or admissions of a child made as a result of interrogation of the child by a law enforcement official concerning acts which would constitute a crime if committed by an adult shall be admissible in evidence unless a parent, guardian, or legal custodian of the child was present at such interrogation, and the child and his parent, guardian or legal custodian were advised of the child's right to remain silent, that any statements made may be used against him in a court of law, the right of the presence of an attorney during such interrogation, and the right to have counsel appointed if so requested at the time of the interrogation." COLO. REV. STAT. ANN. § 22-2-2(3)(c) (Supp. 1967).

"No child shall be questioned about an alleged offense by any law enforcement officer, investigative agency, or employee of the court or the Department unless his parents, guardian, attorney, or their legal custodian are present at the interrogation, and not until the child and his parents, or guardian or other legal custodian shall be fully advised of their constitutional and legal rights, including the right to a jury trial as herein provided, and the right to be represented by counsel at every stage of the proceedings, and the right to have counsel appointed by the court and paid out of the court fund if the parties are without sufficient financial means." OKLA. STAT. ANN. tit. 10, § 1109(a) (Supp. 1968).

123. In Hawaii, there is an interrogation provision which is not a limitation on police authority to interrogate juveniles; it is an express authorization of their authority to do so subject, however, to the rule making power of the Family Court. "[A]ny police officer shall have the power and authority to take and detain any minor coming within the provisions of [the Act] at the bureau or other suitable places for questioning and investigation . . . . The judges of the family courts shall make such rules and set up such standards of investigation and questioning as they consider necessary to guide and control the police in the handling of cases

York[124] and South Dakota[125]—place less extensive limitations on police interrogation. The *Miranda* protections are applicable in a few other jurisdictions, as a matter of practice, even though the juvenile court statutes do not require them.[126]

Court decisions which mention police interrogations are concerned with the admissibility of a confession. In that context, courts have merely held that the police did, or did not, go too far in a particular instance; they have not laid down specific guidelines for police conduct. Nor, on the whole, do the reported decisions seem to hinge on the specific provisions of the applicable juvenile court statute. While the statutory provisions are cited in the decisions, one senses that they are used more to bolster decisions of non-admissibility than to determine them.[127]

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involving minors coming within the provisions of this chapter." HAWAII REV. LAWS §§ 333-33 to-35 (Supp. 1965).

It has been reported that no standards have, in fact, been imposed by the First Circuit Family Court (Honolulu). Dyson, Family Courts in the United States, 1968 (unpublished manuscript; relevant portions available in the files of Juvenile Offender and the Law Project) [hereinafter cited as Dyson].

124. "[T]he police officer shall release the child . . . or . . . take the child to the family court . . . unless the peace officer determines that it is necessary to question the child, in which case he may take the child to a facility designated . . . as a suitable place for the questioning of children and there question him for a reasonable period of time.

"In determining what is a 'reasonable period of time' for questioning the child, the child's age and the presence or absence of his parents or other person legally responsible for his care shall be included among the relevant considerations." N.Y. FAMILY CT. ACT § 724 (McKinney Supp. 1968).

125. "A child shall not be detained by law enforcement officials any longer than is reasonably necessary to obtain his name, age, residence, and other necessary information and to contact his parents, guardian, or custodian, and to deliver him thereto, or to the place of detention." S.D. LAWS 220, 231, ch. 164, § 43.0320 (1968).

126. For example, in Portland, Oregon, the juvenile and his parents receive a mimeographed form which accompanies the notice that proceedings are about to begin. One part of the form says, "You have the right to remain silent and need not answer questions or discuss the facts with the judge, police officer, juvenile court counselor or anyone else." Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527, 531 (1968). In Lincoln, Nebraska, juveniles and their parents are advised of the privilege against self incrimination at various stages of the proceedings "and so far as we have been able to ascertain, it is done by the law enforcement officials at the time they take the child into custody." *Id.* at 543.

Corporation counsel in New York City have already taken the position that *Miranda* rights extend to children, and in Rhode Island and Hawaii the police apparently inform all children that they have a right to remain silent and to be represented by counsel if they wish. Dyson, *supra* note 123.

127. Note the use made of the Family Court Act provisions by the majority in holding the admissions inadmissible in *In re* Gregory, 19 N.Y.2d 55, 224 N.E.2d 102, 277 N.Y.S.2d 675 (1966), while the dissenting judge was able to find "substantial compliance" with the Act in the face of facts which cried out to the contrary.

In *State* v. *Shaw*,[128] the police officers questioned the juvenile without first having notified the juvenile probation officer of his arrest, as required by statute.[129] The Arizona Supreme Court overturned a subsequent criminal conviction based on a confession obtained during the interrogation. In doing so, the court held that one of the purposes of the statutory provision is to protect the juvenile from the adverse effects of interrogation.[130] The confession was held to be inadmissible as a means of enforcing the legislative policy[131] of providing for a representative in the person of the probation officer whose function is to prevent overzealous pressure.[132] Confessions have been admitted by Massachusetts[133] and New Mexico[134] courts despite the fact that the police did not comply with similar statutory provisions.

