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

BARRY C. FELD**

I. INTRODUCTION

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

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

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¹ 387 U.S. 1 (1967).

quent legislative action have transformed the juvenile court into a very different institution from the one originally proposed. The Progressives envisioned a procedurally informal court with individualized, offender-oriented dispositional practices. The Supreme Court’s due process decisions engrafted procedural formality at adjudication on to the juvenile court’s traditional, individualized treatment sentencing schema. As the contemporary juvenile court departs from its original procedural and substantive conception, it has become increasingly criminalized and converged with adult criminal courts. Although the juvenile court’s post-Gault procedural convergence with criminal courts has been described extensively, its pursuit of the substantive goals of the criminal process have not been thoroughly documented.

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

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


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

II. HISTORICAL BACKGROUND

A. THE PROGRESSIVE JUVENILE COURT—PROCEDURAL INFORMALITY AND INDIVIDUALIZED, OFFENDER-ORIENTED DISPOSITIONS

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

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

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9 J. Kett, Rites of Passage: Adolescence in America, 1790 to the Present 114-16 (1977); R. Wiebe, supra note 8; B. Wishy, The Child and the Republic 94-114 (1968).
and middle classes, a more modern conception of childhood emerged. Children were perceived as corruptible innocents whose upbringing required greater physical, social, and moral structure than had previously been regarded as prerequisite to adulthood, and the family, particularly women, assumed a greater role in supervising children's moral and social development.\textsuperscript{13}

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

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

\begin{itemize}
\item \textsuperscript{13} P. Aries, Centuries of Childhood 329 (1962); C. Degler, \textit{supra} note 12, at 86-110; J. Kett, \textit{supra} note 9, at 109-43; A. Platt, \textit{The Childsavers: The Invention of Delinquency} 75-83 (2d ed. 1977); B. Wishy, \textit{supra} note 9, at 116.
\item \textsuperscript{14} R. Hofstadter, \textit{supra} note 8; G. Kolko, \textit{The Triumph of Conservativism: A Reinterpretation of American History, 1900-1916} (1963); J. Weinstein, \textit{The Corporate Ideal in the Liberal State, 1900-1918} (1968); R. Wiebe, \textit{supra} note 8.
\item \textsuperscript{15} See, e.g., S. Hays, \textit{supra} note 8, at 156; R. Wiebe, \textit{supra} note 8, at 166-70; Stone, \textit{A Spectre is Haunting America: An Interpretation of Progressivism}, 3 J. Libertarian Stud. 239 (1979). The Progressives' reliance on the state to implement their social reforms reflected their perception of the benevolence of state action, the ability of government to correct social problems, a confidence in their own values, and a belief in the propriety of inculcating these values in others. They expressed no reservations about their attempts to transform immigrants, the poor and their children into sober, virtuous, middle class Americans by means of a variety of agencies of assimilation and acculturation. Rothman, \textit{The State as Parent: Social Policy in the Progressive Era}, in \textit{Doing Good: The Limits of Benevolence} 67 (D. Rothman ed. 1978).
\item \textsuperscript{17} F. Allen, \textit{Legal Values and the Rehabilitative Ideal}, in \textit{Borderland of Criminal Justice} 25-27 (1964); D. Rothman, \textit{supra} note 2.
\end{itemize}
feature of every Progressive criminal justice reform was discretionary decision-making.

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

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

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18 D. Matza, Delinquency and Drift 5 (1964); D. Rothman, supra note 2, at 50-51; F. Allen, supra note 17.
19 E. Ryerson, supra note 2, at 22.
20 D. Matza, supra note 18; A. Platt, supra note 13; D. Rothman, supra note 2.
21 A. Platt, supra note 13, at 18; D. Rothman, supra note 2, at 56; E. Ryerson, supra note 2; F. Allen, supra note 17.
The juvenile court was a typical Progressive criminal justice reform: a specialized bureaucratic agency staffed by experts and designed to serve the needs of a specific category of client, namely the child offender. The Progressives envisioned the use of indeterminate procedures by juvenile court professionals who would make discretionary, individualized treatment decisions and who would achieve benevolent goals and social uplift by substituting a scientific and preventative approach for the traditional punitive purposes of the criminal law.\textsuperscript{24}

The juvenile court movement attempted to remove children from the adult criminal justice and corrections systems and to provide them with individualized treatment in a separate system of their own. Under the guise of \textit{parens patriae}, an emphasis on treatment, supervision, and control, rather than punishment, allowed the state to intervene affirmatively in the lives of more young offenders.\textsuperscript{25}

Because the juvenile court formally rejected punishment, its ambit of control encompassed behaviors that were previously ignored as well as youthful activities that betokened precocious adulthood or proto-criminality: smoking, sexuality, truancy, immorality, stubbornness, vagrancy, or living a wayward, idle, and dissolute life.\textsuperscript{26}

Its status jurisdiction reflected the normative concept of childhood and adolescence that had taken root during the nineteenth century and authorized pre-delinquent intervention to forestall premature adulthood, enforce the dependent conditions of youth, and supervise their moral upbringing.\textsuperscript{27}

No procedural or substantive distinctions were made among youths on the basis of their criminal or non-criminal conduct, thus providing the rationale that juvenile court proceedings were civil rather than criminal in nature.

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

\textsuperscript{24} See A. \textsc{Platt}, \textit{supra} note 13; E. \textsc{Ryerson}, \textit{supra} note 2; Fox, \textit{Juvenile Justice Reform: An Historical Perspective}, 22 \textsc{Stan. L. Rev.} 1187 (1970); Mack, \textit{The Juvenile Court}, 23 \textsc{Harv. L. Rev.} 104 (1909).

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

\textsuperscript{26} See A. \textsc{Platt}, \textit{supra} note 13; D. \textsc{Rothman}, \textit{supra} note 2; E. \textsc{Ryerson}, \textit{supra} note 2.

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

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

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

28 D. Rothman, supra note 2, at 218; E. Ryerson, supra note 2; President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 92 (1967).
29 D. Matza, supra note 18, at 118.
From its inception, juvenile court judges also had the discretion to waive serious young offenders from the jurisdiction of the juvenile court to adult criminal courts.

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

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

B. THE CONSTITUTIONAL DOMESTICATION OF THE JUVENILE COURT

PROCEDURAL FORMALITY AND INDIVIDUALIZED, OFFENDER-ORIENTED DISPOSITIONS

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

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

30 D. Rothman, supra note 2, at 285.
31 See Gault, 387 U.S. at 14-17.
32 Id. at 18.
court process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes” to the realities of recidivism, the failures of rehabilitation, the stigma of a “delinquency” label, the breaches of confidentiality, and the arbitrariness of the process.\(^3\)

Several features of the juvenile justice process were critical to the imposition of procedural safeguards in *Gault*: the fact that juveniles were being adjudicated delinquent for behavior that would be deemed a criminal offense if committed by adults, the attendant stigma of delinquency/criminal convictions, and the realities of juvenile institutional confinement.\(^3\)\(^4\) These realities motivated the *Gault* Court to mandate elementary procedural safeguards such as the right to advanced notice of charges, the right to a fair and impartial hearing, the right to assistance of counsel, which included the opportunity to confront and cross-examine witnesses, and the protections of the privilege against self-incrimination.\(^3\)\(^5\)

Even with the introduction of these procedural safeguards and its critical dicta, the Supreme Court did not consider the entire procedural apparatus of juvenile justice, its jurisdictional reach, or its dispositional consequences. Instead, the Court narrowly confined its decision to the adjudicatory hearing at which a child is determined to be a delinquent.\(^3\)\(^6\) The *Gault* Court noted that the unique procedures for processing and treating juveniles separately from adults would in no way be impaired by its procedural decisions.\(^3\)\(^7\) The Court asserted, however, that the procedural safeguards associated with the adversarial process were essential both to the determination of truth and the preservation of individual freedom through limitations on the power of the state. The dual function of such procedures, namely, factual accuracy and the prevention of governmental oppression, is most clearly exemplified in the Court’s determination that the privilege against self-incrimination applies to delinquency adjudications.\(^3\)\(^8\) With this recognition of the applicability of the privilege against self-incrimination, juvenile adjudications could no longer be characterized as either “non-criminal” or “non-adversarial,” because this fifth amendment privilege is both the guarantor of an adversarial process and the primary mechanism

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\(^{33}\) *Id.* at 21.

