CONFERENCE DRAFT

Juvenile Crime and Criminal Justice: Resolving Border Disputes

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I. JUVENILE JUSTICE AT THE BORDERS

Boundary Disputes in Juvenile Justice

Anthony Laster was a 15-year-old, eighth grader with an IQ of 58 and, according to his relatives, the mind of a five-year-old.[1] Shortly after his mother died, Anthony was hungry, so he reached into the pocket of another student in his Florida middle school and took $2 in lunch money. The boy's family reported the crime to the police, Anthony was taken into custody, and the local prosecutor decided to file charges against Anthony as an adult. It was Anthony's first arrest. He spent the next seven weeks in an adult jail waiting for his court date while his family tried to raise the $5,000 for a bond. When his case generated national media interest and the victim changed his account of the crime, the prosecutor dropped the charges.[2]

Anthony's case typifies the modern juvenile court. But the current court reacts to cases like this one in a very different way than did the court for its first 75 years. At the outset of the court over a century ago, judges retained the option to expel cases from the juvenile and transfer them to the criminal court.[3] Transfer was an essential and necessary feature of the architecture of the new juvenile court. The option to remove a case served an important legitimating function: it eliminated hard cases that challenged its comparative advantage in dealing with young offenders, cases that could be aggregated by critics to launch attacks on the new Court's efficacy and therefore its core jurisprudential and social policy rationale.

In the early years of the juvenile court, hard cases were not necessarily children charged with murder or other violence. More often than not, it was the incorrigible youths – repetitive delinquents whose failure to respond to the court's therapeutic regime signaled the intractability of their developmental and social deficits.[4] These cases negated the theory of the Court. Their repeated failures to respond to treatment canceled their eligibility for the Court's protection from the stigmatizing and doubtless harmful regimes of criminal punishment. In fact, for more than five decades, juveniles charged with murder were more likely than not to be retained in the juvenile court, beneficiaries of both its diversionary and stigma avoidance rationales.

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[1] *The Christian Science Monitor*, March 21, 1999. His bond was set at $5,000, but his family, still coping with his mother's death shortly before his arrest, was unable to make bail. He used his entire inheritance from his mother's life insurance policy to post bail. He subsequently dropped out of school.

[2] Anthony returned to his family home following his release. He has had subsequent arrests, including an arrest for attempted burglary in 1999 and another for motor vehicle theft in 2003 when he was age 19. He was judged not competent to stand trial and released, but his competency is monitored at six month intervals for five years to determine if and when he becomes competent.

[3] David Tanenhaus, JUVENILE JUSTICE IN THE MAKING (University of Chicago Press, 2000); Judith Sealander, THE FAILED CENTURY OF THE CHILD: GOVERNING AMERICA'S YOUNG IN THE TWENTIETH CENTURY. (Cambridge University Press, 2003); Anthony Platt, CHILD SAVERS: THE INVENTION OF DELINQUENCY (University of Chicago Press, 1967).

[4] Tanenhaus, *id.*

These decisions were made routinely and almost exclusively by juvenile court judges in a retail process of individualized decision making, with little attention or scrutiny from legislators, advocates, scholars or the press. Judges decided which youths were immature and "amenable to treatment" on a case-by-case basis. In some instances, transfer decisions were based on the severity of the offense, where proportionality principles trumped collateral considerations that might have otherwise mitigated the case for transfer. In 1966, the U.S. Supreme Court in *Kent v. U.S.* sanctioned criteria and procedures for waiver to a set of constitutionally sanctioned standards identified.[5] "Maturity" and "sophistication" were important parts of the *Kent* framework, and adolescents who were deemed "amenable to treatment" were retained in the juvenile court. Judges relied heavily on the evaluations of social workers whose recommendations on waiver were usually persuasive to the juvenile court.

Legal Mobilization to Redraw the Boundaries of the Juvenile Court

As crime spiked in the U.S. in the late 1960s, and continued at an elevated rate for nearly three decades before declining to its previous lows, the statutory structure and jurisprudential logic that shaped the boundary between juvenile and criminal courts was renegotiated. The social and political context of this evolutionary process was influenced by popular reactions to rising crime and violence: the near abandonment of the principles of rehabilitation that were essential to the juvenile court, the replacement of judicial discretion with sentencing structures designed politically that fixed punishment to crime seriousness,[6] and a growing popular fear of adolescents as frequent perpetrators of the most serious and violent crimes.[7]

The demand for redrawing the boundaries of the juvenile court and dismantling of its retail judicially-centered waiver regime focused on four issues: inconsistencies and disparities from one case to the next that produced both under- and over-inclusive patterns, racial biases, insensitivity by judges to the seriousness of adolescent crimes, and rising rates of serious juvenile crime that signaled the failure of the juvenile court and corrections to control youth crime.[8] The critiques motivated state legislatures across the country to remove judicial discretion by carving out large sectors of the juvenile court population – as young as 13 years of age -- and removing them to the criminal court.[9] The

[5] *Kent v. U.S.*, 383 U.S. 541, 86 S.Ct. 1045 (1966). The Kent guidelines were an amalgam of administrative rules and norms of everyday practice. States quickly adopted the Kent guidelines into law.

[6] David Garland, PUNISHMENT AND WELFARE (University of Chicago Press, 1990); Jonathan Simon, GOVERNING THROUGH CRIME, Oxford University Press (2007); Michael Tonry, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA (University of Chicago Press, 1996); Tonry, 2000.

[7] Time Magazine, July 1977; Newsweek, 1988; William J. Bennett, , John DiIulio Jr., &, John P. Walters, BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS (Simon and Schuster, 1996).

[8] Barry C. Feld, BAD KIDS (Cambridge University Press, 1999); Simon Singer, RECRIMINALIZING DELINQUENCY (Cambridge University Press, 1996).

[9] Simon Singer, RECRIMINALIZING DELINQUENCY; Jeffrey Fagan and Franklin E. Zimring (eds.), CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (University of Chicago Press, 2000).

result was a recurring cycle of legislation, starting in 1978 and lasting for more than two decades that redrew the boundaries between juvenile and adult court. State legislators passed new laws and revised old ones to steadily expand the criteria for transfer to the criminal court and punishment as an adult.[10] In effect, the states decided that more adolescent offenders are criminally culpable at younger ages than in the past.

