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THE RIGHT TO COUNSEL IN JUVENILE COURT: AN EMPIRICAL STUDY OF WHEN LAWYERS APPEAR AND THE DIFFERENCE THEY MAKE

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I. INTRODUCTION

The United States Supreme Court's decision *In re Gault*[1] transformed the juvenile court into a very different institution than that envisioned by its Progressive creators.[2] Judicial and legislative efforts to harmonize the juvenile court with *Gault*'s constitutional mandate have modified the purposes, processes, and operations of the juvenile justice system. The Progressives envisioned a procedurally informal court with individualized, offender-oriented dispositional practices. The Supreme Court's various due process

[1] 387 U.S. 1 (1967).

[2] *See* D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); E. RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 155 (1978); Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 141-42 (1984). *See infra* notes 13-17.

decisions engrafted procedural formality onto the juvenile court's traditional, individualized-treatment sentencing schema.[3] Increasingly, as the contemporary juvenile court departs from its original model, it procedurally and substantively resembles adult criminal courts.[4]

Central to the "criminalized" juvenile court is the presence and role of defense counsel. *Gault* held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings because "a proceeding where the issue is whether the child will be found to be delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[5] The Court in *Gault* also decided that juveniles were entitled to the privilege against self-incrimination and the right to confront and cross-examine their accusers at a hearing.[6] Without the assistance of counsel, these other rights could be lost as well.[7] "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings . . . . The child 'requires the guiding hand of counsel at every step in the proceedings against him.' "[8] In subsequent decisions, the Supreme Court has reiterated the crucial role of counsel in the juvenile justice process.[9]

In the two decades since *Gault*, the promise of counsel remains unrealized. Although there is a scarcity of data in many states, including Minnesota, less than fifty percent of juveniles adjudicated

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[3] *See, e.g., In re* Winship, 397 U.S. 358 (1970) (proof of guilt beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (procedural due process). *See infra* note 32.

[4] Feld, *supra* note 2, at 272-75; Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 222-24 (1981)[hereinafter *Dismantling Rehabilitative Ideal*]; Feld, *Juvenile Court Meets Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U.L. REV. (1988) (forthcoming) [hereinafter *Punishment, Treatment*].

[5] *Gault*, 387 U.S. at 36.

[6] *Id.* at 55, 57.

[7] *See* Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 86-87 (1984). Professor Guggenheim contends that *Gault* reflects the Court's commitment to personal legal rights and individual autonomy and that the rights afforded in *Gault* can only be implemented if the youth has the power to direct his or her own counsel. *Id.* at 86-87. To allow the child's attorney to substitute his or her version of the child's "best interests" would simply "replace the paternalism of the state with the paternalism of the lawyer" which would be contrary to the basic rationale of *Gault*. *Id.* at 87.

[8] *Gault*, 387 U.S. at 36 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

[9] In Fare v. Michael C., 442 U.S. 707 (1979), the Court noted that "the lawyer occupies a critical position in our legal system . . . . Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Id.* at 719.

delinquent receive the assistance of counsel to which they are constitutionally entitled.[10] 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 much less often than might have been expected."[11] The most comprehensive study to date reports that in half of the six states surveyed, only 37.5%, 47.7%, and 52.7% of the juveniles were represented.[12]

This Article analyzes variations in rates of representation and the impact of counsel in juvenile delinquency and status proceedings in Minnesota in 1986. These statistical analyses provide the first statewide examination of the circumstances under which lawyers are appointed to represent juveniles, the case characteristics associated with rates of representation, and the effects of representation on case processing and dispositions. Part of these analyses treat the availability and role of counsel as a dependent variable using case characteristics and court processing factors as independent variables effecting rates of representation. Other parts treat the presence of counsel as an independent variable, assessing lawyers' impact on juvenile court case processing and dispositions. Taken together, they provide the most comprehensive analyses available on the role of counsel in contemporary juvenile justice administration. These analyses attempt to answer the interrelated questions regarding when lawyers are appointed to represent juveniles, why they are appointed, and what differences does it make whether or not a youth is represented?

II. THE RIGHT TO COUNSEL IN JUVENILE COURT

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

The social history of the juvenile court is an oft-told tale.[13]

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10 Feld, *supra* note 2, at 187-90; Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 400-02 (1988)[hereinafter *In re Gault Revisited*]. Although juveniles have a constitutional right to representation, the low rates of representation reflect the fact that the right to counsel may be waived. *See infra* notes 68-84 and accompanying text.

11 D. HOROWITZ, THE COURTS AND SOCIAL POLICY 185 (1977).

12 Feld, *In re Gault Revisited*, *supra* note 10, at 401, Table 2 and, accompanying text.

13 *See, e.g.*, D. ROTHMAN, *supra* note 2; E. RYERSON, *supra* note 2; Feld, *supra* note 2. *See also*, L. EMPEY, JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS (1979); J. INVERARITY, P. LAUDERDALE & B. FELD, LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW 173 (1983); A. PLATT, THE CHILDSAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977); S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE 1825-1920 (1977); J. SUTTON, STUBBORN CHILDREN: CONTROLLING DELIQUENCY IN THE UNITED STATES, 1640-1981 (1988); Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile*

Changes in the structure and functions of families and a newer cultural conception of childhood accompanied economic modernization.[14] Rapid industrialization, immigration, and urbanization fostered the Progressive movement, many of whose programs shared a unifying child-centered theme.[15]

The Progressives introduced a variety of criminal justice reforms at the turn of the century—probation, parole, indeterminate sentences, and the juvenile court—all of which emphasized open-ended, informal, and highly flexible policies to rehabilitate the deviant.[16] Discretionary decision-making pervaded Progressive criminal

Waiver Statutes, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987)[hereinafter *Principle of Offense*]; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

14 Economic modernization and industrialization are examined in: S. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914 (1957); R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); G. KOLKO, THE TRIUMPH OF CONSERVATIVISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916 (1963); D. NOBLE, AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM (1977); J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918 (1968); R. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

Changes in family structure and function are analyzed in: C. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 178-209 (1980); J. DEMOS & S. BOOCOCK, TURNING POINTS: HISTORICAL AND SOCIOLOGICAL ESSAYS ON THE FAMILY (1978); J. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT (1977); C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 6-10 (1977); S. ROTHMAN, WOMAN'S PROPER PLACE: A HISTORY OF CHANGING IDEALS AND PRACTICES, 1870 TO THE PRESENT (1978); E. SHORTER, THE MAKING OF THE MODERN FAMILY (1975). Demographic changes in the numbers and spacing of children and a shift of economic functions from the family to other work environments altered the roles of women and children. Especially within the upper and middle classes, a more modern conception of childhood emerged in which children were perceived as corruptible innocents whose upbringing required greater physical, social, and moral structure than had previously been regarded as prerequisite to adulthood. The family, particularly women, assumed a greater role in supervising a child's moral and social development. The modernization of the family and the changing conception of childhood are analyzed in: P. ARIES, CENTURIES OF CHILDHOOD (1962); J. GILLIS, YOUTH AND HISTORY: TRADITION AND CHANGE IN EUROPEAN AGE RELATIONS 1770-PRESENT (1974); J. HAWES AND N. HINER, AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK (1985); D. HUNT, PARENTS AND CHILDREN IN HISTORY: THE PSYCHOLOGY OF FAMILY LIFE IN EARLY MODERN FRANCE (1970); B. WISHY, THE CHILD AND THE REPUBLIC (1968); DeMause, *The Evolution of Childhood*, in THE HISTORY OF CHILDHOOD 4 (L. DeMause ed. 1974).

15 The changing cultural conception of childhood informed the Progressives' policies embodied in juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws. *See, e.g.*, L. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957 (1961); L. EMPEY, JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS (1979); J. KETT, *supra* note 14; S. TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA (1982); W. TRATTNER, CRUSADE FOR THE CHILDREN: HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM (1970); R. WIEBE, *supra* note 14.

16 D. ROTHMAN, *supra* note 2, at 206-7; Allen, *Legal Values and the Rehabilitative Ideal*, in THE BORDERLAND OF CRIMINAL JUSTICE 25-27 (1964); Rothman, *The State as Parent: Social*

justice reforms, because diagnosing the causes of and prescribing the cures for delinquency required an individualized approach which precluded uniform treatment or standardized criteria.[17]

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. The Progressives envisioned juvenile court professionals using indeterminate procedures to achieve benevolent goals and social uplift by substituting a scientific and preventative approach for the traditional punitive purposes of the criminal law.[18] Under the guise of *parens patriae*, an emphasis on treatment, supervision, and control, rather than punishment, the state could intervene affirmatively in the lives of more young offenders.[19] Thus, the juvenile court's status jurisdiction encompassed behaviors that previously might have been ignored.[20]

In separating children from adult offenders, the juvenile court also rejected the jurisprudence and procedures of criminal prosecutions. Progressive reformers modified courtroom procedures to eliminate any implication of a criminal proceeding and sometimes

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Policy in the Progressive Era, in DOING GOOD: THE LIMITS OF BENEVOLENCE 67 (D. Rothman ed. 1978).

17 The Progressives' reformulation of criminal justice strategies reflected basic changes in the ideological assumptions about the sources of crime and deviance. Positivism—the effort to identify the antecedent variables that cause crime and deviance—challenged the classic formulations of crime as the product of free will choices. D. MATZA, DELINQUENCY AND DRIFT 5 (1964); D. ROTHMAN, *supra* note 2, at 50-51; Allen, *Legal Values*, *supra* note 16, at 28.

The new criminology, as distinguished from the old "free will," regarded deviance as determined and sought to identify the causes of crime and delinquency. Attributing criminal behavior to external 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. The conjunction of positivistic criminology, analogies to the medical profession in the treatment of criminals, and the growth of new social science professionals gave rise to the "Rehabilitative Ideal." F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 11-15 (1981)[hereinafter DECLINE OF THE REHABILITATIVE IDEAL]; Allen, *supra* note 16, at 25-27 (1964); Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 150-51 (1978).

18 A. PLATT, *supra* note 13, at 67-74; E. RYERSON, *supra* note 2, at 36-37; Fox, *supra* note 13, at 1207-30; Mack, *supra* note 13, at 106-07.

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

20 Youthful activities such as smoking, sexuality, truancy, immorality, stubbornness, vagrancy, or living a wayward, idle, and dissolute life authorized pre-delinquent intervention to enforce the dependent conditions of youth and supervise their moral upbringing. *See, e.g.*, A. PLATT, THE CHILDSAVERS, *supra* note 13, at 135; Schlossman & Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 70, 81 (1978).

conducted proceedings in a physically separate court building.[21] To avoid stigmatizing a youth, hearings were confidential, access to court records limited, a euphemistic vocabulary was introduced, and courts found children to be delinquent rather than guilty of committing a crime. 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, juries and lawyers were excluded almost universally and with them rules of evidence and formal procedures.[22]

From its inception, juvenile court judges were actively hostile to the presence of lawyers in delinquency proceedings:

> Although judges could not banish a lawyer from the courtroom altogether, they did not consider his presence either appropriate or necessary. Minnesota juvenile court judge Grier Orr boasted that in his courtroom "the lawyers do not do very much . . . and I do not believe I can recall any instance where the same attorney came back a second time; he found that it was useless for him to appear . . . for an attorney has not very much standing when it comes to the disposition of children in the juvenile court."[23]

Juvenile court judges regarded lawyers as both irrelevant and an impediment to their "childsaving" mission. At the time of the Supreme Court's decision in *Gault*, juvenile court judges still routinely discouraged the retention or appointment of counsel.[24]

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21 D. ROTHMAN, *supra* note 2, at 218; E. RYERSON, *supra* note 2, at 48-50; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 92 (1967)[hereinafter TASK FORCE REPORT].

22 D. ROTHMAN, *supra* note 2, at 216.

23 *Id.*

24 *See, e.g.*, Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966), in which the authors report that:

> [i]n the court itself, the parent's inquiry as to whether a lawyer is needed is often answered with the statement "that is a decision you must make for yourself," coupled with a reminder that if an attorney is to be retained the proceedings will have to be continued to another date (with the resulting inconvenience). Moreover, parents who are told by the judge that he is willing to proceed immediately and will make every effort himself to ensure that the rights of the child are protected may well fear that to bring in an attorney would be an implicit insult to the judge, an especially unattractive prospect when the judge has such wide discretion in making decisions.

Id. at 796-97. *See also* Ferster, Courtless, and Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 379 (1971) (examples of incomplete and prejudicial notice of right to counsel); Handler, *Juvenile Court and The Adversary System*, 1965 WIS. L. REV. 7, 32 n.86 (quoting CALIFORNIA GOVERNOR'S SPECIAL STUDY COMM'N ON JUVENILE JUSTICE REPORT, pt. II, at 13 (1960)) ("Many judges discourage the presence of counsel in their courts in an effort to reduce the time devoted to the juvenile court assignment. . . . Some courts believe that attorneys have no place in the juvenile court and use coercive means to discourage their presence."); Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491, 511-12 (1969) (colloquies between judges and juveniles that purported to advise the

The Progressives expected expert judges, assisted by social services personnel, to investigate the child's background, identify the sources of the misconduct, and develop a treatment plan to meet the child's needs. Juvenile court personnel enjoyed enormous discretion to make dispositions in the "best interests of the child." Principles of psychology and social work, rather than formal rules, guided decision makers. They collected as much information as possible about the child—his or her life history, character, social environment, and individual circumstances—on the assumption that a scientific analysis of those facts would reveal the proper diagnosis and prescribe the cure. The specific offense that a child committed was accorded minor significance in the overall inquiry, because it indicated little about a child's "real" needs. At hearings and dispositions, the court considered first and foremost the child's character and lifestyle. Dispositions were indeterminate, nonproportional, and continued for the duration of minority.

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

The Supreme Court's *Gault* decision, which mandated procedural safeguards in the adjudication of delinquency, focused judicial attention initially on the determination of legal guilt or innocence. Following its "constitutional domestication," no longer was "saving" an offender's "soul" at issue, but rather proof of his commission of a criminal offense as a prelude to sentencing or, in the euphemisms of juvenile justice, disposition. In so doing, *Gault* fundamentally altered the operation of the juvenile court.

In *Gault*, the Court reviewed the history of the juvenile court and the traditional rationales for denying procedural safeguards to juveniles: that the proceedings were not adversarial; that delinquency proceedings were civil, not criminal; and that when the state acted as *parens patriae*, a child was entitled not to liberty, but to custody.[25] In rejecting these assertions, the Court observed that "unbridled discretion, however benevolently motivated, is frequently a

youths of their right to counsel but that were delivered in a manner designed to discourage the assertion of that right); Rubin, *Juvenile Court's Search for Identity and Responsibility*, 23 CRIME & DELINQ. 1, 5 (1977) (juvenile courts still actively discourage youths from exercising their right to counsel through a variety of approaches and with a variety of motivations).

[25] *In re* Gault, 387 U.S. 1, 14-17. The Court recently revived the idea that juveniles are entitled "not to liberty but to custody." Schall v. Martin, 467 U.S. 253, 265 (1984) (preventive detention of juveniles is constitutional in part because of their lesser liberty interests). *See* Feld, *supra* note 2, at 191-209.

poor substitute for principle and procedure" and concluded that the denial of procedures frequently resulted in arbitrariness rather than "careful, compassionate, individualized treatment."[26] Although the Court hoped to retain the potential benefits of the juvenile process, it insisted that the claims of "the juvenile [court] process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes" to the realities of recidivism, the failures of rehabilitation, the stigma of a "delinquency" label, the breaches of confidentiality, the conditions of institutional confinement, and the arbitrariness of the process.[27]

Several features of the juvenile justice process were critical to the imposition of procedural safeguards and the right to counsel in *Gault*: the fact that juveniles were being adjudicated delinquent for behavior that would be criminal if committed by adults; the attendant stigma of delinquency/criminal convictions; and the realities of juvenile institutional confinement.[28] These realities motivated the Court in *Gault* to mandate elementary procedural safeguards: the right to advance notice of charges; a fair and impartial hearing; the right to the assistance of counsel, including opportunities to confront and cross-examine witnesses; and the protections of the privilege against self-incrimination.[29]

Despite its critical dicta, the Supreme Court did not consider the entire juvenile justice process, its jurisdictional reach, or its dispositional practices, but confined its decision narrowly to the adjudicatory hearing at which a child is determined to be a delinquent.[30] It noted that the unique procedures for processing and treating juveniles separately from adults would not be impaired by its procedural decisions.[31] 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.[32]

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26 *Gault*, 387 U.S. at 18.

27 *Id.* at 21.

28 *Id.* at 27-28. *See infra* notes 32-33 and accompanying text.

29 *See id.* at 31-57.

30 *Id.* at 13. *See* McCarthy, *Pre-Adjudicatory Rights in Juvenile Courts: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459-60 (1981); Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 662-63 (1980).

31 *Gault*, 387 U.S. at 21.

32 *Id.* at 49-50. The dual functions of procedural safeguards—factual accuracy and preventing governmental oppression—are most clearly exemplified by the Court's holding that the privilege against self-incrimination applies to delinquency adjudications. *Id.* *See* Feld, *supra* note 2, at 154-56 nn.46-47 (While the "voluntariness" test assures the factual reliability of confessions, the fifth amendment preserves the balance between the

The *Gault* Court based its decision to grant juveniles the right

individual and the state.); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-67 (1967) (procedural due process ensures the reliability of the guilt-determining process and ensures respect for the dignity of the individual). By recognizing the applicability of the privilege against self-incrimination, juvenile adjudications could no longer be characterized as either "non-criminal" or as "non-adversarial," because the fifth amendment privilege is both the guarantor of an adversarial process and the primary mechanism for maintaining a balance between the state and the individual. *Compare Gault*, 387 U.S. at 50 (1967) (policies of fifth amendment entail more than reliability of confessions and focus on equality between the individual and the state) *with* Allen v. Illinois, 478 U.S. 364, 373 (1986) ("The Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile offenders . . . .") (emphasis in original).

In subsequent juvenile court decisions, the Supreme Court elaborated upon the procedural and functional equivalence between criminal and delinquency proceedings. In *In re* Winship, 397 U.S. 358 (1970), the Court decided that proof of delinquency must be established "beyond a reasonable doubt" rather than by the lower civil standards of proof. *Id.* at 368. 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 also an important constraint on governmental overreaching. *Id.* at 363-64. The seriousness of the consequences in both the adult and juvenile contexts required the highest standard of proof. *Id.* at 363-67.

Similarly, in Breed v. Jones, 421 U.S. 519 (1975), the Court held that the protections of the double jeopardy clause of the fifth amendment prohibited adult criminal reprosecution of a youth after a prior conviction in juvenile court. *Id.* at 541. The Court posited a functional equivalence between an adult criminal trial and a delinquency proceeding, describing the virtually identical interests implicated in both—"anxiety and insecurity," a "heavy personal strain" and the increased burdens as the juvenile system became more procedurally formalized. *Id.* at 528-29. 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. *Id.* at 530.

In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court halted the extension of full procedural parity with adult criminal prosecutions by denying a constitutional right to jury trials in state delinquency proceedings. It held that the only requirement for "fundamental fairness" in juvenile proceedings is "accurate fact-finding" and asserted that this could be performed as well by a judge as by a jury. *Id.* at 543. In suggesting that due process in the juvenile context required nothing more than accurate fact-finding, however, the Court departed significantly from its own prior analyses of the *dual* functions of juvenile court procedures, because those earlier decisions were premised on two rationales—accurate fact-finding *and* protection against governmental oppression. *See, e.g., Winship*, 397 U.S. at 363-64; *Gault*, 387 U.S. at 47; Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 601-07 (1978)[hereinafter *Reference of Juvenile Offenders*].

Justice Brennan's separate opinion in *McKeiver* notes that protection from governmental oppression is a fundamental element of procedural justice, but one which might be afforded by an alternative method, such as a public trial that would render the adjudicative process visible and accountable to the community. *See McKeiver*, 403 U.S. at 553-55 (Brennan, J., concurring in part and dissenting in part). *See, e.g.*, Feld, *supra* note 2, at 158-60, 262-66. Its insistence that accurate fact-finding was the only concern of fundamental fairness required the *McKeiver* Court to ignore its own analysis in *Gault* which held that the fifth amendment's privilege against self-incrimination was necessary in order to protect against governmental oppression even though accurate fact-finding might be impeded. *See*, Feld, *supra* note 2, at 154-57 nn.46-47.

The *McKeiver* Court, however, denied that protection against government oppres-

to counsel on the fourteenth amendment due process clause, rather than the sixth amendment, asserting that as a matter of due process "the assistance of counsel is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution . . . ."[33] The *Gault* Court's holding was strongly influenced by the recommendations of the President's Commission on Law Enforcement and the Administration of Justice[34] that in order to assure procedural justice, the appointment of counsel is necessary "wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[35] While *Gault* recognized that the presence of lawyers would make juvenile court proceedings more formal and adversarial, it asserted that their presence would impart "a healthy atmosphere of accountability."[36] Although the President's Crime Commission recommended the automatic appointment of counsel whenever coercive action by the juvenile court was possible, *Gault*'s actual holding was narrower, requiring only that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."[37]

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sion was required at all. *Id.* at 547-48. Invoking the mythology of the sympathetic, paternalistic juvenile court judge, the Court rejected the argument that the inbred, closed nature of the juvenile court could prejudice the accuracy of fact-finding. According to the Court, concern about procedural safeguards, such as jury trials, to assure accurate fact-finding and protection against governmental oppression, ignores the benevolence and compassion which is the premise of the juvenile court. *Id.* at 550-51.

33 *Gault*, 387 U.S. at 36-37.

34 *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); TASK FORCE REPORT, *supra* note 21.

35 *Gault*, 387 U.S. at 38. The Court quoted extensively from the Commission's Report, stating:

> no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively.

Id. at 38 n.65.

36 *Id.* While conceding that lawyers would make juvenile court proceedings more formal and adversarial, the Court asserted that this was desirable, because "[i]nformality is often abused." *Id.*

37 *Id.* at 41. The *Gault* opinion is unclear regarding whether the various rights afforded juveniles attach because of the possibility of institutional commitment, *see id.* at 13, or if they attach only when the youth is actually committed to a state correctional facility. *See id.* at 36-37, 41, 44, 49, 56, 57. In its holding regarding the right to counsel,

In granting the right to counsel, *Gault* manifested the Warren Court's belief that the adversary process could protect constitutional rights and limit the coercive powers of the state, which, in turn, would assure the regularity of law enforcement and reduce the need for continual judicial scrutiny.[38] Thus, *Gault* was a specific instance of the Warren Court's general broadening of the right to counsel to preserve individual liberty and autonomy.[39]

The *Gault* Court quoted favorably from its 1932 decision in *Powell v. Alabama*,[40] the first decision to hold that the fourteenth amendment due process clause required the appointment of counsel in some state criminal proceedings.[41] In a number of subsequent decisions, the Court elaborated on the "special circumstances" of a particular case that required the appointment of counsel.[42] In *Gideon v. Wainwright*,[43] the Warren Court finally held that the sixth amendment's guarantee of counsel applied to state felony criminal proceedings as well as to prosecutions in federal courts.[44] "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[45]

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for example, the Court stated that the notification was required in "proceedings to determine delinquency which *may* result in commitment to an institution in which the juvenile's freedom is curtailed." *Id.* at 41 (emphasis added). Every delinquency proceeding carries with it the formal possibility of institutional confinement, because there are no explicit limitations on the dispositional authority of a juvenile court judge. *See, e.g.*, MINN. STAT. ANN. § 260.185 (West 1986). Many commentators adopt the broader construction that it is the possibility, not the actuality, of incarceration that triggers the right. *See, e.g.*, Rosenberg, *supra* note 30, at 662-63 (1980) (constitutional protections should attach in proceedings that may result in incarceration of a child).

38 *See* Allen, *The Judicial Quest for Penal Justice: The Warren Court and The Criminal Cases*, 1975 U. ILL. L. FORUM 518, 530-31; Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 125 (1987); Handler, *supra* note 24, at 7.

39 *See, e.g.*, Gideon v. Wainright, 372 U.S. 335 (1963). *See also*, Guggenheim, *supra* note 7, at 89 ("These [due process] rights are ultimately bottomed on the constitutional interest in personal autonomy.").

40 287 U.S. 45 (1932).

41 *Id.* at 71.

42 *Compare* Betts v. Brady, 316 U.S. 455 (1942) (fundamental fairness may require appointment of counsel under "special circumstances") *with* Chewning v. Cunningham, 368 U.S. 443 (1962) ("potential prejudice" of a complex statute is a "special circumstance" requiring appointment of counsel). *See generally*, Israel, *Gideon v. Wainwright: The "Art" Of Overruling*, 1963 SUP. CT. REV. 211; Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962).

43 372 U.S. 335 (1963).

44 *Gideon*, 372 U.S. at 344. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Court had earlier held that the sixth amendment required the appointment of counsel in all federal cases in which a defendant was unable to afford counsel and the right to counsel had not been intentionally and competently waived. *Id.* at 468.

45 *Gideon*, 372 U.S. at 344.

In *Argersinger v. Hamlin*,[46] the Court considered whether an indigent defendant who was charged with and imprisoned for a minor offense was entitled to the appointment of counsel. In *Argersinger*, the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony unless he was represented by counsel."[47] Because Argersinger was actually imprisoned, it was unclear whether the line the Court drew for the right to appointed counsel was based on the type of charge—felony or misdemeanor—and the penalty authorized, or on the actual sentence imposed. In *Scott v. Illinois*,[48] the Court clarified any ambiguity when it held that in misdemeanor proceedings, the sentence the trial judge actually imposed, i.e., whether incarceration was ordered, rather than the one authorized by the statute, determined whether counsel must be appointed for the indigent.[49] Basing the initial decision to appoint counsel on the eventual sentence, however, poses severe administrative problems. How could a judge decide what the eventual sentence likely would be without prejudging the defendant or prejudicing his right to a fair and impartial trial?

In *State v. Borst*,[50] the Minnesota Supreme Court, using its inherent supervisory powers, anticipated the United States Supreme Court's *Argersinger* and *Scott* decisions, and shortly after *Gideon* required the appointment of counsel even in misdemeanor cases "which *may* lead to incarceration in a penal institution."[51] The *Borst* Court relied, in part, upon *Gault*'s ruling on the need for counsel in delinquency cases to expand the scope of the right to counsel for adult defendants in any misdemeanor or ordinance prosecutions that could result in confinement.[52] Like the Court in *Gault*, *Borst* recognized the adversarial reality of even "minor" prosecutions.

> [T]he possible loss of liberty by an innocent person charged with a misdemeanor, who does not know how to defend himself, is too sacred a right to be sacrificed on the altar of expedience. Any society that can afford a professional prosecutor to prosecute this type of crime must assume the burden of providing adequate defense, to the end that innocent people will not be convicted without having facilities available

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46 407 U.S. 25 (1972).

47 *Id.* at 37.

48 440 U.S. 367 (1979).

49 *Id.* at 369.

50 278 Minn. 388, 154 N.W.2d 888 (1967).

51 *Id.* at 397, 154 N.W.2d at 894 (emphasis added). *Accord* City of St. Paul v. Whidby, 295 Minn. 129, 203 N.W.2d 823 (1972) (municipal ordinance); State v. Collins, 278 Minn. 437, 154 N.W.2d 688 (1967) (ordinance violation); State v. Illingworth, 278 Minn. 434, 154 N.W.2d 687 (1967) (ordinance violation).

52 *Borst*, 278 Minn. at 392-93, 154 N.W.2d at 891.

to properly present a defense.[53]

Scott addressed the scope of the sixth amendment's right to counsel in minor cases in state criminal proceedings. Because *Gault* decided the question of a juvenile's right to counsel under the fourteenth amendment due process clause rather than the sixth amendment, the constitutional argument remains that "special circumstances" require the appointment of counsel even in minor non-incarceration cases in which a juvenile may be unable to prepare an adequate defense because of the inherent disabilities of youth, substandard intelligence, or the complexities of the particular case.

C. IMPLEMENTATION OF THE *GAULT* RIGHT TO COUNSEL IN STATE DELINQUENCY PROCEEDINGS

When *Gault* was decided, the presence of an attorney in delinquency proceedings was a rare event.[54] In the immediate aftermath of *Gault*, states that had not previously provided for counsel in juvenile court amended their statutes to do so.[55] Despite the formal legal changes, however, the actual delivery of legal services to juveniles lagged behind. Professors Lefstein, Stapleton, and Teitelbaum examined institutional compliance with the *Gault* decision and found that many juveniles were neither adequately advised of their right to counsel nor had counsel appointed for them.[56] In a more recent evaluation of legal representation in North Carolina, Professors Clarke and Koch found that the Juvenile Defender Project represented only 22.3% of juveniles in Winston-Salem, North Carolina, and only 45.8% in Charlotte, North Carolina.[57] Aday found rates of representation of 26.2% and 38.7% in the two counties of the jurisdiction he studied.[58] Professor Bortner's evaluation of a large, midwestern county's juvenile court showed that "[o]ver half (58.2 percent) [the juveniles] were not represented by an attorney."[59]

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53 *Id.* at 397, 154 N.W.2d at 894-95.

54 *See* Note, *supra* note 24, 796-99 (attorneys appear for the juveniles in no more than five percent of the cases).

55 *See, e.g.*, CAL. WELF. & INST. CODE § 317 (West 1984); COL. REV. STAT. § 19.1.106(1) (1986); CONN. GEN. STAT. § 46B.135(a) (1986); IND. CODE ANN. § 31.6.7.2 (West 1979); MISS. CODE ANN. § 43.21.201 (1972); OHIO REV. CODE ANN. § 2151.35.2 (Baldwin 1987); WASH. REV. CODE ANN. § 13.40.140(2) (1988).

56 Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 517-24, 530-37.

57 Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 297 (1980).

58 Aday, *Court Structure, Defense Attorney Use, and Juvenile Court Decisions* 27 SOC. Q. 107, 112, 114 (1986).

59 M. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 139 (1982).

Evaluations of rates of representation in Minnesota also indicate that a majority of youths are unrepresented.[60] Professor Feld reported enormous county-by-county variations within Minnesota in rates of representation, ranging from a high of over 90% to a low of less than 10%.[61] A substantial minority of youths removed from their homes or confined in state juvenile correctional institutions lacked representation at the time of their adjudication and disposition.[62] Significant numbers of unrepresented juveniles continue to be incarcerated in other jurisdictions as well.[63]

There are a variety of possible explanations for why so many youths are still unrepresented: parental reluctance to retain an attorney;[64] inadequate or non-existent public-defender legal services in nonurban areas; a judicial encouragement of and readiness to find a waiver of the right to counsel in order to ease administrative burdens on the courts;[65] cursory and misleading judicial advisories of rights that inadequately convey the importance of the right to counsel and suggest that the waiver litany is simply a meaningless technicality; a continuing judicial hostility to an advocacy role in traditional treatment-oriented courts;[66] or a judicial predetermina-

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60 K. FINE, OUT OF HOME PLACEMENT OF CHILDREN IN MINNESOTA: A RESEARCH REPORT 48 (1983); Feld, *supra* note 2, at 189; Feld, *In re Gault Revisited*, *supra* note 10, at 400.

61 Feld, *supra* note 2, at 190 n.162.

62 *Id.* at 189.

63 *See* Feld, *In re Gault Revisited*, *supra* note 10, at 403-05.

64 When parents can afford to retain counsel but do not do so and counsel is appointed for the child at public expense, the county may seek reimbursement for the expenses and attorney's fees expended on behalf of the child. MINN. STAT. ANN. § 260.251(4) (West 1984) ("[T]he court may inquire into the ability of the parents to pay for such counsel's services and, after giving the parents a reasonable opportunity to be heard, may order the parents to pay attorney's fees."). In some cases, reimbursement may be considerable. *See, e.g.*, *In re Welfare of M.S.M.*, 387 N.W.2d 194, 200 (Minn. Ct. App. 1986) (reimbursement was $3,191).

65 *See infra* notes 68-84 and accompanying text. *See generally* Feld, *supra* note 2, at 169-190.

66 For example, in *In re* Welfare of M.R.S., 400 N.W.2d 147 (Minn. Ct. App. 1987), the trial court summarily dismissed a juvenile's court appointed attorney for appealing its decision. The court of appeals reversed the dismissal noting that "[t]his kind of arbitrary action can have no other but a chilling effect on conscientious advocacy. To discharge an attorney without just cause simply because he or she challenges the court by seeking a writ of prohibition or appeal is manifestly improper." *Id.* at 152. L. STAPLETON AND V. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972), described the problem of integrating counsel into traditional juvenile court settings:

> [e]mpirical studies show what is to be expected—traditional courts and personnel are reluctant to adapt themselves to the new procedures now required by the due process clause, particularly as they imply injection of elements of an adversary system into juvenile court proceedings. This, taken with the increasing appearance of counsel in juvenile court proceedings, undoubtedly will have consequences for the manner of legal representation. An attorney in traditional courts will find himself

tion of dispositions with nonappointment of counsel where probation or nonincarceration is the anticipated outcome.[67] Whatever the reasons and despite *Gault*'s promise of counsel, many juveniles facing potentially coercive state action never see a lawyer, waive their right to counsel without consulting with an attorney or appreciating the legal consequences of relinquishing counsel, and face the prosecutorial power of the state alone and unaided.

The most common explanation for nonrepresentation is waiver of counsel. In most jurisdictions, including Minnesota, the validity of relinquishing a constitutional right is determined by assessing whether there was a "knowing, intelligent, and voluntary waiver" under the "totality of the circumstances."[68] The judicial position that a young minor can "knowingly and intelligently" waive constitutional rights is consistent with the Minnesota legislature's judgment that a youth can make an informed waiver decision without parental concurrence or consultation with an attorney.[69]

The right to waive counsel and appear as a *pro se* defendant follows from the United States Supreme Court's decisions in *Johnson v. Zerbst*[70] and *Faretta v. California*.[71] In *Faretta*, the Court held that an adult defendant in a state criminal trial had a constitutional right to proceed without counsel when he or she voluntarily and intelligently elects to do so.[72] The Supreme Court has never ruled on the

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within a legal system that still considers itself non-adversary and seeks to serve goals not usually associated with other branches of law. It is only reasonable to anticipate that he will face formal and informal pressures to conform his manner of participation in delinquency hearings to the values of these courts—for example, to be less of an advocate for the child's best interests.

Id. at 38.

67 M. BORTNER, *supra* note 59, at 136-147; V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 63-69; Feld, *supra* note 2 at 190; Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 530.

68 *See, e.g.*, Fare v. Michael C., 442 U.S. 707 (1979) (juvenile's waiver of *Miranda* right to counsel); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of counsel); *In re* M.D.S., 345 N.W.2d 723 (Minn. 1984); State v. Nunn, 297 N.W.2d 752 (Minn. 1980) (juvenile's waiver of *Miranda* rights); *In re* L.R.B., 373 N.W.2d 334 (Minn. Ct. App. 1985); MINN. R. P. JUV. CT. 6.01, 15.02(1), 15.03. *See generally*, Feld, *supra* note 2, at 169-90.

69 *See* MINN. STAT. ANN. § 260.155(8) (West 1982) ("Waiver of any right . . . must be an express waiver intelligently made by the child after the child has been fully and effectively informed of the right being waived.").

70 304 U.S. 458 (1938).

71 422 U.S. 806 (1975).

72 *Id.* at 820. The *Faretta* Court emphasized that the sixth amendment guarantees defendants the "assistance of counsel." It stated that:

> [i]t speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. The *Faretta* Court noted, however, that in order to represent himself, the waiver of

validity of a minor's waiver of the right to counsel in delinquency proceedings as such, although it upheld a minor's waiver of the *Miranda* right to counsel at the pretrial investigative stage under the "totality of the circumstances."[73]

While recognizing an adult defendant's *Faretta* right to waive counsel and proceed *pro se*, the Minnesota Supreme Court has strongly encouraged trial courts to appoint stand-by counsel to assist a defendant at trial and temporary counsel to consult with a defendant prior to the entry of a guilty plea.[74] In *State v. Rubin*,[75] the court described the type of "penetrating and comprehensive examination" that must precede a "knowing and intelligent" waiver and strongly recommended the appointment of counsel "to advise and consult with the defendant as to the waiver."[76] In several earlier adult cases, the Minnesota Supreme Court reversed defendants' convictions where their mental competency or youthfulness and below average intelligence raised an issue about their capacity to knowingly and intelligently waive the assistance of counsel.[77]

The crucial issue for juveniles, as for adults, is whether such a waiver can occur "voluntarily and intelligently," particularly without prior consultation with counsel. The problem is particularly acute when the judges giving the judicial advisories seek a predetermined result—the waiver of counsel—which influences both the information they convey and their interpretation of the juvenile's response.[78] The "totality" approach to waiver of rights by juveniles

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counsel must be "knowing and intelligent." *Id.* at 835. *Accord Johnson*, 304 U.S. at 464-65. *Cf.* Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (plurality opinion) (judge must provide defendant with extensive information to assure that waiver is informed).

73 *See* Fare v. Michael C., 442 U.S. 707, 726 (1979). *See generally*, Feld, *supra* note 2, at 171.

74 *See* State v. Rubin, 409 N.W.2d 504, 506 (Minn. 1987) ("[A] trial court may not accept a guilty plea to a felony or gross misdemeanor charge made by an unrepresented defendant if the defendant has not consulted with counsel about waiving counsel and pleading guilty."); Burt v. State, 256 N.W.2d 633, 635 (Minn. 1977) ("One way for a trial court to help ensure that a defendant's waiver of counsel is knowing and intelligent would be to provide a lawyer to consult with the defendant concerning his proposed waiver . . . ."). *See also* State v. Jones, 266 N.W.2d 706 (Minn. 1978) (standby counsel available to and did consult with defendant throughout proceedings and participated occasionally on defendant's behalf).

75 409 N.W.2d 504 (Minn. 1987).

76 *Id.* at 506. *See also* ABA STANDARDS OF CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, § 5-7.3 (1980); MINN. R. CRIM. P. § 5.02(1).

77 *See Burt*, 256 N.W.2d at 636 (petitioner was "18 years old, had only a tenth grade education and [low scores on I.Q. tests,] suggesting strongly that petitioner was of considerably lower than average intelligence."); State v. Bauer, 310 Minn. 103, 125-26, 245 N.W.2d 848, 860 (1976) (defendant's mental condition impaired competence to waive counsel).

78 *See In re* John D., 479 A.2d 1173, 1178 (R.I. 1984) ("[E]xceptional efforts must be

has been criticized extensively.[79] Empirical research suggests that juveniles simply are not as competent as adults to waive their rights in a "knowing and intelligent" manner.[80] Professor Grisso reports that the problems of understanding and waiving rights were particularly acute for younger juveniles:

> As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension . . . . The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.[81]

Grisso also reported that although "juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence," the level of comprehension exhibited by youths sixteen and older, although comparable to that of adults, was inadequate.[82] While several jurisdictions recognize this "developmental fact" and prohibit uncounselled waivers of the right to counsel or incarceration of unrepresented delinquents,[83] the majority of states, including Minnesota, allow juveniles to waive their *Miranda* rights as well as their right to counsel in delinquency proceedings without an attorney's assistance.[84]

The questionable validity of many juveniles' waivers of the right to counsel raises collateral legal issues as well. In light of *Scott*, *Borst*, *Burt*, and *Rubin*, the initial confinement of an unrepresented juvenile

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made in order to be certain that an uncounselled juvenile fully understands the nature and consequences of his admission of delinquency.").

79 *See* Feld, *supra* note 2, at 170-185; Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1140 (1980); Comment, *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & CRIMINOLOGY 195, 201 (1976). *See generally*, Y. KAMISAR, *A Dissent from the Miranda Dissents*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 41-76 (1980).

80 *See* T. GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 170-82 (1981)[hereinafter JUVENILES' WAIVER OF RIGHTS]; Ferguson & Douglas, *A Study of Juvenile Waiver* 7 SAN DIEGO L. REV. 39, 54 (1970); Grisso, *Juveniles' Capacities to Waive Miranda Rights*, *supra* note 79, 1152; Lawrence, *The Role of Legal Counsel in Juveniles' Understanding of their Rights*, 34 JUV. & FAM. CT. J. 49, 50, 52-53 (Winter 1983).

81 Grisso, *supra* note 79, at 1160.

82 *Id.* at 1157.

83 *See* IOWA CODE ANN. § 232.11 (West Supp. 1985); WIS. STAT. ANN. § 48.23 (West 1987). *See also*, A.B.A.-I.J.A., JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Std. 5.1, at 81 (1980) (the juvenile should have the right to effective assistance of counsel at all stages of the proceedings, a right which is mandatory and nonwaivable)[hereinafter PRETRIAL COURT PROCEEDINGS].

84 *Compare In re* Welfare of L.R.B., 373 N.W.2d 334, 338 (Minn. Ct. App. 1985) (valid *Miranda* waiver by 14 year old with low normal I.Q., significantly below grade in school and difficulty understanding) *with* Burt v. State, 256 N.W.2d 633, 635 (Minn. 1977) (ineffective waiver by 18 year old with low I.Q. and only a tenth grade education).

may be improper.[85] Moreover, it may be improper to consider those prior uncounselled convictions for purposes of subsequent sentencing. In *Baldasar v. Illinois*,[86] the defendant's enhanced penalty was based upon a prior uncounselled misdemeanor conviction that had not resulted in incarceration.[87] When Baldasar was convicted a second time for a similar offense, under the enhanced penalty statute, the prior conviction was used to convert the second conviction into a felony for which the defendant was imprisoned.[88] In a *per curiam* opinion, the Supreme Court reversed Baldasar's felony conviction.[89] *Baldasar* is consistent with an earlier line of cases that held that an uncounselled felony conviction could not be used in a later trial to enhance punishments under recidivist statutes.[90] In *United States v. Tucker*,[91] the Supreme Court remanded for resentencing a defendant whose prior sentence was based upon uncounselled convictions. "The *Gideon* case established an unequivocal rule 'making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one.' "[92] *Tucker* followed *Burgett v. Texas*,[93] in which 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 right,

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85 *See* Scott v. Illinois, 440 U.S. 367, 374 (1979); State v. Rubin, 409 N.W.2d 504, 506 (Minn. 1987); Burt v. State, 256 N.W.2d 633, 635-36 (Minn. 1977); State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967); State v. Collins, 278 Minn. 437, 437, 154 N.W.2d 688, 689 (1967); State v. Illingworth, 278 Minn. 434, 435, 154 N.W.2d 687, 688 (1967). If the punishment is likely to be incarceration, then counsel must be provided for an indigent. In Minnesota, there are no limitations on the dispositional authority of juvenile court judges. Any adjudication of delinquency for any underlying offense—felony, misdemeanor, or ordinance—may lead to removal from the home or commitment to the State Department of Corrections. Moreover, delinquency dispositions may continue until the age of 19. MINN. STAT. ANN. § 260.181(4) (West Supp. 1982). Thus, every juvenile proceeding is of considerable consequence since it carries the potential for confinement.

86 446 U.S. 222 (1980).

87 *Id.* at 223. Because *Baldasar*'s initial misdemeanor conviction only resulted in a fine and probation, but not actual incarceration, the right to counsel, as announced in *Scott*, did not apply.

88 *Baldasar*, 446 U.S. at 223.

89 *Id.* at 224. 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 uncounselled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." *Id.* at 226 (Marshall, J., concurring).

90 *See* United States v. Tucker, 404 U.S. 443, 448 (1972); Burgett v. Texas, 389 U.S. 109, 114 (1967).

91 404 U.S. 443 (1972).

92 *Id.* at 449 (quoting Burgett v. Texas, 389 U.S. 109, 114 (1967)).

93 389 U.S. 109 (1967).

> [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.[94]

The principle of *Baldasar*, *Tucker*, and *Burgett*, that prior convictions obtained without representation by counsel or a valid waiver should not be used to enhance subsequent sentences, has been applied in several sentencing contexts involving uncounselled juvenile convictions. In *Stockwell v. State*,[95] the Wisconsin Supreme Court applied *Tucker* to *Gault* and held that juvenile adjudications in which the juvenile was denied the right to counsel could not be considered in subsequent sentencing proceedings.[96] Similarly, in *Majchszak v. Ralston*,[97] in which the defendant was denied parole release based on a salient factor score which included prior uncounselled delinquency adjudications, the court remanded for resentencing.[98] In *Commonwealth v. Bivens*,[99] the court reversed the defendant's sentence after the sentencing judge used juvenile convictions obtained without the assistance of counsel in computing his adult criminal history score.[100] And, in *Rizzo v. United States*,[101] the court remanded for resentencing an adult defendant whose sentence was based, at least in part, on prior uncounselled juvenile adjudications.[102]

Because Minnesota's Adult Sentencing Guidelines include prior juvenile felony convictions in the calculation of a defendant's current sentence,[103] whether those prior convictions were obtained

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94 *Id.* at 115. Unless there is a valid waiver of the right to counsel on the record when a guilty plea is entered, the conviction cannot be used to enhance the term of incarceration for a subsequent offense. *See* Reeves v. Mabry, 615 F.2d 489, 492 (8th Cir. 1980); United States *ex rel.* Lasky v. LaVallee, 472 F.2d 960, 963 (2d Cir. 1973); United States v. Lufman, 457 F.2d 165, 167 (7th Cir. 1972).

95 59 Wis. 2d 21, 207 N.W.2d 883 (1973).