\(^{34}\) *Id.* at 27-28.

\(^{35}\) *Id.* at 31-57.

\(^{36}\) *Id.* at 13.

\(^{37}\) *Id.* at 21.

\(^{38}\) *Id.* at 49-50. *See Criminalizing Juvenile Justice, supra* note 2, at 154 & n. 46, 155 & n.47, 156.
for maintaining a balance between the state and the individual.\textsuperscript{39}

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

In \textit{Breed v. Jones},\textsuperscript{43} the Court held that the protections of the double jeopardy clause of the fifth amendment prohibited the adult criminal reprosecution of a youth following a conviction in a juvenile court. At issue was the applicability of the double jeopardy clause of the fifth amendment to state proceedings, and the Court resolved the question by establishing a functional equivalence between an adult criminal trial and a delinquency proceeding. The Court described the virtually identical interests implicated in a delinquency hearing and a traditional criminal prosecution—"anxiety and insecurity," a "heavy personal strain"—and the increased bur-
dens as the juvenile system has become more procedurally formalized. In light of the potential consequences of a delinquency proceeding, the Court concluded that there was little basis to distinguish it from a traditional adult criminal prosecution.

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

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

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

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44 Id. at 528-29.
45 403 U.S. 528 (1971).
46 Id. at 543.
47 See, e.g., *Winship*, 397 U.S. at 363-64; *Gault*, 387 U.S. at 47; *Reference of Juvenile Offenders*, supra note 6, at 601-7.
48 *Criminalizing Juvenile Justice*, supra note 2, at 159.
49 See *McKeiver*, 403 U.S. at 553-57 (Brennan, J., concurring in part, dissenting in part).
50 Id. at 550-51.
most disruptive of the traditional juvenile court and its adjudicative practices. The Court’s stated reason for denying jury trials to juveniles was the adverse impact that this right would have on the informality, flexibility, and confidentiality of juvenile court proceedings. The Court realized that the imposition of this last remaining formality of the criminal process would make the juvenile court virtually indistinguishable from a criminal court and would raise the more basic question of whether there is any need for a separate juvenile court at all.

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

The Progressives who created the juvenile court envisioned a
benevolent treatment agency staffed by expert judges and assisted by social services personnel. They emphasized informality, flexibility, and discretionary dispositions in the "best interests of the child." Despite the procedural formalization of the juvenile court in Gault, the Supreme Court in McKeiver remained ideologically committed to the traditional "treatment" rationale of the juvenile court.\(^5\) By uncritically accepting the assertion that juvenile courts are "rehabilitative" rather than punitive, the Court did not inquire further about either the nature of juvenile court treatment that differed from traditional criminal law punishment or the need for procedural protections against governmental oppression.

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

III. THE PRINCIPLE OF OFFENSE IN JUVENILE COURT—JUST DESERTS IN SENTENCING PRACTICES

Justice White's concurrence in McKeiver emphasized the perceived punishment/treatment distinctions between juvenile and criminal proceedings. Whereas the criminal law punishes morally responsible actors for making blameworthy choices, the deterministic assumptions of the juvenile justice system regard juveniles as less culpable for their criminal misdeeds. Justice White stated that the indeterminate length of juvenile dispositions and the "eschewing [of] blameworthiness and punishment for evil choices" satisfied him that "there remained differences of substance between criminal and juvenile courts."\(^6\) Justice Stewart's dissent in Gault articulated a similar distinction between the sentencing practices in the juvenile and adult criminal justice systems. Justice Stewart observed that "a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the

\(^5\) See McKeiver, 403 U.S. at 547.
\(^6\) Id. at 552-53 (White, J., concurring).
other is conviction and punishment for a criminal act." This perception was reflected in the implicit assumption of the McKeiver Court that juveniles receive only positive rehabilitative treatment which requires no further special safeguards against governmental intervention. By contrast, retributive criminal punishment in the adult criminal process requires additional procedural guarantees to prevent governmental oppression.

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

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

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

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57 Gault, 387 U.S. at 79 (Stewart, J., dissenting).
59 F. Allen, supra note 22, at 2-3; H. Packer, The Limits of the Criminal Sanction 23-28 (1968); Allen, supra note 17, at 25.
60 Gardner, supra note 5, at 793 n.18, 815-16; Criminalizing Juvenile Justice, supra note 2, at 248 nn.415-416.
61 D. Matza, supra note 18, at 3.
incapacitation. In the context of waiver decisions, clinical assessments of the individual offender's "amenability to treatment" or "dangerousness" predominate. The decision is based on a prediction of an offender's future course. Thus, waiver statutes reflect the same dispositional tensions between individualized evaluations of the offender and more mechanistic dispositions based on the characteristics of the offense that pervade other sentencing schema.

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

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

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

First, [the principle of individualized justice] is much more inclusive: it contains many more items in its framework of relevance.

... The principle of individualized justice suggests that disposition is to be guided by a full understanding of the client's personal and social character and by his "individual needs."

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

62 "The distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment." In re Felder, 93 Misc. 2d 369, 374, 402 N.Y.S.2d 528, 533 (N.Y. Fam. Cl. 1978). See generally, N. Morris, The Future of Imprisonment 13-20 (1974); H. Packer, supra note 59; Report of Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 11-14 (1976); A. von Hirsch, Doing Justice 11-26 (1976) [hereinafter Doing Justice]; A. von Hirsch, Past or Future Crimes (1986). In analyzing juvenile dispositions, it is useful to contrast offender-oriented dispositions, which are indeterminate and non-proportional, with offense-based dispositions, which are determine, proportional, and related to characteristics of the offense.

63 D. Matza, supra note 18, at 113-14.

64 Id (emphasis supplied).

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

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

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

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

67 Id. at 116.  
69 Martinson, What Works? Questions and Answers about Prison Reform, 35 Pub. Interest 22, 25 (1974)("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable affect on recidivism."); L. Secherest, S. White & E. Brown, The Rehabilitation of Criminal Offenders (1979); G. Kassebaum, D. Ward & D. Wilner, Prison Treatment and Parole Survival (1971). In another survey of correctional evaluations, Greenberg, The Correctional Effects of Corrections: A Survey of Evaluations, in Corrections and Punishment 111, 140 (D. Greenberg ed. 1977), Greenberg concludes:

This survey indicates that many correctional dispositions are failing to reduce recidivism, and it thus confirms the general thrust of... Martinson, ... Much of what is now done in the name of "corrections" may serve other functions, but the prevention of return to crime is not one of them. Here and there a few modest results alleviate the monotony, but most of these results are modest and are obtained through evaluations seriously lacking in rigor. The blanket assertion that "nothing works" is an exaggeration, but not by very much.