This cycle of legislation also reassigned – from juvenile court judges to prosecutors, criminal court judges, legislators, and increasingly, correctional professionals – a large share of the discretion over which types of cases that are transferred. Sometimes the choice is made in a retail process repeated daily in juvenile courts or prosecutors' offices; at other times, corrections officials may decide which youths can be released early and which will serve the balance of long prisons sentences; and at other times, the choice is made in a wholesale legislative process by elected officials far removed from the everyday workings of the juvenile courts.

These choices are not just about two very different court systems, but about deeply held assumptions about the nature of youth crime, about the blameworthiness of youths who commit crimes, and how society should reconcile the competing concerns of public safety, victim rights, and youth development. The two courts have sharply contrasting ideas about adolescents who break the law – their immaturity and culpability, whether they can be treated or rehabilitated, the security threats they pose, and the punishment they might deserve. Whatever the motivation, sending an adolescent offender to the criminal court is a serious and consequential decision: waiver to the criminal court is irreversible, and it exposes young lawbreakers to harsh and sometimes toxic forms of punishment that, as the evidence shows, has the perverse effect of increasing criminal activity.[11]

This Chapter

Nearly three decades later, we can now examine the results of this large-scale experiment in youth and crime control policy. There are several dimensions to understand the new boundaries of the juvenile court. Some are doctrinal and statutory: what was the architecture of the new boundary-drawing and boundary maintenance regimes? Some are conceptual and jurisprudential: what are the normative and practical justifications for the punishments, and what do the new boundaries signal about popular views on youth crime, the appropriate responses, and the theory of a juvenile court reduced stripped of its most challenging cases? The empirical and policy dimensions of the experiment are revealed by assessing the reach, consequences, and effectiveness of criminalization on youth crime. We review this evidence to identify the comparative advantage of relocating entire groups of juvenile offenders and offenses to the criminal court? The social science evidence about how the new youth crime policy lead us to

[10] Feld, BAD KIDS, *supra* note __.

[11] Andrea McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review*. AMERICAN JOURNAL OF PREVENTIVE MEDICINE, 32(4S):7–28 (2006); Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, CRIME AND JUSTICE: A REVIEW OF RESEARCH, 27: 81-167 (2000).

revisit the jurisprudential and policy issues that are the heart of this debate and look to the future.

II. STATUTORY ARCHITECTURE OF JUVENILE TRANSFER

Current Boundary-Drawing Regimes

In the midst of the 1978 New York gubernatorial election, a young man named Willie Bosket shot three strangers on a New York City subway platform. The horrific murder by a 15-year old was all too common for New Yorkers, who had lived through a tripling of the City's homicide rate in the previous decade.[12] In earlier social and political circumstances, and in earlier times, the killings might not have evoked a legislative response. What made this murder salient in Governor Hugh Carey's re-election campaign was the fact that Willie had just been released from a spell in a secure juvenile corrections institution following a string of violent crimes dating back to his childhood.[13] The truncated sentences in the juvenile court for dangerous young men like Willie became the focus of widespread outrage and, quickly, political action. New York legislators promptly passed the Juvenile Offender Law,[14] which lowered the age of majority for murder to 13, and to 14 for other major felonies. At its birth, the law was, and remains today, the nation's toughest law on juvenile crime.

New York already was a tough state on juvenile crime, one of three in the nation where the age of majority was 16.[15] Two years earlier, it had passed the Predicate Felony Law, a measure that mandated minimum terms of confinement for serious juvenile offenders in juvenile corrections facilities.[16] Determinacy in sentencing was nothing new for adults: at least two states began to fix sentence lengths earlier in the 1970s, though none had done so for juveniles. New York's 1976 Predicate Felony Law was the first. But the JO Law, as it came to be known, trumped this earlier law in many ways that signaled the trend that was to come.

First, the legislative branch assumed transfer authority by excluding entire categories of juvenile offenders and offenses from the jurisdiction of the Family Court

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[12] Jeffrey Fagan, Franklin Zimring, and June Kim, Declining Homicide in New York: A Tale of Two Epidemics, Journal of Criminal Law and Criminology, XXXX; Andrew Karmen, NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S (New York University Press, 1998); Erik Monkonnen, MURDER IN NEW YORK CITY (University of California Press, 2001).

[13] See, Fox Butterfield, All God's Children (XXX).

[14] Merrill Sobie, Roysher and Edelman, et al.

[15] Connecticut and North Carolina, at that time, were the others.

[16] CITE Roysher and Edelman

and removing them to the criminal court.[17] In this regime, Family Court judges were eliminated from the decision about which adolescent offenders were to be transferred to the criminal court. The legislature could simply have curtailed the discretion of Family Court judges, but this law foreclosed any role for them. One reading of the JO Law, then, was an attack on the Family Court and its deep adherence to the principles of individualized justice and "best interests of the child." Transfer authority not only was stripped from Family Court Judges, but it also devolved to police and prosecutors, whose unreviewable charging decisions often determined whether cases met the refined charge thresholds that would trigger a transfer.[18]

Second, the transfer decision was made solely on the basis of age and offense. There was no weight accorded to culpability, mitigation, or any other individual factor, including therapeutic needs that might lead to desistance from crime or prior record. The new law assumed that all young persons in these age-offense categories were both sufficiently culpable as to merit criminal justice sanctions, and likely to continue their criminal behavior regardless of whatever interventions they were exposed to in juvenile corrections. In effect, the legislators made an actuarial group prediction of future dangerousness.[19]

Third, sentence lengths for Juvenile Offenders, the label applied to juveniles whose cases were removed by the law, were sufficiently long as to require trans-correctional placements that began in juvenile placements and were continued into the adult corrections system. Although some juveniles always had been transferred to the criminal court following an individualized or "retail" decision by a juvenile or Family Court judge, such transfers were mandated and routinized under the new law, affecting large numbers of youths sentenced to lengthy prison terms despite the absence of a prior record.

In the next two decades, every state expanded its legislation to allow for the prosecution of juveniles in adult criminal court. Most supplanted or eclipsed the traditional system of judicial transfer from the juvenile court with one or more of the mechanisms that were built into the design of the JO law. Other methods were created, shifting discretion from the juvenile court and the judicial branch to elected prosecutors.