96 *Stockwell*, 59 Wis. 2d at 31-33, 207 N.W.2d at 889.

97 454 F. Supp. 1137 (W.D. Wis. 1978).

98 *Id.* at 1144. *See also* Wren v. United States Board of Parole, 389 F. Supp. 938 (N.D. Ga. 1975) (uncounselled juvenile convictions); United States v. Lufman, 457 F.2d 165 (7th Cir. 1972) (uncounselled juvenile convictions).

99 337 Pa. Super. 216, 486 A.2d 984 (1985).

100 *Id.* at 221, 486 A.2d at 986.

101 821 F.2d 1271 (7th Cir. 1987).

102 *Id.* at 1274 ("[T]he judge may have impermissibly relied on the uncounselled [juvenile] adjudication in imposing sentence . . . .").

103 *See* MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 29 (1980). *See also* State v. Edmison, 379 N.W.2d 85, 87 (Minn. 1985) (to use prior conviction in criminal history, state must prove it was obtained without violating defendant's right to counsel); State v. Thomas, 374 N.W.2d 586, 588 (Minn. Ct. App. 1985) (juvenile's waiver of right to counsel); State v. Little, 423 N.W.2d 722 (Minn. Ct. App. 1988) (use of juvenile adjudications to enhance the sentence of an adult criminal defendant is

without the assistance of counsel or a valid waiver of counsel remains an issue at the later sentencing. In *State v. Nordstrom*,[104] the court held that a prior misdemeanor conviction based on an uncounselled guilty plea may not be used to convert a subsequent offense into a gross misdemeanor absent a valid waiver of counsel on the record at the prior proceeding.[105] Similarly, in *State v. Edmison*,[106] the Minnesota Supreme Court based its decision on *Baldasar* and *Tucker*, and held that a sentencing court may not use a defendant's prior misdemeanor convictions in determining the presumptive sentence under the Guidelines unless the state proves that the prior conviction was obtained with the assistance of counsel or a valid waiver of the right.[107]

While juvenile court judges in most states neither follow formal sentencing guidelines nor numerically weigh a youth's prior record, their use of prior uncounselled adjudications in sentencing juveniles upon a subsequent conviction implicates the same issues that *Baldasar* and *Edmison* condemned for adults. "It makes little difference whether an enhanced penalty provision mandates an increased term of imprisonment or whether a judge imposes it exercising his sentencing discretion. As long as the prior uncounselled conviction leads to the increased incarceration, the defendant is being deprived of his liberty because of that conviction."[108] Indeed, because of juvenile court judges' virtually unrestricted sentencing discretion, the *Baldasar* issues are especially acute when sentencing juveniles. If a juvenile who is convicted without counsel and placed on probation is subsequently adjudicated delinquent for a new offense and committed to an institution, is the latter sentence "enhanced" based on

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not contrary to Minnesota Juvenile Court Act and does not violate due process or equal protection).

104 331 N.W.2d 901 (Minn. 1983).

105 *Id.* at 904-05. *See also* State v. Motl, 337 N.W.2d 664, 666 (Minn. 1983) ("absolute bare minimum" examination of defendant by trial court necessary to establish valid waiver of counsel); State v. Hanson, 360 N.W.2d 460, 463 (Minn. Ct. App. 1985) (waiver of counsel); State v. Brown, 346 N.W.2d 187, 190 (Minn. Ct. App. 1984) (waiver of counsel).

106 379 N.W.2d 85 (Minn. 1985).

107 *Id.* at 87. *See also*, State v. Goff, 402 N.W.2d 625 (Minn. Ct. App. 1987) (uncounselled prior felonies may not be included in computation of criminal history or sentence), *rev'd*, 418 N.W.2d 169 (Minn. 1988) (presume, absent evidence to the contrary, that any prior conviction relied upon to enhance a defendant's sentence was not obtained in violation of the right to counsel, with defendant bearing the burden of production with respect to prior convictions obtained in violation of right to counsel); State v. Marquetti, 322 N.W.2d 316 (1982) (imposed upon the state the burden of proving a defendant's criminal history under the sentencing guidelines).

108 Rudstein, *The Collateral Use of Uncounselled Misdemeanor Convictions after Scott and Baldasar*, 34 U. FLA. L. REV. 517, 536 (1982).

the prior, uncounselled conviction, or does it simply reflect the judge's assessment of the juvenile's "treatment needs" including the subsequent delinquency?[109]

The Minnesota Supreme Court affords defendants a right to counsel even for minor offenses that may lead to incarceration.[110] Every delinquency proceeding in Minnesota carries with it the possibility of removal from the child's home or incarceration.[111] Moreover, the Minnesota Supreme Court has urged extreme caution in recognizing the validity of waivers of counsel by young, inexperienced, or impressionable defendants with obvious implications for the capacity of juveniles to waive their rights.[112] Finally, the court has held that prior uncounselled convictions may not be used to enhance subsequent sentences unless there was a valid waiver of counsel at the earlier proceeding.[113] By analyzing empirically the availability of counsel and sentencing practices in delinquency proceedings, this Article will explore the extent to which these well-established legal principles for adults are implemented in juvenile courts.

Even when juveniles are represented, attorneys may not be capable of or committed to representing their juvenile clients in an effective adversarial manner. Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles "beat a case," or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court.[114] Institutional pressures to maintain stable, cooperative

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109 Professor Martin Guggenheim succinctly noted the extraordinary complexity of applying *Baldasar* to the sentencing of juveniles. Letter from Martin Guggenheim to Barry C. Feld (July 25, 1988) (available from author). In emphasizing juvenile court judges' sentencing discretion, Professor Guggenheim observed that:

> judges rarely, if ever, enhance a sentence solely because of the number of prior adjudications. Indeed, in my experience the court freely refers to prior contacts without distinguishing between charges and adjudications . . . . A prior contact which resulted in dismissal—whether counselled or uncounselled—if counted by the sentencing judge, presents a due process problem that is beyond and unreachable by *Baldasar*. When adjudications, rather than mere contacts, do count, the judge almost always focuses on the juvenile's post-sentencing conduct as evidence of the need for more restrictive placement, not to demonstrate that a two-time loser deserves more punishment than a virgin. Unless a prophylactic rule, barring all consideration, direct and collateral, of the fact and effect of a prior, uncounselled case is created, the *Baldasar* rule has little application in the operation of juvenile justice.

Id.

110 *See supra* notes 50-53 and accompanying text.

111 *See* MINN. STAT. ANN. § 260.185(1) (c)-(d) (West 1982).

112 *See supra* notes 75-80 and *infra* notes 278-86 and accompanying text.

113 *See supra* notes 103-07 and accompanying text.

114 *See* M. BORTNER, *supra* note 59, 137-39; J. KNITZER & M. SOBIE, LAW GUARDIANS IN

working relations with other personnel in the system may be inconsistent with effective adversarial advocacy.[115]

Several studies have questioned whether lawyers can actually perform as advocates in a system rooted in *parens patriae* and benevolent rehabilitation.[116] Indeed, there are some indications that lawyers representing juveniles in more traditional "therapeutic" juvenile courts may actually disadvantage their clients in adjudications or dispositions.[117] Duffee and Siegel,[118] Clarke and Koch,[119] Stapleton and Teitelbaum,[120] Hayeslip,[121] and Bortner,[122] all re-

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NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 3 (1984); V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 37-39; Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 18-19 (1967); Clarke & Koch, *supra* note 57, at 297-300; Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 548 (1971); Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 378; 398-99 (1971); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1410 (1973); Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 561; McMillian & McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 ST. LOUIS U.L.J. 561, 572 (1970); Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1163 (1968); Platt, Schechter & Tiffany, *In Defense of Youth: A Case Study of the Public Defender in Juvenile Court*, 43 IND. L.J. 619, 621 (1968).

115 *See* M. BORTNER, *supra* note 59, at 136-39; V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 137-38; Blumberg, *supra* note 114, at 19-20; Lefstein, Stapleton & Teitelbaum, *supra* note 24, 550-51.

116 *See* V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 137-38; Fox, *supra* note 13, at 1404; Kay & Segal, *supra* note 114, at 1402-03. One student commentator observed and interviewed juvenile justice personnel in several jurisdictions and reported that:

> an overzealous defense attorney may produce an adverse reaction in the court. Even judges who are not actually hostile to the presence of an attorney may expect him to assume a different role in the juvenile court from the one he would have in criminal court. He is not to utilize "technical objections" to obtain a finding of no delinquency. Rather he is to act as the servant of the court in the process of ascertaining the truth—a function that seems to entail actively encouraging his client to confess.

Note, *supra* note 24, at 797.

117 *See* M. BORTNER, *supra* note 59, at 139-40(after controlling for offenses, represented juveniles received more severe dispositions); V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 79 (increased probability of commitment); Clarke & Koch, *supra* note 57, at 304-6 (negative effect of representation on dispositions); Note, *supra* note 24, at 798 ("[I]n an informal court in which an aggressive adversary attitude may well hurt his client's interests, an attorney should probably conform to the reigning conventions as much as possible; he might be wise to insist on a strict adherence to the rules of evidence only in those particular instances when their relaxation would be clearly detrimental to his client.").

118 Duffee & Siegel, *supra* note 114, at 548-53.

119 Clarke & Koch, *supra* note 57, at 304-06.

120 V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 64-65.

121 Hayeslip, *The Impact of Defense Attorney Presence on Juvenile Court Dispositions*, 30 JUV. & FAM. CT. J. 9, 12 (1979).

122 M. BORTNER, *supra* note 59, at 139-40.

ported that juveniles with counsel are more likely to be incarcerated than juveniles without counsel. Bortner, for example, found that:

> [w]hen the possibility of receiving the most severe dispositions (placement outside the home in either group homes or institutions) is examined, those juveniles who were represented by attorneys were more likely to receive these dispositions than were juveniles not represented (35.8 percent compared to 9.6 percent). Further statistical analysis reveals that, *regardless of the types of offenses with which they were charged*, juveniles represented by attorneys receive more severe dispositions.[123]

Feld's evaluation of the impact of counsel in six states' delinquency proceedings reported that:

> it appears that in virtually every jurisdiction, representation by counsel is an aggravating factor in a juvenile's disposition . . . . In short, while the legal variables [of seriousness of present offense, prior record, and pretrial detention status] enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.[124]

III. The Present Study—Data and Methodology

The present study provides the first opportunity to systematically analyze variations in rates of representation for an entire jurisdiction and in subsets thereof.[125] These statistical analyses provide a comparative examination of the circumstances under which lawyers are appointed to represent juveniles, the case characteristics associated with rates of representation, and the effects of representation on case processing and dispositions.

An earlier article extensively analyzed juvenile justice administration in Minnesota and provides the legal background for the present study.[126] Typically, juvenile delinquency cases begin with a referral to either the county attorney or a county's juvenile court or a juvenile probation or intake department. Many of these referrals are closed at intake with some type of *informal* disposition: dismissal, counseling, warning, referral to another agency, or probation. In some unknown proportion of cases, a petition—the formal initia-

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123 *Id.* at 139-40 (emphasis added).

124 Feld, *In re Gault Revisited*, *supra* note 10, at 393.

125 There have been remarkably few studies of the role of counsel in juvenile courts in more than one courtroom or county. The few systematic comparative studies of juvenile justice administration were conducted in the aftermath of *Gault*. *See* V. Stapleton & L. Teitelbaum, *supra* note 66; Chused, *The Juvenile Court Process: A Study of Three New Jersey Counties*, 26 Rutgers L. Rev. 488 (1973); Clarke & Koch, *supra* note 57.

126 *See* Feld, *supra* note 2. *See also* J. Sonsteng & R. Scott, Minnesota Practice: Juvenile Law and Practice (1985) (analysis of statutes and rules of procudure for juvenile court).

tion of the juvenile process—is filed by the county attorney. A petition is comparable legally to the prosecutor's issuance of a complaint or a grand jury's indictment in the adult criminal process.[127] The relationship between the screening functions of a juvenile court's intake staff and the charging functions in the county attorney's office vary from county to county.[128] Because different court intake or probation staff as well as county attorneys use different criteria to decide whether or not to file a formal delinquency petition, the selection of delinquent populations varies in different counties. The common denominator of all these cases is that they were formally charged in their respective counties.

A juvenile offender will be arraigned on the petition. Because the constitutional right to counsel attaches in juvenile court only after the filing of the petition,[129] it is typically at this stage, if at all, that counsel will be appointed to represent a juvenile. At the arraignment, the juvenile may admit or deny the allegations in the petition. In many cases, juveniles admit the allegations of the petition at the arraignment and have their cases disposed of without the assistance of an attorney. In other cases, a public defender or court-appointed lawyer who confers briefly with the juvenile before admitting or denying the allegations is appointed at the arraignment. In rare instances, a private attorney retained by the child's family may appear to represent the juvenile. In the very small fraction of cases that actually result in formal, contested hearings, counsel may be present more routinely.

This study uses data collected by the Minnesota Supreme Court's Judicial Information System ("SJIS") for delinquency and status offense cases processed in 1986.[130] The data files are housed

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127 Feld, *supra* note 2, at 217. In other states, petitions are filed in about half the cases referred to juvenile courts. *See* E. NIMICK, H. SNYDER, D. SULLIVAN & N. TIERNEY, JUVENILE COURT STATISTICS 1982 12 (1985) (between 1957 and 1982, approximately half of delinquency referrals were handled by formal petition, ranging from a high of 54% to a low of 41%); Feld, *In re Gault Revisited*, *supra* note 10, at 399 (proportion of petitions to referrals is highly variable: California 46.3%; Nebraska, 62.8%; North Dakota, 10.7%; and Pennsylvania 53.7%).

128 *See* MINN. R. P. JUV. CT. 17 (Intake, which provides that "[t]he discretionary decision as to whether a delinquency or petty matter should be initiated[,] lies with the county attorney.").

While Rule 17 vests the authority to file formal delinquency petitions in the county attorney, in those counties with intake units in the juvenile court, informal arrangments or administrative guidelines govern the screening of cases with minor offenses typically routed initially through intake.

129 *In re* M.A., 310 N.W.2d 699, 701 (Minn. 1981) ("[T]he right to counsel attaches at the time the formal petition is filed. At this point, there is a definite commencement of the adversary proceedings.").

130 The Minnesota Supreme Court's Judicial Information System ("SJIS") compiles

in the National Juvenile Court Data Archive ("NJCDA") at the National Center for Juvenile Justice.[131] The sample in this study consists of individual juveniles against whom *petitions* were filed for delinquency and status offenses. It excludes all juvenile court referrals for abuse, dependency, or neglect, as well as routine traffic violations. Only formally *petitioned* delinquency and status cases are analyzed because the right to counsel announced in *Gault* attaches only after the formal initiation of delinquency proceedings.[132]

More commonly, the NJCDA's unit of count is a "case disposed" of by a juvenile court.[133] The present study, however, is a

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statewide statistical data on juvenile delinquency and status petitions filed annually, as well as dependency, neglect and abuse cases. The data are based on the petitions filed; there is no data base that includes the cases referred to intake, county probation, or juvenile courts that were handled informally. The data collected on a case-specific basis include offense behavior, representation by counsel, court processing information, entries each time a court activity occurs, any continuation or change in the status of a case, and types of dispositions. In most counties, this information is obtained from the juvenile courts' own automated computer system and is entered by each county's court administrators who are trained by the state court administrator. Because the juvenile courts themselves rely upon this computerized information for record keeping, scheduling hearings, maintaining court calendars, and monitoring cases, it is highly reliable.

131 The National Juvenile Court Data Archive ("NJCDA") is housed at the National Center for Juvenile Justice ("NCJJ") which is the research arm of the National Council of Juvenile and Family Court Judges. The Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, has supported the juvenile court data archive for the past decade. Currently, 30 states contribute their annual juvenile court data tapes to the NJCDA.

132 The United States Supreme Court has not decided whether non-criminal status offenders are constitutionally entitled to representation by counsel. The delinquency proceeding in *Gault* involved conduct that would be criminal if committed by an adult and which could result in institutional confinement. The detention and institutionalization of status offenders is barred by federal and state legislation. *See* H. RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 70-73 (2d ed. 1985). Thus, if the issue arose, the Supreme Court could distinguish *Gault* on the grounds that since status offenses do not involve criminal behavior that could lead to incarceration, there is no constitutional right to counsel. Under Minnesota state law, however, the right to counsel attaches in status or "petty" matters as well as delinquency proceedings. *See* MINN. STAT. ANN. § 260.155(2) (West 1986); MINN. R. P. JUV. CT. 1.01, 4.01(1).

133 The NJCDA unit of count is "cases disposed." Each "case" represents a youth whose case is disposed of by the juvenile court for a new delinquency/status referral. A case is "disposed" when some definite action is taken, whether dismissal, warning, informal counseling or probation, referral to a treatment program, adjudication as a delinquent with some disposition, or transfer to an adult criminal court. E. NIMICK, H. SNYDER, D. SULLIVAN, & N. TIERNEY, JUVENILE COURT STATISTICS 1983 6 (1985). As a result of multiple referrals, one child may be involved in several "cases" during a calendar year. Moreover, each referral may contain more than one offense or charge. The multiple referrals of an individual child may tend to overstate the numbers of youths handled annually. Multiple charges in one petition may appear to understate the volume of delinquency in a jurisdiction. Because the unit of count is case disposed, one cannot generalize from the NJCDA data either the number of individual youths who are processed by the courts or the number of separate offenses charged to juveniles.

youth-based data file that analyzes the 17,195 individual juveniles whose cases were formally petitioned in Minnesota's juvenile courts in 1986. The annual data collected by the Minnesota SJIS do not include any family, school, or socioeconomic status variables, or a youth's prior record of offenses, adjudications, or dispositions. However, each youth processed in a county's juvenile court receives a unique identifying number which is used for all subsequent purposes. The NJCDA created a youth-based file by merging the 1984, 1985, and 1986 annual data tapes and matching the county/youth identification number across years to reconstruct a juvenile's prior record of petitions, adjudications, and dispositions. Thus, the data reported herein reflect a youth's most current referral to juvenile court as well as all prior petitions, adjudications, and dispositions for at least the preceding two years or more.[134]

In this Article, the offenses reported by the SJIS were regrouped into six analytical categories.[135] The "felony/minor" offense distinctions provide both an indicator of seriousness and are legally relevant for the right to counsel.[136] Offenses are also classified as person, property, other delinquency, and status. Combining person and property with the felony and minor distinctions pro-

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[134] The youth identification numbers are unique within a county, but not within the entire state. A youth who has delinquency referrals in several different counties will receive separate identification numbers in each county. Thus, the variable "prior referrals" may be slightly inflated by a juvenile with multiple referrals in several counties, and slightly reduced by juveniles whose prior records consist of only one referral in each of several counties. Such multiple cases appear to be rare. A cross-tabulation of youths' county of residence with the county of adjudication reveals between 95-98% overlap. Because Minnesota lacks a statewide juvenile information system, a juvenile court at sentencing normally has information regarding only prior referrals in its own county. Thus, the variable "prior referrals" includes the information routinely available to and relied upon by the courts themselves.

[135] The National Juvenile Court Data Archive has developed a seventy-eight item coding protocol that recodes the raw offense data provided by the states into a uniform format. This permits delinquency offense data from several different original formats to be recoded for analysis using a single conversion program.

[136] *Compare* Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony proceeding) *with* Scott v. Illinois, 440 U.S. 367 (1979) (right to counsel where misdemeanor leads to incarceration). *See supra* notes 43-49 and accompanying text.

The Minnesota Criminal Code contains three categories of offenses: felony (punishable by more than one year of imprisonment); misdemeanor (punishable by less than 90 days); and gross misdemeanor (an intermediate offense which is neither a felony nor a misdemeanor). *See* MINN. STAT. ANN. § 609.02(2)-(4) (West 1986). The Minnesota Sentencing Guidelines treat misdemeanors and gross misdemeanors as one-quarter and one-half units and felonies as one point in the computation of an offender's criminal history score. *See* MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 103, at 27-28. In the present coding schema, gross misdemeanors were classified as "minor" offenses to preserve the felony distinction.

duces a six-item offense scale.[137] When a petition alleges more than one offense, the youth is classified on the basis of the most serious charge.[138] This study uses two indicators of the severity of dispositions: out-of-home placement and secure confinement.[139] Out-of-home placement includes any disposition in which the child is taken from his or her home and placed, for example, in a group home, foster care, in-patient psychiatric or chemical dependency treatment facility, or a secure institution.[140] Secure confinement is a substantial subset of all out-of-home placement but includes only commitments to the county-level institutions or state training schools.[141] Both of these dispositions entail the types of infringements of liberty that trigger the right to counsel under *Gault* and *Scott*.

The data presented in the tables include both the totals for the

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137 The "felony offenses against person" generally correspond to the F.B.I.'s Uniform Crime Report classification of Part I violent felonies against the person—homicide, rape, robbery, and aggravated assault. "Felony offenses against property" generally include Part I property offenses—burglary, felony theft, and auto theft. "Minor offenses against person" consist primarily of simple assaults, and "minor offenses against property" consist primarily of larceny, shoplifting, or vandalism. "Other delinquency" includes a mixed-bag of residual offenses—drug offenses primarily involving possession of marijuana, public order offenses, as well as offenses against the administration of justice, primarily contempt of court. "Status" offenses are the juvenile offenses that are not criminal for adults—runaway, truancy, curfew, ungovernability, and the like.

138 When a petition contains multiple allegations, there is no way to separate whether they are multiple charges arising out of the same offense transaction or whether they represent several offenses committed on different occasions which were simply petitioned in the same document.

139 The NJCDA has developed a twenty-two item conversion program that transforms the state-specific dispositions into a uniform national format. The NJCDA staff speaks directly with the states' data collectors and reporters to determine how specific dispositions or programs should be classified—out of home and secure—within the national format.

Using the severity of sanctions as a measure to evaluate an attorney's effectiveness reflects an assumption that a verdict of "not guilty" is, at least in the defendant's opinion, a positive result and the converse, removal or incarceration, a negative one. "In evaluating attorney effectiveness with juvenile delinquents, a dismissal is considered positive even though this might mean that children who had committed crimes were released without sanction to the possible detriment of society." Kelley & Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 416 (1982). *See* V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 64-65.

140 While many in-patient psychiatric or chemical dependency placements are in secure facilities, these commitments are classified as "out-of-home" to distinguish them from more traditional institutional confinement in training schools.

141 In the juvenile justice context, secure confinement is somewhat of a misnomer, because most juvenile training schools and institutions do not rely upon locks, bars, fences, or armed guards to the same degree as do adult maximum security institutions. *Compare* G. SYKES, SOCIETY OF CAPTIVES (1956) (adult maximum security facility) *with* B. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977) (comparative study of juvenile correctional facilities ranging from minimum to maximum security).

entire state and those for the aggregated counties with high, medium, and low rates of representation. While the overall rate of representation in Minnesota in 1986 was 45.3%, there was substantial variations among the eighty-seven counties. In four counties, more than 90% of juveniles were represented, while in another six counties, less than 10% of juveniles had lawyers. Five counties in which 66.7% or more juveniles were represented were classified as "high" representation.[142] Fourteen counties in which more than 33.3% but less than 66.7% of juveniles had lawyers were classified as "medium" representation.[143] The remaining sixty-eight counties in which less than 33.3% of juveniles had lawyers were classified as "low" representation. The counties differ in their methods of delivering legal services—public defender and court appointed counsel—and some of the analyses will assess the impact of different types of counsel. There is also some geographical pattern to the variations in rates of representation with rural counties which rely primarily on court appointed lawyers predominating in the "low" representation category.[144]

IV. Data and Analyses[145]

The following analyses attempt to answer two interrelated questions. First, what case characteristics determine when lawyers appear on behalf of juveniles? Second, what effect does representation have on the way that a case is handled and disposed? The former will examine the relationships between certain independent variables such as offense seriousness, prior record, pretrial deten-

[142] The "high" representation counties and their primary legal service delivery systems—public defender ("PD") or court appointed ("CA")—include: Anoka (97.9%, PD), Dakota (100.0%, CA), Goodhue (92.7%, PD), LeSuer (68.5%, PD), and Ramsey (St. Paul) (92.3%, PD).

[143] The "medium" representation counties and their primary mechanism for delivering legal services include: Cass (45.2%, CA), Douglas (42.5%, CA), Hennepin (Minneapolis) (47.7%, PD), Lake (38.7%, CA), Lincoln (45.8%, CA), Lyon (42.9%, CA), McLeod (43.3%, CA), Mille Lacs (40.1%, CA), Nobles (39.0%, CA), Pine (44.4%, CA), St. Louis (49.9%, PD), Todd (37.0%, CA), Wadena (65.9%, CA), and Washington (40.1%, CA).

[144] A separate article will analyze the 1986 Minnesota data according to geographic patterns and report on juvenile justice administration in urban, small urban/suburban, and rural counties.

[145] Tables 1-38 report row or column percentages and the sample size (N) where appropriate for the entire state and separately for the aggregated counties with high, medium, and low rates of representation. Because of the large overall sample size, N=17,195, and the non-random assignment of subjects to various categories, tests of significance are omitted. Tables 39-53, which summarize the multiple regression equations, do include levels of significance, and, as would be expected with such large samples, virtually all of the results are highly statistically significant.

tion, and variations in rates of representation. The latter will examine the impact of counsel on the sentences juveniles receive or the ways in which their cases are processed, after controlling for the influence of other independent variables.

A. OFFENSES, ATTORNEYS, AND DISPOSITIONS

The first group of tables introduce the juvenile justice system. They examine the types of offenses juveniles commit, the sources of referral to juvenile courts, rates of representation, and the effect of counsel on juveniles' dispositions.

1. Petitions and Offenses

Initially, the appearance of counsel must be placed in the larger context of juvenile justice administration in Minnesota. Table 1 reports the total number of juveniles against whom petitions were filed and the types of offenses with which they were charged in the state and in the aggregated counties with high, medium, and low rates of representation. Throughout the state, 18.4% of juveniles were charged with offenses that would be felonies if committed by adults, 54.4% were charged with minor offenses such as misdemeanors and gross misdemeanors, and 27.2% were charged with status offenses.[146] Within the felony category, offenses against property, primarily burglary, predominated. Similarly, within the minor offense category, property offenses such as shoplifting, theft, and vandalism predominated. Less than ten percent of Minnesota's delinquency cases involved felony or minor offenses against the person, and slightly more than one-quarter of the cases involved noncriminal status offenses.

When the juveniles' petitions are examined separately for the counties with high, medium, and low rates of representation, different offense patterns emerge. In general, the counties with low rates of representation—primarily rural counties—encounter somewhat less serious delinquency. They process proportionally fewer juveniles charged with felonies and a correspondingly larger proportion of status offenders. Only 7.4% of juveniles in counties with low rates of representation were charged with offenses against the person, as compared with 9.8% and 11.4% of juveniles in counties with medium and high rates of representation. While minor of-

146 "Status Offenses" refer to those forms of juvenile misconduct which would not be criminal if committed by an adult, such as truancy, runaway, alcohol or marijuana consumption. *See* MINN. STAT. ANN. § 260.015(19)-(24) (West 1982). *See generally*, H. RUBIN, *supra* note 132, at 51-80.

TABLE 1
PETITIONS AND OFFENSES

	STATEWIDE	HIGH	MEDIUM	LOW
FELONY				
%	18.4	20.1	19.6	16.6
N=	3153	711	1243	1199
Felony Offense Against Person				
%	4.0	4.8	4.3	3.2
N=	680	169	276	235
Felony Offense Against Property				
%	14.4	15.3	15.2	13.2
N=	2473	542	967	964
MISDEMEANOR				
%	54.4	59.0	53.4	53.0
N=	9298	2084	3383	3831
Minor Offense Against Person				
%	5.2	6.6	5.5	4.2
N=	889	234	348	307
Minor Offense Against Property				
%	32.3	32.0	28.3	35.9
N=	5554	1137	1799	2618
Other Delinquency				
%	16.6	20.1	19.4	12.4
N=	2855	713	1236	906
STATUS				
%	27.2	20.9	27.0	30.5
N=	4649	737	1708	2204

fenses against property are the most prevalent form of delinquency throughout the state, those and status offenses constitute about two-thirds of the dockets of juvenile courts in low representation counties. As later analyses will demonstrate, there is a direct relationship between the seriousness of the offense and rates of representation.[147] Counties with lower rates of representation handle somewhat less serious types of offenders which is consistent with their predominantly rural character.[148] By contrast, the counties with high rates of representation handle about 10% fewer juveniles charged with status offenses and proportionally more youths charged with misdemeanor and felony offenses.

2. *Source of Referral*

Juvenile delinquency cases are referred to juvenile courts from

147 *See infra* Tables 3 and 4 and accompanying text.
148 *See* E. NIMICK, H. SNYDER, D. SULLIVAN & N. TIERNEY, *supra* note 127, at 13.

a variety of sources: police, probation officers, parents, schools, welfare departments, and others. Table 2 reports the sources of referral to juvenile courts in Minnesota.

While police are the primary source of juvenile referrals in the state for all offense categories, probation officers and "other"—primarily schools—refer many juveniles in the "other delinquency" and status offense categories. Other delinquency includes drug offenses such as possession of marijuana, disorderly conduct and public order offenses, and, most significantly, contempt of court and violations of probation. This accounts for the predominance of probation officers as sources of referral. The status offense category includes 1,187 cases of truancy which are referred primarily by the schools.[149] The source of a referral, especially from a probation officer, strongly influences the actions of the courts.

The proportion of referrals by sources other than police differ in the counties with high, medium, and low rates of representation. While referrals by schools are the largest source of non-police referrals in all three types of counties, they differ in the relative make-up of probation and parental referrals. In the high representation counties, about one out of eleven delinquents (10.9%) are referred by probation officers, primarily in the "other delinquency" category for probation violations (38.3%). By contrast, in the medium and low representation counties, probation is an insignificant source of referral, contributing only 0.1% of cases, with proportionally more referrals by parents.

3. Rates of Representation

Tables 3 and 4 report the overall rates of representation by counsel, the percentages of private attorneys and public attorneys—court appointed or public defender—and the rates of representation by type of offense. Although *Gault* held that *every* juvenile is constitutionally entitled to "the guiding hand of counsel at every step in the proceedings against him,"[150] *Gault*'s mandate remains unrealized in Minnesota.

Overall, only 45.3% of juveniles in Minnesota receive the assistance of counsel. However, in the counties with high rates of representation, 94.5% of juveniles have counsel; in counties with medium

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149 While schools are the most obvious source of truancy referrals, because school districts in Minnesota receive state educational funding on a *per capita* basis, they have a substantial fiscal incentive to keep the largest numbers of students enrolled in school. *See* MINN. STAT. ANN. § 124.17 (West 1986).

150 *In re* Gault, 387 U.S. 1, 36 (1967) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

TABLE 2
OFFENSE AND PETITIONER

	STATEWIDE				HIGH REPRESENTATION				MEDIUM REPRESENTATION				LOW REPRESENTATION			
PETITIONER:	POLICE	PROB	PARENT	OTHER	POLICE	PROB	PARENT	OTHER	POLICE	PROB	PARENT	OTHER	POLICE	PROB	PARENT	OTHER
OVERALL																
%	89.2	2.3	1.5	7.0	72.8	10.9	1.3	15.0	92.0	0.1	2.3	5.6	94.6	0.1	0.9	4.3
Felony Offense Against Person																
%	94.6	0.1	0.3	5.0	84.6	-	0.6	14.8	97.8	0.4	-	1.8	97.9	-	0.4	1.7
Felony Offense Against Property																
%	96.1	0.2	0.0	3.7	94.8	0.6	-	4.6	93.7	-	-	6.3	99.3	0.1	0.1	0.5
Minor Offense Against Person																
%	95.7	0.3	0.2	3.7	91.0	0.9	0.4	7.7	95.7	0.3	0.3	3.7	99.3	-	-	0.7
Minor Offense Against Property																
%	95.8	0.3	0.4	3.6	92.7	1.0	0.1	6.2	95.0	-	0.3	4.7	97.6	0.1	0.6	1.6
Other Delinquency																
%	82.8	9.7	0.8	6.8	46.6	38.3	3.1	12.1	93.0	-	-	7.0	97.2	0.3	-	2.4
Status																
%	79.8	2.2	4.4	13.7	43.4	12.9	2.7	41.0	85.9	0.2	8.1	5.9	87.3	0.1	2.0	10.6
REPRESENTATION BY COUNSEL																
%	43.1	89.9	50.4	56.2	96.0	91.2	84.8	90.6	47.5	80.0	40.1	37.8	19.0	44.4	48.4	18.2

rates, 46.8% have counsel; and in counties with low rates, only 19.3% have counsel. While these categories—high, medium, and low—were created by classifying counties on the basis of their rates of representation, the substantial differences in aggregate rates of representation lend themselves to a variety of comparative analyses of the determinants and impact of counsel in delinquency proceedings in different types of juvenile courts within the state.

Table 3 reports aggregate rates of representation regardless of the type of attorney. These summary rates will facilitate subsequent analyses which report the effects of both representation versus non-representation as well as different types of lawyers. It is noteworthy to compare the rates of representation reported in Table 3 with those for different types of petitioners reported in the last row of Table 2. While the overall rate of representation of juveniles in the state is 45.3%, a slightly lower proportion of juveniles referred by police is represented. By contrast, when juveniles are referred by probation officers, a much larger proportion, nearly double the overall state rate, is represented. In part, the greater rate of representation for probation referrals reflects the fact that such juveniles have prior records and perhaps already have an on-going relationship with an attorney from their prior appearances. The rate is inflated somewhat because a large proportion of cases referred by probation officers are in high representation counties, although the same pattern prevails in the medium or low representation counties.[151] There are no other consistent patterns in the rates of representation by remaining sources of referral: parents or schools.

The last row of Table 3 reports the rates of representation of juveniles at the time of their disposition. Comparing the rates of representation at adjudication (arraignment, plea, or trial), with those at disposition (45.3% versus 38.9%), reveals that 6.4% fewer juveniles have counsel when they are sentenced than at the earlier stages of delinquency proceedings. Virtually all of the decrease in representation at disposition occurs in the counties with high rates of representation (94.5% versus 66.7%). Perhaps defense lawyers are more comfortable functioning in a procedurally formal adjudicative context than they are in the "messy" social services-dominated dispositional setting. Or perhaps defense attorneys appreciate that

151 Subsequent analyses will show a consistent relationship between rates of representation and the severity of dispositions. *See infra* Tables 9, 14, and 18 and accompanying text. Many referrals by probation officers involve juveniles who have failed in a previous placement and are being brought back into court for a new disposition. Such juveniles are already considerably more at risk to be removed from their homes and thus more likely to have counsel appointed.

TABLE 3
RATES OF REPRESENTATION AND OFFENSE

	STATEWIDE		HIGH		MEDIUM		LOW	
ATTORNEY:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
OVERALL % Counsel at Adjudication	45.3	54.7	94.5	5.5	46.8	53.2	19.3	80.7
Felony Offense Against Person	77.3	22.7	97.5	2.5	81.5	18.5	56.8	43.2
Felony Offense Against Property	63.0	37.0	98.3	1.7	68.2	31.8	37.3	62.7
Minor Offense Against Person	62.4	37.6	96.5	3.5	66.2	33.8	30.5	69.5
Minor Offense Against Property	44.6	55.4	97.2	2.8	52.3	47.7	15.8	84.2
Other Delinquency	44.9	55.1	91.5	8.5	34.7	65.3	21.3	78.7
Status	28.9	71.1	89.1	10.9	27.2	72.8	9.3	90.7
OVERALL % Counsel at Disposition	38.9	61.1	66.7	33.3	45.3	54.7	20.0	80.0

their presence or participation at disposition may be an exercise in futility or may even adversely affect the eventual disposition. Throughout these analyses, juveniles are classified as represented if an attorney appeared on their behalf during the adjudicatory phase of the preceedings.

Table 3 clearly shows that it is possible to provide very high levels of defense representation to all juveniles charged with delinquency. In the high representation counties which process more than one-fifth of Minnesota's delinquents, more than 97% of youths charged with felony offenses, and more than 90% of those charged with minor criminal offenses are represented. While it may be somewhat more difficult to deliver legal services easily in rural counties of the state, these aggregate county variations suggest that differences in rates of representation reflect deliberate policy decisions about the appointment of counsel by the juvenile court judges rather than any inherent difficulty in providing counsel.

Table 3 also shows the rates of representation by type of offense. One pattern that emerges is a direct relationship between the seriousness of the present offense and rates of representation. Juveniles charged with felonies—offenses against the person or property—and offenses against the person—felony and minor—

generally have higher rates of representation than the overall rate. Thus, while only 45.3% of juveniles in the state have lawyers, 77.3% of those charged with felony offenses against the person are represented by counsel, as are 63.0% of those charged with felony offenses against property, and as are 62.4% of those charged with minor offenses against the person. These types of offenses constitute only about one-quarter of the juvenile courts' dockets (Table 1). However, in no other offense categories are even a majority of youths represented. These variations in rates of representation by offense further reinforce the view that the decision to appoint counsel reflects deliberate judicial policies rather than differences in minors' competence to waive the assistance of lawyers.

In the high representation counties, as would be expected, there is only minor variation by offenses with somewhat lower rates of representation for juveniles charged with the least serious types of delinquency. In the medium and low representation counties, felony offenses and offenses against the person also garner the highest rates of representation. Indeed, in the low representation counties, the only offense category in which even a majority of juveniles are represented (56.8%) are those charged with felony offenses against person, which amount to 3.2% of the delinquency petitions (Table 1). By contrast, nearly two-thirds of those charged with felony offenses against property, such as burglary, appear without counsel. Even though Table 1 reported some differences in offense patterns in high, medium, and low representation counties, Table 3 effectively controls for the seriousness of the present offense. Thus, the variations in rates of representation clearly *are not* a function of differences in the distribution of offenses in the counties.

The first row of Table 4 reports the proportion of private attorneys and public attorneys (court appointed and/or public defenders) reflected in the overall rates of representation.[152] While most of Minnesota's juveniles are unrepresented (54.7%), when they do have lawyers, their lawyers are most likely to be public defenders (28.5%).[153] Because privately retained counsel appear in only 5.1%

[152] Private attorneys are those lawyers directly retained and paid for by the juvenile or his or her parents. Because public defenders and court appointed counsel are appointed by the court and paid for by the county, juveniles have virtually no choice in who will represent them. In rare instances in some counties, a court may appoint a guardian *ad litem*, an adult who is neither a lawyer nor the juvenile's parent, to appear on behalf of the juvenile. Since such guardians are not licensed attorneys, the few juveniles on whose behalf they appear are classified as unrepresented.

[153] *See supra* notes 142-43. Public defenders are the primary legal services delivery system in most of the "high" and "medium" representation counties whereas the "low" representation counties rely upon court appointed counsel. *See also*, Feld, *In re Gault*

TABLE 4
ATTORNEY TYPE AND OFFENSE

	STATEWIDE				HIGH				MEDIUM				LOW			
	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE
OVERALL																
%	5.1	28.5	11.7	54.7	2.4	76.9	15.2	5.5	8.5	30.8	7.5	53.2	3.4	2.3	13.6	80.7
Felony Offense Against Person																
%	11.2	43.5	22.7	22.7	4.3	73.0	20.2	2.5	16.6	54.1	10.8	18.5	9.9	8.0	39.0	43.2
Felony Offense Against Property																
%	7.2	34.0	21.7	37.0	2.3	72.7	23.2	1.7	12.4	40.9	14.9	31.8	4.9	4.8	27.6	62.7
Minor Offense Against Person																
%	6.4	40.5	15.5	37.6	4.4	75.8	16.3	3.5	9.8	47.8	8.6	33.8	3.9	3.5	23.0	69.5
Minor Offense Against Property																
%	4.9	27.5	12.2	55.4	2.1	74.6	20.5	2.8	10.1	34.0	8.2	47.7	2.4	2.0	11.4	84.2
Other Delinquency																
%	6.5	29.7	8.7	55.1	2.6	78.8	10.1	8.5	8.8	21.3	4.7	65.3	6.3	1.7	13.4	78.7
Status																
%	2.1	21.6	5.1	71.1	1.8	82.6	4.6	10.9	2.5	20.9	3.7	72.8	2.0	1.0	6.4	90.7

of all delinquency and status cases in the state, public defenders and court appointed attorneys handle the bulk of lawyer-represented juveniles.

While the seriousness of the offenses increases the likelihood of representation, larger proportions of private attorneys appear on behalf of juveniles charged with felony offenses—person and property—and offenses against the person than appear in the other offense categories. Comparing the overall rate of appearance of private attorneys with the rates when juveniles are charged with felonies against the person shows that the seriousness of the offense doubles the presence of private attorneys. Perhaps, the greater seriousness of those offenses and their potential consequences encourage juveniles and/or their families to retain the assistance of private counsel. Conversely, parents are least likely to retain private attorneys to represent the status offenders whom they have referred and with whom they are often in conflict.

4. Representation by Counsel and Age of Juveniles

One of the traditional explanations for why so many juveniles are unrepresented is that they "waive" their right to counsel.[154] Because legal competency—the capacity to make a "knowing, intelligent, and voluntary" waiver of the right to counsel—presumably correlates with age, one would expect younger juveniles to have higher rates of representation than older youths.

Table 5 reports that for the state overall, juveniles aged sixteen and seventeen, presumably the most mature and therefore competent to waive their rights, have somewhat lower rates of representation than do their younger counterparts, although the rate of representation for the eighteen-year-old juveniles are somewhat higher.[155] Moreover, the rate of representation for even the youngest juveniles—those twelve and under—is virtually indistinguishable from the overall state average, 46.3% representation versus 45.3% representation.

When the data are examined separately in counties with high,

Revisited, supra note 10, at 401, Table 2 (In all six states, public lawyers predominated in the representation of juvenile offenders.).

154 *See supra* notes 78-84 and accompanying text; *infra* notes 280-86 and accompanying text.

155 MINN. STAT. ANN. § 260.015(2) (West 1986) defines "child" as any person under the age of 18 as well as any person who is alleged to have committed their offense prior to age 18. In some instances, a person who commits an offense at age 17 may be 18 by the time he or she is charged as a delinquent. The dispositional authority of Minnesota's juvenile courts continues until age 19. MINN. STAT. ANN. § 260.181(4) (West 1982).

TABLE 5
REPRESENTATION BY COUNSEL AND AGE OF JUVENILE

	STATEWIDE	HIGH	MEDIUM	LOW
12 >	46.3	92.8	56.3	18.6
13	48.9	97.8	49.3	19.9
14	47.7	94.6	45.7	20.9
15	47.4	93.2	45.0	19.2
16	44.1	94.8	46.2	19.8
17	41.9	94.9	46.1	17.8
18	45.0	91.2	45.5	22.8

medium, and low rates of representation, no clear patterns emerge. In the counties with high rates of representation, there is no discernible relationship between a juvenile's age and rates of representation which presumably reflects the general policy to appoint lawyers in all instances. While juveniles aged twelve or younger have the second lowest proportion of representation, those aged thirteen have the highest. The sixteen and seventeen-year-old juveniles have higher rates of representation than do the fourteen or fifteen-year-olds. In the counties with medium rates of representation, the youngest juveniles—twelve and under, and thirteen—have the highest rates of representation, followed by the sixteen and seventeen year old juveniles, while juveniles fourteen and fifteen have the lowest rates of representation. In the counties with low rates of representation, there is no apparent relationship between age and representation by counsel. The youngest juveniles, those twelve and under, have the second lowest rates of representation (18.6%) and only seventeen-year-old juveniles have a lower rate of representation. In short, any relationship between a juvenile's age and a juvenile court judge's determination that the minor is competent to make a "knowing, intelligent, and voluntary" waiver of constitutional rights is purely coincidental. Later analyses will examine the relationships between age, offenses, and dispositions to determine whether other variables account for the high rates of waivers of counsel by even the younger juveniles.[156]

5. Present Offense and Disposition

There is extensive research on juvenile court sentencing practices. However, "even a superficial review of the relevant literature leaves one with the rather uncomfortable feeling that the only con-

[156] *See infra* Tables 7 and 8 and accompanying text.

sistent finding of prior research is that there are no consistencies in the determinants of the decision-making process."[157] The studies—conducted in different jurisdictions at different times and employing different methodologies and theoretical perspectives—yield contradictory results.[158]

Juvenile court judges answer the question "what should be done with this child," in part, by reference to explicit statutory mandates. However, practical and bureaucratic considerations influence their discretionary decision-making as well.[159] Juvenile justice practitioners enjoy greater discretion than do their adult process counterparts because of their presumed need to look beyond the present offense to the "best interests of the child" and paternalistic assumptions about the control of children.[160]

An obvious question, then, is to what extent legal factors such as the present offense and prior record, or social characteristics, such as race, sex, family status, or social class, influence judges' dispositional decision-making. Evaluations of dispositional practices by police, intake and the juvenile court suggest that the principle of offense[161] pervades practical decision-making throughout the pro-

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157 Thomas & Sieverdes, *Juvenile Court Intake: An Analysis of Discretionary Decision-Making*, 12 CRIMINOLOGY 413, 416 (1975).

158 *See* Fagan, Slaughter & Hartstone, *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224, 229-30 (1987); McCarthy & Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: the Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41, 43-47 (1986), for methodological critiques of prior juvenile court sentencing research.