...I never thought it likely that most of these programs would succeed in preventing much return to crime. Where the theoretical assumptions of programs are made explicit, they tend to border on the preposterous. More often they are not made explicit, and we should be little surprised if hit or miss efforts fail.

Id.

70 F. Allen, supra note 22, at 34.
result from individualized sentences. "Just deserts" sentencing, with its strong retributive foundation, punishes offenders according to their past behavior, rather than on the basis of who they are or may be predicted to become. Similarly situated offenders are defined and sanctioned equally on the basis of objective characteristics such as seriousness of offense, culpability, or criminal history.\(^7\)

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

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

A. WAIVER OF JUVENILE OFFENDERS FOR CRIMINAL PROSECUTION

The appropriate disposition of persistent or violent young offenders is one of the most difficult sentencing issues confronting the juvenile justice system.\(^7\) The waiver decision is a form of sentencing decision that represents a choice between the explicitly punitive dispositions of adult criminal courts and the nominally rehabilitative dispositions of juvenile courts.\(^7\) Juvenile courts have traditionally assigned primary importance to individualized treatment, whereas the criminal law accords far greater significance to the seriousness of the offense committed and attempts to proportion punishment

\(^7\) See supra notes 62, 68.
\(^7\) See, e.g., *Readings in Public Policy*, supra note 7; *Youth in Adult Court: Between Two Worlds*, supra note 7; *Reference of Juvenile Offenders*, supra note 6; *Dismantling the "Rehabilitative Ideal"*, supra note 3.
\(^7\) See, e.g., Whitebread & Batey, supra note 7, at 207.
accordingly. These differences between juvenile and criminal courts' penal philosophies are most visible in juvenile waiver proceedings.

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

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

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

\textsuperscript{74} \textit{Youth in Adult Court: Between Two Worlds}, supra note 7; \textit{Reference of Juvenile Offenders}, supra note 6, at 523.

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

\textsuperscript{76} See, e.g., \textit{Reference of Juvenile Offenders}, supra note 6, at 556-71; \textit{Delinquent Careers and Criminal Policy}, supra note 6, at 202-05.
relevance."

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

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

1. Judicial Waiver—Procedural Formality and Individualized Dispositions

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

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77 D. Matza, supra note 18, at 114-15.
78 Reference of Juvenile Offenders, supra note 6, at 529-56. See also infra notes 88-101 and accompanying text.
80 In Kent, the Court concluded that the loss of the special protections of the juvenile
quently, in *Breed v. Jones*, the Court applied the double jeopardy provisions of the Constitution to the adjudication of juvenile offenses, thereby requiring the states to make the juvenile/adult dispositional determination before proceeding against a youth on the merits of the charge.

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

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82 See, e.g., Delinquent Careers and Criminal Policy, supra note 6, at 198; Reference of Juvenile Offenders, supra note 6.
83 Although *Kent* was decided on procedural grounds, the Supreme Court, in an appendix to its opinion, indicated some of the substantive criteria that a juvenile court might consider:

An offense falling within the statutory limitations ... will be waived if it has prosecutorial merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment ...
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults ...
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous con-
As sentencing criteria, the assessment of a youth's amenability to treatment or dangerousness implicates some of the most fundamental and difficult issues of penal policy and juvenile jurisprudence. The underlying legislative assumptions that there are effective treatment programs for serious or persistent juvenile offenders, classification systems that differentiate the treatment potential or dangerousness of various youths, and validated and reliable diagnostic tools that enable a clinician or juvenile court judge to determine the proper disposition for a particular youth are all highly problematic and controversial.\textsuperscript{8} Similarly, legislation authorizing a judge to waive juvenile court jurisdiction because a youth poses a threat to public safety requires the judge to predict the youth's dangerousness despite compelling evidence that the "capacity to predict future criminal behavior [is] quite beyond our present technical ability."\textsuperscript{85}

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

\textsuperscript{8} Contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

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

\textsuperscript{85} N. Morris, supra note 62, at 62. See also Reference of Juvenile Offenders, supra note 6, at 540-46; Morris & Miller, Predictions of Dangerousness, 6 \textit{Crime & Justice} 1 (1985).

\textsuperscript{86} Zimring, \textit{Notes toward a Jurisprudence of Waiver}, in \textit{Readings in Public Policy}, supra note 7, at 195.

\textsuperscript{87} \textit{Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime} 56 (1978), notes that "[c]ollectively, 'lists' of
Like individualized sentencing statutes, the subjectivity inherent in waiver administration allows a variety of inequities and disparities to occur. The empirical reality is that judges cannot administer these discretionary statutes on a consistent, evenhanded basis.\(^8\) Within a single jurisdiction, waiver statutes are inconsistently interpreted and applied from county to county and from court to court.\(^9\) Hamparian's nationwide analysis of waiver in 1978 provides substantial evidence that judicial waiver practices are inherently arbitrary, capricious, and discriminatory.\(^9\) Among the states that rely on judicial waiver for the transfer decision, the rates of waiver vary from a high of 13.5 to a low of .07 per 10,000 youths at risk; youths in Oregon have nearly 200 times the probability of being waived for trial as adults as do youths in Montana.\(^9\)

What we found was a rash of inconsistent judicial waiver decisions, both within and across sites. Inconsistent and standardless decisions for youth retained in juvenile court are not surprising in a judicial context which cherishes individualized justice. . . . But for youth who may be tried and convicted in criminal court and subjected to years of imprisonment in a secure institution, such subjective decision making is no longer justified.\(^9\)

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

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\(^8\) See, e.g., Youth in Adult Court: Between Two Worlds, supra note 7; Reference of Juvenile Offenders, supra note 6, at 546-56.

\(^9\) See, e.g., Edwards, The Case for Abolishing Fitness Hearings in Juvenile Court, 17 Santa Clara L. Rev. 595, 611-12 (1977)(county by county disparity); J. P. Heuser, Juveniles Arrested for Serious Felony Crimes in Oregon and "Remanded" to Adult Criminal Courts: A Statistical Study 30 (1985)(county by county variation in Oregon—"it appears that some counties may be over- or under-represented in terms of the proportion of cases per unit of risk population."); Supreme Court Juvenile Justice Study Commission, Report to the Minnesota Supreme Court 61-78 (1976)(waiver is used for three different purposes in different parts of the state); Youth in Adult Court: Between Two Worlds, supra note 7 (Northeast Region; North Central Region; Southeast Region; South Central Region; West Region (county by county disparity within states)).

\(^90\) Youth in Adult Court: Between Two Worlds, supra note 7, at 102.

\(^91\) Id. at 104-05.