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[17] The Family Court has jurisdiction over delinquency cases in New York State.

[18] A 14 year old offender in New York who snatches a chain from another person could be charged with Robbery in the 3rd degree and remain in the Family Court; if there was any use of force or threat, the offender could be charged with Robbery in the 2nd degree and fall subject to the Juvenile Offender Law, regardless of prior record or impact on the victim. The discretion lay solely with the prosecutor, whose decision is not reviewable. Similar differences exist under the JO law for Assault in the 2nd degree.

[19] There was little discussion in the Juvenile Offender Law about retribution, other than passing comments about the design of minimum sentences using a metric of crime severity, a metric that lengthened sentences. The legislators did not consider the possibility of creating options for longer periods of confinement in juvenile corrections. Accordingly, the law was about more than simply the instrumentalities of how long to confine a violent young offender. It was concurrently an indictment of the Family Court and the juvenile corrections authorities. The JO Law left open the possibility of transferring cases back to the Family Court at the discretion of the Criminal Court judge. By 1982, about one in three JO cases were transferred back to the Family Court (Fagan, 1996).

Still other laws created a new statutory authority to transfer not *court* jurisdiction but *correctional* jurisdiction, and ceded that authority to a vague jurisprudential forum that is more administrative than adjudicative.[20] Some states maintained the structure and primacy of judicial waiver, but reconfigured the process to increase the number of judicial waivers by (a) mandating that waiver be considered for some offense and offender categories, and (b) shifting the burden of proof from the prosecution to the defense to show why the accused should not be transferred to the criminal court.

Similar to other punitive measures that arose in the same era, the expansion of transfer was a massive social and legal experiment that fundamentally transformed the borders and boundaries of the juvenile court and juvenile justice systems. The experiment evolved and strengthened over time. Once passed, these laws often were re-crafted in recurring legislative sessions to further expand the scope of transfer laws to permit transfer or removal to criminal court at lower ages and for more offenses. For example, between 1992 and 1997, forty-seven states and the District of Columbia amended their juvenile justice laws to facilitate the prosecution and incarceration of juveniles within the criminal justice system. The next year, Indiana lowered the age from sixteen to ten. Twenty-two states and the District of Columbia no longer set a minimum age at which a judge may transfer a juvenile to criminal court.

Mechanisms for Juvenile Transfer

Judicial waiver, statutory exclusion, direct file, and blended sentencing are the mechanisms used to transfer juvenile offenders to adult court. Figure 1 arrays the states on each of the mechanisms of juvenile transfer in effect as of 2004.

Judicial Waiver

Judicial waiver to criminal court remains one of the baseline functions of the juvenile court, and in many states, is the most common transfer mechanism: 47 states and the District of Columbia provide judicial discretion to waive certain juveniles to criminal court. Figure 2 shows the age and offense thresholds of waiver eligibility for each state. Historically, judicial waiver decisions were made pursuant to a motion by prosecutors. Evidence was presented and argued, and a decision was made. In *Kent v. U.S.*,[21] the U.S. Supreme Court in 1966 articulated both procedural and substantive standards to regulate judicial waiver decisions. The *Kent* guidelines quickly became law in most states.

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[20] Richard Redding and James Howell, Blended Sentences, Chapter _ in CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan and Franklin Zimring, eds., University of Chicago Press, 2000). See, also, Barry C. Feld and Marcy Rasmussen Podkopacz, *The Back-Door to Prison: Waiver Reform, 'Blended Sentencing,' and the Law of Unintended Consequences*, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 91: 997- __ (2001).

[21] 383 **U.S.** 541 (1966)

Since 1978, judicial waiver criteria and procedures have been redesigned to increase the likelihood of waiver. Some states created a presumption of waiver for specific offenses or offenders, based on age, offense, or prior record. Statutes vary on the combinations of these factors. Reversing the jurisprudential norms of waiver that were followed through the first 75 years of the juvenile court, presumptive waiver shifts the burden of proof from the state to the juvenile to show that he or she should not be transferred. Other states mandate waiver for specific categories of offenses and offenders, often for purposes of sentencing terms that can only take place in the criminal court.

Statutory Exclusion

Statutory exclusions, like New York's Juvenile Offender Law, relocate entire categories defined by age and/or offense criteria, to the criminal court. More than half of the states statutorily exclude some adolescent offenders from the juvenile court. Figure 3 shows the age and offense threshold for statutory exclusion of youthful offenders from the juvenile court jurisdiction. In addition to its *de facto* devolution of transfer authority to prosecutors and police, the statute also moots Kent by rendering a legislative judgment about the future behavior and malleability of excluded youths. Exclusions vary from specific offenses, as in New York, to any felony offense at the age of 17, as in Mississippi.

Concurrent Jurisdiction and Direct File

Concurrent jurisdiction creates the option and discretion for prosecutors to file cases directly in adult court. Fifteen states have created concurrent juvenile and criminal court jurisdiction for specific categories of offenses and offenders, permitting prosecutors to elect the judicial forum for the adjudication and sentencing of the young offender. Figure 4 shows the combinations of offense and age criteria that trigger eligibility for concurrent jurisdiction. A quick glance shows that these statutes are targeted primarily at violent crimes. Most states with concurrent jurisdiction make youths eligible at 14 years of age, though others have higher age thresholds.

Blended Sentencing

Seventeen states give the criminal court the power to impose contingent criminal sanctions for juveniles convicted of certain serious crimes, while fifteen states permit juvenile courts to do the same. A significant number of states permit these contingent sentences by either court. These statutes, known as blended sentencing statutes or extended jurisdiction statutes, identify a specific group of juveniles – based on age, offense and record considerations – whose sentences are bifurcated into separate juvenile and adult components, but linked through a contingent process to determine whether the extended (criminal) punishment will be carried out.[22] Figure 5 shows the offense and age

[22] See, for example, Barry C. Feld and Marcy Podkopacz, *End of the Line*, *supra* note __. For a review, see Richard Redding and James C. Howell, *Blended Sentencing*, *supra* note __.

criteria for blended sentencing in the states with such provisions. Note that two states, Vermont and Kansas, permit blended sentences for any offense for youths beginning at age 10. Many other states have no minimum age for one or more of the eligible offense categories.

