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Juvenile Transfer to Adult Criminal Court: Why Transfer is Not the Best Method in Addressing Juvenile Delinquency

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CLAREMONT MCKENNA COLLEGE

**Juvenile Transfer to Adult Criminal Court:
Why Transfer is Not the Best Method in
Addressing Juvenile Delinquency**

SUBMITTED TO

Professor Ralph A. Rossum

AND

DEAN NICHOLAS WARNER

BY

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for

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Introduction

Juvenile delinquency is a particularly important issue because juveniles make up the next generation in both positive and negative respects; in a negative respect, juvenile offenders today can potentially become the next generation of adult criminals if the current juvenile justice system fails to divert their delinquent behavior. In a positive respect, juveniles make up the next generation of contributing members of society. Therefore, effective juvenile delinquency intervention is important in preventing juveniles from further developing permanent criminal behavior, and instead assisting them to become responsible and effective contributing adults that make socially acceptable decisions.

The first juvenile courts were established by the Illinois legislature in 1899, initially adopting the principle of *parens patriae*, which recognizes that “the State as parent” has the authority and responsibility for intervening on the child’s behalf when a child’s biological parents failed to provide adequate care and supervision.¹ By creating a separate juvenile court from the adult court, legislators recognized that juvenile offenders were different from adult offenders and thus should be treated differently and held to different standards in determining guilt and punishment. More importantly, early juvenile courts believed that juvenile delinquency could be cured using a completely individualized approach that only considers the individual offender and his/her needs rather than looking at the committed offense. Consequently, this rehabilitative approach resulted in a considerable amount of unequal treatment and unproportionality because

¹ Lisette Blumhardt, *In the Best Interest of the Child: Juvenile Justice or Adult Retribution*, 23 Hawaii L. Rev. 341, 343 (2000).

juvenile court judges mainly considered factors pertaining to the individual offender rather than the severity of his/her offense. As a result, a poor black male from a single-parent household may receive harsher punishment for committing burglary than a middle-class white male from a stable home that commits the same offense because the black male would be deemed more at risk and in need of juvenile court intervention.

Then the 1980s and 1990s saw a significant increase in juvenile arrest rates and juvenile violent crime rates thereby creating increased concern from the general public. As a result, the public began to believe that the current juvenile justice system was too lenient on juveniles, and state legislators were prompted to implement stricter juvenile justice laws that created harsher penalties for serious crimes committed by juveniles. Legislators responded to the public's outcry for harsher penalties by broadening the offenses and lowering the age at which a juvenile can be transferred to adult criminal court and tried as an adult. Additionally, juveniles were given harsher penalties for their criminal behavior that mirrored adult sentencing. Juvenile transfer was intended to hold juveniles accountable for their serious and violent crimes and to deter potential future offenders from committing similar crimes. Juveniles that were transferred and convicted in criminal court were held to the same standards as adult offenders and were also subjected to the same penalties, including capital punishment, life in prison, and the death penalty.

However, recent research challenges the idea of punitive measures that focuses on punishing the offender rather than providing rehabilitative treatment and services. This paper examines several studies that show juvenile transfer may not be the most effective means of addressing the issues of juvenile delinquency. Juvenile transfer has been shown

to actually increase juvenile recidivism and does not account for the possibility of reduced juvenile culpability in terms of considering psychosocial immaturity and underdevelopment. Therefore, juvenile transfer may actually be doing more harm than good, and is certainly not achieving the desired goals set forth by the legislatures who created transfer laws. Finally, this paper looks at alternative measures to transfer, including Hawaii's 2014 juvenile justice reform and argues that the United States juvenile justice system should return to a more individualized approach that places more emphasis on rehabilitation, while still maintaining principles of proportionality and punishment for serious offenders.

Chapter 1

History and Evolution of the Juvenile Justice System

First, before one is able to explore the topic of juvenile transfer to adult criminal court it is important to understand the background history of the juvenile justice system and its evolution over the recent decades. Initially in the early 1800s, juvenile offenders were charged and adjudicated in the same justice system as adult criminals, with the exception of those under the age of seven who were presumed to be incapable of forming and understanding criminal intent.² Under this justice system juveniles were placed on the same level of standards as adult criminals and were subjected to the same penalties and punishments. As a result, offenders as young as the age of seven were incarcerated in the same prison as adult offenders and could receive life in prison sentences and the death penalty.

Then in 1822, the Society for the Reformation of Juvenile Delinquents released a report on the penitentiary system in the United States and deemed it incapable of treating juvenile delinquents and addressing their specific needs.³ The organization thus called for separate prisons for juvenile offenders that offered a “course of discipline” that focused on a mental and moral regimen rather than harsh punishment similar to the adult prison system. Consequently, toward the late 1800s the United States saw a reform movement that pushed for the separation of juvenile and adult offenders. This reform movement was partially initiated by the Society for the Prevention of Juvenile

² Lisette Blumhardt, *In the Best Interest of the Child: Juvenile Justice or Adult Retribution*, 23 Hawaii L. Rev. 341, 342 (2000).

³ Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 Mich. J.L. Reform 653, 655 (2003).

Delinquency, which recognized that juveniles and adults are inherently different in terms of physical and mental development and maturity.⁴ Therefore, it saw a need for a justice system that was capable of recognizing such differences and providing necessary treatment that juvenile offenders needed in order to reduce recidivism and become contributing members of society. As the juvenile justice reform movement gained momentum, more reform groups emerged to object the practice of incarcerating juveniles with adult offenders and to the “punitive nature of the sentences” given to these young offenders.⁵

In response to these calls for reform, several institutions known as “Houses of Refuge” were established. These institutions were privately operated and provided housing for delinquent, dependent, neglected, and ungovernable children who were sent via court orders.⁶ By the middle of the nineteenth century, these Houses of Refuge provided education, physical exercise, military drills, work, and extensive supervision, as well as sobriety, thrift, industry, prudence, and other principles of living.⁷ These institutions were notably the nation’s first attempts at separating juvenile and adult offenders by focusing on rehabilitating juvenile offenders rather than punishing them. However, these private institutions came under fire when reports of abuse, cruelty, and injustice surfaced. Consequently, reform organizations came together once again in order to advocate for the states to take over these Houses of Refuge and to provide juveniles with more productive and efficient treatment facilities.

⁴ Blumhardt, at 342.

⁵ Shefi, at 654.

⁶ Ibid, at 655.

⁷ Ibid.

The second step in separating juvenile and adult offenders was to create separate court systems that recognized the developmental differences between children and adults. The first juvenile court was established in 1899 in the state of Illinois through the passage of the Illinois Juvenile Court Act of 1899. Under this act, a delinquent child was defined as a child under the age of sixteen who violates any law, whether state or local.⁸ Moreover, the Illinois Juvenile Court Act gave the courts broad powers to deal with delinquents and dependent children.⁹ The juvenile justice system adopted the principle of *parens patriae*, where “the state, through its courts, had the inherent power and duty to provide protection to children by focusing on the child’s welfare.”¹⁰ As a result, the juvenile justice system moved away from a retributive system of punishment and towards a more rehabilitative system that provided juveniles with treatment in order to address their delinquent habits. By 1925, every state had established juvenile courts.¹¹

According to Ralph Rossum, leaders of the juvenile court movement viewed delinquency as a disease.¹² Therefore, the juvenile justice system was intended to treat delinquency in the similar way that pediatric medicine treats other ailments in children. For example, when a child becomes physically ill, they are first diagnosed and then individually treated by medical professionals according to their particular needs and what is considered in their best interests. Sometimes treatment entails that the child be separated from society so as to not spread the disease if it is deemed contagious or to assure the success of the prescribed treatment. Also, medical personnel are given

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America’s “Juvenile Injustice System*, 22 Pepp. L. Rev. 907, 908 (1995).

maximum discretion to treat their patients according to the patient's best interests. More importantly, these children are not punished or stigmatized for their unfortunate illness.¹³ So in similar fashion, the juvenile justice system was developed to diagnose the "nature and cause of the juvenile's disease of delinquency and recommend to the juvenile court judge, who operates as a physician of sorts, a treatment to address the juvenile's needs."¹⁴ Such treatment may require institutionalization and separation from society "not as punishment but to ensure the successful treatment of delinquency and to prevent the spread of the disease to others."¹⁵ Judges assumed the role of physicians in diagnosing the cause of a juvenile's delinquent behavior and were given maximum discretion in deciding how to treat a juvenile. Most importantly, juvenile delinquents were not punished or stigmatized as criminals for their misdeeds. Reformers of the juvenile justice system understood that children are the next generation to enter the workforce and would be faced with serious obstacles in obtaining a job if the public stigmatized them. Therefore, the main purpose of the juvenile justice system was rehabilitation, not retribution. The courts primarily focused on the offender based on his/her specific needs rather than the committed offense.

In order to mirror this main goal of rehabilitation, and in order to avoid negatively stigmatizing juvenile offenders, the court focused on the child's character, psychology, and home environment and adjusted treatment according to a juvenile's specific circumstances.¹⁶ In doing so, the juvenile court recognized that each juvenile delinquent came from different backgrounds, family structures, and environments. Therefore, the

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid at 909.

cause of delinquent behavior varies from child to child and there cannot be one definitive plan of treatment to address the individual needs of each offender. Additionally, the court developed a specialized vocabulary that replaced stigmatizing terms; for example, “petition” replaced “criminal complaint,” “hearings” replaced “trials,” “adjudication” replaced “judgments of guilt,” and “disposition” replaced “sentence.” Also, unlike adult court hearings, the public was excluded from juvenile hearings in order to protect confidentiality and to shield the juvenile from the public stigma of criminal prosecutions.¹⁷ Finally, the juvenile justice system departed from the adult justice system in that juvenile court judges were given broad discretion to adjudicate delinquency and set dispositions for a flexible individualized system of treatment to rehabilitate offenders rather than punish them. However, this system was rather informal compared to the adult justice system and did not guarantee any due process rights to the offender.

The 1950s saw “disillusionment” with the juvenile justice system and the rehabilitative movement.¹⁸ It was becoming apparent that the rehabilitative model was not having the desired effectiveness and it was evident that the due process rights of juveniles were being heavily violated. Beginning in the 1960s, the United States Supreme Court decided several cases that addressed the lack of due process rights in the juvenile justice system. First, in *Kent v. United States* (1966) a sixteen-year-old boy was convicted as an adult in criminal court for burglary, robbery, and rape. The juvenile court waived jurisdiction without conducting a “full investigation” as required by the Juvenile Court Act and the juvenile was tried in District Court, where he was convicted of six counts of housebreaking and robbery, but acquitted on two rape counts by reason of

¹⁷ Ibid.