The United States Supreme Court did not decide whether Gerald Gault should have been given *Miranda* warnings before being questioned by Arizona probation officers, because the record before the Supreme Court did not disclose the circumstances of his questioning nor his alleged admissions.[135] The Court's views are indicated, however, in its statements that the participation of counsel will assist the police in administering the privilege against self-incrimination[136] and that great care must be taken if an admission is obtained when counsel is not present "for some permissible reason."[137]

Doubt concerning the therapeutic value of "confession" to the child is not the only reason for urging extension of the *Miranda* rule to juveniles; several other factors play a part in formulating this view. First, "there is little or no assurance . . . in most if not all states,

128. 93 Ariz. 40, 378 P.2d 487 (1963).

129. ARIZ. REV. STAT. ANN. § 8-221 (1956).

130. 93 Ariz. at 47-48, 378 P.2d at 492-93.

131. *Id.* at 48-49, 378 P.2d at 493-94.

132. *Id.*

133. In Commonwealth v. Wallace, 346 Mass. 9, 190 N.E.2d 224 (1963), the Supreme Court of Massachusetts held that a violation of the statute requiring police to notify one parent immediately and the probation officer, did not per se render a confession inadmissible, but such violation, together with lengthy questioning by police, would be an important factor to consider in determining whether the juvenile had been overreached or coerced.

134. The Supreme Court of New Mexico held the confessions of boys aged 16 and 17 to be admissible despite the fact that the boys were not delivered forthwith to the juvenile authorities as per the statute. State v. Ortega, 77 N.M. 7, 14, 419 P.2d 219, 224 (1966).

135. *In re* Gault 387 U.S. 1, 43 n.74 (1967), *noted in* 20 VAND. L. REV. at 1161 (1967).

136. 387 U.S. at 55.

137. *Id.* at 55.

that a juvenile apprehended or interrogated by the police . . . will remain outside of the reach of adult courts.''[138] Second, the trustworthiness of confessions made by children to the police is questionable.[139] Third, there is an awareness that police practices do not always show behavior which can be reconciled with the concept of the state as *parens patriae*.[140] The following are a few examples of fact situations described in confession cases:

> (1) A 17 year old boy was questioned for three hours sometime between midnight and 4:00 A.M. He was nauseated and asked to be taken to a hospital or the detention home but was told that his request could not be granted until he had confessed.[141]
>
> (2) A 13 year old boy was questioned continuously from 11:00 A.M. to 6:00 P.M. without being fed in the meantime. His mother was denied permission to see the boy until after he had confessed.[142]
>
> (3) A 15 year old boy, five years behind in school, was questioned continuously from 4:00 P.M. until 2:00 A.M. and was not delivered to Youth House until 2:55 A.M. He was given his first food after 11:00 P.M. His father and other family members went to the police station four times between 7:30 P.M. and 1:00 A.M. but each time they were refused admission to see the boy. The boy's 13 year old companion was questioned from 5:00 P.M. until around midnight and was not delivered to the Youth House until 2:55 A.M. He was given his first food after 10:00 P.M. His father and other family members also went to the police station five times between 6:30 P.M. and 2:00 A.M. but they also were refused permission to see the boy.[143]
>
> (4) A 12 year old boy, who had been a patient in a locked ward at the time the crime was committed elsewhere, was interrogated from 5:30 P.M. one day until 9:30 P.M. the following day with little or no sleep in the meantime. Nothing was said about food. The boy's parents were at the station house until midnight of the first day, but were not with the boy during the interrogation. The boy was taken to see them once in the presence of a detective. The detective again interviewed the boy around midnight of the third day at Youth House and for three hours in the late evening some four days later. During this last session the boy complained continuously that he was tired and wanted to go to bed. The detective threatened that he would get a court order to remove the boy from the protection of Youth House. The boy's 12 year old friend was questioned from 8:00 A.M. until 9:30 P.M. on the second day of the first boy's detention.[144]

The number of juvenile confessions and consequently the number of adjudications of delinquency may decrease if the *Miranda* rule is applicable to juveniles, just as the number of adult confessions and

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138. *Id.* at 50.

139. *E.g., In re* Four Youths, Nos. 28-776-J, 28-783-J, 28-859-J (Juv. Ct. D.C. April 7, 1961).

140. The traditional parens patriae principle is discussed in Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

141. State v. Shaw, 93 Ariz. 40, 378 P.2d 487 (1963).

142. *In re* Rutane, 37 Misc. 2d 234, 234 N.Y.S.2d 777 (Sup. Ct. 1962).

143. *In re* Carlo, 48 N.J. 224, 225 A.2d 110 (1966).

144. *In re* Gregory, 19 N.Y.2d 55, 244 N.E.2d 102, 277 N.Y.S.2d 675 (1966).

convictions may have been reduced. It is not hard to understand that many police officers believe that these decisions are a mistake and will hamper effective law enforcement. This is, however, no basis for holding that *Miranda* should apply to adults but not to juveniles, unless one is willing to say that juveniles are only entitled to an inferior standard of justice.[145]

Deciding whether juveniles are entitled to the same rights as adults is much easier than deciding whether juveniles should have more protection than adults. It is the latter question which will be the focus of the rest of this section on interrogation and the sections on fingerprinting and police records.