In most versions of blended sentencing, the criminal portion of the sentence sanction is imposed only if the juvenile violates the provisions of the juvenile portion of the sentence or commits a new offense. The conditions in the juvenile phase may be narrowly tailored – avoiding subsequent crime – or vague and subjective – making satisfactory "progress" in treatment.

Although conceived as an alternative to ameliorate the consequences of transfer, and waiver, several issues have emerged. First is net widening. In Minnesota, the creation of "Extended Juvenile Jurisdiction" (or EJJ) did not reduce the number of waivers; instead, waivers remained constant, and EJJ dispositions were given to youths who, in the past were given dispositions within the juvenile system.[23] Second, the decision to activate the adult portion of the transitional sentence often is void of procedural safeguards and at times out of the sunlight of accountability. States vary on whether the decision is judicial or administrative, the evidence necessary to trigger the adult portion of the sentence, the standard of proof, whether youths can contest or rebut the evidence against them, whether they are entitled to representation, and whether the decision is reviewable. Given the length and conditions of the contingent portion of the sentence, a more formal, standardized and constitutionally sound procedure would be appropriate.

Competing Instincts and Second Thoughts

The complexity of state statutes, the piecemeal character of the statutory landscape, and the fact that most states have overlapping mechanisms, suggests some ambivalence about the instincts to get tough through the use of criminal sanctions for adolescents. Certainly, a state that really wanted to get tough on juveniles could simply lower its age of majority. Yet throughout this 25 year period of tougher sanctions for adolescent offenders, only two states –Wisconsin and New Hampshire– did so, lowering its age of majority from 17 to 16.[24] But more states – five -- abolished the juvenile death penalty between 1989 and 1995 than did states lower the age of majority in the same period.[25] And in contrast, one state – Connecticut -- recently raised its age of majority from 16 to 18 years of age.

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[23] Feld and Podkopacz, *id*.

[24] CITE

[25] Jeffrey Fagan and Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, ___ (2005).

Instead, rather than follow the lead of New York's legislature in 1978, the states have crafted statutes to criminalize delinquency incrementally and in pieces, measures that stopped short of the more obvious and expedient step of lowering the age of majority. The current landscape of criminalization is full of trapdoors and loopholes that allow some youths – no one knows exactly how many – to escape the reach of the criminal law and its harsher punishments. This ambivalence describes a normative stance among legislators that refuses to abandon the principles of juvenile justice, yet seeks to parse youth crime into categories of those worthy of the remedial and therapeutic interventions of the juvenile court, and those who can be abandoned to the punitive regime of criminal justice in the name of retribution and public safety.

Two collateral provisions of the new transfer mechanisms illustrate these competing instincts about adolescence, youth crime and juvenile justice. Viewed together, they describe an ambivalent or bipolar political and legal culture on the question of adolescent criminals. The first is the return of transferred cases back to the juvenile court, or reverse waiver. Reverse waiver is a retail corrective mechanism, designed to detect errors in attributing full culpability or overlooking evidence of amenability to treatment. Laws in 24 states permit reverse waiver once cases have been initiated in the criminal courts, including 21 of the states with direct file (or prosecutorial waiver) statutes. In some states with statutory exclusion, such as Pennsylvania, these decertification hearings are routine.[26] In New York City, nearly one in three J.O.s are returned to the Family Court. Cases can be returned to the juvenile court either for adjudication and sentencing, or only for sentencing by the juvenile court consistent with it statutory authority. Other states permit juvenile court judges to consider both juvenile and adult sentences for adjudicated youths.

The opposite instinct is evident in the 31 states that have enacted "once waived, always waived" legislation. Here, juveniles who have been waived to adult court and convicted subsequently *must* be charged in criminal court regardless of the offense. For example, in Virginia, any juvenile previously convicted as an adult is excluded from juvenile court jurisdiction. But in California, any waiver qualifies a person for such permanent waiver, regardless of the outcome of the first waived case. Permanent waiver can be invoked in 10 states, and must be invoked in 12 others, if the offender previously has been adjudicated delinquent.

The tension between the punitive and child saver instincts for youth crime are evident in these two faces of waiver law. They co-exist uneasily, forcing binary choices in the election of court jurisdiction, choices that are not well suited to reconcile these tensions. Blended sentences, for example, are a peculiar design that shifts the burden for marginal cases – those where crimes are severe but culpability is in question – from the juvenile court to correctional authorities, with uncertain procedural rules and substantive criteria. In his sentencing colloquy for Nathaniel Abraham in 2000 for a murder

[26] Representation for these youths is provided by the ___. Not every jurisdiction has the resources to provide defense representation that can motion for reverse waiver, and disparities arise when access to services is limited by economic resources.

committed at 12 years of age,[27] Judge Eugene Moore chose among three options. He could sentence Nathaniel as an adult, which would wash the juvenile court's hands of a difficult and troubling case. He could give Nathaniel a blended sentence, shifting responsibility for Nathaniel's punishment and human development to a correctional bureaucracy with limited liability for failure. He could sentence Nathaniel as a juvenile, forcing the juvenile court and its treatment adjuncts to respond to its most challenging case as a way of affirming the court's mission and its rehabilitative and protective *sine qua non*. Judge Moore chose the latter, sentencing Nathaniel to confinement in a juvenile treatment facility until his 21st birthday. Along the way, he articulated the duality of modern juvenile justice.

III. THE UNEASY FIT OF CULPABILITY, MATURITY AND TRANSFER LAW

Maturity is a bedrock construct that lies at the heart of the distinction between the juvenile and criminal courts. When the first juvenile court was created in the U.S. in 1899, the age border between juvenile and criminal courts ranged from 14 to 16 in most states.[28] For women, the age of majority in the early juvenile court was 22. Just about every court reserved the right to transfer some youths to the criminal court, but not under the same conditions and for the same reasons as today: it was common for murderers to be retained in the juvenile court, and for incorrigbles to be expelled to the criminal court.[29] As the child saving philosophy of the juvenile court gained popular support in the early 20th century, the age of majority for eligibility for the criminal court gradually rose to 18 years in most states.[30]

Historically, the juvenile court's algebra of maturity was based on social norms and popular legal comfort zones for other adult functions, such as driving, voting, military service, marrying and signing contracts.[31] The age threshold to confer adult competence for these behaviors typically is 18 years of age, though some states recognize a lower age of 16 for some tasks, including the decision to obtain an abortion without

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[27] CITE Oakland County, 6th Circuit for the State of Michigan, 662 N.W. 2d. 836 (2000)

[28] David Tanenhaus, JUVENILE JUSTICE IN THE MAKING (Oxford University Press, 2004).