159 *See* M. BORTNER, *supra* note 59, at 38-58; A. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE 292-327 (1968); R. EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURTS 29-56 (1969); D. MATZA, *supra* note 17, at 101-52. *See also*, authorities cited *infra* notes 170-71 and accompanying text.

160 Feld, *Reference of Juvenile Offenders*, *supra* note 32, at 587. Thomas and Fitch note that:

> the juvenile justice system differs significantly from its adult counterpart in its express incorporation of highly differential processing of alleged delinquents. The separate juvenile court system emerged from a pervasive belief that the goal of rehabilitation best could be served by permitting juvenile courts to maximize flexibility, informality, and discretion, especially at the dispositional or sentencing stage. Thus, the dispositional alternatives available to the juvenile court are extremely broad.

Thomas & Fitch, *An Inquiry into the Association Between Respondents' Personal Characteristics and Juvenile Court Dispositions*, 17 WM. & MARY L. REV. 61, 64 (1975).

161 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 momentously precluded. Its meaning, especially in criminal proceedings, has been to give a central and unrivaled position in the framework of relevance to considerations of *offense* and conditions closely related to offense like prior record, and to more or less preclude considerations of status and circumstance.

cess.[162] Although traditionally juvenile courts pursued substantive justice in which characteristics of the offender determined dispositional decisions, recent evaluation research suggests an increased

D. MATZA, *supra* note 17, at 113-14 (emphasis added). The emergence of the principle of offense in juvenile courts is analyzed in Feld, *Principle of Offense*, *supra* note 13; Feld, *Punishment, Treatment*, *supra* note 4.

[162] Juvenile justice personnel make dispositional decisions throughout the process. Police officers may refer a case to intake for formal processing, adjust it informally on the street or at the station house, or divert it. Intake, in turn, may refer a youth to the juvenile court for formal adjudication or dispose of the case through informal supervision or diversion. Finally, even after formal adjudication, the juvenile court judge may choose from a wide array of dispositional alternatives ranging from continuing a case without a finding of delinquency, probation, or commitment to a state training school. *See generally* S. FOX, CASES AND MATERIALS ON MODERN JUVENILE JUSTICE (2d ed. 1981); F. MILLER, R. DAWSON, G. DIX & R. PARNAS, THE JUVENILE JUSTICE PROCESS (3d ed. 1985); J. SENNA & L. SIEGEL, JUVENILE LAW (1976); Harris, *Is the Juvenile Justice System Lenient?*, 18 CRIM. JUST. ABSTRACTS 104 (1986).

Recent research indicates that the dispositional decision-making process is cumulative; decisions made by the initial participants—police or intake—affect the types of decisions made by subsequent participants. *See* Barton, *Discretionary Decision-Making in Juvenile Justice*, 22 CRIME & DELINQ. 470 (1976); McCarthy & Smith, *Conceptualization of Discrimination*, *supra* note 158; Phillips & Dinitz, *Labelling and Juvenile Court Dispositions: Official Responses to a Cohort of Violent Juveniles*, 23 SOC. Q. 267 (1982).

Assessing judicial decision-making requires familiarity with decision-making by other juvenile justice actors. Evaluations of police dispositional decisionmaking are reported by: Bittner, *Policing Juveniles: The Social Context of Common Practice*, in PURSUING JUSTICE FOR THE CHILD 69 (M. Rosenheim ed. 1976); Black & Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970); Ferdinand & Luchterhand, *Inner-City Youth, the Police, the Juvenile Court, and Justice*, 17 SOC. PROBS. 510 (1970); Hohenstein, *Factors Influencing the Police Disposition of Juvenile Offenders*, in DELINQUENCY: SELECTED STUDIES 138 (T. Sellin & M. Wolfgang eds. 1969); McEachern & Bauzer, *Factors Related to Dispositions in Juvenile Police Contacts*, in JUVENILE GANGS IN CONTEXT 148 (M. Klein & B. Myerhoff eds. 1964); Pilliavin & Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206 (1964); Terry, *Discrimination in the Handling of Juvenile Offenders by Social Control Agencies*, 4 J. RES. CRIME & DELINQ. 218 (1967); Terry, *The Screening of Juvenile Offenders*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 173 (1967)[hereinafter *Screening*]; Thornberry, *Race, Socioeconomic Status and Sentencing in the Juvenile Justice System*, 64 J. CRIM. L. & CRIMINOLOGY 90 (1973); Weiner & Willie, *Decisions by Juvenile Officers*, 77 AM. J. SOC. 199 (1970); Werthman & Pilliavin, *Gang Members and the Police*, in THE POLICE 56 (D. Bordua ed. 1970); Williams & Gold, *From Delinquent Behavior to Official Delinquency*, 20 SOC. PROBS. 209 (1972).

If the police refer a case to juvenile court, typically an intake probation officer will screen it to decide whether to process the case formally or informally. About half of the cases referred to intake are closed or informally adjusted. *See* E. NIMICK, H. SNYDER, D. SULLIVAN & N. TIERNEY, *supra* note 127, at 12. Between 1957 and 1982, the percentage of delinquency referrals resulting in formal petitions has ranged from 41% to 54%. In 1982, 44% of referrals resulted in formal petitions, the lowest rate in a decade. Some research suggests that a child's social characteristics, demeanor or race, rather than the referral offenses, influence intake decision-making, thereby amplifying racial and class disparities in processing youths referred to juvenile court. *See* Bell & Lang, *The Intake Dispositions of Juvenile Offenders*, 22 J. RES. CRIME & DELINQ. 309, 310-11 (1985); Fagan Slaughter & Hartstone, *supra* note 158, at 230; McCarthy & Smith, *Conceptualization of Discrimination*, *supra* note 158, at 51; Thomas & Sieverdes, *Juvenile Court Intake*, *supra* note 157, at 425-26; Thornberry, *supra*, at 99; Williams & Gold, *supra*, at 226.

emphasis on characteristics of the offense.[163] As a corollary of procedural formality, juvenile courts increasingly seek formal rationality by using general rules applicable to categories of cases rather than pursuing individualized substantive justice.[164]

In 1967 the President's Commission on Law Enforcement and the Administration of Justice provided a theoretical imprimatur for offense-based sentencing when it explicitly acknowledged the punitive character of juvenile court intervention.[165] Subsequently, several juvenile justice policy groups have recommended the abolition of indeterminate sentences and their replacement with formal dispositional criteria and sentences proportional to the seriousness of the offense, which in short, results in a shift from substantive justice to formal legal rationality.[166]

The elevation of the principle of offense receives practical impetus from bureaucratic imperatives—the desires of juvenile and

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163 *See generally* Feld, *Punishment, Treatment, supra* note 4.

164 *See* M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 7 (M. Rheinstein ed. 1954). Weber's typology of law distinguishes between formal legal rationality and substantive rationality. Formal rationality is characterized by the application of explicit, universal rules to legal problems. In contrast, substantive rationality prevails when decisions are made on the basis of principles that are not derived from the legal system but from some other authoritative source or belief system. *See generally* J. INVERARITY, P. LAUDERDALE & B. FELD, LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW 112-16 (1983).

The traditional juvenile court provides an instance of Weberian substantive rationality. *See* D. MATZA, *supra* note 17, at 125-29; A. PLATT, *supra* note 13, at 152-63; Schultz, *The Cycle of Juvenile Court History*, 19 CRIME & DELINQ. 457, 461 (1973). Horowitz and Wasserman noted that:

> [d]ecision-making in systems of substantive justice is guided by reference to a substantive goal or by the best decision in the individual case, not by the application of abstract rules. The ideal in the juvenile court has been one of "individualized" justice whereby each offender should be treated as unique and as deserving such treatment. The framework of relevant criteria of decision-making is far broader than only the "legal" factors relevant in adult courts, and encompasses a variety of social background variables that are indicative of the offender's personal, home, and community situations.

Horwitz & Wasserman, *Some Misleading Conceptions in Sentencing Research: An Example and Reformulation in the Juvenile Court*, 18 CRIMINOLOGY 411, 417 (1980).

165 The Commission explained that:

> [c]ourt adjudication and disposition of those offenders should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection. While rehabilitative efforts should be vigorously pursued in deference to the youth of the offenders and in keeping with a general commitment to individualized treatment of all offenders, the incapacitative, deterrent, and condemnatory aspects of the judgment should not be disguised.

TASK FORCE REPORT, *supra* note 21, at 2.

166 *See* A.B.A.-I.J.A., JUVENILE JUSTICE STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS Stds. 5.1-5.2 (1980) [hereinafter JUVENILE DELINQUENCY AND SANCTIONS]; NATIONAL ADVISORY COMM. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMIN. OF JUVENILE JUSTICE Std. 3.181 (1980).

criminal justice agencies to avoid scandal and unfavorable political and media attention.[167] These factors encourage courts to attach more formal and restrictive responses to more serious forms of juvenile deviance.[168] "[W]hether a juvenile goes to some manner of prison or is put on some manner of probation . . . depends first, on a traditional rule-of-thumb assessment of the total risk of danger and thus scandal evident in the juvenile's current offense and prior record of offenses . . ."[169]

Finally, juvenile courts necessarily develop bureaucratic strategies to cope with the requirements of contradictory formal goals and highly individualized assessments.[170]

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167 Several scholars have noted the constraint that "fear of scandal" imposes on juvenile court dispositions. *See* M. BORTNER, *supra* note 59, at 63-92; A. CICOUREL, *supra* note 159, at 170-242; R. EMERSON, JUDGING DELINQUENTS, *supra* note 159, at 29-56; D. MATZA, *supra* note 17, at 120-23. Emerson observes that:

> juvenile court decision-making comes to be pervaded by a sense of *vulnerability* to adverse public reaction for failing to control or restrain delinquent offenders . . . . [Fear of scrutiny and criticism increases pressures] to impose maximum restraints on the offender—in most instances incarceration. Anything less risks immediate criticism. But more than this, it also exposes the court to the possibility of even stronger reaction in the future. For given any recurrence of serious illegal activity, former decisions that can be interpreted as "lenient" become difficult to defend.

R. EMERSON, ROLE DETERMINANTS IN JUVENILE COURT, HANDBOOK OF CRIMINOLOGY 624 (D. Glaser ed. 1974) (emphasis added).

168 Matza notes that the juvenile court judge is

> ultimately responsible to the public. He will have to explain . . . why the 17-year-old murderer of an innocent matron was allowed to roam the streets, on probation, when just last year he was booked for mugging. This is no easy question to answer. Somehow, an invoking of the principle of individualized justice and a justification of mercy on the basis of accredited social-work theory hardly seems appropriate on these occasions.

D. MATZA, *supra* note 17, at 122.

169 *Id.* at 125.

170 Internal and external organizational factors constrain judicial autonomy. While exercising discretion, the judge

> is restricted by the peculiar bureaucratic setting in which it appears. His judgment and wisdom may reign but only precariously since he is simultaneously the manager of the court and must thus concern himself with public relations, internal harmony, efficient work flow, and the rest . . . . Within the limits set by the demands of time, efficiency, and work flow, the kadi's wisdom and judgment may operate. He must decide which portion of the wide frame of relevance to invoke in each case, and in every case he is subjected to the remaining cross-pressures; one calling for severity, the other for mercy; one emanating from far-off and occasional critics, the other from nearby and ever-present underlings with whom he must work; one irrelevant to the day-to-day administration of an efficient court, the other crucially relevant; but one representing what he takes to be public opinion, the other what he takes to be professional opinion; and one holding the sanction of public scandal, the other of professional criticism.

Id. at 122-23. While balancing these internal and external considerations, the juvenile court restores the principle of offense, at least in part, as a form of decisional rule. Matza argues that:

> [t]he court's solution [to its dispositional dilemma] contains two elements. One, the main part of the solution, is to more or less reinstore—*sub rosa*—the *principle of offense*

> Time after time after time procedures emerge which permit officials in these organizations to classify and categorize those who come to their attention as swiftly and simply as they can. The form of these categorization processes is commonly defined by the types of information which organizations routinely capture as a basis for forming or, equally often, defending the decisions they are obligated to make.[171]

Since the present offense and the prior record of delinquency are among the types of information routinely and necessarily collected in juvenile court processing, it is hardly surprising that they provide a type of decisional rule.

Since the SJIS data tape unfortunately does not include information on several of the social variables characteristically used in sentencing research, this study cannot explain fully the determinants of dispositions. However, the data do lend themselves to an exploration of the relationships between offenses, dispositions, and representation by an attorney. Table 6 uses two measures of juvenile court dispositions: 1) out-of-home placements, and 2) secure confinement. Out-of-home placement involves any disposition in which the child is removed from his or her home and placed, for example, in a group home, foster care, in-patient psychiatric or chemical dependency treatment facility, or secure institution. Secure confinement is a substantial subset of all out-of-home placement and consists exclusively of commitments to the county-level institutions or state training schools. While out-of-home placement is not the exact equivalent of adult penal confinement, it constitutes a very severe intervention in the life of a child and family which may continue for a significant period. Both of these forms of intervention provide clear-cut delineations that lend themselves to cross-county comparisons. They are legally significant for the appointment of counsel, because the Supreme Court has held, at least for adults, that all persons charged with felonies must be afforded the right to counsel and that no person convicted of a misdemeanor may be incarcerated unless he or she was afforded or waived the assistance of counsel.[172]

Table 6 reports both the overall rates of out-of-home place-

> . . . . [T]he concern with individual characteristics and with treatment is not completely surrendered by the court . . . but they are transformed . . . . The workable bureaucratic equivalents of the stress on extraordinary individual characteristics—equity—and the philosophy of treatment are the doctrines of *parental sponsorship* and *residential availability*.

Id. at 124-25 (emphasis in original).

171 Marshall & Thomas, *Discretionary Decision-Making and the Juvenile Court*, 34 JUV. & FAM. CT. J. 55-57 (1983).

172 *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Gideon v. Wainwright, 372 U.S. 335, 344 (1963). *See* notes 43-49, 136 *supra* and accompanying text.

TABLE 6
OFFENSE AND DISPOSITION: OUT OF HOME PLACEMENT/SECURE CONFINEMENT

	STATEWIDE	HIGH	MEDIUM	LOW
OVERALL				
% Home	18.5	25.1	20.0	13.9
% Secure	11.1	15.8	12.3	7.8
Felony Offense Against Person				
% Home	42.2	44.2	46.0	35.9
% Secure	27.5	29.5	32.1	20.2
Felony Offense Against Property				
% Home	32.1	33.1	35.9	27.4
% Secure	23.6	25.0	27.9	18.1
Minor Offense Against Person				
% Home	24.0	29.5	24.6	19.6
% Secure	14.5	19.7	13.1	12.7
Minor Offense Against Property				
% Home	16.0	19.3	19.6	12.0
% Secure	10.8	13.3	13.9	7.6
Other Delinquency				
% Home	18.9	33.6	14.0	15.0
% Secure	11.3	20.3	8.4	8.6
Status				
% Home	12.4	23.1	12.5	8.9
% Secure	3.5	9.7	2.3	2.5
SOURCE OF REFERRAL AND DISPOSITION:				
Police				
% Home	17.0	20.3	20.0	13.3
% Secure	10.7	14.1	12.6	7.8
Probation				
% Home	53.0	52.0	80.0	77.7
% Secure	28.7	28.4	20.0	44.4
Parents				
% Home	34.0	38.6	25.2	47.7
% Secure	7.4	15.9	1.4	14.9
Other				
% Home	22.3	28.5	17.7	17.2
% Secure	11.2	15.2	11.0	4.8

ment and secure confinement dispositions in the state and in the respective counties, as well as by categories of offenses. The high, medium, and low representation counties differ markedly in their use of out-of-home placements and secure confinement. For the whole state, 18.5% of all petitioned juveniles are removed from their homes, and 11.1% of all juveniles are incarcerated in state or local institutions. However, in high representation counties, about

one of four juveniles is removed from his or her home, in medium representation counties, about one of five, while in low representation counties, only about one out of seven is removed. Juveniles prosecuted in the high representation counties are nearly twice as likely to be removed or confined as those in low representation counties.

As might be expected, the seriousness of the present offense substantially alters a youth's risk of removal and confinement. Despite the juvenile court's theoretical commitment to individualized dispositions in which there is no necessary relationship between a juvenile's offense, his or her "real needs," and the ultimate sentence, the actual practices evidence a strong element of proportionality. Juveniles charged with felony offenses—person and property—and lesser offenses against the person have the highest rates of out-of-home placements and secure confinement. For the state as a whole, of all the juveniles charged with a felony offense against the person, 42.2% are removed from their homes, and 27.5% are incarcerated. Overall, about one-third of all juvenile offenders charged with felony offenses are removed from their homes; about one-quarter of all juveniles charged with felony offenses are confined.

Conversely, minor property offenses, primarily theft and shoplifting, result in substantially lower rates of removal and confinement. As a result of legal restrictions on the placement of status offenders,[173] they have the lowest proportion of removal from the home or secure confinement. Significantly, however, even though institutional confinement of status offenders is not authorized,[174] 3.5% of the status offenders in the state and nearly 10% of those in the high representation counties still are being incarcerated in county or state institutions. The sentences imposed on juveniles charged with "other delinquency" are inflated by the substantially higher rates of out-of-home placement and confinement dispositions imposed in the counties with high rates of representation. In those counties, 38.3% of "other delinquency" referrals, primarily for contempt or probation violations, were made by probation officers (Table 2). As Table 6 indicates, referrals by probation officers in all counties characteristically garner higher rates of severe sentences.

While there is a clear and direct relationship between the seri-

173 *See* MINN. STAT. ANN. § 260.194 (West 1982). *See also* State v. Hammergren, 294 N.W.2d 705 (Minn. 1980) (uses of contempt power to convert status offender who violates court order into a delinquent).

174 *See* MINN. STAT. ANN. § 260.185(1)(c)(5)(d) (West 1986).

ousness of the present offense and the severity of disposition, there are also marked differences between the sentences imposed in the high and medium representation counties when compared with those in the low representation counties. At nearly every level of offense, the judges in the low representation counties impose less severe dispositions. These differences are most conspicuous in the sentencing of juveniles charged with the most serious offenses, in which about 10% fewer juveniles charged with felony offenses receive secure confinement dispositions than do those in the medium or high representation counties.

Table 6 also reports on the rates of out-of-home placement and secure confinement dispositions by sources of referral. Table 2 reported that most of the non-police referrals occurred in the categories of other delinquency and status offenses, that in the counties with high rates of representation, probation officers referred a substantial proportion of juveniles for probation violations and schools referred a large proportion of status offenders as truants, and that in the medium and low rates of representation counties, school referrals for truancy predominated.

Comparing the rates of out-of-home placement and secure confinement by the type of petitioner with the overall rates of dispositions and, especially, with the disposition rates for the "other delinquency" and status offense categories indicates that the source of a petition strongly influences the disposition of a case. In general, somewhat fewer referrals by police than other sources of petitions result in significant interventions by juvenile courts even though police predominate in the referrals of serious criminal offenses (Table 2). By contrast, courts react very severely to referrals by probation officers with over half of all such juveniles removed from their homes and more than one-quarter incarcerated.[175] Because probation referrals are generally for less serious types of offenses—other delinquency and status (Table 2)—than those by police, these differences are even more substantial. Similarly, complaints by parents and schools are given great credence by juvenile courts. About one-third of all referrals by parents result in the removal of the juvenile from the home as do more than one-fifth of the referrals from schools.

6. Age, Offense, and Disposition (Home/Secure)

As might be expected, juveniles aged fifteen to seventeen predominate in the juvenile court, and the length of a youth's prior

175 *See supra* Table 2 and accompanying text.

record increases with age. Table 7 summarizes the relationships between age, delinquency, and prior referrals.

For the state as a whole, juveniles aged fourteen and under constitute 27.7% of all delinquents. In the counties with high, medium, and low rates of representation, these younger juveniles constitute 27.7%, 30.6%, and 25.1%, respectively, of the juvenile court dockets. Comparing juveniles' proportional contributions to the juvenile courts' population with their contribution to the various offense categories indicates that these younger juveniles are charged with about as many felony offenses against the person and against property as their overall percentage of the court population. If anything, the younger juveniles tend to be underrepresented only in the less serious categories of offenses. This suggests that the seriousness of the offense influences the pre-petition screening and charging decisions in the cases of younger juveniles. By contrast, the eighteen-year-old juveniles contribute slightly less than their proportional make-up of the juvenile court's population to the more serious offenses.

Although slightly more younger juveniles are charged with serious offenses, they tend to have fewer prior referrals. This is primarily a function of age. Thus, in the state, about 10% fewer juveniles aged twelve and under have prior referrals when compared with fifteen-year-old youths, the group with the most extensive record of prior referrals. The relationship between age and prior record is the same in the state overall and in the counties with high, medium, and low rates of representation with the youngest juveniles having fewer prior referrals and the older juveniles having more.

Subsequent analyses will show a strong relationship between the seriousness of a juvenile's present offense, the length of the prior record, and the eventual sentence that is imposed. While younger juveniles' present offenses are often comparable with those of their older colleagues, their somewhat less extensive prior records and their extreme youth may provide some protection at the time of sentencing.

Table 8 shows the relationship between juveniles' age and disposition. A comparison of the overall rates of out-of-home placement (18.5%, Table 6) and secure confinement dispositions (11.1%, Table 6) with the rates by age indicates that substantially fewer juveniles twelve or younger are removed from their homes or confined. However, by age fourteen, youthfulness is no longer a mitigating factor in the sentencing of juveniles. In addition, the ratio of out-of-home placement to secure confinement decreases with age. Thus, for twelve-year-old juveniles about one of three who is

TABLE 7-1
AGE, OFFENSE, AND PRIOR REFERRALS

	STATEWIDE							HIGH REPRESENTATION						
AGE:	12>	13	14	15	16	17	18	12>	13	14	15	16	17	18
% Delinquents	6.1	7.8	13.8	21.1	22.6	25.8	2.8	4.7	7.9	15.1	25.0	21.6	23.1	2.7
PRESENT OFFENSE														
Felony Offense Against Person	8.8	10.7	13.5	21.2	20.1	23.2	2.4	8.9	13.6	13.0	24.9	13.0	24.9	1.8
Felony Offense Against Property	6.6	7.3	13.7	21.6	25.2	23.0	2.6	4.6	6.3	15.1	24.9	22.1	24.4	2.6
Minor Offense Against Person	5.8	12.0	13.9	19.0	21.9	25.1	2.1	5.6	11.5	14.1	18.8	20.9	27.8	1.3
Minor Offense Against Property	8.7	8.3	14.4	20.0	22.1	23.8	2.8	6.1	7.4	14.2	23.3	23.9	22.6	2.6
Other Delinquency	2.6	5.7	11.6	19.9	24.1	31.7	4.3	2.8	7.4	16.0	27.8	21.6	20.9	3.5
Status Offense	4.3	7.5	14.5	23.5	21.5	26.5	2.1	3.3	7.6	16.7	27.0	19.7	23.1	2.7
PRIOR REFERRALS														
0	79.6	72.7	69.0	68.9	72.5	73.4	70.2	68.7	69.0	64.6	59.1	63.5	67.1	62.1
1-2	16.5	22.5	24.6	24.5	22.8	22.7	25.0	23.5	24.2	27.6	29.5	28.7	26.8	29.5
3-4	2.9	4.1	4.9	4.8	3.6	3.0	4.2	5.4	5.3	5.6	8.4	5.2	4.8	7.4
5+	1.1	0.7	1.5	1.7	1.1	0.9	0.6	2.4	1.4	2.2	3.0	2.6	1.3	1.1

TABLE 7-2
AGE, OFFENSE, AND PRIOR REFERRALS

	MEDIUM REPRESENTATION							LOW REPRESENTATION						
AGE:	12>	13	14	15	16	17	18	12>	13	14	15	16	17	18
% Delinquents	6.8	9.0	14.8	21.5	21.6	23.8	2.5	6.1	6.7	12.3	19.0	24.0	28.9	3.0
PRESENT OFFENSE														
Felony Offense Against Person	8.3	10.5	12.7	19.6	23.2	22.8	2.9	9.4	8.9	14.9	20.4	21.7	22.6	2.1
Felony Offense Against Property	7.8	7.7	12.6	19.2	26.9	23.2	2.7	6.4	7.6	14.1	22.1	25.1	22.1	2.6
Minor Offense Against Person	8.6	15.8	16.4	18.7	17.2	22.1	1.1	2.9	8.1	11.1	19.5	28.0	26.4	3.9
Minor Offense Against Property	8.9	7.6	13.3	19.8	22.1	25.6	2.7	9.6	9.2	15.2	18.7	21.4	23.1	2.9
Other Delinquency	2.2	4.7	10.1	18.4	24.7	35.2	4.7	3.1	5.7	10.3	15.7	25.4	35.3	4.5
Status Offense	6.7	12.9	21.1	27.6	16.5	14.2	1.0	2.9	3.4	8.7	19.1	26.0	37.3	2.7
PRIOR REFERRALS														
0	76.2	65.4	62.9	66.8	70.8.	71.6	72.2	86.9	83.1	78.1	77.2	77.8	77.1	72.1
1-2	19.0	28.1	28.2	26.6	24.6	24.1	22.8	11.5	15.0	19.0	19.2	18.8	20.2	24.7
3-4	3.9	5.9	7.1	4.9	3.8	3.2	4.3	0.9	1.2	2.2	2.5	2.7	2.1	2.7
5+	0.9	0.5	1.8	1.6	0.8	1.1	0.6	0.7	0.6	0.7	1.0	0.7	0.6	0.5

TABLE 8
AGE AND DISPOSITION (HOME/SECURE)

	STATEWIDE	HIGH	MEDIUM	LOW
Twelve or Younger				
% Home	13.4	16.8	15.2	10.4
% Secure	4.4	8.4	3.9	3.4
13				
% Home	21.5	27.0	22.9	16.7
% Secure	9.4	12.6	10.3	6.5
14				
% Home	21.0	26.7	21.6	16.8
% Secure	11.6	16.5	12.1	8.1
15				
% Home	21.2	29.3	20.3	16.8
% Secure	12.7	19.5	12.2	8.8
16				
% Home	18.8	26.7	21.4	13.4
% Secure	11.7	15.9	14.6	7.6
17				
% Home	15.8	20.8	18.5	11.9
% Secure	11.4	14.7	13.4	8.6
18				
% Home	10.8	9.5	14.9	8.3
% Secure	9.3	8.4	13.0	6.9

removed from home is confined. For the eighteen-year-old juveniles, if a sentence is imposed, in about nine of ten cases it will be for secure confinement. The likely explanation is that for older juveniles with prior referrals, previous non-institutional placements, and only a limited time remaining within juvenile court jurisdiction, a more severe consequence is required.

7. *Offenses and Dispositions By Counsel*

Table 9 amplifies the information contained in Table 6 and provides the first assessment of the impact of counsel on delinquency dispositions. Within each offense category, Table 9 shows the disposition rates—out-of-home placement or secure confinement—for those juveniles who were represented and those who were not. Thus, Table 6 reports that for the entire state, 18.5% and 11.1% of all juveniles receive out-of-home placement and secure confinement dispositions. The same cell in Table 9 shows that youths *with counsel* are substantially more likely to receive severe dispositions than are those *without counsel*—28.1% versus 10.3% out-of-home placement

and 17.6% versus 5.2% secure confinement—nearly three times as much.

TABLE 9
REPRESENTATION BY COUNSEL AND DISPOSITION (HOME/SECURE)

	STATEWIDE		HIGH		MEDIUM		LOW	
COUNSEL:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
Overall								
% Home	28.1	10.3	25.9	12.9	29.4	10.8	30.5	9.9
% Secure	17.6	5.2	16.2	7.5	18.6	5.6	18.8	5.0
Felony Offense Against Person								
% Home	44.8	29.5	43.4	100.0[1]	49.0	28.3	37.2	29.3
% Secure	28.3	19.4	28.7	0.0	33.3	19.6	17.0	19.5
Felony Offense Against Property								
% Home	37.9	19.3	32.2	50.0[2]	40.6	17.6	41.5	20.0
% Secure	28.1	13.0	23.8	50.0	31.8	13.6	27.4	12.5
Minor Offense Against Person								
% Home	30.7	13.6	29.5	0.0	31.4	11.7	31.5	14.8
% Secure	18.0	8.5	19.9	0.0	15.5	7.2	20.5	9.3
Minor Offense Against Property								
% Home	22.8	10.2	19.5	20.0[3]	24.8	13.1	26.8	8.8
% Secure	15.7	6.5	13.6	12.0	17.3	9.2	17.7	5.4
Other Delinquency								
% Home	29.4	9.5	34.8	20.9	21.8	8.0	29.2	10.5
% Secure	18.2	4.8	20.8	14.0	13.7	3.9	19.4	5.3
Status								
% Home	24.8	8.1	25.2	9.4	23.5	9.2	26.6	7.3
% Secure	8.3	1.7	10.7	3.1	3.8	1.7	10.6	1.6

[1] Of the 123 juveniles charged with a felony offense against person, only 1 (or 0.8% of the total) was unrepresented and received an out-of-home placement.

[2] Of the 454 juveniles charged with felony offenses against property, 4 (or 0.9% of the total) were unrepresented. Two of them (or 1.8% of the total) received institutional confinement dispositions.

[3] Of the 1058 juveniles charged with minor offenses against property, only 25 (or 2.4% of the total), were unrepresented of whom 5 (or 2.4% of the total) received out of home placements.

A comparison of the two columns in the state and in the high, medium, and low representation counties at each offense level reveals that youths with lawyers consistently receive more severe dispositions than do those without attorneys. In twelve possible

comparisons—six offense categories times two dispositions—represented youths received more severe dispositions than unrepresented youth at every offense level in the state overall and in the counties with medium rates of representation, and in eleven out of twelve comparisons in the counties with low rates of representation. Although a similar pattern was revealed in the counties with high rates of representation (eight out of twelve comparisons), as the footnotes in Table 9 indicate, in several cells there were so few unrepresented youths that any out-of-home placement or secure confinement disposition produced anomalous results. Because the data reported in Table 9 control for the seriousness of the present offense, it appears that youths *with* attorneys are between two and three times more likely to receive severe dispositions than are those youths *without* counsel.

While the relationship between representation and more severe disposition is consistent, the explanation of this relationship is not readily apparent. It may be that the presence of lawyers antagonizes traditional juvenile court judges and subtly influences the eventual disposition imposed. Conversely, while not necessarily "punishing" juveniles who appear with counsel, judges may exhibit more leniency to a youth who is not represented. However, the pattern also prevails in the counties with high rates of representation where the presence of counsel is not unusual. Perhaps judges discern the eventual disposition early in the proceedings and appoint counsel more frequently when an out-of-home placement or secure confinement is anticipated. Still another possibility is that other variables beside the seriousness of the present offense may influence both the initial decision to appoint counsel as well as the ultimate disposition.

While Table 9 reports the rates of disposition for represented and unrepresented juveniles, Table 10 reports the proportions of juveniles who receive out-of-home placement and secure confinement dispositions who were represented. Thus, Table 6 reports that for the state as a whole, 18.5% and 11.1% of juveniles received out-of-home and secure confinement dispositions. Table 10 reports that of the 18.5% of juveniles who were removed from their home, 69.3% were represented and 30.7% were not. Similarly, of the 11.1% of juveniles who were incarcerated, 73.5% had counsel and 26.5% did not. In short, more than one-quarter of the juveniles in secure confinement and nearly one-third of those removed from their homes *did not* have counsel.

In light of the differences in counties with high, medium and low rates of representation as well as in rates of representation by offense (Table 3), the results reported in Table 10 follow predict-

TABLE 10
DISPOSITION (HOME/SECURE) OF JUVENILES AND REPRESENTATION BY COUNSEL

	STATEWIDE		HIGH		MEDIUM		LOW	
COUNSEL:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
OVERALL								
% Home	69.3	30.7	97.2	2.8	70.4	29.6	42.4	57.6
% Secure	73.5	26.5	97.4	2.6	74.6	25.4	47.4	52.6
Felony Offense Against Person								
% Home	83.2	16.8	98.1	1.9	88.5	11.5	59.3	40.7
% Secure	82.6	17.4	100.0	-	88.3	11.7	50.0	50.0
Felony Offense Against Property								
% Home	76.5	23.5	98.6	1.4	83.3	16.7	52.1	47.9
% Secure	78.2	21.8	98.2	1.8	83.6	16.4	53.6	46.4
Minor Offense Against Person								
% Home	77.8	22.2	100.0	-	83.3	16.7	46.0	54.0
% Secure	76.6	23.4	100.0	-	80.0	20.0	46.9	53.1
Minor Offense Against Property								
% Home	65.0	35.0	97.6	2.4	67.8	32.2	37.7	62.3
% Secure	66.5	33.5	97.9	2.1	67.8	32.2	39.5	60.5
Other Delinquency								
% Home	72.2	27.8	96.1	3.9	60.6	39.4	46.0	54.0
% Secure	76.0	24.0	95.6	4.4	66.3	33.7	53.2	46.8
Status								
% Home	55.3	44.7	96.2	3.8	48.8	51.2	27.2	72.8
% Secure	66.9	33.1	97.0	3.0	45.7	54.3	40.8	59.2

able patterns. Overall, less than 3% of unrepresented juveniles in the high representation counties were removed from their homes or incarcerated. In the medium representation counties, more than one-quarter of the juveniles, and in the low representation counties, more than half of the juveniles who were removed and incarcerated did not have counsel. Indeed, in the low representation counties, only a bare majority of the juveniles charged with felony offenses who received home removal or confinement dispositions were represented. In every other offense category, the majority of juveniles who were removed or incarcerated did not have attorneys.

Table 3 reported higher rates of representation for juveniles charged with more serious offenses. When the disposition rates are analyzed by offense, it appears that the largest proportions of un-

represented juveniles who are removed or incarcerated are those who are charged with the less serious offenses. For the state, only 17.4% of unrepresented juveniles charged with a felony offense against the person were incarcerated. By contrast, 33.5% of the juveniles charged with minor offenses against property—the most common delinquency allegation in the state—and 33.1% of unrepresented status offenders were incarcerated. Only 18.4% of Minnesota's juveniles were charged with felony offenses and the greatest concentrations of delinquents were in the minor property offense category, such as shoplifting, theft, and vandalism and status offense categories (Table 1). Juveniles charged with these offenses had lower rates of representation (Tables 3 and 4), and, as a result, these were the offense categories in which the largest proportions of unrepresented juveniles were removed from their homes and incarcerated.

These findings are especially important in light of the United States and Minnesota Supreme Courts' rulings in *Scott* and *Borst* that adult misdemeanor defendants should not be incarcerated without the assistance of counsel or a valid waiver.[176] There are many counties in the state in which half or more of the youths who are charged with seemingly minor, misdemeanor offenses are removed from their homes or incarcerated without the assistance of counsel. It is questionable whether the juvenile court judges who sentenced the young juveniles in these minor nuisance cases engaged in the type of "penetrating and comprehensive examination" that must precede a "knowing and intelligent" waiver of the right to counsel.[177]

Tables 9 and 10 report the proportions of represented and unrepresented juveniles charged with different types of offenses who received out-of-home placement and secure confinement dispositions. Table 11 reports on juveniles' dispositions when represented by different types of attorneys—private, public defender, county attorney, or none. Thus, Table 9 reports that in the state overall, of those juveniles who were represented by counsel and charged with a felony offense against the person, 44.8% and 28.3% respectively received out-of-home placement and secure confinement dispositions. Table 11 indicates that the 44.8% overall rate differs by type of attorney, with 30.3% of juveniles represented by private counsel removed from their homes as compared with 49.0% of those

176 *See Scott*, 440 U.S. at 373-74; State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967).

177 *See supra* notes 75-77 and accompanying text.

TABLE 11
TYPE OF ATTORNEY AND DISPOSITION (HOME/SECURE)

	STATEWIDE				HIGH				MEDIUM				LOW			
	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE
OVERALL																
% Home	19.5	28.8	30.0	10.3	14.5	27.3	20.8	12.9	22.9	30.9	30.4	10.8	13.6	29.4	34.9	9.9
% Secure	15.5	17.9	17.6	5.2	8.4	17.1	12.9	7.5	19.4	18.9	16.4	5.6	9.2	20.9	20.8	5.0
Felony Offense Against Person																
% Home	30.3	49.0	44.3	29.5	16.7	44.1	47.8	100.0	36.4	53.7	46.2	28.3	18.8	33.3	42.4	29.3
% Secure	25.8	34.3	17.4	19.4	16.7	31.2	21.7	0.0	31.8	36.6	19.2	19.6	12.5	33.3	15.2	19.5
Felony Offense Against Property																
% Home	30.4	40.6	36.0	19.3	12.5	36.5	21.6	50.0	35.9	43.5	36.4	17.6	18.9	48.7	44.3	20.0
% Secure	27.0	30.7	24.4	13.0	0.0	27.3	15.5	50.0	34.0	33.4	25.6	13.6	13.5	33.3	28.9	12.5
Minor Offense Against Person																
% Home	15.4	33.6	30.4	13.6	22.2	32.1	21.2	0.0	12.9	36.7	23.1	11.7	16.7	0.0	39.6	14.8
% Secure	5.8	20.2	17.9	8.5	11.1	23.1	9.1	0.0	3.2	18.7	11.5	7.2	8.3	0.0	26.4	9.3
Minor Offense Against Property																
% Home	20.2	21.9	25.7	10.2	16.0	19.9	18.1	20.0	21.7	24.7	28.9	13.1	17.5	20.8	29.7	8.8
% Secure	16.7	15.3	16.4	6.5	12.0	14.3	11.0	12.0	18.9	16.8	17.6	9.2	12.3	12.5	19.7	5.4
Other Delinquency																
% Home	11.1	33.7	28.7	9.5	13.3	37.6	21.6	20.9	12.5	25.4	23.4	8.0	7.5	40.9	35.5	10.5
% Secure	8.9	20.3	17.7	4.8	0.0	22.2	15.9	14.0	10.7	15.3	12.5	3.9	7.5	36.4	21.3	5.3
Status																
% Home	14.7	24.5	30.8	8.1	18.2	25.4	24.2	9.4	17.9	23.3	28.6	9.2	11.1	16.7	33.6	7.3
% Secure	7.4	8.1	9.8	1.7	18.2	10.5	12.1	3.1	7.7	4.0	0.0	1.7	4.4	5.6	13.6	1.6

represented by public defenders and 44.3% of those represented by court appointed lawyers.

It is difficult to assess the effectiveness of different types of attorneys because the method of delivering legal services is associated closely with counties, which in turn vary in rates of representation (Table 3) and in other dimensions. While private attorneys are a relative rarity in juvenile courts, they appear least frequently in the county courts with high rates of representation. By contrast, public defenders predominate in the counties with high and medium rates of representation—primarily urban and suburban county courts—while court appointed lawyers predominate in the rural counties with lowest rates of representation. Despite these variations in legal services systems by county rate of representation, rank ordering the different types of attorneys within an offense category by dispositions provides a crude indicator of the effectiveness of counsel.

Table 9 reported that generally smaller proportions of unrepresented juveniles than represented juveniles received the most intrusive dispositions. For the state as a whole, juveniles represented by private attorneys have the lowest rates of out-of-home placement and secure confinement dispositions of represented juveniles; those represented by court appointed attorneys have intermediate rates; and those represented by public defenders appear to have the highest rates of removal. Of course, these findings are only suggestive, because court appointed lawyers predominate in the rural counties with low rates of representation where the judges also impose less severe sentences for offenses of comparable severity (Table 6).

When the data are examined separately by county, according to the rates of representation, the pattern remains. In counties with high rates of representation, the 2.4% of juveniles who retain private counsel have the lowest rate of out-of-home placement and secure confinement of all represented juveniles. In the counties with medium rates of representation, juveniles with private counsel have the lowest rates of out-of-home placement, but the highest proportion who receive secure confinement dispositions. In the counties with low rates of representation, the 3.4% of juveniles who retain private counsel have the lowest proportions of out-of-home placement or secure confinement dispositions and enjoy a distinct advantage over their counterparts who are represented by other types of attorneys. Despite the relative success of private attorneys as compared to other types of lawyers, unrepresented juveniles in the state and in all types of counties still have lower rates of removal and confinement.

The comparative success of private attorneys in juvenile courts

is somewhat surprising. Private attorneys are not attracted to juvenile court practice for a variety of reasons.[178] As an arcane legal specialty area marked by informality and confidentiality, juvenile courts are typically closed, in-bred, and inhospitable to the occasional outsiders who invade their province. In the present study, however, this may be a blessing in disguise. A private attorney with relatively little regular involvement in juvenile court proceedings may have a smaller stake in conforming to the expectations of the court or social services personnel and thus may be more independent on behalf of his client.[179] By contrast, attorneys immersed more routinely in the juvenile justice process may be more responsive to institutional expectations and more inclined to value stable long-term relations with the court and its personnel.

Although the SJIS data do not include information on parental socioeconomic status, later analyses suggest that the presence of a private attorney may be an indirect indicator of a somewhat more

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178 *See* A. PLATT, *supra* note 13, at 163-75. The disincentives for private attorneys to represent juveniles are substantial: juveniles are not a significant source of fee-paying clients. If a private attorney is retained, most likely it will be by the child's parents, a situation which potentially puts the attorney in the middle of a conflict between the interests of the juvenile client and those of the fee-paying parent. Moreover, most juvenile courts do not give private practitioners priority on the calendar and they may have less access to court personnel than do the public lawyer regulars. Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1169-79 (1968)[hereinafter *Limits of Advocacy*]. Finally, private lawyers may be discouraged from juvenile practice because of the inherent difficulty of working with unpredictable young people and the frustration of practicing law in a highly discretionary, alegal environment. *See* Feld, *supra* note 2, at 272-75.

In light of the amorphous nature of a delinquency charge, there are few opportunities for outright "victory" and these are further diminished by the unreliability of young witnesses and the comparative credibility of adults versus juveniles. Ultimately, lawyers manipulate symbols and create an appearance of action which justifies their fees. *See* Blumberg, *supra* note 114, at 18-19. In juvenile court, there is less opportunity for that type of mystification because there are fewer rules or administrative guidelines to manipulate and less opportunity for plea and sentence bargaining than in the adult system. *See* M. BORTNER, *supra* note 59, at 46-60; R. EMERSON, *supra* note 159, at 172-216; D. MATZA, *supra* note 17, at 121-25. Finally, private attorneys, as adults, share the juvenile court's view of their clients as children, experience dilemmas when representing youngsters that do not occur when defending adults, and internalize the court's nominal commitment to the rehabilitative ideal.

179 *See* Kelley and Ramsey, *supra* note 139, at 438-39. *See also* Nardulli, *"Insider" Justice: Defense Attorneys and the Handling of Felony Cases*, 77 J. CRIM. L. & CRIMINOLGY 379, 415 (1986) (impact of different types of defense attorneys on criminal justice administration); Wheeler & Wheeler, *Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice*, 26 CRIME & DELINQ. 319, 326-27 (1980) ("[I]t appears that clients of retained and appointed attorneys have similar conviction rates but the retained attorneys' clients receive less serious dispositions. These findings indicate that type of attorney has a greater impact on sentencing than on conviction.").

affluent family background.[180] If so, then the relative success of private practitioners may be less a tribute to their legal acumen than to the parental wherewithal that led to their retention. When the parents pay the fees, a private attorney may be more responsive to their interests. In the juvenile court context, this may mean that the private attorney shares the parents' interest in seeking a disposition that will further the child's best interest. The coalition of a private attorney and parents pursuing the child's welfare may provide evidence of "family sponsorship" that justifies a more lenient disposition.[181] Thus, the variations in rates of disposition may reflect social characteristics of juveniles for which this study cannot account and for which the type of attorney is an indirect indicator.

B. Prior Referrals, Attorneys, and Dispositions

In addition to the seriousness of the present offense, a prior history of delinquency referrals effects the eventual disposition that a juvenile receives.[182] The next analyses control for the present offense and assess the relationships between prior referrals and dispositions, prior referrals and representation by counsel, and prior referrals, representation by counsel, and dispositions. A juvenile's prior record in 1986 was constructed by merging 1984, 1985, and 1986 annual data tapes and matching a youth's identification numbers across the years.[183] In these analyses, the record of prior referrals are coded as 0, 1 or 2, 3 or 4, and 5 or more. Prior referrals include only previous cases that were *formally petitioned* and does not reflect a juvenile's contacts that were referred to court but which did not result in the filing of formal charges.

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180 *See infra* notes 219-20 and accompanying text. *See also* M. Bortner, *supra* note 59, at 172-74.

181 D. Matza, *supra* note 17, at 125-28. Matza concludes that dispositional decision-making is strongly influenced by the ability of parents to supervise their child to avoid subsequent "scandal." Matza noted that:

> this initial reckoning is then importantly qualified by an assessment of the potentialities of "out-patient supervision" and the guarantee against scandal inherent in the willingness and ability of parents or surrogates to sponsor the child . . . . If the reckoning of danger [of scandal] is moderate then the decision will turn on an assessment of the presence, the amount, the quality, and the dependability of parental sponsorship . . . . [T]hose with adequate sponsorship will be rendered onto probation, and those inadequately sponsored to prison.

Id. at 125.

182 *See* Clarke & Koch, *supra* note 57, at 297; Henretta, Frazier & Bishop, *The Effects of Prior Case Outcomes on Juvenile Justice Decision-Making*, 65 Soc. Forces 554, 560 (1986).

