1993

Criminalizing the American Juvenile Court

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ABSTRACT

Progressive reformers envisioned a therapeutic juvenile court that made individualized treatment decisions in the child's "best interests." The Supreme Court's *Gault* decision provided the impetus for transforming the juvenile court from an informal welfare agency into a scaled-down criminal court. Since *Gault*, the juvenile court procedures increasingly resemble those of adult courts, although in some respects, such as assistance of counsel, juveniles receive less adequate protections. Judicial and legislative changes have altered the juvenile court's jurisdiction over noncriminal status offenders and serious young offenders—as the former are diverted from the system, the latter are transferred to adult criminal courts. Juvenile courts increasingly punish youths for their offenses rather than treat them for their "real needs." These charges eliminate most differences between juvenile and criminal courts. The juvenile court must either develop a new rationale and mandate or face further erosion and redundancy.

The Supreme Court's decision *In re Gault*, 387 U.S. 1 (1967), began transforming the juvenile court into a very different institution than the Progressives contemplated. Progressives envisioned an informal court whose dispositions reflected the "best interests" of the child. In *Gault*, the Supreme Court engrafted formal procedures at trial onto the juvenile court's individualized treatment sentencing schema. Although the Court's decisions were not intended to alter the juvenile court's therapeutic mission, subsequent legislative, judicial, and administrative responses to *Gault* have modified the court's jurisdiction, purpose, and

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0192-3234/93/0017-0002$01.00

procedures (Feld 1984, 1987, 1988*b*). As a result, juvenile courts now converge procedurally and substantively with adult criminal courts.

Legislative recognition that juvenile courts often failed to realize their benevolent purposes has led to two jurisdictional changes. The first concerns status offenses—misconduct by juveniles such as truancy or incorrigibility that would not be a crime if committed by an adult. Recent reforms limit the dispositions that noncriminal offenders may receive or remove status offenses from juvenile court jurisdiction altogether. A second jurisdictional change is the criminalizing of serious juvenile offenders. Increasingly, some youths are transferred from juvenile courts to criminal courts for prosecution as adults.

As the juvenile court's jurisdiction contracts, its commitment to rehabilitating offenders is also changing. The sentences that delinquents charged with crimes receive increasingly are based on the idea of just deserts rather than their "real needs." Proportional and determinate sentences based on the current offense and prior record, rather than the "best interests" of the child, dictate the length, location, and intensity of intervention. An increased emphasis on formal procedural justice has accompanied the enhanced role of punishment in sentencing juvenile offenders. Although in principle juvenile courts' procedural safeguards closely resemble those of criminal courts, in practice, the procedural justice routinely afforded juveniles is far less than the minimum insisted on for adults.

Throughout its history, the juvenile court has been marked by a disjunction between its rehabilitative rhetoric and its punitive reality (Rothman 1980; Feld 1990*b*). As the Supreme Court noted in *Kent v. United States*, 383 U.S. 541, 555 (1966), "The child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Even as states increasingly punish young offenders, most juvenile codes provide neither special procedural safeguards to protect juveniles from their own immaturity nor the full panoply of adult criminal procedural safeguards to protect them from punitive state intervention. Rather, juvenile courts employ procedures that assure that youths continue to "receive the worst of both worlds," treating delinquents just like adult criminal defendants when formal equality redounds to their disadvantage while providing less adequate juvenile court safeguards when those deficient procedures redound to the advantage of the state (Feld 1984, 1990*b*). This is most evident, for example, in the continuing

absence of counsel for many juveniles in many states (Feld 1988*a*, 1989, 1991; Kempf, Decker, and Bing 1990).

The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the conceptual and operational differences in strategies of social control for youths and adults. Even with the juvenile court's transformation into a scaled-down criminal court, however, its modes of operation continue virtually unchanged from an era when its processes were informal by design and its purposes expressly rehabilitative. Despite juvenile courts' inability to prevent or reduce youth crime, they survive and even prosper. Despite statutory and judicial reforms, official discretion arguably has increased rather than decreased. This raises the question whether there is any longer any reason to maintain a punitive juvenile court separate from the adult criminal court whose only distinction is its persisting procedural deficiencies.

This essay draws on judicial opinions, legislative changes, empirical research, and theoretical writings to evaluate the contemporary juvenile court. Its purpose is to describe and analyze the transformation of the juvenile court from a benevolent, therapeutic institution into a scaled-down criminal court for young people and to assay the policy implications of these changes. Section I examines the assumptions underlying the original juvenile court and its subsequent constitutional domestication after *Gault*. Section II provides an overview of the sources of knowledge and data-analytic techniques used to examine juvenile courts. Section III examines the shift from informal to formal procedures in juvenile justice administration following *Gault*. Section IV examines legal and policy changes in the juvenile court's response to noncriminal status offenders. Section V analyzes changes in the response to serious young offenders. Section VI employs a variety of indicators to document the jurisprudential shift in sentencing policy from treating delinquent offenders to punishing them. Section VII considers alternative models of a juvenile court and the policy issues they raise.

I. The Transformation of the Juvenile Court

Ideological changes in cultural conceptions of children and in strategies of social control during the nineteenth century led to the creation of the juvenile court in Cook County, Illinois, in 1899 (Sutton 1988;

Ainsworth 1991). Progressive reformers applied new theories of social control to new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youths (Fox 1970*a;* Empey 1979; Mennel 1983; Sutton 1988). Before the juvenile court, the only special protections accorded young offenders charged with crimes were those afforded by the common law's infancy mens rea defense (Fox 1970*b;* McCarthy 1977*a;* Weissman 1983; Walkover 1984). The criminal law presumed that rational actors made blameworthy choices and exempted from punishment categories of people who lacked the requisite moral and criminal responsibility (Kadish 1968). At common law, children less than seven years old were conclusively presumed to lack criminal capacity, while those fourteen years of age and older were treated as fully responsible. Between the ages of seven and fourteen years, there was a rebuttable presumption of criminal incapacity (Fox 1970*b;* McCarthy 1977*a;* Weissman 1983). If found to be criminally responsible, youths as young as twelve years of age could be and were executed (Streib 1987).

Historically, the criminal law presented the stark alternatives of a criminal conviction and punishment as an adult or an acquittal or dismissal that freed a youth from all supervision. Jury or judicial nullification to avoid punishment excluded many youths from control, particularly those charged with minor offenses (Fox 1970*a;* Platt 1977). To avoid these consequences, special institutions for youths proliferated. In the early to mid-nineteenth century, the first youth institutions, Houses of Refuge, made their appearance in the East Coast urban centers (Fox 1970*a;* Hawes 1971; Rothman 1971; Mennel 1973). By mid-century, reformatories and youth institutions spread to the rural and midwestern regions (Rothman 1980; Sutton 1988). By the end of the century, juvenile courts completed the process of differentiating the social control of youths from adults (Platt 1977; Ryerson 1978; Rothman 1980).

A. The Progressive Juvenile Court

By the end of the nineteenth century, America had changed from a rural, agrarian society to an urban, industrial society (Wiebe 1967). Between 1870 and World War I, railroads fostered economic growth, changed the processes of manufacturing, and ushered in a period of rapid social and economic modernization (Hofstadter 1955; Hays 1957; Kolko 1963; Wiebe 1967). Traditional social patterns faced new challenges as immigrants, primarily from southern and eastern Europe, and

rural Americans flooded into the burgeoning cities to take advantage of new economic opportunities. The "new" European immigrants differed in language, religion, political heritage, and culture from the dominant Anglo-Protestant Americans who had preceded them (Hofstadter 1955; Higham 1988). They predominantly were peasants; their cultural and linguistic differences from the dominant culture, coupled with their numbers, hindered their assimilation. Overburdened by numbers, cities proved unable to provide even basic needs (Trattner 1984). Crowded ethnic enclaves, urban ghettos, poverty, disorder, crime, and inadequate social services were untoward features of modern urban industrial life.

Changes in family structure and functions accompanied the economic transformation and included a reduction in the number and spacing of children, a shift of economic functions from the family to other work environments, and a modernizing and privatizing of the family that substantially modified the roles of women and children (Kett 1977; Lasch 1977; Demos and Boocock 1978; Degler 1980). The latter development was especially noticeable in the upper and middle classes, which had begun to view children as corruptible innocents whose upbringing required special attention, solicitude, and instruction (DeMause 1974; Kett 1977). The social construction of childhood as a recognizable developmental stage is a relatively recent phenomenon (Ainsworth 1991). While Aries (1962) contends that, prior to the past two or three centuries, young people were regarded as miniature adults, small versions of their parents, clearly by the end of the nineteenth century, a newer view of childhood and adolescence emerged (Kett 1977; Hawes and Hiner 1985; Ainsworth 1991). Children increasingly were seen as vulnerable, innocent, passive, and dependent beings who needed protection and extended preparation for life (Kett 1977; Platt 1977; Zimring 1982; Hawes and Hiner 1985).

The social and economic changes associated with modernization and industrialization sparked the Progressive Movement (Hofstadter 1955; Wiebe 1967). Progressivism encompassed a host of ideologies and addressed issues ranging from economic regulation to criminal justice and social and political reform. One unifying theme was that professionals and experts could develop rational and scientific solutions to social problems that would be administered by the state (Sutton 1988). Progressive reliance on the state reflected a fundamental belief that state action could be benevolent, that government could rectify social problems, and that Progressive values could be inculcated in others (Allen

1964, 1981). Progressives felt no reservations when they attempted to "Americanize" the immigrants and poor through a variety of agencies of assimilation and acculturation to become sober, virtuous, middle-class Americans (Platt 1977; Rothman 1978, 1980).

The Progressives' trust of state power coupled with the changing cultural conception of children and child rearing led them into the realm of "child saving" (Platt 1977). Child-centered Progressive reforms, such as the juvenile court system, child labor and welfare laws, and compulsory school attendance laws, both reflected and advanced the changing imagery of childhood (Cremin 1961; Trattner 1965; Wiebe 1967; Kett 1977; Tiffin 1982). Progressive programs attempted to structure child development, control and mold children, and protect them from exploitation. The goals and the methods of these programs, however, often reflected the Anglo-Americans' antipathy to the immigrant hordes and a desire to save the second generation from perpetuating the Old World ways (Platt 1977; Empey 1979).

Changes in ideological assumptions about human behavior and social deviance led Progressives to new views on criminal justice and social control policies (Rothman 1980; Allen 1981). Positivism—the effort to identify the various factors that cause crime and deviance—challenged the classic formulations of crime as the product of free will choices (Matza 1964; Allen 1981). Positive criminology, as distinguished from "free will," asserted a scientific determinism of deviance, sought to identify the causal variables producing crime and delinquency, and informed many Progressive criminal justice reforms (Allen 1964; Platt 1977; Rothman 1980). Assuming that criminal behavior was determined rather than chosen reduced actors' moral responsibility and led to a focus on reforming offenders rather than punishing them for their offenses (Allen 1964, 1981; Matza 1964; Rothman 1980). Applying medical analogies to the treatment of offenders, a growing class of social science professionals fostered the "rehabilitative ideal" (Platt 1977; Ryerson 1978; Allen 1981).

A flourishing "rehabilitative ideal" entails certain assumptions about means and ends. It requires a belief in the malleability of human behavior and a basic moral consensus about the appropriate directions of human change (Allen 1964, 1981). Progressives believed that the new behavioral sciences provided them with the tools for systematic reform and that it was proper to impose the virtues of a middle-class lifestyle on immigrants and the poor (Rothman 1980; Allen 1981). The "rehabilitative ideal," which permeated Progressive criminal justice reforms

such as probation and parole, indeterminate sentences, and the juvenile court (Allen 1964, 1981; Rothman 1980), emphasized open-ended, informal, and highly flexible policies. Discretion was necessary because diagnosing the causes of and prescribing the cures for delinquency required an individualized, case-by-case strategy that precluded uniform treatment or standardized criteria (Rothman 1980). It is probably not coincidental that the increased flexibility, indeterminacy, and discretion in social control practices corresponded with the increasing volume and changing ethnic characteristics of offenders during this period (Fox 1970*a;* Sutton 1988).

Progressive "child savers" described juvenile courts as benign, nonpunitive, and therapeutic, although modern writers disagree as to whether their movement should be seen as a humanitarian attempt to save poor and immigrant children (Hagan and Leon 1977; Sutton 1988) or as an effort to expand state social control over them (Fox 1970*a;* Platt 1977). The legal doctrine of *parens patriae*, the state as parent, legitimated intervention (Cogan 1970; Rendleman 1971). The *parens patriae* doctrine drew no distinction between criminal and noncriminal conduct, a view that supported the Progressive position that juvenile court proceedings were civil rather than criminal in nature. The civil nature of the proceedings fulfilled the reformers' desire to remove children from the adult criminal system and allowed greater supervision of children and greater flexibility in treatment (Hawes 1971; Platt 1977; Rothman 1980). Because the reformers eschewed punishment, through the juvenile court's "status jurisdiction" they could respond to noncriminal behavior such as smoking, sexual activity, truancy, immorality, or living a wayward, idle, and dissolute life—activities that previously might have been ignored but that the Progressives wished to end because it betokened premature adulthood (Rosenberg and Rosenberg 1976; Schlossman and Wallach 1978; Garlock 1979). Status jurisdiction reflected the reformulated conception of childhood and adolescence that had emerged during the nineteenth century and authorized predelinquent intervention to forestall premature adulthood, enforce the dependent position of youth, and supervise children's moral upbringing (Platt 1977; Rothman 1980).

The "rehabilitative ideal," as implemented in the juvenile court, envisioned a specialized judge trained in social sciences and child development whose empathic qualities and insight would aid in making individualized dispositions. Specialized judges, assisted by social service personnel, clinicians, and probation officers, would act in the "best

interests of the child" (Ryerson 1978; Rothman 1980). Progressives assumed that a rational, scientific analysis of facts would reveal the proper diagnosis and prescribe the cure, and the juvenile court's methodology encouraged collecting as much information as possible about the child. The resulting factual inquiry into the whole child accorded minor significance to the specific crime since the offense indicated little about a child's "real needs." Because the reformers' aims were benevolent, their solicitude individualized, and intervention guided by science, they saw no reason to circumscribe narrowly the power of the state. Rather, they maximized discretion to provide flexibility in diagnosis and treatment and focused on the child's character and lifestyle rather than on the crime.

By separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected both the criminal law's jurisprudence and its procedural safeguards such as juries and lawyers. Court personnel used informal procedures and a euphemistic vocabulary to eliminate any stigma and implication of an adult criminal proceeding (Mack 1909; President's Commission on Law Enforcement and Administration of Justice 1967*b*). Hearings were confidential and private, access to court records was limited, and youths were "adjudicated" to be "delinquent" rather than convicted and found to be guilty of an offense. Theoretically, a child's "best interests," background, and welfare guided dispositions (Mack 1909). Since a youth's offense was only a symptom of the "real" needs, sentences were indeterminate, nonproportional, and potentially continued for the duration of minority. The events that brought the child before the court affected neither the degree nor the duration of intervention because each child's needs differed and no limits could be defined in advance.

B. The Constitutional Domestication of the Juvenile Court

By the 1960s, several forces combined to erode the rehabilitative premises of the Progressive juvenile court and undermine support for discretionary, coercive socialization in juvenile courts, criminal justice, and social welfare. A flourishing "rehabilitative ideal" entails assumptions about means and ends: faith in human malleability and the existence of an effective change technology, and a social consensus regarding what it means to be "rehabilitated"—that is, agreement about the nature of the "finished product" (Allen 1981). Progessives believed that the new social sciences and the medicalization of deviance provided them with the tools for reformation and that it was proper to socialize

and acculturate the children of the poor and immigrants to become middle-class Americans (Rothman 1978, 1980; Ryerson 1978).

By the time of *Gault*, the Progessives' consensus about state benevolence, the legitimacy of imposing certain values on others, and what rehabilitation entailed and when it had occurred were all matters of intense dispute (Rothman 1978; Allen 1981). The decline in deference to the professionalism and benevolence of rehabilitative experts led to an increased emphasis on procedural formality, administrative regularity, and the rule of law.

Several forces unraveled support for the rehabilitative enterprise and led to the imposition of due process safeguards in juvenile and criminal justice: left-wing critiques of rehabilitation that characterized all governmental programs as coercive instruments of social control through which the state oppresses the poor and minorities (American Friends Service Committee 1971), liberal disenchantment with the unequal and disparate treatment of similarly situated offenders resulting from treatment officials' exercise of clinical discretion (Rothman 1978), and conservative advocates of a "war on crime" during the turbulent 1960s who favored repression over rehabilitation (Graham 1970).

The reevaluation of juvenile and criminal justice social control strategies in the 1960s was occasioned by the dramatic increase in youth crime and urban disorders as the children of the post–World War II "baby boom" came of age. The demographic bulge in the cohort of fourteen- to twenty-four-year-olds overwhelmed many traditional socializing institutions, led to fears of the young, an increase in social disorder associated with the young, and increased demands for their social control (Coleman et al. 1974). Black migration from the rural South to the urban North during and after World War II greatly increased minority concentrations in urban ghettos and gave impetus to the civil rights movement (Hodgson 1976). Urban riots in the 1960s exacerbated the crisis of "law and order," added fuel for the advocates of repression, and led to the elections of Richard Nixon as president and Ronald Reagan as governor of California.

The decline of support for rehabilitation accompanied the declining legitimacy of public authority (Allen 1981). Where Progressive claims of benevolence legitimated a program, by the 1960s, bureaucratic assertions of benevolence elicited skepticism and scrutiny (Rothman 1978). Empirical evaluations of treatment programs raised substantial doubts about the effectiveness of efforts to coerce change and concerns about the subjectivity inherent in therapeutic justice (Martinson 1974; Allen

1981). Questioning the scientific bases of rehabilitation also implicated the processes by which it was implemented as critics equated discretionary expertise with standardless subjectivity that lent itself to discriminatory applications (American Friends Service Committee 1971).

Although constitutional criminal procedural safeguards served to protect citizens against governmental power, the Progressives had redefined coercion as benevolent social services, rejected the antagonism of governmental power and citizens' liberty interests, and insulated many forms of intervention from formal legal limitations (Rothman 1978). As the relationship between state benevolence and coercion became more apparent and the expertise of the intervenors more suspect, the Supreme Court resorted to adversarial procedures and rule-oriented limitations to protect individual liberties.