¹⁸ Ibid.

insanity.¹⁹ The U.S. Court of Appeals for the District of Columbia affirmed. However, in a 5-4 decision, the United States Supreme Court reversed the U.S. Court of Appeal's decision and declared that the juvenile court's waiver to District Court was invalid because the juvenile was not given a hearing, access to counsel, or access to his juvenile record prior to his waiver. According to the U.S. Supreme Court, juvenile courts do have significant discretion in deciding whether a juvenile should be waived to adult criminal court. However, the Supreme Court also states, "The statute does not permit the Juvenile Court to determine, in isolation and without the participation or any representation of the child, the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act."²⁰ As a result, the Supreme Court's decision in *Kent* "created a due process-like framework for courts to consider when waiving a juvenile's jurisdiction and allowing transfer."²¹

Secondly, in *In re Gault* a fifteen-year-old boy was adjudicated in juvenile court and committed to a State Industrial School for making lewd phone calls.²² The appellant brought a habeas corpus action to state court in order to challenge the constitutionality of the Arizona Juvenile Code and argued that the procedure used in *Gault*'s case did not provide him with the proper due process rights. The State Supreme Court recognized that Arizona's Juvenile Code does guarantee due process rights in juvenile proceedings but the procedure in *Gault*'s case did not violate those rights. In an 8-1 decision, the United States Supreme Court reversed the State Supreme Court's decision and declared that the

¹⁹ "Kent v. United States." *Legal Information Institute*. Cornell University Law School. Web. 26 Oct. 2014.

²⁰ *Kent v. United States*, 383 U.S. 553 (1966).

²¹ Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*. 44 Am. Crim. L. Rev. 175, 176 (2007).

²² "In re Gault." *Legal Information Institute*. Cornell University Law School. Web. 26 Oct. 2014.

juvenile court did not provide the juvenile with due process rights thereby violating the Fourteenth Amendment.²³ The juvenile was not given adequate written notice informing him of the specific issue, the juvenile and his mother did not properly relinquish their right to counsel, and the juvenile's admission did not measure up to the standards protecting his right from self-incrimination.²⁴ As a result, the Supreme Court's decision extended constitutional due process rights to accused juveniles, including representation by counsel, notice of charges, confrontation and cross-examination of witnesses, protection against self-incrimination, protection from double jeopardy, proof of delinquency charges beyond a reasonable doubt, and the guarantee of a hearing before judicial waiver to criminal court.²⁵

The third case that addresses juvenile due process rights is *In re Winship*, in which a twelve year old boy was adjudicated as a juvenile for breaking into a woman's locker and stealing money from her pocketbook. The juvenile court relied on the New York Family Court Act, "which provided that determinations of juvenile's guilt be based on a preponderance of the evidence," and found the boy guilty even though the court admitted that the evidence did not establish his guilt beyond a reasonable doubt."²⁶ In a 5-3 vote, the United States Supreme Court ruled that the juvenile courts must provide juvenile offenders the due process right of establishing guilt beyond a reasonable doubt before being convicted of criminal charges.²⁷ Therefore, the Supreme Court guarantees

²³ "In re Gault." The Oyez Project at IIT Chicago-Kent College of Law. Web. 26 Oct. 2014. <http://www.oyez.org/cases/1960-1969/1966/1966_116>.

²⁴ Ibid.

²⁵ Pagnanelli, at 176.

²⁶ "In re Winship." The Oyez Project at IIT Chicago-Kent College of Law. Web. 23 October 2014. <http://www.oyez.org/cases/1960-1969/1969/1969_778>.

²⁷ Ibid.

juvenile offenders with the same due process rights given to adult offenders in criminal court.

These three Supreme Court cases precipitated a major shift in the ideology and structure of the juvenile court system. According to Enrico Pagnanelli, the “judicial and legislative bent became not how to treat children *differently* from adults, but how to treat them the *same*.”²⁸ Consequently, by treating juvenile offenders the same as adult offenders the juvenile justice system began to move away from a rehabilitative objective and towards a system more reflective of the adult criminal system of punishment and retribution. Interestingly, the juvenile justice system adopted the very ideology that they initially were so adamant in rejecting because early juvenile justice officials did not want to place juvenile delinquents on the same level of standards as adult criminal offenders. In recognizing that juveniles and adults were different, the juvenile justice system believed that juvenile delinquents could be treated and saved from a life of criminal behavior. However, this shift from rehabilitation to retribution recognized that juveniles could be held responsible for their criminal behavior because “they had sufficient maturity to be culpable,” even though they still deserved less punishment due to their underdevelopment, impulsiveness, and lack of self control.²⁹ As a result, these court decisions paved the way for a reconceptualization of the juvenile justice system that subjects juveniles to harsher penalties similar to that of the adult justice system.

²⁸ Pagnanelli, at 176.

²⁹ Blumhardt, at 344.

Chapter 2

Moving Toward Juvenile Transfer to Adult Court

The 1980s saw a huge shift in the perception of the juvenile justice system and its ideology. Up until this point the juvenile justice system focused on the rehabilitation of juvenile offenders with the goal of treating the cause of delinquency and reducing recidivism in order to produce effective contributing members of society. Rather than punishing offenders for particular crimes, the juvenile court sought to focus on the individual and his/her specific needs in order to treat the source of their delinquent behavior. Ultimately, the juvenile justice system was very protective of its juvenile offenders and did not want to stigmatize or negatively label individuals. Under the *parens patriae* philosophy the state aimed at nurturing juvenile offenders and treating their delinquent “illness.” However, increased juvenile crime rates from the 1980s and 1990s indicated that the juvenile justice system wasn’t achieving its desired goals.

Between the 1960s and 1970s the United States saw a huge increase in crime rates. According to James Alan Fox’s report to the United States Attorney General on current and future rates of juvenile offenders from 1990 to 1994, criminologists predicted this wave of increased crime because of shifts in America’s demographics; during this time the post-World War II baby boomers reached late adolescence and early adulthood, an age at which aggressive behavior and tendencies are at their strongest.³⁰ As this group of baby boomers reached adulthood during the 1980s, taking on new job and family responsibilities, criminologist predicted that crime rates would decrease. Moreover, the population of juveniles, the age group that was most prone to violent and aggressive

³⁰ James Alan Fox, “Trends in Juvenile Violence,” Northeastern University, March 1996, 3.

behavior, would be decreasing, which in turn would decrease juvenile crime rates. Just as criminologists predicted the crime rate in the United States decreased from 1980 till about 1985.³¹ However, an unexpected increase of crime occurred in 1986 and the “rate of crime began to surge, despite continued shrinkage within the most crime prone population.”³²

Interestingly, crime reports in the 1990s indicated a decrease in violent crime rates in cities across the United States. According to Fox, the overall rate of murder declined slightly by 4%.³³ Furthermore, adult murder rates from ages twenty-five and older decreased 18%, and murder rates from ages eighteen to twenty-four rose a mere 2%.³⁴ However, the rate of murder committed by juveniles age fourteen to seventeen increased by 22%.³⁵ Fox’s report revealed that the juvenile violent crime rate was rising even though the adult criminal rate was showing stability and slight levels of decrease. It was becoming more and more evident that the juvenile justice system was not effective enough to address the source of the delinquency problem. Rather than decreasing juvenile violent crime rates, violent crime rates were rising.

According to another statistics summary by the National Center for Juvenile Justice, the years between 1988 and 1991 saw a 38% increase in the rate of juvenile arrests for overall violent crimes after more than a decade of stable crime rates.³⁶ This increase jump over such a short period of time signified a violent crime arrest rate far above any other year since the mid-1960s in which the earliest comparable statistics are

³¹ Ibid.

³² Ibid.

³³ Ibid, at 2.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Howard N. Snyder & Melissa Sickmund, “Juvenile Offenders and Victims: A Focus on Violence,” National Center for Juvenile Justice, May 1995, 6.

available.³⁷ Moreover, the statistical summary indicated that in 1991 juveniles were responsible for 19% of all violent crime reported in the United States for which there was a single offender, and 17% of all serious violent crimes were committed by juveniles only.³⁸ Notably, the report indicated that one in seven serious violent crimes involved juveniles in groups, and 14% of all juvenile victims reported that they were victimized by a group of juvenile offenders rather than a single offender.³⁹ Overall, National Center for Juvenile Justice found that 25% of all serious violent crime involved a juvenile offender.⁴⁰ In 1992, juveniles were responsible for 9% of all murders, 12% of aggravated assaults, and 14% of forcible rapes.⁴¹

In looking specifically at juvenile arrests, law enforcement agencies made almost 2.3 million arrests in 1992. About 6% of all juvenile arrests were for violent crimes, and about half of those violent crime arrests involved juveniles below the age of 16.⁴² In addition, crime rates increased substantially in every racial group. Between 1983 and 1992, the white arrest rate increased 82% compared to blacks at 43%.⁴³ However, there still remained a large gap between white and black violent crime arrest rates, where the violent crime arrest rate for black juvenile offenders were nearly seven times the violent arrest rate for white juvenile offenders.⁴⁴ Additionally, the violent crime arrest rate for

³⁷ Ibid.

³⁸ Ibid, at 1.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid, at 3.

⁴² Ibid, at 2.

⁴³ Ibid, at 6.

⁴⁴ Ibid.

youth of other minority races increased 42%, almost similar to the increase in the black violent arrest rate.⁴⁵

Furthermore, the National Center for Juvenile Justice predicted that if violent crime arrest rates of 1992 were to continue to the year 2010 then the number of violent juvenile crime arrests was projected to increase another 22% in correspondence to the projected population growth in the juvenile population ages of 10 to 17.⁴⁶ Consequently, in 1992 the National Center for Juvenile Justice predicted that the number of juvenile violent crime arrests would double by 2010, where the number of arrests for murder was expected to increase 145% over the 1992 level.⁴⁷

These statistical reports inevitably sparked great concern amongst the general public and legislative officials. It was becoming more and more apparent that the current juvenile justice system was not having the desired effect in reducing juvenile crime and recidivism. Juvenile arrests rates and violent crime rates were increasing significantly and were projected on a dangerous path of increase into the upcoming millennium. Moreover, during this period the media began highly publicizing violent acts of crime committed by juveniles, further increasing public concern that the juvenile justice system was drastically failing. For example, in 1997 sixteen-year-old Luke Woodham made national news when he murdered his mother at home and then went to his high school where he murdered his ex-girlfriend, another student, and wounded seven others. Woodham was tried and convicted in circuit court and was sentenced to life in prison for the murder of his mother. In a second trial, Woodham was sentenced to two consecutive

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

life sentences for the deaths of the two girls and seven twenty-year sentences for the aggravated assault convictions. This horrific example of juveniles committing heinous violent acts of crime is just one of the numerous other violent acts committed by juveniles. Moreover, these highly publicized violent crimes opened the eyes of the public and stimulated growing concern about public safety and the juvenile justice system's inability to control the increasing juvenile crime rate.

It was becoming apparent that the general public was losing faith in the juvenile justice system. In a 1989 Yankelovich Clancy Shulman Poll, respondents were asked to identify those factors that they believed were chiefly to blame for teenage violence. Seventy percent of respondents mentioned "lenient treatment of juvenile offenders by the courts;" and when respondents were asked what actions they favored to reduce teenage violence, 79% said "tougher criminal penalties for juvenile offenders."⁴⁸ Similarly, in a 1996 Gallup Poll, 72% of respondents stated that criminal justice programs that treated juveniles differently than adults who committed the same crime were unsuccessful.⁴⁹ Additionally, a 1994 Los Angeles Times Poll revealed that 68% of respondents believed that juveniles who commit violent acts of crime should be treated the same as their adult counterparts, where only 13% believed that these juvenile offenders should receive more lenient treatment.⁵⁰

These national polls reveal that the public's perception of the juvenile justice system was deteriorating quickly and that the public did not believe that juvenile courts

⁴⁸ Ralph A. Rossum, "Juvenile Justice Professionals: Opponents of Reform," in *Juvenile Delinquency in the United States and the United Kingdom*, (New York: St. Martin's Press, Inc. 1999) 67.