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

\(^93\) Id. at 21.
nor simple explorations identified strong or consistent determinants of the judicial transfer decision. Except for a relationship between extensive prior offense history and the transfer decision, none of the identified variables could significantly describe differences between youths who were or were not transferred.94

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

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

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

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94 Id. at 19.
95 Eigen, The Determinants and Impact of Jurisdictional Transfer in Philadelphia, in Readings in Public Policy, supra note 7, at 333; Keiter, Criminal or Delinquent: A Study of Juvenile Cases Transferred to the Criminal Court, 19 Crime & Delinq. 528 (1973); Youth in Adult Court: Between Two Worlds, supra note 7, at 104-05.
96 Youth in Adult Court: Between Two Worlds, supra note 7, at 104-05. Without being able to control for the seriousness of the present offense and prior record, it is not possible to ascribe the disproportionate overrepresentation of minority youths in waiver proceedings to racial discrimination.
97 Eigen, supra note 95. Cf. McCleskey v. Kemp, 107 S. Ct. 1756 (1987)(statistical evidence that black defendants whose victims are white are disproportionately at risk for execution does not result in violations of due process or equal protection). Zimring, in Notes Toward a Jurisprudence of Waiver, in Readings in Public Policy, supra note 7, at 193, described the waiver of serious juvenile offenders as “the capital punishment of juvenile justice.” Zimring observed that “[c]apital punishment in criminal justice and waiver in juvenile justice share four related characteristics: 1) low incidence; 2) prosecutorial and judicial discretion; 3) ultimacy; and 4) inconsistency with the premises that underlie the system’s other interventions.” Id. See also infra notes 172-207 and accompanying text, in which the implications of waiver for capital punishment are addressed directly.
99 Bortner, Traditional Rhetoric, Organizational Realities: Remand of Juvenile to Adult Court, 32 Crime & Delinq. 53 (1986).
creates an effective symbolic gesture regarding protection of the public but it also advances its territorial interest in maintaining jurisdiction over the vast majority of juveniles and deflecting more encompassing criticisms of the entire system.\textsuperscript{100}

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

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

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

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

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

\textsuperscript{100} Id. at 69-70.
\textsuperscript{101} Youth in Adult Court: Between Two Worlds, supra note 7, at 105.
\textsuperscript{102} Reference of Juvenile Offenders, supra note 6, at 556-71.
\textsuperscript{103} Zimring, Notes Toward a Jurisprudence of Waiver, in Readings in Public Policy, supra note 7, at 201. See generally, Juvenile Justice Standards Relating to Transfer Between Courts 6-7, 39-42 (1980).
[T]he justification for waiver is singular: transfer to criminal court is necessary when the maximum punishment available in juvenile court is clearly inadequate. . . [T]he standard for making a waiver decision is a determination that the maximum social control available in juvenile court falls far short of the minimum social control necessary if a particular offender is guilty of the serious crime he is charged with.\textsuperscript{104}

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

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

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

\textsuperscript{104} Zimring, \textit{Notes Toward a Jurisprudence of Waiver}, in \textit{READINGS IN PUBLIC POLICY}, supra note 7, at 201.
\textsuperscript{105} The Juvenile Court and Violent Youth, \textit{supra} note 92, at 11.
\textsuperscript{106} H. Packer, \textit{supra} note 59, at 62-70.
\textsuperscript{107} \textit{Id.} at 68.
benefit of preventing some future crimes. Although selective incapacitation attempts to identify those offenders with a substantially greater probability of future criminal involvement, juveniles waived pursuant to this strategy are waived not on the basis of a prediction regarding the future, but rather because of their past conduct. By confining the predictor criteria to past criminal history, many of the legitimate civil liberty-oriented objections to over-prediction, false positives, and preventive incarceration may be avoided.

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

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


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

111 See, e.g., M. Wolfgang, R. Figlio & T. Sellin, Delinquency in a Birth Cohort (1972) [hereinafter cited as Delinquency in Birth Cohort].

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

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

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


\textsuperscript{114} See supra notes 111-13.

\textsuperscript{115} See supra notes 111-13.

\textsuperscript{116} See, e.g., Greenwood, Differences in Criminal Behavior and Court Responses Among Juvenile and Youth Adult Defendants, 7 Crime & Justice 164 (1986).

\textsuperscript{117} See Delinquent Careers and Criminal Policy, supra note 6, at 195; Reference of Juvenile Offenders, supra note 6, at 614; Greenwood, supra note 116.
necessarily a last resort; some offenders, however, do deserve it, and
the community needs a respite from their predation. From the com-
munity's perspective, the principal values of exclusion are: en-
hanced community protection through the greater security and
longer sentences available in the adult system, increased general de-
terrence though greater certainty and visibility of consequences,
and reaffirmation of fundamental norms. Because most offenders,
adults and juveniles alike, do not require penal incarceration, legis-
lative exclusion is appropriate only when a juvenile offender's rec-
ord of persistence and the seriousness of his present offense warrant
confinement for a substantially longer term than could be imposed
on him as a juvenile.

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

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

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

118 See, e.g., Reference of Juvenile Offenders, supra note 6, at 609-11.
119 Twentieth Century Fund Task Force on Sentencing Policy Toward Young
Offenders, Confronting Youth Crime 25.
sion criteria involves both empirical and value choices, the particu-
lar combinations of present offense and prior record could vary
from jurisdiction to jurisdiction in light of prevailing crime rates, the
offense characteristics of classes of youthful offenders, the availabil-
ity of penal bed-space, actual sentencing practices of the adult
courts, and the like. Ultimately, the legislature must work back-
wards from what the probable adult sentence would be for the par-
ticular offense or offender.

Zimring has objected to the adoption of mechanistic legislative
exclusion criteria on the grounds that the legislature will adopt stan-
dards drafted on the basis of the hypothetical “worst case scenario”
within various offense categories. The resulting laundry list of ex-
cluded offenses and offense histories, Zimring asserts, will quickly
multiply and result in far more transfers than would occur within a
discretionary system.\textsuperscript{120} Using Zimring’s own rationale for waiver,
however, apart from a very few major offenses against the person,
how many even “worst case” offenses by juveniles without prior
records are likely to result in adult incarceration for a longer dura-
tion than available within the juvenile justice system? And if ex-
tended incarceration is not likely, then the rationale for exclusion is
obviated.

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

\textsuperscript{120} Zimring, \textit{Notes Toward a Jurisprudence of Waiver}, in \textit{READINGS IN PUBLIC POLICY}, supra
note 7, at 199. Indeed, the experience with California’s waiver legislation confirms his
prediction. \textit{See} Table 1 n.3, which describes an initially short list of offense criteria ex-
panded by subsequent legislatures.

\textsuperscript{121} If the rationale for transfer, whether judicial or legislative, is based on the serious-
ness of the offense and the need for extended confinement, then permanent divestiture
of juvenile court jurisdiction should be based on the offense for which a youth is ulti-
mately convicted, not the offense initially charged.

Return to juvenile court is certainly consistent with the statutory policies providing
for differential treatment on the basis of offense committed. Moreover, the policy
reasons that militate against subjecting the prosecutor’s charging decision to prior
judicial review do not preclude examining it after the fact. Finally, in the absence of
B. DISPOSITIONS OF SERIOUS YOUNG OFFENDERS—TOWARDS AN INTEGRATED SENTENCING SYSTEM

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

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

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

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

122 See supra note 113.

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

124 Greenwood, supra note 116, at 163.

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

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

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

\(^{126}\) P. Greenwood, A. Abrahamse & F. Zimring, Factors Affecting Sentence Severity for Young Adult Offenders 12-14 (1984) [hereinafter Factors Affecting Sentence Severity]; Age, Crime and Sanctions, supra note 125, at 22, 32.