In the 1960s, the issue of race in American society was the crucial factor linking distrust of governmental benevolence, concern about social service personnel's discretionary decision making, the crisis of "law and order," and the Supreme Court's due process jurisprudence (Graham 1970; Debele 1987). The Warren Court's "due process revolution," which reformed the criminal process and the administration of social services, reflected a judicial effort to expand civil rights, protect minorities from state officials, and infuse governmental services with greater equality through the imposition of the rule of law and procedural restraints on official discretion (Graham 1970; Rothman 1978). Beginning with the struggle for racial justice in school desegregation in *Brown v. Board of Education*, 347 U.S. 483 (1954), during the 1960s the Warren Court interpreted the Constitution to restrict the scope of governmental intervention in citizens' lives, extended equality to minorities and the disenfranchised, and regularized administrative decision making. In the context of criminal justice, the Supreme Court simultaneously applied many of the provisions of the Bill of Rights to the states, redefined and expanded the meanings of those rights to control the actions of local law enforcement officials, and extended constitutional safeguards to administrative officials previously immune from judicial scrutiny (Graham 1970).

The Supreme Court's juvenile court decisions in *Gault* and several later cases mandated procedural safeguards in delinquency proceedings and focused judicial attention initially on whether the child committed an offense as prerequisite to sentencing (Feld 1984, 1988*b*). In shifting the formal focus of juvenile courts from "real needs" to legal guilt, *Gault* identified two crucial gaps between juvenile justice rhetoric and

reality: differences between the theory and the practice of rehabilitation and between procedural safeguards afforded adults and those available to juveniles. The *Gault* Court emphasized that juveniles charged with crimes who faced institutional confinement required elementary procedural safeguards including advance notice of charges, a fair and impartial hearing, assistance of counsel, an opportunity to confront and cross-examine witnesses, and the privilege against self-incrimination (Paulsen 1967; Rosenberg 1980; McCarthy 1981; Feld 1984). Thus began the procedural convergence of the juvenile justice system with the adult criminal process.

In *In re Winship*, 397 U.S. 358 (1970), the Court concluded that the risks of unwarranted convictions and the need to protect against government power required delinquency to be proved by the criminal law's standard of proof "beyond a reasonable doubt" rather than by lower civil standards of proof. In *Breed v. Jones*, 421 U.S. 519 (1975), the Court posited a functional equivalence between criminal trials and delinquency proceedings and applied the bar on double jeopardy to delinquency convictions.

In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), however, the Court denied to juveniles the constitutional right to jury trials and halted the extension of full procedural parity with adult criminal prosecutions. In contrast to its analyses in earlier decisions, the *McKeiver* Court reasoned that "fundamental fairness" in delinquency proceedings required only "accurate factfinding," a requirement that can be satisfied as well by a judge as by a jury. Unlike *Gault* and *Winship*, which recognized that procedural safeguards protect against governmental oppression, the Court in *McKeiver* denied that such protection was required and invoked the stereotype of the sympathetic, paternalistic juvenile court judge (Feld 1984, 1988*b*). Although the *McKeiver* Court relied on the differences between juvenile courts' *treatment* rationale and criminal courts' *punitive* purposes to justify the procedural differences in the two settings, it did not analyze the differences between treatment as a juvenile and punishment as an adult that warranted those procedural differences (Feld 1987, 1988*b*).

Together, *Gault*, *Winship*, and *McKeiver* precipitated a procedural and substantive revolution in the juvenile court system that unintentionally but inevitably transformed it from its original Progressive conception. By emphasizing criminal procedural regularity in the determination of delinquency, the Supreme Court shifted the focus of juvenile courts from paternalistic assessments of a youth's "real needs" to proof

of the commission of criminal acts. By formalizing the connection between criminal conduct and coercive intervention, the Court made explicit a relationship that previously was implicit and unacknowledged.

Since those decisions, a variety of legislative, judicial, and administrative actions have transformed the juvenile court. Four developments—increased procedural formality, removal of status offenders from juvenile court jurisdiction, waiver of serious offenders to the adult system, and an increased emphasis on punishment in sentencing delinquents—are manifestations of the criminalizing of the juvenile court. These reforms have not been implemented as intended, have not had their expected effects, and as a result, the juvenile court has been transformed but remains unreformed. While the remainder of this essay examines these changes and their implications for the juvenile court, it is first necessary to identify some of the sources of knowledge about juvenile courts and their administration.

II. Sources of Knowledge about the Juvenile Court

Juvenile courts are a study in contradictions marked by disjunctions between theory and practice, between rehabilitative rhetoric and punitive reality, and between the law on the books and the law in action (Feld 1990*b*). Analyses are complicated further because juvenile courts are almost exclusively state statutory entities with only a secondary federal judicial role. Among the fifty separate state systems, juvenile courts differ substantially in both their legislative definitions and processing of young offenders. In different states, a juvenile court may be a division of the court of general jurisdiction, a separate court, or part of an inferior court system (Edwards 1992). In most states, juvenile court jurisdiction encompasses criminal and noncriminal misconduct by all persons under eighteen years of age. However, in twelve states, adult criminal court jurisdiction begins at sixteen or seventeen years of age, while in Wyoming, it may not begin until a youth is nineteen (Hamparian et al. 1982; Feld 1988*b*). In addition, even where general juvenile court jurisdiction extends until eighteen years of age, some states may automatically place younger youths charged with serious offenses in adult criminal court (Feld 1987). In a few states, juvenile and criminal courts exercise concurrent jurisdiction over young offenders, which means that the prosecutor's decision to charge a youth as a juvenile delinquent or as an adult criminal determines the forum in which the case will be heard (Feld 1978, 1987; Hamparian et al. 1982).

As a consequence of variations in legislative definitions, juvenile courts in different jurisdictions may confront widely divergent clientele. While it is possible to generalize about juvenile courts, analyses of juvenile justice administration necessarily must be qualified by specific references to each state's legislative nuances and judicial opinions.

A. Sources of Knowledge

Analyzing states' juvenile court "law on the books" is the relatively straightforward task of legal scholarship and involves analyses of statutes, judicial opinions, and court rules. For example, juvenile courts' procedures are structured by an amalgam of United States Supreme Court constitutional decisions such as *Gault*, state statutes, judicial opinions, and court rules of procedure; juvenile court procedures are analyzed by comparing those used in different jurisdictions or in criminal courts (Rosenberg 1980; McCarthy 1981; Feld 1984). Legal scholars also analyze juvenile court substantive law, for example, by examining statutes and judicial opinions regulating juvenile court sentencing practices (Walkover 1984; Feld 1988*b*) or the bases for transferring some juveniles to criminal courts (Vereb and Hutzler 1981; Hamparian et al. 1982; Feld 1987).

Analyzing the "law in action" in juvenile courts is a more complicated matter. There have been relatively few intensive ethnographic studies of juvenile courts that provide detailed information about the operations of a single juvenile court (Cicourel 1968; Emerson 1969; Bortner 1982). Such studies typically involve participant observation of a court's operations over a period of months or years, extensive interviews with selected or random samples of court personnel, observations of court hearings and other decisions, identification and tracking of individual juveniles' cases through the process, or statistical analyses of cases processed during the observation period (Cicourel 1968; Emerson 1969; Bortner 1982). While these studies provide a richness of data and analyses, unfortunately they are somewhat dated and do not reflect the contemporary reality of juvenile justice administration. Moreover, in order to preserve the anonymity of the court sites being observed, the authors do not provide enough information about the courts' social structural contexts to permit generalization to other courts in other settings.

Many studies of juvenile justice administration rely on secondary analyses of official data collected by local or state agencies: police, probation, prosecution, juvenile courts, corrections, and the like (e.g.,

Henretta, Frazier, and Bishop 1986; Feld 1989, 1991; Bishop and Frazier 1992). Reliance on official police crime statistics is frequently criticized because of concerns about underreporting of crime by victims to the police as well as by police departments to the FBI and selection bias by police in detecting, recording, and reporting crime (Sampson 1986).

Official juvenile court statistics reflect further population selection biases. The typical juvenile delinquency or status offense case begins with a juvenile's referral by police, parents, probation officers, or school officials to either the county prosecuting attorney, a county's juvenile court, or the court's juvenile probation or intake department. These prosecutorial and intake "gatekeepers" may screen cases on a discretionary basis for legal sufficiency, social welfare needs, or both to determine whether formal juvenile court intervention is appropriate (Feld 1989). Many referrals are dismissed by prosecutors or closed by the social services staff at intake with some type of *informal* disposition —dismissal, counseling, warning, diversion or referral to another agency, or informal probation—that does not result in the filing of a petition. In the remaining cases, the juvenile process is *formally* initiated by the filing of a petition, typically by the prosecuting attorney. In many jurisdictions, referrals that do not result in formal charges may not generate systematic records that can be retrieved or analyzed. This is an important source of population selection bias in juvenile records since informal screening and formal charging practices vary considerably among states, as well as among counties within a state. Between 1957 and 1982, for example, approximately half of all delinquency referrals nationwide were handled by formal petition, ranging from a high of 54 percent in some years to a low of 41 percent in others (Nimick, Szymanski, and Snyder 1985, p. 12). In 1988, 48 percent of all delinquency referrals and 22 percent of all status referrals resulted in the filing of a formal petition (Snyder et al. 1990, pp. 14, 99). One study reported that in four states the proportion of juvenile court referrals that resulted in the filing of petitions ranged from 10.7 percent to 62.8 percent (Feld 1988*a*).

For those cases that become official juvenile court statistics, access to and secondary analyses of juvenile court data becomes somewhat easier in many jurisdictions. Following passage of the Juvenile Justice and Delinquency Prevention Act of 1974, the Office of Juvenile Justice and Delinquency Prevention within the U.S. Department of Justice has supported the National Juvenile Court Data Archive (NJCDA)

at the National Center for Juvenile Justice (NCJJ). In the mid-1970s, state and local juvenile courts began to adopt automated record keeping and statistical reporting systems. Thirty states or metropolitan courts now contribute case-level data or court-level aggregate statistics to NJCDA (National Center for Juvenile Justice 1991). While the amount of data and types of variables contained in the respective states' data sets vary considerably, these official data have considerable validity because they were designed and collected by state and local juvenile courts to meet their own calendar, information, planning, and operational needs (Snyder et al. 1990).

Each year, data contributed to NJCDA are merged to create a national data set containing detailed descriptions of cases handled by the states' juvenile courts (Snyder et al. 1990).[1] Although the individual states collect, code, and report different types of information about a case, NJCDA has developed a standardized, national coding format that enables it to recode the raw data provided by the states into a more uniform format. The staff study codebooks and operation manuals, interview data suppliers, and analyze data files to maximize their understanding of each information system.

The diversity and quantity of data in NJCDA permit analyses that would not be possible within a more general and uniform national coding system such as the FBI's Uniform Crime Reports. In one study of 17,195 individual juveniles' cases in Minnesota in 1986, Feld (1989) analyzed the delivery of legal services and the impact of counsel in juvenile courts and reported considerable variation in juvenile justice administration in counties in which lawyers routinely, occasionally, and seldom appeared.[2] In a second analysis of that NJCDA data file,

[1] The NJCDA's unit of count is "cases disposed." Each "case" represents a youth whose case is disposed of by the juvenile court for a new delinquency or status referral. A case is "disposed" when some definite action is taken, whether dismissal, warning, informal counseling or probation, referral to a treatment program, adjudication as a delinquent with some disposition, or transfer to an adult criminal court (Nimick et al. 1985, p. 3). As a result of multiple referrals, one child may be involved in several "cases" during a calendar year. Moreover, each "case" referral may contain more than one offense or charge. The multiple referrals of an individual child may tend to overstate the numbers of youths handled annually. Multiple charges in one petition may appear to understate the volume of delinquency in a jurisdiction. Because the unit of count is "case disposed," one cannot generalize from the data either the number of individual youths who are processed by the court annually or the number of separate offenses with which juveniles are charged.

[2] While normally the NJCDA data unit is "case disposed," the NJCDA was able to convert its case-based data file into a youth-based data file, permitting Feld (1989, 1991) to analyze the cases of *individual juveniles* against whom *petitions* were filed in 1986. The annual data collected by the Minnesota Supreme Court's Judicial Information System

Feld (1991) reported that there was "justice by geography"; urban, suburban, and rural courts screened, detained, and sentenced similarly situated offenders differently. Because Feld's (1989, 1991) research was not experimental with random assignments, multivariate analyses controlling for the effects of the present offense, prior record, and other legal variables on variations in juveniles' sentences could not account for local differences in precharge screening practices and population selection biases that may account for some of the differences found in juvenile justice administration.

Some of the better studies analyzing juvenile court dispositional practices attempt to account for precharge screening by collecting data directly through the individual court itself and at several decision-making points (Dannefer and Schutt 1982; McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987). McCarthy and Smith (1986) analyzed racial discrimination in juvenile justice processing by collecting data at intake screening, detention, adjudication, and disposition. They used path analyses to examine the cases of an original sample of 649 youths referred to one southeastern, metropolitan juvenile court for delinquency; they also examined subsamples of 406 petitioned youths and 186 adjudicated youths to assess the effects of race and sample selection biases on juvenile justice processing. Their multivariate analyses of sequential screening processes concluded that cumulative decisions produced a legally more homogeneous population in which social class and race became "increasingly important as direct influences on final disposition as youths are selected into the system for further processing" (McCarthy and Smith 1986, p. 58).

Fagan et al. (1987) extended McCarthy and Smith's (1986) strategy and analyzed screening decision making by using a stratified, random sample of youths at six decision points in the juvenile justice process in a metropolitan area in a western state. They collected data on actions taken by the police, the prosecutor, the juvenile court, the probation department, and the state correction agency. The police records included demographic characteristics, prior contacts, and the instant offense. The prosecutor's records included charging information, and the court-processing data, collected directly from court files, contained summaries of findings and actions taken at each hearing, motions filed

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included information on the data of referral, county and source of referral, referral offense(s), the offense(s) for which the youth was ultimately adjudicated, the youth's detention status, the nature of the juvenile's defense representation, the eventual disposition, the juvenile's birthdate, race, and sex.

by counsel, and predispositional and other reports and records relevant to the case. They used simple two- and three-way contingency tables to control for demographic, offense history, and specific violent offense characteristics in the apprehension, detention, charging, adjudication, and sentencing of 114 Anglo and 120 minority youths accused of violent, serious, and other offenses. They concluded, after controlling for a wide range of offense and offender characteristics, that minority youths consistently received harsher and more punitive dispositions than did Anglo youths. Like McCarthy and Smith, however, Fagan et al. were only able to control weakly for social class and social status, which correlate with race and which may provide an alternative, nondiscriminatory explanation for the juvenile courts' dispositions.

Clarke and Koch (1980) used court records to conduct a quasi experiment that examined the effects of legal representation and court-processing variables on juveniles' dispositions. They collected 1,435 court records from a period six months prior to the start of a juvenile legal representation project and for six months after it was implemented. They constructed matched sets of cases on the basis of seriousness of offense and prior records within which the disposition rates were homogeneous. Controlling for the offense variables, they examined the effects of certain risk factors—race, sex, age, home structure, parental presence at hearing, source of referral, legal representation, and detention—on dispositions. Because Clarke and Koch worked from "raw" court records, they were able to construct an offense-seriousness index based on more information than simply the type of offense charged. While the present offense and prior record accounted for most of the variance in sentencing, after controlling for their effects, juveniles against whom probation officers and parents were complainants, those held in pretrial detention, and those with legal representation received more severe sentences.

Hamparian et al.'s (1982) study of juveniles waived to criminal court and prosecuted as adults is one of the most ambitious juvenile court data collection projects undertaken. Hamparian conducted a complete nationwide census of every juvenile, defined as persons under eighteen years of age, waived from juvenile court or tried as an adult in 1978. Her project, which produced a summary volume and five volumes of individual state-by-state data, entailed preliminary telephone surveys of state and local agencies, followed by physical data retrieval in 3,100 counties. Data were gathered from state court administrative offices, juvenile courts, prosecutors, and adult criminal courts. State data sets

were verified by contacting the local units of government. In each state, data on each youth's age, sex, race, offense, adult court judgment, sentence, and maximum sentence if confined were collected in the most populous 10 percent of the counties and in all counties in which five or more youths were waived. The types of "official" records available included "everything from very sophisticated data tapes to court records kept in penciled, handwritten notebooks" (Hamparian et al. 1982, p. 238).

Although juvenile court records increasingly are computerized, Hamparian et al.'s description of the range of quality of data in juvenile courts is apt. Like all official records, the validity, reliability, completeness, and accuracy of the information recorded and transmitted varies substantially. Moreover, different components of the juvenile justice system—police, intake, probation, prosecutors, courts, corrections—collect different types of information for different administrative purposes. There are virtually no consistent identifiers that enable researchers or policy planners to link individual case files in different agencies or to track offenders through various stages of "loosely coupled" systems or over time. While most states' automated juvenile court data systems include data on a youth's date of birth, county, offense, and disposition, very few juvenile court information systems routinely and consistently collect data on important legal and sociodemographic variables such as family status, income, school performance, use of weapons, injury to victims, representation by counsel, or the like (National Center for Juvenile Justice 1991). For example, only six states routinely code and collect data on whether juveniles had the assistance of counsel in juvenile court proceedings (Feld 1988*a*). While sociodemographic information is regularly collected and included in a juvenile's social services records, those social services records are less accessible to researchers or policy analysts and entail substantially greater costs in order to put them into an analytically useable format.

B. Varieties of Juvenile Courts

The idealized portrayal of the traditional juvenile court is one of procedural informality in the quest of the goals of treatment and rehabilitation (Mack 1909). The historical focus on characteristics of the young offender fostered judicial discretion and organizational diversity rather than formality and consistency, such that "any attempt to analyze the workings of a given court demanded a lengthy evaluation of its judge" (Rothman 1980, p. 238). Evaluations of contemporary juvenile courts continue to emphasize the diversity of judges and the highly

discretionary legal framework that allows for "very individualistic interpretation and clearly different application" of laws (Rubin 1985, p. 7).

With *Gault's* imposition of formal procedures and the emergence of punitive as well as therapeutic goals (Feld 1984, 1988*b*), a state's juvenile courts can no longer be assumed to conform to the traditional rehabilitative model or even to be similar to one another. One cannot generalize from intensive ethnographic studies of a single juvenile court to other courts in other locales. The few comparative studies of juvenile courts reveal some of the complexities of goals, philosophies, court structures, and procedures that characterize the juvenile court as an institution (Sarri and Hasenfeld 1976; Cohen and Kluegel 1978, 1979).