⁴⁹ Ibid.

⁵⁰ Ibid.

were doing enough in preventing future violent acts of crime. Many believed that the juvenile justice system was too lenient on juveniles who obviously had the capacity to commit violent crimes just as heinous as a full grown adult. Therefore, the public believed that juvenile sentencing was not forceful enough in reducing recidivism of current juvenile offenders, and it was also not effective as acting as a deterrent in preventing violent crimes of other juveniles. Many people believed the increase in juvenile violent crime rates indicated that juveniles did not feel constrained by the current punishment of the juvenile court. Public perception further revealed divergence from the initial rehabilitative ideology of the juvenile justice system and towards a more punitive ideology similar to the adult criminal justice system. As a result, the public called for harsher penalties and a focus on the particular crimes committed rather than focusing on the individual offender.

Furthermore, aside from the growing public support for harsher juvenile sentencing and penalties, a group called “crime control conservatives” also pushed for a juvenile justice system that more closely mirrored that of the adult justice system.

Thomas and Bilchik describe the core position of these crime control conservatives:

At the core of their position is a belief that substantial numbers of juvenile offenders, especially those who are approaching adulthood, who have significant records of prior delinquency, and/or whose presenting offenses involve serious felonies, are “precocious criminals.”⁵¹

Crime control conservatives thus advanced the belief that such serious juvenile offenders should be removed from the jurisdiction of the juvenile court and prosecuted as adults.

⁵¹ Charles W. Thomas, et al., *Criminal Law: Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. Crim. L. & Criminology 439, 440 (1985).

These conservative critics believed that the juvenile court's focus on the individual offender rather than his offense was "thwarting the effectiveness of the criminal law and undermining the moral structure of society."⁵² Moreover, crime control conservatives believe that the rehabilitative ideology was illogical because it incorrectly assumed that the juvenile offender had the "illness" of delinquency and thus could be treated, when instead they should be viewed as free-willed rational actors that are capable of assuming responsibility for their crimes.⁵³ Crime control conservatives mirrored the public perception of the juvenile justice system in that they believed juvenile offenders who committed violent crimes should be treated the same as adults. Affording juveniles leniency in sentencing only shows that they can get away with serious crimes just because of their age.

Ralph Rossum offers a similar argument in "Juvenile Justice Professionals: Opponents to Reform," in which he criticizes the rehabilitative treatment model of the juvenile justice system as "unjustifiably lenient."⁵⁴ Rossum states:

This is so because the treatment model prohibits juvenile courts from linking the seriousness of the offense to the subsequent treatment they prescribe. In juvenile court, a juvenile who commits murder is not charged with, found guilty of, or punished for murder rather, he is simply adjudicated delinquent and treated in such a way as to cure his disease of delinquency. His murderous conduct is a symptom of his disease of delinquency and of his need for individually tailored treatment to cure him of that disease. So, too, for a juvenile who shoplifts; his

⁵² Eric Fritsch, et al., *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, 46 *Juv. & Fam. Ct. J.* 17, 22 (1995).

⁵³ *Ibid.*

⁵⁴ Rossum, at 71.

misdeed establishes him as a delinquent - no more and no less than the one who murders - and shows him to be equally in need of individualized treatment to cure his disease.⁵⁵

Unfortunately, as a result of individualized treatment, the juvenile court obscures any relationship between an act and its consequences and the juvenile offender is “neither forced to confront the consequences of what he has done to others nor made to understand that what is being done to him is a consequence of his criminal offense.”⁵⁶ Therefore, the juvenile justice system does not effectively allow juveniles to understand the extent of the seriousness of their crimes and does not encourage future self-control in avoiding future acts of crime. Furthermore, juvenile courts fail to deter other juveniles from committing similar acts of crime because the courts characterize dispositions as treatment rather than punishment, and closed hearings prevent the threat of punishment from being communicated to other potential juvenile offenders.⁵⁷ As a result, current juvenile offenders are not able to serve as examples to other juveniles in showing the consequences of criminal behavior.

Secondly, Rossum argues that the treatment model is a great form of injustice in the juvenile justice system because it violates the principle of equality, which states like cases should be treated alike, and also the principle of proportionality, which states that the severity of the punishment should be proportionate to the severity of the offense.⁵⁸ Juvenile court judges are given considerable discretion in determining the proper treatment for each individual offender in order to treat his/her delinquency, and in making

⁵⁵ Ibid.

⁵⁶ Ibid, at 72

⁵⁷ Ibid.

⁵⁸ Ibid.

such determinations a judge may weigh different factors such as the home and neighborhood environment. Consequently, heavy judicial discretion leads to disparate and unequal results amongst white and black offenders.⁵⁹ For example, juvenile court judges often impose dispositions of community-based counseling and supervision on white juvenile offenders who have committed serious violent crimes but who are considered amenable to treatment because they come from intact, stable families living in safe neighborhoods. Meanwhile, black juvenile offenders who commit lesser crimes often receive harsher dispositions such as confinement in secure detention facilities because they are deemed incorrigible and unamenable to treatment since they come from single-parent families or impoverished neighborhoods.⁶⁰ This shows that the juvenile court's focus on the individual rather than the seriousness of the offense leads to equality and proportionate injustices.

Crime control conservatives were not the only ones rejecting the rehabilitative goals of the juvenile justice system, many liberals were “disenchanted with the concept of rehabilitation and treatment of offenders” as well.⁶¹ Liberal critics argued that juvenile court judges abused the great discretion that they were given, thus leading to inconsistent judgments and unequal treatment of juvenile offenders. They suggested that the state should stop focusing on forcing juveniles to undergo treatment in order to change their delinquent behavior and should instead focus on “insuring that all who came into contact with it were treated fairly and equally.”⁶² Due to the overwhelming opposition to the

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Fritsch, et al., at 22.

⁶² Ibid.

juvenile court's leniency and rehabilitative ideology, lawmakers were strongly pressured to enact tougher juvenile legislation in order to address the rising juvenile crime rate.

As a result, state legislatures began to respond to the heavy criticisms and amended state statutes to emphasize punishment alongside rehabilitation in the juvenile court's decision making.⁶³ Washington was the first state to establish sentencing standards, mandating presumptive and determinate sentences according to the seriousness of the offense.⁶⁴ In its 1977 Juvenile Justice Act and subsequent amendments, Washington shifted the focus of their juvenile courts from rehabilitation towards a more punitive system "along the lines of individual responsibility and system accountability."⁶⁵ Washington legislation changed the wording in its juvenile laws to include "making the juvenile accountable for his criminal behavior" and to "provide punishment commensurate with the age, crime, and criminal history of the juvenile offender."⁶⁶ Other states also followed suit and began to change their legislation to reflect the adoption of a more punitive goal. Some states lowered the minimum age of adult criminal court jurisdiction for some offenses and amended the jurisdiction of the juvenile corrections system to allow longer confinement sentences. Texas increased the age at which the Texas Youth Commission was required to release an incarcerated juvenile from age 18 to age 21. Ultimately, these legislative changes exemplify the new idea of holding juveniles accountable for their offenses and punishing them accordingly.

⁶³ Ibid, at 23.

⁶⁴ Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 *Pepp. L. Rev.* 907, 911 (1995).

⁶⁵ Ibid.

⁶⁶ Fritsch, et al., at 23.

Juveniles would no longer be afforded leniency due to their age, thus completely eliminating the principle of *parens patriae*.

Overall, punitive changes in juvenile justice legislation made it easier to transfer offenders from juvenile court jurisdiction into the adult criminal justice system. Juvenile transfer to adult court has been an option since the inception of the juvenile justice system, and most states had always permitted some use of transfer.⁶⁷ However, judges rarely utilized transfer until the late 1960s. By 1970 every state allowed some form of waiver.⁶⁸ Transfer rates began to increase significantly; between 1971 and 1981, juvenile transfers increased nationally from less than 1% to slightly more than 5% of juvenile arrests, a 400% increase.⁶⁹

There are three methods of transferring a juvenile to adult court: prosecutorial waiver, judicial waiver, and legislative waiver (also known as statutory exclusion). Prosecutorial waiver provides the district attorney the individual discretionary power to decide which court to charge the juvenile offender. By the end of 1997, fifteen states had statutes allowing prosecutorial waiver.⁷⁰ This appears as an attractive option because it is a one-step process that bypasses hearing requirements of the typical juvenile transfer.⁷¹ However, prosecutorial waiver is by far the most controversial out of the three methods because critics argue that prosecutors are not equipped with the necessary knowledge to make such an important decision that will inevitably impact the future of the individual offender. Moreover, the objective of the prosecutor is to obtain convictions; therefore,

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Lisette Blumhardt, *In the Best Interest of the Child: Juvenile Justice or Adult Retribution*, 23 Hawaii L. Rev. 341, 344 (2000).

⁷¹ Ibid.

prosecutorial waiver runs the serious risk of giving too much power and discretion to one person, “especially in circumstances where political pressures may outweigh the concern for the needs of the juvenile.”⁷² Moreover, the prosecutor is not necessarily required to consider factors set forth in *Kent v. United States*, and his/her decisions are not subjected to appellate review.⁷³ Since prosecutorial waiver is considered the most dangerous, it is used the least out of all three waiver methods.

Second, judicial waiver provides that the juvenile court judge decide whether a juvenile should be charged in juvenile court or transferred to adult court based on a case-by-case analysis of each offender. Within judicial waiver there are three subtypes: discretionary, presumptive, and mandatory. Discretionary waiver requires juvenile judges to consider the factors laid out in *Kent*, including age, prior record, previous offenses, etc. in making the decision of whether or not to keep the offender in juvenile court or to transfer him to adult court.⁷⁴ Presumptive waiver places the burden on the juvenile and his defense counsel in showing the court that the case belongs in juvenile court. If they fail to meet this burden of proof then the judge is obligated to transfer the case to adult court.⁷⁵ Lastly, mandatory waiver specifies that juvenile offenders who meet certain criteria, including age and offense type, must be automatically transferred to adult court.⁷⁶

Third, legislative waiver excludes from juvenile jurisdiction children of a certain age who are charged with certain offenses, usually the most serious offenses or who are

⁷² Ibid.

⁷³ Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*. 44 Am. Crim. L. Rev. 175, 177 (2007).

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

repeat offenders. Consequently, legislatures are given the power to determine when juvenile offenders should be transferred to adult court. According to Lisette Blumhardt, legislative waiver is responsible for the greatest number of juvenile transfers but can be dangerous because it does not account for factors specific to each individual offender such as the offender's environmental circumstances, potential for rehabilitation, or whether it is the offender's first criminal act.⁷⁷ However, legislative waiver gained popularity in the 1980's, in which eight states adopted legislative waiver to exclude the most serious offenses from juvenile court jurisdiction. Meanwhile, other states used legislative waiver to also exclude repeat offenders from juvenile court jurisdiction. For example, Georgia adopted legislative waiver in order to exclude offenders fifteen years or older who had three prior burglary adjudications from the jurisdiction of juvenile court.⁷⁸ While legislative transfer has been criticized for not considering individual factors, it has also been praised for the same reasoning. Taking away judicial discretion leads to a "rational, non-discretionary, and easily administered method for deciding which youths should be prosecuted as adults."⁷⁹

As juvenile waiver gained increasing popularity throughout the states, state legislatures promptly amended their statutes in order to make it easier to transfer offenders to adult court. By 2004, forty-six states had judicial waiver provisions that allowed juvenile court judges to waive jurisdiction over juvenile offenders, transferring them to adult court.⁸⁰ Forty-five states gave full discretion to the judge, fifteen states gave prosecutors the power and discretion to decide which court to file charges in, and

⁷⁷ Blumhardt, at 344.