[29] Id. See, also, Judith Sealander, THE FAILED CENTURY OF THE CHILD (___)

[30] A few states – New York, North Carolina, Connecticut – have had a lower age threshold of 16 for several decades. See, Patricia Torbet and Linda Szymanski, "State Legislative Responses to Violent Juvenile Crime: 1996-97 Update." Juvenile Justice Bulletin (1998), Washington, D.C.: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention.

[31] Elizabeth Scott, *The Legal Construction of Adolescence,* HOFSTRA LAW REVIEW, Vol. 29, p. 547 (2000).

parental consent.[32] Over time, legal variations in the age of majority across social and behavioral tasks came to reflect the distinction in capacities for each task.[33]

Within this algebra, juvenile courts assume that young offenders similarly are not fully responsible for social behaviors, and their punishment is (at least in theory) discounted from adult tariffs. Because they are immature, the juvenile court assumes they have "room to reform"[34] and will desist from crime given helpful services and protection from the stigma of a criminal conviction and exposure to the toxic influences of adult punishments.[35] Even as the juvenile court shifted its philosophy and practice to place punishment ahead of rehabilitation in its policy emphases, there remained in most juvenile courts and correctional agencies attention to the remedial and therapeutic interventions.[36] After *Kent* newly regulated judicial waiver decisions, "maturity" and "sophistication" were important parts of the *Kent* framework, and adolescents who were deemed "amenable to treatment" were retained in the juvenile court. Judges relied heavily on the evaluations of social workers whose recommendations on waiver were usually persuasive to the juvenile court. The diminution of immaturity (but certainly not its death) as a jurisprudential principle came a decade after after *Kent* with New York's Juvenile Offender Law.

The Enduring Importance of Maturity and Development in Juvenile Justice

What, then, does 25 years of transfer activism signal about legal and popular notions of maturity and its place in juvenile justice? The political discourse and legal mobilization that animated the criminalization push beginning in the 1980s was

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[32] *Hodgson v. Minnesota*, 497 U.S. 417 (1990). In its Amicus brief for the plaintiff in Hodgson, the American Psychological Association cited a "rich body of research" showing that by age 14-15, juveniles develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws.

[33] Elizabeth Scott, *The Legal Construction of Adolescence*, HOFSTRA LAW REVIEW, Vol. 29, p. 547 (2000). See, e.g., Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip Flop."* Unpublished. The increase in the drinking age presents an interesting case where evidence of immaturity in decision making – a sharply elevated rate of automobile accidents involving young intoxicated drivers – led to a national movement to raise the minimum drinking age from 18 to 21. Some saw this in the larger context of increasing social control on youths, consistent with the quick ratcheting up of waiver laws. See, e.g, Craig Reinarman, *The Social Construction of an Alcohol Problem: The Case of Mothers Against Drunk Drivers and Social Control in the 1980s*," THEORY AND SOCIETY 17 91-120 (1988).

[34] Franklin Zimring, CHANGING LEGAL WORLD OF ADOLESCENCE (Free Press, 1982).

[35] Franklin Zimring, *The Common Thread -- Diversion in the Jurisprudence of Juvenile Courts*, in Peggy Rosenheim et al. (eds.), A CENTURY OF JUVENILE JUSTICE (University of Chicago Press, 2001). The two were seen as separate prongs. These theories converged institutionally, in a linkage that foreshadowed the growing empirical evidence that such stigma may in fact cause the very crimes that the juvenile court would avoid through its paternalism.

[36] For a summary, see, Jeffrey Fagan, *Punishment or Treatment for Adolescent Offenders: Therapeutic Integrity and the Paradoxical Effects of Punishment.*" 18 QUINNIPIAC LAW REVIEW 385 (1999). For a contrary view, see, Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, J. CRIM. L. & CRIMINOLOGY 88: 68 (1998).

ambiguous about maturity. From the outside, legal academics read the movement as a sign that legislators assumed that young offenders have reached a developmental threshold of criminal responsibility where they are fully culpable for their crimes.[37] Indeed, the *Kent* regulations confused "sophistication of the crime" with "maturity" and culpability. Critics of the juvenile court argued that proportionality and the concerns of victims should trump the "best interests of the child." Similar to the design of waiver at the outset of the juvenile court, some argued for proportionality as a necessity to maintain the legitimacy of the juvenile court.[38] Others recommended a proportionality regime in the interests of fairness and consistency, diminishing but not discarding the notions of proportionality.[39] Public safety concerns also were a dominant narrative, drawing hard lines to determine when longer, incapacitating punishments were needed to protect citizens. Still others preferred the deterrent effects of criminal court punishment over a regime of individualized justice. The notion of immaturity as a culpability discount was set aside in these moves, or standardized in a complex heuristic of when and for who transfer is necessary.[40]

Accordingly, the transfer activism of the past two decades did not affirmatively or uniformly reject the notion of developmental immaturity and diminished culpability of youths. In many instances, it merely set it aside, or reserved it for less serious or visible offenders. Functionally, though not explicitly, these transfer moves assume that adolescents are no different from adults in the capacities that comprise maturity and hence culpability. The new boundaries of juvenile justice also assume that adolescents have the same competencies as adults to understand and meaningfully participate in criminal proceedings. In the absence of good social and behavioral science, legislators were free to make those assumptions.

Yet in case law, the immaturity of youth has been an enduring truism that has compelled special protections for youths. Cases like *Haley v Ohio*[41] ("Age 15 is a tender and difficult age for a boy") and *Gallegos v Colorado*[42] ("A 14-year old boy, no matter how sophisticated, …. is not equal to the police in knowledge and understanding…and is unable to know how to protect his own interests or how to get the benefit of his constitutional rights…) embed immaturity in the consideration of juveniles' competence.