183 *See supra* note 134. Hennepin County (Minneapolis) is the most populous county in Minnesota and processes more than one-quarter of all delinquency cases. Its computerized court processing data was integrated into the SJIS data system in 1984 thereby providing statewide totals.

1. *Prior Referrals and Dispositions*

Table 12 reports both the overall percentages of juveniles with prior records as well as the relationship between the present offense, prior referrals, and out-of-home placement and secure confinement dispositions. For the entire state, 71.9% of the youths against whom petitions were filed appeared in juvenile court for the first time. When the prior referrals in the counties with high, medium, and low representation are examined separately, however, about 10% more of the juveniles in the low representation counties were making their first appearance with correspondingly fewer recidivists than in the other types of counties. This reinforces the observation based on Table 1 that the juveniles in the low representation, predominantly rural, counties were relatively less involved in criminal activity.

Table 12 also reports the relationship between a prior record of delinquency and out-of-home placement and secure confinement dispositions. Quite clearly, both overall and within categories of offenses, a record of previously petitioned offenses substantially alters a youth's likelihood of receiving a more severe disposition. In the aggregate, each additional one or two prior referrals increases the proportion of juveniles' receiving out-of-home placements and secure confinements with the largest increase occurring between those juveniles with one or two prior referrals and those with three or four. Regardless of the nature of the present offense, by the time a juvenile appears in juvenile court on his or her third or fourth delinquency petition, more than half (52.9%) will be removed from the home and more than one-third (39.9%) will be confined.

Within each offense level, there appears to be a nearly perfect linear relationship between additional prior referrals and more severe dispositions. For example, Table 6 reports that of those juveniles who commit a felony offense against the person, 42.2% receive out-of-home placement dispositions. Table 12 shows that the 42.2% overall rate is composed of 35.7% of those with no prior referrals, 51.9% of those with one or two, 84.8% of those with three or four, and 100% of those with five or more priors. The same pattern prevails at all offense levels, prior referrals, and for both types of dispositions.

Even though there is a direct relationship between prior referrals and increasing severity of intervention in all types of counties, the juvenile court judges in the low representation counties consistently remove and confine smaller proportions of juveniles than do their counterparts in the medium and high representation counties.

TABLE 12

PRESENT OFFENSE, PRIOR RECORD, AND DISPOSITION (HOME/SECURE)

	STATEWIDE				HIGH				MEDIUM				LOW			
	0	1-2	3-4	5+	0	1-2	3-4	5+	0	1-2	3-4	5+	0	1-2	3-4	5+
PRIOR OVERALL																
%	71.9	23.0	3.9	1.2	64.0	27.7	6.0	2.2	68.9	25.3	4.6	1.2	78.3	18.8	2.2	0.7
N =	12359	3962	669	205	2274	984	214	79	4378	1610	293	74	5707	1368	162	52
DISPOSITION OVERALL																
% Home	12.4	29.5	52.9	61.6	13.8	37.5	68.3	80.5	14.6	28.1	47.8	56.8	10.1	25.4	42.2	40.4
% Secure	6.8	17.7	39.9	48.8	7.1	24.1	52.9	64.9	8.8	16.0	36.5	43.2	5.2	15.3	29.2	32.7
Felony Offense Against Person																
% Home	35.7	51.9	84.8	100.0	33.3	60.7	88.9	100.0	42.6	44.1	88.9	-	28.7	57.1	66.7	-
% Secure	22.9	33.3	60.6	100.0	16.7	50.0	77.8	100.0	31.4	25.4	61.1	-	16.0	33.3	33.3	-
Felony Offense Against Property																
% Home	21.7	46.4	76.5	72.0	16.8	55.6	83.3	85.7	26.1	46.3	83.3	90.5	19.6	41.3	62.2	33.3
% Secure	16.0	31.9	67.0	54.0	11.9	42.1	76.7	50.0	20.8	31.7	75.0	81.0	12.9	26.1	48.6	20.0
Minor Offense Against Person																
% Home	14.2	38.5	62.2	73.3	14.5	44.7	78.6	100.0	15.2	40.7	55.0	75.0	13.0	34.2	33.3	50.0
% Secure	8.0	22.6	40.5	66.7	8.2	27.8	57.1	80.0	8.5	18.5	30.0	75.0	7.3	23.3	33.3	50.0
Minor Offense Against Property																
% Home	10.4	27.3	49.0	65.2	10.5	31.3	67.3	83.3	13.9	28.2	45.1	58.8	8.4	24.0	40.0	45.5
% Secure	6.6	18.8	39.5	52.2	5.6	23.1	55.1	77.8	9.8	19.3	37.4	35.3	5.1	15.6	30.0	36.4
Other Delinquency																
% Home	12.4	31.5	46.9	55.0	19.4	45.7	70.8	68.4	10.2	22.3	30.4	33.3	11.6	27.6	26.3	55.6
% Secure	6.7	19.2	31.9	50.0	10.8	26.9	47.9	57.9	5.2	14.4	28.3	33.3	6.5	16.5	-	55.6
Status																
% Home	8.7	19.3	38.9	48.8	13.1	31.9	61.2	86.7	9.0	18.6	26.5	31.6	7.5	13.7	31.3	22.2
% Secure	1.6	5.8	23.5	30.2	2.9	12.6	42.9	66.7	1.1	3.7	10.3	10.5	1.5	5.0	21.9	11.1

This pattern, initially observed in Table 6, persists. After controlling simultaneously for the seriousness of the present offense and prior referrals, the juvenile court judges in the low representation counties generally sentence less severely.[184]

Examining the ratios of out-of-home placement to secure confinement indicates that as a juvenile accumulates prior referrals the likelihood that the eventual disposition will entail secure confinement increases. For example, for the state overall, of the juveniles with no prior referrals who were removed from their home, 54.8% received institutional commitments (6.8/12.4%). By contrast, of those with five or more priors, 79.2% were confined in secure settings (48.8/61.6%). Comparing the dispositions of juveniles making their first appearance with those of juveniles with five or more prior referrals suggests that prior referrals exert a stronger influence on the sentences received by juveniles charged with less serious offenses than those charged with more serious offenses.

Table 12 provides a strong indicator that despite the juvenile court's nominal commitment to individualized sentencing, the judges have reintroduced *de facto* the principle of offense as a dispositional guideline. The seriousness of the present offense and the length of the prior record both exert substantial influences on a youth's eventual disposition. These are also the primary factors included in the Minnesota Adult Sentencing Guidelines.[185]

2. *Prior Referrals and Rates of Representation*

Tables 3 and 4 report that for the state as a whole, 45.3% of juveniles were represented. In the counties with high, medium, and low rates of representation, the rates were 94.5%, 46.8%, and 19.3% respectively. The aggregate rates and the rates for the different offenses are the composites for all juveniles. Table 13 shows, overall and within each offense level, the relationship between prior delinquency referrals and representation.

There is a direct relationship between additional prior referrals and increased rates of representation. For example, while, for the state as a whole, the rate of representation is 45.3%, only 39.3% of juveniles appearing for the first time have counsel, as contrasted with 57.8% of those with one or two prior referrals, 74.0% of those with three or four, and 80.8% of those with five or more prior refer-

184 Juvenile court judges' dispositions may also reflect budgetary considerations, because the costs of placements are borne by the welfare funds of the county. *See* MINN. STAT. ANN. § 260.251 (West 1986). In rural counties, with small populations and tax bases, extensive and therefore expensive intervention simply may be fiscally prohibitive.

185 *See* MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 103.

TABLE 13
RATES OF REPRESENTATION AND PRIOR REFERRALS

	STATEWIDE				HIGH				MEDIUM				LOW			
PRIORS:	0	1-2	3-4	5+	0	1-2	3-4	5+	0	1-2	3-4	5+	0	1-2	3-4	5+
OVERALL % COUNSEL	39.3	57.8	74.0	80.8	93.5	95.6	97.0	100.0	40.7	57.7	72.4	75.4	16.1	29.0	43.8	57.1
Felony Offense Against Person %	75.5	80.3	89.7	100.0	97.4	97.3	100.0	100.0	79.5	84.5	93.8	-	55.6	61.7	50.0	-
Felony Offense Against Property %	57.6	72.9	77.6	85.7	97.9	100.0	93.1	100.0	62.7	78.9	82.5	93.8	31.2	49.1	60.5	64.7
Minor Offense Against Person %	57.2	71.0	89.5	71.4	95.2	98.4	100.0	100.0	60.3	77.1	85.7	75.0	26.6	39.4	66.7	40.0
Minor Offense Against Property %	38.9	57.6	75.9	83.0	96.9	97.7	97.9	100.0	44.8	64.9	83.5	77.8	12.8	25.1	40.8	63.6
Other Delinquency %	37.3	60.3	73.8	89.2	89.0	93.2	98.0	100.0	30.3	44.7	55.0	77.8	19.0	29.0	38.5	71.4
Status %	23.6	40.1	62.5	69.0	87.3	90.9	96.0	100.0	20.2	39.2	53.0	55.6	8.0	14.2	25.0	37.5

rals. The relationship between prior referrals and rates of representation prevails at all offense levels and in all types of counties. The minor deviations that occur only appear for those juveniles with five or more referrals and can be attributed to the diminishing numbers in those cells. The relationship between prior referrals and appointment of counsel occurs even in the high representation counties where there is very little overall variation in rates of representation. Because larger proportions of juveniles charged with serious offenses are represented in all types of counties, the influence of priors on rates of representation appears to be stronger for youths charged with less serious types of offenses.

The findings in Tables 12 and 13 also implicate the United States and Minnesota Supreme Courts' rulings in *Baldasar* and *Edmison* that prohibit the use of prior uncounselled convictions to enhance subsequent sentences.[186] Overall, more than half the juveniles in the state are unrepresented. If, as Table 13 indicates, even lower proportions of first-offenders are represented by counsel, then many of those who are sentenced subsequently as repeat offenders have had their dispositions based, at least in part, on uncounselled prior convictions. Because the use of prior uncounselled convictions at later sentencing is prohibited for adults, one can only speculate about juvenile court judges' apparent heavy reliance on uncounselled prior adjudications as a major determinant of many juveniles' subsequent sentences.

3. Dispositions by Attorneys by Priors

Tables 12 and 13 show that a record of prior referrals is associated with receiving more severe dispositions as well as with a greater likelihood of having an attorney. Table 14 examines the relationship between prior referrals and receiving an out-of-home placement or secure confinement disposition when an attorney is present or absent. The row percentages within offense categories, dispositions, and prior referrals are those for youths receiving an out-of-home placement or secure confinement disposition when an attorney is present and when one is not.

As can be seen by row comparisons at each offense level and type of disposition across priors, youths with attorneys are more likely to receive out-of-home placement and secure confinement dispositions than are those without counsel. In Table 14, which controls for the seriousness of the present offense and the prior record

186 *See* Baldasar v. Illinois, 446 U.S. 222, 227 (1980); State v. Edmison, 379 N.W.2d 85, 87 (Minn. 1985).

TABLE 14
DISPOSITIONS (HOME/SECURE) BY ATTORNEY BY PRIORS

		STATEWIDE				HIGH				MEDIUM				LOW			
PRIORS:		0	1-2	3-4	5+	0	1-2	3-4	5+	0	1-2	3-4	5+	0	1-2	3-4	5+
	ATTORNEY																
Felony Offense Against Person																	
Home	Yes	39.5	49.5	84.0	100.0	32.9	59.3	87.5	100.0	47.1	42.9	86.7	30.9	32.4	52.4	50.0	-
	No	23.1	54.5	66.7	-	100.0*	-	-	-	24.3	37.5	100.0*	14.6	21.2	64.3	50.0	-
Secure	Yes	24.3	32.0	56.0	100.0	16.5	48.1	75.0	100.0	35.0	22.4	53.3	-	12.7	33.3	-	-
	No	15.4	31.8	66.7	-	-	-	-	-	16.2	25.0	100.0*	-	15.2	35.7	50.0	-
Felony Offense Against Property																	
Home	Yes	25.2	53.4	76.9	75.0	16.2	54.5	83.3	85.7	30.9	49.4	82.4	85.7	28.8	59.6	60.0	37.5
	No	15.2	27.7	68.2	42.9	-	-	100.0	-	14.6	21.7	71.4	100.0*	15.5	30.3	61.5	33.3
Secure	Yes	18.9	37.2	66.7	55.6	11.0	41.3	75.0	50.0	25.5	33.9	70.6	78.6	18.3	38.2	50.0	25.0
	No	10.4	16.8	54.5	28.6	-	-	100.0	-	11.0	15.2	71.4	100.0*	10.1	17.4	38.5	16.7
Minor Offense Against Person																	
Home	Yes	19.4	41.5	65.6	90.0	14.0	42.0	78.6	100.0	21.9	41.7	62.5	66.7	25.0	40.0	-	100.0
	No	7.5	31.7	50.0	50.0	-	-	-	-	5.7	31.6	33.3	100.0*	8.8	31.7	100.0*	33.3
Secure	Yes	11.1	22.2	40.6	80.0	8.4	28.0	57.1	80.0	11.7	16.7	31.3	66.7	15.9	24.0	-	100.0
	No	3.5	21.7	50.0	50.0	-	-	-	-	3.4	15.8	33.3	100.0*	3.6	24.4	100.0*	33.3
Minor Offense Against Property																	
Home	Yes	14.8	32.8	50.7	68.4	10.7	31.2	68.9	83.3	18.1	31.3	41.7	61.5	19.5	40.0	42.9	42.9
	No	7.5	20.1	37.8	50.0	5.3	60.0	100.0*	-	10.0	22.6	50.0	50.0	6.6	18.3	30.0	50.0
Secure	Yes	9.1	23.8	39.1	57.9	5.7	23.6	57.8	77.8	12.4	21.5	33.3	38.5	11.7	30.0	19.0	42.9
	No	4.9	11.7	33.3	25.0	5.3	20.0	100.0*	-	7.2	14.4	42.9	25.0	4.1	10.3	26.7	25.0
Other Delinquency																	
Home	Yes	20.2	39.3	59.0	55.9	20.1	46.0	73.9	68.4	18.7	25.0	42.3	37.5	24.2	45.7	16.7	42.9
	No	6.8	20.1	14.8	50.0	10.7	40.0	-	-	5.7	17.0	10.5	-	7.9	21.8	25.0	100.0
Secure	Yes	11.6	23.5	42.3	50.0	10.9	26.5	50.0	57.9	10.3	14.8	38.5	37.5	15.3	32.6	-	42.9
	No	3.1	11.5	7.4	50.0	7.1	26.7	-	-	2.1	10.5	10.5	-	3.9	10.9	-	100.0
Status																	
Home	Yes	17.3	30.0	53.4	64.3	14.0	35.2	65.2	86.7	19.2	25.6	34.3	40.0	23.9	27.3	71.4	33.3
	No	6.5	13.8	19.2	14.3	8.0	15.4	-	-	7.2	14.5	19.4	12.5	6.1	13.0	20.0	16.7
Secure	Yes	3.2	10.6	30.7	42.9	2.8	14.5	45.7	66.7	1.4	4.9	8.6	20.0	6.7	18.2	42.9	-
	No	1.1	2.8	13.5	7.1	4.0	-	-	-	1.1	2.3	12.9	-	1.0	3.3	15.0	16.7

* There was only (1) unrepresented juvenile in this cell.

simultaneously, larger proportions of youths with lawyers receive out-of-home placements and secure confinement than do those without counsel. For the state as a whole, with fourty-eight possible comparisons—six categories of offenses times two types of dispositions times four degrees of priors—represented youths received more severe dispositions in forty-four instances, or 93.3% of the cases.

When the effects of representation are analyzed separately in the counties with high, medium, and low rates of representation, the same pattern prevails—represented youths consistently fare worse than unrepresented ones. In the counties with high rates of representation, one would expect very little variation in dispositions because nearly all juveniles had attorneys and virtually no unrepresented youths were removed or confined. Of the fourty-eight comparisons, there were only seven instances in which a larger proportion of unrepresented juveniles received more severe dispositions than their represented counterparts. Further, as Table 14 indicates, in five of those seven instances, only one unrepresented juvenile in the comparison cell received an out-of-home or secure disposition. What is especially impressive about the dispositional practices in the high representation counties is the extremely low percentages and absolute numbers of juveniles who were removed from their homes or confined without the assistance of counsel (see Table 10).

The same pattern of represented youths receiving more severe sentences than unrepresented youths prevailed in the medium and low representation counties as well. In the medium rate counties, in thirty-six of forty-eight comparisons, or 75% of the cases, represented juveniles fared worse. Further, in five of the twelve comparisons in which larger proportions of unrepresented juveniles received more severe sentences, there was only one case in the unrepresented cell. In the low rate counties, the pattern was somewhat less strong, probably because there were proportionally so few represented juveniles, only 19.3% of the total. Even so, there were only fifteen comparisons in which unrepresented juveniles received more severe sentences, and in four of those instances, there were no represented juveniles in the comparison cell.

Thus, for juveniles in Minnesota, the presence of an attorney seems to be an aggravating factor at sentencing after controlling for the seriousness of the present offense and prior record. Both in the state as a whole, as well as in the counties with high, medium and low rates of representation, the same pattern prevails: larger proportions of represented juveniles than unrepresented youths re-

ceived severe dispositions. Since many of the deviations from this pattern are the result of small numbers—only one juvenile in the unrepresented comparison cell—the apparently adverse impact of counsel probably is even stronger.

Although a lengthy prior record increases both the likelihood of representation and probability of receiving a severe disposition, the absence of counsel by no means protects a juvenile from harsh dispositions. While larger proportions of represented youths may be removed from their homes or confined, a substantial proportion of unrepresented juveniles, including many with extensive records of delinquency, are also removed or confined (Tables 12 and 13). Since *Argersinger*, *Scott*, and *Borst* alerted trial judges to the need to appoint counsel when incarceration is anticipated, it is difficult to explain why so many youths charged with a serious present offenses and with extensive prior records appear in court without counsel when a severe sentence appears so likely.

While the relationship between representation and more severe dispositions is consistent in the state and in the different types of counties, the explanation of this relationship is not readily apparent. Perhaps still other variables besides the seriousness of the present offense and the length of the prior record influence both the initial appointment of counsel and the eventual disposition.

C. PRETRIAL DETENTION, ATTORNEYS, AND DISPOSITIONS

Several studies have examined the determinants of detention and the relationship between a child's pretrial detention status and subsequent disposition.[187] These studies report that while several of the same variables affect both rates of detention and subsequent disposition, after appropriate controls, detention *per se* exhibits an independent effect on dispositions.[188] It may be, therefore, that the

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[187] *See* Clarke & Koch, *supra* note 57; Frazier & Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Dispositions*, 76 J. CRIM. L. & CRIMINOLOGY 1132 (1985); Krisberg & Schwartz, *Rethinking Juvenile Justice*, 29 CRIME & DELINQ. 333 (1983); McCarthy, *Preventive Detention and Pretrial Custody in the Juvenile Court*, 15 J. CRIM. JUST. 185 (1987).

[188] Clarke and Koch note that:

> [after controlling for the effects of present offense and prior record,] the commitment rate remained much greater for children held in detention, except at the highest level of record and offense seriousness . . . . We conclude that being detained before adjudication had an independent effect on the likelihood of commitment, entirely apart from the fact that both detention and commitment had some common causal antecedents.

Clarke & Koch, *supra* note 57, at 294. Professors Clarke and Koch suggest that the independent effects of detention on rates of adjudication and commitment stem from the fact that "[t]he child's ability to defend himself may have been impaired by detention, either *because he was prejudged by the same court that later decided his case*, or because it was

apparent relationship between representation by counsel and more severe dispositions is influenced by differences in rates of pretrial detention. The next set of analyses, therefore, examine the relationships between detention and offenses, detention and counsel, detention and dispositions, and detention, counsel, and dispositions.

1. Detention by Offense

Table 15 shows the overall numbers and percentages of juveniles against whom petitions were filed and who were detained. It also shows the rates of pretrial detention by present offense category and the number of prior referrals. Detention, as used here, refers to a juvenile's custody status following arrest or referral but prior to formal court action—adjudication or disposition. Detention, as distinguished from shelter care, connotes a physically restricting facility which may include a county or regional detention center, state institution, or adult jail.[189] The Minnesota detention statutes and Juvenile Court Rules governing detention procedures authorize pretrial preventive detention if "the child would endanger self or others, not return for a court hearing, nor remain in the care or control of the person to whose lawful custody the child is released, or that the child's health or welfare would be immediately endangered."[190] The specific offense that a juvenile allegedly committed is not an explicit statutory criterion for detention except in-

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harder for him to talk to his lawyer and otherwise prepare his defense." *Id.* at 295 (emphasis added).

189 *See* MINN. STAT. ANN. § 260.015(16)-(17) (West 1986); Schwartz, Harris & Levi, *The Jailing of Juveniles in Minnesota: A Case Study*, 34 CRIME & DELINQ. 133 (1988).

190 MINN. STAT. ANN. § 260.171(1). *See* MINN. STAT. ANN. § 260.172(1) (West 1986); MINN. R. P. JUV. CT. 18.02(2)(A)(i), 18.06(5)(b)(i), 18.09(2)(D)(i). *See generally* Feld, *supra* note 2, at 191-209. Professor Feld has criticized the Minnesota juvenile detention statute extensively:

> In Minnesota, the detaining court need only find "probable cause that . . . others would be *endangered* if [the defendant were] released," and eligibility for detention is neither limited to the type of crime charged nor based on an examination of the accused's individual circumstances. Although continued detention is authorized based on an individual judge's conclusion that the community would be "endangered" by a youth's release, "endangerment" is not statutorily defined or circumscribed. The Minnesota rule lacks even the New York statutory requirement [upheld in *Schall v. Martin*] that the risk be that of "an act which if committed by an adult would constitute a crime." Furthermore, as distinguished from the "substantial probability" of "dangerous crimes" requirement in *Edwards*, Minnesota requires only a finding of probable cause that a youth committed a delinquent act, which can include a violation of "any state or local law" as well as of many ordinances. Presumably, every juvenile court judge in the state may apply this same lower standard of proof on any individual, idiosyncratic basis with virtually no means of effective appellate supervision.

Id. at 206-07.

TABLE 15
OFFENSE AND DETENTION

	STATEWIDE	HIGH	MEDIUM	LOW
OVERALL				
% DETENTION	7.6	6.7	12.2	4.0
N =	1309	239	775	295
Felony Offense Against Person				
%	24.3	20.7	35.1	14.0
N =	165	35	97	33
Felony Offense Against Property				
%	12.3	5.5	20.5	8.0
N =	305	30	198	77
Minor Offense Against Person				
%	11.4	6.4	19.8	5.5
N =	101	15	69	17
Minor Offense Against Property				
%	6.0	3.5	12.5	2.6
N =	332	40	224	68
Other Delinquency				
%	6.1	7.6	6.8	3.9
N =	173	54	84	35
Status				
%	4.8	8.7	5.8	2.6
N =	221	64	99	58
DETENTION and PRIORS				
0	5.5	4.7	8.9	3.3
1-2	11.3	9.3	16.9	6.2
3-4	19.9	12.6	30.0	11.1
5+	20.5	16.5	33.8	7.7

sofar as a juvenile court judge views it as evidence of "endangering" others.

While Minnesota appears to have a low overall rate of pretrial detention,[191] only 7.6%, the SJIS uses a very restrictive definition of "detention." Juveniles in Minnesota are coded as detained only if a detention hearing is held within thirty-six hours—about two court days—after the juvenile was placed in custody.[192] Many more juveniles who are detained briefly pending the arrival of their par-

[191] In 1984, the Minnesota rate of pretrial detention was 9.4%, the lowest in a six state comparison. *See* Feld, *In re Gault Revisited*, *supra* note 10, at 409-11, Table 5.

[192] *See generally* MINN. STAT. ANN. §§ 260.171(1), 260.172(1) (West 1986), MINN. R. P. JUV. CT. 18; Feld, *supra* note 2, at 191-209. Because the detention statute excludes weekends and holidays from the 36-hour time limit, a child taken into custody on a Friday could be held for four days or more prior to a detention hearing.

ents or released within one or two days but prior to a detention hearing are not counted as detained.

The use of pretrial detention follows a similar pattern in the state as a whole as well as in the counties classified on the basis of rates of representation. While only a small proportion of all juveniles in the state receive a detention hearing (7.6%), the seriousness of the present offense and the length of the prior record both appear to alter substantially a youth's likelihood of being detained.[193] For the entire state, nearly one-quarter of youths charged with a felony offense against the person are detained. Juveniles charged with felony offenses against property in addition to those charged with minor offenses against the person also have higher than baseline rates of detention.[194] While there is some relationship among the seriousness of the offense, prior referrals, and rates of detention, it does not appear to be a strong one. Even when youths are charged with the most serious offenses, the vast majority are not detained.

When the data are examined separately for counties with high, medium, and low rates of representation, similar patterns emerge. Youths charged with felony offenses, offenses against the person, and those with lengthier prior records are consistently detained at higher rates than their less delinquent counterparts. While the pattern is the same, the overall use of detention differs substantially. Detention is used most heavily in the counties with medium rates of representation in which Hennepin County predominates. By contrast, the counties with low rates of representation employ pretrial detention far less often. Their rates of detention are typically only

193 The significance of a prior record for the detention decision has been noted in several studies. *See* Bailey, *Preadjudicatory Detention in a Large Metropolitan Juvenile Court*, 5 LAW & HUM. BEHAV. 19 (1981) (a youth's previous court experience was found to be an important predictor of detention); Cohen & Kluegel, *The Detention Decision: A Study of the Impact of Social Characteristics and Legal Factors in Two Metropolitan Juvenile Courts*, 58 SOC. FORCES 146 (1979) (prior record is a major determinant of detention); McCarthy, *supra* note 187 (youths detained to protect the community are more dangerous than other offenders).

194 The bivariate analyses presented here suggest a greater degree of "legal rationality" than do other studies which report insignificant relationships between legal variables and detention decisions. *See, e.g.*, R. COATES, A. MILLER & L. OHLIN, DIVERSITY IN A YOUTH CORRECTIONAL SYSTEM 65-67, 101-04 (1978) (current offense, offense history, and prior experience in youth corrections do not appear to be strongly related to the detention decision); Clarke & Koch, *supra* note 57, at 293-94 (initial detention decision is not based on offense criteria or other rational factors); Frazier & Bishop, *supra* note 187, at 1143 ("[N]either legal variables nor sociodemographic characteristics can predict the probability of being detained."). However, the regression analyses of the detention decisions, *infra* Tables 43-46, are much more consistent with the other research that suggests that there is no apparent rationale for the initial decision to detain a juvenile.

one-third to one-half of those in the medium representation counties. The most likely explanation for differences in overall rates of detention is the availability of detention facilities. There is substantial evidence that the primary determinant of rates of detention in a state or county is the availability of detention bed space.[195]

2. *Pretrial Detention and Representation by Counsel*

Table 16 examines the relationship between juveniles' detention status and rates of representation by counsel. Detention, particularly if it continues for more than a day and results in a hearing, is a legally significant juvenile court intervention which also requires the assistance of counsel.[196] Every jurisdiction provides for a prompt detention hearing to determine the existence of probable cause, the presence of substantive grounds for detention, and the child's custody status pending trial.

TABLE 16
PRETRIAL DETENTION AND REPRESENTATION BY COUNSEL

	STATEWIDE		HIGH		MEDIUM		LOW	
DETENTION:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
OVERALL % COUNSEL	75.4	43.0	96.0	94.4	73.7	43.4	60.6	17.8
Felony Offense Against Person	87.2	74.5	96.9	97.7	86.7	79.0	76.9	54.0
Felony Offense Against Property	82.0	60.8	100.0	98.2	84.2	65.0	68.9	35.0
Minor Offense Against Person	77.5	60.6	100.0	96.2	73.0	64.6	75.0	28.5
Minor Offense Against Property	72.3	42.9	97.4	97.2	71.9	49.6	55.8	14.9
Other Delinquency	76.1	43.2	91.8	91.5	66.7	32.8	70.4	19.7
Status	62.3	27.2	95.3	88.4	53.3	25.5	37.3	8.6

195 A penological paraphrase of Parkinson's Law is that "bodies expand to fill the bedspace allotted." *See* Bookin-Weiner, *Assuming Responsibility: Legalizing Preadjudicatory Juvenile Detention*, 30 CRIME & DELINQ. 39 (1984); Kramer & Steffensmeier, *The Differential Detention/Jailing of Juveniles: A Comparison of Detention and Non-Detention Courts*, 5 PEPPERDINE L. REV. 795 (1978); Krisberg & Schwartz, *supra* note 187; Lerman, *Discussion of Differential Selection of Juveniles for Detention*, 14 J. RES. CRIME & DELINQ. 166 (1977); Pawlak, *Differential Selection of Juveniles for Detention*, 14 J. RES. CRIME & DELINQ. 152 (1977). Frazier and Bishop summarize these studies, noting that "a juvenile's detention status may be based on illegitimate factors such as the organization of the decision-making process or the philosophies of justice held by officials." Frazier & Bishop, *Pretrial Detention*, *supra* note 187, at 1136.

196 *See* Schall v. Martin, 467 U.S. 253, 275-77 (1984); Feld, *Criminalizing Juvenile Justice*, *supra* note 2, at 191-209.

Table 16 reports the rates of representation overall and at each offense level for juveniles who were detained and for those who were not. While only 45.3% of juveniles in the state were represented (Table 3), the rate of representation for the 7.6% who were detained was 75.4%, as contrasted with 43.0% for those who remained at liberty. Similarly, 77.3% of all juveniles charged with a felony offense against the person were represented (Table 3) and nearly a quarter of them were detained (Table 15). Of those who were detained, 87.2% were represented, as contrasted with 74.5% of those who were not detained. A comparison of the two columns for the state as a whole and for the counties grouped by rates of representation reveals a very consistent pattern—youths who were held in detention had substantially higher rates of representation than did juveniles who were not (compare Table 3 with Table 16). While there is virtually no difference between detained and non-detained youths in the counties with high rates of representation, in the other types of counties as well as for the state as a whole, the differences in rates are considerable, especially as the seriousness of the offense decreases. While a majority of all the juveniles charged with minor offenses against property, other delinquency, and status offenses are unrepresented (Table 3), the situation is reversed for the small group who are held in detention. In the low representation counties, where only 19.3% of all juveniles have counsel, for the 4.0% of youths who are detained, more than 60% are represented.

Comparing the overall rates of representation at different offense levels (Tables 3) with the rates of representation for detained youths (Table 16) shows that detention provides a significant additional impetus for the appointment of counsel, particularly for less serious offenders. For example, while only 15.8% of juveniles in low representation counties charged with a minor offense against property have counsel (Table 3), 55.8% of those held in detention do have counsel.

3. Detention and Dispositions

Several studies that examined the determinants of detention and the relationship between pretrial detention and subsequent dispositions report that while the two decisions share common variables, detention appears to exhibit an independent effect on the severity of dispositions.[197] Table 17 shows the relationship between a youth's present offense, detention status, and eventual disposition.

[197] *See supra* notes 187, 193 and accompanying text.

TABLE 17
IMPACT OF PRETRIAL DETENTION ON DISPOSITION (HOME/SECURE)

	STATEWIDE		HIGH		MEDIUM		LOW	
DETENTION:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
OVERALL								
% Home	57.3	15.3	56.7	22.8	56.6	15.0	59.7	12.0
% Secure	35.3	9.1	32.0	14.6	35.7	9.0	36.6	6.6
Felony Offense Against Person								
% Home	65.2	35.0	62.5	40.0	61.5	37.9	80.8	29.1
% Secure	46.1	21.7	41.7	26.7	48.4	23.6	42.3	16.9
Felony Offense Against Property								
% Home	71.0	26.8	85.7	30.7	69.9	26.9	69.0	24.3
% Secure	53.3	19.5	57.1	23.5	53.4	21.2	51.7	15.6
Minor Offense Against Person								
% Home	54.2	19.8	64.3	26.6	48.5	18.6	68.8	16.6
% Secure	32.3	12.0	35.7	18.3	30.3	8.7	37.5	11.2
Minor Offense Against Property								
% Home	53.4	13.6	60.5	17.8	49.3	15.4	63.5	10.7
% Secure	33.9	9.4	36.8	12.5	30.3	11.6	44.4	6.7
Other Delinquency								
% Home	59.7	15.9	60.0	31.3	58.6	10.3	61.5	12.4
% Secure	36.4	9.4	36.4	19.0	36.4	6.1	36.5	7.0
Status								
% Home	47.9	10.6	51.7	20.4	49.0	10.2	42.1	8.0
% Secure	11.4	3.1	17.2	9.0	6.3	2.0	14.0	2.1

It reports the percentages of youths within each offense category who were detained and who were not detained who received out-of-home placement and secure confinement dispositions.

Again, the results are remarkably consistent; in the state as a whole, in the counties grouped by rates of representation, and at every offense level, substantially larger proportions of youths who were detained received more severe dispositions than did those who were not detained. When compared with the overall disposition rates by offense (Table 6), detained youths were about three times more likely to receive severe dispositions than their counterparts who were not held in detention. Again, while 18.5% of all juveniles were removed from their homes (Table 6), 57.3% of detained juveniles were removed as contrasted with 15.3% of those who were not detained. In part, the differences in rates of dispositions may

reflect the somewhat larger proportion of juveniles with prior records being held in pretrial detention.[198] This suggests that similar factors influence both the initial detention decision and the ultimate disposition as well. However, when one compares the relationship between present offense and disposition (Table 6) with the relationship between offense/detention and disposition (Table 17), it is apparent that detained youths are substantially more at risk of receiving out-of-home placement and secure confinement dispositions than are non-detained youths. While pretrial detention increases a youth's probability of receiving more severe dispositions, the impact of detention on dispositions increases as the seriousness of the offense declines (compare Table 6 with Table 17).

4. Representation by Counsel of Detained Juveniles and Disposition

Table 15 reported the percentages of youths who were detained at each offense level. Table 16 examined the relationship between detention status and representation and reported that detention substantially increased the likelihood of representation. Table 17 examined the relationship between detention status and disposition and showed that detention increased the likelihood of a youth receiving more severe dispositions. Table 18 reports the relationship between offense and disposition of detained youths when youths are represented by counsel and when they are not, to investigate whether the presence of counsel affects their sentence.

Even though pretrial detention increases the likelihood that a youth will have counsel (Table 16), Table 18 indicates that a detained youth who is represented by counsel remains more likely to receive a severe disposition than a detained youth who is not represented. For the state as a whole, out of twelve comparisons—six offenses times two dispositions—larger proportions of detained juveniles who were represented received more severe dispositions in ten instances. In the counties with high rates of representation, the represented/detained youths received more severe dispositions simply because there were so few cases of unrepresented detained juveniles (Table 9). In the counties with medium rates of representation, in 75% of the comparisons, detained juveniles with lawyers received more severe sentences than did their unrepresented counterparts, as was also the case in 62.5% of the counties with low rates or representation. When the focus is only on the most severe disposition—secure confinement—larger proportions of detained juveniles with lawyers than those without lawyers were institutional-

198 *Compare* Table 12 (overall priors) *with* Table 15 (detention of juveniles with priors).

TABLE 18
REPRESENTATION OF DETAINED JUVENILES AND DISPOSITION (HOME/SECURE)

	STATEWIDE		HIGH		MEDIUM		LOW	
ATTORNEY:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
Felony Offense Against Person								
% Home	64.8	53.3	59.1	-	63.2	40.0	80.0	80.0
% Secure	43.8	40.0	36.4	-	48.5	30.0	33.3	60.0
Felony Offense Against Property								
% Home	70.0	59.4	83.4	-	68.3	52.2	69.7	70.5
% Secure	52.2	43.2	55.6	-	51.2	43.5	54.5	42.9
Minor Offense Against Person								
% Home	57.1	45.0	58.3	-	51.1	41.1	87.5	66.6
% Secure	31.7	25.0	33.3	-	30.2	23.5	37.5	33.3
Minor Offense Against Property								
% Home	51.7	59.0	60.0	100.0*	47.9	50.0	60.0	84.2
% Secure	34.3	29.5	37.1	-	29.7	25.9	53.3	42.1
Other Delinquency								
% Home	56.2	59.5	66.7	20.0	50.0	61.6	51.6	72.7
% Secure	35.4	26.2	37.8	20.0	29.6	30.8	41.9	18.2
Status								
% Home	55.8	35.5	52.7	33.3	56.3	38.1	64.7	32.4
% Secure	13.3	8.9	18.2	-	4.2	7.1	23.5	11.8

* There was only one (1) unrepresented juvenile in this cell.

ized in twenty-two out of the twenty-four comparisons. Thus, the presence of counsel appears to be an "aggravating" factor in the sentencing of detained youths, although it may also reflect the influence of other factors, such as prior record, which influence both the initial detention decision, rates of representation, and the ultimate disposition.

The data in Table 18 also reinforce the findings reported in Table 9; in the counties with high rates of representation, there was very little detention, removal from home, or incarceration of unrepresented juveniles. By contrast, even allowing for the "aggravating" effect of counsel, substantial proportions of youths in the other counties in Minnesota were being detained and removed from their homes or incarcerated without the assistance of counsel.

D. DEMOGRAPHIC CHARACTERISTICS—RACE AND SEX—AND RATES OF REPRESENTATION

Thus far, the analyses have focused on the relationships between three legal variables—present offense, prior record, and pretrial detention—and rates of representation and dispositions. Many sentencing studies also examine the effects of demographic variables, such as sex and race, on juvenile justice administration.

1. Race, Representation, and Sentencing

The wide frame of relevance associated with individualized justice raises concerns about the impact of discretionary decision-making on lower class and nonwhite youths who are frequently overrepresented in the juvenile justice system.[199] When practitioners of "individualized justice" base discretionary judgments on social characteristics which indirectly mirror race, rather than on legal variables, their decisions frequently redound to the disadvantage of the poor and minorities and raise issues of fairness, equality, and justice.[200] Their decisions may result in differential processing and more severe sentencing of minority youths relative to whites.[201]

An alternative explanation of the disproportionate overrepre-

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199 *See* Dannefer & Schutt, *Race and Juvenile Justice Processing in Court and Police Agencies*, 87 AM. J. SOC. 1113 (1982); Fagan, Slaughter & Hartstone, *supra* note 158, at 229-30; Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173, 179 (1987); McCarthy & Smith, *supra* note 158, at 63-65; Thornberry, *supra* note 162, at 168.

200 Feld, *Reference of Juvenile Offenders*, *supra* note 32, at 591. Thornberry also noted that:

> [s]uch a finding [of discrimination] would raise questions about the ability of the American criminal justice system to dispense fair and equitable justice for all. In turn, that unfairness would raise questions about the ability of correctional institutions to rehabilitate offenders who doubt the legitimacy of the system because of its perceived bias.

Thornberry, *supra* note 162, at 164. *See* Chiricos, Jackson, & Waldo, *Inequality in the Imposition of a Criminal Label*, 19 SOC. PROBS. 553, 556 (1972); Green, *Race, Social Status, and Criminal Arrest*, 35 AM. SOC. REV. 476, 481 (1970). *See generally* AMERICAN FRIENDS SERVICE COMM., STRUGGLE FOR JUSTICE (1971). Some research reassessing earlier studies which found racial differentials in sentencing practices reports "clear and consistent evidence of a racial differential operating at each decision level. Moreover, the differentials operate continuously over various decision levels to produce a substantial accumulative racial differential which transforms a more or less heterogeneous racial arrest population into a homogeneous institutionalized black population." Liska & Tausig, *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decision-Making for Juveniles*, 20 Soc. Q. 197, 205 (1979). *See* McCarthy & Smith, *supra* note 158, at 56-61; Thornberry, *Sentencing Disparities in the Juvenile Justice System*, 70 J. CRIM. L. & CRIMINOLOGY 164, 168 (1979)[hereinafter *Sentencing Disparities*].

201 *See* Fagan, Slaughter & Hartstone, *supra* note 158, at 231-34; Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *supra* note 199, at 179; McCarthy & Smith, *Conceptualization of Discrimination*, *supra* note 158, at 56-61.

sentation of minorities in the juvenile justice process is that despite the juvenile system's nominal commitment to individualized justice, dispositional decisions are based on the principle of offense rather than on an assessment of individual needs. In that case, the overrepresentation of minority and lower class youths in the juvenile system may be a function of differences in rates of delinquent activity by these youths rather than discrimination by decision-makers.[202]

Recent research notes some racial differences in the sentencing of juveniles which cannot be accounted for by the legal variables.[203] Two general findings emerge from this research. The first is that the principle of offense accounts for most of the variance in dispositions that can be explained.[204] The second is that after controlling for present offense and prior record, discretionary individualization may be synonymous with racial discrimination. These studies report that minority or lower class youths receive more severe dispositions than do white youths after controlling for legally relevant variables.[205] McCarthy and Smith report that while screening, deten-

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202 M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972), note that "official delinquents," those whose contacts with law enforcement personnel resulted in official records, are disproportionately concentrated in poor and minority communities and that in every socioeconomic category, black youths engaged in delinquency to a greater extent than their white counterparts. *Id.* at 135-40. *See also* Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93 (1978) (racial differentials in criminal justice system may reflect real differences in behavior rather than effects of discriminatory decision-making). However, Huizinga & Elliot, *Juvenile Offenders: Prevalence, Offender Incidence, and Arrest Rates by Race*, 33 CRIME & DELINQ. 206 (1987), conclude that:

> it does not appear that differences in incarceration rates between racial groups can be explained by differences in the proportions of persons of each racial group that engage in delinquent behavior. Even if the slightly higher rates for more serious offenses among minorities were given more importance than is statistically indicated, the relative proportions of Whites and minorities involved in delinquent behavior could not account for the observed differences in incarceration rates.

Id. at 212. *See also* Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *supra* note 199, at 196 ("[D]ifferences in incarceration rates by race cannot be explained by the proportions of each racial group that engage in delinquent behavior.").

203 *See* Fagan, Slaughter & Hartstone, *supra* note 158, at 241-46; Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *supra* note 199, at 181; McCarthy & Smith, *supra* note 158, at 55-58.

204 *See* McCarthy & Smith, *supra* note 158, at 55; Terry, *Discrimination in the Handling of Juvenile Offenders by Social Control Agencies*, 4 J. RES. CRIME & DELINQ. 218, 229-30 (1967)[hereinafter *Discrimination in Handling of Juvenile Offenders*]; Terry, *Screening*, *supra* note 162, at 177; Thomas & Cage, *The Effects of Social Characteristics on Juvenile Court Dispositions*, 18 Soc. Q. 237, 242-44 (1977). *See also infra* notes 206-10 and accompanying text, which report that the principle of offense only accounts for about 25% of the variance in sentencing.

205 *See* Arnold, *Race and Ethnicity Relative to Other Factors in Juvenile Court Dispositions*, 77 AM. J. Soc. 211, 219 (1971) (influence of juveniles' race on dispositions); Dannefer & Schutt, *supra* note 199, at 1129-30 (evidence of substantial bias in police referrals, but less evidence of bias in subsequent court decisions); Fagan, Slaughter & Hartstone, *supra*

tion, charging, and adjudication decisions are strongly influenced by the principle of offense, as cases penetrate further into the process, race and class directly affect dispositions, with minority youths receiving more severe sentences.[206] Thomas and Cage conclude that when legal variables are held constant, the juvenile court's individualized justice "typically applies harsh sanctions to blacks, those who have dropped out of school, those in single parent or broken homes, [and] those from lower socioeconomic backgrounds . . . ."[207]

Moreover, examining the effects of race or social class only at the time of sentencing may mask the more significant effect that these personal characteristics may have had in the initial screening stages of juvenile justice administration. Fagan examined the impact of extra-legal factors, especially race, on decision-making at six points in the juvenile process and reported that "minority youth receive consistently harsher sentences."[208] They concluded that:

> The evidence for racial discrimination in this study is compelling. Its sources may lie in the individual attitudes of decision makers in the system's independent agencies, but it is unlikely that these seemingly isolated decision makers of substantially different backgrounds would produce such consistent, systemic behaviors. Rather than a chance convergence of independent behaviors, they seem to reflect a sociological process, if not a generalized perspective, shared across decision makers of disparate backgrounds. Like other societal institutions, the justice system is not blind to ethnic and racial differences.[209]

Other research reports that juveniles' race only affects the dispositions of minor offenders, while for serious or repeat offenders, sentencing disparities between the races decline.[210] Contrary to ex-

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note 158, at 224 (racial disparities at each decision point with minorities receiving harsher sentences); Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *supra* note 199, at 179 (effect of race on institutional commitments); McCarthy & Smith, *supra* note 158, at 55-58 (minority youths receive more severe sentences); Thomas & Cage, *supra* note 204, at 247 (blacks treated more harshly than whites); Thomas & Fitch, *supra* note 160, at 80 (blacks more likely to be confined for their offenses than whites); Thornberry, *Sentencing Disparities*, *supra* note 200, at 170 (blacks receive more severe dispositions than whites). *Cf.* Carter, *Juvenile Court Dispositions: A Comparison of Status and Nonstatus Offenders*, 17 CRIMINOLOGY 341, 356 (1979) ("social class bias at all juvenile court disposition levels")[hereinafter *Juvenile Court Dispositions*]; Carter & Clelland, *A Neo-Marxian Critique, Formulation and Test of Juvenile Dispositions as a Function of Social Class*, 27 SOC. PROBS. 96, 104-06 (1979) (discrimination against youths from unstable working class backgrounds in moral crime categories)[hereinafter *Neo-Marxian Critique*].