⁷⁸ Fritsch, at 31.

⁷⁹ Ibid, at 32.

⁸⁰ Pagnanelli, at 178.

fifteen states enacted mandatory waiver to adult court for certain offenses and circumstances.⁸¹ Moreover, thirty-four states have some variation of once-an-adult-always-an-adult, in which juveniles who have been previously transferred and convicted in adult court will be automatically transferred for any other subsequent offenses regardless of the severity.⁸²

The reconstruction of the juvenile justice system signifies a major shift in juvenile justice ideology and holds many implications for the futures of juvenile offenders. First, transferring more juveniles to adult criminal court means that these offenders will be openly subjected to harsher penalties, including life in prison. When transfer was first implemented, juveniles faced the possibility of the death sentence, until the U.S. Supreme Court ruled in *Roper v. Simmons* (2005) that the Cruel and Unusual Punishments Clause prohibited the death penalty for any person under the age of eighteen at the time of committing the offense.⁸³ Second, adult court convictions are available to the public and can negatively impact a juvenile's future by hindering his/her chances at employment and other economic and social opportunities. A convicted juvenile will have to go for the rest of his/her life labeled as a criminal, which can also have debilitating psychological effects on the individual offender, which may cause him/her to genuinely believe that they are indeed criminals and will therefore perpetuate criminal behavior. Third, juvenile transfer recognizes that juvenile offenders are culpable and autonomous agents who are capable of undergoing criminal trials and being held accountable for their criminal behavior. As a result, juvenile transfer finalizes the shift from rehabilitation to retribution by treating

⁸¹ Ibid.

⁸² Ibid.

⁸³ *Roper v. Simmons*, 543 U.S. 551 (2005).

juvenile offenders who commit serious violent crimes the same as an adult offender.

Under this current juvenile justice system, no longer does the principle of *parens patriae* protect juveniles from the harsh penalties and consequences of the criminal court.

Chapter 3

At First Glance: Is Juvenile Transfer Effective?

Due to the overwhelming public outcry for stricter juvenile justice policies and harsher punishments, state legislatures promptly responded by implementing a series of “get tough on crime” legislation that expanded the offenses and circumstances in which a juvenile can be transferred to adult court, and also enacted harsher sentences for serious offenses. As a result, it became increasingly easier for judges to waive juvenile court jurisdiction and have the juvenile transferred to adult court. The number of judicial waivers peaked in 1994 with approximately 13,300 cases transferred, more than double the number of judicial waivers in 1984.⁸⁴ This significant increase signifies the juvenile court’s implementation of stricter punishments and the rejection of the court’s initial goal of rehabilitation, replacing it with more retributive goals. Consequently, the juvenile court places juvenile offenders on the same level of standards as adult offenders and views them as culpable autonomous agents that should be held responsible for their crimes. Furthermore, the dramatic increase of juvenile transfers to adult court raises the question of effectiveness and whether enacting harsher punishments really decreases juvenile crime rates, specifically violent crime.

At first glance it seems as though harsher penalties and stricter treatment of juvenile offenders is effective in reducing juvenile delinquency and violent crime rates. First, the overall juvenile arrest rate in 2010 was 21% less than the number of arrests in 2001, indicating a decrease in almost every category of serious offenses.⁸⁵ Moreover, the

⁸⁴ Robert L. Listenbee, “Delinquency Cases Waived to Criminal Court, 2010,” Office of Juvenile Justice and Delinquency Prevention, February 2014, 1.

⁸⁵ Charles Puzzanchera, “Juvenile Arrests 2010,” Office of Juvenile Justice and Delinquency Prevention, December 2013, 4.

number of arrests in 2010 was more than half the number of arrests in 1995, with an estimated 1.6 million arrests in 2010 and about 2.7 million arrests in 1995.⁸⁶ Secondly, the violent crime index, which measures the number of arrests per 100,000 juveniles in the population, significantly decreased in 2010 in comparison with the violent crime index of the 1980s and 1990s. Between 1987 and 1994 the violent crime index arrest rate increased about 70%, raising considerable concern about the nature of the juvenile justice system and its effectiveness in addressing juvenile delinquency. After state legislatures implemented their “get tough on crime” policies and made it easier for juveniles to be transferred to adult court the violent crime index rate experienced a dramatic drop. Between 1994 and 2010, the violent crime index rate decreased 55%, which was the lowest rate since at least 1980.⁸⁷ As a result, the number of juvenile violent crime arrests in 2010 was less than any other year in 30 years.

Furthermore, all four offenses (murder and negligent manslaughter, forcible rape, robbery, and aggravated assault) that make up the violent crime index decreased in their arrest rates. First, the murder rate increased sharply between the mid-1980s and peaked in 1993. However, that rate decreased significantly through the 2000s and remained relatively stable. Although the number of juvenile arrests for murder increased each year between 2005 and 2007, that rate declined 24% in 2010, indicating the lowest level of murder in three decades.⁸⁸ The number of juvenile murder arrests in the short 4-year period between 1992 through 1995 exceeded the total number of murder arrests from

⁸⁶ Howard N. Snyder & Melissa Sickmund, “Juvenile Offenders and Victims: A Focus on Violence,” National Center for Juvenile Justice, May 1995, 1.

⁸⁷ Puzzanchera, at 8.

⁸⁸ *Ibid*, at 5.

2000 to 2010.⁸⁹ Second, the number of juvenile arrests for forcible rape in 2010 was less than any other year since 1980.⁹⁰ The juvenile arrest rate for forcible rape peaked in 1991 with a little more than 22 arrests per 100,000 juveniles ages ten through seventeen, and a 50% increase from 1980.⁹¹ After 1991, the arrest rate for forcible rape decreased through 2010, with an arrest rate that was 62% below the 1991 arrest rate.⁹² Third, the juvenile arrest rate for robbery peaked in 1994 with about 180 arrests per 100,000 juveniles ages ten through seventeen. Then that rate decreased 60% through 2002, but increased again 43% till 2008. However, it has decreased again since 2008 by 22% in 2010.⁹³ Finally, the juvenile arrest rate for aggravated assault also displayed significant decreases in 2010, signifying the lowest level since the early 1980s. The juvenile arrest rate for aggravated assault peaked in 1994 with about 280 arrests per 100,000 juveniles ages ten to seventeen. That rate decreased 53% since 1994 in 2010.⁹⁴ This decrease in the aggravated assault arrest rate mirrors the low resting level in the 1980s.

Also noteworthy is the overall decrease in the violent crime index (the amount of arrests per 100,000 juveniles in the population) of all racial groups. Juvenile violent arrest rates peaked between the late 1980s and early 1990s, then declined significantly through 2010 for all racial groups including Asian (75%), American Indian (65%), black (57%), and white youth (54%).⁹⁵ In regard to murder arrests, the black to white ratio of juvenile arrest rates for murder was nearly nine to one in 1993, indicating high murder rates among blacks. However, through 2000 the murder arrest rate for blacks fell sharply

⁸⁹ Ibid, at 9.

⁹⁰ Ibid, at 5.

⁹¹ Ibid, at 10.

⁹² Ibid.

⁹³ Ibid, at 11.

⁹⁴ Ibid, at 12.

⁹⁵ Ibid, at 8.

so that in 2010 the black to white ratio for murder arrests was six to one. With forcible rape arrests, the rate for blacks decreased by 75% in 2010 from its peak in 1987.⁹⁶ For whites the forcible rape arrest rate decreased 55% in 2010 from its peak in 1991.⁹⁷ For robbery, the juvenile arrest rate decreased in each racial group by more than 50% between the mid-1990s and early 2000s.⁹⁸ Finally, the arrest rate for aggravated assault also decreased for all four racial groups, with the 2010 arrest rate displaying the lowest levels since the early 1980s.⁹⁹

The dramatic decrease in juvenile arrest rates consequently led to a decrease in juvenile transfers. Since the transfer peak in 1994, the juvenile courts waived about 6,000 juvenile cases, which is 55% less than in 1994. Moreover the likelihood of judicial waiver declined for all four general offense categories, including person, drug, property, and public order offenses. The peak for judicial waiver for person offenses was in 1994 with about 2.6% of petitioned cases being judicially waived to adult court. That rate decreased to 1.5% in 2010.¹⁰⁰ Judicial waiver for drug offenses peaked in 1991 at 4% of petitioned cases being waived to adult court. In 2010 that rate decreased to less than 1%.¹⁰¹ Waiver for property offenses peaked in 1994 with over 1% of petitioned cases being waived to adult court. In 2010 that rate fell slightly to about 0.7%.¹⁰² Finally, the peak of public order waivers was in 1994 with about 0.6% of cases being waived to adult court. That rate fell to about 3% in 2010.¹⁰³

⁹⁶ Ibid, at 10.

⁹⁷ Ibid.

⁹⁸ Ibid, at 11.

⁹⁹ Ibid, at 12.

¹⁰⁰ Listenbee, at 2

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

Evidently, the decrease in juvenile transfers to adult court mirrors the overall decrease in juvenile crime rates. Since there aren't as many violent crimes being committed, there are fewer reasons for judges to waive jurisdiction over juvenile offenders. Looking strictly at juvenile arrest rate statistics it would appear as though stricter penalties for serious offenses deter potential juvenile offenders from committing serious crimes. Since state legislatures have changed their statutes regarding the juvenile justice system, overall delinquency rates have decreased, especially violent offense rates.

Chapter 4

Effects of Juvenile Transfer on Recidivism

Although the overall juvenile crime rates were in decline entering the early 2000s, critics of juvenile transfer challenged whether the decrease was really due to stricter punishments and a greater willingness by juvenile judges to transfer juveniles to adult court. Critics raised questions of the effectiveness of juvenile transfer and whether it was actually achieving the overarching goal of the juvenile justice system, which was to reduce crime rates and recidivism. Contrary to the statistics presented in the previous chapter and the appearance of reduced juvenile delinquency, several studies reveal that transferring juvenile offenders to adult court is actually doing more harm than good by increasing offender recidivism. Moreover, these studies show that transferred offenders are more likely to re-offend quicker, be incarcerated longer, and are more likely to commit serious crimes than juveniles who are retained in juvenile court. As a result, it appears as though juvenile transfer is not the most effective solution to the juvenile delinquency issue.

The first study is a cross-jurisdictional study conducted by Jeffrey Fagan in 1996. Fagan examined the deterrent effects of sanction and court jurisdiction on recidivism rates in juvenile court versus adult court.¹⁰⁴ Fifteen and sixteen year old juveniles who were charged with either felony robbery or burglary in juvenile court in New Jersey were matched with juvenile offenders in New York, whose cases originated in adult criminal court.¹⁰⁵ Offenders came from Essex and Passaic counties in northern New Jersey and Brooklyn and Queens counties in southeastern New York, which share similar large

¹⁰⁴ Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders*, 18 *Law and Policy*, 84, (1996).