The centrality of immaturity to culpability is most visible in the evolving jurisprudence of the juvenile death penalty. In *Eddings v Oklahoma*, the U.S. Supreme Court reinforced the importance of immaturity by acknowledging that young offenders

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[37] Stephen J. Morse, *Immaturity and Responsibility*. JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 88: 15-__ (1998).

[38] Franklin Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibilty*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Robert Schwartz and Thomas Grisso, eds.) (Chicago: University of Chicago Press, 2000).

[39] Barry Feld, *Abolish the Juvenile Court, supra* note __. Feld advanced the concept of a "youth discount" on adult sentences, standardizing immaturity strictly by age.

[40] Cite

[41] 332 U.S. 596 (1948)

[42] 82 S. Ct. 1209 (1962)

are not fully responsible for their crimes, at least not to the extent of deserving the ultimate punishment.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.[43]

The recognition of immaturity in *Eddings* continued in *Thompson v. Oklahoma*,[44] and *Stanford v. Kentucky*.[45] In his plurality opinion in *Thompson*, Justice Stevens focused on the immature judgment of adolescents in explaining why juvenile executions violate the principle of proportionality under the Eighth Amendment's prohibition of cruel and unusual punishment:

> [L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis of this conclusion is too obvious to require extensive explanation. 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 reasons 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.[46]

Social science research cited in the opinion's footnotes further elaborated upon the characteristics of adolescence that contribute directly to the reduced culpability of juvenile offenders. In *Stanford v Kentucky*,[47] the Court critiqued the idea that immaturity compromised moral reasoning, or that limitations on voting, for example, apply to culpability assessments for murderers. But the Court approved regimes of individualized assessments to determine the extent to which immaturity compromised culpability.

"As Every Parent Knows"

Which brings us to *Roper v. Simmons*,[48] the 2005 case banning execution of minors below the age of 18. Justice Kennedy's opinion in *Roper* leans heavily on social science evidence that was supplied in amicus briefs from the two APA's: the American Psychological Association and the American Psychiatric Association. His conflation of

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43 *Eddings v. Oklahoma*, 455 US 104 at 115 (1982)

44 487 US 815 (1988)

45 492 US 361 (1989)

46 487 U.S. 815 at 835

47 492 US 361 (1989)

48 125 S. Ct. 1183 (2005).

science and intuition was the first step toward a creating a legally relevant category of adolescence within the criminal law:

> "As any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.'"[49]

He said that juveniles are less culpable because they are "more vulnerable and susceptible to negative peer influences and outside pressures, including peer pressure."[50] He characterized them as "comparatively immature, reckless and irresponsible.[51] He noted that the character of juveniles is less well formed than that of adults and their personalities are "more transitory."[52] The sum of these developmental gaps between adolescents and adults, according to Kennedy, "...means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[53] Kennedy concluded that because of these deficits, they could not be classified among the worst offenders (a necessity of death penalty jurisprudence). He worried that the risk of executing a young offender "despite [their] insufficient culpability" was too great, especially if we conflate the heinousness of the crime with maturity and sophistication.

While Kennedy drew from social science research cited in the American Psychological Association amicus brief, evidence from neuroscience was presented by the American Psychiatric Association identifying "anatomically-based" evidence of "concrete differences" between juveniles and adults. This APA based its conclusions on "[c]utting-edge brain imaging technology [that] reveals that regions of the adolescent brain do not reach a fully mature state until after the age of 18. These regions are precisely those associated with impulse control, regulation of emotions, risk assessment, and moral reasoning. Critical developmental changes in these regions occur only after late adolescence."[54]

Accordingly, new science shows that adolescents think and behave differently from adults, and that the deficits of teenagers in judgment and reasoning are the result of biological immaturity in brain development. The adolescent brain is immature in precisely the areas that regulate the behaviors that typify adolescents who break the law. And the recent evidence suggests that the brain does not settle into its mature state until well after adolescents have begun the transition to adulthood. The fluidity of

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[49] *Roper* at 1125

[50] *Id*.

[51] *Id*. He also said these same qualities are the reasons why juveniles are not permitted to vote, serve on juries or marry without parental consent. He effectively contradicted Justice Scalia's majority opinion in *Stanford*, and recent empirical work emphasizing variable in developmental trajectories for different decisional competencies. See, Steinberg et al., *supra* note __.

[52] *Id.*

[53] *Id.*

[54] Amicus Brief of the American Psychiatric Association, in rel. *Roper v. Simmons*, 06-633, at 2-3.

development is probably greatest for teenagers at 16 and 17years of age, the age group most often targeted by laws promoting adult treatment of young offenders.
In other words, behavioral science and natural science are nearly perfectly aligned, to show that "the average adolescent cannot be expected to act with the same control or foresight as a mature adult."[55] Translating this evidence into a legally relevant category required a different task:

> "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. .... however, a line must be drawn.[56]
>
> And draw it they did, at 18 years of age.

Kennedy was careful to show that this proportionality analysis was focused on the possibility of execution, or, in passing, life without the possibility of parole.[57] While not precluding its applications to other punishments, he certainly never ruled them in. In fact, whether proportionality can be applied to non-capital punishments in other than extreme cases is hotly contested in law, regardless of whether the punished is a juvenile or an adult.[58] In punishments other than death, age often is discounted as a factor in proportionality considerations.[59] While age is a consideration in the calculus of judicial transfer, and perhaps for a few cases when prosecutors exercise jurisdictional discretion, it is unlikely to weigh in the minds of legislators when they redraw boundaries for the juvenile court through exclusions. The landscape of transfer laws in Figure XX shows that, in fact, offense seriousness trumps age in most states.

Nevertheless, the new science of juvenile culpability runs counter to the patterns in transfer law. Here, the downward ratcheting of the age at which youths are exposed to adult punishment sharply contradicts evidence that full maturity in legally relevant dimensions that map onto constructs of culpability and blameworthiness, comes later than 18, not earlier. The recent push to lower the age threshold for treating juvenile offenders as adults assumes that they are sufficiently mature to be held culpable for their crimes, that any deficits in their maturity are minor compared to the harm they have done, and that unless punished harshly, they are likely to do it again. It assumes that adolescents

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[55] *Id*.

[56] *Roper* at 1197-98.

[57] *Id.* Kennedy noted that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person"... See, Jeffrey Fagan, *Abolish Life Without Parole for Juveniles*, CRIMINOLOGY AND PUBLIC POLICY (2007, forthcoming).