Recent research indicates that juvenile courts vary on a number of structural, philosophical, and procedural dimensions (Stapleton, Aday, and Ito 1982; Hasenfeld and Cheung 1985). Stapleton et al. (1982) at the National Center for State Courts developed a detailed questionnaire to elicit information on ninety-six theoretically relevant variables about juvenile courts' jurisdiction, administrative structure, procedures, and options at intake, detention, adjudication, and disposition. They interviewed two respondents, a judge and a court administrator, in a saturated sample of 150 metropolitan juvenile courts. They compared the two sets of responses from each court and called back or made site visits to resolve discrepancies. Through factor analyses, they identified clusters of factors—status offender orientation, centralization of authority, formalization of procedure, and intake screening discretion—around which courts varied and developed an empirical typology of metropolitan juvenile courts. Their typology confirmed "the existence of the two major types of juvenile courts ('traditional' and 'due process') suggested in the literature. More important, however, it reveals variations in court structure and procedure that are not captured adequately by existing simplistic typologies" (Stapleton et al. 1982, p. 559). For example, their factor analyses identified "transitional courts," which represent an intermediate point in the transformation from traditional, therapeutic courts to formal, due process courts.

Traditional courts intervene in a child's "best interests" on an informal, discretionary basis, while the legalistic courts emphasize more formal, rule-oriented decision making and recognition of a juvenile's legal rights. "Traditional" and "due process" courts may be arrayed across a continuum from informal to formal procedures with corresponding structural and substantive differences (Stapleton et al. 1982). Traditional, informal, cooperative courts and formal, adversarial courts

differ considerably in the presence of counsel, which is one important indicator of procedural, substantive, and structural variations among juvenile courts (Handler 1965; Stapleton and Teitelbaum 1972; Cohen and Kluegel 1978; Feld 1984, 1989, 1991). Whether attorneys are present routinely, in turn, affects many other aspects of juvenile justice administration. Recent studies indicate that the presence of counsel, which is associated with a formal, due process orientation, is also related to differences in pretrial detention, sentencing, and case-processing practices (Cohen and Kluegel 1978; Carrington and Moyer 1988*a*, 1988*b*; Feld 1988*a*, 1989, 1991; Kempf et al. 1990).

While juvenile courts vary substantially among the states, they vary considerably within a single state as well. Although the same laws typically apply to all juvenile courts within a state, there is substantial structural and geographic administrative variation (Mahoney 1987; Kempf et al. 1990; Feld 1991). For example, whether youths live in metropolitan areas with full-time juvenile courts or in rural areas with part-time juvenile judges affects how their cases are screened, processed, and sanctioned (Kempf et al. 1990; Feld 1991). Differences in social structure are associated consistently with differences in juvenile crime rates and in juvenile justice administration (Kempf et al. 1990; Feld 1991). In Minnesota's urban counties, which are more heterogeneous and racially diverse, and less stable, than rural counties, juvenile court intervention is more formal and due process oriented. Feld's (1989, 1991) research demonstrates both a theoretical and an empirical relationship between variations in social structure and juvenile justice administration. Feld (1989) compared counties with high (95 percent), medium (46 percent), and low (19 percent) rates of representation and reported considerable variation in detaining, sentencing, and processing of juveniles. Feld (1991) reported that attorneys appeared in 62.6 percent of all cases in urban courts, where a more formal, due process model of justice occurs, whereas they appeared only in 25.1 percent of cases in rural juvenile courts, where a more traditional, informal model of justice occurs.

There also appears to be a relationship between social structure, procedural formality, and severity of sanctions. In the more formal, urban courts, 12.9 percent of all juveniles were held in pretrial detention as contrasted with 4.8 percent of suburban youths and 4.4 percent of rural juveniles (Feld 1991). Urban courts also sentenced similarly charged youths more severely than did judges in suburban or rural courts. For youths charged with felony offenses, for example, urban

judges removed 42.3 percent from their homes as compared with 23.7 percent of suburban judges and 29.5 percent of rural judges (Feld 1991). Multiple regression analyses using an urban "dummy" variable indicate that being tried in an urban court aggravates the severity of a youth's sentence (Feld 1991).

Kempf et al. (1990) examined juvenile justice administration in Missouri and found similar variations:

> The results of this study show differential processing within two distinct court systems operating in Missouri juvenile justice. One court type is rural and the other is primarily urban. . . . Rural courts typically are guided by one judge who holds the position for several years where the majority of decisions are made by one chief juvenile officer. Rural courts rarely have separate detention facilities, and have less access to local treatment facilities. Decisions are made individually, that is, on a case by case basis. . . . In urban courts the judges rotate to other types of courts frequently. Different staff are responsible at different stages in the process. Decisionmaking is guided more often by written standards, but policies still enable discretionary choices. Urban courts operate their own facilities, and have greater access to both home and residential placement services. These two types of courts function by different standards as well. Rural courts seem to adhere to traditional, pre*Gault*, juvenile court *parens patriae* criteria in their handling of youths. Urban courts appear more legalistic in orientation and process cases more according to offense criteria. [Kempf, Decker, and Bing 1990, p. 118]

There is also some macrolevel evidence from which to infer a relationship between process formality and sentencing severity. An interstate analysis of appointment of counsel reported that rates of representation in more urban, industrial states—California (84.9 percent), Pennsylvania (86.4 percent), and New York (95.9 percent)—were about double the rates in more rural, Midwestern states—Minnesota (47.7 percent), North Dakota (37.5 percent), and Nebraska (52.7 percent) (Feld 1988*a*). Perhaps related to its greater procedural formality, California is also one of the leaders in "cracking down" on youth crime (Private Sector Task Force on Juvenile Justice 1987; Forst and Blomquist 1991). And New York's "designated felony" legislation has been characterized as "one of the harshest juvenile justice [sentencing] systems in the country" (Woods 1980, p. 2).

The intrastate and interstate variations raise the question whether there is a relationship between procedural formality and severity of sanctions. Does greater urban crime engender more punitive responses, which then require more formal procedural safeguards as a prerequisite? Or, does urban bureaucratization lead to more formal procedural safeguards, which then enable judges to exact a greater toll than they otherwise might? Perceived increases in urban crime may foster a "war-on-crime" mentality that places immense pressures on the juvenile justice system to "get tough" and furthers the convergence between juvenile and criminal courts. In short, structural features associated with juvenile crime and its repression may also be associated with process formality and sentencing severity.

These recurring findings of extensive interstate and intrastate variations in procedural formality, representation by attorneys, and detention and sentencing practices raise important issues for understanding juvenile courts. Finding "justice by geography" and substantial judicial diversity in ostensibly similar counties and under identical legal regimes vastly complicates the tasks of criminologists. There is both a theoretical and empirical relationship between variations in social structure and in juvenile justice administration. If a state's juvenile courts are not a single, uniform justice system, then research must identify and account for these systemic and structural differences. Studies that analyze and interpret aggregated statewide data without accounting for procedural, contextual, and structural characteristics or intrastate variations may systematically mislead and obscure, rather than clarify. Studies reporting differences in juvenile courts' decision making actually may reflect sampling errors, population biases, or system differences. Subject to these caveats, the next sections of this essay examine the juvenile court as an institution in transition.

III. Procedural Justice in Juvenile Courts

Procedure and substance are inextricably intertwined in juvenile courts. The increased procedural formality since *Gault* has been associated with a corresponding shift in emphasis, both in legal theory and in administrative practice, away from therapeutic, individualized dispositions toward more punitive, offense-based sentences (Gardner 1987; Feld 1988*b*; Forst and Blomquist 1991). In 1970, when the Supreme Court decided *McKeiver*, juvenile court judges' discretion was not constrained by determinate or mandatory minimum sentencing statutes or administrative guidelines. In the mid- to late 1970s, several states adopted "designated felony" and serious offender sentencing leg-

islation and determinate sentencing guidelines (Feld 1988*b*; Ainsworth 1991). Since 1980, eleven more states have adopted mandatory minimums, determinate sentences, or administrative release guidelines. Legislative revisions of juvenile courts' purpose clauses eliminate even rhetorical support for rehabilitation, and court decisions endorsing punishment contradict the therapeutic premise of juvenile dispositions (Walkover 1984; Feld 1988*b*). As a result, about one-third of the states use at least some explicitly punitive sentencing strategies (Feld 1988*b*). A similar pattern occurred in the use of offense criteria to structure the waiver decision that places some juvenile offenders in adult criminal courts (Feld 1987).

These changes repudiate many of the original juvenile courts' basic assumptions that juveniles should be treated differently than adults, that juvenile courts operate in a youth's "best interest," and that rehabilitation is an indeterminate process that cannot be limited by fixed-time punishment (Coates, Forst, and Fisher 1985). These changes also contradict *McKeiver's* premise that therapeutic juvenile dispositions require fewer procedural safeguards than do adult criminal prosecutions and raise questions about the quality of juvenile justice that the Court avoided.

The formal procedures of juvenile and criminal courts have converged under *Gault's* impetus (Feld 1984, 1988*b*). There remains, however, a substantial gulf between theory and reality, between the law on the books and law in action. Theoretically, delinquents are entitled to formal trials and the assistance of counsel. In actuality, the quality of procedural justice is far different. Despite the criminalizing of juvenile courts, most states provide neither special procedures to protect juveniles from their own immaturity nor the full panoply of adult procedural safeguards.[3] Based on depictions of courtroom dramas and publicized criminal trials, young people have a cultural expectation of what a "real" trial should be. The contrast between the ideal-typical jury trial with vigorous defense representation and the "actualized caricature" of a juvenile bench trial fosters a sense of injustice that may delegitimatize the legal process (Ainsworth 1991, p. 1119).

A. Jury Trials

The right to a jury trial is a critical procedural safeguard when sentences are punitive rather than therapeutic. Only thirteen states'

[3] Feld (1984) elaborated the thesis that states treat juveniles like adult criminal defendants when equality redounds to their disadvantage and use less adequate juvenile court safeguards when those deficient procedures provide an advantage to the state by comparing juvenile and adult criminal procedural safeguards.

case law or statutes grant juveniles the right to jury trials (Feld 1988*b;* Ainsworth 1991), while the majority of states follow the Supreme Court's lead in *McKeiver v. Pennsylvania* and deny access to juries. Without citing any empirical evidence, the *McKeiver* Court posited virtual parity between the factual accuracy of juvenile and adult adjudications to rationalize denying juveniles a jury trial. But juries provide special protections to assure factual accuracy, use a higher evidentiary threshold when they apply *Winship's* "proof beyond a reasonable doubt" standard, and acquit more readily than do judges (Kalven and Zeisel 1966). Greenwood, Lipson, Abrahamse, and Zimring (1983) analyzed arrest disposition rates for similar types of cases in juvenile and adult courts in California and concluded that "it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases" (Greenwood, Lipson, Abrahamse, and Zimring 1983, pp. 30–31).

Ainsworth (1991) offers a variety of reasons why juvenile court judges convict more readily than juries. Fact finding by judges and juries is intrinsically different since the former try hundreds of cases every year while the latter hear only one or two. As a result of hearing many cases routinely, judges may become less meticulous in considering evidence, may evaluate facts more casually, and may apply less stringently the concepts of reasonable doubt and presumption of innocence than do jurors (Ainsworth 1991). The personal characteristics of judges differ from those of jurors, and it is more difficult for a defendant to determine how those personal characteristics will affect the decision in a case. Through voir dire, litigants may examine jurors about their attitudes, beliefs, and experiences as they may bear on the way they will decide the case; there is no comparable opportunity to explore a judge's background to determine the presence of judicial biases. In addition to the novelty of deciding cases, juries and judges evaluate testimony differently. Juvenile court judges hear testimony from the same police and probation officers on a recurring basis and develop a settled opinion about their credibility. Similarly, as a result of hearing earlier charges against a juvenile, or presiding over a detention hearing or pretrial motion to suppress evidence, a judge already may have a predetermined view of a youth's credibility and character (Feld 1984; Ainsworth 1991). Fact finding by a judge differs from that by a jury because an individual fact finder does not have to discuss either the law or the evidence with a group before reaching a conclusion. Although a jury must be instructed explicitly about the law to

be applied to a case, the judge in a bench trial is not required to articulate the law, and it is more difficult to determine whether the judge correctly understood and applied it (Ainsworth 1991).

Moreover, *McKeiver* ignored that constitutional procedures also prevent governmental oppression (Feld 1981*a*, 1984, 1988*b*). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that adult criminal proceedings required a jury to assure both factual accuracy *and* protection against governmental oppression. *Duncan* emphasized that juries protect against a weak or biased judge, inject the community's values into law, and increase the visibility and accountability of justice administration. These protective functions are even more crucial in juvenile courts, which labor behind closed doors immune from public scrutiny. Appellate courts acknowledge that juvenile cases exhibit far more procedural errors than do adult criminal cases and suggest that secrecy may foster a judicial casualness toward the law that visibility might constrain (*R.L.R. v. State*, 487 P.2d 27 [Alaska 1971]; *In re Dino*, 359 So.2d 586 [Louisiana 1978]).

Few of the states that sentence juveniles punitively provide jury trials; several have rejected constitutional challenges (e.g., *State v. Schaaf*, 743 P.2d 240 [Washington 1987]; Feld 1988*b*). Juries have symbolic significance for the juvenile court out of all proportion to their practical impact since even in states where they are available, they are seldom used (Feld 1988*b*). A survey of jury trials in those few jurisdictions that give juveniles access to a jury reported that the rates ranged between .36 percent and 3.2 percent (Shaughnessy 1979). There are no data available on the rates of juvenile jury trials compared with adult jury trials for comparable offenses. As a symbol, however, the jury requires candor and honesty about punishment that is imposed in the name of treatment and the need to protect against even benevolent governmental coercion.

B. The Right to Counsel

Procedural justice hinges on access to and the assistance of counsel. When *Gault* was decided, an attorney's appearance in delinquency proceedings was a rare event, occurring in perhaps 5 percent of cases (*Harvard Law Review* 1966; President's Commission on Law Enforcement and Administration of Justice 1967*b*). Despite *Gault's* formal legal changes, however, the actual delivery of legal services lagged behind. In the immediate aftermath of *Gault*, observers in two metropolitan juvenile courts systematically monitored institutional compliance with

the decision and reported that juveniles were neither adequately advised of their right to counsel nor had counsel appointed for them (Lefstein, Stapleton, and Teitelbaum 1969). Ferster and Courtless's (1972) analysis of court records in 1968 showed that 27 percent of juveniles were represented, and observations of sixty-four hearings in 1969 included only 37.5 percent in which juveniles had counsel at the adjudicatory stage; in 66.7 percent of those cases in which lawyers were present, they did not participate in any way.

In the two decades since *Gault*, the promise of legal representation remains unrealized; in many states half or less of all juveniles receive the assistance of counsel to which they are constitutionally entitled. In the only study that reports statewide data or makes interstate comparisons of the delivery of legal services, Feld (1988*a*) reported that in three of the six states surveyed, only 37.5 percent, 47.7 percent, and 52.7 percent of juveniles charged with delinquent and status offenses were represented. Clarke and Koch's (1980) evaluations of legal representation in North Carolina in 1978 found that the juvenile defender project represented only 22.3 percent of juveniles in Winston-Salem, North Carolina, and only 45.8 percent in Charlotte, North Carolina. Aday (1986) found rates of representation of 26.2 percent and 38.7 percent in the southeastern jurisdictions he studied. Walter and Ostrander (1982) observed that only 32 percent of the juveniles in a large north central city were represented by counsel. A study of a large, midwestern county's juvenile court found that only 41.8 percent of juveniles were represented by an attorney (Bortner 1982). In Minnesota, a majority of all juveniles are unrepresented: in 1984, 53.2 percent of juveniles appeared without counsel (Feld 1984, 1988*a*); in 1986, 54.7 percent were unrepresented (Feld 1989, 1991); in 1988, 58.9 percent had no attorney (Minnesota Supreme Court 1990). Feld (1989) reported enormous county-by-county variations in rates of representation within Minnesota, ranging from a high of 100 percent in one county to a low of less than 5 percent in several others. A substantial minority of youths removed from their homes (30.7 percent) or confined in state juvenile correctional institutions (26.5 percent) lacked representation at the time of their adjudication and disposition (Feld 1989).

Juveniles charged with more serious offenses are more likely to be represented. In Minnesota, where only 45.3 percent of youths overall had counsel, 66.1 percent of those charged with a felony offense, 46.4 percent of those charged with misdemeanors, and only 28.9 percent of those charged with status offenses had lawyers (Feld 1991). Emphasiz-

ing the variability of juvenile justice, however, for youths in Minnesota's seventy-seven rural counties, even a majority of those charged with felony offenses (50.4 percent) appeared without counsel (Feld 1991). While youths charged with serious offenses are more likely to be represented, they constitute a small part of juvenile court dockets in most states (Feld 1988*a*, 1989). In Minnesota in 1986, for example, only 18.4 percent of youths were charged with a felony, and most of those were felony offenses against property, such as burglary. In 1984, in California, 35.9 percent of youths were charged with felony offenses; in New York, 23.1 percent; and in Nebraska, 12.1 percent (Feld 1988*a*), with property felony crimes predominating in all jurisdictions. The largest group of unrepresented youths and those most likely to be incarcerated without representation are charged with minor property offenses like shoplifting (Feld 1988*a*, 1989).

There are a variety of possible explanations for why so many youths appear unrepresented in juvenile courts: parental reluctance to retain an attorney, inadequate public defender legal services in nonurban areas, a judicial encouragement of and readiness to find waivers of the right to counsel in order to ease administrative burdens on the courts, cursory and misleading judicial advisories of rights that inadequately convey the importance of the right to counsel and suggest that the waiver litany is simply a technicality, a continuing judicial hostility to an advocacy role in a traditional treatment-oriented court, or a judicial predetermination of dispositions with nonappointment of counsel where probation is the anticipated outcome (Feld 1984, 1989; Bortner 1982; Lefstein et al. 1969; Stapleton and Teitelbaum 1972). In many instances, juveniles may plead guilty and have their case disposed at the same hearing without benefit of counsel. Whatever the reason, many juveniles facing potentially coercive state action never see a lawyer and waive their right to counsel without consulting with an attorney or appreciating the legal consequences of relinquishing counsel.