¹⁰⁵ *Ibid.*

metropolitan areas as well as similar demographic, social, and cultural characteristics. Also, the four counties were found to have similar crime rates and risk factors for delinquency. The four counties were deemed appropriate for comparison because they are also interrelated economically, in transportation, media and culture, and in major social institutions including universities, financial services, and medical centers.¹⁰⁶ Similar environmental and social structures allow for minimal selection effects and provide that the juvenile offenders from the two states are coming from similar backgrounds and environments, which creates closer matches between juveniles convicted in adult court and juveniles adjudicated in juvenile court.

First, Fagan looked at the certainty and severity of sanctions among juveniles in adult court in comparison to juveniles in juvenile court. He found that juveniles convicted in criminal court for robbery were more likely to receive sentences of incarceration than their matches in juvenile court. Only 18.3% of juvenile court offenders were placed in a training school or residential facility, whereas 46.4% of juveniles in criminal court were sentenced to either a state prison, secure youth corrections facilities, or local jails.¹⁰⁷ Similarly, incarceration rates for burglary convictions were higher in criminal court than in juvenile court, where 46.5% of juveniles in criminal court were incarcerated while only 23.8% of juvenile court defendants were incarcerated.¹⁰⁸ Therefore, juveniles convicted in criminal court were highly more likely to spend time incarcerated than their matches in juvenile court.

¹⁰⁶ Ibid, at 86.

¹⁰⁷ Ibid, at 90.

¹⁰⁸ Ibid.

Second, Fagan compared and analyzed the effects of criminal court convictions on recidivism compared to those of juvenile court. Interestingly, Fagan did not find significant differences between juveniles who were convicted in criminal court for burglary and juveniles who were adjudicated in juvenile court. Re-arrest rates for burglary showed no difference between court jurisdiction, and there was no significant differences of the time to first re-arrest between juvenile and criminal court cases.¹⁰⁹ However, there were significant differences for robbery cases in juvenile and criminal court. Juveniles in criminal court were re-incarcerated more often at 56.2%, while juveniles in juvenile court had a re-incarceration rate of 40.9%.¹¹⁰ Therefore, robbery offenders in criminal court were re-arrested for a new criminal violation over 50% more than robbery offenders in juvenile court.¹¹¹

Moreover, juvenile offenders in criminal court were more likely to be re-arrested quicker than their juvenile court counterparts. The average time to first re-arrest for juvenile court offenders was 553 days after release.¹¹² On the other hand, juveniles in criminal court had a much shorter time to their first re-arrest with an average of 456.5 days between their first and second arrests after being released from incarceration.¹¹³ Also, Fagan found that juveniles sanctioned in juvenile court had lower hazard of re-arrest rates than juveniles in criminal court. According to Fagan, hazard models estimate the probability that an individual will fail during a given time period and be re-arrested; they simultaneously estimate recidivism based on its prevalence during a given time

¹⁰⁹ Ibid, at 93.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

period, and the interval until re-arrest occurs.¹¹⁴ The hazard of re-arrest for juvenile court cases was 29% lower than the hazard for juveniles in criminal court. Fagan discovered that juveniles convicted in criminal court were more likely to be re-arrested for a violent offense than juveniles sanctioned in juvenile court.¹¹⁵ So juveniles convicted in adult court were not only found to recidivate faster than their juvenile court matches, but they were also found to commit more serious and violent crimes than juveniles that were retained in juvenile court.

The second study that examined the effects of transfer on recidivism was a within-jurisdictional study conducted by Donna M. Bishop, et al. in 1996. Unlike Fagan's cross jurisdictional-study Bishop, et al. compared the recidivism rates of 2,738 Florida juvenile offenders who were transferred to criminal court to a matched sample of offenders who were retained in juvenile court.¹¹⁶ In order to match juvenile court cases as closely as possible to criminal court cases, researchers used a matching procedure that controlled for seriousness of the transfer offense, number of charges, number of prior offenses, severity of prior offenses, and sociodemographic characteristics including age, gender, and race.¹¹⁷ Therefore, matches were created in order to ensure equivalency among juveniles in the juvenile court and criminal court cohorts.

Research findings revealed that the probability of re-arrest among transfer cases was greater than among their matched controls across all levels of offense severity. Thirty percent of transferred offenders were re-arrested during the follow-up period,

¹¹⁴ Ibid, at 95.

¹¹⁵ Ibid.

¹¹⁶ Donna M. Bishop, et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference*, 42 *Crime and Delinquency*, 171 (1996).

¹¹⁷ Ibid, at 175.

whereas only 19% of the non-transfer matches were re-arrested, which shows that transferred offenders were significantly more likely to commit additional offenses and be re-arrested than the juvenile offenders that were kept in juvenile court.¹¹⁸ Secondly, the transfer group was more likely to be incarcerated for longer periods of time with an average of 245 days compared to 90 days for the non-transfer group.¹¹⁹ Third, the transferred group was more likely to reoffend quicker than the non-transfer group. For those in the transfer group that were re-arrested, the average time to failure was 135 days.¹²⁰ The non-transfer group had a significantly longer average time of failure with 227 days.¹²¹ Fourth, researchers found that transferred offenders were more likely to be re-arrested for a more severe offense than their non-transfer matches. Ninety-three percent of the transferred matches were re-arrested for a felony offense while 85% of non-transfer matches were re-arrested for a felony offense.¹²² Aside from being more likely to commit more serious offenses, transferred juveniles were also less likely to show improvement from the severity of their first offense to their second offense. For the transferred cohort, 5% of those who reoffended showed some improvement in that, although they were first transferred for a serious felony offense, their second arrest was for a less serious misdemeanor offense.¹²³ In comparison, non-transferred offenders showed an 11% improvement transitioning from a felony arrest to a subsequent misdemeanor offense.¹²⁴

¹¹⁸ Ibid, at 182.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

In addition to these two studies that were conducted in the 1990s, the Office of Juvenile Justice and Delinquency Prevention conducted two follow up studies to examine whether the 1990 research results remained consistent in the 2000s. The first study was conducted in 2003 by Fagan and his colleagues as an extended and largely replicated study of his previous research in 1996. This study examined more closely the time-at-risk recidivism rates for 2,382 fifteen and sixteen year old juvenile offenders charged with robbery, burglar, or assault in 1992 or 1993.¹²⁵ This study also used the same cross-jurisdictional method by comparing juvenile offenders who were convicted in New York with similarly matched juveniles who were retained in juvenile court in New Jersey. This study revealed similar results as the 1996 study in that criminal court cases were found to be 100% more likely to be re-arrested for a violent offense and 47% more likely to be re-arrested for a property offense.¹²⁶ Additionally, juveniles convicted in criminal court were 26% more likely to be reincarcerated.¹²⁷

The second follow-up study was conducted by Lanza-Kaduce and colleagues in 2005, in which they looked at 950 juvenile offenders, half of which were prosecutorially transferred to criminal court and the other half retained in juvenile court. Similar to the 1996 Florida study, Lanza-Kaduce, et al. created 475 matched pairs of transferred and retained cases that reflected similar characteristics including age, gender, race, number of previous juvenile referrals, most serious prior offense, offense, and number of charges in order to control for geographical effects and variations in decision making.¹²⁸ This study

¹²⁵ Richard E. Redding, "Juvenile Transfer Laws: An Effective Deterrent to Delinquency?" Office of Juvenile Justice and Delinquency Prevention, June 2010, 6.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid, at 5.

specifically focused on recidivism after the age of 18 since “The focus on adult recidivism... captures the persistence of a criminal career into adulthood-a pivotal policy concern.”¹²⁹ Research results revealed very similar results as the 1996 Florida study and found that transferred offenders were significantly more likely to recidivate than their juvenile court matches. Forty-nine percent of the transferred cohort reoffended, while only 35% of the non-transferred offenders reoffended.¹³⁰ Moreover, this study found that violent offenders were particularly more likely to reoffend; for violent offenses, 24% of the transferred offenders reoffended compared to 16% of the non-transferred matches.¹³¹

These four studies present major challenges to the practice of transferring juvenile offenders to adult criminal court, and shows that transfer actually does more harm than good by increasing recidivism rates and compromising public safety.¹³² Although overall crime rates decreased in the late 1990s and early 2000s, it does not appear as though transfer was a contributing factor. Since the four studies revealed that transferred offenders were more likely to recidivate and be re-arrested for subsequent crimes, transfer is obviously not an adequate solution to further reducing crime rates. On the contrary, it would seem as though transferring juveniles only set juvenile offenders up for a life of crime as they age out of the juvenile justice system and into the adult criminal system. The more a juvenile recidivates, the more likely he/she is to maintain that behavior through adulthood. Therefore, juvenile transfer may bridge the gap between juvenile and adult offenders by subjecting juveniles to the same levels of punishment as

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid, at 6.

adults, but it is also evident that transfer does not effectively create a new generation of contributing members of society.

Furthermore, the goal of protecting the public's safety is not achieved through juvenile transfer because transferred juvenile offenders are more likely to be re-arrested for additional offenses and are also more likely to commit violent offenses rather than misdemeanors. As a result, the public's push for harsher penalties does not actually do anything to protect the general public. On the contrary, it places the general public at a greater risk of being victimized, because the more juveniles that are waived to adult court, the more likely they are to commit subsequent violent offenses.

Moreover, transfer appears to do more harm than good to the individual offenders because imposing harsher sentences and incarcerating more juveniles in adult prisons do not provide individual offenders with the necessary treatment and services that will transform them into contributing members of society rather than reoffending adult criminals. In addition to the Florida follow-up study, Lanza-Kaduce, et al. conducted detailed interviews with 144 serious male offenders between ages seventeen and twenty, half of whom had been transferred and the other half whom were retained in juvenile court.¹³³ Eighty-three percent of the interviewee sample had more than one prior arrest, 60% committed their first offense before the age of fourteen, and 47% had committed a violent offense.¹³⁴ Interview results found that the youth favored the juvenile facilities and programs the most and found them to be the most beneficial because they provided offenders with intensive, long-term job skills training and treatment. Many of the transferred youth that were incarcerated in adult jails stated that they expected to remain

¹³³ Ibid, at 5.

¹³⁴ Ibid.

crime-free because their experiences in the adult facility were so terrible and they did not want to return. However, many youth that were incarcerated in adult prisons indicated that their terrible experiences in prison actually worsened their circumstances because they “learned more crime while there.”¹³⁵ Consequently, placing juveniles in adult facilities creates hardened criminals that are more likely to maintain a life of crime because being surrounded by experienced adult criminals negatively influences the juvenile offender and will teach them how to become better criminals rather than deterring them committing future offenses.

Secondly, incarcerating juveniles in adult facilities is detrimental to the individual offender because it does not provide them with the proper treatment and services. For example, many juvenile facilities will provide offenders with psychological treatment and counseling, as well as educational and vocational training that prepares juveniles with the skills needed to obtain jobs after they are released. In adult facilities juveniles are not provided with the same resources and individualized treatment, so they end up serving their sentence time and being released into society no better than when they went in. Interviewees did indicate that their horrible experiences in adult prisons will act as a deterrent from committing any future offenses. However, 61% of youth said that prison had either no impact or had a negative impact on their behaviors.¹³⁶

Ultimately, these studies and in-depth interviews expose the negative effects of juvenile transfer to adult courts. Instead of protecting the general public from delinquent acts and creating the next generation of successful contributing members of society, transferring juveniles to adult court only increases the chance that a juvenile will

¹³⁵ Ibid.