Requiring juveniles to be turned over to probation officers before questioning,[146] requiring that they be questioned at home,[147] and prohibiting the use of their admissions made during interrogation if parents or counsel are not present,[148] are all examples of special safeguards for juveniles. There are two reasons for the use of these special safeguards. The first is the basic premise, underlying the whole juvenile justice system, that juveniles who commit unlawful acts are not criminals and whould not be treated as criminals. This view is summarized in the case of *State v. Shaw*:[149]

> The need for special treatment begins the instant the juvenile is contacted by peace officers . . . . A few hours of the treatment sometimes accorded mature and hardened criminals can give the impressionable mind of a youth an indelibly warped view of society and its interest in him.[150]
>
> Unquestionably the purpose [of the legislation]] was to alter the usual method of handling persons arrested on suspicion or for investigation of criminal activities when those persons are juveniles . . . . Since a major feature of the usual treatment of newly arrested persons is interrogation, it follows that one of the purposes of [this legislation] is to protect the juvenile from the adverse effects of this procedure.[151]

The second reason is that juveniles are not mature enough to understand their rights and are not competent to exercise them. The

145. It was hoped that the question of the admissibility of a juvenile's statements made to the police without an appropriate warning would be settled by the United States Supreme Court. Unfortunately, the issue was not resolved because the case was remanded "for consideration in light of *In re* Gault." *In re* Whittington, 391 U.S. 341, 344 (1968).

146. For example, the California provision provides that the arresting officer's alternatives are to release the minor or take the minor without unnecessary delay before a probation officer. CAL. WELFARE & INST'NS CODE § 626 (West Supp. 1968).

147. MYREN & SWANSON, *supra* note 79, at 35.

148. COLO. REV. STAT. ANN. § 22-2-2 (Supp. 1967).

149. 93 Ariz. 40, 378 P.2d 487 (1963).

150. *Id.* at 47, 378 P.2d at 491.

151. *Id.* at 48-49, 378 P.2d at 492-93.

following comment from an attorney and an anecdote related by a judge illustrate this problem. The attorney said, "Oh sure, they have a 'Miranda card' which they read off to every kid. But how many of these kids do you think have ever head of the Constitution?"[152] A Hawaii judge related an incident to demonstrate the fact that children seldom ask for an attorney. A boy informed of his right to an attorney told police, "Yeah, I want a mouthpiece." The police were so nonplussed that they let the boy go.[153]

This problem was also described in a recent case.[154] William L., aged 14, was taken from his home by the police at 3:00 A.M. because they had been told the youth was involved in a murder. The police responded to the mother's request to accompany William to the police station by saying that it was not a serious matter and the boy would be home in an hour or two.[155] William was questioned by several policemen who informed him of his four-fold rights: to counsel, to have counsel appointed if he was indigent, to remain silent, and that anything he said might be used against him. The questioning was completed in about an hour.[156]

The appellate court emphasized that William's mother had not been told of the child's rights nor was she present when the law enforcement officer advised the boy of his rights. The court reversed the delinquency adjudication saying:

> We think it is almost self-evident that a boy of 14 aroused from sleep at 3:00 A.M., taken to a police station and questioned by four or five police officers, concerning a homicide would scarcely be in a frame of mind capable of appreciating the nature and effect of the constitutional warnings given him before the questioning begins . . . . The age and immaturity of the juvenile, both emotionally and intellectually, create the need for the advice of counsel and his presence at the questioning, when charges of juvenile delinquency may ensue.[157]

The argument against this view is that these protective procedures interefere with police investigations. The police, of course, are anxious to obtain information concerning any connection a juvenile may have with a crime, and they know the advantage of conducting the interrogation before the juvenile suspect has time to dissemble after reflection.[158] Also, at least some police officials believe

152. Dyson, *supra* note 123.

153. *Id.*

154. *In re* William L. (Anonymous), 29 App. Div. 2d 182, 287 N.Y.S.2d 218, *appeal denied*, 236 N.E.2d 864 (N.Y. Ct. App. 1968).

155. 29 App. Div. 2d at 183, 287 N.Y.S.2d at 220.

156. *Id.*

157. *Id.* at 183, 287 N.Y.S.2d at 221.

158. State v. Shaw, 93 Ariz. 40, 48-49 n.7, 378 P.2d 487, 492-93 n.7 (1963).

that questioning the juvenile in his own home and having his parents present is unrealistic from the point of view of meaningful police interrogation.[159]

Providing for special safeguards for juveniles does not mean that juveniles have more rights than adults. The provisions are there because of the belief that without them, juveniles are in an inferior position. Therefore, it is not likely that these special safeguards will impede the police investigation any more than the requirements in *Miranda*.

The more basic question is: Does society want a separate, nonpunitive system of justice for juveniles? To answer this question it will be necessary to examine all the laws and procedures affecting the juvenile justice system, not only those pertaining to arrest.