The most common explanation for why so many juveniles are unrepresented is that they waive their right to counsel (Lefstein et al. 1969; Stapleton and Teitelbaum 1972; Bortner 1982; Feld 1984, 1989). Most state courts use the adult legal standard—"knowing, intelligent, and voluntary" under the "totality of the circumstances"—to assess the validity of juveniles' waivers of constitutional rights (*Fare v. Michael C.*, 442 U.S. 707 [1979]; Feld 1984, 1989). The crucial issue, as for adults, is whether a waiver of counsel can be "knowing, intelligent, and voluntary" if it is made by a child alone without consulting with

an attorney. The problem is exacerbated when, in closed confidential proceedings, judges who expect waivers immediately create an impression that waiver is a meaningless technicality and have responsibility for interpreting the juvenile's response (Feld 1989).

The "totality" approach to juveniles' waivers of rights has been criticized extensively as an example of treating juveniles just like adults when formal equality puts them at a disadvantage (Grisso 1980; Rosenberg 1980; Feld 1984; Melton 1989). Juveniles simply are not as capable as adults to waive their constitutional rights in a knowing and intelligent manner (Grisso 1980, 1981). Grisso (1980, 1981) evaluated juveniles' understanding of their *Miranda* rights by administering multiple tests to determine whether they could paraphrase the words in the warning, whether they could define six critical words in the *Miranda* warning such as "attorney," "consult," and "appoint," and whether they could give correct true-false answers to twelve rewordings of the *Miranda* warnings. The structured interviews, designed by a panel of psychologists and lawyers, were administered to three samples of juvenile subjects, 431 in all, who varied by age, race, social class, and juvenile court experience, and to two samples of adult subjects, 203 parolees residing in a halfway house, and fifty-seven volunteers from university and hospital custodial services. The adult samples were used to compare the juveniles' performances with adult norms. The findings indicated that most juveniles who receive legal advisories do not understand them well enough to waive their constitutional rights in a "knowing and intelligent" manner. Only 20.9 percent of the juveniles, as compared with 42.3 percent of the adults, demonstrated adequate understanding of the four components of a *Miranda* warning, while 55.3 percent of juveniles as contrasted with 23.1 percent of the adults exhibited no comprehension of at least one of the four warnings (Grisso 1980, pp. 1153–54). The most frequently misunderstood *Miranda* advisory was that the suspect had the right to consult with an attorney and have one present during interrogation. Problems of understanding and waiving rights are particularly acute for younger juveniles. "As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension. . . . The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights" (Grisso 1980, p. 1160). The recognition that children have different competencies than adults is reflected in the

host of legal disabilities imposed on children for their own protection that limit their ability, for example, to enter into contracts, convey property, marry, drink, drive, or even donate blood. While several states recognize this developmental fact with respect to waivers of counsel, most states allow juveniles to waive constitutional rights such as *Miranda* and the right to counsel without restriction and confront the power of the state alone and unaided (e.g., Iowa Code Ann. § 232.11 [West 1985]; Wis. Stat. Ann. § 48.23 [West 1983]; American Bar Association—Institute of Judicial Administration 1980*a;* Feld 1984).

The questionable validity of juvenile waivers of counsel rights raises several collateral legal issues. Absent a valid waiver, appointment of counsel is a constitutional prerequisite to any sentence restricting an adult defendant's liberty (*Scott v. Illinois*, 440 U.S. 367 [1979]). It is also a constitutional violation to use prior convictions obtained without counsel to enhance later sentences (*United States v. Tucker*, 404 U.S. 443 [1972]; *Burgett v. Texas*, 389 U.S. 109 [1967]; *Baldasar v. Illinois*, 446 U.S. 222 [1980]). Every time a juvenile court judge incarcerates a youth without representation, or uses prior uncounseled convictions to sentence a juvenile, to impose a mandatory minimum or enhanced sentence, to waive a juvenile to criminal court, or to "bootstrap" a status offender into a delinquent through the contempt power, he or she compounds the problems associated with the original denial of counsel (Feld 1989).

Even when juveniles are represented, attorneys may not represent their clients effectively. Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles "beat a case," or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court (Fox 1970*a;* Clarke and Koch 1980; Feld 1989). Institutional pressures to maintain stable, cooperative working relations with other personnel in the system may be inconsistent with effective adversarial advocacy (Lefstein et al. 1969; Stapleton and Teitelbaum 1972; Bortner 1982).

Several studies indicate that juveniles with lawyers in juvenile courts may be at a disadvantage when compared with similarly situated unrepresented youths; that is, procedural formality may constitute an aggravating factor in sentencing. While the relationships between the factors producing more severe dispositions and the factors influencing the appointment of counsel are complex, the presence of counsel ap-

pears to aggravate the sentences that juveniles receive (Feld 1989). Stapleton and Teitelbaum (1972), Clarke and Koch (1980), Bortner (1982), and Feld (1988*a*, 1989) all reported that juveniles with lawyers are more likely to be incarcerated than juveniles without counsel. For example, Feld (1989) reported that 28.1 percent of all juvenile offenders with lawyers were removed from their homes as contrasted with 10.3 percent of those appearing without counsel. Multiple regression analyses that controlled for a host of legal variables indicate that the presence of an attorney accounts for about 1.5 percent of the variance in home removal dispositions and about .6 percent of the variance in secure confinement sentences (Feld 1989, p. 1308). In a methodologically more sophisticated study, Clarke and Koch (1980) applied a variable-selection procedure to the association between dispositions and all variables potentially related to it, except for court administrative variables such as detention status or representation by counsel, to construct matched sets of cases. Using court files, they constructed a more sensitive offense seriousness index. Comparing the disposition rates for juveniles in different risk categories, they concluded that "there was a significant and consistent difference in the commitment rates of uncounseled and counseled cases: *children without counsel were less likely to be committed*, especially if they were in the intermediate risk groups" (Clarke and Koch 1980, p. 301). Research on legal representation in Canadian juvenile courts also reports a negative impact of counsel on juveniles' sentences in some settings (Carrington and Moyer 1988*a*, 1988*b*, 1990). An evaluation of the impact of counsel in six states' delinquency proceedings reported that, "in virtually every jurisdiction, representation by counsel is an aggravating factor in a juvenile's disposition. . . . While the legal variables [of seriousness of present offense, prior record, and pretrial detention status] enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions" (Feld 1988*a*, p. 393).

There are several possible explanations for the apparent relationship between procedural formality, as evidenced by the presence of counsel, and more severe sentences. One is that the lawyers who appear in juvenile court are incompetent and prejudice their clients' cases (Knitzer and Sobie 1984). While systematic qualitative evaluations of the actual performance of counsel in juvenile courts are lacking, the available evidence suggests that even in jurisdictions where counsel routinely are appointed, there are grounds for concern about their effectiveness (Knitzer and Sobie 1984; Feld 1989). Or it may be that,

early in a proceeding, a juvenile court judge's familiarity with a case alerts him or her to the eventual disposition that will be imposed on conviction, and counsel may be appointed in anticipation of more severe consequences (Aday 1986; Feld 1989). In most jurisdictions, the same judge who presides at a youth's arraignment and detention hearing will later decide the case on the merits and then pronounce a sentence. Perhaps the initial decision to appoint counsel is based on evidence obtained in the preliminary stages that also influences later dispositions. If so, the court's extensive familiarity with a case prior to the fact-finding hearing raises basic questions about the fairness and objectivity of the adjudicative process (Ainsworth 1991).

Another possible explanation for the aggravating effect of lawyers on sentences is that juvenile court judges may treat more formally and severely juveniles who appear with counsel than those without. Within statutory limits, judges may feel less constrained when sentencing a youth who is represented since adherence to the form of due process may insulate sentences from appellate reversal. In short, there may be a price for the use of formal procedures similar to that experienced by adult criminal defendants who insist on a jury trial rather than pleading guilty. While not explicitly punishing juveniles who are represented because they appear with counsel, judges may be more lenient toward those youths who appear unaided and contritely "throw themselves on the mercy of the court." At the very least further research is needed on the delivery of legal services, the role and effect of counsel, and the relationship between procedural formality and sentencing severity in juvenile court.

IV. Jurisdiction over Noncriminal Status Offenders

While the notion of helping troubled children is inherently attractive, the definition and administration of status jurisdiction has been criticized extensively in the post-*Gault* decades (Teitelbaum and Gough 1977; Allinson 1983). Beginning with the President's Commission on Law Enforcement and Administration of Justice (1967*a*, 1967*b*), which recommended narrowing the range of conduct for which court intervention is authorized, many professional organizations have advocated reform or elimination of the juvenile court's status jurisdiction (National Council on Crime and Delinquency 1975; American Bar Association—Institute of Judicial Administration 1982). Critics focus on its adverse impact on children, its disabling effects on families, schools, and other agencies that refer status offenders, and the legal and admin-

istrative issues status offenses present (Andrews and Cohn 1974; Katz and Teitelbaum 1978; Rosenberg 1983).

Status offenses traditionally were treated as a form of delinquency; status delinquents were detained and incarcerated in the same institutions as criminal delinquents even though they had committed no crimes (Handler and Zatz 1982). Parental referrals overloaded juvenile courts with intractable family disputes, diverted scarce judicial resources from other tasks, and exacerbated rather than ameliorated family conflict (Andrews and Cohn 1974). Social agencies and schools used the court as a "dumping ground" to impose solutions rather than to address sources of conflict. Status jurisdiction raised legal issues of "void for vagueness," equal protection, and procedural justice (Katz and Teitelbaum 1978; Rubin 1985). Judges were granted broad discretion to prevent unruliness or immorality from ripening into criminality, and intervention often reflected individual judges' values and prejudices. The exercise of standardless discretion to regulate noncriminal misconduct had a disproportionate impact on poor, minority, and female juveniles (Chesney-Lind 1977, 1988; Sussman 1977; Teilmann and Landry 1981).

Three post-*Gault* trends—diversion, deinstitutionalization, and decriminalization—reflect judicial and legislative disillusionment with the court's treatment of noncriminal youths and efforts to respond to these criticisms (Empey 1973). The Federal Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601 *et seq.* (1983), required states to begin a process of removing noncriminal offenders from secure detention and correctional facilities. Federal and state restrictions on commingling status and delinquent offenders in secure institutions provided the impetus to divert some status offenders from juvenile courts and decarcerate those who remained in the system (Klein 1979; Handler and Zatz 1982).

A. Diversion

Since *Gault*, one juvenile justice reform strategy focuses on providing services on an informal basis through diversion programs (Klein 1979). Just as the original juvenile court diverted youths from adult criminal courts, diversion programs shift away eligible youths from juvenile court who otherwise would enter that system. Klein (1979) and Polk (1984) question whether diversion programs have been implemented coherently or been effective when attempted. The ideology of juvenile justice—early identification and treatment—is inherently expansive

and lends itself to overreaching. Klein (1979), for example, contends that diversion programs have not restricted themselves to youths who would otherwise have entered the juvenile justice system but have also encompassed "young people who are normally counseled and released by the police, if indeed they have any dealings with the police" (Klein 1979, p. 165). Moreover, many diversion programs are operated either by police or juvenile court personnel, who thereby retain effective control over juvenile offenders (Klein 1979). As a result, diversion, which theoretically was intended to reduce the court's client population, has had the opposite effect of "widening the net of social control" (Klein 1979; Polk 1984). The number of juveniles referred to court remains relatively constant despite a declining youth population, while juveniles who previously would have been released are subjected to other forms of intervention. For example, Decker (1985) analyzed juvenile court referrals for a four-year period prior to and after the adoption of a status offender diversion program in St. Louis. Although the number of status offenders referred to juvenile court declined somewhat following the introduction of diversion, the overall percentage of youth population at risk and the number of youths referred to juvenile court actually increased from an annual average of 5,276 prior to the introduction of the program to 6,615 in the four years following its implementation (Decker 1985). Moreover, diversion provides a rationale for shifting discretion from the juvenile court itself, where it is subject to some procedural formality as a result of *Gault*, to police or intake "gatekeepers" who continue to operate on an informal pre-*Gault* basis with no accountability. In his comprehensive study of the history of regulating "stubborn children," Sutton (1988, p. 215) concludes that diversion "sanctified and encouraged a strategy for circumventing due process, assured that programs would stay in the discretionary hands of local officials, and encouraged the privatization of long-term social control." Similarly, Decker's "net-widening" analysis concludes that, "because of the vagueness of the statutes defining status-offense conduct, the low visibility of police decisions in such situations, and the low probability of judicial review of these decisions, these programs present an even greater opportunity for abuse" (Decker 1985, p. 215).

B. Deinstitutionalization

Federal and state bans on secure confinement provided an impetus to deinstitutionalize noncriminal youths. Although the numbers of status offenders in secure detention facilities and institutions declined by the

mid-1980s (Handler and Zatz 1982; Krisberg and Schwartz 1983; Schneider 1984), only a small proportion of status offenders ever were sent to secure institutions; most remain eligible for commitment to "forestry camps" and other medium-security facilities (Sutton 1988). Amendments to the Federal Juvenile Justice Act in 1980 weakened even the restrictions on secure confinement; status offenders who run away from nonsecure placements or violated court orders may be charged with contempt of court, a delinquent act, and incarcerated (42 U.S.C. § 5633(a)(12)(A) [1983]; Costello and Worthington 1981; Schwartz 1989*a*). Bishop and Frazier (1992) report that using contempt power to "bootstrap" status offenders into delinquents is an important continuing source of gender bias in juvenile justice administration. "The typical female offender not in contempt has a 1.8 percent probability of incarceration, which increased markedly to 63.2 percent if she is held in contempt. In short, females referred to juvenile court for contempt following an earlier adjudication for a status offense receive harsher judicial dispositions than their male counterparts" (Bishop and Frazier 1992, p. 1183). Even though subsequent probation violations may result in incarceration, juveniles initially charged with status offenses enjoy fewer procedural rights than do youths charged with delinquency. For example, states use the prohibition on secure confinement as a rationale to deny youths charged with noncriminal misconduct the privilege against self-incrimination (*In re Spalding*, 273 Md. 690 [1975]), the right to counsel (*In re Walker*, 282 N.C.28 [1972]; Feld 1988*a*, 1989), or to proof beyond a reasonable doubt (*In re Henderson*, 199 N.W.2d 111 [Iowa 1972]).

C. Decriminalization

Until recent reforms, status offenses were classified as a form of delinquency. Beginning with jurisdictional redefinitions in California in 1961 and in New York in 1962, almost every state has decriminalized conduct which is illegal only for children—incorrigibility, runaway, truancy—by relabeling it into new nondelinquency classifications such as Persons or Children in Need of Supervision (PINS) (Rubin 1985). The most recent legislative strategy is to relabel "juvenile nuisances" as dependent, neglected, or in need of protection and services (Rosenberg 1983; Bishop and Frazier 1992). Such label changes simply shift youths from one jurisdictional category to another without significantly limiting courts' dispositional authority, other than secure confinement. By manipulating labels, former status offenders may be relabeled

downward as "dependent" or "neglected" youths, upward as "delinquent offenders," or laterally into the private sector (Klein 1979; Handler and Zatz 1982; Schneider 1984). Based on courtroom observations, Mahoney and Fenster (1982) report that, following the decriminalization of status offenses in 1979, many girls were charged with criminal-type offenses—for example, loitering—for behavior that previously would have been charged as status offenses—for example, running away.

Many youths who formerly would have been status offenders, especially those who are middle-class and female, now are shifted into the private mental health or chemical dependency treatment systems by diversion, court referral, or voluntary parental commitment (Schwartz 1989*b*). The Supreme Court in *Parham v. J.R.*, 442 U.S. 609 (1979), ruled that the only process juveniles are due when their parents "voluntarily" commit them to secure treatment facilities is a physician's determination that it is medically appropriate (Weithorn 1988). Most states' civil commitment laws do not provide juveniles with the same procedural safeguards as they do adults. Clearly, some children's psychological dysfunctions or substance abuse require medical attention. However, many commitments result from status-like social or behavioral conflicts, self-serving parental motives, and medical entrepreneurs coping with underutilized hospitals (Ellis 1974). Weithorn (1988, p. 799) observes that, "whereas in prior years, the juvenile justice system institutionalized troublemaking youth as status offenders, recent legal reforms have closed the doors of juvenile justice institutions to a sizable population of difficult children. Families and community agencies seeking intensive intervention have turned increasingly to mental hospitals: the only institutional alternative that is available, provides easy access, and is adequately funded by third-party payment." Coinciding with the deinstitutionalization of status offenders, Schwartz, Jackson-Beeck, and Anderson (1984, p. 375) report that the rate of juvenile psychiatric commitments in Minneapolis-St. Paul Hospitals doubled between 1976 and 1983 from ninety-one youths per 100,000 to 184. Jackson-Beeck (1985) reports that between 1978 and 1984 in Minnesota, juvenile psychiatric inpatients as a proportion of total inpatients increased from 16 percent to 26 percent, and juvenile chemical dependency inpatients in hospitals and treatment centers increased from 17 percent to 22 percent.

The combination of psychiatric hospitals seeking profits, insurance and Medicaid coverage for inpatient mental health care, and the mallea-

bility of diagnostic categories permits deviance to be "medicalized" and troublesome children to be incarcerated without meaningful judicial supervision, thereby providing an attractive alternative response for "youthful nuisances" (Schwartz et al. 1984; Weithorn 1988; Schwartz 1989*b*). Compared with adults, juveniles admitted for inpatient mental health treatment suffer from less serious disorders but stay longer once hospitalized (Schwartz et al. 1984; Jackson-Beeck, Schwartz, and Rutherford 1987).

Historically, the child welfare, juvenile justice, and mental health systems have dealt with relatively interchangeable youth populations that shift from one system to another depending on social attitudes, available funds, and imprecise legal definitions. The numbers of juveniles entering the "hidden system" of private psychiatric and chemical dependency treatment facilities has increased as the confinement of status offenders has declined (Schwartz et al. 1984; Jackson-Beeck et al. 1987). Weithorn (1988) reports that adolescent admissions to private hopitals' psychiatric units between 1980 and 1984 increased more than fourfold from 10,764 to 48,375. Lerman (1980) describes the private sector of the mental health industry as the juvenile justice system's institutional successor for the care and control of problematic youths and contends that deinstitutionalization has resulted in transinstitutionalization, with the transfer of some noncriminal juveniles from publicly funded facilities to private institutions (Lerman 1982, 1984).