206 McCarthy & Smith, *supra* note 158, at 56.

207 Thomas & Cage, *supra* note 204, at 250. *See* Thomas & Fitch, *supra* note 160, at 82-83.

208 Fagan, Slaughter & Hartstone, *supra* note 158, at 252.

209 *Id.* at 253.

210 *See* Carter, *Juvenile Court Dispositions*, *supra* note 205, at 355 (number of previous court referrals and multiple petitions increase likelihood of more severe disposition); Clarke & Koch, *supra* note 57 (controlling for present offense and prior record accounts

pectations, a few studies report that white youths receive more severe dispositions than blacks.[211] Some studies report that substantive factors such as "family and school problems," along with legal criteria, explains some of the racial variations in sentencing.[212] Summarizing this research, the principle of offense appears to be the most significant factor influencing juvenile court dispositions of juveniles along with an additional amount of sentencing variation related to a juvenile's race.[213]

The present study provides a limited opportunity to analyze the relationships between a juvenile's race, representation by counsel, and sentences. Although the Minnesota SJIS code forms include the variable "race," racial information is omitted by court personnel in most counties in the state. Fortunately, however, in Hennepin County (Minneapolis), which has the highest proportion of minority youths in Minnesota,[214] a juvenile's race is coded more routinely.[215] Thus, the following analyses provide an opportunity to examine the

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for disparities); Cohen & Kluegel, *Determinants of Juvenile Court Dispositions: Ascriptive and Achieved Factors in Two Metropolitan Courts*, 43 AM. SOC. REV. 162, 174-75 (1978) (little support for racial bias on sentencing); Ferdinand & Luchterhand, *supra* note 204, at 521 (same); Terry, *Screening*, *supra* note 162, at 177 (legal variables most significant).

211 *See* Ferster & Courtless, *Pre-Dispositional Data, Role of Counsel and Decisions in a Juvenile Court*, 7 LAW & SOC'Y REV. 195, 205 (1972); Scarpitti & Stephenson, *Juvenile Court Dispositions: Factors in the Decision-Making Process*, 17 CRIME & DELINQ. 142, 148 (1971).

212 *See* Horwitz & Wasserman, *supra* note 164, at 421; Thomas & Fitch, *supra* note 160, at 74-75.

213 *See supra* notes 199-212 and accompanying text. Phillips and Dinitz report that in addition to present offense and the number of prior arrests, prior court responses tend to predict subsequent dispositions; prior institutionalization is a strong predictor of subsequent institutionalization independently of both present and past behavior. Phillips and Dinitz, *supra* note 162, at 275-76. Kowalski & Rickicki, *Determinants of Juvenile Postadjudication Dispositions*, 19 J. RES. CRIME & DELINQ. 66, 72 (1982), report that correctional administrators in a postadjudication context also use present offense and prior record for making institution/community placements.

214 *See* U.S. DEPT. OF COM., BUREAU OF CENSUS, 1980 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS MINNESOTA 25-198 (1982) [hereinafter 1980 CENSUS].

215 In Hennepin County, a juvenile's race is reported in 79.8% of all petitions, or 3385 cases. Thus, the data reported here constitute a very large subset of the total cases in the county. However, comparing this "race" subsample with the county totals suggests that it is representative. Thus, the cases missing information on race do not appear to introduce any systematic bias. For example, for the Hennepin County population as a whole (4243) and the "race sample," the proportion of offenses are respectively: felony against person, 4.1% and 4.4%; felony against property, 12.9% and 13.3%; minor offense against person, 5.2% and 5.5%; minor offense against property, 26.8% and 28.1%; other delinquency, 21.8% and 20.6%; and status, 29.0% and 28.0%. Similarly, for Hennepin County as a whole and for the "race sample", the proportions of juveniles with priors are: 0=66.7% and 66.5%; 1-2=26.1% and 26.0%; 3-4=5.6% and 5.8%; and 5+=1.6% and 1.7%.

TABLE 19
RACE, PRESENT OFFENSE, AND PRIOR RECORD
(HENNEPIN COUNTY)

	WHITE	BLACK	OTHER
% DELINQUENTS:	65.9	23.6	10.4
PRESENT OFFENSE			
Felony Offense Against Person	3.1	7.8	4.5
Felony Offense Against Property	13.4	12.4	15.0
Minor Offense Against Person	4.0	10.1	4.8
Minor Offense Against Property	27.5	31.1	24.9
Other Delinquency	24.5	14.5	9.9
Status	27.5	24.0	40.8
PRIOR RECORD			
0	70.6	58.1	59.8
1-2	23.6	31.3	29.5
3-4	4.5	8.0	8.8
5+	1.3	2.6	2.0

effects of race on rates of representation as well as dispositions only in Hennepin County.

Based on the 1980 census, there were approximately 115,000 youths aged ten to seventeen living in Hennepin County of whom slightly more than 105,000 were white, 5,300 were black, and the remainder were "other"—primarily Native American with a smattering of Hispanic and oriental.[216] While blacks and other racial minorities constitute about 5% each of the county youth population, they constitute a substantially larger proportion of the clientele of the Hennepin County juvenile court. As indicated in Table 19, more than one of five (23.6%) youths against whom petitions were filed were black and one of ten (10.4%) were from other minorities. Thus, the characteristic disproportionate overrepresentation of minorities reported in other studies appears in Hennepin County as well.

An examination of juveniles' race, present offense, and prior record suggests that at least part of the overrepresentation of minority youths may be attributed to differences in their offense patterns. As a group, a larger proportion of blacks and other minorities are charged with felony offenses and offenses against the person than are whites. Proportionately, twice as many blacks as whites are charged with offenses against the person (3.1% vs. 7.8%

216 *See* U.S. DEPT OF COM., 1980 CENSUS, *supra* note 214, at 25-198, 25-246.

for felony, and 4.0% vs. 10.1% for minor offense against the person). Black and other minority youths are significantly underrepresented relative to whites only in the category of "other delinquency," which includes misdemeanor public order offenses, drug offenses, and probation violations.

Blacks and other minority youths also had more extensive records of prior delinquency involvement than did their white counterparts. Approximately 10% more whites than blacks and others appeared in juvenile court for the first time. Conversely, blacks and other minorities were nearly twice as likely as whites to have records of chronic recidivism. Of course, the prior record variable reflects every previous discretionary decision made by every juvenile justice operative.[217] While the more extensive record of prior referrals may reflect real differences in rates of behavior by race, it may also indicate the cumulative differential selection of juveniles by race over time.

2. *Race and Representation by Counsel*

For all juveniles whose cases included information on race, the rates of representation in Hennepin County were: private attorneys, 10.3%; public defenders, 37.5%; and unrepresented, 52.1%.[218] Thus, even in the most populous county in Minnesota, which has a well established public defender system, the majority of juveniles still were unrepresented.

Table 20 reports on representation by counsel and race. Examining the relationship between race and rates of representation reveals that larger proportions of blacks and other minorities are routinely represented at every level of offense than are white juveniles. When compared with white juveniles, 15.4% more black youths overall and 10% more youths of other racial minorities had counsel. Since a serious present offense and prior record increases the likelihood of representation (Tables 3 and 13), the greater presence of counsel is consistent with blacks and other minority youths' somewhat more extensive delinquency involvements. Because Table 20 controls for the seriousness of the present offense, the differences in the rates of representation by race remain.

After examining the type of attorney involved, statistics reveal

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217 *See* Feld, *Reference of Juvenile Offenders*, *supra* note 32, at 585-601; McCarthy and Smith, *supra* note 158, at 56-58.

218 For the entire population in Hennepin County juvenile court, the rates of representation were: private attorneys, 10.4%; public defenders, 37.3%; and unrepresented, 52.3%. These proportions are nearly identical with the sample containing information on juveniles' race. *See supra* note 215 and accompanying text.

TABLE 20
REPRESENTATION BY COUNSEL AND RACE
(HENNEPIN COUNTY)

	WHITE			BLACK			OTHER		
	PRIV	PD	NONE	PRIV	PD	NONE	PRIV	PD	NONE
OVERALL % ATTORNEY	11.5	31.7	56.7	7.9	50.7	41.3	8.1	45.2	46.7
Felony Offense Against Person	30.3	51.5	18.2	10.2	72.9	16.9	28.6	71.4	0.0
Felony Offense Against Property	20.9	50.9	28.2	10.6	65.9	23.5	9.1	63.6	27.3
Minor Offense Against Person	12.5	51.1	36.4	12.8	64.1	23.1	5.9	58.8	35.3
Minor Offense Against Property	15.1	35.6	49.3	7.4	56.6	36.0	10.5	58.1	31.4
Other Delinquency	9.5	19.8	70.7	10.1	45.9	44.0	14.3	48.6	37.1
Status	2.4	23.4	74.2	2.9	24.6	72.5	2.4	24.0	73.6

that larger proportions of white youths retain private counsel while black and other minority youths are more likely to be represented by a public defender. As noted in earlier analyses, while only 5.1% of Minnesota's delinquents retained private counsel, 11.2% of those charged with a felony offense against the person did retain private counsel (Table 3). Examining the use of private counsel by race reveals that proportionately, white youths are three times more likely than blacks to have private counsel when charged with felony offenses against the person and twice as likely to have private counsel when charged with a felony offense against property. Conversely, blacks are most likely to be represented by the public defender.[219] Juveniles of other minorities are nearly as likely as white juveniles to retain private counsel when charged with a felony offense against the person, but less likely than blacks to retain private counsel when charged with a felony involving property. Unfortunately, the SJIS data tapes do not include information on juveniles' family status, socioeconomic status, or the like. However, black and other minority delinquents' greater use of public defenders rather than private attorneys may be an indirect indicator of their comparatively lower socioeconomic status than that of white

[219] This finding is consistent with the only other study to examine the relationship between race and type of representation. *See* Fagan, Slaughter & Hartstone, *supra* note 158, at 242 ("Anglo youth are more likely to have private counsel . . . whereas minority youth are more likely to have public defenders or court-appointed attorneys.").

TABLE 21
RACE, DISPOSITION, AND REPRESENTATION
(HENNEPIN COUNTY)

	WHITE		BLACK		OTHER	
ATTORNEY:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
Felony Offense Against Person						
% Home	49.1	22.2	57.4	50.0	25.0	—
% Secure	39.6	11.1	48.9	37.5	16.7	—
Felony Offense Against Property						
% Home	47.7	25.8	50.0	31.3	58.8	16.7
% Secure	39.0	25.8	46.9	25.0	44.1	16.7
Minor Offense Against Person						
% Home	30.8	16.7	34.5	17.6	36.4	20.0
% Secure	15.4	8.3	16.4	—	18.2	20.0
Minor Offense Against Property						
% Home	31.7	20.3	23.2	14.9	25.0	35.0
% Secure	24.8	14.8	16.6	13.4	17.9	20.0
Other Delinquency						
% Home	21.2	10.7	27.1	15.2	21.1	8.3
% Secure	11.6	6.7	22.0	4.3	15.8	8.3
Status						
% Home	27.5	12.4	26.7	6.5	14.7	9.2
% Secure	5.1	1.4	11.1	—	2.9	1.1

delinquents.[220]

Table 9 reported that juveniles with counsel consistently received more severe dispositions than did those without representation. Table 11 suggested that youths represented by private counsel perhaps received somewhat more lenient sentences than did those who were represented by public defenders or court appointed attorneys. A larger proportion of minority youths than white juveniles were represented by public defenders (Table 20). Table 21 compares the disposition rates of represented and unrepresented youths of different races. The pattern of larger proportions of represented juveniles than unrepresented ones receiving more severe sentences prevails within each racial group. It is unlikely that the small variations in the type of representation account for differences in the ways that white and minority youths' cases are processed.

[220] Fagan, Slaughter and Harstone noted that "[p]ublic defenders are more likely to represent minority youth, an artifact of the race/social class interaction." *Id.*

TABLE 22
RACE, OFFENSE, AND DISPOSITION (HOME/SECURE)
(HENNEPIN COUNTY)

	WHITE	BLACK	OTHER
OVERALL			
% Home	21.0	25.8	23.5
% Secure	13.3	18.5	15.0
Felony Offense Against Person			
% Home	45.7	57.4	33.3
% Secure	34.3	49.2	26.7
Felony Offense Against Property			
% Home	41.8	50.0	58.5
% Secure	34.3	44.9	43.4
Minor Offense Against Person			
% Home	22.5	30.8	29.4
% Secure	11.2	14.1	17.5
Minor Offense Against Property			
% Home	23.4	20.2	27.9
% Secure	17.8	15.8	19.8
Other Delinquency			
% Home	12.3	23.9	14.3
% Secure	7.5	16.2	11.4
Status			
% Home	13.8	10.4	9.1
% Secure	2.1	2.6	1.4

3. Race, Offense, Prior Record, Detention, and Disposition

Table 22 examines the dispositions received by juveniles of different races on the basis of their present offense. In the aggregate, about 5% more black youths and 2% to 3% more youths of other minorities than whites received out-of-home placement and secure confinement dispositions.

The racial differences in sentencing are most conspicuous for black juveniles charged with felony offenses and offenses against the person. For those offenses, about 10% more blacks than whites received severe dispositions. For juveniles of other races, the pattern is more complicated with less severe sentencing than whites for those charged with felony offenses against the person, but higher rates for those charged with felony offenses against property, such as burglary. While "other delinquency" was the only offense category in which minority youths were underrepresented compared to whites (Table 19), minority youths received proportionally more

TABLE 23
RACE, OFFENSE, PRIORS, AND DISPOSITION
(HOME/SECURE)
(HENNEPIN COUNTY)

	WHITE			BLACK			OTHER		
PRIORS:	0	1-2	3+	0	1-2	3+	0	1-2	3+
Felony Offense Against Person									
% Home	44.4	27.3	100.0	55.6	50.0	85.7	20.0	16.7	75.0
% Secure	35.2	18.2	60.0	47.2	44.4	71.4	20.0	16.7	50.0
Felony Offense Against Property									
% Home	32.1	48.0	89.7	41.2	45.2	87.5	42.9	72.2	85.7
% Secure	28.5	34.7	72.4	33.3	41.9	87.5	32.1	44.4	85.7
Minor Offense Against Person									
% Home	16.7	29.4	66.7	13.3	48.0	75.0	10.0	50.0	100.0
% Secure	6.1	17.6	50.0	6.7	16.0	50.0	—	33.3	100.0
Minor Offense Against Property									
% Home	19.9	31.5	36.8	8.1	27.1	61.5	23.4	28.6	45.5
% Secure	15.3	24.4	23.7	5.9	23.5	42.3	14.9	17.9	45.5
Other Delinquency									
% Home	9.4	19.5	33.3	12.5	35.0	46.2	13.6	12.5	20.0
% Secure	4.7	13.8	33.3	6.3	22.5	46.2	13.6	—	20.0
Status									
% Home	9.7	20.2	29.7	7.0	14.3	28.6	6.2	16.7	10.0
% Secure	1.0	3.6	8.1	0.8	4.1	14.3	1.0	2.8	—

out-of-home and secure confinement dispositions in this category as well.

The apparent racial differences in sentencing may be the result of differences in the white and minority juveniles' prior records. Table 12 summarized the nearly linear relationship between additional priors and increased sanctions; judges' sentencing practices conformed to informal sentencing guidelines. The more extensive prior records of delinquency of black and other minority juveniles than their white counterparts (Table 19) may account for the apparent differences in their dispositions.

Table 23 summarizes juveniles' dispositions—out-of-home and secure confinement—while controlling for the seriousness of the present offense and the prior record simultaneously. Even with controls, larger proportions of black juveniles charged with felony offenses against the person and property and "other delinquency"

received out-of-home placement and secure confinement dispositions than did similarly situated white offenders. These differences are most conspicuous for black juveniles charged with felony offenses who receive sentences of secure confinement. Of the juveniles charged with a felony offense against the person, 12% more black juveniles than white youths with no prior record, 24.2% with one or two priors, and 11.4% more of those with three or more prior petitions were incarcerated. Similarly, 4.8%, 7.2%, and 15.1% more blacks than whites charged with felony offenses against property received secure confinement sentences. For youths charged with "other delinquency," 1.6%, 8.3%, and 12.9% more blacks than whites were incarcerated. There were no consistent patterns in the sentencing of youths of other races or in other categories of offenses.

The previous analyses of the effects of detention on dispositions (Tables 15 and 17) indicated that pretrial detention exerted a significant independent influence on a juvenile's ultimate disposition. It may be that the racial disparities in the sentencing of black juveniles reported above are the function of differences in rates of pretrial detention.[221]

Table 24 reports the rates of detention for Hennepin County overall as well as separately for white youths, black youths, and other minority youths. Overall, 14.1% of the juveniles referred to the Hennepin County juvenile court received one or more detention hearings. This rate of detention is nearly double the state average and reflects a higher rate of detention for every offense category except status offenses (compare Table 24 with Table 15, Statewide and Medium Representation).

Although 14.1% of all referrals are detained, the rates of detention differ substantially by race: only 10.6% of white juveniles are detained as compared with 22.6% of blacks and 17.3% of other minority youths. The earlier analyses reported higher rates of detention for youths charged with more serious present offenses and those with records of prior referrals (Table 15). Somewhat larger proportions of minority youths were charged with serious offenses and had more extensive prior records than did their white counterparts (Table 19). Thus, it is necessary to control for the effects of the present offense and prior record on the decision to detain

221 *See* Krisberg, Schwartz, Fishman, Eisikovits, Guttman & Joe, *supra* note 199, at 179; Krisberg, Schwartz, Litsky & Austin, *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5, 11 (1986).

TABLE 24
RACE, OFFENSE, PRIORS, AND DETENTION
(HENNEPIN COUNTY)

		WHITE			BLACK			OTHER		
PRIORS:		0	1-2	3+	0	1-2	3+	0	1-2	3+
	COUNTY TOTAL %									
OVERALL % DETENTION	14.1		10.6			22.6			17.3	
Felony Offense Against Person	42.6	24.1	27.3	60.0	52.8	72.2	71.4	40.0	33.3	50.0
Felony Offense Against Property	27.9	15.0	30.1	54.7	33.3	42.0	75.0	25.0	33.3	100.0
Minor Offense Against Person	23.2	9.1	35.2	66.7	17.8	28.0	50.0	10.0	50.0	—
Minor Offense Against Property	15.8	7.1	20.4	23.7	18.4	24.7	38.4	19.1	14.3	45.5
Other Delinquency	7.9	5.2	9.3	20.0	9.4	22.5	15.4	4.5	25.0	—
Status	5.4	3.9	5.4	18.9	2.4	10.2	14.3	5.1	8.4	20.0

before attributing the racial disparities in sentencing to differential rates of detention.

Table 24 reports the rates of detention separately for juveniles of different races while controlling simultaneously for the seriousness of the present offense and prior record. Thus, 42.6% of all Hennepin County juveniles charged with a felony offense against the person are detained. While a larger proportion of black youths than white youths commit felony offenses against the person (Table 19), it is readily apparent that proportionately more black and minority youths than white youths are detained for the same offense. For juveniles charged with a felony offense against the person appearing in juvenile court for the first time, more than twice as many blacks as whites are detained, 52.8% versus 24.1%. For juveniles charged with a felony offense against the person with one or two prior referrals, again more than twice as many black youths as white youths are detained, 72.2% versus 27.3%. Even for youths with three or more prior referrals charged presently with a felony offense against the person, 11.4% more blacks youths than white youths are detained. Comparisons of rates of detention across races while controlling for the present offense and prior record suggest that at least some of the differences in the sentencing of minority youths charged with felony offenses against person and property probably

TABLE 25
RACE, DETENTION, AND DISPOSITION (HOME/SECURE) (HENNEPIN COUNTY)

	WHITE		BLACK		OTHER	
DETENTION:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
Felony Offense Against Person						
% Home	70.0	38.3	63.9	50.0	50.0	12.5
% Secure	50.0	31.9	55.6	40.9	50.0	—
Felony Offense Against Property						
% Home	73.8	35.6	70.7	36.5	85.0	46.7
% Secure	55.7	30.6	63.4	32.7	75.0	26.7
Minor Offense Against Person						
% Home	56.3	18.0	52.6	25.0	50.0	23.1
% Secure	31.3	8.2	36.8	7.1	25.0	15.4
Minor Offense Against Property						
% Home	56.9	22.0	38.9	16.5	47.1	23.3
% Secure	33.8	17.8	25.9	14.1	35.3	15.0
Other Delinquency						
% Home	61.1	11.5	50.0	18.9	66.7	10.7
% Secure	38.9	6.8	31.3	12.6	33.3	10.7
Status						
% Home	53.1	12.8	40.0	8.9	40.0	7.0
% Secure	12.5	1.7	10.0	2.2	—	1.6

result from the variations in rates of pretrial detention.[222]

Table 25 summarizes the disposition rates of white and minority youths who were detained. The relationship between pretrial detention and more severe sentences prevails for both white and minority juveniles. Although about 5% more detained black juveniles than detained white youths charged with felony offenses against person and property and minor offenses against the person received secure confinement dispositions, it is unlikely that these differences account for the more substantial disparities observed in Table 23.

Black and other minority youths share certain characteristics that increase their likelihood of receiving more severe sentences compared with white juveniles. Their more serious present offenses

222 The findings are consistent with other evaluations of the effects of race on pretrial detention and disposition. *See* Fagan, Slaughter & Hartstone, *supra* note 158, at 237, Figure 1.

and prior records (Table 19) generally are associated with more severe dispositions (Table 12). These offense patterns are also associated with higher rates of representation by counsel (Table 20) which, in turn, is associated with more severe sentences (Tables 14 and 21). Black and other minority juveniles are held in detention at somewhat higher rates than are white youths, even after controlling for the present offense and prior record (Table 24), and detention of any juveniles, regardless of race, is associated with more severe sentences (Tables 17 and 25). Finally, after controlling for the seriousness of the present offense (Table 22) and the length of the prior record (Table 23), it appears that black and minority youths are still somewhat more likely to receive severe sentences than their white counterparts. As later analyses suggest, however, these modest differences in sentencing by race are not necessarily evidence of racial discrimination.

4. Sex, Representation, and Sentencing

The next analyses examine the relationships between juveniles' sex, rates of representation, and dispositions. Table 26 reports the distribution of offenses by sex in the state and in the counties with high, medium, and low rates of representation. For the state as a whole, approximately three-quarters (74.5%) of the delinquents were male and about one-quarter (25.5%) were female. With some variation, similar proportions obtained in the high, medium, and low representation counties as well.

When the relationship between a juvenile's sex and offense is analyzed separately, however, a very different pattern emerges. In the state and in the high, medium, and low representation counties separately, male delinquents predominate in the felony offense categories by about a nine to one ratio. Males predominate in the other categories of delinquency by about a three to one ratio. It is only in the status offense categories that the sexes approach parity with about a six to four ratio of males to females. Tables 6, 9, and 13 report a relationship between the seriousness of the offense, rates of representation, and dispositions. Given the skew in the distribution of offenses by sex, a similar pattern should prevail on these other dimensions as well.

Table 26 also reports the relationship between juveniles' sex and prior referrals. While Table 12 summarizes the impact of prior referrals on dispositions, Table 26 provides the separate breakdown of prior referrals by sex. About 5% more females than males made their first appearances in juvenile court and there are conversely fewer female recidivists than males. On the basis of their present

TABLE 26
OFFENSES AND PRIOR REFERRALS BY SEX

	STATEWIDE		HIGH		MEDIUM		LOW	
	Male	Female	Male	Female	Male	Female	Male	Female
OVERALL %	74.5	25.5	75.8	24.2	71.4	28.6	76.6	23.4
N =	12806	4385	2691	860	4538	1817	5577	1708
Felony Offense Against Person %	90.6	9.4	89.9	10.1	89.5	10.5	92.3	7.7
Felony Offense Against Property %	91.2	8.8	91.5	8.5	91.7	8.3	90.5	9.5
Minor Offense Against Person %	72.7	27.3	79.1	20.9	65.8	34.2	75.6	24.4
Minor Offense Against Property %	76.3	23.7	77.5	22.5	74.7	25.3	77.0	23.0
Other Delinquency %	77.2	22.8	70.5	29.5	75.5	24.5	84.8	15.2
Status Offense %	59.9	40.1	62.6	37.4	51.9	48.1	65.3	34.7
PRIOR REFERRALS								
0	70.4	76.1	63.1	67.1	66.8	74.2	77.0	82.6
1 - 2	24.0	20.2	27.9	27.1	26.8	21.7	19.9	15.2
3 - 4	4.3	2.8	6.5	4.7	5.1	3.3	2.5	1.4
5+	1.3	0.9	2.6	1.2	1.3	0.8	0.7	0.8

offenses and prior records, females are somewhat less delinquent than their male counterparts.

5. Representation by Counsel and Sex of Juvenile

Table 27 provides the overall rates of representation of male and female delinquents as well as by type of offense. While 45.3% of all juveniles in Minnesota were represented (Table 3), this is the composite of 46.7% representation for males and 41.1% representation for females. In light of the relationships between more serious present offenses, more extensive prior records, and rates of representation (Table 13), and the pattern of offenses and sex (Table 26), the 5.6% disparity in representation is not necessarily indicative of discrimination in the appointment of counsel on the basis of sex.

When the relationships between offense, sex, and rates of representation are analyzed, the only clear difference that emerges is for the small group of juveniles charged with felony offenses against the person, in which for the state as a whole and in the medium and

TABLE 27
REPRESENTATION BY COUNSEL AND SEX OF JUVENILE

	STATEWIDE		HIGH		MEDIUM		LOW	
	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
OVERALL % COUNSEL	46.7	41.1	95.1	92.3	49.5	39.8	20.4	15.7
Felony Offense Against Person	78.1	69.5	97.3	100.0	82.7	71.4	58.8	28.6
Felony Offense Against Property	62.3	60.3	98.3	97.6	68.2	68.8	37.7	34.1
Minor Offense Against Person	62.0	63.6	95.6	100.0	66.1	66.4	29.6	33.3
Minor Offense Against Property	45.1	42.3	97.2	97.1	53.5	48.9	16.0	15.0
Other Delinquency	43.8	48.4	92.8	88.6	34.9	34.0	21.9	17.5
Status	27.8	30.5	89.7	88.0	26.5	27.9	8.1	11.8

low representation counties, a substantially larger proportion of males than females are represented. Of course, this offense only constitutes 4.0% of the state's delinquency (Table 1) and male delinquents account for nearly all of it (Table 26). For the other offense categories, the rates of representation are approximately equal, although somewhat larger proportions of girls than boys are represented for status offenses and other delinquency.

6. *Pretrial Detention, Disposition, and Sex of Juvenile*

The apparent relationship between offenses and detention (Table 15) coupled with the patterns of offenses for male and female juveniles (Table 26) suggests that proportionately fewer females than males should be detained. Table 28 reports on the rates of detention for male and female offenders overall and while controlling for the seriousness of the offense.

In the state as a whole, a slightly larger proportion of female delinquents than male delinquents are detained. Comparing the rates of detention by sex (Table 28) with the rates of detention (Table 15) indicates that the discrepancies in rates of detention occur for females in all offense categories *except* offenses against the person. Even though female juveniles have less extensive prior records and are involved in less serious types of delinquency than are male offenders (Table 26), still a larger proportion of female juveniles are detained.[223]

[223] The sexual disproportionality in the detention and sentencing of female status offenders and minor offenders has been reported by many researchers. *See, e.g.*, R. SARRI,

TABLE 28
DETENTION BY SEX OF JUVENILE

	STATEWIDE		HIGH		MEDIUM		LOW	
	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
OVERALL % DETENTION	7.4	8.3	6.0	9.1	12.6	11.2	3.8	4.8
Felony Offense Against Person	24.2	25.0	21.1	17.6	34.8	37.9	14.3	11.1
Felony Offense Against Property	12.0	16.1	5.4	6.5	20.2	23.8	7.3	14.1
Minor Offense Against Person	11.6	10.7	7.6	2.0	21.0	17.6	5.6	5.3
Minor Offense Against Property	5.7	6.9	3.3	4.3	12.3	12.9	2.3	3.5
Other Delinquency	5.1	9.4	5.4	12.9	6.4	7.9	3.3	7.2
Status	3.2	7.1	6.7	12.0	3.6	8.2	1.8	4.2

Previous analyses identified the detrimental impact of pretrial detention on dispositions (Table 17). Because female offenders appear to be disproportionately detained relative to males, Table 29 illustrates the relationships between pretrial detention and sentences separately for male and female offenders. It will be useful to compare the relationship between detention and dispositions (Table 17) with the dispositions received by detained male and female offenders. First, smaller proportions of juveniles charged with less serious, albeit far more numerous, offenses are detained (Table 15). When those juveniles are detained, however, they experience considerably higher rates of home removal and secure confinement than do youths charged with those less serious offenses who are not detained (compare Table 6 and 17). Finally, when the disposition rates of detained males and females charged with less serious offenses—minor property offenses, other delinquency, and status offenses—are examined, a gender-related pattern emerges. Larger proportions of detained female juveniles receive more severe sentences than do their male counterparts. For the state as a whole, slightly more detained females than males charged with minor property offenses are removed from their homes; 5.7% more detained females charged with other delinquency; and 9.4% more detained females charged with status offenses. While these minor offenses

UNDER LOCK AND KEY: JUVENILES IN JAIL AND DETENTION (1974); Chesney-Lind, *Girls in Jail*, 34 CRIME & DELINQ. 150 (1988); Chesney-Lind, *Judicial Paternalism and the Female Status Offenders: Training Women to Know their Place*, 23 CRIME & DELINQ. 121 (1977); Pawlak, *supra* note 195.

TABLE 29
DISPOSITION OF DETAINED JUVENILES BY SEX OF JUVENILE

	STATEWIDE		HIGH		MEDIUM		LOW	
DETAINED:	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
OVERALL								
% Home	58.2	55.0	59.6	54.8	58.4	52.8	56.9	60.0
% Secure	39.7	23.6	37.8	21.9	40.4	22.3	39.4	27.8
Felony Offense Against Person								
% Home	63.8	81.8	62.5	—	61.4	75.0	73.9	100.0
% Secure	46.2	45.5	41.7	—	49.4	50.0	39.1	33.3
Felony Offense Against Property								
% Home	71.1	70.0	94.7	50.0	69.5	68.4	67.9	85.7
% Secure	55.0	40.0	57.9	50.0	55.1	36.8	53.6	42.9
Minor Offense Against Person								
% Home	56.2	47.8	66.7	100.0	51.1	44.4	64.3	50.0
% Secure	34.2	26.1	41.7	—	31.9	27.8	35.7	25.0
Minor Offense Against Property								
% Home	53.2	53.8	57.7	72.7	51.3	45.8	57.1	66.7
% Secure	35.9	28.6	42.3	27.3	31.1	25.4	44.9	38.1
Other Delinquency								
% Home	57.9	63.6	65.6	57.1	57.7	61.5	51.4	73.7
% Secure	36.4	36.4	37.5	38.1	36.6	34.6	35.1	36.8
Status								
% Home	42.2	51.6	48.1	54.8	43.3	51.5	34.6	48.4
% Secure	14.5	9.4	25.9	9.7	6.7	6.1	11.5	16.1

typically are associated with somewhat less severe sentences (Table 6), the combined effect of being detained and female appears to alter a juvenile's likelihood of home removal.

A similar pattern prevails when examined in the counties with high, medium, and low rates of representation where, in half or more of the comparisons, a larger proportion of detained females are removed from their homes than are males. This is most conspicuous in the low representation counties where a larger proportion of detained females are removed from their homes in five out of six offense comparisons.

One possible explanation for the pattern may be a gender-linked parental influence on both pretrial detention and eventual dispositions. If the parents of female juveniles are more likely than those of males to express their frustration with their child's misconduct by refusing to accept the juvenile's return to the home, then both pretrial detention and subsequent home removal may become more likely.[224] Explaining why parents would react differently to

[224] *See* Table 6 which reports the rates of disposition and the source of referral. Pa-

similar minor misdeeds when committed by female than male juveniles is beyond the scope of this data.

7. *Disposition and Sex of Juvenile*

Table 6 summarizes the relationship between juveniles' offenses and dispositions. A comparison of Table 6 and Table 30 shows the impact of a juvenile's sex on the disposition. For the state overall as well as in the high, medium, and low representation counties separately, proportionately fewer females than males are removed from their homes or incarcerated. The disparities are most striking for the use of secure confinement: nearly twice as many males as females are incarcerated. The male bias in the use of incarceration probably reflects the male predominance in the felony offenses against the person and property and in the minor offenses against the person categories which have higher rates of secure confinement. In addition, there are fewer beds available for female offenders in the juvenile institutions in Minnesota.

By contrast, the rates of out-of-home placement of female offenders consistently exceed those of their male counterparts for the least serious offenses—other delinquency and status offenses. These were the offenses for which larger proportions of girls than boys had attorneys (Table 27). These were also the offense categories for which proportionately more female offenders than males were held in pretrial detention (Table 28) and in which the impact of gender and detention on dispositions appeared (Table 29). Because only a small proportion of juveniles charged with these offenses are detained (Tables 15, 28, and 29), however, differential rates of detention alone do not explain all of the variation in sentencing. The disproportionate intervention with female offenders charged with other delinquency and status offenses may reflect the "double standard" and "paternalistic" attitudes for which scholars have criticized juvenile courts.[225]

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rental referrals are second only to those of probation officers in resulting in out of home placement of juveniles. Because the offenses for which parents refer their children are typically less serious than those, for example, of police referrals , this high rate provides an indirect indicator of family dysfunction. The SJIS data provide no basis for inferring why this would be more the case for female than for male juveniles.

225 *See* Anderson, *The Chivalrous Treatment of the Female Offender in the Arms of the Criminal Justice Systems: A Review of the Literature*, 23 SOC. PROBS. 50, 55 (1976); Armstrong, *Females Under the Law—Protected But Unequal*, 23 CRIME & DELINQ. 109, 115-18 (1977); Chesney-Lind, *Judicial Enforcement of the Female Sex Role: The Family Court and the Female Delinquent*, 8 ISSUES IN CRIMINOLOGY 51, 54-59 (1973); Chesney-Lind, *Judicial Paternalism and the Female Status Offenders*, *supra* note 223, at 221; Datesman and Scarpetti, *Unequal Protection for Males and Females in the Juvenile Court*, in WOMEN, CRIME AND JUSTICE 314 (S. Datesman and F. Scarpetti eds. 1980).

TABLE 30
DISPOSITION (HOME/SECURE) BY SEX

	STATEWIDE		HIGH		MEDIUM		LOW	
	Male	Female	Male	Female	Male	Female	Male	Female
OVERALL								
% Home	19.1	16.4	24.8	25.9	22.1	14.9	14.1	13.5
% Secure	12.7	6.5	16.9	12.2	15.1	5.2	8.5	5.5
Felony Offense Against Person								
% Home	42.8	36.4	43.2	54.5	47.5	33.3	36.5	29.4
% Secure	27.9	23.6	28.0	45.5	33.2	22.2	21.0	11.8
Felony Offense Against Property								
% Home	32.3	30.3	34.9	15.9	36.1	34.1	26.7	34.8
% Secure	24.5	14.1	26.4	11.4	29.2	15.3	18.4	14.5
Minor Offense Against Person								
% Home	25.9	19.1	32.9	17.5	27.1	19.8	19.9	18.8
% Secure	16.2	10.0	22.4	10.0	14.7	9.9	13.6	10.1
Minor Offense Against Property								
% Home	16.6	13.9	19.0	20.6	21.6	13.8	12.3	11.2
% Secure	11.7	7.9	13.6	12.3	16.0	7.7	8.0	6.2
Other Delinquency								
% Home	18.2	21.4	31.0	40.1	14.7	11.8	14.4	18.4
% Secure	11.6	10.3	21.0	18.8	9.6	5.2	8.2	10.4
Status								
% Home	10.7	15.0	20.5	27.6	11.3	13.7	7.2	12.0
% Secure	3.7	3.1	10.3	8.7	2.9	1.6	2.3	2.8

E. ADDITIONAL INDICATORS OF THE IMPACT OF COUNSEL ON JUVENILE JUSTICE ADMINISTRATION

This Article analyzes the legal variables associated with the initial decision to appoint and the ultimate impact of counsel on juveniles' dispositions. These analyses indicate that each legal variable—seriousness of present offense, prior referrals, and pretrial detention status—appears to be associated with both receiving a more severe disposition and higher rates of representation. While the legal variables enhance the probabilities of representation, the presence of an attorney makes an additional contribution to the severity of dispositions.

1. Representation by Counsel and Number of Offenses at Disposition

The next analyses seek additional ways of measuring the determinants and impact of representation in juvenile court proceedings.

Table 31 reports on the number of charges that remain at the time of a juvenile's disposition. As the note to Table 31 indicates, juveniles are acquitted or have all charges dismissed in a very small proportion of delinquency and status cases, only 3.3% of the total. In most instances, a delinquency determination is based on only one sustained charge, and two or more offenses occur in only 14.0% of the cases. A substantially larger proportion of cases involving felony offenses and offenses against the person involve multiple offenses at disposition: 30.4% of felony offenses against the person; 30.2% of felony offenses against property; and 18.0% of minor offenses against the person. By contrast, for the state overall, only 3.3% of juveniles charged with status offenses have more than one offense at disposition.

Table 31 reports that more serious offenses often are associated with several offenses remaining at disposition. More serious offenses also engender higher rates of representation (Table 4). Thus, a comparison of juveniles with multiple offenses at dispositions both with and without counsel provides an additional opportunity to assess the determinants and the impact of counsel.

Although the differences are often quite small, for the counties with high, medium, and low rates of representation, a larger proportion of juveniles who are represented by attorneys had multiple charges at disposition than did the unrepresented youths. The number of petitions with sustained charges at disposition are reduced by those resulting in acquittals or dismissals. The note to Table 31 reported that in the counties with high rates of representation, 6.3% of all juveniles were acquitted or had all charges dismissed. These dismissals were confined primarily to those few juveniles who appeared without counsel. While only 5.0% of represented juveniles had all charges dismissed, 23.8% of the unrepresented ones had all charges dismissed. While the counties with medium and low rates of representation did not differ as dramatically in the rates of dismissal for represented and unrepresented juveniles, 5.7% and 10.4% more, respectively, of the represented juveniles in those counties had multiple charges at disposition than did their unrepresented counterparts. Thus, represented juveniles had somewhat more complex cases than did unrepresented youths as evidenced by multiple charges.[226]

Comparing the proportion of represented and unrepresented

[226] This finding is consistent with other studies that attempted to identify the factors that influenced juveniles to seek representation and to gauge the complexity of cases as they influenced the severity of dispositions. *See* V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 72-79, Tables III.6(a) and III.6(b).

TABLE 31
NUMBER OF OFFENSES AT DISPOSITION

	STATEWIDE		HIGH		MEDIUM		LOW	
# OFFENSES:	1	2+	1	2+	1	2+	1	2+
OVERALL %*	82.7	14.0	85.7	8.0	84.8	13.8	79.4	17.1
Felony Offense Against Person	69.6	30.4	79.8	21.2	68.3	31.7	64.7	35.3
Felony Offense Against Property	69.8	30.2	83.0	17.0	70.4	29.6	61.5	38.5
Minor Offense Against Person	82.0	18.0	91.3	8.7	81.5	18.5	76.5	23.5
Minor Offense Against Property	85.0	15.0	90.0	10.0	86.3	13.7	82.0	18.0
Other Delinquency	85.0	15.0	95.2	4.8	85.8	14.2	76.4	23.6
Status	96.7	3.3	97.8	2.2	97.9	2.0	95.5	4.5

* The overall percentages for the total number of offenses at disposition do not equal 100% because of the small fraction of cases in which there were no offenses at disposition, i.e. acquittal or dismissal of all charges. For the state as a whole, and the high, medium, and low representation counties, the rates were, respectively: 3.3%, 6.3%, 1.4% and 3.5%.

juveniles with two or more charges at disposition in the counties with high, medium, and low rates of representation also confirms that represented juveniles had somewhat more complex cases. In the counties with high and medium rates of representation, a larger proportion of represented juveniles had more charges than their unrepresented colleagues in four of six comparisons. In the counties with low rates of representation, the represented juveniles exceeded their unrepresented counterparts in all six comparisons.

2. *Representation by Attorneys and Reduction in Charges*

Whether or not a juvenile was convicted of the original and most serious offense for which the petition was filed provides another way to assess the performance of attorneys. Unfortunately, the SJIS data tapes do not permit direct tracking of each discrete offense from filing to disposition. Fortunately, however, for the vast majority of juveniles—82.7%—only one offense is alleged (Table 31).

Table 33 compares the most serious offense initially alleged in the petition with the offense at the time of disposition to determine in what proportion of cases the original charge was reduced. Quite clearly, juveniles charged with a serious offense have a greater likelihood of having their charges reduced than do those charged with

TABLE 32
REPRESENTATION BY COUNSEL AND NUMBER OF OFFENSES AT DISPOSITION

	STATEWIDE		HIGH		MEDIUM		LOW	
ATTORNEY:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
OVERALL %								
# OFFENSES AT DISPOSITION*								
1	81.8	83.8	86.9	7.25	81.6	87.4	69.8	82.1
2+	14.7	13.5	8.1	3.7	17.0	11.3	25.6	15.2
Felony Offense Against Person								
1	70.2	69.5	80.3	100.0**	66.7	76.1	64.9	65.5
2+	29.8	30.5	19.7	—	33.3	23.9	35.1	34.5
Felony Offense Against Property								
1	73.0	63.5	82.5	75.0	71.9	66.3	59.3	61.9
2+	27.0	36.5	17.5	25.0**	28.1	33.7	40.7	38.1
Minor Offense Against Person								
1	83.8	80.4	92.1	100.0	80.2	82.9	74.3	78.7
2+	16.2	19.6	7.9	—	19.8	17.1	25.7	21.3
Minor Offense Against Property								
1	85.4	84.7	90.0	92.3	85.8	87.0	72.4	83.7
2+	14.6	15.3	10.0	7.7	14.2	13.0	27.6	16.3
Other Delinquency								
1	89.1	81.9	95.5	95.6	86.0	85.8	76.5	76.7
2+	10.9	18.1	4.5	4.4	14.0	14.2	23.5	23.3
Status								
1	97.0	96.6	98.0	96.9	97.1	98.0	93.6	95.6
2+	3.0	3.4	2.0	3.1	2.9	2.0	6.4	4.4

* The overall percentages for the total number of offenses at disposition do not equal 100% because of the small fraction of cases in which there were no offenses at disposition, i.e., acquittal or dismissal of all charges. *See* Table 31, n.1. For the state as a whole and the high, medium, and low representation counties, the acquittal/dismissal rates for represented and unrepresented youth were, respectively: 3.5% and 2.7%; 5.0% and 23.8%; 1.4% and 1.3%; and 4.6% and 2.8%.

** There was only 1 unrepresented juvenile in this cell.

less serious offenses. Thus, about 15% of the juveniles charged with a felony offense against the person have their top charge reduced as compared with only about 5% of those charged with a status offense. In part, the greater reduction of serious offenses reflects the fact that the more serious offenses encompass a greater number of "lesser included" offenses and include a larger propor-

tion of cases with multiple allegations (Table 31), both of which permit pleas to other less serious offenses.

TABLE 33
REPRESENTATION BY COUNSEL AND REDUCTION OF CHARGES

	STATEWIDE		HIGH		MEDIUM		LOW	
ATTORNEY:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
Felony Offense Against Person	82.9	88.9	73.0	25.0	93.4	95.8	77.7	88.0
Felony Offense Against Property	86.8	89.5	84.6	44.4	93.6	94.0	77.6	87.9
Minor Offense Against Person	84.5	91.8	77.2	25.0	92.4	95.6	82.6	92.3
Minor Offense Against Property	92.3	94.1	90.6	80.6	96.0	95.7	88.4	93.7
Other Delinquency	91.5	94.6	90.1	72.4	95.4	97.3	87.2	93.4
Status	94.2	96.4	93.9	82.1	95.8	97.0	92.2	96.7

Comparing the proportions of reduced charges when juveniles are or are not represented by counsel provides another basis for assessing the performance of attorneys. In the state overall and in the counties with medium and low rates of representation, a larger proportion of juveniles who appear with counsel are convicted of offenses less serious than those with which they were originally charged (Table 33). As expected, the amount of reduction is greatest for those charged with felony offenses and offenses against the person and less for those charged with the more numerous but less serious minor offenses against property, other delinquency and status violations.

When the counties with high, medium, and low rates of representation are examined separately, attorneys show the greatest impact in those counties where they are least common, such as low representation counties, and the least impact in the counties where they appear most frequently. In the counties with high rates of representation, the 5.5% of unrepresented juveniles (Table 4) have much greater rates of charge reduction than do their represented colleagues. The greater rate of charge reduction and dismissal (Table 32) suggests that the juvenile court judges in the high representation counties are especially conscious of these juveniles' lack of representation, indulge a presumption for leniency in their favor,

and impose very few out-of-home placement or secure confinement dispositions on them (Tables 9 and 10).