\(^{127}\) See supra note 126.

\(^{128}\) See supra notes 120, 124-25.

\(^{129}\) Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 63.

\(^{130}\) Youth in Adult Court: Between Two Worlds, supra note 7, at 106-09.

\(^{131}\) J. P. Heuser, supra note 89, at 21-22 (16.7% involved violent crime charges and 83.3% involved property crime charges).

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

\(^{133}\) Id. at 26-27.
tions were approximately the same ones that juveniles with extensive prior records who are convicted of felonies within juvenile court would receive.

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

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

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

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

\textsuperscript{135} Bortner, \textit{supra} note 99, at 56-57 (emphasis added).
\textsuperscript{136} \textit{Youth in Adult Court: Between Two Worlds}, \textit{supra} note 7, at 112.
criminal history stems from the confidential nature of juvenile court records, the functional and physical separation of the respective court services staffs, and the sheer bureaucratic ineptitude that makes the maintenance of an integrated system for tracking offenders and compiling complete criminal histories extremely difficult.\textsuperscript{138} In a recent study of the effects of juvenile offense histories on adult sentencing practices, Greenwood reported that "local sentencing policies have much more of an impact on how young adults are treated, than any modest variations in the availability of juvenile records."\textsuperscript{139}

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

IV. RECENT LEGISLATIVE CHANGES IN WAIVER STATUTES

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


\textsuperscript{139} \textit{FACTORS AFFECTING SENTENCE SEVERITY}, \textit{supra} note 126, at 36.
that exacerbates the potential for discretionary abuse and discrimination.\textsuperscript{140} To the extent that organizational or political considerations result in youths being waived for less serious offenses, the inconsistency between juvenile and adult criminal sentencing practices is further aggravated.

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

A. CONTROLLING JUDICIAL DISCRETION THROUGH OFFENSE CRITERIA

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

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

\textsuperscript{140} Zimring, Notes Toward a Jurisprudence of Waiver, in Readings in Public Policy, supra note 7, at 199.
## TABLE 1

### JUDICIAL WAIVER STATUTES

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<thead>
<tr>
<th>STATE</th>
<th>JuvCl Juris.</th>
<th>Min.Age Adult Pros.</th>
<th>Waiver Criteria</th>
<th>Offense Limits Minimum</th>
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Legislation current through June 30, 1986.

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

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

1. Under previous legislation, any offense was waivable. As amended, only felony offenses are waivable.
2. Under previous legislation, only felony offenses were waivable. As amended, any offense is waivable.
3. CAL. WELF. & INST. CODE §707(b) contains a twenty (20) item catalogue of primarily major offenses against the person for which adult waiver is presumed. See generally, Feld, Dismantling Rehabilitative Ideal, supra note 3, at 215-17. §707(b)(2-14, 9-15) was added in 1976; §707(b)(16) in 1977; §707(b)(5-8) in 1979; and §707(b)(17-20) in 1982.
4. "Serious Juvenile Offenses" as defined in CONN. GEN. STAT. §46b-120 include thirty-nine (39) serious offenses such as homicide, assault, sexual assault, kidnapping, and certain categories of burglary and larceny.
5. DEL. CODE ANN. tit. 10 §921 requires a mandatory waiver hearing for any youth aged 16 or older who is charged with one of eight (8) offenses which include murder, robbery, burglary, or arson.
6. D.C. CODE ANN. §16-2307(a)(2) authorizes a waiver hearing for a sixteen year old youth charged with any offense provided the child is "already under commitment to an agency or institution as a delinquent child . . . ."
7. Fla. Stat. Ann. §39.09 defines a violent crime against a person as “Murder, sexual battery, armed or strong-armed robbery, aggravated battery, or aggravated assault...”. The offense catalogue was adopted in 1975 with additions and deletions in 1978. For youths charged with those offenses who have a prior conviction of any such offense, a waiver hearing is mandatory. Thomas & Bilchik, supra note 75, at 460-66.

8. Georgia Code Ann. §15-11-37 catalogues thirteen “designated felonies” which, if committed by a child thirteen years or older, permit waiver for adult criminal prosecution.

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

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

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

12. Mont. Code Ann. §41-5-205 lists nine (9) offenses or attempts to commit those offenses in its waiver provision, including murder, rape, arson, aggravated assault, robbery, and kidnapping.

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

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


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

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

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

In addition to minimum offense limitations, a second legislative strategy is to identify certain categories of present offenses for special waiver consequences. California legislative amendments place the burden of proving fitness for juvenile court treatment on the
youth if certain enumerated offenses are alleged, rather than requiring the state to prove the youth’s nonamenability or dangerousness. Thus, allegations of certain serious offenses create a presumption in favor of waiver, and the youth bears the burden of non-persuasion. Subsequent amendments in 1977, 1979, and 1982 have expanded the catalogue of offenses which create this presumption of adulthood.

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

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

141 Dismantling the “Rehabilitative Ideal”, supra note 3, at 215-17.
143 Id. at 30.
144 Id. at 32-35.
145 AGE, CRIME AND SANCTIONS, supra note 125, at 22, 32.
BARRY C. FELD

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

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

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

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

146 Dismantling the Rehabilitative Ideal, supra note 3.
147 Id. at 194-96.
serious offenses who have two prior convictions for similarly serious offenses. By emphasizing serious present offenses in combination with significant prior records, these states both constrain judicial discretion and increase the probabilities of significant adult dispositions following waiver.

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

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

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

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

149 For discussion of Kent criteria, see supra notes 75-83 an accompanying text.
## TABLE 2
### LEGISLATIVELY EXCLUDED OFFENSES*
#### CONCURRENT JURISDICTION**