Whether incarceration is for the juvenile's "best interests," for "adjustment reactions" symptomatic of adolescence, or for "chemical dependency," these trends revive the imagery of diagnosis and treatment on a discretionary basis without regard to formal due process considerations. The appropriate social and legal response to minor, nuisance, and noncriminal youngsters goes to the heart of the juvenile court's mission and the normative concept of childhood on which it is based. The debate polarizes advocates of authority and control of youth (Arthur 1977) and those who view intervention too often as discriminatory and a denial of rights (Murray 1983; Rubin 1985). While a few states—for example, Washington and Maine—have eliminated status jurisdiction entirely and allow noncriminal intervention only in cases of dependency or neglect, juvenile court judges strongly resist removal of status jurisdiction since any contraction of their authority over children leads to further convergence with criminal courts (Klein 1979; Handler and Zatz 1982). Sutton's (1988) seminal historical analysis of status offenders concludes that much of the policy debate is symbolic, that many

of the adaptations are cosmetic, and that the differentiation of status offenders from delinquents perpetuates the traditional juvenile court by reserving the former for informal treatment while consigning the latter to formal punishment.

V. Waiver of Jurisdiction over Serious Juvenile Offenders

The post-*Gault* era has witnessed a fundamental change in the jurisprudence of juvenile sentencing, as considerations of the offense, rather than the offender, increasingly dominate the decision. A shift in sentencing philosophy from rehabilitation to retribution is evident both in the response to serious juvenile offenders and in the routine sentencing of delinquent offenders (Feld 1987, 1988*b*).

Whether persistent or violent young offenders should be sentenced as juveniles or adults poses difficult theoretical and practical problems. The decision implicates both juvenile court sentencing practices and the relationship between juvenile and adult court sentencing practices. Virtually every state has a mechanism for prosecuting some juveniles as adults (Feld 1978, 1987). While few in number, these youths challenge juvenile courts' rehabilitative assumptions about nonpunitive, short-term social control (Feld 1990*a*).

Two types of statutes—judicial waiver and legislative offense exclusion—which focus repectively on characteristics of the offender or on the seriousness of the offense, highlight the differences between juvenile and criminal courts' sentencing philosophies (Thomas and Bilchik 1985; Feld 1987; Bishop and Frazier 1991).[4] Since juvenile courts traditionally emphasize individualized treatment of offenders, with judicial waiver a judge may transfer jurisdiction on a discretionary basis after a hearing to determine whether a youth is amenable to treatment or a threat to public safety. With legislative offense exclusion, by statutory definition youths charged with certain offenses, typically capital crimes or the most serious felonies—such as murder, rape, or armed robbery—simply are not within juvenile court jurisdiction (Feld 1987).

Judicial waiver's focus on the offender and legislative exclusion's focus on the offense illustrate the jurisprudential choices respectively

[4] A third mechanism for removing juvenile offenders from the juvenile system is prosecutorial waiver, or concurrent jurisdiction between juvenile and criminal courts over certain offenses (Feld 1978, 1987; Hamparian et al. 1982; Thomas and Bilchik 1985; Bishop and Frazier 1991). Since this analysis focuses primarily on the differences between the juvenile and adult justice systems and their respective emphases on offenders and offenses in sentencing, prosecutorial waiver is not discussed.

posed by emphasizing treatment and punishment. Punishment is retrospective and imposes unpleasant consequences for past offenses, while treatment is prospective and seeks to improve offenders' future welfare. Punitive sentences based on the offense typically are determinate and proportional, while individualized sentences based on the offender are indeterminate and nonproportional (Morris 1974; von Hirsch 1976, 1986). When youths are transferred to criminal court, legislative exclusion uses the seriousness of the offense, sometimes in combination with chronicity, to control the decision to prosecute a youth as an adult, whereas judicial waiver looks to individualized clinical assessments of the offender's amenability to treatment or dangerousness (Feld 1978, 1987).

A. Judicial Waiver

Judicial waiver embodies the juvenile court's approach to individualized sentencing with its focus on characteristics of the offender to decide whether a youth should be treated as a juvenile or punished as an adult (Zimring 1991). In *Kent v. United States*, 383 U.S. 541 (1966), the Supreme Court mandated that formal procedural due process must be observed in judicial waiver determinations. Subsequently, in *Breed v. Jones*, 421 U.S. 519 (1975), the Court applied the double jeopardy provisions of the Constitution to the adjudication of juvenile offenses and thereby required states to make the dispositional determination before proceeding against a youth on the merits of the charge.

Although *Kent* and *Breed* provide the formal procedural framework within which the judicial waiver decision occurs, the substantive bases of the waiver decision pose the principal difficulties. Most jurisdictions provide for discretionary waiver based on a juvenile court judge's assessment of a youth's amenability to treatment or dangerousness, as indicated by age, the treatment prognosis, and the juvenile's dangerousness, as reflected in the seriousness of the present offense and prior record (Feld 1983). While many jurisdictions limit judicial waiver to felony offenses and establish some minimum age for adult prosecution, typically fourteen or fifteen, some states provide neither offense nor minimum age restrictions (Feld 1987).

1. *Waiver Disparities.* As sentencing criteria, "amenability to treatment" and "dangerousness" implicate some of the most fundamental and difficult issues of penal policy and juvenile jurisprudence. The underlying legislative assumptions that there are effective treatment programs for serious or persistent juvenile offenders, classification sys-

tems that differentiate the treatment potential or dangerousness of various youths, and validated and reliable diagnostic tools that enable a clinician or juvenile court judge to determine the proper disposition for a particular youth are all highly problematic and controversial. Similarly, asking a judge to decide whether a youth poses a threat to public safety requires judges to predict future dangerousness even though clinicians lack the technical capacity reliably to predict low base-rate serious criminal behavior (Monahan 1981; Morris and Miller 1985).

Judicial waiver statutes give judges broad, standardless discretion. While some legislation includes lists of amorphous and contradictory factors such as those appended to the *Kent* decision, those lists do not guide discretion but rather reinforce it by allowing judges selectively to emphasize one factor or another to justify any decision (*Kent v. United States*, 383 U.S. at 566 [1966]; Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders 1978; Zimring 1981*a*). Because judges interpret and apply the same law inconsistently, discretionary statutes are not administered on an evenhanded basis (Hamparian et al. 1982; Feld 1978, 1987). Rural youths are more likely to be waived than are similarly situated urban offenders (Hamparian et al. 1982; Feld 1990*a*). Feld (1990*a*) found that, in Minnesota, 88.6 percent of waived urban juveniles were charged with a felony, as contrasted with 53.6 percent of rural juveniles. In addition, 48.6 percent of waived urban youths previously had been removed from their homes, as compared with 28.6 percent of waived rural juveniles. Hamparian et al.'s (1982) nationwide evaluation of judicial waiver in 1978 demonstrates that waiver is often inconsistent. Highlighting the interstate variability of juvenile justice administration, under similar statutory regimes among the states that rely on judicial waiver to transfer youths to criminal court, the rates of waiver vary from a high of 13.5 per 10,000 youths at risk to a low of .07.

Fagan and Deschenes (1990) analyzed waiver petitions filed against a sample of 201 violent youths in Boston, Detroit, Newark, and Phoenix in 1981–84. The violent offender population was defined as persons currently charged with a crime of violence and having at least one prior felony adjudication. Data on offense and offender characteristics were collected from police reports, court records, and social histories. Fagan and Deschenes analyzed the governing statutes, compared the rates of waiver—Boston (21 percent transferred), Detroit (31 percent), Newark (41 percent), and Phoenix (71 percent)—and concluded that no uniform

or consistent criteria guided the transfer decision in any jurisdiction: "Neither did we find a strong relationship between transfer and more offense-related variables, including the nature of the offense, number of coparticipants or number of victims. What we found was a rash of inconsistent judicial waiver decisions, both within and across sites" (Fagan and Deschenes 1990, p. 347).

A youth's race may also affect waiver decisions (Fagan, Forst, and Vivona 1987). Eigen (1981*a*, 1981*b*) reported an interracial effect in transfers in Philadelphia; black youths with white victims were significantly more at risk for waiver. In their study of transfer of violent youths, Fagan, Forst, and Vivona (1987) also found disparities in the rates of transfer of minority and white offenders. Although there was no direct evidence of sentencing discrimination, "it appears that the effects of race are indirect, but visible nonetheless" (Fagan, Forst, and Vivona 1987, p. 276).

2. *Waived Juveniles' Criminal Court Dispositions.* Because young people are not irresponsible children one day and responsible adults the next, except as a matter of law, juvenile and adult courts may pursue inconsistent sentencing goals when juveniles make the transition to criminal courts. Despite public concern with youth violence, most juveniles who are judicially waived are charged with felony property crimes like burglary, rather than with serious offenses against the person (Hamparian et al. 1982; Feld 1987, 1990*a*). When they appear in criminal courts as adult first offenders, typically they are not imprisoned (Greenwood, Petersilia, and Zimring 1980; Hamparian et al. 1982; Greenwood 1986).

Hamparian et al.'s (1982) nationwide study of waiver reported that, of the 7,318 juveniles judicially transferred in 1978, less than one-third (32 percent) of the youths were charged with offenses against the person; the largest proportion (45 percent) were charged with property crimes (Hamparian et al. 1982). Nimick et al. (1986), at the NJCDA, analyzed 127,163 petitioned delinquency cases disposed in 1982 and found waiver petitions were filed in about 2,335 cases, or less than 2 percent of all filings. They report that "waiver was not reserved for youth charged with a violent offense; in this sample only a third [34.3 percent] of all youth waived to criminal court were charged with an index violent offense. A greater percentage of waived cases were charged with an index property offense [40.3 percent], and nearly one-quarter [25.4 percent] of all waived cases involved what are commonly

considered the less serious nonindex offenses" (Nimick et al. 1986, p. 2).

When Hamparian et al. (1982) traced the subsequent sentences of judicially waived youths in criminal court, they found that the majority were fined or placed on probation. Even among those confined, 40 percent had maximum sentences of one year or less. In part, these relatively lenient dispositions reflect the fact that most waived youths were not violent offenders. In analyzing the relationships between the offense for which jurisdiction was waived and the eventual adult sentence, Hamparian concluded that "there seems to be a direct correlation between low percentage of personal offenses waived and high proportion of community dispositions (as opposed to incarceration)" (Hamparian et al. 1982, p. 112). Heuser's (1985) evaluation in Oregon of the adult sentences received by waived juvenile felony defendants showed that the vast majority were property offenders rather than violent offenders and that, as a consequence, only 55 percent of the youths convicted of felonies were incarcerated, with the rest receiving probation. Moreover, even of those youths incarcerated as adults, nearly two-thirds received jail terms of one year or less and served an average of about eight months, approximately the same terms that juveniles with prior records who were convicted within juvenile court would receive (Heuser 1985). Gillespie and Norman's (1984) study of youths waived in Utah between 1967 and 1980 revealed that the majority of juveniles who were transferred were not charged with violent offenses, and the majority of juveniles convicted as adults were not imprisoned. Bortner's (1986) study of 214 waived juveniles in a western metropolitan county reported that less than one-third (30.8 percent) of the juveniles convicted in adult proceedings were sentenced to prison.

Greenwood, Abrahamse, and Zimring (1984) examined dispositions of youths tried as adults in several jurisdictions and found substantial variation in sentencing practices. In New York City and in Franklin County (Columbus), Ohio, they found that, controlling for offense seriousness, youthful offenders faced a substantially lower chance of being incarcerated than did older offenders; that youthful violent offenders got lighter sentences than did older violent offenders; and that, for approximately two years after becoming adults, youths were the beneficiaries of informal lenient sentencing policies in adult courts. Another study reported that, although the seriousness of a juvenile's offense is the primary determinant of the severity of the adult sentence

imposed in Washington, D.C., "youth, at least through the first two years of criminal court jurisdiction, is a perceptible mitigating factor" (Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders 1978, p. 63).

The lack of congruence between juvenile courts' maximum sanction, waiver, and adult criminal courts' sentencing practices occurs because the typical youth who is waived is an older juvenile charged with burglary rather than violence, because of qualitative differences in the nature of juveniles' offenses relative to adults', because of differences in sentencing philosophies between the two systems when youths make the transition from the one to the other, and because of the failure to integrate juvenile and adult criminal records for sentencing purposes. Even within the more serious categories of crimes, for example, there are age-related patterns of seriousness that may affect eventual sentences: younger offenders are less likely than adults to be armed with guns, inflict as much injury, or steal as much property (Greenwood, Petersilia, and Zimring 1980; McDermott and Hindelang 1981). Adult criminal courts tend to rely primarily on the seriousness of the present offense and the prior adult criminal history in making sentencing decisions. Their failure to include fully the juvenile component of the offender's criminal history stems from the confidential nature of juvenile court records, the functional and physical separation of the respective court services staffs, and the difficulty of compiling and maintaining criminal histories through several different bureaucracies (Greenwood, Petersilia, and Zimring 1980; Petersilia 1981; Greenwood 1986). As more states' criminal courts consider juvenile convictions as part of adult criminal history scores, however, juvenile records may become more fully integrated into and play a larger role in adult sentencing regimes (Feld 1981*a*).

Ultimately, waiver involves the choice of appropriate disposition of offenders who chronologically happen to be juveniles. The distinction between treatment as a juvenile and punishment as an adult is based on an arbitrarily chosen age that has no criminological significance other than its legal consequences. There is a strong relationship between age and crime; crime rates for many offenses peak in mid to late adolescence (Greenberg 1979; Hirschi and Gottfredson 1983; Farrington 1986; Greenwood 1986). Rational sentencing policy requires coordinated responses to young offenders on both sides of the juvenile/adult line using a standardized means to identify and sanction serious and chronic young criminals (Twentieth Century Fund Task Force on

Sentencing Policy Toward Young Offenders 1978; Greenwood 1986; Feld 1987, 1990*a*).

Although juvenile and adult courts' sentencing practices may work at cross-purposes when youths make the transition to criminal court, Bortner (1986) contends that juvenile courts' organizational and political considerations explain more about waiver decisions than does the seriousness or intractability of a youth. By relinquishing a small fraction of its clientele and portraying these juveniles as the most intractable and dangerous in the system, juvenile courts create the appearance of protecting the public, preserve their jurisdiction over the vast bulk of juveniles, and deflect more comprehensive criticisms (Bortner 1986; Feld 1978, 1987).

B. Legislative Exclusion of Offenses

Legislative offense exclusion defines juvenile court jurisdiction as not encompassing certain offenses (Feld 1978, 1987). Some jurisdictions exclude only capital crimes or murder while others may place youths charged with rape, armed robbery, and other offenses automatically in adult criminal court (Hamparian et al. 1982; Feld 1987). While most prescribe some minimum age for "automatic adulthood," typically sixteen years of age, youths as young as thirteen charged with murder in New York are prosecuted as adults (Feld 1987). Since juvenile courts are statutory entities, legislatures may modify their jurisdiction as they please, although it is often not apparent which of several alternative sentencing policies are being pursued when they redefine jurisdiction to exclude offenses.

Legislatively defining adulthood entails both empirical judgments and value choices. One normative judgment sometimes made is that certain crimes are so serious or so controversial that those who commit them deserve to be tried as adults and subjected to adult sanctions (Feld 1978, 1987). An empirical judgment involves an effort to identify persistent or serious offenders by selecting offense and recidivism criteria that differentiate between the relatively few serious or chronic young offenders who would be prosecuted as adults and the vast majority of juveniles who would remain within the jurisdiction of the juvenile court.[5] The policy choice is between having judges make these

[5] If the legislative goal in redefining juvenile court jurisdiction is to incapacitate chronic offenders selectively, for example, then excluding offenders solely on the basis of the seriousness of their present offense may not be the most effective strategy. Offenders who are both persistent and violent are legislatively distinguishable from their less criminally active peers on the basis of chronic criminal activity but not on the basis of

empirical and normative decisions on an ad hoc clinical basis or developing standard legislative criteria that integrate juvenile and adult sentencing practices and enable criminal courts to sentence violent or chronic juveniles more consistently (Feld 1983, 1990*a*).

Zimring (1981*a*, 1991) and Feld (1978, 1990*a*) contend that waiver should occur only when the minimum period of appropriate confinement for an offense substantially exceeds the maximum sentence available to a juvenile court. This criterion would identify "principal offenders accused of criminal homicide, and a few repetitively violent offenders accused of life-threatening crimes" (Zimring 1991, p. 276). One empirical impetus to waiver is a judge's perception that a juvenile requires a longer sentence than is available in the juvenile court (Feld 1990*a*). Fagan and Deschenes (1990) report that the length of time from age at offense to the maximum age jurisdictional limit, rather than prior record, predicts judicial transfer decisions.

C. Offense Criteria and Waiver Decisions

Judicial waiver and legislative offense exclusion statutes present many of the same sentencing policy issues as the choice between indeterminate or determinate sentencing for adults. In the adult context, determinate sentences based on just deserts provide an alternative sentencing rationale to indeterminate sentences (American Friends Service Committee 1971; von Hirsch 1976; Petersilia and Turner 1987). Just deserts sentencing emphasizes concern for proportionality and equality, defines similar cases as similar based primarily on the seriousness of the offense and prior record, and limits consideration of individual status or circumstances. By contrast, individualized decisions envisioned by indeterminate sentencing can take account of all personal characteristics as relevant and rely heavily on professional discretion to weigh every factor (Matza 1964). Proponents of just deserts approaches reject individualization because treatment programs are seen as ineffective (Martinson 1974; Greenberg 1977; Sechrest, White, and Brown 1979; Lab and Whitehead 1988), individualization vests broad discretion in experts who often cannot justify treating similarly situated offenders differently, and clinical subjectivity often produces unequal

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the seriousness of any given act. The research on criminal careers indicates that young offenders do not "specialize" in particular types of crime, that violence occurs within an essentially random pattern of delinquent behavior, and that a small number of chronic delinquents are responsible for many offenses and most of the violent offenses committed by juveniles (Blumstein et al. 1986).

and unjust results (von Hirsch 1976, 1986; Feld 1988*b*, 1990*a*). The just deserts sentencing philosophy has influenced several states' juvenile waiver and sentencing statutes (Feld 1987, 1988*b*).