By contrast, the presence of lawyers has the greatest impact on charge reduction in the low representation counties where attorneys appeared in less than 20% of cases. For juveniles charged with the most serious felony offenses, attorneys were able to effect about a 10% reduction when compared with the unrepresented juveniles. Even for the less serious offenses, represented juveniles enjoyed about a 5% reduction in charges as compared with the unrepresented youths. In the counties with medium rates of representation, there was a modest 1% to 2% difference in reduced charges in favor of represented juveniles.

Table 34 reports the proportional reduction in charges by the type of attorney. Slightly more than 5% of juveniles had a private attorney while the bulk of juveniles were represented either by public defenders or court appointed attorneys depending upon the legal services delivery system in the particular county (Table 3). In examining charge reduction by type of attorney for the state as a whole, it appears that a juvenile fares somewhat better when represented by a public attorney rather than a private attorney. For the six offense comparisons, in no instance did a private attorney garner a greater proportion of charge reductions than did at least one of the public attorney types, and in two-thirds of the comparisons private attorneys did worse than both. Setting aside the data from the counties with high rates of representation where there were very few private attorneys (2.4%, Table 3) or unrepresented juveniles, it appears from the medium and low representation counties that if a juvenile seeks counsel at all, a public sector attorney who is more familiar with the system may provide greater assistance. Interestingly, in many of the comparisons, unrepresented juveniles enjoyed a larger proportional reduction in charges than did those who retained private counsel. It must be recalled, however, that private attorneys were somewhat more effective than public attorneys when measured by the dispositions their clients received (Table 11).

3. Finding of Delinquency

A juvenile court judge in Minnesota may, as one of his or her dispositional options, find the facts to be proven but continue a case "before a finding of delinquency has been entered . . ."[227] Even

[227] MINN. STAT. ANN. § 260.185(3) (West 1982) provides:

When it is in the best interests of the child to do so and when the child has admitted the allegations contained in the petition before the judge or referee, or when a hearing has been held . . . and the allegations contained in the petition have been

TABLE 34
ATTORNEY TYPE AND CHARGE REDUCTION

	STATEWIDE				HIGH				MEDIUM				LOW			
LAWYER	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE	PRIV	PD	CA	NONE
Felony Offense Against Person %	90.1	82.6	79.9	88.9	71.4	73.9	69.7	25.0	100.0	91.4	92.9	95.8	76.2	70.6	79.5	88.0
Felony Offense Against Property %	84.4	89.3	83.7	89.5	41.7	83.8	91.7	44.4	90.1	94.8	92.5	94.0	79.5	90.7	75.0	87.9
Minor Offense Against Person %	90.7	83.4	84.7	91.8	80.0	74.4	89.2	25.0	93.9	92.5	89.7	95.6	90.9	90.0	80.0	92.3
Minor Offense Against Property %	94.2	92.9	90.2	94.1	87.0	90.7	90.6	80.6	97.7	96.1	93.7	95.7	86.2	92.0	88.2	93.7
Other Delinquency	93.1	91.7	89.5	94.6	77.8	90.6	89.9	72.4	100.0	93.6	94.5	97.3	84.9	100.0	86.7	93.4
Status	95.7	94.9	91.0	96.4	84.6	94.6	84.8	82.1	97.4	95.7	94.8	97.0	97.6	90.0	90.9	96.7

without finding delinquency, a judge may order many of the same dispositions.[228] The option of continuing a case without a formal finding of delinquency provides a dispositional alternative to intake screening for those county juvenile courts that do not screen cases prior to the filing of a petition. A finding of delinquency, however, constitutes a more formal determination with some additional consequences.[229]

An obvious question is what factors influence a judge's decision of whether or not to make a formal finding of delinquency. The obvious candidates are the seriousness of the present offense, pretrial detention, the severity of the eventual disposition, and the presence of an attorney. Table 35 summarizes the relationships between these variables and a finding of delinquency.

For the state as a whole and in the counties with high, medium, and low rates of representation, juvenile court judges make a finding of delinquency in slightly more than half of all petitioned cases, 55.2%. All the legal variables influence the judges' propensity to make a formal finding of delinquency in the expected directions. Judges make a finding of delinquency in about 10% more of the cases in which a juvenile is convicted of a felony offense than for a less serious offense. The only surprising result is the very high rate of findings of delinquency, 75.9%, for juveniles convicted of status offenses in the counties with high rates of representation.

Similarly, a juvenile's pretrial detention status influences the judge's eventual decision to make a finding of delinquency. Recall from Table 15 that while only 7.6% of juveniles in the state were detained, the rates of detention were higher for those charged with more serious offenses and with more extensive prior records. Thus, in the state as a whole, 78.3% of those juveniles held in detention as compared with 53.4% of those who were not held in detention were formally found to be delinquent. While pretrial detention was associated with a greater likelihood of a finding of delinquency in all types of counties, the impact was greatest in the counties with me-

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duly proven but, in either case, *before a finding of delinquency has been entered*, the court may continue the case for a period not to exceed 90 days on any one order. Such a continuance may be extended for one additional successive period not to exceed 90 days and only after the court has reviewed the case and entered its order for an additional continuance without a finding of delinquency . . . .

Id. (emphasis added).

228 *Id.*

229 *See* MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 103, at 29 (findings of delinquency may count as part of the adult criminal history score for subsequent sentencing purposes). They may also contribute to a "prima facie" case for transfer to adult criminal court. *See* MINN. STAT. ANN. § 260.125(3) (West 1986); Feld, *Dismantling the Rehabilitative Ideal*, *supra* note 4, at 230-39.

TABLE 35
FACTORS ASSOCIATED WITH A FINDING OF DELINQUENCY

	STATEWIDE	HIGH	MEDIUM	LOW
FINDING OF DELINQUENCY				
OVERALL %	55.2	53.3	56.0	55.5
OFFENSE				
Felony Offense Against Person	65.0	63.6	67.2	63.1
Felony Offense Against Property	65.9	57.1	70.3	66.1
Minor Offense Against Person	54.8	46.4	59.0	55.3
Minor Offense Against Property	55.2	48.8	60.6	54.3
Other Delinquency	54.4	49.1	55.1	57.2
Status	54.6	75.9	44.3	55.8
DETENTION				
Yes	78.3	69.0	83.9	71.2
No	53.4	52.3	52.1	54.8
DISPOSITION OVERALL				
% Home	79.1	76.5	82.6	77.0
% Secure	84.6	80.4	89.6	81.7
ATTORNEY				
Present	61.2	56.0	66.3	63.0
Absent	53.3	40.7	48.4	56.5

dium rates of representation where pretrial detention was used more extensively (Table 15).

There was also a direct relationship between a formal finding of delinquency and the severity of the eventual disposition a juvenile received. In the state as a whole, judges made a formal finding of delinquency in 79.1% of cases in which juveniles were removed from their homes, and in 84.6% of cases in which a secure confinement disposition was imposed.

In light of the previously described relationships between offenses, dispositions, detention, and representation by counsel (Tables 3-18), it is not surprising that judges entered findings of delinquency in larger proportions of cases in which juveniles were represented by an attorney than in cases in which they were not. In the state as a whole, judges made a formal finding of delinquency in nearly two out of three cases (61.2%) when juveniles were represented as contrasted with just over half (53.3%) the cases when they were not represented. In the counties with high, medium, and low rates of representation the same pattern prevailed with larger proportions of represented juveniles than unrepresented juveniles found delinquent. In light of the associations between the legal

variables and rates of representation, and the legal variables and formal delinquency determinations, it is difficult to attribute the differences in rates of finding delinquency to the presence of counsel as such. Rather, the presence of lawyers probably mirrors the other variables that increase the likelihood of a formal delinquency determination.

4. Case Processing Time and the Impact of Counsel

An important question is whether the presence of attorneys expedites or retards the rapidity of juvenile justice administration. The next analyses summarize the relationships between offenses and the amount of time it takes to process a case, detention and the amount of time it takes to process a case, and the presence of an attorney and the amount of time it takes to process a case. The amount of time a juvenile spends in the system is measured from the date the petition is filed to the date of disposition. Throughout these analyses, time in the system is reported for cases that take less than eight weeks to process and those that take more than twenty-one weeks.

Table 36 reports on the amount of time it takes to process delinquency cases by the type of offense. Overall, juvenile justice appears to be very expeditious—more than half of the cases are disposed of in less than two months and only about one case in five is still pending five months after the petition was filed. The counties with low rates of representation appear to dispose of cases somewhat faster than the counties with medium and high rates of representation, with about 8% more cases disposed of within eight weeks and about 5% percent fewer still pending in the system five months later.

There is a direct relationship between the amount of time a youth spends in the juvenile justice process and the seriousness of the offense. A smaller proportion of felony offenses and offenses against the person are disposed of quickly and a larger proportion of those cases are still active twenty-one weeks later. For example, of juveniles charged with a felony offense against the person, about one-third (33.4%) have their cases resolved in less than two months, while an even larger proportion (37.3%) of those cases are still active five months later. By contrast, more than half of the juveniles charged with minor property offenses, and other delinquency, and more than two-thirds of those charged with status offenses have their cases resolved quickly, and only about one out of six are still in the system five months later. When the processing times are analyzed separately for the counties with high, medium, and low rates

TABLE 36
OFFENSE AND CASE PROCESSING TIME

TIME:	STATEWIDE		HIGH		MEDIUM		LOW	
	8 wks less	21 wks more	8 wks less	21 wks more	8 wks less	21 wks more	8 wks less	21 wks more
OVERALL %	57.9	18.3	54.1	20.4	54.4	20.6	62.8	15.4
Felony Offense Against Person	33.4	37.3	43.4	20.9	27.5	44.2	34.8	38.8
Felony Offense Against Property	47.3	25.5	54.6	21.2	41.9	27.7	49.0	25.6
Minor Offense Against Person	43.3	26.6	48.4	22.3	34.0	32.8	50.9	22.0
Minor Offense Against Property	56.3	18.5	54.1	19.5	50.0	24.6	61.7	13.9
Other Delinquency	61.1	16.9	56.6	21.2	64.6	14.1	59.8	17.7
Status	68.8	11.6	54.3	20.9	65.9	11.5	75.7	8.6

of representation, it appears that the high representation counties dispose of felony cases most efficiently and the counties with low rates of representation dispose of the less serious cases most expeditiously.

Analyses discussed above reported the relationship between offenses and rates of representation (Tables 3 and 4) as well as between detention and rates of representation (Tables 15 and 16). In order to ascertain the impact of attorneys on case processing time, it is also necessary to analyze the effects of detention on case processing. Table 37 reports the amount of time it takes to process cases in which juveniles are held in detention and in which they are at liberty. Recall Table 15 indicates that 7.6% of juveniles received one or more detention hearings and that the seriousness of the present offense affected rates of detention. Table 37 controls for the present offense and reports the processing time of detained and nondetained juveniles.

Quite clearly, detaining a juvenile dramatically alters the rapidity with which juvenile courts process his or her case. For the state overall, only 35.1% of detained juveniles have their cases disposed of within eight weeks, as contrasted with 59.8% of those who were not detained. Conversely, detention more than doubles the proportion of cases that are still active five months later, 38.6% versus 16.7%. The finding that detention substantially *slows* the processing of a case is especially troubling. Minnesota juvenile court rules require that juveniles held in detention should be tried within 30 days of denying the allegations of a petition as contrasted with a 60 day

TABLE 37
OFFENSE, DETENTION, AND CASE PROCESSING TIME

	STATEWIDE		HIGH		MEDIUM		LOW	
DETENTION:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
OVERALL %								
> 8 Weeks	35.1	59.8	40.2	55.1	29.5	57.9	45.8	63.5
21 Weeks >	38.6	16.7	33.5	19.5	42.6	17.5	32.2	14.7
Felony Offense Against Person								
> 8 Weeks	35.7	32.7	41.7	43.8	30.8	25.9	46.4	32.9
21 Weeks >	38.5	36.9	33.3	18.1	41.8	45.4	32.1	39.9
Felony Offense Against Property								
> 8 Weeks	40.7	48.2	52.4	54.7	37.8	43.0	45.8	49.2
21 Weeks >	34.4	24.3	14.3	21.5	36.8	25.3	33.9	24.9
Minor Offense Against Person								
> 8 Weeks	32.7	44.8	46.7	48.5	25.8	36.1	47.1	51.2
21 Weeks >	49.0	23.4	40.0	20.7	53.0	27.8	41.2	20.8
Minor Offense Against Property								
> 8 Weeks	27.6	58.2	34.2	54.8	22.2	54.0	42.2	62.2
21 Weeks >	47.4	16.7	42.1	18.7	52.0	20.7	34.4	13.4
Other Delinquency								
> 8 Weeks	36.7	63.0	44.1	57.7	32.3	67.3	36.5	61.1
21 Weeks >	36.7	15.5	32.2	20.2	37.4	12.1	40.4	16.4
Status								
> 8 Weeks	29.9	70.7	23.0	57.3	22.9	68.5	49.1	76.4
21 Weeks >	33.2	10.5	39.3	19.1	34.4	10.1	24.6	8.2

time limit for juveniles not detained.[230] Similarly, the Juvenile Justice Standards recommend the expedited hearing and disposition of cases of detained juveniles.[231]

When the impact of detention on case processing is analyzed

[230] MINN. R. P. JUV. CT. 27.02(1). *See generally*, Feld, *supra* note 2, at 165-67 n.87:

> The Rules establish two timetables for processing juvenile offenders through the various stages of the justice system. The timetables vary depending upon whether the youth is being held in detention . . . . For a youth who is taken into custody and held in detention, the sequence and timing of the stages of the process are accelerated and a detention hearing is required . . . . Following arraignment, a detained youth must be brought to trial within 30 days rather than the 60 days provided for youths who remain at liberty, and the various notice, discovery, and pretrial proceedings must be completed during this period.

Id.

[231] *See* A.B.A.-I.J.A., PRETRIAL COURT PROCEEDINGS, *supra* note 83, Std. 7.1 B.2; A.B.A.-I.J.A., JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS Std. 7.10 (1980) [hereinafter INTERIM STATUS].

for the high, medium, and low representation counties, the deleterious effect of detention is most conspicuous in the counties with medium rates of representation. In those counties, about 10% fewer cases are disposed of quickly and about 10% more are still active later than in the high or low representation counties. Recall also that the counties with medium rates of representation had the highest rates of pretrial detention (Table 15, 12.2% versus 6.7% for high and 4.0% for low).

Although the seriousness of a juvenile's offense substantially alters the likelihood of detention (Table 15), the fact of detention as such exerts a relatively constant effect on the time required to process cases: roughly the same proportion of cases are still active five months later at all levels of offense. However, when detained cases are compared with non-detained cases, the retarding effect of detention on processing is most apparent for juveniles charged with less serious types of offenses. Thus, for juveniles charged with minor property and status offenses, about three times as many cases of those who were detained initially as contrasted with those who were not detained were still active after five months (compare Table 36 with 37).

Throughout these analyses, many of the indicators that a case is more complex—seriousness of present offense (Table 4), a prior record (Table 13), pretrial detention (Table 16), the number of offenses at disposition (Table 32)—have been associated with higher rates of representation. Table 38 reports on the effects of an attorney on case processing time while controlling for the seriousness of the offense.

For the state overall, 57.9% of all delinquency cases were resolved in less than eight weeks and only 18.3% were still active after twenty-one weeks (Table 36). Table 38 reports those rates for juveniles with and without counsel. Quite clearly, the presence of an attorney substantially slows the speed with which a case is disposed. While 57.9% of all cases are disposed of in less than two months, only 45.6% of represented cases as contrasted with 66.7% of unrepresented cases are disposed of in less than two months. Similarly, nearly twice as many of the cases of represented youths as unrepresented youths are still active five months later. Although Table 36 reported that much larger proportions of the less serious cases—minor property, other delinquency and status offenses—were resolved quickly, when juveniles were represented by counsel, nearly twice as many cases remained active after five months as compared with the unrepresented youths.

The impact of an attorney differs when the data are examined

TABLE 38
TIME IN SYSTEM AND REPRESENTATION BY COUNSEL

	STATEWIDE		HIGH		MEDIUM		LOW	
ATTORNEY:	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*	*YES*	*NO*
OVERALL %								
> 8 Weeks	45.6	66.7	54.4	42.9	39.2	65.5	37.8	68.2
21 Weeks >	25.3	13.0	20.2	26.5	29.8	13.3	28.5	12.3
Felony Offense Against Person								
> 8 Weeks	28.1	39.7	41.8	—	23.0	34.8	21.3	42.9
21 Weeks >	41.0	32.1	20.5	100.0*	48.0	32.6	52.1	31.0
Felony Offense Against Property								
> 8 Weeks	42.1	53.3	54.0	25.0	35.6	52.0	35.7	54.2
21 Weeks >	28.7	21.2	20.8	50.0	32.0	19.0	34.6	22.1
Minor Offense Against Person								
> 8 Weeks	35.6	55.4	47.5	50.0	25.6	50.5	35.1	58.5
21 Weeks >	30.1	20.9	22.0	50.0	36.7	24.3	31.1	18.6
Minor Offense Against Property								
> 8 Weeks	45.1	64.8	54.6	26.9	39.1	60.9	33.8	66.9
21 Weeks >	24.3	14.0	19.5	26.9	30.5	18.4	23.1	12.0
Other Delinquency								
> 8 Weeks	49.3	70.5	57.1	44.4	43.7	76.2	37.8	65.6
21 Weeks >	23.7	11.6	21.0	26.7	24.8	8.1	29.5	14.5
Status								
> 8 Weeks	53.2	73.7	53.3	60.9	52.8	67.3	53.7	78.0
21 Weeks >	19.9	8.5	21.8	12.5	18.5	10.2	17.0	7.4

* There was only 1 unrepresented juvenile in this cell

separately for counties with high, medium, and low rates of representation. In counties where virtually all juveniles have lawyers, it takes somewhat longer to process the cases of unrepresented juveniles. In those counties, a larger proportion of unrepresented cases are still active after five months for juveniles charged with all offenses except status offenses. In the counties with medium and low rates of representation, however, about 25% more of the cases of unrepresented juveniles are closed early while twice as many cases of represented juveniles remain active five months later.

F. MULTIPLE REGRESSION EQUATIONS FOR APPOINTMENT OF COUNSEL, PRE-TRIAL DETENTION, OUT-OF-HOME PLACEMENT AND SECURE CONFINEMENT DISPOSITIONS

The preceding analyses have focussed on bivariate relationships between selected variables while controlling for the effects of one or more other variables. The next analyses use ordinary least squares multiple regression procedures to analyze the relationships among a number of independent variables and to assess the relative impact of each independent variable on the dependent variable while controlling for the effects of other variables. Using regression techniques allows one to estimate and evaluate the strength and significance of the independent contributions of a number of factors to the explanation or prediction of a dependent variable.[232] Multiple regression estimates the relationships between the dependent variable and the independent variables by extracting from each variable the effects of the others. Thus, for example, the unique effect of the presence of an attorney on dispositions can be measured while taking into account or controlling for the effect of other variables.

The standardized regression coefficient for each independent variable ("beta" in Tables 39-53) expresses the relationship between each independent variable and the dependent variable, after the effects of the other variables have been taken into account. The relative importance of each independent variable in predicting the dependent variable is determined by the size of the beta, or standardized regression, coefficient. Where two or more independent variables are measured in different units, standardized coefficients provide the only way to compare the relative effect on the dependent variable of each independent variable. Tables 39-53 also report the zero-order correlation coefficient ("r") between each independent variable and the dependent variable, the multiple regression correlation coefficient ("R"), and R^2. The R^2 summarizes the amount of variation in the dependent variable that is explained by the independent variables included in the regression equation. The R^2 has the additional virtue of being interpretable as a straightforward percentage. For example, an $R^2 = .20$ means that 20 percent of the variation in a dependent variable is explained by the joint operation of the independent variables.

Forward, stepwise regression equations[233] were computed us-

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232 *See generally* F. KERLINGER & E. PEDHAZUR, MULTIPLE REGRESSION IN BEHAVIORAL RESEARCH (1973); D. KLEINBAUM & L. KUPPER, APPLIED REGRESSION ANALYSIS AND OTHER MULTIVARIABLE METHODS (1978); M. LEWIS-BECK, APPLIED REGRESSION: AN INTRODUCTION (1980).

233 *See* N. NIE, C. HULL, J. JENKINS, K. STEINBRENNER & D. BENT, SPSS: STATISTICAL

ing SPSS for the entire state and separately for counties with high, medium, and low rates of representation for the following dichotomous dependent variables: attorney; detention; out-of-home placement; and secure confinement.[234] The independent variables and their coding, which effects the signs of the beta coefficients, include: attorney (1=yes, 2=no); secure confinement (1=yes, 2=no); a previous secure confinement disposition (1=yes, 2=no); out-of-home placement (1=yes, 2=no); a previous out-of-home placement (1=yes, 2=no); age (1=12 or younger, through 7=18 years of age); gender (1=male, 2=female); detention (1=no, 2=yes); priors (1=none, through 4=5 or more); present offense (1=felony offense against person, through 6=status); number of offenses at disposition (1=none, through 6=five or more); and a "dummy" variable for race with race/black (1=not black, 2=black); race/Native American (1=not Native American, 2=Native American). As previously noted, the SJIS data includes only court-processing variables. Thus, the study cannot control for the influence of many of the substantive factors that juvenile courts deem relevant such as family status, socioeconomic status, clinical evaluations, and school or work involvement.

1. *Regressing Appointment of Counsel for Independent Variables*

The first regression equations are designed to determine which factors relate to the initial decision to appoint an attorney for a juvenile. Tables 39-42 summarize the regression equations for the state and for the counties with high, medium, and low rates of representation. In the state and in all types of counties, the most significant

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PACKAGE FOR THE SOCIAL SCIENCES (2d ed. 1975). Using standard regression techniques, each variable is added to the regression equation in a separate step after the influence of all other variables has been calculated. The increment in R^2 due to the addition of that variable is taken as the component of variation attributable to that variable. Forward stepwise inclusion enters independent variables only if they meet certain statistical criteria, for example $p<.05$, and the order of inclusion is determined by the respective contribution of each variable to the explained variance. *Id.* at 345.

234 Since the four dependent variables analyzed in this Article are dichotomous, categorical variables rather than interval variables, log linear or logit approaches to multivariate analyses may be preferable to ordinary least squares regression. For example, Cohen and Kluegel criticized earlier research on juvenile justice decision-making for using inadequate data-analytic techniques. Cohen & Kluegel, *Determinants*, *supra* note 210, at 165. Thornberry reanalyzed the data in his earlier study and concluded that the findings "are remarkably similar to the ones reached in this author's earlier study, even though the earlier work was based on less sophisticated analytic techniques." Thornberry, *supra* note 200, at 170. Because the sample size in this study is very large (N=17,195), the data robust, and the complexity of the data requires multivariate analyses, ordinary least squares regression was used. *See* D. KLEINBAUM & L. KUPPER, *supra* note 232.

TABLE 39
REGRESSION MODEL OF FACTORS INFLUENCING THE APPOINTMENT OF COUNSEL (STATEWIDE)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Offense Severity	.253*	.216*	.253	.064
Prior Record	−.205*	−.128*	.320	.102
Home	.229*	.120*	.350	.122
Detention	−.164*	−.082*	.359	.129
Prior Out-of-Home Disposition	.193*	.039*	.360	.130
Age	.040*	.017***	.361	.130

* $p < .001$
** $p < .01$
*** $p < .05$

TABLE 40
REGRESSION MODEL OF FACTORS INFLUENCING THE APPOINTMENT OF COUNSEL (HIGH REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Offense Severity	.115*	.101*	.115	.013
Prior Record	−.102*	−.071*	.156	.024
Home	.111*	.077*	.170	.029
Gender	.077*	.051**	.177	.031

* $p < .001$
** $p < .01$
*** $p < .05$

independent variable affecting the appointment of counsel is the seriousness of a juvenile's present offense. The length of the prior record, a juvenile's pretrial detention status, and eventually receiving an out-of-home placement disposition also influence the appointment of counsel.

For the state as a whole, the present offense and prior record explain most of the variance that can be accounted for in rates of representation (10.2%). The beta coefficient indicates that the seri-

ousness of the present offense (.216) has almost twice the influence of the prior record (−.128). Whether a juvenile eventually is removed from his or her home accounts for an additional 2% of the variance in rates of representation and has nearly the same impact as the prior record (.120) does on the appointment decision. Obviously, an event such as removal from the home, which may occur several months after the initial decision to appoint counsel, does not *cause* that earlier decision. Regression simply describes the association between the eventual disposition, such as removal from the home, and the presence of counsel. While the present offense and prior record are also associated with removal from the home,[235] multiple regression has already factored those variables into the equation and the impact of the disposition represents the residual effect after accounting for the partial influence of those other variables.

The relationship between the initial decision to appoint counsel for a juvenile and the later decision to remove him or her from home may reflect a process in which the initial appointment decision is dictated by the anticipated home removal decision. Finally, as earlier analyses suggested (Table 16), a juvenile's pretrial detention status is also associated with the appointment of counsel. Here, the causal ordering is clearer—if a juvenile is detained initially, then an attorney is more likely to be appointed both for the detention hearing as well as for subsequent proceedings. The cumulative R^2 for the statewide regression equation is .130, which means that 13% of the variance in the appointment of counsel can be explained by the six independent variables in this equation.

Because nearly 95% of the juveniles in the counties with high rates of representation had attorneys (Table 3), there is very little variation in the dependent variable. While the present offense, prior record, and home removal disposition enter the regression equation, together they explain very little of the variance in the appointment of counsel, only 2.9%, and the beta weights for those variables are only about half of those for the entire state. There is also a slight tendency for male delinquents to have higher rates of representation than females (Table 27). However, when nearly every juvenile has a lawyer, there is very little systematic variation that explains those few who do not.

235 *See* Tables 47-51 *infra* and accompanying text. *See also* Tables 6 and 12 *supra* and accompanying text.

TABLE 41
REGRESSION MODEL OF FACTORS INFLUENCING THE APPOINTMENT OF COUNSEL (MEDIUM REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Offense Severity	.324*	.291*	.324	.105
Prior Record	−.169*	−.116*	.366	.133
Home	.208*	.091*	.383	.147
Detention	−.172*	−.066*	.388	.151
Prior Out-of-Home Disposition	.178*	.041**	.389	.152

* $p < .001$
** $p < .01$
*** $p < .05$

TABLE 42
REGRESSION MODEL OF FACTORS INFLUENCING THE APPOINTMENT OF COUNSEL (LOW REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Offense Severity	.248*	.207*	.248	.062
Home	.236*	.144*	.318	.101
Detention	−.195*	−.133*	.343	.118
Prior Record	−.175*	−.122*	.361	.130
Age	.008*	−.027***	.362	.131

* $p < .001$
** $p < .01$
*** $p < .05$

The regression equation for the appointment of counsel in counties with medium rates of representation mirrors that for the state as a whole. The independent variables of present offense, prior record, home removal disposition, and pretrial detention enter the equation in the same order and account for more of the variance in appointment of counsel, 15.1%. Of these factors, the seriousness of the present offense is clearly the most influential (.291 versus .116 for prior record).

In the counties with low rates of representation, the order in which the independent variables enter the equation is somewhat dif-

ferent from those in the high and medium representation counties. While the seriousness of the present offense remains the strongest influence on the appointment of counsel, removal from the home is second, detention is third, and a prior record is fourth. Moreover, the beta weights of home removal, detention, and prior record are about the same, indicating that each has about the same association with variance in representation. While the length of the prior record is associated with a juvenile's age (Table 7), after controlling for that relationship, older youths are somewhat more likely to be represented than their younger counterparts (Table 5). If age provides a surrogate for competence to waive counsel, then this relationship is the opposite of what would be expected.

The multiple regression equations confirm the earlier bivariate analyses. In the state and in all types of counties, juveniles charged with more serious offenses are more likely to be represented (Tables 3 and 4), as are those with lengthier prior records (Table 13), those who are held in pretrial detention (Table 16), and those who are removed from their homes following adjudication (Tables 10, 11, and 14). What is somewhat surprising, however, is that after factoring into the regression equation all of the legally relevant variables—present offense, prior record, pretrial detention, and post-adjudication disposition—only 13% of the variance in appointment of counsel can be explained. While the very low R^2 in the high representation counties is understandable, even in the medium representation counties, only 15.2% of the variance in representation can be explained. While it is possible that other variables for which this study cannot account—parental socioeconomic status, family structure, educational attainment, or the like—may explain some additional variance in representation, a very large amount of the variation in representation seems to be random. The very substantial aggregate county variations in rates of representation suggest that after identifying the relevant legal variables, idiosyncratic judicial policies regarding waivers of rights are the major, albeit unmeasurable, factor in the appointment decision.

2. *Regressing Pretrial Detention on Independent Variables*

In the next set of regression equations, the dependent variable is pretrial detention (1=no, 2=yes). The independent variables are those used in the preceding analysis as well as the presence of an attorney. The regression equations attempt to identify which factors influence the decision to place a juvenile in pretrial detention.

As the earlier analyses of detention indicated,[236] while a juvenile's detention status exerts a strong influence on case processing and dispositions, identifying the factors that lead to the initial decision to detain juveniles is more problematic. Several studies suggest that there is no formal rationale for the detention decision or that the primary determinate is the availability of detention bedspaces.[237]

Tables 43-46 summarize the regression equations for pretrial detention for the state and the counties with high, medium, and low rates of representation. As will be seen in the regression analyses for out-of-home placement and secure confinement, after controlling for the present offense and prior record, a juvenile's pretrial detention status is a significant factor in dispositions.[238] Given the impact of pretrial detention on subsequent sentencing, the issue is what factors influence the initial decision to detain.

TABLE 43
REGRESSION MODEL OF FACTORS INFLUENCING THE DETENTION DECISION (STATEWIDE)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Out-of-Home Disposition	−.265*	−.211*	.265	.070
Attorney	−.164*	−.086*	.285	.081
Offense Severity	−.117*	−.068*	.290	.084
Prior Record	.140*	.048*	.296	.087
Gender	.020**	.046*	.299	.090
Age	−.039*	−.019***	.300	.090

* $p < .001$
** $p < .01$
*** $p < .05$

Table 43 reports the independent variables entering the regression equation for pretrial detention for the entire state. Recall that 7.6% of all juveniles in Minnesota had one or more detention hearings (Table 15). Interestingly, a subsequent event, receiving an out-of-home placement, accounts for most of the variance in pretrial detention, 7% (beta=−.211). The next most influential variable is the presence of an attorney, which accounts for an additional 1.1%

236 *See* Tables 15-18 *supra* and accompanying text.
237 *See, e.g.*, R. COATES, A. MILLER & L. OHLIN, *supra* note 194, at 65-67, 101-04; Frazier & Bishop, *supra* note 187, at 1149-50.
238 *See* Tables 47-51 *infra* and accompanying text.

of variance (beta=−.086). While both out-of-home placement and the appointment of counsel are influenced by the seriousness of the present offense and the prior record,[239] the residuals of those variables also enter the regression equation for pretrial detention. Finally, it appears that juveniles who are female and those who are younger are somewhat more likely to be detained than male or older juveniles after controlling for the influence of those other variables.

Because the eventual disposition occurs weeks or months after the initial detention decision, one possible inference is that out-of-home placement and pretrial detention share underlying common elements. The detention statute focuses on a juvenile's danger to others, danger to self, or likelihood of absconding.[240] While the disposition statute does not include specific sentencing criteria,[241] one interpretation is that the same factors that animate the initial detention decision later influence a judge's decision to remove a juvenile from the home. An equally plausible interpretation which draws on the findings of other research is that there is very little rationale for the initial detention decision,[242] but that it, in turn, may exert an independent effect on eventual dispositions apart from any common elements. A comparison of the beta coefficient for out-of-home placement with the betas of the other variables indicates that the eventual disposition exerts three or more times as much influence as any of the other variables on detention. Similarly, the association between representation and detention probably results from detention increasing the likelihood of representation, rather than from representation increasing a juvenile's likelihood of being detained[243] (Tables 16, 39, and accompanying text). Being female explains an additional .3% of the variance in pretrial detention. While

239 *See* Tables 39-42 *supra* and accompanying text (appointment of counsel); Tables 47-50 *infra* and accompanying text (out-of-home placement).

240 MINN. STAT. ANN. §§ 260.171-260.172 (West 1986); Feld, *supra* note 2, at 191-209.

241 MINN. STAT. ANN. § 260.185 (West 1986).

242 *See supra* notes 187-95 and accompanying text. Frazier and Bishop, for example, provide alternative interpretations for their inability to explain the detention decision.

> The fact that we were unable to model detention decisions in these data may mean that courts detain juveniles based on legitimate considerations supplied to the judge in ad hoc fashion, although we have no evidence to suggest that this occurs. Alternatively, this inability to model detention decisions may mean that the process is idiosyncratic, causing some juveniles to suffer significant deprivations of liberty based on considerations that are irrelevant to the approved purposes of detention. If this latter explanation is correct, the problem may lie in the fact that statutory detention criteria are too broad and/or that detention statutes offer too little guidance regarding whether youths meet the stated criteria.

Frazier & Bishop, *supra* note 187, at 1150-51.

243 *See supra* Tables 16, 39 and accompanying text.

the beta for gender is small (.046), it is comparable in influence to a prior record (.048) or a more severe offense (−.068).

TABLE 44
REGRESSION MODEL OF FACTORS INFLUENCING THE DETENTION DECISION (HIGH REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Out-of-Home Disposition	−.189*	−.193*	.189	.036
Prior Out-of-Home Disposition	−.146*	−.139*	.198	.039
Prior Secure Confinement Disposition	−.082*	.119*	.212	.045
Gender	.050**	.041***	.217	.047
Secure Confinement Disposition	−.106*	.062***	.220	.048
Prior Record	.128*	.056***	.224	.050
Age	−.047**	−.033***	.226	.051

* $p < .001$
** $p < .01$
*** $p < .05$

In the counties with high rates of representation, the regression equation can only account for 5.1% of the variance in rates of detention, and most of that is explained by the eventual sentence imposed in the present proceeding or by previous out-of-home or secure confinement dispositions. A relationship between previous sentences, current pretrial detention, and the eventual disposition is understandable. A record of prior referrals influences a juvenile's present detention status (Table 15). A prior out-of-home placement or secure confinement disposition represents a previous judicial determination that the juvenile should not remain at home, whether because of the nature of the prior offense or perceived treatment needs. Thus, when a juvenile on probation or parole is reapprehended, police and probation officers as well as the juvenile court judge are likely to incorporate their earlier decisions into their current ones.

Table 45 reports the regression equation for pretrial detention in the counties with medium rates of representation where nearly twice as many juveniles were detained as in other parts of the state (12.2% versus 6.7% and 4.0%, Table 15). Again, eventually receiv-

TABLE 45
REGRESSION MODEL OF FACTORS INFLUENCING THE DETENTION DECISION
(MEDIUM REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Out-of-Home Disposition	−.304*	−.272*	.304	.092
Offense Severity	−.177*	−.121*	.327	.107
Prior Record	.158*	.076*	.342	.117
Attorney	−.172*	−.067*	.348	.121
Gender	−.006	.051*	.352	.123
Prior Secure Confinement Disposition	−.165*	−.052*	.354	.124
Secure Confinement Disposition	−.224*	−.044***	.355	.125

* $p < .001$
** $p < .01$
*** $p < .05$

ing an out-of-home placement, the seriousness of the present offense, the length of the prior record, and the presence of an attorney explains most of the variance, 12.1%, of which the out-of-home placement exerts the most influence (beta=−.272). Female juveniles are somewhat more likely to be detained than are their male counterparts after controlling for the other independent variables (beta=.051).

Table 46 reports the regression equation for the detention decision in the counties with low rates of representation where comparatively few juveniles are detained (Table 15). As in other settings, pretrial detention is most strongly associated with an eventual out-of-home placement and the presence of an attorney (R^2=.085). Perhaps more surprising, however, is the absence of either the present offense or prior record from the regression equation. For the reasons indicated previously, neither the eventual disposition nor the appointment of counsel cause the initial pretrial detention. Yet this data and the regression equation do not identify any other significant causal variables that logically do explain detention. The inability of this study to model the initial detention decision is consistent with other recent research findings.[244]

[244] For instance, Frazier and Bishop conclude that:

> neither standard sociodemographic variables nor theoretically important legal variables are related to detention decisions. These findings suggest that courts do not

TABLE 46
REGRESSION MODEL OF FACTORS INFLUENCING THE DETENTION DECISION (LOW REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Out-of-Home Disposition	−.255*	−.192*	.256	.065
Attorney	−.195*	−.143*	.291	.085
Gender	.028***	.037**	.293	.086
Secure Confinement Disposition	−.207*	−.041***	.294	.087

* $p < .001$
** $p < .01$
*** $p < .05$

These data raise troubling questions about the determinants and uses of detention. Very little of the variance in the use of detention can be explained by traditional legal variables. Only .6% of the detention decision can be explained by the seriousness of the present offense and prior record independently of a home removal disposition and the presence of counsel (Table 42). The variations in the use of detention in different parts of the state suggest that the vague and general statutory criteria are susceptible to many differing local interpretations and applications.

Pretrial detention is a very onerous imposition and its overuse is a frequent source of criticism.[245] Quite apart from the obvious

make detention decisions based on the juvenile's age, gender or race and that courts are influenced neither by the seriousness of the current charges nor by prior records of offending.

Frazier & Bishop, *supra* note 187, at 1143. After additional analyses, they conclude that "detention decisions are systematically related neither to characteristics of juveniles nor to the offenses of juveniles about which decision-makers are routinely informed." *Id.* at 1150.

[245] The overuse and abuse of pretrial detention for juveniles has been criticized extensively. *See, e.g.*, Feld, *supra* note 2, at 191-209; Guggenheim, *Paternalism, Prevention and Punishment: Pretrial Detention of Juveniles*, 52 N.Y.U. L. REV. 1064, 1071-74 (1977); Krisberg & Schwartz, *supra* note 187, at 357-62; Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution of a Due Process Dilemma*, 132 U. PA. L. REV. 95, 95-98 (1983).

The vast majority of juveniles' institutional contacts occur in pretrial detention centers rather than in postadjudication commitments to training schools or other correctional facilities. *See* R. SARRI, *supra* note 223, at 7; Sarri, *Service Technologies: Diversion, Probation, and Detention*, in BROUGHT TO JUSTICE? JUVENILES, THE COURTS AND THE LAW 166 (R. Sarri & Y. Hasenfeld eds. 1976). Moreover, many juvenile court jurisdictions do not have juvenile detention facilities and juveniles routinely endure preventive deten-

injurious consequences of pretrial imprisonment, such as deprivation of liberty, stigmatization, and negative self-labeling, detention may also impair a juvenile's ability to prepare legal defenses and may increase both a juvenile's probability of conviction and the likelihood of institutional confinement following adjudication.[246] Moreover, the presence of the gender variable in the regression equation confirms the earlier observed disproportionate detention of female offenders (Tables 28 and 29).

3. Regressing Out-of-Home Placement and Secure Confinement Dispositions on Independent Variables

This study uses two alternative measures of dispositions—out-of-home placement and secure confinement. The next sets of regression equations examine the independent variables associated with the juvenile court's sentencing decision to remove a juvenile from his or her home and to institutionalize. Tables 47 through 50 summarize the regression equations for the state as a whole and separately for the counties with high, medium, and low rates of representation.

Table 47 reports the regression variables for juvenile court sentencing decisions—out-of-home placement and secure confinement—for the entire state. All of the independent variables account for 24.5% of the variance in home removal and 22.4% of the variance in institutionalization. Of the independent variables, a previous disposition of removal from the home is the most powerful determinant of the present decision to remove a juvenile from the

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tion in adult jails. *See* Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976) ("Pretrial detention is an onerous experience, especially for juveniles . . . ."); D.B. v. Tewksbury, 545 F. Supp. 896, 898-903 (D. Or. 1983) (graphic description of the conditions under which juveniles are confined in adult jails); R. GOLDFARB, JAILS: THE ULTIMATE GHETTO 286-344 (1975). Commentators have described the realities of juvenile confinement thusly:

> [o]ver half a million juveniles annually detained in "junior jails," another several hundred thousand held in adult jails, penned like cattle, demoralized by lack of activities and trained staff. Often brutalized. Over half the facilities in which juveniles are held have no psychiatric or social work staff. A fourth have no school program. The median age of detainees is fourteen; the novice may be sodomized within a matter of hours. Many have not been charged with a crime at all.

Wald, *Pretrial Detention for Juveniles*, in PURSUING JUSTICE FOR THE CHILD 119 (M. Rosenheim ed. 1976). It is this institutional reality that Justice Rehnquist characterized as the equivalent of parental supervision. *See* Schall v. Martin, 467 U.S. 253, 265 (1984).

246 *See* R. COATES, A. MILLER & L. OHLIN, *supra* note 194, at 101-04 (detained juveniles more likely to be institutionalized); Clarke & Koch, *supra* note 57, at 293-94 ("[b]eing detained before adjudication had an independent effect on the likelihood of commitment, entirely apart from the fact that both detention and commitment had some common causal antecedents . . . ."); Frazier & Bishop, *supra* note 187, at 1148 (detention increases likelihood of institutionalization).

TABLE 47
REGRESSION MODEL OF FACTORS INFLUENCING OUT-OF-HOME PLACEMENT AND SECURE CONFINEMENT DISPOSITIONS (STATEWIDE)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
OUT-OF-HOME PLACEMENT				
Prior Home Removal Disposition	.422*	.357*	.422	.179
Detention	−.265*	−.175*	.467	.218
Attorney	.229*	.107*	.483	.233
Offense Severity	.157*	.077*	.490	.240
Number of Offenses at Disposition	−.084*	−.060*	.494	.244
Age	.039*	.018**	.494	.244
Prior Record	−.282*	−.019***	.494	.244
Gender	.023**	−.014***	.494	.245
SECURE CONFINEMENT				
Prior Secure Confinement Disposition	.414*	.354*	.414	.171
Offense Severity	.191*	.120*	.445	.198
Detention	−.194*	−.115*	.462	.214
Attorney	.197*	.081*	.469	.220
Number of Offenses at Disposition	−.086*	−.050*	.471	.222
Prior Record	−.260*	−.040*	.473	.223
Age	−.023**	−.040***	.474	.224

* $p < .001$
** $p < .01$
*** $p < .05$

home (beta=.357). Similarly, a previous disposition of secure confinement is the most powerful determinant of the present decision to incarcerate a youth (beta=.354).

Two recent studies examined the impact of prior juvenile court sentences on the present one. Thornberry and Christenson report that the dispositions for prior offenses exert a strong influence on the current dispositions and that repeat offenders are likely to receive the same type of disposition for subsequent offenses, that is to say, there is stability in sentencing.[247] By contrast, Henretta, Frazier, and Bishop analyze the effects of previous sentences on the

247 Thornberry & Christenson, *Juvenile Justice Decision Making as Longitudinal Process*, 63 SOC. FORCES 433, 442 (1984).

present disposition while controlling for other variables and report evidence of progression or escalation, rather than stability, in sentencing.[248]

Although this study was not designed to replicate those of Thornberry or Henretta, it does provide evidence of the strong influence of prior dispositions on later sentences. The high zero-order correlations ("r") between prior home removal and present home removal, and between prior secure confinement and present secure confinement show the strong relationship between the two decisions. For the state as a whole and in all types of counties, a previous sentence of the same type as the current sentence is the first variable to enter the regression equation, has a beta weight that is double or triple that of the next variables, and explains about two-thirds to three-quarters of the total explained variance in sentencing.

The relationship between the previous disposition and the present one is consistent with the traditional, rehabilitative juvenile court sentencing philosophy. If sentencing decisions are individualized to fit the offender rather than the offense, then, absent a significant change in individual circumstances, a repeat involvement calls for a similar or greater intervention, regardless of the nature of the present offense. A juvenile's recidivism provides strong evidence to a sentencing judge that the child has failed to "learn his lesson." The previous disposition serves as a minimum constraint on the severity of the present sentence. To intervene less stringently is to give up and admit failure.

The next three variables to enter the equations for home removal and secure confinement, albeit in somewhat different order, are seriousness of the present offense, pretrial detention, and presence of an attorney. A relationship between the seriousness of the present offense and the more severe sentences reflects a modicum of proportionality in individualized dispositions (Table 6). A comparison of the beta weights for the present offense (home=.077, institutionalize=.120) with those of previous dispositions indicates that the latter are three to five times more powerful in explaining the present sentence.

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248 They conclude that:

> prior dispositions exert a fairly strong influence on the disposition of new offenses .... [O]nly severity of the current offense proved to be a stronger predictor of case outcomes .... [W]e did not find only stability in dispositional outcomes over repeat offenses. In our data, there is evidence of progression or escalation in the severity of disposition of subsequent offenses.

Henretta, Frazier & Bishop, *supra* note 182, at 561.