¹³⁶ Ibid.

recidivate and commit subsequent crimes. Moreover, it is detrimental to the individual offenders that are incarcerated in adult prisons because they are not provided with the necessary services and individualized treatments that juvenile facilities provide. The practice of transfer is actually counterproductive of the intended goals of lawmakers the juvenile justice system in addressing delinquency and reducing crime rates. Therefore, legislators and juvenile court reformers need to create more effective alternatives that will proportionately punish the offender for their crimes, but still provide services and treatment that prevents them from committing subsequent offenses.

Chapter 5

Undermining Juvenile Culpability

Due to stricter juvenile justice legislation, the age at which a juvenile can be transferred to criminal was lowered in some states to as young as fourteen-years-old. Also, the expansion of offenses that necessitate transfer allow for more juveniles and also younger juveniles to be convicted in criminal court. As a result, these juvenile offenders are held to the same punitive standards as adult offenders and are subjected to the same range of possible sentences including capital punishment and life in prison. Consequently, a fourteen-year-old child charged with murder will be held to the same standards as a 40-year-old adult charged with the same offense, and the two individuals can potentially receive the same sentence. Supporters of juvenile transfer and harsher juvenile sentencing argue that juveniles who have the capacity to commit serious crimes such as rape and murder are therefore fit to be held to the same standards of culpability as adults. Many supporters believe that if a juvenile is old enough to commit serious and violent crimes, then they are old enough to be sentenced just as harshly as adult offenders.

However, recent research indicates that juveniles are not as psychosocially developed as adults and do not demonstrate the same levels of maturity in their decision-making processes. Adolescents are more susceptible to peer pressure and are not able to assess long-term consequences of their actions in the same capacity as fully developed adults.¹³⁷ Therefore, it can be argued that juveniles should be viewed as less culpable than adult offenders, and should not be subjected to the same types of punishment.

¹³⁷ Lisette Blumhardt, *In the Best Interests of the Child: Juvenile Justice or Adult Retribution*, 23 Hawaii L. Rev. 341, 346 (2000).

The topic of juvenile culpability has legal pertinence because the Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment, and the U.S. Supreme Court has prohibited punishments that are excessive in comparison to the crime or compared to the competence of the offender. For example, in *Thompson v. Oklahoma* (1988) the Supreme Court identified the immature judgment of adolescents in prohibiting the execution of juveniles whose offenses occurred before their sixteenth birthday.¹³⁸ Justice Stevens declared that imposing the death penalty on juveniles below the age of sixteen violates the principle of proportionality; he states,

Less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult...Inexperience, less intelligence and less education make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult. The reason that juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.¹³⁹

Then in *Roper v. Simmons* (2005), the U.S. Supreme Court went one step further and declared that it was unconstitutional to impose the death penalty for crimes committed before the age of eighteen.¹⁴⁰ The Court stated that the death penalty is an unproportionate punishment for juveniles, thereby violating the Cruel and Unusual Punishment clause of the Eighth Amendment. Therefore, if juveniles are to be

¹³⁸ Laurence Steinberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *American Psychologist*, 5 (2003).

¹³⁹ *Ibid.*

¹⁴⁰ *Roper v. Simmons*, 543 U.S. 551 (2005).

considered as less culpable than adults, then it follows that juveniles should not be transferred to adult court and subjected to the same punishments as adult offenders.

In determining criminal culpability there are three categories that factor into whether an offender is culpable for an offense. The first category includes endogenous impairments or deficiencies in the actor's decision-making capacity.¹⁴¹ Under this category, some individuals with mental illness or mental retardation would be found less culpable because they do not have the sufficient decision-making capacity to decipher between social and antisocial behavior. The second category examines the external circumstances faced by the actor and determines whether these external circumstances are so compelling that a reasonable person might have succumbed to the pressure in the same way as the defendant.¹⁴² If someone commits a crime in response to situations that involve duress, provocation, threatened injury, or extreme need then they are typically considered less culpable than someone who commit the same crime under less compelling situations. For example, if someone commits murder in self-defense or because he thought that his own safety was endangered, then he may be found less culpable for his crime. The third category includes evidence that the criminal act was out of character for the actor and does not reflect regular criminal character.¹⁴³ For example, an individual may receive a reduced sentence if the crime was his first offense, or if the actor had a history of steady employment, fulfillment of family obligations, and good citizenship.

¹⁴¹ Steinberg and Scott, at 3.

¹⁴² Ibid.

¹⁴³ Ibid.

According to research that focuses solely on adolescent cognitive development, adolescents from age fifteen and on are no more likely than adults to suffer from the “personal fable,” the belief that one’s behavior is somehow not governed by the same rules of nature that apply to everyone else, such as when a cigarette smoker believes that he is immune to the negative health effects of smoking.¹⁴⁴ Also, research shows that adolescents are no less likely than adults to employ rational algorithms in decision-making processes. Moreover, it has been shown that adolescents are aware of the risk that they take, and increasing their awareness of risk does not significantly impact their decision-making processes. When adolescents choose to take greater risks, it is not a result of the adolescent’s incompetence to make rational decisions; rather it is due to the adolescent’s concerns in weighing benefits over consequences.¹⁴⁵ Therefore, researchers have found little evidence from cognitive studies that distinguish the competence of adolescent decision-making from that of adults. As a result, it is argued that juveniles can be held just as culpable as adult offenders who commit similar crimes because they are just as capable as adults of choosing socially accepted behavior over antisocial behavior.

However, a study conducted by Elizabeth Cauffman and Laurence Steinberg focuses on psychosocial factors rather than cognitive factors by looking at whether there are developmental changes during adolescent years in psychological characteristics that are relevant to determinations of culpability.¹⁴⁶ Through their research, Cauffman and Steinberg pose the question of whether adolescents possess the same maturity in their

¹⁴⁴ Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. Law 741, 744 (2000).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, at 742.

decision making processes as adults, and whether they can be held responsible for their criminal actions and decision-making. By focusing on psychosocial factors Cauffman and Steinberg propose a model of maturity of judgment that emphasizes three factors that are likely to affect the way individuals make decisions: responsibility, perspective, and temperance.¹⁴⁷ Responsibility encompasses characteristics of self-reliance, clarity of identity, and independence; perspective refers to one's likelihood of considering situations from various viewpoints; and temperance refers to tendencies to limit impulsivity and the ability to evaluate situations and consequences before acting.¹⁴⁸ According to Cauffman and Steinberg, these three psychosocial factors affect the decision-making processes of each individual, and underdevelopment or psychosocial immaturity of adolescents may hinder their abilities to make mature and rational decisions like fully developed adults.

The study sample 1,015 individuals in eighth, tenth, and twelfth grade, as well as college students attending schools in the Philadelphia area.¹⁴⁹ The junior high and high school students were selected to yield a diverse sample in regard to ethnicity, gender, socioeconomic status, and community type (suburban or urban). The junior high and high school students were also selected to similarly mirror the type of college students that were studied. Since the adult sample was drawn from a college population, the adolescent group was chosen to similarly reflect a group that would go onto post-secondary education. Data was collected through a self-reporting questionnaire in which students were asked to rate how likely they were to commit certain acts under certain

¹⁴⁷ Ibid, at 745.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid, at 746.

circumstances. In order to measure responsibility participants were assessed using the personal responsibility scale that specifically examines self-reliance (feelings of internal control and the ability to make decisions without extreme reliance on others), identity (self-esteem, clarity of the self, and consideration of life goals), and work orientation (pride in completely tasks successfully).¹⁵⁰ Perspective was measured to examine individual's ability to see short and long term consequences, and how often participants take other people's perspectives into account when making decisions. Lastly, temperance was measured by examining impulse control and self-restraint from aggressive behavior. The antisocial decision-making of participants was assessed using the Youth Decision-Making Questionnaire that presents participants with a set of hypothetical situations that involve choosing between socially accepted and antisocial actions.¹⁵¹ For example, participants were posed with situations such as "You're out shopping with some of your friends and they decide to take some clothing without paying for it. You don't think it's a good idea, but they say you should take something too." Then participants are asked how likely they are to shoplift if they knew there were certain consequences or chances for no consequences.¹⁵²

Research results found that antisocial decision-making is in fact affected by age, where older adults are more likely to choose socially accepted actions than adolescents in the eighth and tenth grade.¹⁵³ Moreover, research shows that psychosocial maturity improves as a function of age, with eighth and tenth grade students displaying the lowest levels of maturity out of the entire sampled group. In looking at whether age and

¹⁵⁰ Ibid, 748.

¹⁵¹ Ibid, at 749.

¹⁵² Ibid.

¹⁵³ Ibid, at 751.

psychosocial maturity affects individual's decision-making, research results indicate that individuals who are more psychosocially mature are less likely to commit antisocial actions. It follows that since adults exhibit higher levels of psychosocial maturity as they get older, then older adults are also less likely to engage in anti-social decision-making. However, these results do not indicate that all adolescents are psychosocially immature, and have insufficient decision-making capabilities. Cauffman and Steinberg found that antisocial decision-making was more strongly influenced by psychosocial maturity than by age, which suggests that a 14-year-old child can potentially demonstrate high levels of psychosocial maturity comparable to an adult.¹⁵⁴ Regardless, it is reasonable to conclude that socially responsible decision-making is more common among adults than in adolescents.

Furthermore, Cauffman and Steinberg discovered that college students under the age of twenty-one performed similarly to those over twenty-one suggesting that maturity of judgment may stabilize once adolescents are fully developed.¹⁵⁵ According to research results, the steepest inflection point in the psychosocial developmental curve occurs sometime between the ages of sixteen and nineteen. This indicates that the ages between sixteen and nineteen are a crucial period in adolescent development, and in an adolescent's ability to make mature and rational decisions that are comparable to that of adults.

Cauffman and Steinberg's results cannot draw a distinct age line at which juvenile offenders should be transferred to adult court, and their current research has several limitations. For example, their study relies on hypothetical situations and responses to

¹⁵⁴ Ibid, at 756.

¹⁵⁵ Ibid.

hypothetical situations are often different from responses to real-world situations. By providing participants with questionnaires of hypothetical situations, researchers create a very controlled environment for the participant and does not account for external factors that can influence an adolescent's antisocial decision-making. For example, the circumstances leading up to a typical adolescent criminal offense such as robbing a convenience store are characterized by heightened emotional arousal, time pressure, and peer influence, all of which are impossible to replicate in a controlled experiment. Additionally, research relies on self-report mechanisms, which allow for biases that can potentially skew responses toward more socially acceptable responses because the participants are aware that their answers are being examined by researchers. Therefore, their answers to the hypothetical situations may not accurately reflect the actions that they would really take in real life.