VI. FINGERPRINTING

Controversy about fingerprinting juveniles centers not on the act of fingerprinting but on the maintenance of fingerprint files and the people who have access to them. The three basic uses for fingerprints in police work are:

> (1) Positive identification of latent fingerprints found at the scene of an offense . . . . This does not require the maintenance of fingerprint files.
> (2) Positive identification of a person printed on a given occasion as the same person who was printed on a previous occasion. The purpose of this procedure is to establish the presence or absence of a record of previous offenses. . . . It requires a file of fingerprints against which to make comparisons.
> (3) Positive identification of latent prints found at the scene of an offense as those of a person previously fingerprinted, thus establishing that the previously printed person was at the scene of this offense . . . . [This] requires a file of fingerprints against which to make comparisons.[160]

The provisions on fingerprinting in the 1954 version of *Standards for Specialized Courts Dealing with Children* recommended that fingerprinting of juveniles be limited solely to the first use listed above.[161] It said that fingerprints should be taken only with court

159. The position of the International Association of Chiefs of Police is argued and stated clearly in the form of policy guides in O'CONNOR & WATSON, *supra* note 47, at 55-60. The same basic position is taken by Kenney and Pursuit, including the need to interview juveniles alone, but with more explicit recognition of the difference between a juvenile and an adult with attendant tempering of interviewing techniques. J. KENNEY & D. PURSUIT, POLICE WORK WITH JUVENILES 208-13 (1965).

160. MYREN & SWANSON, *supra* note 79, at 84.

161. U.S. CHILDREN'S BUREAU, DEP'T OF HEALTH, EDUCATION, AND WELFARE, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 39 (Children's Bur. Pub. No. 346, 1954).

authorization granted on an individual basis. Also, it provided that prints should be destroyed in any case where the courts or the police find that the child was not involved. In all other cases the prints were to be returned to the court for destruction or kept on a civil identification card only. The card was not to contain any information which might disclose reasons for taking the print.[162]

The 1966 edition of *Standards* adopts the view that fingerprint files are necessary to protect the public.[163] It still provides, however, that prints may be taken as an investigative procedure in a current case, but the requirement that this be done only with court permission on an individual basis is no longer present.[164] The recommendations concerning fingerprint files are as follows:[165] (1) Fingerprints of children under 14 should not be placed in the file; (2) Cards should be placed in the file for murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, housebreaking, purse snatching, and auto thefts;[166] (3) Copies of the fingerprint cards should not be sent to a local or federal depository, except in national security cases; (4) The files should be kept separate from adult files and should not be available to non-police agencies except the juvenile court. Representatives of the military services making background investigations for placing men and women already in military or civilian governmental service or in the employ of defense contractors in particularly sensitive positions would also have access; (5) Cards should be destroyed if there is no basis for juvenile court jurisdiction[167] and when the juvenile is 21, if he has not violated the law since his 16th birthday.[168]

Twenty jurisdictions have statutes on the fingerprinting of

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162. *Id.*

163. W. SHERIDAN, *supra* note 11, at 50-52; MYREN & SWANSON, *supra* note 79, at 87-88.

164. W. SHERIDAN, *supra* note 11, at 52.

165. The recommendations are summarized from MYREN & SWANSON, *supra* note 79, at 87-88. They are reprinted in full in W. SHERIDAN, *supra* note 11, at 50-52.

166. The list is suggested for trial purposes, subject to modification with experience. The rationale is that fingerprints should be on file only when police experience shows that they are useful in solving future cases. MYREN & SWANSON, *supra* note 79, at 87.

167. If there is basis for jurisdiction but the police decide not to refer the case, the card should be destroyed unless special permission to retain it is obtained from the juvenile judge. *Id.*

168. If the juvenile has committed an offense during his sixteenth or seventeenth year the police are to have discretion about destroying the card or transferring it to the adult criminal file. *Id.*

The policy guides with respect to fingerprinting developed by O'CONNOR & WATSON, *supra* note 47, at 46, are in general accord with MYREN & SWANSON as to the rationale for taking fingerprints. The authors were not ready, however, to establish standards and procedures for making identification records inactive or inaccessible without further deep study.

juveniles.[169] Ten of them[170] require court permission for taking the fingerprints of juveniles but they do not include the provision, suggested in the 1954 *Standards*, that the fingerprints be destroyed or turned over to the juvenile court, nor do they contain any restrictions on access to the fingerprint records. Two other states limit the fingerprinting of juveniles. One of them, New Jersey, seems to forbid the fingerprinting of all juveniles under 17.[171] The other state, Tennessee, prohibits fingerprinting until after the juvenile has been brought before the juvenile court. The remaining eight states deal only with the use of, and access to, fingerprint records,[172] and two of them[173] provide for expungement of the fingerprint records.