Pretrial detention also exerts a significant influence on the eventual sentence imposed on a juvenile (home beta=−.175, institutionalize beta=−.115). The presence of detention in the regression equations means that after controlling for the effects of the present offense, prior record and other variables that detention and the dispositions may share in common, the fact of detention *per se* exerts an additional and substantial effect on sentences. Indeed, a juvenile's pretrial detention status is about as influential as the present offense (beta=−.115 vs. .120) in the decision to confine and about twice as important (beta=−.175 vs. .077) in the decision to remove a juvenile from home. Other studies have noted the deleterious impact of pretrial detention on postadjudication dispositions.[249]

Other than noting the strong and consistent relationship between pretrial detention and later receiving an out-of-home placement, the above regression analyses (Tables 43-46) could not identify causal variables that explained much of the variance in detention. The presence of detention in the disposition regression equations indicates that after controlling for the influences of the other independent variables, the fact of detention itself has a substantial impact on the sentences that youths receive. It is possible that both the detention and the disposition decisions share common factors other than legal variables for which this study cannot control but which explain the strong relationship between the two. It is at least as likely, however, that the initial decision to detain is "irrational," meaning it has no formal legal rational basis, but that it strongly influences subsequent decisions.[250] If process variables such as detention have no objective bases but strongly influence subsequent decision-making, then it is important for juvenile court judges and legislators to scrutinize more closely and regulate more extensively those earlier decisions that may cumulate to a juvenile's detriment.

The regression equations indicate that the presence of an attorney is an aggravating factor in a juvenile's disposition, accounting for about 1.5% of the variance in home removal and about .6% of the variance in secure confinement. While the overall explained variance is small, the beta coefficient indicates that the presence of an attorney has more influence on a youth's removal from home than does the seriousness of the offense (attorney beta=.107, offense beta=.077). Thus, earlier observations that the presence of an at-

249 *See supra* notes 187-95 and accompanying text.

250 *Cf.* McCarthy & Smith, *supra* note 158, at 55-60.

TABLE 48
REGRESSION MODEL OF FACTORS INFLUENCING OUT-OF-HOME PLACEMENT AND SECURE CONFINEMENT DISPOSITIONS (HIGH REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
OUT-OF-HOME PLACEMENT				
Prior Home Removal Disposition	.498*	.347*	.498	.248
Detention	−.189*	−.115*	.511	.261
Prior Record	−.407*	−.112*	.519	.270
Number of Offenses at Disposition	−.083*	−.068*	.525	.276
Offense Severity	.055*	.075*	.530	.281
Attorney	.111*	.054*	.532	.283
Gender	−.014	−.054**	.535	.286
SECURE CONFINEMENT				
Prior Secure Confinement Disposition	.478*	.325*	.478	.228
Prior Record	−.393*	−.134*	.494	.244
Offense Severity	.099*	.109*	.507	.257
Detention	−.106*	−.050*	.510	.260
Prior Out-of-Home Disposition	.444*	.083**	.511	.262
Number of Offenses at Disposition	−.064*	−.040**	.513	.263

* $p < .001$
** $p < .01$
*** $p < .05$

torney seems to be an aggravating factor at sentencing are borne out by the regression equations (Tables 9, 10, 14, and 18).

The other variables in the regression equation explain very little additional variance in sentencing. The beta signs associated with the variable "age" indicate a slight tendency to remove younger juveniles from their homes (beta=.018) and to institutionalize older juveniles (−.040). Similarly, the beta sign for gender (−.014) indicates a very weak tendency to remove more female offenders than males from their homes after controlling for other variables. However, while statistically significant, none of these other variables explain even .1% of the variance in sentencing.

Table 48 reports the regression equations for home removal and secure confinement in counties with high rates of representa-

tion. Again, a previous sentence of home removal or institutional confinement is the variable which is most powerfully associated with a current home removal or secure placement. Although pretrial detention, a prior record, and the severity of the present offense also influence both decisions, their relative contributions are distinctly subordinate to the juvenile justice system's ratification of its own prior decisions. Somewhat surprisingly, even in counties where virtually all youths are represented, the presence of an attorney is still a slightly aggravating factor in the decision to remove a juvenile from home (beta=.054).

TABLE 49
REGRESSION MODEL OF FACTORS INFLUENCING OUT-OF-HOME PLACEMENT AND SECURE CONFINEMENT DISPOSITIONS (MEDIUM REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
OUT-OF-HOME PLACEMENT				
Prior Home Removal Disposition	.373*	.371*	.373	.139
Detention	−.304*	−.213*	.443	.196
Offense Severity	.197*	.098*	.461	.213
Attorney	.208*	.082*	.467	.218
Number of Offenses at Disposition	−.087*	−.051*	.470	.221
Prior Secure Confinement Disposition	.279*	−.076*	.472	.223
SECURE CONFINEMENT				
Prior Secure Confinement Disposition	.364*	.311*	.364	.133
Offense Severity	.255*	.156*	.424	.180
Detention	−.224*	−.134*	.445	.197
Gender	.137*	.052*	.448	.201
Attorney	.182*	.056*	.451	.203
Number of Offenses at Disposition	−.101*	−.048*	.454	.206
Age	−.056*	−.041*	.455	.207

* $p < .001$
** $p < .01$
*** $p < .05$

Table 49 presents the regression statistics for out-of-home placement and secure confinement of juveniles in counties with me-

dium rates of representation. A prior home removal disposition and pretrial detention status are the most influential determinants of a current home removal, and a prior institutional commitment, the seriousness of the present offense, and pretrial detention are the most significant determinants of current institutional confinement. The relationship between out-of-home placement and pretrial detention was noted earlier (Tables 43-46). In these equations, detention emerges as a strong influence on out-of-home placement and a somewhat lesser influence on secure confinement (home beta=−.213, institutionalize beta=−.134). While a juvenile's detention status explains more of the variance in home removal than does either the present offense or the prior record, it will be recalled that there was no apparent explanation for the initial decision to detain. As in previous analyses, the presence of an attorney is an aggravating factor at sentencing (home beta=.082, institutionalize beta=.056). After controlling for other variables, older males are somewhat more at risk for secure confinement than are other juveniles.

In the counties with low rates of representation, the previous home removal or confinement disposition, the pretrial detention, the seriousness of the offense, and the presence of an attorney explain most of the variance in dispositions. Of these, the previous sentence is clearly the dominant influence (home beta=.338, institutionalize beta=.351) followed by pretrial detention. A comparison of the beta weights for attorney representation in the high, medium, and low representation counties suggests that in the low representation counties where attorneys appear infrequently, their presence makes a larger contribution to the severity of the eventual sentences imposed than in settings where they appear more commonly.

4. Regressing Appointment of Counsel, Pretrial Detention, and Dispositions for Independent Variables Including a Juvenile's Race

The final set of regression equations, which are computed for Hennepin County only, include as an additional independent variable a juvenile's race—white, black, and other.[251] Race was "dummy" coded separately for black and Native American juveniles (1=not black, 2=black; 1=not Native American; 2=Native American). Creating separate variables to reflect a youth's minority status

[251] For a description of the Hennepin County "race" sample see *supra* notes 215-18 and accompanying text.

TABLE 50
REGRESSION MODEL OF FACTORS INFLUENCING OUT-OF-HOME PLACEMENT AND SECURE CONFINEMENT DISPOSITIONS (MEDIUM REPRESENTATION COUNTIES)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
OUT-OF-HOME PLACEMENT				
Prior Home Removal Disposition	.388*	.338*	.388	.151
Detention	−.255*	−.184*	.443	.197
Attorney	.236*	.120*	.464	.215
Offense Severity	.163*	.072*	.471	.222
Number of Offenses at Disposition	−.116*	−.060*	.474	.225
Gender	.001	−.025***	.475	.226
Age	.039*	.022***	.475	.226
SECURE CONFINEMENT				
Prior Secure Confinement Disposition	.391*	.351*	.391	.153
Detention	−.207*	−.141*	.426	.181
Offense Severity	.177*	.106*	.446	.199
Attorney	.205*	.099*	.457	.209
Number of Offenses at Disposition	−.118*	−.054*	.460	.212
Age	−.022***	−.034**	.461	.213

* $p < .001$
** $p < .01$
*** $p < .05$

permits an assessment of the impact of race on juvenile justice decision-making. The bivariate analyses of race are reported in Tables 19-25. It is also useful to compare the regression equations reported in Tables 51-53 with those for counties with medium rates of representation (Table 41, appointment of counsel; Table 45, detention; Table 49, dispositions).

Table 51 reports the regression factors influencing the appointment of counsel. As in other analyses, the seriousness of the present offense is the principal determinate of the decision to appoint counsel (beta=.336). A comparison of the regression variables for counties with medium rates of representation with those for Hennepin County reveals that the present offense carries substantially more weight relative to other variables and that a juvenile's pretrial

TABLE 51
REGRESSION MODEL OF FACTORS INFLUENCING THE APPOINTMENT OF COUNSEL INCLUDING A JUVENILE'S RACE (HENNEPIN COUNTY)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Offense Severity	.370*	.336*	.370	.137
Prior Home Removal Disposition	.171*	.051*	.395	.156
Home Removal	.217*	.102*	.406	.165
Prior Record	−.144*	−.082*	.412	.170
Black	−.097*	−.065*	.415	.173
Native American	−.031***	−.051**	.418	.175

* $p < .001$
** $p < .01$
*** $p < .05$

detention status is not a factor in the appointment decision. Finally, the regression equation confirms the observation that black and Native American juveniles are more likely to be represented than their white counterparts (Table 20). The beta weights for race (black beta=−.065, Native American beta=−.051) are comparable to those for a prior record and a prior home removal disposition, suggesting a small but significant relationship between minority racial status and the appointment of counsel.

Table 52 reports the regression factors influencing the detention decision in Hennepin County. A comparison of the detention variables with those for counties with medium rates of representation (Table 45) reveals many common features. An eventual home removal disposition, the seriousness of the present offense, and the presence of a prior record dominate both decisions. However, in Hennepin County, the fourth variable to enter the regression equation is a juvenile's black race (beta=.090). This confirms the observation that black juveniles in Hennepin County were being detained at higher rates than their white counterparts, after controlling for the present offense and prior record (Table 24). Indeed, comparing the betas indicates that being black has a greater impact on the detention decision than does having a prior record of offenses or a prior training school commitment. The influence of being a Native American juvenile on the detention decision is about half of that for black youths (beta=.046). However, any residual influence of a juvenile's race on the detention decision after controlling for present

TABLE 52
REGRESSION MODEL OF FACTORS INFLUENCING THE DETENTION DECISION INCLUDING A JUVENILE'S RACE (HENNEPIN COUNTY)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
Home Removal	−.297*	−.266*	.297	.088
Offense Severity	−.235*	−.176*	.341	.117
Prior Record	.168*	.081*	.361	.131
Black	.113*	.090*	.371	.138
Prior Secure Confinement Disposition	−.195*	−.069*	.375	.141
Native American	.029	.046**	.378	.143
Secure Confinement Disposition	−.235*	.063***	.380	.144

* $p < .001$
** $p < .01$
*** $p < .05$

offense and prior record raises further troubling questions about the administration of this practice.

The final set of regression equations examine the impact of a juvenile's race on the dispositional decisions—out-of-home placement and secure confinement. A comparison of the regression equations for Hennepin County with those for counties with medium rates of representation reveals that the same variables have comparable weights and account for about the same amount of variance. However, in the regression equations in Table 53, whether a juvenile is black or Native American also influences the decision to remove him or her from home. While the effects of race are small compared with the other variables, they are still statistically significant. Moreover, while a juvenile's race influences somewhat the initial decision to detain, after controlling for the effects of detention, minority youths are still at somewhat greater risk for removal from their homes. However, interestingly, there is no evidence of racial discrimination in the decision to commit juveniles to secure institutions.

While these data provide some evidence of disparities in the detention and sentencing of minority youths, there are other possible explanations besides racial discrimination for which this study cannot account. Historically, juvenile court judges base their decisions on a host of individual characteristics of the offender. Because

TABLE 53
REGRESSION MODEL OF FACTORS INFLUENCING OUT-OF-HOME PLACEMENT AND SECURE CONFINEMENT DISPOSITIONS INCLUDING JUVENILE'S RACE (HENNEPIN COUNTY)

INDEPENDENT VARIABLES	ZERO-ORDER r	STANDARDIZED BETA COEFFICIENT	MULTIPLE R	R^2
OUT-OF-HOME PLACEMENT				
Prior Home Removal Disposition	.347*	.287*	.347	.120
Detention	−.297*	−.200*	.417	.174
Offense Severity	.239*	.125*	.448	.200
Attorney	.217*	.094*	.455	.207
Number of Offenses at Disposition	−.103*	−.051**	.458	.210
Black	−.016	.056**	.461	.212
Native American	−.006	.037***	.462	.214
SECURE CONFINEMENT				
Prior Secure Confinement Disposition	.354*	.284*	.354	.126
Offense Severity	.312*	.186*	.446	.199
Detention	−.235*	−.118*	.460	.212
Gender	.191*	.085*	.478	.219
Attorney	.213*	.066*	.472	.223
Number of Offenses at Disposition	−.118*	−.057*	.475	.226
Age	−.099*	.053**	.478	.229

* $p < .001$
** $p < .01$
*** $p < .05$

the SJIS data only includes legal variables, this study cannot control for many of the factors which the principle of individualized justice deems relevant, such as family status, socioeconomic status, clinical evaluations, "treatment needs," school progress, and employment status. Indeed, the differential access of white and minority youth to private counsel provides an indirect indicator that black offenders may be somewhat poorer (Table 20). While individualized social variables that correlate with race may account for some of the racial differences in detention and out-of-home placement, it simply raises under a different guise the propriety of individualizing sentences on the basis of factors other than present offense and prior record

when doing so produces a disparate impact.[252]

The overall findings in this study are consistent with other studies of sentencing practices in juvenile courts. While legal variables exhibit a stronger statistical relationship with dispositions than do social variables, a very substantial amount of the variation in sentencing juveniles cannot be explained. Generally, the present offense and prior record—for which a prior disposition often serves as a surrogate in this study—are the best predictors of dispositions. However, they only account for about 25% of the variance in sentencing (Table 47, home R^2=.245; institutionalize R^2=.224).[253] Commentators have observed, with respect to the large amount of unexplained variation, that "the juvenile justice process is so ungoverned by procedural rules and so haphazard in the attribution of relevance to any particular variables or set of variables that judicial dispositions are very commonly the product of an arbitrary and capricious decision-making process."[254] Moreover, while this study could not explain the determinants of pretrial detention, its pronounced negative effect on subsequent sentences introduces yet another "arbitrary and capricious" and cumulative factor into the dispositional process.

The absence of any powerful, explanatory relationship between the legal variables and dispositions may be interpreted as true "individualized justice;" that is, every child is the recipient of a unique disposition tailored to his or her individual needs without regard to their offense severity or prior record. "Given the philosophy of the juvenile court system, this finding might be interpreted as quite positive in the sense that it could imply that judges consider a broad spectrum of both legal and social variables in their attempt to individualize decisions."[255]

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252 *See* Coffee, *The Repressed Issues in Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1020-1023 (1978); Feld, *Reference of Juvenile Offenders*, *supra* note 32, at 585-601.

253 *See* Clarke & Koch, *supra* note 57, at 286 (present offense and prior record explain 31% of variance in sentencing); Feld, *Reference of Juvenile Offenders*, *supra* note 32, at 598-99 (survey of dispositional studies that typically explain about 25% of variance); Horwitz & Wasserman, *supra* note 164, at 411 (inclusion of social background variables with offense variables accounts for 26% of variance); Marshall & Thomas, *Discretionary Decision-Making*, *supra* note 171, at 57 (careful measurement of legal and extralegal variables "account for only a little more than a quarter of the variance in the judicial dispositions . . . ."); Thomas & Cage, *supra* note 204, at 244 (legal factors more clearly linked to dispositions than are social variables); Thomas & Fitch, *supra* note 160, at 75 ("[T]he levels of association between both objective and personal variables and case dispositions are of weak to moderate magnitude, suggesting that no single factor exerts a major independent influence on judicial decisionmaking . . . .").

254 Marshall & Thomas, *supra* note 171, at 57.

255 Thomas & Cage, *supra* note 204, at 244.

An equally plausible interpretation, however, is that there is no rationale to dispositional decision-making; it consists of little more than hunch, guesswork, and hopes, constrained marginally by the youth's present offense, prior record, and previous dispositions. In such a case, individualization is simply a euphemism for subjectivity, arbitrariness, and discrimination:

> [T]hese findings also suggest the possibility that those who share various social characteristics will be treated in a significantly different fashion from those drawn from other categories in the population; those against whom complaints are filed by one type of complainant will be treated differently than those who have engaged in comparable behavior, but whose offense has been brought to the attention of social control agencies by a different complainant; and those who come before one judge will be disposed of differently than those who appear before another judge, regardless of who they are or what their present and past offense record might be.[256]

A system of justice in which the most powerful explanatory variables—present offense and prior record—only account for about 25% of the variance in sentencing remains a highly discretionary and, perhaps, discriminatory, one. It means that there is substantial attenuation between a youth's criminal behavior and the severity of the disposition; minor offenders can receive much more severe dispositions than serious offenders. Similarly situated offenders—defined in terms of their present offense or prior record—can receive markedly dissimilar dispositions depending on the county in which they are tried or the judge before which they appear. The desirability of perpetuating such subjective and idiosyncratic sentencing of similarly situated offenders goes to the heart of the juvenile court as an institution.

V. Discussion, Policy Implications, and Conclusions

This research provides a comprehensive empirical description and analysis of juvenile justice administration in Minnesota in 1986. It raises a number of disturbing and troubling questions about the quality of "justice" in juvenile courts in Minnesota and, by implication, in many other states. The empirical findings bear on a number of juvenile justice policy issues. What degree of county and judicial diversity in pretrial detention and sentencing is tolerable or desirable within a nominally statewide juvenile justice system? What can be done to improve the mechanisms for delivering legal services to juveniles, especially in rural counties? What legal standards should be used to assess the validity of waivers of counsel, especially those

256 *Id.*

by young juveniles? What can be done to eliminate the impact of prior, uncounselled convictions on subsequent sentencing of juveniles both as juveniles and as adults? What explicit and objective criteria should be adopted to limit the initial use and subsequent impact of pretrial detention? Should "in/out"—commitment and release—and "durational" sentencing guidelines be used in juvenile courts to reduce idiosyncratic and geographical sentencing disparities? The legislative and judicial reforms necessary to address and resolve these problems have profound implications for the juvenile court as an institution.

A. VARIETIES OF JUVENILE JUSTICE

The idealized portrayal of the traditional juvenile court is one of procedural informality in the quest of the goals of treatment and rehabilitation.[257] Historically, the predominant focus on characteristics of the young offender fostered judicial discretion and organizational diversity rather than uniformity.

> Since the court intended to rehabilitate the individual delinquent, and not primarily to exact the just measure of the law, the judge's hands could not be tied with procedural requirements. But translated into practice, this grant of authority meant that juvenile courts would be as different from each other as judges were different from each other .... The result was a system that made the personality of the judge, his likes and dislikes, attitudes and prejudices, consistencies and caprices, the decisive element in shaping the character of the courtroom .... Without set rules of evidence, without fixed guidelines, and, in many cases, without the prospect of appeal, the court quite literally had the delinquent at its mercy. The person of the judge himself assumed an altogether novel significance .... [A]ny attempt to analyze the workings of a given court demanded a lengthy evaluation of its judge.[258]

Evaluations of contemporary juvenile courts continue to emphasize the diversity of judges and the broad legal framework that allows for "very individualistic interpretation and clearly different application" of laws.[259]

With *Gault*'s imposition of procedural formality and the emergence of punitive as well as therapeutic goals,[260] a state's juvenile courts can no longer be assumed to be in conformity with the traditional model or even to be similar to one another. Intensive ethno-

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257 *See* Mack, *supra* note 13, at 106-09. *See also supra* notes 13-23 and accompanying text.

258 D. ROTHMAN, *supra* note 2, at 238.

259 H. RUBIN, BEHIND THE BLACK ROBES: JUVENILE COURT JUDGES AND THE COURT 7 (1985). *See* P. KFOURY, CHILDREN BEFORE THE COURT: REFLECTIONS ON LEGAL ISSUES AFFECTING MINORS (1987).

260 *See* Feld, *supra* note 2, at 272-74; Feld, *Punishment, Treatment, supra* note 4.

graphic studies that focus on a single juvenile court cannot be generalized to other courts in other settings.[261] The few comparative studies of juvenile courts reveal some of the complexities of goals, philosophies, and procedures that characterize the juvenile court as an institution.[262]

Recent comparative research by Stapleton and others indicates that juvenile courts are highly variable organizations with observable structural characteristics on a number of dimensions, such as status offender orientation, centralization of authority, formalization of procedure, intake screening discretion, and the like.[263] "[T]he empirical typology of metropolitan juvenile courts reflects the existence of the two major types of juvenile courts ('traditional' and 'due process') suggested in the literature. More important, however, it reveals variations in court structure and procedure that are not captured adequately by existing simplistic typologies."[264] The recognition that a state's juvenile courts cannot be treated as a single, uniform justice system vastly complicates research which must identify and account for these systemic differences as well.

The present study provides additional support for the existence of "varieties of juvenile justice." Even though the same state laws and rules of procedure apply in all eighty-seven counties of Minnesota, it is readily apparent that at the county level the administration of juvenile justice differs substantially. This comparative research design was shaped by variations in rates of representation. The appearance of counsel, as a dependent variable, provides an indicator of structural variation of types of courts on many other dimensions as well. A juxtaposition between a traditional therapeutic and due process orientation summarizes many of the variations in juvenile justice administration.[265] "At one extreme lies the system best de-

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261 Detailed ethnographic studies of juvenile courts include: M. BORTNER, *supra* note 59 (juvenile court in midwestern state); A. CICOUREL, *supra* note 159 (urban court); R. EMERSON, *supra* note 159 (urban court).

262 *See* Cohen & Kluegel, *Detention Decision*, *supra* note 193 (comparison of juvenile courts in Denver and Memphis); Cohen & Kluegel, *Determinants*, *supra* note 210 (same); Hackler, Brockman & Luczynska, *The Comparison of Role Interrelationships in Two Juvenile Courts: Vienna and Boston*, 5 INT. J. CRIM. & PENOLOGY 367 (1977) (cross-national comparison); Handler, *The Juvenile Court and the Adversary System: Problems of Form and Function*, 1965 WIS. L. REV. 7 (1965) (diversity of juvenile courts).

263 *See* Stapleton, Aday & Ito, *An Empirical Typology of American Metropolitan Juvenile Courts*, 88 AM. J. SOC. 549, 555 (1982). *See also* Hasenfeld & Cheung, *The Juvenile Court as a People-Processing Organization: A Political Economy Perspective*, 90 AM. J. SOC. 801 (1985) (analysis of juvenile courts in their sociopolitical context).

264 Stapleton, Aday & Ito, *supra* note 263, at 559.

265 *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-246 (1968) (crime control-due process dichotomy); V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 38-46 (cooperative-adversary dichotomy); Cohen & Kluegel, *supra* note 210, at 168-70 (thera-

scribed by the concept of *parens patriae*, with an emphasis on 'helping' the child, intervening in his or her best interest. At the other lies the more formal, legalistic system, with a due process model of restricted information flow and precise rules of adjudication . . . ."[266]

Having categorized Minnesota's juvenile courts on the basis of the availability of attorneys, it is useful to highlight some of the other differences among juvenile courts in the counties with high rates of representation and those with low rates of representation. Other systematic or structural differences are observable between counties in which 94.5% of juvenile offenders are represented and those in which only 19.3% are represented.

Using some of Stapleton's criteria, it is apparent that the courts in high representation counties and those in low representation counties differed significantly in their "status offender orientation."[267] The high representation counties handled about 10% more juveniles charged with criminal offenses and 10% fewer status offenders than did the low representation counties (Table 1, 20.9% versus 30.5% status offenses). While some of these differences may reflect geographic differences in rates of delinquency, it probably represents a jurisdictional policy decision about informal screening of cases as well.

The differences between the rates of representation and the impact of counsel on juvenile justice administration have been noted extensively throughout this Article. Although the presence of an attorney is not one of the indicators of "formalization" used by Stapleton, Aday and Ito,[268] the presence of lawyers, as an indicator of a "due process orientation," is consistent with their classification scheme. The formalization associated with higher levels of representation are apparently also associated with more severe sentencing practices. After controlling for the effects of differences in offense patterns, the judges in the procedurally formal, high representation counties order more severe sentences than do their counterparts in low representation counties.[269] Proportionately, almost twice as many youths are removed from their homes and confined in

peutic-due process dichotomy); Feld, *supra* note 2, at 167-68 n.88 (applying Packer's crime control/due process dichotomy to juvenile justice); Handler, *supra* note 262, at 14-20 (casework-legal dichotomy).

266 Stapleton, Aday & Ito, *supra* note 263, at 550.

267 *Id.* at 553.

268 *Id.*

269 Cohen and Kluegel compared juvenile justice administration in Denver, which exhibited a strong "due process" orientation, and Memphis, which resembled the more traditional, therapeutic model of juvenile courts. Contrary to the findings in the present

the high representation counties as in the low representation counties (compare Tables 6 and 12).

The judges in the high representation counties also appear to rely upon and reinforce the authority of their professional staff to a greater extent than do those in the low representation counties. For example, probation officers in the high representation counties refer substantially more cases than do their counterparts in low representation counties (Table 2), and those referrals result in more serious dispositions than might otherwise be expected (Table 6). While the juvenile courts in the high representation counties detain proportionally more youths than do those in the low representation counties, these disparities in detention are increasingly significant as the seriousness of the offenses decline (Table 15).

Most fundamental, however, is the differential presence of defense attorneys in the high and low representation juvenile courts. What accounts for these differences? To what extent is the presence of defense counsel a reflection of differences in the roles of prosecutors in these respective jurisdictions.[270] If more prosecutors are present and involved in the pre-screening of cases using formal legal criteria in the high representation courts, then there may be a correspondingly greater legal role for defense counsel. This may explain, perhaps, why so many fewer defense attorneys appear at the time of sentencing in the high representation counties than in the other types of courts (see Table 3). It may be, for example, that the presence of defense attorneys in juvenile court evolves with the presence of prosecutors who use formal legal screening criteria.[271]

These procedurally and philosophically different courts operating under uniform state laws implicate a host of socio-legal issues that go far beyond issues of juvenile justice administration.[272] What

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study, they reported more severe sentences imposed by the therapeutic court than by the due process oriented court. Cohen & Kluegel, *supra* note 210, at 173.

270 Stapleton, Aday, and Ito differentiate among different types of juvenile courts on the basis of the presence and role of prosecutors in screening cases. Stapleton, Aday & Ito, *supra* note 263, at 554-55. *See generally* Rubin, *The Emerging Prosecutor Dominance of Juvenile Court Intake Process*, 26 CRIME & DELINQ. 299, 312-17 (1980).

271 Eisenstein and Jacob analyze the processing and disposition of adult felony cases using the model of a "courtroom work-group." J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 294-99 (1977). Applying their "work-group" concept to this juvenile court study, it may be that defense lawyers are as effective as the juvenile justice system allows them to be. If prosecutors do not pre-screen cases on formal legal grounds, then the juvenile court's emphasis on substantive justice discourages the presence and participation of defense attorneys.

272 *See generally* D. BLACK, THE BEHAVIOR OF LAW (1976); D. BLACK & M. MILESKI, THE SOCIAL ORGANIZATION OF LAW (1973); W. EVAN, THE SOCIOLOGY OF LAW: A SOCIAL-STRUCTURAL PERSPECTIVE (1980); J. INVERARITY, P. LAUDERDALE, & B. FELD, LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW (1983); C. REASONS & R. RICH,

external political, social, and legal variables influence the procedural and substantive orientation of a court? What are the legal cultures that foster a traditional or due process orientation? What are the comparative costs and benefits of formal versus informal dispute resolution?

This research documents substantial variations within a single state's juvenile justice system in offense screening, detention, sentencing, and the role of counsel in justice administration. While diversity rather than uniformity historically characterized juvenile justice, whether continued justification remains for such extensive local variation is highly questionable. Answering this question, however, depends upon additional research on the determinants and impact of diversity. This, in turn, requires much more information than is currently required or collected through the SJIS coding forms. The juvenile court judicial information systems in other states routinely collect information on a host of important legal and socio-demographic variables.[273] Because this information is already included in a juvenile's social services records, expanding the SJIS code forms to incorporate summaries in the Minnesota data reporting system would entail minor additional administrative burdens, but would greatly enrich policy analysis.

B. THE RIGHT TO COUNSEL AND THE WAIVER OF COUNSEL IN JUVENILE COURT—SHEDDING LIGHT ON THE DARK SECRET

Empirical evaluations of the impact of Supreme Court decisions on police and courtroom practices indicate that their influence often is limited and their policy goals frequently overridden by the organizational requirements of the affected agencies.[274] Several contemporaneous observers reported the limited influence of *Gault* on the

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THE SOCIOLOGY OF LAW: A CONFLICT PERSPECTIVE (1978); R. SIMON, THE SOCIOLOGY OF LAW: INTERDISCIPLINARY READINGS (1968).

273 *See, e.g.*, NATIONAL JUVENILE COURT DATA ARCHIVE, NEBRASKA JUVENILE COURT CASE RECORDS 1975-1985 USER'S GUIDE (1986) (living arrangements of child, parental marital status, family income, occupation of parent, employment and school status, and school attainment); PENNSYLVANIA JUVENILE COURT JUDGES' COMM'N, STATISTICAL CARD PROCEDURES (1984) (school status, family status, family income, victim information including the amount of injury inflicted or property taken, and the use of a weapon).

274 *See* Ingraham, *The Impact of Argersinger—One Year Later*, 8 LAW & SOC'Y REV. 615, 615-16 (1974) (impact of Argersinger v. Hamlin, 407 U.S. 25 (1972)); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 727-29 (1970) (impact of Mapp v. Ohio, 367 U.S. 643 (1961), exclusionary rule); Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office*, 12 SOC. PROBS 255, 265-68 (1965) (impact of Gideon v. Wainwright, 372 U.S. 335 (1963)); Comment, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1521, 1613-16 (impact of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

delivery and effectiveness of legal representation.[275] Nearly twenty years after *Gault* held that juveniles are constitutionally entitled to the assistance of counsel,[276] more than half of all delinquent and status offenders in Minnesota still did not have lawyers (Tables 3 and 4). Indeed, in only six of Minnesota's eighty-seven counties are even a majority of juveniles represented, and in sixty-eight counties, less than one-third of juveniles have counsel.[277]

Many juveniles who receive out-of-home placement and even secure confinement dispositions were adjudicated delinquent and sentenced without the assistance of counsel (Tables 9 and 10). For the state as a whole, nearly one-third of all juveniles removed from their homes and more than one-quarter of those incarcerated in secure institutions *were not represented* (Table 10). In the sixty-eight counties in the state with low rates of representation, *more than half* of the juveniles who were removed from their homes and who were incarcerated *were not represented* (Table 10). These very high rates of home removal and incarceration without representation constitute an indictment of all participants in the Minnesota juvenile justice process—the juvenile court bench, the county attorneys, the organized bar, the legislature and especially the Minnesota Supreme Court, which has supervisory and administrative responsibility for the state's juvenile courts.

The United States Supreme Court held in *Scott v. Illinois*[278] and the Minnesota Supreme Court in *State v. Borst*[279] that it was improper to incarcerate an adult offender, even one charged with a minor offense, without either the appointment of counsel or a valid waiver of counsel.[280] Moreover, both the United States and the Minnesota Supreme Courts have described the type of penetrating inquiry that must precede a "knowing, intelligent, and voluntary" waiver of the right to counsel.

Whether the typical *Miranda* advisory and the following waiver of rights under the "totality of the circumstances" is sufficient to assure a valid waiver of counsel by juveniles is highly questionable. Shortly after the *Gault* decision, commentators warned that simply importing adult waiver doctrines into delinquency proceedings was unrealistic and threatened the entire fabric of rights that the *Gault*

275 *See* Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 515; Duffee & Siegel, *supra* note 114, at 548.

276 *In re* Gault, 387 U.S. 1, 42 (1967).

277 *See supra* notes 142-43 and accompanying text.

278 440 U.S. 367 (1979).

279 278 Minn. 388, 154 N.W.2d 888 (1967).

280 *Scott*, 440 U.S. at 374; *Borst*, 278 Minn. at 398-400, 154 N.W.2d at 894-95.

decision granted.[281] An earlier article that criticized the ease with which juvenile court judges often found waivers of rights by minors noted that:

> considerable doubt remains as to whether a typical juvenile's waiver is, or even can be, "knowing, intelligent, and voluntary." Empirical studies evaluating juveniles' understanding of their *Miranda* [and *Gault*] rights indicate that most juveniles who receive the *Miranda* warning may not understand it well enough to waive their constitutional rights in a "knowing and intelligent" manner. Such lack of comprehension by minors raises questions about the adequacy of the *Miranda* warning [or *Gault*'s advisory of the right to counsel] as a safeguard. The *Miranda* warning was designed to inform and educate a defendant to assure that subsequent waivers would indeed be "knowing and intelligent." If most juveniles lack the capacity to understand the warning, however, its ritual recitation hardly accomplishes that purpose.[282]

No doubt, many juvenile court judges in Minnesota concluded that the majority of unrepresented juveniles "waived" their right to counsel in delinquency proceedings.[283] Are the majority of the young juveniles in Minnesota who waived their rights to counsel really that much more competent and legally sophisticated than the eighteen-year-old adult defendant in *Burt v. State*,[284] whose waiver was disallowed? Continued judicial and legislative reliance on the "totality of the circumstances" test clearly is unwarranted and inappropriate in light of the multitude of factors implicated by the "totality" approach, the lack of guidelines as to how the various factors should be weighed, and the myriad combinations of factual situations that make every case unique. These factors result in virtually

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[281] Lefstein, Stapleton and Teitelbaum cautioned that:

> the concept of waiver of rights in juvenile delinquency proceedings is unrealistic. The Supreme Court in *Gault* assumed without discussion that the waiver doctrine could be imported to juvenile court hearings . . . . We submit that these special problems are extremely serious, and that a review of the appropriateness of this doctrine for juvenile courts is necessary.

Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 537-38.

[282] Feld, *supra* note 2, at 174-75.

[283] An early empirical study of the right to counsel for adult defendants in Minnesota reported that:

> the attempted waiver is the exceptional case. Although one prosecutor estimated that almost 10 percent of the accused attempted to decline counsel—especially if they expected to be granted probation—this figure was atypical. Most estimates ran *under three percent*, and even this minute figure is greatly fractionalized when the judge fully explains the important role a defense lawyer may play. On the basis of these findings, any appellate court would seem justified in begrudgingly treating a state's claim that counsel has been intelligently waived.

Kamisar & Choper, *The Right To Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 36-37 (1963) (emphasis added).

[284] 256 N.W.2d 633, 636 (1977) (18 years old, had only a tenth grade education, and his scores on I.Q. tests were consistently low).

unlimited and unreviewable judicial discretion to deprive juveniles of their most fundamental procedural safeguard—the right to counsel.

Only the cynical or myopic can contend that immature and impressionable young juveniles can waive their right to counsel alone and unaided. How, then, does one explain the fact that in the sixty-eight counties with low rates of representation, only 18.6% of twelve-year-old juveniles have counsel? That only 19.9% of thirteen-year-old juveniles do? That in the entire state of Minnesota, less than half of the fourteen and fifteen-year-old juveniles do? Can that many juveniles be so mature as to make "knowing, intelligent, and voluntary" waivers of their constitutional rights alone and unaided in a frightening and alien courtroom environment?[285] Or is it that the youngest juveniles do not need representation because the consequences of juvenile court adjudication and disposition are so benign? How, then, does one account for the fact that more than one in five juveniles aged *thirteen* are removed from home—the highest rate for any age group—and nearly one in ten of those thirteen-year-old youths is incarcerated?

There are direct legislative and judicial policy implications of the findings reported here. Legislation or judicial rules of procedure mandating the automatic and non-waivable appointment of counsel at the earliest stage in a delinquency proceeding is necessary.[286] As long as it is possible for a juvenile to waive the right to counsel, juvenile court judges will continue to find such waivers on a

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285 Flicker notes that:

> [t]he special problems of juveniles in connection with the right to counsel include: 1. Immaturity. A juvenile's youth, limited experience, and undeveloped cognitive skills create confusion and fear in an unfamiliar and threatening situation and a greater need for assistance in decisionmaking, case preparation, and dealing with law enforcement, social service, and court officials.

B. FLICKER, PROVIDING COUNSEL FOR ACCUSED JUVENILES ii (1983).

286 *See, e.g.*, IOWA CODE ANN. § 232.11(2) (West Supp. 1985) (no child may waive the assistance of counsel at any of the stages and hearings of the juvenile justice process); N.M. STAT. ANN. § 10-205 (court to advise public defender to provide defense for juvenile); State v. Doe, 95 N.M. 302, 304, 621 P.2d 519, 521 (N.M. Ct. App. 1980) (child cannot waive the initial appointment of counsel).

Lefstein, Stapleton & Teitelbaum conclude that mandatory representation is essential:

> [i]n view of the inability of most juveniles to protect themselves from the consequences of the waiver of rights, or from the forces impelling them to effect a waiver, and because of the difficulties in placing substantial reliance on parental assistance, it may be argued that a minor should not, except in the most unusual circumstances [such as prior consultation with counsel], be held to a waiver of the right to counsel, nor an uncounseled minor to a waiver of the rights to silence, confrontation, and cross examination.

Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 553. *See also* Rubin, *supra* note 24, at 12 (mandatory representation by counsel at all stages of the juvenile process).

discretionary basis under the "totality of the circumstances." The very fact that it is legally possible for a juvenile to waive counsel itself may discourage some youths from exercising their right if asserting it may be construed as an affront to the presiding judge.[287] The A.B.A.-I.J.A. Juvenile Justice Standards recommend that "[t]he right to counsel should attach as soon as the juvenile is taken into custody, . . . when a petition is filed . . . or when the juvenile appears personally at an intake conference, whichever occurs first."[288] In addition, "[the juvenile] should have the 'effective assistance of counsel at all stages of the proceeding,' " and this right to counsel is mandatory and non-waivable.[289]

Some may question the utility of mandatory, non-waivable counsel if, as this research indicates, many of the consequences of representation are negative. Obviously, full representation of all juveniles would eliminate any variations in sentencing or processing associated with the presence of attorneys. Full representation would "wash out" the apparently negative effects of representation. Clearly, a full representation model is quite compatible with contemporary juvenile justice administration. Five counties—urban,

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287 Handler notes that:

> if the program of rights is to be effective, it must deal with the problem of waiver—waiver by those who do not understand and waiver by those who, rightly or wrongly, think, or have been coerced into thinking that they have more to gain by playing ball or by manipulation. Waiver under either circumstance should not be allowed . . . . [T]he community's interest here is greater than that which the adolescent or the parent thinks his best interests are. Furthermore, if these rights are to serve the important function of testing and questioning the juvenile process, allowing waiver should increase coercive tactics by the officials who are going to be questioned. Paradoxically, then, for "rights" to be effective, they must be made mandatory.

Handler, *supra* note 262, at 33.

288 A.B.A.-I.J.A., PRETRIAL COURT PROCEEDINGS, *supra* note 83, std. 5.1, at 89.

289 *Id.* The commentary to the Standards does qualify the absolute, nonwaivable nature of the right to counsel. "[I]n recommending that the respondent's right to counsel in delinquency proceedings should be nonwaivable, this standard is not intended to foreclose absolutely the possibility of *pro se* representation by a juvenile." A.B.A.-I.J.A., PRETRIAL COURT PROCEEDINGS, *supra* note 83, std. 5.1 commentary, at 93. While the Supreme Court held in Faretta v. California, 422 U.S. 806 (1976), that an adult defendant in a state criminal trial has a constitutional right to proceed without counsel when he or she voluntarily and intelligently elects to do so, *id.* at 834-36, whether a juvenile defendant can meet the requirements of a *Faretta* waiver is questionable. *See supra* notes 71-73 and accompanying text. Moreover, while the *Faretta* right to proceed *pro se* was based on the sixth amendment right to counsel, *Gault* based its holding on the fourteenth amendment. *In re* Gault, 387 U.S. 1, 41 (1967). A court or legislature could conclude that the "special circumstances" of youth, immaturity, and inexperience imposed a significantly higher, effectively unattainable, standard for competence before allowing the waiver of counsel by a young juvenile.

See generally B. FLICKER, *supra* note 285, at i ("Providing accused juveniles with a non-waivable right-to-counsel is probably the most fundamental of the hundreds of standards in juvenile justice . . . ."); Handler, *supra* note 262, at 21.

suburban, and rural—which process 21% of all of the delinquents in Minnesota already employ a full representation system. The comparisons between the counties with high rates of representation and those with medium and low rates of representation do not indicate that juvenile justice grinds to a halt if juveniles are routinely represented. The systematic introduction of defense counsel would provide the mechanism for creating trial records which could be used on appeal and which could provide an additional safeguard to assure that juvenile court judges adhere more closely to the formal procedures that are now required.[290] Moreover, eliminating waivers of counsel would lead to greater numbers of public defenders in juvenile justice cases. An increased cadre of juvenile defenders would get education, support, and encouragement from statewide asociation with one another similar to the post-*Gideon* revolution in criminal justice that resulted from the creation of statewide defender systems.

More fundamentally, however, since the *Gault* decision, the juvenile court is first and foremost a legal entity engaged in social control and not simply a social welfare agency. As a legal institution exercising substantial coercive powers over young people and their families, safeguards against state intervention and mechanisms to implement those safeguards are necessary.[291] The *Gault* Court was

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290 Several courts acknowledge that juvenile cases exhibit far more procedural errors than do comparable adult cases and suggest that confidential proceedings and the absence of counsel may foster a judicial casualness toward the law that visibility and appellate accountability might constrain. *See, e.g.*, RLR v. State, 487 P.2d 27, 38 (Alaska 1971); *In re* Dino, 359 So. 2d 586, 597 (La. 1978). Commentators have been even more critical of closed proceedings and the lack of appeals taken from juvenile courts.

> [A]ccess to juvenile delinquency hearings would function as a check on the abuse of power by judges, probation officers, and other public officials. The nature of the juvenile justice system, even more than the criminal system, suggests a compelling need to check the exercise of government power. Juvenile court judges, for example, exercise more discretion than their criminal trial counterparts . . . . Such a system relies heavily on subjective judgments, making the "compliant, biased, or eccentric judge" a particular hazard. Juvenile court judges, moreover, are often less qualified and less competent than other judges. As a result, juvenile courts often commit "much more extensive and fundamental error than is generally found in adult criminal cases." Because juvenile cases are only rarely appealled, public scrutiny of the juvenile justice system takes on added importance as a check against official misconduct.

Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1550-51 (1983) (citations omitted).

291 Handler argued, even prior to *Gault*, that adversary procedures were necessary to assure accurate fact-finding in delinquency proceedings and that "the nonadversary, solicitous procedure seriously underestimates the extraordinary task placed on the fact-finder adjudicator." Handler, *supra* note 262, at 29. While the United States Supreme Court in McKeiver v. Pennsylvania, 403 U.S. 528 (1970), asserted that judges were as capable as juries of accurate fact-finding, it did not disturb *Gault*'s premise that delinquency hearings were adversary proceedings. *McKeiver*, 403 U.S. at 543.

unwilling to rely solely upon the benevolence of juvenile court judges or social workers to safeguard the interests of young people. Instead, it imposed the familiar adversarial model of proof which recognizes the likely conflict of interests between the juvenile and the state.[292] Further, in an adversarial process, only lawyers can effectively invoke the procedural safeguards that are the right of every citizen, including children, as a condition precedent to unsolicited state intervention.[293]

A rule mandating non-waivable assistance of counsel for juveniles appearing in juvenile court might impose substantial burdens on the delivery of legal services in rural areas, such as the sixty-eight counties with low rates of representation.[294] Presumably, however, those counties already are providing adult defendants with representation and standby counsel in criminal proceedings so the organizational mechanisms already exist. Moreover, despite any possible fiscal or administrative concerns, every juvenile is already entitled by *Gault* to the assistance of counsel at every critical stage in the process and only an attorney can redress the imbalance between a vulnerable youth and the state.[295] As the Supreme Court said in *Gault*, "the condition of being a boy does not justify a kangaroo court,"[296] especially if the justification proferred for such a proceed-

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292 The *Gault* Court explicitly invoked the fifth amendment to establish that juveniles were protected against self-incrimination in delinquency proceedings. *Gault*, 387 U.S. at 49-50. As a consequence of the Court's application of the privilege against self-incrimination, juvenile adjudications no longer could be characterized as either "noncriminal" or as "nonadversarial," because the fifth amendment privilege, more than any other provision of the Bill of Rights, is the fundamental guarantor of an adversarial process and the primary mechanism for maintaining a balance between the state and the individual. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (describing the multiple policies underlying the fifth amendment, which include "our preference for an accusatorial rather than an inquisitorial system"). *See generally* Goodpaster, *supra* note 38; Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986).

293 *See* Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223, 229 (1986) ("[I]t is belaboring the obvious to assert that within the confines of the adversary system, the accuracy of a finding that a particular defendant is guilty or not guilty—especially the former—is greatly improved by providing him with a lawyer.")

294 A.B.A.-I.J.A., PRETRIAL COURT PROCEEDINGS, *supra* note 83, std. 5.1 commentary, at 93 (inadequate availability of legal services in rural areas may make compliance with mandatory counsel recommendation difficult).