<table>
<thead>
<tr>
<th>STATE</th>
<th>Minimum Concur Age</th>
<th>Excluded Offenses</th>
<th>Year Adopted***</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Yes-------------Murder 1,2 Rape</td>
<td>1981</td>
</tr>
<tr>
<td><strong>Colorado</strong> (Col. Rev. Stat. §19-1-104(b))</td>
<td>14</td>
<td>Yes----------Cl. I</td>
<td>1973</td>
</tr>
<tr>
<td><strong>Connecticut</strong> (Conn. Gen. Stat. §46b-127)</td>
<td>16</td>
<td>Yes1 Cl. II,III Felony</td>
<td>1973</td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>Murder</td>
<td>1979</td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>Class A Class A</td>
<td>1979</td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>Class B 2 A or B</td>
<td>1979</td>
</tr>
<tr>
<td><strong>Delaware</strong> (Del. Code Ann. tit.10 §921)</td>
<td>None</td>
<td>Murder 1, Rape, Kidnap</td>
<td>1971</td>
</tr>
<tr>
<td><strong>Florida</strong> (Fla. Stat. Ann. §§39.02, 39.04)</td>
<td>None</td>
<td>Yes----Indict Felony^2</td>
<td>1951</td>
</tr>
<tr>
<td></td>
<td>16</td>
<td>Yes----------Any (Inform)</td>
<td>1978</td>
</tr>
<tr>
<td><strong>Georgia</strong> (Ga. Code Ann. §15-11-5)</td>
<td>None</td>
<td>Yes-----Yes</td>
<td>[1915]</td>
</tr>
<tr>
<td><strong>Idaho</strong> (Id. Code §16-1806A)</td>
<td>14</td>
<td>Murder, Rob Rape, Mayhem</td>
<td>1981</td>
</tr>
<tr>
<td></td>
<td>15</td>
<td>Murder, Agg. Crim.Sex, Rob(Armed)</td>
<td>1982</td>
</tr>
<tr>
<td><strong>Illinois</strong> (Ill. Ann. Stat. ch.37, §702-7)</td>
<td>16</td>
<td>Murder3 Rob(Armed), Kidnap, Rape</td>
<td>1975</td>
</tr>
<tr>
<td></td>
<td>16</td>
<td>1570(A)(5)</td>
<td>1978</td>
</tr>
<tr>
<td></td>
<td>16</td>
<td>Rob(Armed)</td>
<td>1973</td>
</tr>
<tr>
<td><strong>Maryland</strong> (Md. Code Ann. §3-804(d))</td>
<td>14</td>
<td>Yes</td>
<td>[1946]</td>
</tr>
<tr>
<td><strong>Mississippi</strong> (Miss. Code Ann. §43-21-105)</td>
<td>None</td>
<td>Yes^6----------Any</td>
<td>[1974]</td>
</tr>
<tr>
<td><strong>Nebraska</strong> (Neb. Rev. Stat. §43-247)</td>
<td>None</td>
<td>Murder or Att. Murd.</td>
<td>1977</td>
</tr>
<tr>
<td><strong>Nevada</strong> (Rev. Rev. Stat. §62.040)</td>
<td>None</td>
<td>Murder or</td>
<td>1977</td>
</tr>
</tbody>
</table>
Table 2  LEGISLATIVELY EXCLUDED OFFENSES: CONCURRENT JURISDICTION continued

<table>
<thead>
<tr>
<th>STATE</th>
<th>Minimum Concur Juris</th>
<th>Excluded Offenses</th>
<th>Prior Conviction</th>
<th>Year Adopted***</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York (N.Y.PENALLAWS §30.00(2))</td>
<td>13</td>
<td>Int.Murder</td>
<td>1978</td>
<td></td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>Kid,Arson,Rape,</td>
<td>kids</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Burg,Att.Murder</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Felony Murder</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio (OH.REV.CODEANN. §2151.26)</td>
<td>15</td>
<td>Murder,Agg.</td>
<td>1981</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fel. 1, 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fel. 1, 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma (OK.STAT.ANN. tit.10 §1104.2)</td>
<td>16</td>
<td>Murder,Kid,Rob,</td>
<td>1978</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rape,Arson⁶</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania (42 PA.CONS.STAT. ANN. §6302)</td>
<td>None</td>
<td>Murder</td>
<td>[1953]</td>
<td></td>
</tr>
<tr>
<td>Rhode Island (R.I.GEN.LAWS §14-1-7.1)</td>
<td>16</td>
<td>Any Felony</td>
<td>2 Felonies</td>
<td>1972</td>
</tr>
<tr>
<td>Utah (UTAH CODE ANN. §788-3a-25(6))</td>
<td>16</td>
<td>Yes--------------Murder,Agg.</td>
<td>1981</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rob,Rape,Kid⁹</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vermont (VT.STAT.ANN. tit. 33 §§632,635(a))</td>
<td>14</td>
<td>Murder,Mans.</td>
<td>1981</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rob(Arm),Rape¹⁰</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming (WY.STAT. §14-6-203(c))</td>
<td>13</td>
<td>Yes---------------Any</td>
<td>1971</td>
<td></td>
</tr>
</tbody>
</table>

Legislation current through June 30, 1986.

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

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

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

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

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

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


5. Louisiana excluded capital offenses from juvenile court jurisdiction in 1950. In 1975, armed robbery was also excluded. The 1980 legislation reported in Table 2 excludes several degrees of homicides as well as aggravated rape, robbery, kidnapping and burglary.
6. Nebraska is a "pure" prosecutorial waiver jurisdiction. Neb.Rev.Stat. §§43-247, -276 grants juvenile courts and district courts concurrent jurisdiction over juveniles of any age charged with felonies, and those 16 or older charged with misdemeanors. The prosecutor's choice of a juvenile or adult forum is nominally guided by Kent waiver criteria.

7. Ohio Rev. Code Ann. §2151.26 excludes from juvenile court jurisdiction any youth who was previously waived for adult prosecution, tried and convicted of murder or aggravated murder or an aggravated felony of the first or second degree or a felony of the first or second degree, who is charged with any of those offenses on a subsequent occasion.


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

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

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

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

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

150 See, e.g., Reference of Juvenile Offenders, supra note 6, at 558-61; Thomas & Bilchik, supra note 75, at 478.
151 Reference of Juvenile Offenders, supra note 6, at 564; Thomas & Bilchik, supra note 75.
as prosecutorial waivers because the decision as to the offense charged determines the forum, it is the legislature, not the prosecutor, which makes the policy choice. By legislatively focusing on characteristics of the offense rather than the offender, such legislation precludes any consideration of an individual's characteristics.

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

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

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

\(^{153}\) Chicago Law Enforcement Study Group, Juveniles Tried as Adults: Cook County 1975-1984 (1986).
\(^{154}\) N.Y. Penal Law § 30.00(2) (McKinney 1978).
tional change and an increase in the severity of punishment does not
necessarily lead to reductions in violent juvenile crime."\footnote{156}

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

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

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

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

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

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

\textit{Id.} at 221.

\footnote{157} Ruhland, Gold & Hekman, \textit{Deterring Juvenile Crime: Age of Jurisdiction}, 13 YOUTH AND 
Soc'y 353 (1982).

\footnote{158} \textit{Id.} at 373.

\footnote{159} \textit{Id.} at 374.
who have two prior felony convictions. By legislatively emphasizing
an offender's cumulative persistence, rather than just the current se-
riousness, these statutes reflect a balance between retributive and
selective incapacitative policies.160

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

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

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

It is instructive to compare the sentencing of juveniles tried as

160 Delinquent Careers and Criminal Policy, supra note 6; Reference of Juvenile Offenders, supra
note 6.
161 See Reference of Juvenile Offenders, supra note 6, at 558-66.
162 Youth in Adult Court: Between Two Worlds, supra note 7, at 106.
163 Age, Crime and Sanctions, supra note 125; Bortner, supra note 99; Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Con-
fronting Youth Crime.
adults in jurisdictions in which they are targeted as serious offenders with the sentences received in more discretionary jurisdictions. In their study of waived youths' dispositions in Florida, a concurrent jurisdiction/direct file state, Thomas and Bilchik reported that the majority of youths tried as adults were older males with prior delinquency adjudications and multiple present felony charges, typically property offenses. Unlike Hamparian's findings, however, approximately two-thirds of these Florida juveniles were sentenced to substantial terms of imprisonment.

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

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

164 Thomas & Bilchik, supra note 75, at 470-74.
165 Compare id. at 474 with YOUTH IN ADULT COURT: BETWEEN TWO WORLDS, supra note 7, at 112.
166 Rudman, Hartstone, Fagan & Moore, Violent Youth in Adult Court: Process and Punishment, 32 CRIME & DELINQ. 5 (1986) [hereinafter Violent Youth in Adult Court].
167 Id. at 89.
168 J. P. HEUSER, supra note 89, at 24, 28-29.
169 See, e.g., FACTORS AFFECTING SENTENCE SEVERITY, supra note 126, at 52; Greenwood, supra note 116.
row category of violent and/or repetitive offenders, the sentences that they receive as adults are substantial. It must be emphasized, however, that violent and repetitive juvenile offenders are a small subset of the group of juveniles typically waived in most discretionary jurisdictions.