The most comprehensive statute on the subject of fingerprinting is that of Florida. It requires the fingerprinting of any child over 14 who is adjudicated a delinquent on the basis of an act wnich would be a felony if committed by an adult. Any fingerprint records made prior to such an adjudication may be used for comparison purposes only and copies cannot be made from them for any person or agency, state or federal.[174] The fingerprints are to be destroyed when the child is 21. Children under the age of 14 may not be fingerprinted except by special order of the juvenile judge, and all originals and copies of the

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169. CAL. WELFARE & INST'NS CODE § 504 (Deering 1937); COLO. REV. STAT. ANN. § 22-2-2 (Supp. 1967); DEL. CODE ANN. tit. 10, § 977 (Supp. 1966); FLA. STAT. ANN. § 39.03 (Supp. 1969); GA. CODE ANN. § 24-2419 (1959); HAWAII REV. LAWS §§ 333-35, 333-39 (Supp. 1965); IDAHO CODE ANN. § 16-1811 (Supp. 1967); ILL. ANN. STAT. ch. 37, § 702-8 (Smith-Hurd Supp. 1969); KAN. STAT. ANN. § 38-815 (Supp. 1968); MO. ANN. STAT. § 211.151 (1962); N.J. STAT. ANN. § 2A:4-21 (1952); OHIO REV. CODE ANN. § 2151.31 (Page 1967); OKLA. STAT. ANN. tit. 10, § 1127 (Supp. 1968-69); ORE. REV. STAT. § 419.585 (Supp. 1967); S.C. CODE ANN. §§ 15-1291.18, 15-1321.31 (1962); S.D. LAWS, ch. 164, § 43.0320 (1968); TENN. CODE ANN. § 37-251 (Supp. 1968); UTAH CODE ANN. § 55-10-116 (Supp. 1967); VT. STAT. ANN. tit. 33, § 664 (Supp. 1968); WASH. REV. CODE ANN. § 13.04.130 (1962). All references in this section to fingerprinting statutes are to the statutory provisions cited in this footnote.

170. Delaware, Florida, Georgia, Hawaii, Kansas, Missouri, Ohio, Oregon, South Carolina, and Washington.

171. The New Jersey statute provides that any person of 17 years and under the age of 18 years, who shall have been arrested and charged with the commission of any offense which, except for the provisions of this statute, would be an indictable offense, may be fingerprinted.

172. California, Colorado, Idaho, Illinois, Oklahoma, South Dakota, Utah, and Vermont.

173. Idaho and Vermont. The New Jersey statute also provides for expungement of fingerprints.

174. California, Colorado, Hawaii, Idaho, Illinois, South Dakota, and Vermont also prohibit the distribution of fingerprints to persons other than local law enforcement officers. In each instance, however, there are exceptions to the prohibition. The weakest provision is South Dakota's, which excludes from the prohibition cases of felony or misdemeanor involving moral turpitude. Vermont's statute offers the strongest protection; it exempts only national security cases.

prints must be delivered to the court at the time directed in the order and promptly destroyed.

Only two significant cases have been found which deal with the issue of fingerprinting juveniles. The first involved a fourteen year old boy who was arrested, charged with murder, and fingerprinted. When the indictment was dismissed and the boy referred to the juvenile court, his father applied to that court for an order to have the prints turned over to the court for destruction. In granting the application, the court did not mention the statutory provision concerning fingerprints but relied on the fact that, under New Jersey law, a child under 16 is incapable of committing a crime.[175]

The other case, which involves the criminal prosecution of a juvenile, is now pending before the Supreme Court of the United States.[176] Davis, aged 14, was one of the 24 youths fingerprinted, for the purpose of matching latent prints found at the scene, in the course of investigating the rape and beating of an 86 year old woman. The Federal Bureau of Identification identified the latent prints as being those of Davis. Subsequently Davis was tried for rape, found guilty, and given a life sentence.[177] On appeal to the Mississippi Supreme Court Davis contended that his fingerprints were taken while he was illegally under arrest and without benefit of counsel and that this violated his rights under the fourth and fourteenth amendments. The court held first that Davis was not under arrest at the time his prints were taken, but he "was merely escorted to headquarters for interrogation, as in fact were numerous others, in the course of an investigation by police of an unsolved major crime."[178] Second, the court held that fingerprinting is a recognized and aeceptable means to identify criminals.[179] In concluding this portion of the opinion, the court said:

> We are unwilling to impose further restrictions upon the efforts of the police in the detection and punishment of criminals. The use of fingerprinting has long been recognized as a scientific or exact method of identification. It is as valuable in clearing the innocent as it is in bringing his crime home to the guilty.[180]

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175. Oberg v. Department of Law & Pub. Safety, 41 N.J. Super. 256, 124 A.2d 618 (Juv. & Dom. Rel. Ct. 1956).

176. Davis v. State, 204 So. 2d 270 (Miss. 1967), *cert. granted sub nom.* Davis v. Mississippi, 393 U.S. 821 (1968).

177. In Mississippi juvenile courts do not have jurisdiction over capital offenses including rape. *Id.*

178. 204 So. 2d at 275.

179. *Id.* at 276.