[58] *Compare Coker v. Georgia*, 433 U.S. 584 (1977) (invalidating the death penalty for the rape of an adult woman), *with Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life sentence for possession of 672 grams of cocaine), *and Rummel v. Estelle*, 445 U.S. 263 (1980)(allowing life imprisonment for passing a bad check), *and Ewing v. California*, 538 U.S. 11 (2003)(upholding long sentence (25 to life) for committing three minor property felonies, under a Three Strikes law).

[59] Fagan, *End Life Without Parole for Juvenile Offenders*, *supra* note _., for a review of appellate decisions rejecting age as a factor in proportionality analyses.

are no different from adults in the capacities that comprise maturity and hence culpability. It also assumes that adolescents have the same competencies as adults to understand and meaningfully participate in criminal proceedings. In the absence of good social and behavioral science, legislators were free to make those assumptions. This new evidence suggests that the law has been moving in the wrong direction.

Developmentally Constrained Choices

Developmental psychologists have identified specific dimensions of psychosocial components of mature thinking and reasoning, and shown how adolescents and adults differ along these lines. The most dramatic changes in development, when teenagers begin to reach the same capacities as adults, occur between 16 and 19 years of age. The most important difference, whether in crime or in choices involving everyday social or personal behaviors, is teenagers through age 19 are poor decision makers when it comes to crime. Their judgment is immature because they have not yet attained several dimensions of psychosocial development that characterize adults as mature, including the capacity for autonomous choice, self-management, risk perception and the calculation of future consequences.[60] The attainment of these developmental capacities is perhaps one reason why crime rates peak in late adolescence, but then subsequently decline as adolescent development progresses toward maturity.[61]

Notwithstanding the fact that different adolescents develop at different rates, adolescence, generally, serves as a bridge between childhood and adulthood with regard to developing psychosocial capacity. Although cognitive capacities for reasoning and understanding are well formed for many by mid-adolescence and approximate the skills shown by most adults,[62] teens are less skilled in using these skills to make real-life decisions.[63] They lack experience, and even when they do have knowledge, they use it poorly. So, this immaturity of judgment underlies their tendency to make choices that are harmful to themselves or others.[64] Finally, adolescence is characterized by incomplete identity formation, a process that – when mixed with poor judgment and decision-making – leads to exploration, behavioral experimentation, and fluctuations in self-image.[65]

Perhaps the most significant difference between adults and adolescents is their attitude toward risk. They simply assess risk differently from adults. They may be

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[60] Steinberg and Cauffman, *Maturity of Judgment in Adolescent Decision Making* , *supra* note __.

[61] Robert J. Sampson and John H. Laub, *Understanding Desistance from Crime*, CRIME AND JUSTICE 28: 1-56 (2001) (reviewing literature on the robust finding that crime peaks in late adolescence and declines for most persons sharply during developmental transitions from adolescence to adulthood).

[62] Steinberg and Cauffman, *Maturity of Judgment in Adolescent Decision Making* , *supra* note __

[63] S. Ward and W. Overton. (1990). *Semantic familiarity, relevance, and the development of deductive reasoning*. DEVELOPMENTAL PSYCHOLOGY, *26*, 488-493.

[64]Elizabeth Scott, *Evaluating Adolescent Decision Making, supra* note__; Elizabeth S. Scott and Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, J. CRIM. L. & CRIMINOLOGY 88*:* 137 - 171 (1997)

[65] Laurence D. Steinberg, ADOLESCENCE (6th ed. 2002)

unaware of risks that adults typically perceive, or have bad information about risks, or miscalculate the probability or magnitude risk in ways that adults would not.[66] They are present-oriented and discount future costs, and lack the social judgment to fully evaluate consequences.[67] For example, in laboratory experiments and studies across a wide range of adolescent populations, developmental psychologists show that adolescents are risk takers who inflate the benefits of crime and sharply discount its consequences, even when they know the law.[68] Adolescents take more risks with health and safety than do older adults, such as unprotected sex, drunk driving and other illegal behaviors.[69] Adolescents are more impulsive than adults, and insensitive to contextual cues that might temper their decisions.[70] They lack the capacity for self-regulation of either impulses or emotions, and their tendency toward sensation-seeking often trumps both self-regulation and social judgments or risks and consequences.[71]

Adolescents also are far more prone to peer influence than are adults. In some contexts, adolescents might make choices in response to direct peer pressure, burying considerations such as legality, consequences or risk. Their desire for peer approval can shape their behavioral decisions even without direct coercion, often anticipating peer rewards. Peer approval is an essential component of adolescent socialization, and the fear of rejection (or non-satisfaction of desires for peer approval) can animate behavior and shape choices. Peer influence interacts with risk taking and impulsivity to compound bad decisions: recent studies have shown that people generally make riskier decisions in groups than they do alone. In a recent study that simulated a driving game called "Chicken," where drivers chose whether to speed through a yellow light, Gardner and Steinberg showed that teenagers ages 13-16 took more risks that persons over 18, and that the presence of peers sharply increased risk taking behavior among teens and young adults ages 18-22 compared to young adults.[72] Why do adolescents take risks compared to young adults? One reason is that they usually overstate rewards while underestimating risks.[73]

Finally, a developmental analysis can also provide an alternate view of the intent or *mens rea* requirement for criminal liability. The trajectory of maturation of adolescents raises questions about the degree to which the decision-making processes of

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[66] See, Kim Taylor-Thompson, *States of Mind, States of Development*, STANFORD LAW AND POLICY REVIEW, 14:143-173 (2003).

[67] Elizabeth Scott and Laurence Steinberg, *Blaming Youth*, TEXAS LAW REVIEW, 81: 799 - __ (2003).

[68] Id

[69] Jonathan Gruber, but see Mike Males, *Framing Youth* (1999)

[70] Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, BEHAVIORAL SCIENCES AND THE LAW, Vol. 18, p. 741 (2000).

[71] Laurence Steinberg, ADOLESCENCE (McGraw-Hill, 2002).

[72] Margo Gardner, and Laurence Steinberg. Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: An experimental study. DEVELOPMENTAL PSYCHOLOGY 4:625–35 (2005).