295 Grisso concludes that:

> [t]he beneficial effects of a per se requirement of counsel in juvenile waiver proceedings should be enhanced as the juvenile justice system increases its own support of a strong advocacy role for these attorneys. At a minimum, the requirement provides a reasonable level of protection for younger juveniles; without this protection, they would be subjected to the very circumstances that *Miranda* [and *Gault*] sought to eliminate.

Grisso, *Juveniles' Capacities to Waive Miranda Rights*, *supra* note 79, at 1164.

296 387 U.S. at 28.

ing is simply the state's fiscal convenience. The issue is not one of entitlement, because all are entitled to representation, but rather the ease or difficulty with which waivers of counsel are found, which in turn has enormous implications for the entire administration of juvenile justice.

Short of mandatory and non-waivable counsel, a prohibition on waivers of counsel without prior consultation and the concurrence of counsel would provide greater assurance than the current practice that any eventual waiver was truly "knowing, intelligent, and voluntary."[297] Because waivers of rights, including the right to counsel, involve legal and strategic considerations as well as knowledge and understanding of rights and an appreciation of consequences, it is difficult to see how any less stringent alternative could be as effective. A *per se* requirement of consultation with counsel prior to a waiver takes into account the immaturity of youths and their lack of experience in law enforcement situations. In addition, it recognizes that only attorneys possess the skills and training necessary to assist the child in the adversarial process. Moreover, a requirement of consultation with counsel prior to waiver would assure the development of legal services delivery systems that would then facilitate the more routine representation of juveniles.

At the very least, court rules or legislation should prohibit the removal from home or incarceration of any juvenile who was neither represented by counsel nor provided with standby counsel. Such a limitation on disposition is already the law for adult criminal defendants,[298] for juveniles in some jurisdictions,[299] and the opera-

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297 In McLemore v. Cubley, 569 F.2d 940 (5th Cir. 1978), a class-action suit that raised the issue whether a juvenile can intelligently and competently waive his right to counsel in a delinquency proceeding without prior consultation with counsel, the Court rejected the juveniles' contention and reaffirmed the "totality of the circumstances" test as the appropriate means to determine the validity of a juvenile's waiver of rights. *Id.* at 940. However, an empirical study of juveniles' understanding of their right to counsel concluded that:

> the appointment of legal counsel at an earlier point in the juvenile justice process is recommended as a means of enhancing juveniles' understanding of the law and the legal process, and ensuring that any waiver of their legal rights is an informed waiver with a full understanding of the possible consequences of the waiver. Earlier appointment of legal counsel would also reduce the wide variation in the quality of legal counsel and the amount of time attorneys are able to spend in case preparation.

Lawrence, *supra* note 80, at 57.

298 *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). *See also supra* notes 43-49 and accompanying text.

299 *See* Feld, *supra* note 2, at 187. In Thomas v. Mears, 474 F. Supp. 908 (E.D. Ark. 1979), the court entered a consent decree creating a presumption against waiver of counsel and prohibiting a waiver where the parents initiate the petition or request a juvenile's removal from the home. *Id.* at 911.

tional practice in jurisdictions such as New York and Pennsylvania, where virtually no unrepresented juveniles are removed or confined.[300]

Apart from simply documenting variations in rates of representation, this research also examined the determinants of representation. It examined the relationship between legal variables—seriousness of offense, detention status, prior referrals—and the appointment of counsel. In each analysis, it showed the relationship between the legal variables and dispositions, the legal variables and the appointment of counsel, and the effects of representation on dispositions, while controlling for those legal variables. The regression equations summarized the interrelationship between those variables and their effects on the appointment of counsel and the influence of counsel on dispositions.

There are complex relationships between the factors producing more severe dispositions and the factors influencing the appointment of counsel. Each legal variable that is associated with a more severe disposition is also associated with greater rates of representation. Yet, within the limitations of this research, it appears that representation by counsel is an additional aggravating factor in a juvenile's disposition. When controlling for the seriousness of the present offense, unrepresented juveniles seem to fare better than do those with lawyers (Table 10). When controlling for the seriousness of the present offense and prior referrals, the presence of counsel produces more severe dispositions (Table 14). When controlling for offense and detention status, unrepresented juveniles again fare better than do those with representation (Table 18). When controlling for the effects of all of the independent variables simultaneously through the use of regression techniques, the relationship between the presence of an attorney and receiving a more severe disposition persists (Tables 47-50). In short, while the legal variables enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.

Although other studies have alluded to this phenomenon,[301] this research provides strong and consistent evidence that representation by counsel redounds to the disadvantage of a juvenile. One possible explanation is that the lawyers who appear in juvenile courts are incompetent and prejudice their clients' cases.[302] While systematic qualitative evaluations of the actual performance of coun-

300 *See* Feld, *In re Gault Revisited*, *supra* note 10, at 402-07.

301 *See, e.g.*, M. BORTNER, *supra* note 59, at 138-40; Clarke & Koch, *supra* note 57, at 297; Feld, *In re Gault Revisited*, *supra* note 10, at 419.

302 *See* J. KNITZER AND M. SOBIE, *supra* note 114, at 8-9; A. PLATT, *supra* note 13, at 139;

sel in juvenile courts are lacking, the available evidence suggests that even in jurisdictions where counsel are routinely appointed, there are grounds for concern about their effectiveness.[303] Public defender offices in many jurisdictions often assign their least capable lawyers or newest staff attorneys to juvenile courts to get trial experience and these neophytes may receive less adequate supervision than their prosecutorial counterparts.[304] Similarly, court appointed counsel may be beholden to the judges who select them and more concerned with maintaining an ongoing relationship with the court than vigorously protecting the interests of their frequently changing clients.[305]

V. STAPLETON & L. TEITELBAUM, *supra* note 66, at 38; Fox, *supra* note 13, at 1237; Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 511-12.

303 The state of New York had the highest rate of representation, over 95%, in a six-state study of the delivery of legal services in juvenile courts. Feld, *In re Gault Revisited*, *supra* note 10, at 400-02. Despite the routine presence of counsel, however, observers expressed concern about the quality of their performance. Knitzer and Sobie reported a number of very disturbing findings.

> Using the most basic criteria of effectiveness—that the law guardian meet the client, be minimally prepared, have some knowledge of the law and of possible dispositions, and be active on behalf of his or her client—serious and widespread problems are evident.
>
> —Overall, 45% of the courtroom observations reflected either seriously inadequate or marginally adequate representation; 27% reflected acceptable representation, and 4% effective representation. . . . Specific problems center around lack of preparation and lack of contact with the children.
>
> —In 47% of the observations it appeared that the law guardian had done no or minimal preparation. In 5% it was clear that the law guardian had not met with the client at all. . . . Further, in 35% of the cases, the law guardians did not talk to, or made only minimal contact with their clients during the court proceedings. . . . In addition, ineffective representation is characterized by violations of statutory or due process rights; almost 50% of the transcripts included appealable errors made either by law guardians or made by judges and left unchallenged by the law guardians . . . .

J. KNITZER & M. SOBIE, *supra* note 114, at 8-9.

304 Flicker notes that:

> [i]n some defender offices, assignment to kiddie court' is the bottom rung of the ladder, to be passed as quickly as possible on the way up to more visible and prestigious criminal court assignments. Little attention may be paid by superiors to performance in juvenile court, providing few incentives for hard work. Finally, the problem of cooptation is prevalent in juvenile court and many public defenders choose to join with the other child-savers in the court, sacrificing their clients' rights to zealous representation to the treatment goals of probation officers, judges, and other officials.

B. FLICKER, *supra* note 285, at 2. Indeed, commentators have noted that judges avoid or resist assignment to juvenile court for similar reasons. "[T]he juvenile court is considered to be the lowest rung on the judicial ladder. Rarely does the court attract men of maturity or ability. The work is not regarded as desirable or appropriate for higher judgeships." Handler, *supra* note 262, at 17.

305 Flicker commented that:

> [a]nother concern in assigned counsel systems is the preservation of the independence of attorneys from the influence of judges and other court officials. The problem is acute in juvenile courts because of its relative informality and smaller size. The continued reliance by probation officers, judges, and other officials on the con-

Measuring defense attorney performance by dispositional outcomes raises questions about the meaning of effective assistance of counsel in a court system in which many of the participants—juvenile court judges, probations officers, and prosecuting attorneys—do not regard an acquittal as a "victory." What does it take to be an effective attorney in juvenile court? Why do fewer defense attorneys appear at the time of juveniles' sentencing than appear at adjudications (Table 4)? Since virtually all juveniles are convicted of some offense (Table 31), thereby giving the court jurisdictional authority to intervene, how might attorneys for juveniles become more familiar with dispositional alternatives and more effective advocates for the substantive interests of their clients?[306]

Perhaps, however, the relationship between the presence of counsel and the increased severity of disposition is spurious. Obviously, this study cannot control for all of the variables that influence dispositional decision-making. It may be that early in a proceeding, a juvenile court judge's familiarity with a case alerts him or her to the eventual disposition that will be imposed if the child is convicted and counsel may be appointed in anticipation of more severe consequences.[307] In many states and counties, the same judge who pre-

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cepts of rehabilitation and best interests of the child create a tension between the adversarial role of defense counsel and the interventionist objectives of those who see themselves as providers of social services. The court officials' hostility to counsel's efforts has resulted in negative performance evaluations, slashed fees, and even pressure from the court to remove the offending attorneys from the panel.

B. FLICKER, *supra* note 285, at 4.

The relative efficacy of public defender versus court appointed systems of delivering legal services has been studied in both juvenile and adult settings in several jurisdictions. *See* J. EISENSTEIN & H. JACOB, *supra* note 271, at 294-99 (examining types of attorneys on criminal justice administration in three jurisdictions); Kamisar & Choper, *supra* note 283, at 101-16; Nardulli, *supra* note 179, at 415; Platt, Schechter, & Tiffany, *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 IND. L.J. 619, 638 (1968); Wheeler & Wheeler, *supra* note 179, at 326-27; Note, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 50 DEN. L.J. 101, 124 (1973).

306 Knitzer and Sobie report that "substantial numbers of law guardians assume virtually no role at dispositional proceedings. Instead, they rely almost totally upon others." J. KNITZER & M. SOBIE, *supra* note 114, at 10.

In State *ex rel.* D.E.H. v. Dostert, 269 S.E.2d 401 (W.Va. 1980), the West Virginia Supreme Court discussed thoughtfully and extensively the role of counsel at a dispositional hearing.

> [C]ounsel has a duty to investigate all resources available to find the least restrictive alternative . . . . Court appointed counsel must make an independent investigation of the child's background . . . . Armed with adequate information, counsel can then present the court with all reasonable alternative dispositions to incarceration and should have taken the initial steps to secure the tentative acceptance of the child into those facilities.

Id. 412-13.

307 *See* Aday, *supra* note 58, at 115.

sides at a youth's arraignment and detention hearing will later decide the case on the merits and then impose a sentence.[308] Perhaps the initial decision to appoint counsel is based upon the evidence developed at those earlier stages which also influences later dispositions. In short, perhaps judges attempt to conform to the dictates of *Argersinger* and *Scott*, try to predict, albeit imperfectly, when more severe dispositions will be imposed and then appoint counsel in such cases. Even if this somewhat explains the greater severity of sentences of represented juveniles than unrepresented ones, it remains the case that the requirements of *Argersinger*, *Scott*, and *Borst* are not being fulfilled because many unrepresented juveniles are removed from their homes and incarcerated as well. A fundamental dilemma posed by *Argersinger* and *Scott* is how to obtain the information necessary to determine before the trial whether, upon conviction, the eventual sentence will result in incarceration and thus will require the appointment of counsel without simultaneously prejudging the case and prejudicing the interests of the defendant.

Another possible explanation for the aggravating effect of lawyers on sentences is that juvenile court judges may treat more formally and severely juveniles who appear with counsel than those who do not. Within statutory limits, judges may feel less constrained when sentencing a youth who is represented. Adherence to formal due process may insulate sentences from appellate reversal.[309] Such may be the price of formal procedures. While not necessarily punishing juveniles who are represented because they appear with counsel, judges may be more lenient toward those youths who appear unaided and "throw themselves on the mercy of

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308 Feld notes that:

> at a detention hearing, a judge may be exposed to a youth's "social history" file and the youth's prior record of police contacts and delinquency adjudications, all of which bear on the issue of the appropriate pretrial placement of the youth. When that same judge is subsequently called on to determine the admissibility of evidence in a suppression hearing and the guilt of the juvenile in the same proceeding, the risks of prejudice become almost insuperable. To whatever degree a judge is unable to compartmentalize, a juvenile is denied the basic right to a fair trial by an impartial tribunal with a determination of guilt based on admissible evidence. The risk of prejudice is even more significant in juvenile court proceedings than in adult bench trials because adult defendants can at least avoid the risk by choosing a jury trial. Since juveniles have no right to a jury trial, their risks of prejudice are aggravated by their inability to avoid those risks.

Feld, *supra* note 2, at 240-41.

309 Duffee and Siegel contend that "juveniles who *are* represented by counsel should be subjected to control . . . more often than those who waive their rights. When the *appearance* of due process has been maintained, the juvenile court should feel secure about future challenges and safer in prescribing even stricter control over its wards." Duffee & Siegel, *supra* note 114, at 548-549 (emphasis added).

the court." While such an interpretation is consistent with this data, it raises in a different guise the question of judicial hostility toward adversarial litigants. Why should the fact that a youth avails himself of an elementary, constitutional procedural safeguards result in an aggravated sentence compared to that of an unrepresented juvenile? At the very least, further research, including qualitative studies of the processes of initial appointment and performance of counsel in several jurisdictions will be required to untangle this complex web.

Qualitative studies are also necessary to determine what attorneys actually do in juvenile court proceedings. In light of this research, the right to counsel and the role of counsel in juvenile court entails a twostep process. The first is simply assuring the presence of counsel at all. In many jurisdictions, simply getting an attorney into juvenile court remains problematic. Once an attorney is present, however, the role he or she adopts is also fraught with difficulties. While it is beyond the scope of this Article to prescribe the appropriate role for counsel, a number of commentators have questioned whether attorneys can function as adversaries in juvenile courts and, yet, have questioned the utility of their presence in any other role.[310] The reluctance of many to simply apply the role of counsel established in adult criminal courts to juvenile proceedings stems from the perceived differences in sentencing policies and the more "therapeutic" orientation of juvenile courts. Thus, many commentators prescribe different roles for counsel during the fact-finding adjudicative stage than for the dispositional process. Whether there are sufficient differences between punishment in criminal courts and treatment in juvenile courts to sustain differences in the role of counsel is certainly open to question.[311] At the very least, however, many more observations and studies of attorneys' actual performance must precede efforts to prescribe appropriate roles.

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310 *See* Ferster, Courtless & Snethen, *supra* note 114, at 398-99; Kay & Segal, *supra* note 114, at 1412; Lefstein, Stapleton & Teitelbaum, *supra* note 24, at 510-12; McMillian & McMurtry, *supra* note 114, 572; Platt & Friedman, *Limits of Advocacy*, *supra* note 178, at 1163.

311 *See* B. FELD, *supra* note 141, 131-69 (analyzing conditions of confinement in juvenile training schools); Feld, *Punishment, Treatment*, *supra* note 4 (contending that juvenile courts effectively "punish" youths and that there is no justification for any procedural differences between juvenile and adult courts).

C. *BALDASAR, EDMISON,* AND THE USE OF PRIOR UNCOUNSELLED CONVICTIONS TO ENHANCE SENTENCES FOR JUVENILES AND ADULTS

The inclusion of some juvenile delinquency convictions in the criminal history score of the Minnesota Adult Sentencing Guidelines[312] and the impact of previous delinquency dispositions on present juvenile court sentences raises an additional important issue. Juvenile court judges are influenced by the nature of previously imposed sentences as well as by a juvenile's prior record (Table 47). Judges sentencing adult offenders, whether by the guidelines or on a discretionary basis, also consider juveniles' prior records of delinquency.[313] Yet, several federal and state cases—*Baldasar, Tucker, Burgett, Nordstrom,* and *Edmison*—have condemned the enhancement of a defendant's current sentence on the basis of prior convictions where the defendant was unrepresented.[314] The enhancement of sentences occurs both formally by statute or guideline and informally as an exercise of judicial sentencing discretion. This research demonstrates that many unrepresented juveniles are routinely adjudicated delinquent and removed from their homes and incarcerated. It also shows that those earlier dispositions substantially influence later ones. Further, it is undoubtedly the case that many of those unrepresented juveniles who are later tried as adults will have their prior, uncounselled convictions included in their adult criminal history scores as well.

The Minnesota Sentencing Guidelines Commission policy decision to include juveniles' prior records in the adult criminal history score is correct.[315] Other jurisdictions using sentencing guidelines

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312 The Adult Sentencing Guidelines explicitly include the felony convictions of juveniles aged 16 or older in the adult criminal history score. MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 103, at 22-24. The guidelines provide that:

> 4. The offender is assigned one point for every two juvenile adjudications for offenses that would have been felonies if committed by an adult, provided that:
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> a. The juvenile adjudications were pursuant to offenses occurring after the offender's sixteenth birthday;
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> b. The offender had not attained the age of twenty-one at the time the felony was committed for which he or she is being currently sentencing [sic]; and
>
> c. No offender may receive more than one point for prior juvenile adjudications.

Id. at 29.

313 *See, e.g.*, Hendrickson v. Myers, 393 Pa. 224, 231, 144 A.2d 367, 370-71 (1958); State v. Dainard, 85 Wash. 2d 624, 628, 537 P.2d 760, 762 (1975).

At least some courts have held, without elaboration, that "a juvenile adjudication [obtained] without counsel is not per se constitutionally infirm," and allowed its use in subsequent adult sentencing. People v. Covington, 144 Mich. App. 652, 655, 376 N.W.2d 178, 180 (1985). *But see supra* notes 86-102 and accompanying text.

314 *See supra* notes 86-109 and accompanying text.

315 *See* Feld, *Dismantling Rehabilitative Ideal*, *supra* note 4, at 233-37.

also include a juvenile's prior record of delinquency in the adult criminal history score.[316] Having done so, however, both juvenile and adult sentencing authorities must now confront the reality of the quality of adjudication in juvenile courts. Both the United States Supreme Court and the Minnesota Supreme Court have denied juveniles the right to jury trials, contending that a juvenile court judge's factual determinations are as reliable as those of a jury.[317] While this is a dubious equation, it is even more questionable given the routine absence of counsel in delinquency proceedings.

If juvenile adjudications are to be used to enhance sentences for juveniles as juveniles or as adults, then a mechanism must be developed to assure that only constitutionally obtained prior convictions are considered. Again, automatic and mandatory appointment of counsel in all cases is the obvious device to assure the validity of

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> The Sentencing Guidelines Commission's decision to include juvenile felony convictions in an adult criminal history score was predicated on several substantial policy considerations. The commission initially found that including such information was consistent with existing adult sentencing practices, especially in the urban counties of the state . . . . The commission chose to include in the sentencing framework features of incapacitation, which focus on persistence of criminal activity, as well as features of "just deserts," which focus on the seriousness of criminal activity. A pattern of criminal violations is reliable evidence of persistence, regardless of whether it occurs while the offender is a juvenile or an adult.

Id. at 234-35. In State v. Little, 423 N.W.2d 722 (Minn. Ct. App. 1988), the Minnesota Court of Appeals upheld the use of juvenile adjudications to enhance the sentence of an adult defendant. The Court noted that the protections afforded by the Juvenile Court Act were consistent with the inclusion of juvenile adjudications in the Sentencing Guidelines.

> The legislature has drawn a line between the mistakes of youth that are not repeated and those which continue into young adulthood. The system punishes only those offenders who have abused the juvenile court's leniency and then does so only within the confines and safeguards supplied by the Minnesota Sentencing Guidelines. . . . The one point limit was deemed consistent with the purpose of including a juvenile record in the criminal history—to distinguish the young adult felon with no juvenile record of felony-type behavior from the young adult offender who has a prior juvenile record of repeated felony-type behavior. The one point limit also was deemed advisable to *limit the impact of findings obtained under a juvenile court procedure that does not afford the full procedural rights available in adult courts.*

Id. at 724-25 (emphasis added). The court in *Little* expressly noted that in his juvenile proceedings, Little received the assistance of counsel. *Id.*

316 *See, e.g.*, PENNSYLVANIA SENTENCING GUIDELINES, 42 PA. CONS. STAT. ANN. § 9721(b) (Purdon 1982); 204 PA. CODE § 303.7(b) (1) (ii) (1984) (juvenile adjudications may be counted when there was an express finding that the offense constituted a felony or one of the weapons misdemeanors); Commonwealth v. Bivens, 337 Pa. Super. 216, 218 n.2, 486 A.2d 984, 985 n.2 (1985).

317 *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1970); *In re* K.A.A., 410 N.W.2d 836, 841 (Minn. 1987). The *McKeiver* decision reflects the Supreme Court's belief that the quality of juvenile adjudications are the functional equivalent of adult determinations. *McKeiver*, 403 U.S. at 543 (emphasis on factfinding procedures). The correctness of this equation is highly questionable. *See* Feld, *supra* note 2, at 243-66; Feld, *Punishment, Treatment, supra* note 4.

the criminal history score. Anything less will subject a juvenile or young adult's sentence to direct or collateral attack, produce additional appeals, and impose a wasteful and time-consuming burden on the prosecution to establish the validity of prior convictions.

Until provisions for the mandatory appointment of counsel are implemented, however, the Minnesota Sentencing Guidelines Commission should amend the guidelines to create a presumption that all prior juvenile felony convictions included in the adult criminal history score were obtained *without* the assistance of counsel, with the burden on the prosecution to establish that such prior convictions were obtained validly. This takes cognizance of the fact that more than one-third of all juvenile felony convictions were obtained without counsel (Table 3). It would increase the prosecutor's institutional interest in juvenile justice administration and provide a non-judicial mechanism to assure that juveniles charged with felony offenses were represented and that any waivers of counsel were adequately documented on the record.

D.. REGULATING PRETRIAL DETENTION

The overuse and abuse of pretrial detention is a recurrent theme in juvenile justice. Although the United States Supreme Court in *Schall v. Martin*[318] upheld the constitutionality of preventive detention of juveniles, as a matter of policy, the types of statutes approved in *Schall* and used in Minnesota are deficient and lack any objective, administrative criteria.[319] The virtual absence of meaningful substantive standards for detention and the minimal procedures used to implement them invariably result in the excessive detention of many juveniles who pose no threat to themselves or others.[320]

Empirical studies in several other jurisdictions report that there is no apparent rationale to detention decisions.[321] The present study confirms that there is no discernible legal or substantive rationale for detention in Minnesota either. Like other studies reporting negative effects of pretrial detention on subsequent sentencing,

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318 467 U.S. 283 (1984).

319 *Schall*, 467 U.S. at 268. *See generally* Feld, *supra* note 2, at 191-209.

320 Professor Feld noted that:

> [t]he lack of statutory standards or criteria about ultimately speculative future behavior remits the detention decision to the individual discretion of each judge. As the [*Schall*] dissent noted, unstructured discretion both creates the danger that many juveniles will be detained "erroneously" and fosters arbitrariness, inequality and discrimination in a process that impinges on fundamental liberty interests.

Feld, *supra* note 2, at 203-04.

321 *See supra* notes 187-89, 193-95 and accompanying text.

this research also confirms the substantial impact of detention on later dispositions. The regression equations reported in Tables 43-46 explain only 9% of the variance in detention decisions and the most influential variable is the sentence imposed later. Analyses of sentencing decisions indicate that pretrial detention is typically the second most important determinate of home removal and secure confinement. Moreover, the analyses suggest some gender and racial bias in the administration of detention.

Detention constitutes a highly arbitrary and capricious process of short-term confinement with no tenable or objective rationale. Once it occurs, however, it then increases the likelihood of additional post-adjudication sanctions as well. In operation, detention almost randomly imposes punishment on some juveniles for no obvious reason and then punishes them again for having been punished before.

An earlier article criticized Minnesota's legislature and Supreme Court for perpetuating such an unjust process.[322] The present research provides additional evidence of the deficiencies of the current detention statute, the prejudicial and cumulative impact of detention decisions, and the need for substantive revisions. There are a number of recommended standards for detention that the Minnesota Supreme Court and legislature might consider to limit the scope of detention. The American Bar Association's Juvenile Justice Standards Project, for example, recommended that a juvenile not be detained unless: the youth is charged with a serious crime of violence which, if proven, would likely result in commitment to a secure facility; the youth is an escapee from an institution to which he has been previously committed as an adjudicated delinquent; or the juvenile will not appear at subsequent proceedings based on a demonstrated history of prior failures to appear.[323] Similarly, the National Juvenile Justice Advisory Committee recommends detention only "[t]o prevent the juvenile from inflicting bodily harm on others."[324] Commentators have recommended that "[c]riteria for detention should be explicit and limited solely to acts that would be felonies requiring detention if committed by adults."[325] In Minnesota (Table 15), the adoption of such criteria

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322 *See* Feld, *supra* note 2, at 208-09.

323 A.B.A.-I.J.A., INTERIM STATUS, *supra* note 231, std. 6.6.

324 NATIONAL ADVISORY COMM., TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, § 12.7, at 390 (1976) ("A court may not, however, detain a youth simply to prevent the predicted commission of property offenses.").

325 R. SARRI, *supra* note 223, at 68 (1974).

would dramatically reduce the numbers of juveniles detained and, perhaps, subsequently removed from their homes.

In addition to objective, offense-based detention criteria, court rules or law should create a presumption against detention of non-felony offenders with the burden on the proponent to establish both the need for detention and the exhaustion of all non-secure alternative placements. When adult defendants are charged with misdemeanor offenses, for example, the Minnesota rules of criminal procedure create a presumption for citation in lieu of arrest or detention.[326] To the extent that female offenders charged with minor delinquencies and status offenses are disproportionately at risk for detention and subsequent home removal (Tables 28 and 30), shelter care alternatives to secure detention are necessary.[327]

E. SENTENCING GUIDELINES FOR JUVENILE COURT

Historically, juvenile courts based their dispositional decisions on an individualized assessment of a youth's "best interests."[328] Increasingly, however, the principle of offense and an emphasis on characteristics of the offense rather than those of the offender dominate juvenile court sentencing decisions. The changes in sentencing orientation are reflected in legislative changes in juvenile courts' purpose clauses,[329] legislative changes in juvenile sentencing statutes, and the adoption by correctional administrators of dispositional guidelines that emphasize proportional and determinate sentences based on the present offense and prior record and dictate the length, location, and intensity of intervention.[330] The shift in emphasis from treatment to punishment is also reflected in the actual determinants of dispositional decision-making.[331]

Reflecting the national trend, Minnesota has changed the underlying philosophical premises and sentencing policies in its juvenile courts as well. In 1980, the Minnesota Legislature redefined

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326 MINN. R. CRIM. P. 6.01(1) (1) (a) & (b) (*shall* issue citations in lieu of arrest or detention).

327 One hypothesis, which this data cannot address, is that the the greater rates of detention and home removal of female compared to male juveniles charged with minor offenses—misdemeanor property offenses, other delinquency and status—reflect a "family sponsorship" variable. *See supra* notes 223-25 and accompanying text. For some reason, parents of female juveniles charged with minor delinquencies are less willing than those of male juveniles charged with similar offenses to have the child at home, either prior to trial or following adjudication.

328 *See generally* Feld, *Punishment, Treatment, supra* note 4 (analyzing the philosophical shift from treatment to punishment in juvenile courts).

329 *See id.*

330 *Id.*

331 *See supra* notes 157-71 and accompanying text.

the purpose of its juvenile courts.[332] Minnesota derived its new statement of purpose from the Juvenile Justice Standards which also recommend determinate sentences which are proportional to the seriousness of the offense and jury trials.[333] While Minnesota's new punitive purpose clause marks a fundamental philosophical departure from its previous rehabilitative orientation, the legislature did not provide for a jury trial.[334]

Although, statutorily, Minnesota is an "indeterminate" sentencing state,[335] in 1980, the Minnesota Department of Corrections ad-

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[332] The relevant provision states that "[t]he purpose of the laws relating to children alleged or adjudicated to be delinquent is *to promote public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior.*" MINN. STAT. ANN. § 260.011(2) (West 1982) (emphasis added). *See also* A.B.A.-I.J.A., JUVENILE JUSTICE STANDARDS RELATING TO DISPOSITIONS, 1.1 (1980). *See generally* Feld, *Dismantling Rehabilitative Ideal, supra* note 4, at 197-203. The changes in the purpose clause provide a basis upon which courts decide cases. Thus, the Minnesota Court of Appeals decided, as a matter of law, that a juvenile charged with murder should be tried as an adult on the basis of the amendments to the purpose clause. *In re* D.F.B., 430 N.W.2d 475 (Minn. Ct. App. 1988). The court noted that:

> the 1980 amendments also reflect a shift in legislative attitude regarding punishment as a goal of juvenile courts. Prior to the amendments the stated purpose of those courts was to secure care and guidance . . . . Subsequent to the 1980 amendment . . . [f]or [those] youths charged with the commission of a crime, a more punitive approach is emphasized . . . .

Id. at 478.

[333] A.B.A.-I.J.A., JUVENILE DELINQUENCY AND SANCTIONS, *supra* note 166, std. 5.2; A.B.A.-I.J.A., JUVENILE JUSTICE STANDARDS RELATING TO ADJUDICATION 4.1(a) (1980).

[334] *See* Feld, *Dismantling the Rehabilitative Ideal, supra* note 4, at 197-203. Moreover, in *In re* the Welfare of K.A.A., 410 N.W.2d 836 (Minn. 1987), the Minnesota Supreme Court held that a juvenile could not voluntarily waive juvenile court jurisdiction in order to obtain a jury trial in an adult criminal proceeding. *Id.* at 842. "The legislature could, and apparently did, conclude that allowing a juvenile to waive juvenile court jurisdiction for some perceived short-term benefit ignores the best interests of the State in addressing juvenile problems as well as the overall interests of the juvenile." *Id.* at 840. As a result of *K.A.A.*, juveniles are trapped in a procedurally deficient justice system without any possibility of escape. *Cf.* F. KAFKA, THE TRIAL (1937).

[335] MINN. STAT. ANN. § 260.185 (West 1988). In addition to providing the customary range of dispositional options, however, Minnesota's dispositional statute includes the following language which was adopted in 1976:

> Any order for a disposition authorized under this section shall contain written findings of fact to support the disposition ordered, and shall also set forth in writing the following information:
>
> (a) why the best interests of the child are served by the disposition ordered; and (b) what alternative dispositions were considered by the court and why such dispositions were not appropriate in the instant case.

Id.

In *In re* Welfare of L.K.W., 372 N.W.2d 392 (Minn. Ct. App. 1985), the Minnesota Court of Appeals interpreted the language to require consideration of "less restrictive alternatives" and proportionality of sanctions. The court stated:

> To measure what is necessary, a trial court must assess two factors, the severity of the child's delinquency, and the severity of the proposed remedy. When the severity of intervention is disproportionate to the severity of the problem, the interven-

ministratively implemented a determinate sentencing plan for youths committed to the state's juvenile institutions. Based on the juvenile's present offense and prior record, the plan "provide[s] a more definite and distinct relationship between the offense and the amount of time required to bring about positive behavior change."[336] Under the current version of the guidelines, a juvenile's projected minimum length of stay, based on the present offense and prior record, is established within seven weeks after admission to an institution.[337]

The departmental decision to implement a determinate sentencing system reflected its concerns with the adequacy and equity of individualized treatment dispositions.[338] Under the Minnesota

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tion is not necessary and cannot lawfully occur. The court must take the least drastic necessary step.

Id. at 398. *See also* Comment, *Minnesota Articulates Standards for Delinquency Disposition*, 13 WM. MITCHELL L. REV. 247 (1987) (dispositions proportional to seriousness of offense).

336 MINNESOTA DEP'T. OF CORRECTIONS, JUVENILE RELEASE GUIDELINES 2-3 (1980). It should be noted, however, that the Department of Corrections Guidelines only apply to those juveniles committed to the state department of corrections. Minnesota is among those states where the juvenile court judge determines the nature and location of dispositions. Minnesota has several hundred private commitment alternatives to the state and many juvenile courts have assurances from private facilities that they will confine children for terms desired by the court. Because the departmental guidelines do not govern the initial commitment decision, Minnesota effectively has at least eighty-seven different sets of sentencing practices in addition to the departmental release guidelines.

337 MINNESOTA DEP'T. OF CORRECTIONS, OFFICE OF JUVENILE RELEASE § 5-204.4 (1985). The guidelines provide that:

> [t]he scheduling of parole consideration reviews shall be based on the severity, recency, and chronicity of the juvenile's adjudicated offenses according to the grid for projected length of stay. Using the severity, recency, and chronicity of a juvenile's offense behavior as a starting point in projecting the length of stay recognizes that state juvenile correctional facilities are expensive and restrictive facilities, that the best predictor of future offending is the number of past offenses and that the Minnesota Juvenile Code emphasizes public safety as well as treatment.

Id. The actual parole release within the minimum/maximum range is based upon both the presumptive sentence which reflects aggravating/mitigating factors associated with the commitment offense, and subsequent institutional conduct including the completion of an agreed upon treatment plan. *Id.* at § 5-204.2.

338 An evaluation of commitment/release decision-making in Minnesota's juvenile correctional institutions prior to the adoption of the guidelines concluded that:

> There is no relationship between the juvenile's offense and the disposition of his case at either the State Training School or the Minnesota Home School.
>
> Status offenders stay slightly longer in the institution than serious offenders. . . . Juveniles at the State Training School stay longer than juveniles at the other two institutions.
>
> All in all, there are no consistent or systematic criteria used in making decisions about whether or not to institutionalize and when to parole juveniles.

D. CHEIN, DECISION MAKING IN JUVENILE CORRECTIONS INSTITUTIONS 1 (1976). *See also* Wheeler, *Juvenile Sentencing and Public Policy: Beyond Counterdeterrence*, 4 POL'Y ANALYSIS 33, 44 (1978) (length of stay based on the institution to which committed)[hereinafter *Beyond Counterdeterrence*]. Wheeler reports that:

> [t]he juvenile sentencing structure is a paradox. Each institution in this study ap-

Department of Corrections sentencing guidelines, a juvenile's length of stay is based on the severity of the most serious offense committed and the weight of "risk of failure" factors that are "predictive to some degree of future delinquent behavior."[339] The recidivism risk factors included in the juvenile release guidelines are prior felony adjudications and probation and parole failures.

Minnesota's Sentencing Guidelines for adult offenders, which are explicitly punitive and expressly designed to achieve "just deserts" rely on similar factors. The "purpose and principles" section of Minnesota's Adult Sentencing Guidelines specifically mentions severity of the offense and past criminal history as factors in determining sentencing.[340] The adult guidelines also add points to the sentencing scale whenever the defendant committed the offense while on probation or parole.[341]

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peared to have operationalized a sentencing procedure that often discriminated against the youngest age group, the least serious offender, and the white offender in long-term, "treatment-oriented" facilities. But generally, the institutional decision-making process that determined release appeared more random than deliberate. The data illustrate the absence of discrimination in release criteria with regard to offense at commitment. The fact that felony offenders were treated equally or less strictly than status and non-felony offenders resulted in disproportionately heavy application of correctional resources on youngsters who were the least threat to the community.

G. WHEELER, COUNTER-DETERRENCE: A REPORT ON JUVENILE SENTENCING AND EFFECTS OF PRISONIZATION 44 (1978)[hereinafter COUNTER-DETERRENCE].

Chein's study found that commitment and release decisions in Minnesota were so "individualized" that no factors explained the institutional staffs' handling of different youths. D. CHEIN, *supra*, at 35. There was no relationship between the most serious offenses in juveniles' files and their dispositions. *Id.* at 33. The most significant variable affecting the length of youths' incarceration was the institution to which they were committed. *Id.* at 37.

This finding is consistent with studies in other jurisdictions which also reported that within a nominally "indeterminate" juvenile sentencing system, incarcerated youths serve "fixed sentences" based on the institutions to which they are committed. *E.g.*, G. WHEELER, COUNTER-DETERRENCE, *supra*, at 39; Wheeler, *Beyond Counterdeterrence*, *supra*, at 45. Wheeler notes that "[t]he particular institution to which the male offender was assigned appears to be more important in determining length of stay than the offender's social characteristics or offense." G. WHEELER, COUNTER-DETERRENCE, *supra*, at 40. The study concludes that a pattern of uniformity in sentences, rather than individualized differentiation, prevails in such institutions. *Id.* at 41. Wheeler further notes that:

> [T]he "institutional effect . . . is more random than deliberate. While release practices in individual institutions tended to discriminate against whites, the youngest age group, and the least serious offenders, these differences were nullified by disparity observed in mean stay for each of these groups when we controlled for institutional assignment. In this instance, institutional assignment emerges as more important in terms of predicting length of incarceration than the offender's social characteristics or offense.

Id.

339 *See* MINNESOTA DEP'T OF CORRECTIONS, *supra* note 336, at 7.

340 MINNESOTA SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY I.2 (1983).

341 *Id.* at II.B.2.

Apparently, some of Minnesota's juvenile courts are using determinate sentencing guidelines as well.[342] In *In re D.S.F.*,[343] the juvenile received a ninety-day sentence of incarceration for an assault. In rejecting a less restrictive alternative disposition, the trial court asserted that confinement was required because "a specific consequence was necessary to impress upon D.S.F. the seriousness of his behavior."[344]

While the majority in *D.S.F.* concluded that the disposition was within the broad sentencing discretion that juvenile courts enjoy,[345] the dissent characterized it as "a purely offense-based determinate sentence of incarceration as a largely predetermined consequence for a serious assault."[346] Judge Crippen's dissent in *D.S.F.* correctly perceived that determinate sentencing strikes at the very heart of the traditional juvenile court.[347] Judge Crippen suggested that punitive juvenile sentencing practices posed three alternative options: restructuring juvenile courts to fit their original rehabilitative purpose; extending to juveniles all of the procedural safeguards afforded to adults in criminal cases;[348] or abolishing juvenile courts

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342 *See In re* D.S.F., 416 N.W.2d 772, 775 (Minn. Ct. App. 1987) (Crippen, J., dissenting). "[I]t is evident that a determinate sentence of incarceration imposed by the trial court was prompted by unpublished sentencing guidelines, based singularly on the offense committed, and not by the spontaneous exercise of discretion by the presiding judge." *Id.* at 779 (Crippen, J., dissenting). Judge Crippen further noted that cases in which the sentence is based on the type of offense, "we are dealing here with a criminal justice sentence, not a juvenile court disposition aimed at doing what is best for the individual. The juvenile has been ordered incarcerated for a definite term as part of a predetermined sentencing practice." *Id.* at 780 (Crippen, J., dissenting).

343 416 N.W.2d 772 (Minn. Ct. App. 1987).

344 *Id.* at 774

345 *Id.*

346 *Id.* at 775 (Crippen, J., dissenting) ("[T]he sentence was chosen based solely on the occurrence of a serious offense . . . and acceptance by the trial court of a settled local court sentencing practice.").

347 Judge Crippen's analysis noted that:

> [d]eliberate acceptance of offense-based determinate sentencing categorically belies the promises which are the foundation for the 1971 due process analysis of the United States Supreme Court [in *McKeiver*]. Appellate affirmation of criminal justice sentencing in the juvenile court unravels the rationale underlying the equal protection analysis of the Minnesota Supreme Court [in *In re K.A.A.*]. A system already on the brink of its demise is pushed still closer to a long postponed day of reckoning.

416 N.W.2d at 777 (Crippen, J., dissenting).

348 *D.S.F.*, 416 N.W.2d at 777 (Crippen, J., dissenting) ("Can American law suffer criminal justice sentencing in a court which denies criminal law safeguards for the accused?"). Judge Crippen noted two fundamental procedural deficiencies in juvenile justice administration: "the demonstrated need for jury trials in accusatory proceedings where juveniles may be incarcerated, and the additional need for representation by competent counsel in every case where a juvenile is faced with incarceration." *Id.* (Crippen, J., dissenting). *See also* notes 349-51 *infra* and accompanying text.

altogether.[349] While Judge Crippen was reluctant to acknowledge his "ultimate disillusionment" with the juvenile court experiment and endorse the third alternative, neither could he subscribe to the majority's approval of punitive sentences without criminal procedural safeguards.[350]

Earlier, this Article summarized the research literature on *de facto* sentencing practices in juvenile court.[351] The data reported in this Article support the two principal findings which emerge from that research literature: a juvenile's present offense, prior record, and previous sentences account for most of the variance in dispositions that can be explained; and after controlling for the legal variables, discretionary individualization may be synonymous with a variety of inequalities based on race, gender or simple geography.

Clearly, the seriousness of a juvenile's offense substantially alters the sentence imposed. For the state overall, and in the counties with high, medium, and low rates of representation, juveniles charged with a felony offense against the person consistently have the highest rates of out-of-home placement and secure confinement, followed by those charged with a felony offense against the property and then with a minor offense against person (Table 6). Thus, the principle of offense and proportionality in dispositions influences judicial decision-making. Likewise, the length of a juvenile's prior record strongly influences dispositional decision-making. There is a direct, linear relationship between additional referrals and the severity of the eventual sentence. Regardless of the seriousness of the present offense, of those juveniles with five or more prior referrals, nearly two-thirds are removed from their homes and nearly half are incarcerated (Table 12). Within each offense category, the same linear relationship between additional offenses and increased severity of dispositions prevails (Table 12). Similarly, the regression equations identified the legal variables—previous sentence, offense severity, and prior record—as the most influential determinants of a juvenile's present disposition (Table 47). In general, the severity of the sentence imposed upon a juvenile on a previous occasion ex-

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349 *See id.* (Crippen, J., dissenting). Judge Crippen concluded that:

> we could call for dismantling a system that openly exacts from our younger citizens a sacrifice of liberties and gives in return a false promise to serve the best interests of those who come before it. The federal and state constitutions do not permit a criminal justice system without criminal justice safeguards. . . . Can we accept as merely unfortunate a system meting out punishment without fundamental constitutional safeguards?

Id. (Crippen, J., dissenting).

350 *Id.* at 777 (Crippen, J., dissenting).

351 *See supra* notes 157-71 and accompanying text. *See also* Feld, *Punishment, Treatment, supra* note 4.

plains more of the variance in dispositions than virtually all of the other variables combined.

To the extent that juvenile justice administration can be rationalized, the traditional principles of adult criminal law provide the appropriate framework. While there are substantial variations in sentencing that cannot be explained simply by the legal variables, these factors account for most of what can be explained. Within the limits of this research and data, the other variables that consistently appear to influence judges' decisions are a juvenile's pretrial detention status, representation status, gender, and, perhaps, race. A juvenile's pretrial detention status has a consistently substantial and negative effect on subsequent sentencing (Tables 17, 47-50), as does the presence of an attorney on behalf of a juvenile. This study also reports that a somewhat larger proportion of black juveniles charged with felony offenses received more severe sentences than did white juveniles in Hennepin County, and that this disparity probably resulted from a difference in the rates of pretrial detention due to a juvenile's race (Tables 22-26). The regression equations also identified a small racial component in the initial detention decision (Table 51) and the later decision to remove a youth from his or her home (Table 52). The impact of "status" and process variables—pretrial detention, representation, and possibly being female or a member of a racial minority—on sentencing raises serious concerns.

If, in fact, the legal variables already strongly influence juvenile court judges' sentencing decisions, it is time to formalize the disposition process through the adoption of sentencing guidelines to regularize the commitment and release, and durational decisions. The rationale for the Adult Sentencing Guidelines is "to reduce sentencing disparity by providing recommendations" governing both the decision to incarcerate and the length of confinement.[352] The Sentencing Guidelines Commission's research found some evidence of both racial disparities and regional disparities in the sentencing of offenders.[353] This research reports similar non-systematic racial, gender, and geographic disparities in the administration of juvenile justice as well.

The adoption of administrative criteria or sentencing guidelines to structure the disposition of juveniles does not require sentencing them just like adults. An increasing number of jurisdictions have adopted determinate and proportional sentencing guidelines to

352 MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 103, at 13.

353 *Id.* at 5.

structure dispositional practices in juvenile courts.[354] It is highly desirable that young offenders survive adolescence with their life chances intact and this goal is threatened by the draconian sentences frequently inflicted on eighteen year old "adults." Developmental differences render youths less culpable or criminally responsible than their adult counterparts.[355] The common law mens rea infancy defense and "diminished responsibility" doctrines provide a conceptual justification for shorter sentences for juveniles.[356] Shorter sentences for reduced culpability is a much more modest justification and attainable goal for the juvenile courts than those advanced by the Progressive childsavers. Principles of determinacy and proportionality, however, recognize the legal and punitive realities of juvenile court intervention. Acknowledging the punitive reality of the contemporary juvenile court, however, carries with it a concomitant obligation to provide appropriate procedural safeguards, most notably the effective assistance of counsel.

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354 *See* Feld, *Punishment, Treatment, supra* note 4 (summarizing recent legislative and administrative changes in juvenile court sentencing practices).

355 *See* Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (constitution bars capital punishment for fifteen-year-old offender because of lesser culpability).

356 *See* F. ZIMRING, CONFRONTING YOUTH CRIME 66-67 (1978); Feld, *supra* note 2, at 275; Feld, *Punishment, Treatment, supra* note 4; Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 664-74 (1970); McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REF. 181, 214-16 (1977); Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 533-47 (1984); Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DEN. L.J. 485, 495-501 (1983).