Within the past two decades, concern for offense seriousness rather than reliance on judges' clinical assessments has come to dominate the waiver decision (Feld 1987, 1990*a*). Legislatures use offense criteria either as dispositional guidelines to limit judicial discretion or automatically to exclude certain youths (Feld 1987). More than twenty states have amended their judicial waiver statutes to reduce their inconsistency and to improve the fit between juvenile waiver and adult sentencing practices (Feld 1987). Legislatures use offense criteria to structure judicial discretion by specifying that judges may waive only certain serious offenses, identifying certain categories of serious current offenses or combinations of offenses and prior record for special procedural handling, or by prescribing the dispositional consequences that follow from proof of serious offenses or prior records (Feld 1987). Such legislative strategies restrict judicial waiver to serious offenses such as murder, rape, or robbery, use offense criteria to make transfer hearings mandatory, or shift to the juvenile the burden of affirmatively proving amenability to treatment rather than requiring the state to prove nonamenability (Feld 1987).

Evaluations of California's statutory waiver changes in 1976, adopting offense criteria and shifting the burden of proof to the juvenile, indicate that there was a dramatic increase in the numbers of youths who were tried as adults after being charged with one of the enumerated offenses (Teilmann and Klein n.d.). After accounting for possible fluctuations in juvenile crime rates, evaluators reported that "Los Angeles County experienced a 318 percent increase in certification hearings and a 234 percent increase in certifications" between 1976 and 1977 (Teilmann and Klein n.d., p. 30). Juveniles who were waived and tried as adults were almost as likely to be convicted as youths tried in juvenile court; following their convictions, they were more likely to be incarcerated than were their juvenile courtparts. Similarly, although Greenwood, Petersilia, and Zimring (1980) reported substantial variation in sentencing practices in several jurisdictions, they found that juveniles tried as adults in Los Angeles were not sentenced more leniently than other offenders; that for more serious crimes the seriousness or violence of the crime, not the age or record of the offender, determined the sentence; and that in sentencing marginal crimes like burglary the prior juvenile record appeared to influence the severity of

the first adult sentence. Thus, restricting waiver to serious offenses and specifying special procedures may limit judicial discretion and increase the likelihood that significant adult sanctions will occur if waiver is ordered.

Nearly half of the states have excluded some offenses and offenders from juvenile court jurisdiction. While some states exclude only youths charged with capital crimes, murder, or offenses punishable by life imprisonment, others exclude longer lists of offenses or youths charged with repeat offenses (Feld 1987). The Illinois legislature, for example, redefined juvenile court jurisdiction in 1982 to exclude any youth aged fifteen or older who was charged with murder, armed robbery, or rape. In the seven years prior to the offense exclusion legislation, Cook County averaged forty-seven judicially waived youths per year. In the first two years following the enactment of the offense exclusion legislation, adult criminal prosecutions of juveniles more than tripled to 170, of which 151 resulted from the automatic transfer provision (Knoohuizen 1986). New York, which has no judicial waiver provisions and where juvenile court jurisdiction ends at age sixteen, adopted legislation in 1978 that excluded juveniles thirteen years or older charged with murder and fourteen years or older charged with kidnapping, arson, or rape (Singer and McDowall 1988).

Legislative amendments of judicial waiver statutes or exluded offense laws that target serious offenses or that couple serious offenses with prior records also increase the likelihood of significant adult sentences for serious young offenders. One way to examine the effects of such laws is to compare the sentences of juveniles tried as adults in jurisdictions in which they are targeted as serious offenders with the sentences received in more discretionary jurisdictions. Hamparian et al.'s national waiver survey showed that most judicially waived juveniles were property offenders, not violent offenders, and were not sentenced to prison (Hamparian et al. 1982; Nimick et al. 1986). By contrast, Thomas and Bilchik's (1985) study of waived youths' dispositions in Florida, where prosecutors can charge juveniles directly in adult court, reports that the majority of youths tried as adults were older males with prior delinquency adjudications and multiple present felony charges and that approximately two-thirds of these youths were sentenced to substantial terms of imprisonment. Rudman et al. (1986) evaluated the processing and dispositions of youths charged with a violent offense who had a prior felony conviction who were waived in four urban sites and reported that over 90 percent were incarcerated,

and their sentences were five times longer than youths with similar characteristics who were retained in juvenile court. Even among this sample of violent offenders, however, Fagan and Deschenes (1990) were unable to identify factors that distinguished between those who were waived and those who were not. Heuser (1985) reported that, while violent and repetitive juvenile offenders were a small subset of the juveniles waived in Oregon, 75 percent of the juveniles convicted of violent offenses were incarcerated and received prison sentences in excess of six years. Hamparian et al. (1982) examined the adult sentences received by youths in excluded offense jurisdictions. They found that 97.8 percent of such youths were excluded for offenses against the person. They were only able to retrieve adult sentence data in Pennsylvania, where 62 percent of convicted youths were sent to adult correctional facilities.

Legislative strategies that use offense criteria as sentencing guidelines to structure judicial waiver discretion or to exclude certain offenses from juvenile court jurisdiction provide one indicator of a policy shift from an offender-oriented treatment sentencing philosophy to a more retributive one. Legislation structuring or elimination of judicial discretion repudiates rehabilitation at least with respect to "hard-core" offenders, narrows juvenile court jurisdiction, marginally reduces its clientele, and denies juvenile courts the opportunity to treat certain youths without even inquiring into their personal characteristics. Indeed, the increased emphasis on punishing serious young offenders as adults exposes at least some youths to the possibility of capital punishment for the crimes they committed as juveniles (Streib 1987).[6]

VI. Sentencing Delinquent Offenders

For the Supreme Court in *McKeiver*, the basic justification for denying jury trials in delinquency proceedings and for maintaining a juvenile justice system separate from the adult one was based on the differences between juvenile treatment and criminal punishment (Gardner 1982; Feld 1988*b*). Despite the fundamental importance of the rehabilitation-retribution distinction, however, the Court did not analyze the differences between the two. There are several factors that the *McKeiver*

[6] In *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988), a plurality of the Supreme Court ruled that executing an offender for a crime committed at fifteen years of age violated the Eighth Amendment constitutional prohibition on "cruel and unusual punishment." However, in *Stanford v. Kentucky*, 109 S.Ct. 1969 (1989), a majority of the Court concluded that imposing capital punishment on an offender for a crime committed at sixteen or seventeen years of age did not violate the Constitution.

Court might have considered to decide whether a juvenile court is punishing a youth for his past offenses or treating him for his future welfare. This section examines legislative purpose clauses and court opinions, juvenile court sentencing statutes and sentencing practices, and conditions of institutional confinement and evaluations of their effectiveness to determine whether a juvenile is being treated or punished (Feld 1988*b*). All of these indicators consistently reveal that, despite persisting rehabilitative rhetoric, treating juveniles closely resembles punishing adult criminals.

Punishment involves state imposition of burdens on an individual who has violated legal prohibitions for purposes of retribution or deterrence. Punishment assumes that responsible, freewill moral actors make blameworthy choices and deserve to suffer the prescribed consequences for their acts because of *past offenses* (Hart 1968; von Hirsch 1976). Treatment, by contrast, focuses on the mental health, status, and *future* welfare of the individual rather than on the commission of prohibited acts (Allen 1964, 1981). Most forms of rehabilitative treatment assume that there is a degree of determinism, that antecedent factors caused the undesirable behavior, and that intervention strategies can be applied that will improve the offender's *future well-being.*

Whether juvenile court sentencing decisions are based on the past offense or the offender's future welfare provides an indicator of the governing sentencing philosophy. Just deserts sentencing, with its strong retributive foundation, punishes offenders according to their past behavior rather than on the basis of who they are or may become, and sentences are typically determinate and proportional. Similarly situated offenders are defined and sanctioned on the basis of relatively objective and legally relevant factors such as seriousness of offense, culpability, or criminal history (von Hirsch 1976, 1986). By contrast, sentences based on characteristics of the offender are typically open-ended, nonproportional, and indeterminate. Individualized justice deems all personal and social characteristics as relevant and does not assign controlling significance to any one factor.

The influence of just deserts principles for sentencing adults has spilled over into the routine sentencing of juveniles as well as to the waiver decision (Feld 1987, 1988*b*; Gardner 1987). But punishing juveniles has constitutional consequences since the *McKeiver* Court justified the procedural differences of juvenile court by positing a therapeutic, rather than punitive, purpose. Moreover, juveniles currently may serve longer sentences than their adult counterparts convicted of the same

offense because they purportedly receive treatment rather than punishment.[7]

A. The Purpose of Juvenile Courts

Among the factors which the Supreme Court considers to determine whether seemingly punitive and coercive governmental intervention constitutes punishment or an "alternative purpose" of treatment is the stated legislative purpose (*Allen v. Illinois*, 478 U.S. 364 [1986]; Gardner 1982). Most states' juvenile court statutes contain a purposes clause that declares the underlying legislative rationale as an aid to courts in interpreting the statute. These preambles provide one indicator of the goals of juvenile court intervention (Feld 1988*b*).

Forty-two states' juvenile codes contain a legislative purpose clause (Feld 1988*b*). In the decades since *Gault* and *McKeiver*, about one-quarter of the states have redefined their juvenile codes' statements of legislative purpose (Feld 1988*b*, p. 842, n. 84). These amendments deemphasize rehabilitation and intervention in the child's "best interest" and assert the importance of "provid[ing] for the protection and safety of the public" (Cal. Welf. & Inst. Code § 202 [West Supp. 1988]), "protect[ing] society . . . [while] recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases" (Fla. Stat. Ann. § 39.001(2)(a)[West Supp. 1988]), "render[ing] appropriate punishment to offenders" (Haw.Rev.Stat. § 571-1 [1985]), "protect[ing] the public by enforcing the legal obligations children have to society" (Ind. Code Ann. § 31-6-1-1 [Burns 1980]), and the like (Feld 1981*a*, 1988*b*; Walkover 1984).

Many courts recognize that these changes signal a basic philosophical reorientation in juvenile justice (*State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401 [West Virginia 1980]). The Washington Supreme Court reasoned that "sometimes punishment is treatment" and upheld the legislature's conclusion that "accountability for criminal behavior, the

[7] The California Supreme Court in *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976), limited the maximum sentence that could be imposed on an adult misdemeanant committed to the California Youth Authority to the maximum length that could be imposed on an adult sentenced for the same offense. By contrast, in *People v. Eric J.*, 25 Cal. 3d 522, 601 P.2d 549, 159 Cal. Rptr. 317 (1979), the Court refused to apply the *Olivas* adult sentence limitations to juveniles committed to the Youth Authority and upheld a longer term imposed on a juvenile than could be imposed on an adult sentenced for the same offense. In rejecting *Eric J.'s* equal protection claim, the Court emphasized that, unlike "punitive" sentences for adults, "there has been no like revolution in society's attitude toward juvenile offenders. It is still true that 'Juvenile commitment proceedings are designed for the purposes of rehabilitation and treatment, not punishment.' " Id. at 554.

prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing on the particular characteristics of the individual juveniles" (*State v. Lawley*, 91 Wash.2d 654, 656, 591 P.2d 772, 773 [1979]). The Nevada Supreme Court endorsed punishment and held that "by formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population" (*In re Seven Minors*, 99 Nev. 427, 423, 664 P.2d 947, 950 [1983]).

B. Sentencing Legislation and Practices

Sentencing statutes and practices provide another indicator of whether a juvenile court is punishing or treating delinquents. Originally, juvenile court sentences were indeterminate and nonproportional to achieve the child's "best interests" (Mack 1909; Rothman 1980). Recently, however, many states' juvenile court sentencing legislation has shifted toward a greater emphasis on punishment (Feld 1988*b*).

1. *Determinate Sentences in Juvenile Court.* Despite the court's history of indeterminate sentencing, about one-third of the states now use the present offense, the prior record, or both, to regulate at least some juvenile court sentencing decisions through determinate or mandatory minimum sentencing statutes or correctional administrative guidelines (Feld 1988*b*). The clearest departure from traditional juvenile court sentencing practices occurred in 1977 when Washington state enacted just deserts legislation that based presumptive juvenile sentences on a youth's age, present offense, and prior record (Schneider and Schram 1983; Fisher, Fraser, and Forst 1985). The Washington code creates three categories of offenders—serious, middle, and minor—with presumptive sentences and standard ranges for each. A sentencing guidelines commission developed dispositional ("in/out") and presumptive length-of-stay guidelines in the form of standard ranges that are proportionate to the seriousness of the present offense, age, and prior record (Feld 1988*b*). Evaluations concluded that sentences became more uniform, consistent, and proportionate to the seriousness of the offense than under the prior rehabilitative sentencing regime (Schneider and Schram 1983; Fisher et al. 1985; Forst and Blomquist 1991).

In New Jersey, juvenile court judges consider offense, criminal history, and statutory "aggravating and mitigating" factors when sentenc-

ing juveniles determinately (N.J. Stat.Ann. §§ 2A:4A-43(a), 44(a), (d)[West 1987]). In 1987, Texas adopted determinate sentencing legislation for juvenile offenders charged with serious offenses if the prosecutor submits the petition to a grand jury (Tex. Fam. Code Ann. §§ 53.045, 54.04(d)(3)[Vernon Supp. 1988]; Dawson 1988; 1990*b*). Although the Texas legislation was intended to increase juvenile courts' sentencing powers over young offenders and to provide an alternative to judicial waiver, Dawson (1990*b*) contends that one unintended consequence of the law was to increase prosecutors' plea-bargaining leverage.

2. *Mandatory Minimum Terms.* A number of states—for example, Georgia, New York, and Ohio—impose mandatory minimum sentences for certain "designated felonies" (Feld 1988*b*). While some mandatory minimum sentencing statutes allow judges discretion whether to impose the mandated sanctions, other jurisdictions—for example, Delaware—require the court to commit youths for the mandatory minimum (Feld 1988*b*). These "therapeutic" mandatory sentencing laws are addressed to "violent and repeat offenders," "aggravated juvenile offenders," "serious juvenile offenders," or "designated felons" (Feld 1988*b*). Terms of mandatory confinement range from twelve to eighteen months, to age twenty-one, or to the adult limit for the same offense (Feld 1988*b*). Basing mandatory minimum sentences on the offense precludes any individualized consideration of the offender's "real needs."

3. *Administrative Sentencing and Parole Release Guidelines.* Several states' departments of corrections—for example, in Arizona, Georgia, and Minnesota—have adopted administrative guidelines that use offense criteria to specify proportional mandatory minimum terms, and these provide another form of just deserts sentencing (Forst, Friedman, and Coates 1985; Georgia Division of Youth Services 1985; Arizona Department of Corrections 1986; Feld 1988*b*). Minnesota's Department of Corrections adopted determinate "length-of-stay" guidelines based on the current offense and other "risk" factors (Minnesota Department of Corrections 1980). The juvenile risk factors—prior record, probation or parole status—are the same as those used in Minnesota's adult-sentencing guidelines, which are designed to achieve just deserts. In California, juveniles committed to the Youth Authority are released by the Youthful Offender Parole Board (Forst and Blomquist 1991). The board uses offense categories to establish parole eligibility based on its assessment of the "seriousness of the specific [offense] and the

degree of danger those committed to the Youth Authority pose to the public" (Cal. Admin. Code tit. 15, § 4945 [1987]; Private Sector Task Force on Juvenile Justice 1987).

4. *Empirical Evaluations of Juvenile Court Sentencing Practices.* Juvenile court judges decide what to do with a child, in part by reference to statutory mandates. Practical bureaucratic considerations and paternalistic assumptions about children influence their discretionary decisions as well (Matza 1964; Cicourel 1968; Emerson 1969; Bortner 1982).

The exercise of broad discretion associated with individualized justice raises concerns about its discriminatory impact (Dannefer and Schutt 1982; McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987; Krisberg et al. 1987; Pope and Feyerherm 1990*a*, 1990*b*). Poor and minority youths are disproportionately overrepresented in juvenile correctional institutions relative to white youths (Krisberg et al. 1987; Pope and Feyerherm 1990*a*, 1990*b*). Do discretionary sentences based on social characteristics result in more severe sentencing of minority youths (McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987; Krisberg et al. 1987)? Or, despite a theoretical commitment to individualized justice, are sentences based on offenses, and does the racial disproportionality result from real differences in rates of offending by race (Wolfgang, Figlio, and Sellin 1972; Hindelang 1978; Huizinga and Elliott 1987)? Or, does the structure of justice decision making—for example, racial differences in rates of pretrial detention or representation by counsel—act to the detriment of minority juveniles (Pope and Feyerherm 1990*a*, 1990*b*)? In short, to what extent do legal offense factors, social variables, or system-processing variables influence juvenile court judges' sentencing decisions and explain racial disparities?

While evaluations of juvenile court sentencing practices are somewhat contradictory, two general findings emerge (McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987). First, the present offense and prior record account for most of the variance in juvenile court sentencing that can be explained (Barton 1976; Clarke and Koch 1980; Horowitz and Wasserman 1980; Phillips and Dinitz 1982; McCarthy and Smith 1986; Feld 1989). In multivariate studies (Clarke and Koch 1980; McCarthy and Smith 1986; Fagan, Slaughter, and Hartstone 1987; Feld 1989), offense variables typically explain about 25–30 percent of the variance in sentencing. Practical bureaucratic considerations provide an impetus to base sentences on the offense. Avoiding scandals and unfavorable political and media attention constrain juvenile court

judges to impose more formal and restrictive sentences on more serious delinquents (Cicourel 1968; Emerson 1969; Bortner 1982). Moreover, complex organizations that pursue multiple goals develop bureaucratic strategies to simplify individualized assessments (Matza 1964; Marshall and Thomas 1983). Since juvenile courts routinely collect information about present offenses and prior records, these legal factors provide bases for decisions. Despite juvenile courts' claims to individualize sentences, their practices are similar to adult courts' in their emphases on present offense and prior record. A survey of juvenile sentencing practices in California concluded that "juvenile and criminal courts in California are much more alike than statutory language would suggest in the degree to which they focus on aggravating circumstances of the charged offense and the defendant's prior record in determining the degree of confinement that will be imposed" (Greenwood et al. 1983, p. 51).