180. *Id.*

The United States Supreme Court has granted certiorari limiting the constitutional issues involved to the introduction of the fingerprints into evidence at Davis's trial.[181]

VII. POLICE RECORDS

The juvenile court laws in most states try to implement the policy of a non-punitive rehabilitative system of juvenile justice in many ways. For example, most jurisdictions use the term "taking into custody" instead of "arrest" so that juveniles can say on school, employment, and military forms that they have not been arrested.[182] In fact, many of these states say that the process does not constitute an arrest,[183] and two say that it will not constitute a police record.[184] Court records are supposed to be inaccessible for the same reason.[185]

Unfortunately, these protections exist more in law than in fact, because even if the information is not accessible from juvenile court records it is usually obtainable from police records.[186] The subject of police records is extremely important because virtually all juveniles who come into contact with the police may have police records. In some jurisdictions records are made and maintained on even those juveniles "picked up" by police and returned home without further action.[187]

The controversy concerning police records is similar in many ways to that surrounding the use of fingerprints. It is not the making of the record which is questioned,[188] but its maintenance and the people who have access to it. Police records, as well as fingerprint files, are useful in police work. There are two principal arguments advanced by the police for maintaining juvenile records: (1) The police and the courts need to know an offender's past anti-social behavior, if recorded, in order intelligently to determine appropriate dispositions.[189] (2) Police records are held out to be "the memory cell for information of value in affording knowledge of and protection from persons and conditions which endanger the safety and order of

181. 393 U.S. 821 (1968).
182. *See* notes 75-78 *supra* and note 210 *infra.*
183. *See* notes 76-78 *supra.*
184. *Id.*
185. *See Harvard Study, supra* note 47, at 779.
186. *Id.* at 785.
187. *Id.* at 784.
188. *But see* O'CONNOR & WATSON, *supra* note 47, at 63.
189. *Id.* at 61. *See also* MYRON & SWANSON, *supra* note 79, at 77.

the community."[190] Then the records are an aid in regular police investigative work.

One danger, which is recognized by the police, is that the police records do not always accurately reflect the minor's conduct.[191] In one article a former probation officer describes the case of an eleven year old boy who was charged with burglary by the California police. He had stolen a package of bologna from a grocery store to eat while running away from home, because of a conflict with this "uncle."[192] The juvenile court handled the case as a dependent child, but his police record of apprehension for burglary remained.[193] Another case involved a fourteen year old youth whom the police charged with child molesting for kissing his thirteen year old girl friend in public. The boy was reprimanded and sent home, but again the arrest charge remained in the police files.[194]

The argument that records must be maintained to help the police protect society is not very convincing if the police have not even referred the child to court. Nor is it convincing when the court has not seen fit to adjudicate the child a delinquent. Yet, in only two states, California and Kansas,[195] are there procedures for the destruction of police records maintained non-adjudicated youngsters.

The practice of maintaining these records can be extremely damaging to juveniles. In establishing criteria for hiring, firing, and promotion, most employers and labor organizations do not make any distinction between arrest and conviction or adjudication.[196] A recent study made by the New York Civil Liberties Union illustrates the problem. Seventy-five per cent of the employment agencies sampled in New York city ask job applicants about arrest records, and as a matter of regular and automatic procedure, do not refer those applicants with arrest records, whether followed by conviction or

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190. O'CONNOR & WATSON, *supra* note 47, at 61. *See also Harvard Study, supra* note 47, at 785.

191. O'CONNOR & WATSON, *supra* note 47, at 60.

192. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 WASH. U. L.Q. 147, 173.

193. *Id.*

194. *Id.*

195. CAL. WELFARE & INST'NS CODE § 781 (Deering Supp. 1968-69); KAN. STAT. ANN. § 38-815(h) (Supp. 1968).

196. E. SPARER, EMPLOYABILITY AND THE JUVENILE ARREST RECORD, TRAINING SERIES, New York Center for the Study of Unemployed Youth, Graduate School of Social Work, New York University, June 1966.

not.[197] Imagine how devastating this must be for the juvenile who was apprehended by the police and thus has a police record but was found uninvolved by the juvenile court, whose records, unlike police records, are likely to be confidential. Even if the court dismissal were reflected on the police record, and it usually is not, the inquirer is likely to conclude the youth "did something" or no police record would exist. Unless a juvenile is adjudicated delinquent by a court of law, absolutely no justification can exist for the maintenance of police records beyond a reasonable amount of time, perhaps six months after apprehension. The risk to society is minimal in such a case and the risk facing the juvenile with a police record is enormous.