V. IMPLICATIONS OF WAIVER FOR JUVENILES AND JUSTICE

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

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

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

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

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

171 See F. ALLEN, supra note 22.
pudiation of the traditional, offender-oriented treatment dispositions characteristic of the juvenile court in favor of mechanistic, offense-oriented decisions. Exclusion also represents an expression of legislative distrust of juvenile court judges' discretionary decision-making. If legislators perceived juvenile court judges as properly and consistently responding to serious juvenile offenders, there would be less legislative impetus to take those decisions out of the judges' hands. In light of the substantial research from many jurisdictions showing the inherent arbitrariness of juvenile court's waiver decisions in juvenile courts, there is ample support for the legislatures' disquiet.

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

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

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

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

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


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

F. ZIMRING, _CHANGING LEGAL WORLD OF ADOLESCENCE_ xii.

173 Streib, supra note 172, at 637.


175 See, e.g., W. LaFAVE & A. SCOTT, _CRIMINAL LAW_ 351 (1972); Fox, supra note 174; McCarthy, supra note 174; Westbrook, _Mens Rea in the Juvenile Court_, 5 J. FAM. L. 121 (1965); Weissman, supra note 174; Walkover, supra note 174, at 512. Walkover notes that:

At common law the infancy defense was grounded in an unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts. Linked to that normative imperative was the common sense judgment that punishment cannot deter an individual from commission of future wrongful acts where he is in fact incapable of knowing right from wrong. _Id._ (citations omitted).
The emergence of the principle of offense in waiver statutes, coupled with the possibility of capital punishment following conviction as an adult, challenged the juvenile courts’ basic assumptions about young peoples’ lack of criminal responsibility. Making juveniles eligible for capital punishment constitutes a legislative judgment that young people are just as responsible, culpable, and blameworthy as their somewhat older counterparts and, therefore, are just as deserving of punishment.\footnote{\textsuperscript{176}} Both historically and presently, children have been executed,\footnote{\textsuperscript{177}} and the constitutionality of executing offenders for crimes committed as juveniles will be reconsidered by the United States Supreme Court during its 1987 term in Thompson v. Oklahoma.\footnote{\textsuperscript{178}}

The extent to which young offenders are as deserving of punishment as their adult counterparts hinges in a fundamental way on an assessment of culpability and the extent to which youthfulness is, or should be, a formal mitigating factor which bars execution. The underlying rationale of “deserved” punishments, or just deserts, derives from von Hirsch’s writings in moral philosophy.\footnote{\textsuperscript{179}} Central to the contemporary deserts theory, which is addressed explicitly only to adult offenders, is the notion of punishment as censure, condemnation, and blame. “[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it.”\footnote{\textsuperscript{180}} Proportioning penalties to the seriousness of the crime reflects the connection between the nature of the conduct and its blameworthiness.\footnote{\textsuperscript{181}}
Although the principle of commensurate desert apportions the sanctions, condemnation, and blame to the seriousness of the offense, it shifts the analytical focus to the meaning of "seriousness." The seriousness of an offense is the product of two components: harm and culpability. Evaluations of harm focus on the degree of injury inflicted, risk created, or value taken. In assessing the harmfulness of a criminal act, the age of the perpetrator is of little consequence.

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

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

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

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

through later life.\textsuperscript{187}

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

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

\textsuperscript{187} See, e.g., Kohlberg, The Development of Children’s Orientations Toward a Moral Order, 6 Vita Humana 11, 16 (1963) (By the age of fourteen, most people employ the same or nearly the same level of moral reasoning as they will as adults.) Tapp notes that “crystallization occurs during the adolescent years and . . . substantial consistency is demonstrated during adulthood.” Tapp, Psychology and the Law: An Overture, 27 Ann. Rev. Psychology 359, 374 (1976).

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

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

\textsuperscript{189} Id. at 102.

\textsuperscript{189} Apart from the infancy defense, the presence or absence of criminal responsibility, i.e., the knowledge of right from wrong, is typically litigated in the context of an insanity defense. See generally H. Fingarette, The Meaning of Criminal Insanity (1972); A. Goldstein, The Insanity Defense (1967); N. Morris, Madness and the Criminal Law (1982); Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S. Cal. L. Rev. 779 (1985).

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

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

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.

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


One commentator has noted:

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

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

Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime, supra note 87, at 7. One commentator has
Moreover, the crimes of juveniles are seldom their fault alone; society shares at least some of the blame for their offenses as a result of juveniles' limited opportunities to learn to make correct choices. Indeed, even though the ability to make responsible choices is learned behavior, the dependent status of juveniles systematically deprives them of opportunities to learn to be responsible. Finally, even if a youth is aware of the abstract criminal prohibition, juveniles are more susceptible to peer group influences and group process dynamics than are their older counterparts.

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

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

"[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime

7. See generally Capital Punishment for Minors, supra note 172, at 1495-98.

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

196 "[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7. See generally Capital Punishment for Minors, supra note 172, at 1495-98.


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

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

200 Eddings, 455 U.S. at 116. The four Eddings dissenters, however, saw no constitutional bar to the imposition of the death penalty for a crime committed at age sixteen. Id. at 128 (Burger, C.J., dissenting)(joined by JJ. White, Blackmun, and Rehnquist). Moreover, Justice O'Connor noted in her concurrence that "I, however, do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16." Id. at 119 (O'Connor, J., concurring).
of jurisdictions explicitly prohibit the execution of offenders for crimes committed while the offenders were juveniles.\textsuperscript{201} Others simply weigh youthfulness as a mitigating factor offsetting aggravating factors in the decision to impose the death penalty.\textsuperscript{202} Although all capital jurisdictions must formally consider youthfulness as a mitigating factor, the majority of such states still authorize the execution of juveniles.

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

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

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

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

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

\textsuperscript{203} See Capital Punishment for Minors, supra note 172, at 1499:

Nor do the criteria used in making transfer decisions indicate that transferred minors are as accountable for their crimes as adults are for theirs. Under legislative waiver, minors are transferred solely on the basis of the crime they allegedly committed. . . . But just because a minor commits murder or rape or any other violent offenses does not indicate that society is less responsible for the minor’s act. Nor is it evidence that the minor is more mature than his peers or is able to control his conduct and understand the consequences of his actions.
the law in a limited number of capital states, the Supreme Court has not ruled that the Constitution prohibits the execution of juveniles. Furthermore, there is at least an intimation that Thompson v. Oklahoma will provide the Court with an opportunity to endorse the practice.\footnote{In Eddings v. Oklahoma, the Court reversed Eddings’ capital sentence by a five-to-four margin on the procedural ground that the trial court had failed to consider Eddings’ youthfulness and “family background” as a mitigating factor. The four dissenting justices, Burger, White, Blackmun, and Rehnquist, would have addressed the issue on which the case was initially presented, namely, whether the eighth amendment prohibits the execution of young offenders, and would have ruled that it did not. Although Justice Scalia has replaced Chief Justice Burger since the Eddings decision, Justice Scalia has voted with the five-to-four majorities in upholding capital punishment in two recent death penalty cases. See Tison v. Arizona, 107 S. Ct. 1676 (1987); McCleskey v. Kemp, 107 S. Ct. 1756 (1987).} If the Supreme Court does constitutionally endorse this practice, it will put the United States in conflict with the sound policy judgment of a number of its states,\footnote{See supra note 172 and accompanying text. At its Annual Meeting in Atlanta, Georgia, in August, 1983, the American Bar Association adopted the following resolution: Be it resolved, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offenses committed while under the age of eighteen (18).} most foreign countries,\footnote{See, e.g., Streib, supra note 172, at 631. Streib notes that: More than three-fourths of the nations of the world (73 of 98 reporting countries) have set age eighteen as the minimum age for execution. The United Nations endorsed this position in 1976. . . . Contrast this benevolent international attitude with the current “get tough” attitude toward violent juvenile offenders that seems to be sweeping legislatures and the judiciary in the United States. Id. See also Hill, supra note 170, at 18.} and the United States’ own international treaty obligations.\footnote{On October 5, 1977, President Jimmy Carter signed the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. See Weissbrodt, United States Ratification of the Human Rights Covenants, 63 MINN. L. REV. 35 (1978). Article six of the covenant on Civil and Political Rights prohibits the imposition of the death penalty on either pregnant women or children under the age of eighteen. Id. at 72.} 

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

One consequence of the legislative changes in waiver statutes described earlier is the increased significance of a juvenile’s prior record of delinquency adjudications in addition to the seriousness of the present offense. Whether a record of prior convictions presumptively requires judicial waiver or results in a youth’s automatic exclusion from juvenile court, the effect of “making offenses count” is to increase the significance of every prior contact with the juvenile justice system. Although emphasizing prior offenses may help to structure discretionary decision-making throughout the juvenile jus-
tice process,\textsuperscript{208} it also raises some submerged questions about the quality of procedural justice in juvenile court.

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

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

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

\textsuperscript{209} See generally Criminalizing Juvenile Justice, supra note 2. See also supra notes 3-4.

\textsuperscript{210} \textit{Kent v. United States}, 383 U.S. 541, 55 (1966). In an earlier article, Criminalizing Juvenile Justice, supra note 2, identified a number of instances in which the procedural safeguards afforded to juvenile offenders are not comparable either formally or functionally to those provided to adult criminal defendants. Juveniles were found to waive their \textit{Miranda} rights and their right to counsel under a standard that, in practice, is unlikely to discern whether they adequately understand the rights they relinquished. \textit{Id.} at 169-90. The high rate of waiver of counsel, in particular, is an indictment of the entire juvenile adjudicative apparatus because the effective assistance of counsel is the necessary prerequisite to the invocation of every other procedural safeguard. \textit{Id.} at 186-90. Similarly, preventive detention, deplorable in its own right, further disadvantages a youth at adjudication and disposition. \textit{Id.} at 191-208. The inadequate screening and charging practices used in juvenile court result in more youths being drawn more deeply into the process. \textit{Id.} at 217-29. The absence of counsel to challenge deficient petitions leads many youths to admit allegations that cannot be proved. Combining the suppression hearing with the trial on the merits is also a highly prejudicial practice that increases the likelihood of erroneous determinations of guilt. \textit{Id.} at 229-43. The denial of jury trials and public trials raises troubling questions about the factual accuracy of delinquency adjudications. \textit{Id.} at 243-46. At the same time, an analysis of sentencing practices and conditions of institutional confinement indicates that whatever the rehabilitative justifications for these procedural deficiencies may have been, such justifications are increasingly untenable in a juvenile court system that is explicitly punitive and offense-oriented rather than rehabilitative and offender-oriented. \textit{Id.} at 246-66.
consequences of their own immaturity nor the full panoply of adult criminal procedural safeguards to protect them from punitive state intervention. Instead, they increase the likelihood that juveniles will continue to receive the worst of both worlds by treating juvenile offenders just like adult criminal defendants when formal equality redounds to their disadvantage, yet provide less effective juvenile court procedures when those procedural deficiencies redound to the advantage of the state.

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

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

The *McKeiver* Court's decision to deny the provision juries in juvenile court proceedings makes it easier to convict a youth appearing before a judge in juvenile court than to convict a youth, on the basis of the same evidence, before a jury of detached citizens in a criminal proceeding. Furthermore, the subsequent use of qualitatively in-
ferior convictions to waive juvenile court jurisdiction and enhance sentences as adults raises profound issues of procedural justice.

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

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

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215 See supra note 35 and accompanying text. See generally Criminalizing Juvenile Justice, supra note 2, at 186-90.
218 D. Horowitz, The Courts and Social Policy 185 (1977). Although the rates of representation vary widely from county to county within a state, Horowitz' survey of the available data failed to find one state in which even 50% of the juveniles were represented by counsel.
219 In an evaluation of legal representation in North Carolina, Clarke and Koch reported that the Juvenile Defender Project provided representation for 22.3% of the juvenile offenders in Winston-Salem, N.C. and 45.8% of the juvenile offenders in Charlotte, N.C. Clarke & Koch, Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?, 14 Law & Soc'y Rev. 263, 297 (1980). In a recent survey, Bortner evaluated a large midwestern county's juvenile court and reported that "[o]ver half (58.2 percent) [of the juveniles] were not represented by an attorney." M. Bortner, Inside a Juvenile Court: The Tarnished Idea of Individualized Justice 139 (1982). Evaluations of rates of representation in Minnesota also show that a majority of youths go unrepresented. Criminalizing Juvenile Justice, supra note 2, at 189; K. Fine, Out of Home Placement of Children in Minnesota: A Research Report 48 (1983)"
explanations for why so many youths are unrepresented despite Gault's promise of the right to counsel, most juveniles face potentially coercive state action without seeing a lawyer, waive their right to counsel without consulting with an attorney or appreciating the legal consequences, and, thereby, face the prosecutorial power of the state alone and unaided. Although waiver of the right to counsel is the most common explanation, the variations in rates of representation within a state suggest that nonrepresentation reflects judicial policies, especially juvenile court judges' continuing hostility toward lawyers, rather than any systematic differences in youthful competence.

Using prior convictions to enhance subsequent penalties implicates the quality of procedural justice in juvenile court, especially if the prior convictions were obtained without the assistance of counsel or an adequate waiver of counsel. In Scott v. Illinois, the Supreme Court upheld the denial of counsel as constitutionally valid if the uncounseled conviction did not result in incarceration. In Baldasar v. Illinois, the defendant was denied counsel, convicted of a misdemeanor, and fined and placed on probation. The defendant in Baldasar was convicted a second time for a similar offense, and, under an enhanced penalty statute, the prior uncounseled conviction was used to convert the second conviction into a felony for...
which the defendant was imprisoned. In a per curiam opinion, the Supreme Court reversed the defendant’s felony conviction.\textsuperscript{226} The Court’s decision in Baldasar is consistent with an earlier line of cases in which the Court held that an uncounseled felony conviction could not be used in a later trial to enhance punishments under recidivist statutes.\textsuperscript{227}

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

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

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

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

\textsuperscript{389} U.S. at 115.

\textsuperscript{228} See generally Criminalizing Juvenile Justice, supra note 2, at 169-90.