A second finding is that, after controlling for offense variables, the individualized justice of juvenile courts is often associated with racial disparities in sentencing juveniles (McCarthy and Smith 1986; Krisberg et al. 1987; Fagan, Slaughter, and Hartstone 1987; Pope and Feyerherm 1990*a*, 1990*b*). McCarthy and Smith (1986) and Fagan, Slaughter, and Hartstone (1987) report that, while initial screening decisions were not overtly discriminatory, racial effects were amplified as minority youths were processed through the system. Bishop and Frazier (1988) also report that race, as well as legal factors, influenced sequential processing decisions and that, as they proceeded further into the system, black youths were at a disadvantage relative to white youths. Bishop and Frazier analyzed all 54,266 referrals to juvenile court in Florida between January 1, 1979, and December 31, 1981. While black youths made up 28.4 percent of the initial referrals, court intake recommended formal processing of 59.1 percent of the cases involving black youths, compared with 45.6 percent of the white youths. Youths formally petitioned to juvenile court included 47.3 percent of black youths, compared with 37.8 percent of the whites, thereby increasing the minority composition of the cohort from 28.4 percent black to 32.4 percent black (Bishop and Frazier 1988). Of the youths adjudicated delinquent, 29.6 percent of black youths were incarcerated, compared to 19.5 percent of white youths. "The probability of an initial referral resulting in movement through the system of a disposition of incarceration/transfer is nearly twice as great for blacks (10.2 percent) as for whites (5.4 percent)" (Bishop and Frazier 1988,

p. 251). After multivariate controls and measures of interaction effects, Bishop and Frazier (1988) concluded that "race is a far more pervasive influence in processing than much previous research has indicated. Blacks are more likely to be recommended for formal processing, referred to court, adjudicated delinquent, and given harsher dispositions than comparable white offenders" (p. 258). Reports by McCarthy and Smith (1986), Fagan, Slaughter, and Hartstone (1987), and Bishop and Frazier (1988) emphasize the importance of analyzing juvenile justice decision making as a multistage process rather than focusing solely on the final dispositional decision. For example, Bortner and Reed (1985), Frazier and Cochran (1986), and Feld (1989) report that black youths are more likely to be detained than white youths and that detained youths are more likely to receive severe sentences.

While legal variables exhibit a stronger relationship with dispositions than do social variables, most of the variation in sentencing juveniles remains unexplained (Thomas and Fitch 1975; Clarke and Koch 1980; Horowitz and Wasserman 1980). The recent legislative changes in juvenile sentencing statutes reflect disquiet with the underlying premises of individualized justice, the idiosyncratic exercises of discretion, and the inequalities that result (Feld 1987, 1988*b*). If there are racial differences in patterns of offending, then coupling the legislative emphases on offense seriousness with the cumulative impact of race on multistage screening and processing decisions amplifies the disproportionate overrepresentation of minority youths in correctional institutions (Krisberg et al. 1987).

C. Conditions of Confinement

The correctional facilities to which young offenders are sentenced provide another indicator of whether juvenile courts are punishing or treating them. The Court in *Gault* belatedly recognized the longstanding contradictions between rehabilitative rhetoric and punitive reality; conditions of confinement motivated the Court to insist on minimal procedural safeguards for juveniles. Rothman's (1980) study of the early Progressive training schools provides a dismal account of institutions which failed to rehabilitate and were scarcely distinguishable from adult penal facilities. Schlossman (1977) offers an equally negative account of Progressive juvenile correctional programs. Historical studies of the juvenile court's institutional precursor, the House of Refuge, provide similar descriptions of custodial, rather than rehabilitative, facilities (Hawes 1971; Rothman 1971; Mennel 1973; Sutton 1988).

Contemporary evaluations of juvenile institutions reveal a continuing gap between rehabilitative rhetoric and punitive reality (Bartollas, Miller, and Dinitz 1976; Feld 1977, 1981*b*; Lerner 1986). Research in Massachusetts described violent and punitive institutions in which staff physically abused inmates and were frequently powerless to prevent inmate violence and predation (Feld 1977, 1981*b*). A study in Ohio described a similarly violent and oppressive institutional environment for the "rehabilitation" of young delinquents (Bartollas et al. 1976). Studies in other jurisdictions report staff and inmate violence, physical abuse, and degrading make-work (Guggenheim 1978; Lerner 1986). The daily reality for juveniles confined in many "treatment" facilities is one of violence, predatory behavior, and punitive incarceration.

Coinciding with these post-*Gault* evaluation studies, lawsuits challenged conditions of confinement, alleged that they violated inmates' "right to treatment," inflicted "cruel and unusual punishment," and provided another outside view of juvenile corrections (Feld 1978, 1984).[8] During the 1970s, courts attempted to define the juvenile "treatment" that justified fewer procedural safeguards, although they decided most cases either on procedural grounds or by prohibiting clearly punitive institutional practices such as excessive use of solitary confinement and physical beatings.[9] Juvenile conditions-of-

[8] The right to treatment follows from the state's invocation of its *parens patriae* power to intervene for the benefit of the individual. In a variety of settings other than juvenile corrections, such as institutions for the mentally ill and mentally retarded, states confine individuals without affording them the procedural safeguards associated with criminal incarceration for punishment. In all of these settings, it is the promise of benefit that justifies the less stringent procedural safeguards. The constitutional rationale of the civil commitment cases has been invoked to secure treatment for juveniles incarcerated in state training schools. The right to treatment has been relied on in juvenile institutions in cases in which rehabilitative services were not forthcoming and custodial warehousing or barbaric practices were shown.

[9] In *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974), the Court found that inmates were beaten with a "fraternity paddle," injected with psychotropic drugs for social control purposes, and deprived of minimally adequate care and individualized treatment. In *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972), the Court found inmates confined in dark and cold dungeonlike cells in their underwear, routinely locked in solitary confinement, and subjected to a variety of antirehabilitative practices. In *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), the Court found numerous instances of physical brutality and abuse, including hazing by staff and inmates, staff-administered beatings and teargassings, homosexual assaults, extensive use of solitary confinement, repetitive and degrading make-work, and minimal clinical services. In *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977), the Court found youths confined in padded cells with no windows or furnishings and only flush holes for toilets and denied access to all services or programs except a Bible. In *State v. Werner*, 242 S.E.2d 907 (West Virginia 1978), the Court found inmates locked in solitary confinement, beaten, slapped, kicked, and sprayed with mace by staff, required to scrub floors with a

confinement litigation in the 1980s focused on juvenile pretrial detention facilities as well as institutions and attempted to define constitutionally adequate minimum living conditions without prescribing any affirmative obligations associated with "treatment."[10]

Although the courts' analytic strategies vary and outcomes of cases differ, judicial descriptions of custodial institutions emphasize that rehabilitative euphemisms such as "providing a structured environment" cannot disguise the punitive reality of juvenile confinement. The institutional experiences of confined juveniles are not as unmitigatedly bad as those of adult prison inmates (Forst, Fagan, and Vivona 1989). Based on interviews with fifty-nine chronic juvenile offenders in state training schools and eighty-one comparable youths in adult correctional facilities, Forst et al. (1989) report that juveniles in training schools rated their treatment and training programs, services, and institutional personnel more positively than did the youths in prison. Despite their relative superiority, however, juvenile correctional facilities certainly are not so benign and therapeutic as to justify depriving those who face commitment to them of adequate procedural safeguards.

Evaluations of juvenile institutions conclude that violent inmate subcultures are a function of security arrangements; the more staff impose authoritarian controls to facilitate security, the higher the levels of covert inmate violence within the subculture (Bartollas et al. 1976; Feld 1977, 1981*b*). Juveniles sentenced to long terms under "get-tough" legislation are the most serious and chronic offenders, yet facilities designed to handle them often suffer from limited physical mobility, inadequate program resources and staff, and intense interaction among the most difficult and troubled youths in the system. The result is a situation that can easily produce a juvenile correctional "warehouse" with all of the worst characteristics of adult penal incarceration. The recent changes in juvenile court sentencing legislation exacerbate the deleterious side effects associated with institutional overcrowding (Krisberg et al. 1986).

The "medical model" underlying the rehabilitative juvenile court assumes that social or psychological factors cause delinquent behavior,

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toothbrush, and subjected to punitive practices such as standing and sitting for prolonged periods without changing position.

[10] In *D.B. v. Tewksbury*, 545 F.Supp 896 (D.C. Ore. 1982), the Court found that the conditions of juvenile pretrial detainees who were incarcerated in an adult jail were punitive and worse than those experienced by adult convicts. Other courts have found similar conditions violate either juveniles' Fourteenth Amendment due process rights or the Eighth Amendment's prohibition against cruel and unusual punishment.

that sentences should be individualized based on assessments of treatment needs, that release should occur based on when the juvenile improves, and that successful treatment will reduce recidivism (Kassebaum and Ward 1991). Evaluations of the effectiveness of juvenile rehabilitation programs on recidivism rates provide scant support for the conclusion that juveniles confined in institutions are being treated rather than punished (Lab and Whitehead 1988; Whitehead and Lab 1989). Martinson's (1974, p. 25) general observation that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable affect on recidivism" challenged the fundamental premise of therapeutic dispositions and the juvenile court. More recent evaluations of the impact of correctional programs on recidivism counsel skepticism about the availability of programs that consistently or systematically rehabilitate adult or serious juvenile offenders (Greenberg 1977; Sechrest et al. 1979; Whitehead and Lab 1989). The National Academy of Science's Panel on Research on Rehabilitation Techniques concluded that "the current research literature provides no basis for positive recommendations about techniques to rehabilitate criminal offenders. The literature does afford occasional hints of intervention that may have promise, but to recommend widespread implementation of those measures would be irresponsible. Many of them would probably be wasteful, and some would do more harm than good in the long run" (Sechrest et al. 1979, p. 102). A meta-analysis of juvenile correctional treatment evaluations appearing in the professional literature between 1975 and 1984 and meeting certain methodological criteria concluded that "the results are far from encouraging for rehabilitation proponents" (Lab and Whitehead 1988, p. 77).

While the general conclusion that "nothing works" in juvenile or adult corrections has not been persuasively refuted, it has been strenuously resisted (Melton 1989). Gendreau and Ross (1979, 1987), Garrett (1985), Greenwood and Zimring (1985), Izzo and Ross (1990), Palmer (1991), and Roberts and Camasso (1991), for example, offer literature reviews, meta-analyses, or program descriptions that stress that some types of intervention may have positive effects on selected clients under certain conditions. However, even Palmer's (1991, p. 340) optimistic assessment of the rehabilitation of "rehabilitation" concludes only that "several methods seem promising, but none have been shown to usually produce major reductions [in recidivism] when applied broadly to typical composite samples of offenders." The issue for the juvenile

court is not whether some programs work for some offenders under some conditions, but whether the possibility of an effective rehabilitation program should be used to justify confining young offenders "for their own good" and with fewer procedural safeguards than are provided to adults.

VII. Conclusion

For more than two decades since *Gault*, juvenile courts have deflected, co-opted, ignored, or accommodated constitutional and legislative reforms with minimal institutional change. Despite its transformation from a welfare agency into a criminal court, the juvenile court remains essentially unreformed. Public and political concerns about drugs and youth crime encourage the repression rather than the rehabilitation of young offenders. With fiscal constraints, budget deficits, and competition from other interest groups, there is little likelihood that treatment services for delinquents will expand. Coupling the emergence of punitive policies with a societal unwillingness to provide for the welfare of children in general (National Commission on Children 1991), much less for those who commit crimes, there is scant reason to believe that the juvenile court, as originally conceived, can be revived.

The recent changes in procedures, jurisdiction, and sentencing policies reflect ambivalence about the role and purpose of juvenile courts and the social control of children. As juvenile courts converge procedurally and substantively with criminal courts, is there any reason to maintain a separate court whose only remaining distinctions are procedures under which no adult would agree to be tried (McCarthy 1977*b;* Wizner and Keller 1977; Guggenheim 1978; Wolfgang 1982; Dawson 1990*a;* Federle 1990; Ainsworth 1991)? While most commentators acknowledge the emergence of a punitive juvenile court, they recoil at the prospect of its outright abolition, emphasizing that children are different and that distinctions between "delinquents" and "criminals" should be maintained (Rubin 1979; Gardner 1987; Melton 1989; Dawson 1990*a;* Springer 1991). Most conclude, however, that the juvenile court sorely needs a new rationale, perhaps one that melds punishment with reduced culpability and procedural justice (Rubin 1979; American Bar Association—Institute of Judicial Administration 1980*b;* Walkover 1984; Gardner 1989; Melton 1989; Springer 1991).

There are three plausible responses to a juvenile court that punishes in the name of treatment and simultaneously denies young offenders

elementary procedural justice: restructure juvenile courts to fit their original therapeutic purpose, embrace punishment as an acceptable and appropriate part of delinquency proceedings but coupled with criminal procedural safeguards (American Bar Association—Institute of Judicial Administration 1980*b*; Melton 1989; Forst and Blomquist 1991), or abolish juvenile court jurisdiction over criminal conduct and try young offenders in criminal courts with certain modifications of substantive and procedural criminal law (Feld 1984, 1988*b*; Ainsworth 1991).

A. Return to an Informal, "Rehabilitative" Juvenile Court

Some proponents of an informal, therapeutic juvenile court contend that the "experiment" cannot be declared a failure since it has never been implemented effectively (Ferdinand 1991). From their inception, juvenile courts and correctional facilities have had more in common with penal facilities than with welfare agencies, hospitals, or clinics (Schlossman 1977; Rothman 1980). By the 1960s and the *Gault* decision, the failures of implementation were readily apparent (President's Commission on Law Enforcement and Administration of Justice 1967*a*, 1967*b*). Any proposal to reinvigorate the juvenile court as an informal, therapeutic welfare agency must first explain why the resources and personnel that have not been made available previously will now become available (Edwards 1992).

Even if a coterie of clinicians suddenly descended on a juvenile court, it would be a dubious policy to recreate the juvenile court as originally conceived. The central critique of individualized justice is that juvenile courts are substantively and procedurally lawless. Despite the existence of statutes and procedural rules, juvenile courts operate effectively unconstrained by the rule of law. To the extent that judges make dispositions based on individualized assessments of an offender's "best interests" or "real needs," judicial discretion is formally unrestricted. If there are neither practical scientific nor clinical bases by which judges can classify for treatment (Sechrest 1987), then the exercise of "sound discretion" is simply a euphemism for idiosyncratic judicial subjectivity. If intervention were consistently benign and effective, perhaps differential processing would be tolerable. But juveniles committed to institutions or whose liberty is restrained regard the experience as a sanction rather than as beneficial (Wizner and Keller 1977). At the least, similarly situated offenders will be handled differently based on extraneous personal characteristics for which they are not

responsible. At the worst, if juvenile courts effectively punish, then discretionary sentences based on individualized assessments introduce unequal and discriminatory sanctions on invidious bases.

The critique of the juvenile court does not rest on the premise that "nothing works" or ever can work. Indeed, some demonstration model programs may produce positive changes in some offenders under some conditions. And some treatment programs may be more effective than the evaluation studies indicate. However, after a century of unfulfilled promises, a continuing societal unwillingness to commit scarce resources to rehabilitative efforts, and intervention strategies of dubious or marginal efficacy, the possibility of an effective treatment program is too fragile a reed on which to construct an entire separate adjudicative apparatus. We should exercise caution in delegating coercive powers to penal therapists to use on a subjective, nonscientific basis.

Procedural informality is the concomitant of substantive discretion. The traditional juvenile courts' procedures are predicated on the assumption of benevolence. If clinical decision making is not constrained substantively, then it cannot be limited procedurally, either, since every case is unique. A primary role of lawyers is to manipulate legal rules for their clients' advantage; a discretionary court without objective laws or formal procedures is unfavorable terrain. The limited presence and role of counsel in many juvenile courts may reflect judicial adherence to a treatment model that no longer exists, if it ever did. But the absence of lawyers reduces the ability of the legal process to invoke existing laws to make courts conform to their legal mandates. The closed, informal, and confidential nature of delinquency proceedings reduces visibility and accountability and precludes external checks on coercive intervention.

The fundamental shortcoming of the traditional juvenile court is not a failure of implementation but a failure of conception. The original juvenile court was conceived of as a social service agency in a judicial setting, a fusion of welfare and coercion (Springer 1991). But providing for child welfare is ultimately a societal responsibility rather than a judicial one. It is unrealistic to expect juvenile courts, or any other legal institutions, to resolve all of the social ills afflicting young people or to have a significant impact on youth crime. Despite claims of being a child-centered nation, we care less about other people's children than we do our own, especially when they are children of other colors or cultures (Edelman 1987; National Commission on Children 1991). Without a societal commitment to a social welfare system that ade-

quately meets the minimum family, health, housing, nutrition, and educational needs of all young people on a voluntary basis, the juvenile court provides a mechanism for involuntary control, however ineffective it may be in delivering services or rehabilitating offenders. Historical analyses of juvenile justice suggest that when social services and social control are combined in one setting, social welfare considerations quickly are subordinated to custodial ones (Platt 1977; Rothman 1980; Sutton 1988; Ferdinand 1989, 1991).

In part, the juvenile court's subordination of individual welfare to custody and control stems from its fundamentally penal focus. Rather than identifying the characteristics of children for which they are not responsible and that could improve their life circumstances—their lack of decent education, their lack of adequate housing, their unmet health needs, their deteriorated family and social circumstances (National Commission on Children 1991)—juvenile court law focuses on a violation of criminal law that is their fault and for which they are responsible (Fox 1970*b*). As long as juvenile courts emphasize the characteristics of children least likely to elicit sympathy and ignores the social conditions most likely to engender a desire to nurture and help, the law reinforces retributive rather than rehabilitative impulses. So long as juvenile courts operate in a societal context that does not provide adequate social services for children in general, intervention in the lives of those who commit crimes inevitably will be for purposes of social control rather than social welfare.

B. Due Process and Punishment in Juvenile Court

Articulating the purposes of juvenile courts requires more than invoking treatment versus punishment formulae since in operation there are no practical or operational differences between the two. Acknowledging that juvenile courts punish imposes an obligation to provide all criminal procedural safeguards since "the condition of being a boy does not justify a kangaroo court," *In re Gault*, 387 U.S. at 28 (1967). While procedural parity with adults may realize the *McKeiver* Court's fear of ending the juvenile court experiment, to fail to do so perpetuates injustice. Treating similarly situated juveniles dissimilarly, punishing them in the name of treatment, and denying them basic safeguards fosters a sense of injustice that thwarts any reform efforts (Melton 1989).