At this point it seems appropriate to examine the statutory provisions on juvenile police records. Over half the states have no statutes concerning such records, and presumably in these states they are public records and may be examined by anyone. Twenty states have some provisions concerning juvenile police records. One of these states, Iowa, specifically provides that these records "shall be public records."[198] The other nineteen all limit access to these records.[199] Thirteen states require a court order to inspect the records,[200] while the other six provide that such records are not open to public inspection.[201]

For several reasons, these statutes do not necessarily provide the protection which would appear from a first reading. In some states

197. *Id.*

198. IOWA CODE ANN. § 232.56 (Supp. 1969).

199. ALASKA STAT. § 47.10.090 (Supp. 1962); COLO. REV. STAT. ANN. § 22-2-2 (Supp. 1967); FLA. STAT. ANN. § 39.03 (Supp. 1969); GA. CODE ANN. § 24.2418 (Supp. 1968); HAWAII REV. LAWS § 333-39 (Supp. 1965); IDAHO CODE ANN. § 16-1811 (Supp. 1967); ILL. ANN. STAT. ch. 37, §§ 702-8, 703-2 (Smith-Hurd Supp. 1969); KY. REV. STAT. ANN. § 208.340 (1963); KAN. STAT. ANN. § 38-815 (Supp. 1968); MO. ANN. STAT. § 211.321 (1959); MINN. STAT. ANN. § 260.161 (Supp. 1969); N.Y. FAMILY CT. ACT § 784; OKLA. STAT. ANN. tit. 10, § 1127 (Supp. 1968-69); S.C. CODE ANN. § 15-1291.18 (1962); S.D. LAWS ch. 164, § 43.0320 (1968); VT. STAT. ANN. tit. 33, § 663 (Supp. 1968); VA. CODE ANN. § 16.1-163 (1960); WIS. STAT. ANN. § 48.26 (Supp. 1968); WYO. STAT. ANN. § 14-102 (1965); All references to police record statutes in this section are to the statutory provisions cited in this footnote.

200. Five of these statutes (Alaska, Hawaii, Kansas, Missouri and Wisconsin) prohibit "inspection" except by court order. Seven statutes (Colorado, Illinois, Minnesota, Oklahoma, South Dakota, Vermont, and Virginia) prohibit "public" disclosure or "public" inspection except by court order. Florida provides for non-disclosure to the public, but allows that "the records of any child over the age of fourteen who is adjudicated delinquent may, in the discretion of the court, be opened to inspection by anyone."

201. GA. CODE ANN. § 24.2418 (1959); IDAHO CODE ANN. § 16-1811(7) (Supp. 1967); KY. REV. STAT. ANN. § 208.340 (1963); N.Y. FAMILY CT. ACT § 784; S.C. CODE ANN. § 15-1291.18(6) (1962); WYO. STAT. ANN. § 14-102(e) (1965).

the statutes explicitly allow certain persons access to these records without resort to court order; for example, schools, hospitals, churches, social and welfare agencies, juvenile courts and law enforcement agencies.[202] In other states, despite the statutory protections outlined above, federal agencies (especially the armed forces), many private employers, state and city employment agencies, housing authorities and others seem to be able to inspect these records.[203] For example, the New York Civil Service Commission turned down an engineer's job application because of his juvenile arrest record some twelve years earlier. Although the decision was overturned in *Adler v. Lang*,[204] it cannot be assumed that legal relief is sought in each instance where employment is denied for this reason.

Another problem is that only three states offer any guidelines for the granting of a disclosure order by the judge.[205] Without guidelines it is difficult for the court to decide to what extent the decision should be based on the needs of the employer or any other person asking permission to see the records and to what extent the decision should be influenced by the best interest of the juvenile. Statutory clarification of the term "public" would also be helpful. It seems likely that there is considerable variation from court to court in the definition of that term.

Some states have adopted expungement statutes in an effort to balance society's need to be protected from criminals and the juvenile's need to be free of the stigma of being a "criminal." Provisions for expungement of juvenile police records are included in the statutes of seven states.[206] The offender must meet a number of requirements before his record may be expunged. All but one of the

202. Note the statutes of Wisconsin and Kentucky. Wisconsin excepts from the requirement of non-disclosure without court order the "confindential exchange of information between the police and officials of the school attended by the child or other law enforcement or social welfare agencies." WIS. STAT. ANN. § 48.26 (Supp. 1968). Kentucky makes the record available to the "family, guardian, or legal representative of the child involved," and "to the court, probation officers, to a representative of any public or private social agency, institution, hospital or church, having a direct interest in the record or social history of the child." KY. REV. STAT. ANN. § 208.340. (1963).

203. E. SPARER, *supra* note 196.

204. 21 App. Div. 2d 107, 248 N.Y.S.2d 549 (1964).

205. Statutes in Vermont, Virginia, and Florida do offer guidelines for the granting of such an order. In Vermont, the court may order disclosure "in the interests of the child," VT. STAT. ANN. tit. 33, § 663(a) (Supp. 1968); in Virginia, the judge may grant disclosure to "persons having a legal interest therein," VA. CODE ANN. § 16.1-163 (1960); and in Florida, the statute allows the judge to grant an order for disclosure if a child is over 14 and adjudicated a delinquent, FLA. STAT. ANN. § 39.03(6) (Supp. 1969).

206. CAL. WELFARE & INST'NS CODE § 781 (Deering Supp. 1968-69); COLO. REV. STAT.

statutes[207] require a waiting period after termination of court jurisdiction. In addition, the juvenile must not have been convicted of a felony or misdemeanor involving moral turpitude since his release from the training school or court jurisdiction, nor should such a proceeding be pending. Or the court must find that the juvenile has been "rehabilitated," which in effect provides the court with discretion in granting or denying expungement of the record.