Although current research cannot identify a specific age line at which juveniles should be found equally as culpable as adults and transferred to adult court, it does provide significant insight into the debate about transfer. First it supports the argument that juveniles should not be transferred to adult court and subjected to adult court punishments because they are not as culpable as adult offenders. According to the first category of determining criminal culpability, deficiencies in an actor's decision-making abilities are sufficient grounds to reduce culpability for a crime. Since adolescents are still undergoing crucial psychosocial development they do not have the full capacity to make mature and rational decisions like fully-grown adults. Therefore, juvenile offenders should not be held as culpable as adult offenders. Moreover, this is not to say that juveniles should be found completely free of criminal culpability, or that juveniles

cannot understand the immediate harmful consequences of his/her decisions, as may be the case for individuals with mental disorders. Juveniles should still be held accountable for their crimes, but the sanctions should be less severe than adult sanctions. Therefore, greater effort should be made by judges to keep juveniles offenders in the juvenile justice system rather than transferring them to adult court because the juvenile court can provide sanctions that are appropriate and proportionate to the culpability of the offender.

Secondly, since many juvenile offenders are still undergoing psychosocial development it is arguable that their delinquent behavior is not an accurate reflection of their true character because their personal identity is still undergoing considerable development.¹⁵⁶ An individual's personal identity does not reach full development until late adolescence or early adulthood, and the process of identity formation includes considerable exploration and experimentation during the adolescent period. As a result, many children exhibit risky, illegal, or dangerous behavior such as alcohol and drug use, unprotected sex, and antisocial behavior.¹⁵⁷ However, it is often the case that these adolescents "outgrow" their delinquent tendencies as they reach maturity and their personal identity reach full development. According to Steinberg and Scott, it is therefore unfair to make individual character predictions about the development of relatively more permanent characteristic traits based on patterns of delinquent behavior during the individual's adolescence.¹⁵⁸

Based on the assumption that juvenile offenders are still undergoing psychosocial and identity development, juveniles should be viewed as less culpable for their criminal

¹⁵⁶ Steinberg and Scott, 6.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

actions in comparison to adult offenders. The third category of distinguishing criminal culpability states that mitigation includes evidence that the criminal act was out of character for the actor and does not reflect genuine bad character. Therefore, juvenile delinquency is more likely to be caused by a juvenile's tendency to experiment with risky behavior rather than a reflection of their bad character. When adults commit criminal offenses they act on subjectively defined preferences and values, and their choices are influenced by their deficient moral character. On the other hand, juvenile criminal behavior is more likely to be shaped by developmental forces that are constitutive to adolescence.¹⁵⁹ When a juvenile exhibits antisocial behavior it does not necessarily mean that he/she will continue their criminal tendencies throughout adulthood, and often times it is a temporary stage that most adolescents go through. It would be unjust to transfer a juvenile to criminal court and subject them to adult sentencing when the juvenile may not possess the same immoral character as adult criminals.

Moreover, since juvenile offenders are still undergoing psychosocial development and have not reached full maturity, it is more likely that they can be rehabilitated and saved from a career of criminal behavior through their adult life. When adolescents undergo psychological and cognitive development they are considerably more impressionable and easily influenced. It is arguable that juveniles are more receptive to the psychological treatment and services provided by the juvenile justice system than adults. So research conducted by Cauffman and Steinberg also suggests that juveniles should be held in juvenile court rather than being transferred to adult court. Naturally, juveniles who prove to be impervious to the treatment and services provided by the

¹⁵⁹ Ibid.

juvenile justice system ought to be transferred and given more punitive sentences for their criminal actions. Therefore, Cauffman and Steinberg's study does not argue that transfer should be completely abolished, but that it should be reserved for individuals that are shown to have reached psychosocial maturity and who's actions may reflect bad character and not just developmental experimentation.

Chapter 6

Evaluating Alternatives to Transfer

Based on research focused on the effects of juvenile transfer and the psychosocial development of adolescents, it is evident that transfer may be causing more harm than good by increasing juvenile recidivism rates and not accounting for the underdevelopment of adolescent maturity in their decision-making processes. Initially, legislators expanded the offenses that allow juveniles to be transferred to adult court and also lowered the age at which one can be transferred in the hopes that more punitive sanctions would hold juveniles accountable for serious crimes, while deterring potential future offenders from committing crimes. However, it has been proven that juvenile transfer does not achieve these goals; therefore more effective measures must be established in order to address the issue of serious juvenile delinquents.

Transfer should be reserved for the worst juvenile offenders who undoubtedly prove to be unamenable to the treatment and services provided by the juvenile justice system. Moreover, research shows that decisions to transfer a juvenile should be left to the discretion of the judge and decided on a case-by-case basis according to the individual's past offender history, the seriousness of the current offense, the level of psychosocial maturity exhibited by the individual, and other environmental and personal factors. Ultimately, transferring a juvenile to adult criminal court should be the last option that a juvenile court judge considers.

In recognizing that juveniles are not the same as adults, and harsher penalties and sentences are not as effective as legislators hoped they would be, legal critics and reformers are pushing for a return to the old juvenile justice theory of rehabilitation rather

than punishment, but in a way that will hold the juvenile accountable for their serious criminal behavior. Consequently, legislators are searching for alternative measures that effectively and proportionately punish a juvenile offender without treating them equally as adult offenders. For example, in her article titled “Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime,” Ellie D. Shefi proposes that juvenile justice systems implement a continuum of graduated sanctions in which a serious juvenile offender begins with imprisonment in a small, very structured maximum-security juvenile facility and then eventually progresses down a decreasing spectrum of sanctions such as participation in wilderness camps, residential and non-residential community programs, intensive supervision and monitoring, as well as the imposition of restitution and fines.¹⁶⁰ The purpose of such a program would be to decrease the amount of juveniles in adult prisons thereby preventing juveniles from being exposed to the detrimental environment and effects of incarceration in adult prisons.

According to Shefi, the most severe sanction on the continuum should be imprisonment in a very small-scale, structured, maximum-security juvenile facility that provides comprehensive treatment, educational, vocational, transitional, and aftercare services to juvenile offenders.¹⁶¹ Moreover, Shefi argues that these juvenile facilities must provide offenders with small self-contained units separated based on age, offense, and required treatment services. Correctional staff should be trained to effectively interact with and understand troubled youth. Additionally, programs provided to residents should be structured and intensely supervised while also maintaining a

¹⁶⁰ Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. Mich. J.L. Reform 653, 657 (2003).

¹⁶¹ *Ibid.*

foundation of respect for each resident. These juvenile facilities would take serious juvenile offenders off of public streets while protecting the community from subsequent crimes.

One example of a maximum-security juvenile facility as proposed by Shefi is the Riverbend secure juvenile correctional facility in St. Joseph, Missouri. Riverbend houses thirty-three felony offenders who reside in three open dormitories rather than traditional one or two-person prison cells. Each dormitory forms a treatment group of ten to twelve juveniles who not only share the dormitory but also attend academic classes and participate in group therapy sessions together. Riverbend requires that residents attend academic instruction year-round in order to obtain their GED or high school diplomas. More importantly, Riverbend strongly focuses on treatment and rehabilitation, where residents attend ninety-minute group therapy sessions led by highly trained college educated youth specialists. Treatment emphasizes messages of individual responsibility and discipline by helping residents explore their personal identities, reflect on their family histories, learn to understand emotions, and build skills that help them to recognize and avoid antisocial behavior.¹⁶²

Shefi suggests that the next sanction along the continuum include comprehensive residential wilderness programs such as the Florida Environmental Institute's "Last Chance Ranch," which offers waived juveniles with the opportunity to participate in a program centered on educational and vocational training as well as farming activities instead of being incarcerated in an adult prison.¹⁶³ The Ranch houses twenty-two male juveniles in two dormitories. The program is divided into several phases in which each

¹⁶² Ibid, at 658.

¹⁶³ Ibid.

juvenile participates in individualized academic educational programs and also tends to the animals, crops, land, and ranch facilities. Youth also participate in community service and environmental projects and is able to return to the community with the accompaniment of a program staff member in order to find employment, register for school, secure housing, and re-establish family relationships. After successfully completing the necessary phases, the youth enters a transitional and aftercare phase in which the youth receives frequent visits from a community coordinator who closely monitors the youth's progress and assists him in re-integrating back into the community.

These intensive small-scaled juvenile facilities prove to be highly effective in treating juveniles and reducing recidivism. In 1999 and 2000, Missouri's Department of Youth Services reported that only 11% of juveniles who were released from the Department of Youth Services' custody or transferred from a secure residential facility to a non-secure community program were either re-arrested or returned to juvenile custody within a year.¹⁶⁴ Additionally, a Department of Youth Services study of five thousand youth discharged from DYS in the 1980s found that only 15% were arrested as adults.¹⁶⁵ Therefore, Riverbend illustrates a successful alternative to juvenile transfer and juvenile incarceration in adult facilities. The Florida Ranch program also yields impressive results; from 1997 through 2000 Ranch graduates had a one-year recidivism rate of less than 16%. In 2000 only one out of 21 Ranch graduates were convicted of a new offense.¹⁶⁶

¹⁶⁴ Ibid, at 659.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

Shefi states that the next step after secure residential facilities would be residential community-based facilities and programs followed by non-residential community-based facilities and programs. Residential community-based facilities would include group homes, halfway homes, and inpatient facilities. Non-residential community-based facilities and programs would include community centers, day and evening reporting centers, and day treatment centers. These programs would provide treatment, educational and vocational training, counseling, and specialized programs designed to address specific issues such as substance abuse, violent behavior, sex offenses, parenting, gang activity, and anger management.

VisionQuest is an example of a successful comprehensive residential community-based facility that provides “Independent Living Group Homes” to six to ten juveniles each. Each resident is required to attend school and/or work and must participate in household activities and chores. Also, juveniles are taught basic life skills and learn to live cooperatively with other housemates and staff. Initially, these group homes are designed to be under constant supervision but residents gain increasing independence as they progress through their treatment programs as long as they are compliant with treatment plans. In regard to non-residential community-based facilities, the Star Program in Gladstone, Missouri serves as an exemplary model where juveniles receive educational, family, and therapeutic counseling, while also participating in community service projects.

According to Shefi, the juvenile would step down from community-based sanctions and receive intensive supervision and restitution sanctions, while still receiving services that assist them in integrating back into the community as contributing members

of society.¹⁶⁷ Intensive supervision could require electronic monitoring, daily reporting, random visits by a probation officer, drug testing, curfew, class attendance, and individual, group, or family counseling. When a juvenile exhibits consistent good behavior then the intensity of supervision will decrease, allowing the juvenile more freedom and flexibility. Shefi suggests that restitution be mandated in order for the juvenile to compensate their victims for any damage that the juvenile has caused, thereby punishing the juvenile and also creating a restorative justice system that mitigates the victim's losses.¹⁶⁸

Many state juvenile justice systems already implement some sort of intensive supervision of their juvenile offenders and require restitution upon adjudication. However, the small-scaled, comprehensive, maximum-security juvenile facilities are a rarity in many states. One reason for this, and a major roadblock in Shefi's proposed juvenile reform is that these small juvenile facilities are very expensive to run, require highly trained and educated staff, and are limited to only providing services to a very small group of juveniles. Even though these facilities have proved to be highly effective in reducing recidivism and providing individual offenders the treatment and services they need, it is simply not feasible to duplicate in large states that have a larger juvenile offender population such as California, which has one of the highest juvenile violent crime rates in the United States.¹⁶⁹

At the same time, states across the nation are making significant efforts to reform their juvenile justice systems in order to revert back to the original rehabilitative theory

¹⁶⁷ Ibid, at 663.