Articulating alternative rationales for handling young offenders requires reconciling the two contradictory impulses provoked by recognizing that the child is a criminal and the criminal is a child. If the

traditional juvenile court provides neither therapy nor justice and cannot be rehabilitated, then the policy alternatives for responding to young offenders are either to make juvenile courts more like criminal courts or to make criminal courts more like juvenile courts. In reconsidering basic premises, issues of substance and procedure must be addressed whether young offenders ultimately are tried in a separate juvenile court or in a criminal court (Feld 1988*b*). Issues of substantive justice include developing and implementing a doctrinal rationale—diminished responsibility or reduced capacity—for sentencing young offenders differently, and more leniently, than older defendants (Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders 1978; Feld 1988*b;* Gardner 1989; Melton 1989). Issues of procedural justice include providing youths with *all* of the procedural safeguards adults receive *and* additional protections that recognize their immaturity (Rosenberg 1980; Feld 1984; Melton 1989).

Many recent commentators conclude that "the assumptions underlying the juvenile court shows it to be a bankrupt legal institution" (Melton 1989, p. 166) and that it is increasingly penal in character. Rather than proposing to abolish the juvenile court, they propose to transform the juvenile court into an explicitly penal one, albeit one that limits punishment based on reduced culpability and provides enhanced procedural justice (Rubin 1979; American Bar Association—Institute of Judicial Administration 1980*b;* Walkover 1984; Gardner 1989; Melton 1989; Forst and Blomquist 1991). Springer (1991, p. 398), for example, argues that "no longer will the juvenile court be seen as a quasi-judicial court-clinic but, rather, as a real court, administering real justice in its traditional retributive and distributive meanings. . . . Juveniles should have to pay for their crimes; but . . . society has a duty to its young delinquents to help them to gain moral and civic equilibrium."

The paradigm of the new juvenile court is that propounded by the American Bar Association—Institute of Judicial Administration's Juvenile Justice Standards Project. The twenty-six volumes of Juvenile Justice Standards recommend the repeal of jurisdiction over status offenders, the use of proportional and determinate sentences to sanction delinquent offenders, the use of restrictive offense criteria to regularize pretrial detention and judicial transfer decisions, and the provision of all criminal procedural safeguards, including nonwaivable counsel and jury trials (McCarthy 1977*a;* Wizner and Keller 1977; Flicker 1983). Under the Juvenile Justice Standards, "the rehabilitative model of juvenile justice is rejected and the principles of criminal law and procedure

become the cornerstones of a new relationship between the child and the state" (McCarthy 1977*a*, p. 1094).

While proponents of the "criminal juvenile court" advocate fusing reduced culpability sentencing with greater procedural justice (Gardner 1989; Melton 1989; Springer 1991), they often fail to explain why these principles must be implemented within a separate juvenile court rather than in a criminal court. The Juvenile Justice Standards assert that "removal of the treatment rationale does not destroy the rationale for a separate system or for utilization of an ameliorative approach; it does, however, require a different rationale" (American Bar Association—Institute of Judicial Administration 1980*b*, p. 9, n. 5). Unfortunately, even though the standards propose a virtual replication of adult criminal procedure, they do not provide any rationale for doing so in a separate juvenile system.

Other commentators have suggested some possible rationales. Rubin (1979), for example, speculates that, since some specialized juvenile procedures and dispositional facilities would be needed, it is more practical and less risky to retain specialized juvenile divisions of general trial courts rather than to abolish juvenile courts entirely. Given institutional and bureaucratic inertia, however, it may be that only a clean break with the personnel and practices of the past could permit the implementation of the procedures and policies he endorses.

Proponents of a criminal juvenile court point to the deficiencies of criminal courts—overcriminalization, ineffective defense representation and excessive caseloads, poor administration, insufficient sentencing alternatives—to justify retaining a separate juvenile court (Rubin 1979). Unfortunately, these are characteristics of juvenile courts as well (Dawson 1990*a*). While certain elements of the criminal justice system, such as bail, might pose additional problems if applied without modification to juveniles (Dawson 1990*a*), those are not compelling justifications for retaining a complete and separate judicial system. Rather, such arguments suggest a comparison of the relative quality of juvenile and criminal justice in each state to determine in which system young people are more likely to be treated justly and fairly.

The only real substantive difference between the "criminal juvenile court" and adult courts is that the Juvenile Justice Standards call for shorter sentences than criminal courts would impose (Wizner and Keller 1977). Particularly for serious young offenders, the quality and quantity of punishment imposed in juvenile court is less than that in criminal courts. Maintaining a separate court may be the only way to

achieve uniformly shorter sentences and insulate youths from criminal courts' "get tough" sentencing policies (Gardner 1989).

If there is a relationship between procedural formality and substantive severity, could a "criminal juvenile court" continue to afford leniency? As juvenile courts move in the direction of greater formality—lawyers insisting on adherence to the rule of law; openness, visibility, and accountability; proportional and determinate sentencing guidelines—will not the convergence between juvenile and criminal courts increase their repressiveness and further erode sentencing differences? Can juvenile courts only be lenient because their substantive and procedural discretion is exercised behind closed doors? Would the imposition of the rule of law prevent them from affording leniency to most youths? These issues are not even recognized, much less answered, by the Juvenile Justice Standards.

C. Young Offenders in Criminal Court

If the child is a criminal and the primary purpose of formal intervention is social control, then young offenders could be tried in criminal courts alongside their adult counterparts. Before returning young offenders to criminal courts, however, there are preliminary issues of substance and procedure that a legislature should address. Issues of substantive justice include developing a rationale for sentencing young offenders differently, and more leniently, than older defendants. Issues of procedural justice include affording youths alternative safeguards *in addition* to full procedural parity with adult defendants. Taken in combination, legislation can avoid the worst of both worlds, provide more than the protections accorded to adults, and do justice in sentencing.

1. *Substantive Justice—Juveniles' Criminal Responsibility.* The primary virtue of the contemporary juvenile court is that serious young offenders typically receive shorter sentences than do adult offenders for comparable crimes. As a policy goal, young offenders should survive the mistakes of adolescence with their life chances intact (Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders 1978; Zimring 1982). This goal is threatened if youths sentenced in criminal courts received the same severe sentences frequently inflicted on eighteen-year-old "adults." And, of course, the contemporary juvenile court's seeming virtue of shorter sentences for serious offenders is offset by the far more numerous minor offenders who receive longer "rehabilitative" sentences as juveniles than they would if they were simply punished as adults.

Shorter sentences for young people do not require that they be tried in separate juvenile courts. Both juvenile and adult courts are supposed to separate the adjudication of guilt or innocence from sentencing, with discretion confined largely to the sentencing phase (Dawson 1990*a*). Adult courts are capable of dispensing lenient sentences to youthful offenders when appropriate (Wizner and Keller 1977), although explicit and formal recognition of youthfulness as a mitigating factor is desirable (Zimring 1981*a*, 1991).

There are a variety of doctrinal and policy justifications for sentencing young people less severely than their adult counterparts. The original juvenile court assumed that children were immature and irresponsible (Ainsworth 1991). These assumptions about young people's lack of criminal capacity built on the common law's infancy mens rea defense, which presumed that children less than seven years old lacked criminal capacity, those between seven and fourteen years rebuttably lacked criminal capacity, while those fourteen years of age and older were fully responsible (Fox 1970*b*; McCarthy 1977*b*; Weissman 1983; Walkover 1984). Juvenile court legislation simply extended upward by a few years the general presumption of youthful criminal incapacity.

Common-law infancy and other diminished responsibility doctrines reflect developmental differences that render youths less culpable or criminally responsible and provide a conceptual basis for shorter sentences for juveniles than for their adult counterparts. When sentencing within a framework of deserved punishment, it would be fundamentally unjust to impose the same penalty on a juvenile as on an adult. Deserved punishment emphasizes censure, condemnation, and blame (von Hirsch 1976, 1986). Penalties proportionate to the seriousness of the crime reflect the connection between the nature of the conduct and its blameworthiness.

Because commensurate punishment proportions sanctions to the seriousness of the offense, it shifts the analytical focus to the meaning of seriousness. The seriousness of an offense is the product of two components—harm and culpability (von Hirsch 1976, p. 79). Evaluations of harm focus on the degree of injury inflicted, risk created, or value taken. The perpetrator's age is of little consequence when assessing the harmfulness of a criminal act. Assessments of seriousness also include the quality of the actor's choice to engage in the conduct that produced the harm. It is with respect to the culpability of choices—the blameworthiness of acting in a particular harm-producing way—that the issue of youthfulness becomes especially troublesome.

Psychological research indicates that young people move through

developmental stages of cognitive functioning with respect to legal reasoning, internalization of social and legal expectations, and ethical decision making (Piaget 1960; Kohlberg 1969; Tapp and Levine 1974; Tapp and Kohlberg 1977). The developmental sequence and changes in cognitive processes are strikingly parallel to the imputations of responsibility associated with the common-law infancy defense and suggest that by midadolesence individuals acquire most of the legal and moral values and reasoning capacity that will guide their behavior through later life (Kohlberg 1964; Tapp 1976).

Even a youth fourteen years of age or older who knows "right from wrong" and abstractly possesses the requisite criminal mens rea is still not as blameworthy and deserving of comparable punishment as an adult offender. Relative to adults, youths are less able to form moral judgments, less capable of controlling their impulses, and less aware of the consequences of their acts: "Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults" (Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders 1978, p. 7). Because juveniles' criminal choices are less blameworthy than adults and their responsibility is diminished, they "deserve" less punishment than an adult for the same criminal harm.

The crimes of children are seldom their fault alone. The family, school, and community are responsible for socializing young people, and society shares at least some of the blame for their offenses. Moreover, to the extent that the ability to make responsible choices is learned behavior, the dependent status of youth systematically deprives them of opportunities to learn to be responsible (Zimring 1982). Finally, children live their lives, as they commit their crime, in groups. Young people are more susceptible to peer group influences than their older counterparts, which lessens, but does not excuse, their criminal liability (Zimring 1981*b*).

The Supreme Court in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), analyzed the criminal responsibility of young offenders and provided additional support for shorter sentences for reduced culpability even for youths older than the common-law infancy threshold of age fourteen. In vacating Thompson's capital sentence, the plurality concluded

that "a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty" (*Thompson v. Oklahoma*, 108 S.Ct. at 2692 [1988]). A plurality of the Supreme Court subsequently upheld the death penalty for youths who were sixteen or seventeen at the time of their offenses (*Stanford v. Kentucky*, 109 S.Ct. 2969 [1989]). While recognizing that juveniles as a class may be less culpable than adults, the Court in *Stanford* decided on the narrow grounds that there was no clear national consensus that such executions violated "evolving standards of decency" encompassed in the Eighth Amendment's prohibition against "cruel and unusual" punishment.

The Court in *Thompson* reaffirmed earlier decisions holding that youthfulness was a mitigating factor at sentencing and concluded that juveniles are less blameworthy for their crimes than are their adult counterparts. Since deserved punishment must reflect individual culpability and "there is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults" (*Thompson v. Oklahoma*, 108 S.Ct. at 2698 [1988]), even though Thompson was responsible for his crime, simply because of his age he could not be punished as severely as an adult:

> Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults. . . . The Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. [*Thompson v. Oklahoma*, 108 S.Ct. at 2698-99 (1988)]

The Court cited other instances—serving on a jury, voting, marrying, driving, and drinking—in which states act paternalistically and impose disabilities on youths because of their presumptive incapacity, lack of experience, and judgment. The Court emphasized that it would be

both inconsistent and a cruel irony suddenly to find juveniles as culpable as adult defendants for purposes of capital punishment.

Quite apart from differences in culpability, there are other reasons why juveniles deserve less severe punishment than adults for comparable crimes. Penalties—whether adult punishment or juvenile "treatment"—are measured in units of time—days, months, or years. However, the ways that youths and adults subjectively and objectively conceive of and experience similar lengths of time differ (Piaget 1969; Cottle 1976; Friedman 1982). The developmental progression in thinking about and experiencing time—future time perspective and present duration—follows a sequence similar to the development of criminal responsibility. Without a mature appreciation of future time, juveniles are less able to understand the consequences of their acts. Because a juvenile's "objective" sense of time duration is not comparable to an adult's, objectively equivalent sentences are experienced subjectively as unequal. While a three-month sentence may be lenient for an adult offender, it is the equivalent of an entire summer vacation for a youth, a very long period of time. Because juveniles are more dependent on their parents, removal from home is a more severe punishment than it would be for adults. Thus, sentencing adults and juveniles to similar terms for similar offenses would be unjust.

Shorter sentences for reduced responsibility is a more modest rationale for treating young people differently than the rehabilitative justifications advanced by the Progressive child savers. Adult courts could impose shorter sentences for reduced culpability on a discretionary basis, although it would be preferable for a legislature explicitly to provide youths with categorical fractional reductions of adult sentences. This could take the form of a formal "youth discount" at sentencing. For example, a fourteen-year-old might receive 33 percent of the adult penalty, a sixteen-year-old 66 percent, and an eighteen-year-old the full penalty. A proposal for explicit fractional reductions in youth sentences can only be made against the backdrop of realistic, humane, and determinate adult sentencing practices in which "real-time" sentences can be determined. Several of the "serious juvenile offender" or "designated felony" sentencing statutes provide terms for serious young offenders that are considerably shorter than sentences for their adult counterparts. For youths below the age of fourteen, the common-law infancy mens rea defense would acquire new vitality for proportionally shorter sentences or even noncriminal dispositions.

A graduated age/culpability sentencing scheme could avoid some of

the inconsistency and injustice associated with the binary either/or juvenile versus adult sentencing played out in judicial waiver proceedings. Depending on whether transfer is ordered, the sentences that youths receive can differ by orders of magnitude (Fagan and Deschenes 1990). Because of the differences in consequences, transfer hearings consume a disproportionate amount of juvenile court time and energy (Dawson 1990*a*). Abolishing juvenile courts would eliminate the need for transfer hearings, save considerable resources which are ultimately expended to no purpose, eliminate the punishment gap that occurs when youths make the transition between systems, and assure similar consequences to similar offenders.

Trying young people in criminal courts with full procedural safeguards would not especially diminish judges' expertise about appropriate dispositions for young people. The Progressives envisioned a specialized juvenile court judge who possessed the wisdom of a *kadi* (Matza 1964). Increasingly, however, district court judges handle juvenile matters as part of their general docket or rotate through juvenile court on short-term assignments without acquiring any particular juvenile dispositional expertise (Edwards 1992). Even in specialized juvenile courts, the information necessary for appropriate dispositions resides with the court services personnel who advise the judge on sentences, rather than with the court itself. Even if criminally convicted, court services personnel advise the judge as to the appropriate sentence, and, within the time limits defined by the offense, young offenders could be transferred to a family court or social services agency if a welfare disposition is appropriate.

Even a punitive sentence does not require incarcerating juveniles in adult jails and prisons. The existing detention facilities, training schools, and institutions provide the option of age-segregated dispositional facilities. Moreover, insisting explicitly on humane conditions of confinement could do at least as much to improve the lives of incarcerated youths as has the "right to treatment" or the "rehabilitative ideal" (Feld 1977, 1981*b*). A recognition that most young offenders will return to society imposes an obligation to provide the resources for self-improvement on a voluntary basis.

2. *Procedural Justice.* Since *Gault*, many of the formal procedural attributes of criminal courts are routine aspects of juvenile justice administration as well. The same laws apply to arresting adults and taking juveniles into custody, to searches, and to pretrial identification procedures (Dawson 1990*a*). Juveniles charged with felony offenses

now are routinely subjected to similar fingerprinting and booking procedures. The greater procedural formality and adversary nature of the juvenile court reflects the merger of the court's therapeutic mission and its social control functions. The many instances in which states choose to treat juvenile offenders procedurally like adult criminal defendants, even when formal equality redounds to their disadvantage, is one aspect of this process (Feld 1984).

Differentials in age and competency suggest that youths should receive more protections than adults, rather than less. The rationales to sentence juveniles differently than adults also justify providing them with *all* of the procedural safeguards adults receive *and* additional protections that recognize their immaturity (McCarthy 1977*b*; Rosenberg 1980; Feld 1984; Melton 1989). This dual-maximal strategy would provide enhanced protection for children explicitly because of their vulnerability and immaturity.

One example where this dual-maximal procedural strategy would produce different results is waivers of Fifth and Sixth Amendment constitutional rights. Although the Supreme Court in *Gault* noted that the appointment of counsel is the prerequisite to procedural justice, *Gault's* promise of counsel remains unrealized because many judges find that youths waived their rights in a "knowing, intelligent, and voluntary" manner under the "totality of the circumstances." A system of justice that recognizes the disabilities of youths would prohibit waivers of the right to counsel or the privilege against self-incrimination without prior consultation with counsel (American Bar Association—Institute of Judicial Administration 1980*b*). The right to counsel would attach as soon as a juvenile is taken into custody and would be self-invoking; it would not require a juvenile affirmatively to request counsel as is the case for adults (*Moran v. Burbine*, 475 U.S. 412 [1986]). The presence and availability of counsel throughout the process would assure that juveniles' rights are respected and implemented. This is the policy that the Juvenile Justice Standards propose, albeit in a juvenile court setting.

Full procedural parity in criminal courts, coupled with alternative legislative safeguards for children, can provide the same or greater protections than does the current juvenile court. Expunging criminal records and eliminating collateral civil disabilities following the successful completion of a sentence could afford equivalent relief for an isolated youthful folly as does the juvenile court's confidentiality.

Abolishing the juvenile court would force a long overdue and critical

reassessment of the entire social construct of "childhood" (Ainsworth 1991). As long as young people are regarded as fundamentally different from adults, it becomes too easy to rationalize and justify a procedurally inferior justice system. The gap between the quality of justice afforded juveniles and adults can be conveniently rationalized on the grounds that "after all, they are only children," and children are entitled only to custody, not liberty (*Schall v. Martin*, 467 U.S. 253 [1984]). So long as the view prevails that juvenile court intervention is "benign" coercion and that in any event children should not expect more, youths will continue to receive "the worst of both worlds."

But issues of procedure and substance, while important, focus too narrowly on the legal domain. The ideology of therapeutic justice and its discretionary apparatus persist because the social control is directed at children. Despite humanitarian claims of being a child-centered nation, our cultural and legal conceptions of children support institutional arrangements that deny the personhood of young people. A new purpose for the juvenile court cannot be formulated successfully without critically reassessing the meaning of "childhood" and creating social institutions to assure the welfare of the next generation.

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