Ideally, the statute should set forth the effects of an order expunging the record with respect to the arrest, detention, offense, probation, and conviction. It should also specify the relation of such an order to relevant questions asked on employment applications, school admission forms, examination as a witness, passports, and so forth. Notably, the statutes in California, Colorado, Utah, and Vermont similarly provide that after the entry of an expungement order, all proceedings are to be deemed never to have occurred, and thus the child may reply accordingly to inquires on such matters.[208] This type of explanation does not leave the offender in a quandry as to how such questions should be answered.

In the past there has been some objection to the effects of an expungement order. The concern centers about the "legalized prevarication" which is created[209] in answering "no" to questions of arrest and conviction.[210] Since it is felt that this form of legalizing impairs the law's integrity, it has been suggested that state statutes include a provision that persons may be questioned "only with respect to arrests or convictions not annulled or expunged."[211]

ANN. § 22-1-11(b) (Supp. 1967); IND. ANN. STAT. § 9-3215(a) (Supp. 1968); KAN. STAT. ANN. § 38-815 (Supp. 1968); S.D. LAWS ch. 164, § 43.0321 (1968); UTAH CODE ANN. § 55-10-117 (Supp. 1967); VT. STAT. ANN. tit. 33, § 665 (Supp. 1968). All references to expungement statutes in this section are to the statutory provisions cited in this footnote.

207. KAN. STAT. ANN. § 38-815(h) (Supp. 1968).

208. In Colorado, "[t]he person and court may properly reply that no record exists with respect to such person upon any inquiry in the matter." COLO. REV. STAT. ANN. § 22-1-11(2)(d) (Supp. 1967). In California and Utah, such person "may properly reply accordingly." CAL. WELFARE & INST'NS CODE § 781 (Deering Supp. 1968-69); UTAH CODE ANN. § 55-10-117 (Supp. 1967). The Vermont statute reads: "The person, the court and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such person upon inquiry in the matter." VT. STAT. ANN. tit. 33, § 665(c) (Supp. 1968).

209. Gough, *supra* note 192, at 189.

210. Drafters of application forms have progressed beyond asking "have you ever been arrested" and "have you ever been convicted of a crime" to "have you ever been taken into custody," and "have you ever appeared in court," and other more sophisticated forms of questions. *Harvard Study*, *supra* note 47, at 800.

211. Gough, *supra* note 192, at 188.

Although the public needs protection against crime, it is important to remember that "despite the fact that many adult criminals were juvenile delinquents, only a very small percentage of juveniles who have contact with the police while growing up actually become criminals."[212] Juvenile offenders who subsequently achieve satisfactory social adjustments should not have the shadow of a police record jeopardizing their future.

The juveniles most in need of protection from such records are those who have had "contacts" with the police but either have not been referred to court or, if so referred, have not been adjudicated delinquent. No court has determined that these juveniles are "offenders," and there would seem to be no justification for continued maintenance of their police records to protect the public. The records may be necessary, however, in order to aid police in deciding whether referral to juvenile court is necessary. The whole question of police discretion and the criteria for such discretion must be decided before a decision can be made about the merits of keeping police records for this purpose. In any event, police records should not be maintained on such juveniles for more than a few months.

If there is to be a separate system of justice for juveniles, police records should not be available to anyone but the juvenile court. When a juvenile is "taken into custody" it is illogical to say that such process is not an "arrest" and that he has not committed a crime, yet at the same time saddle him with a criminal record which is available to numerous people and agencies. Even if access is limited, it appears necessary that the record be destroyed at some point, either automatically or by expungement. If the juvenile continues to commit anti-social acts as an adult, he will have an adult record. It is difficult to find any reason for the juvenile record to follow him through his adult life, except as a punishment. If expungement is to be the method of eliminating the record the following procedures should be adopted: (1) The juvenile should be informed of his right to expungement.[213] (2) The effects of expungement should be made clear to the juvenile and to those who will receive inquiries about his record. (3) The waiting period should not be so long that it nullifies its effect on rehabilitation; for example, a five year waiting period is too long if a 17 year old juvenile wants to go to college.[214] (4) Expungement

212. MYRON & SWANSON, *supra* note 79, at 79.

213. Only in Colorado and South Dakota do the expungement statutes require the court to so inform the child of this rights.

214. As they exist, the seven expungement statutes which reach the police record offer

proceedings should be available to all juveniles with police records. (5) There should be a provision for appeal if the judge has discretion to deny expungement.[215] Finally, if there is a consensus that juvenile proceedings are truly to be noncriminal and confidential, then there is fuel for the suggestion that employers and others should be prohibited by law from questioning about any arrests, apprehensions, or detentions leading to such proceedings.[216]

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wide variation. Kansas imposes no time requirement while the other six states run the gambit from one year after unconditional release or termination of court jurisdiction to five years after such termination. The time which must elapse before the expungement procedure becomes available is very often that in which the existence of the record is most important, the time of higher education, military service, and/or initial employment. See *Harvard Study*, *supra* note 47, at 800.

215. Gough, *supra* note 192, at 187.

216. E. SPARER, *supra* note 196.