¹⁶⁸ Ibid.

¹⁶⁹ Charles Puzzanhera, "Juvenile Arrests 2010," Office of Juvenile Justice and Delinquency Prevention, December 2013, 21.

that recognizes the significant differences between juvenile and adult offenders, and treats them according to these differences. For example, California recently changed their juvenile laws regarding parole procedures for juveniles currently serving prison sentences in adult prisons. Beginning on January 1, 2014, Senate Bill 260 requires that the California Board of Parole Hearings conduct a youth offender hearing to consider the release of juvenile offenders who committed specified crimes prior to being eighteen-years-old and who were sentenced to an adult prison.¹⁷⁰ Bill 260 provides that a person is eligible for release on parole during the fifteenth year of incarceration if “the person meeting these criteria received a determinate sentence, during the twentieth year if the person received a sentence that was less than twenty-five years to life, and during the twenty-fifth year if the person received a sentence that was twenty-five years to life in prison.”¹⁷¹ This California bill effectively serves to give a second chance to offenders who were under the age of eighteen when they committed their particular criminal offense. It also recognizes that juvenile offenders have a significantly decreased psychosocial capacity to make rational and mature decisions in comparison to adults that may diminish a juvenile offender’s criminal culpability. Bill 260 states:

The bill would require that, in assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, be administered by licensed psychologists employed by the board and take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark

¹⁷⁰ “Senate Bill 260-Justice for Juveniles With Adult Prison Sentences,” *Fair Sentencing for Youth*, Web, 27 Nov 2014.

¹⁷¹ California Senate Bill 260.

features of youth, and any subsequent growth and increased maturity of the individual.¹⁷²

Ultimately, legislators are recognizing that there is indeed a difference between adolescents and adults and should therefore be treated differently when it comes to punishment. Although lawmakers are still concerned with punishing juvenile offenders proportionately for their criminal behavior, they aim to do so by a different standard than that of adult offenders.

Hawaii is another state that recently reformed their juvenile justice laws. On July 2, 2014, Governor Neil Abercrombie signed Bill 2490 into law, which aims at reducing the number of juveniles committed to the Hawaii Youth Correctional Facility (HYCF) on Oahu and provides for investments in community-based alternatives.¹⁷³ In 2013, the average cost of a bed in HYCF was \$199,320 and the average length of stay was 188% longer in 2013 than in 2004 even though juvenile arrests and commitments in Hawaii have decreased 28% from 2002 to 2011, and 41% from 2004 to 2013.¹⁷⁴ Moreover, three in four released juveniles were re-adjudicated as delinquent or convicted as adults of new crimes within three years of release.¹⁷⁵ Research also shows that a large portion of commitments to HYCF was for non-violent and misdemeanor offenses; in 2013, 61% of juveniles committed to HYCF for new offenses were adjudicated for misdemeanors, a significant increase from 47% in 2004.¹⁷⁶ Furthermore, based on research it was found that when less serious juvenile offenders are placed in secure facilities, the risk of

¹⁷² Ibid.

¹⁷³ “Hawaii’s 2014 Juvenile Justice Reform,” The Pew Charitable Trusts, Web, 27 Nov 2014.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

recidivism increases, while mental health and substance abuse treatment was found to be more effective delivered in a community setting.¹⁷⁷

Therefore, Bill 2490 creates a plan of re-entry into the community for each juvenile committed to HYCF, establishing individualized goals to guide successful reentry to the community and identification of and a plan for coordination with agencies that can provide or contact for existing programs and services relevant/necessary for successful reentry. Secondly, Bill 2490 creates a new incentivized probation system that identifies a series of incentives that a juvenile can receive as a reward for compliance with the rules and conditions of his/her probation, completion of benchmarks, or positive behavior exceeding expectations, to the discretion of the probation officer. In addition, this new incentivized probation system provides that a juvenile placed on probation will be eligible to receive early discharge credits to reduce the length of an individual's probation term.

By creating a system of incentives that encourages good behavior and compliance, Bill 2490 targets less serious offenders in order to reduce incarceration time for juveniles that don't really pose a threat to public safety and so that HYCF can reserve bed space and resources for the worst juvenile offenders. Although Hawaii's new juvenile justice reform is targeted at less serious juvenile offenders, it is still a good candidate to adopt the suggestions posed by Shefi by establishing effective residential and non-residential homes and facilities so that serious offenders and repeat offenders can receive intensive individualized treatment, educational, vocational, and transitional services in an environment that does not make them feel like criminals. In 2010, Hawaii had a violent

¹⁷⁷ Ibid.

crime index of 217 violent crime arrests under the age of eighteen per 100,000 juveniles between the age of ten and seventeen, which was slightly below the national average of 225.¹⁷⁸ Hawaii's violent offender population is significantly smaller than other states; for example, in 2010, California had a violent crime index of 304, Florida had a violent crime index of 343, and Maryland had a violent crime index of 522.¹⁷⁹ Therefore, Hawaii could possibly afford to establish a sufficient amount of small-scaled comprehensive maximum-security juvenile facilities throughout the islands that provide juveniles with small-scaled maximum-security housing accompanied by intensive and comprehensive treatment that has been proven to reduce recidivism.

Furthermore, in order for Hawaii's new juvenile justice reform to be successful, each island needs to create enough community-based programs in order to meet the needs of each juvenile offender. One of the problems highlighted by Bill 2490 is that there aren't enough community-based services available to juvenile offenders. The bill states, "The legislature further finds that critical services to reduce delinquency, including mental health and substance abuse treatment, are not sufficiently resourced or accessible to Hawaii's youth."¹⁸⁰ Hawaii already has several effective programs that serve juvenile offenders and their families, but more programs and facilities are needed in order to accommodate each individual juvenile offender with efficiency and effectiveness. Hale Kipa's Hawaii Advocate Program (HAP) is one example of an existing comprehensive community-based program that is established on each of the major islands of Hawaii, Maui, Oahu, and Kauai. HAP is based on an intensive, strength-based approach that

¹⁷⁸ Puzzanchera, at 21.

¹⁷⁹ Ibid.

¹⁸⁰ Hawaii Bill 2490.

focuses on the needs of the individual juvenile and his/her family.¹⁸¹ Once a family is admitted to HAP then they are assigned a community advocate that assists each family identify and maintain relationships with persons and associations within the community that can offer beneficial services, including individual and group counseling, individualized service plan development, competency development for youth and parents, youth and family support, and in-school assistance, among other services. Although Hale Kipa is established statewide more community-based programs such as HAP are needed throughout Hawaii in order to ensure the success of Bill 2490 and to service every individual that applies for services.

Hawaii's 2014 juvenile justice reform is critical in recognizing that juvenile offenders are in a critical stage of life that impacts the formation of their individual characters and their decision-making processes. Young adolescents are extremely impressionable and easily influenced; therefore they should be treated with extra care in order to prevent future criminal offenses and from developing criminal habits and behaviors that persist through adulthood. Similar to other states that have revised their juvenile justice laws, Hawaii's juvenile justice reform illustrates a change in the ideology of juveniles courts; whereas the 1980s and 1990s exhibited a more punitive outlook in punishing juvenile offenders, the current juvenile justice system is again embracing a more rehabilitative approach similar to the initial philosophy adopted by the first juvenile courts.

¹⁸¹ "Hawaii Advocate Program," Hale Kipa, Web, 27 Nov 2014.

Conclusion

When state legislators implemented stricter juvenile laws they did so with the intent to hold juveniles accountable for their criminal offenses by providing sentences that were harsh enough to proportionately punish the offender, while deterring other potential offenders from committing similar criminal offenses. Legislators believed that a more punitive approach would show juveniles that they couldn't commit serious and violent offenses without receiving the appropriate consequences alongside it. Juvenile transfer was supposed to serve this legislative purpose of providing harsher sentences to juveniles who commit serious crimes in order to deter future acts of crime, and to also remove serious offenders from the public streets in order to maintain public safety. By expanding the offenses and lowering the age at which a juvenile can be transferred to criminal court, more juveniles were being transferred and charged as an adult, thereby receiving harsher penalties and sentences similar to those of an adult offender.

However, several studies have shown that juvenile transfer actually does more harm than good for both the individual offender and the general public. It is evident that juvenile transfer is counterproductive to the goals set forth by the state legislators by actually increasing juvenile offender recidivism and increasing the risk that a juvenile commits subsequent violent offenses. Therefore, the general public is not any safer from serious juvenile offenders than before transfer was implemented. Moreover, transfer is debilitating to the individual juvenile offenders who are incarcerated in adult prisons because they are exposed to serious adult offenders who then teach them to be hardened habitual criminals. Juveniles are also not able to receive the treatment and services that they need in order to meet their individual needs, whether it be psychological treatment

or educational and vocational services that enable them to obtain their high school diploma or an occupation after being released from incarceration.

Secondly, juvenile transfer evidently violates principles of determining criminal culpability by not accounting for the psychosocial immaturity and underdevelopment that is evident in adolescents. Research has shown that juveniles have a decreased capacity to make mature and socially accepted decisions in comparison to adults. Therefore, juveniles should not be held to the same standards as adults because they are not as capable of weighing the consequences of their actions and are more susceptible to external factors such as peer pressure. Transferring a juvenile to adult court also automatically marks a juvenile as an adult and does not recognize that juveniles often mature out of their delinquent behaviors. Therefore, juvenile anti-social decision-making during adolescence does not indicate permanent bad character that will persist through adulthood. By transferring juveniles and trying them as adults, transfer actually increases the likelihood that a juvenile will continue his/her delinquent behavior through adulthood.

It should be noted that this paper does not suggest that juvenile transfer be completely abolished, but rather that transfer should be reserved as a last resort method for the “worst of the worst” juvenile offenders who prove to be unamenable and unresponsive to the treatment and services provided in the juvenile justice system. Additionally, transfer should be left to the discretion of the juvenile court judge because each individual offender’s case is different and the cause of delinquency may vary from one individual to another. Therefore, the decision to transfer a juvenile should be based on individualized factors including, but not limited to, the individual’s past offender

history, responsiveness to treatment, the seriousness of the current offense, and external factors such as family support and neighborhood environment.

In order for the juvenile justice system to effectively and efficiently address issues of juvenile delinquency it needs to revert back to the original rehabilitative approach that places more emphasis on the individual offender, while also considering appropriate and proportionate punishment for the juvenile's committed offense. Creating more community-based facilities prevents juveniles from entering the adult prison system and even the juvenile prison system, and provides them with treatment services and educational/vocational opportunities that allows them to return to the community as contributing members rather than releasing them completely unprepared and unable to transition back into the community. Moreover, creating small-scaled maximum security juvenile facilities provide an effective method of incarcerating serious juvenile offenders and punishing them, but also does so in an environment that promotes personal growth and provides the necessary services that juvenile offenders need.

Focusing on the needs of the individual is imperative because adolescence is a critical period that will significantly affect the pathway that a juvenile progresses on throughout life. Therefore, the juvenile justice system is a pivotal system of intervention that can prevent a juvenile from taking a path that leads to a life of criminal behavior if the juvenile justice system can effectively provide services and treatment methods that divert juveniles from criminal behavior and onto a path that enables them to become successful and effective contributing members of society.

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