[73] See Lita Furby & Ruth Beyth-Marom, Risk *Taking in Adolescence: A Decision-Making Perspectiv*e, DEVELOPMENTAL REVIEW, Vol. 12, p.1 (1992)

adolescents mirror those of adults, and more centrally, whether compromises in their decision making capacities undermines the *mens rea* requirement of intent. Can any court conclude that an adolescent intended a crime in the same way and with the same capacities as an adult?[74] The same logic applies to accomplice liability: if offending is developmentally linked to peer influences: it is hard to imagine how an immature accomplice could form the intent to assist the principal actor in a crime.[75] If choice itself is fundamental to intent in the criminal law, and at the same time is the very essence of immaturity, there is reasonable doubt that a young offender can be fully culpable for her decision to engage in crime.

I Didn't Do It, My Brain Did It

Advances in neuropsychological research have produced a new body of knowledge that shows, compared to a fully mature brain in adults, that teen brains remain immature through late adolescence and early adulthood.[76] These new studies have zeroed in on the areas of the brain that where impulsivity, risk taking, and poor social judgment are regulated. These areas are immature among teenagers, often not reaching full maturity until early adulthood. Michael Gazaniga, writing in *The Ethical Brain* (2005),[77] suggests that these regions of the brain are most important for what they control, not necessarily for what they motivate. It is no surprise, then, that since adolescent brains are not fully developed, they do not achieve critical mechanisms of impulsivity and behavioral control until age 20 or beyond.[78]

Beginning in the early 1990's, new forms of brain scans called "functional" MRIs provided images of brain functioning during tasks such as speech, perception, reasoning and decision making. In one study, Dr. Jay Giedd used this type of MRI to track the individual brains of 145 children and adolescents over a 10 year period into young adulthood.[79] These studies showed that the frontal lobe, especially the prefrontal cortex, is the region of the brain associated with the decision making and the several behavioral dimensions associated criminal culpability. This is the brain region where cognitive skills are put to work make plans and start behaviors in pursuit of their goals. It also is the region where control mechanisms are most active. Longitudinal MRI studies following subjects from ages 4 through 21 have shown that this is one of the last areas of the brain to reach maturity.[80]

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[74] Kim Taylor-Thompson, *States of Mind, supra* note __.

[75] *Id* at 167

[76] Laurence Steinberg, *A Neurobehavioral Perspective on Adolescent Risk-Taking,* DEVELOPMENTAL REVIEW (in press).

[77] Michael Gazzaniga, THE ETHICAL BRAIN, Dana Press (2005).

[78] Elizabeth Sowell et al., *Mapping Accelerated Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Post Adolescent Brain Maturation.* THE JOURNAL OF NEUROSCIENCE, Vol. 15, p. 8819 (2001)

[79] Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study,* NATURE NEUROSCIENCE, Vol. 2, p. 861 (1999)

[80] Nitin Gogtay et al., Dynamic Mapping of Human Cortical Development During Childhood *Through Early Adulthood,* Proceedings of the National Academy of Science, Vol. 101, p. 8174 (2004).

It is not just brain or lobe size that matters – the composition of the frontal lobe is still developing even after it reaches an adult-like size. Using MRIs with groups of young people over time into early adulthood, Professor Elizabeth Sowell and her colleagues have shown that during the period when cognitive functioning is improving in the frontal lobe, gray matter thins in a process of "pruning" that allows for tight connections to be built among the remaining neurons, in effect, completing the circuitry that ties together impulsivity, control, and judgment.[81] This pruning, which begins around age 11 in girls and 12 in boys, continues into the early or mid-20s, particularly in the prefrontal cortex, an area associated with "higher" functions such as planning, reasoning, judgment, and impulse control.

A Colder Appraisal

To some observers, the evidence is less than conclusive. Justice Scalia, in his dissent in Roper, refused to uncouple evidence of developmental maturity in *Hodgson* from the claims of immaturity in *Roper*.[82] Others wonder whether evidence of developmental immaturity in laboratory experiments comports with what we might find with samples of serious juvenile offenders.

Few people doubt that the brains of 13-year old teens differ from the brains of 25 year old adults. But the research doesn't make the types of age-graded distinctions that the new waiver laws make, especially in the critical age span of 14 through 19. For example, Sowell and colleagues (2001) report average results for groups that span a wide age range –comparing teens ages 12 to 16 old teens with adults ages 23 to 30.[83] The Grisso team that studied adjudicative competence also reported two-year averages rather than age-specific results. The legislatures and the courts are much more concerned with the fine distinctions of 15 versus 16 versus 17 years of age, not just in crime but in a wide range of age-specific competencies. Nor are the results as reliable as advocates might wish. For example, we know next to nothing about how brains react under real-world conditions of threat, arousal, or peer provocation. As Dr. Sowell told *Science* in May 2005, "…The hardest thing ... is to bring brain research into real-life contexts."

Develop, Immaturity and Transfer Law

Still, the new developmental and neuropsychogical research has strong value and importance for laws that funnel adolescents wholesale into the adult courts. To use the language of law, it casts reasonable doubt on statutes that sweep all 15 or 16 year old offenders into the criminal justice system. Some adolescent offenders may have reached

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[81] Peter R. Huttenlocher, Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex (Harvard University Press, 2002).

[82] Roper at 1222-23 (Scalia, J., dissenting).

[83] Sowell et al., *supra* note __.

a threshold of maturity by 16 consistent with the legal conceptions of maturity-culpability, but many others won't. Such legal regimes assume maturity where it simply is not true; in those cases, immaturity – both in the capacities that comprise culpability and the brain functions that launch them – argues persuasively against transfer to the criminal court.

The alternative is to rely on case-by-case assessments, much as the early juvenile courts did in deciding which youths were so incorrigible as to warrant expulsion from the juvenile court. We worry, as did Justice Kennedy in Roper, about these being wrong, and the younger we draw the line for eligibility for criminal punishment, the greater the risk of error, and errors are anything but cost-free. So, the new science should raise cautions for practitioners of laws that allow for such retail selections as young as 12. MRIs and social experiments help us draw a developmental trajectory for most teens, but the metrics to reliably assess which youths are at what points on those pathways simply aren't available. The unsettled nature of brain development makes it very hard to reliably determine the maturity and future behavior of adolescents at 16, 17 or even 18 years of age. Our toolkit of diagnostics is unlikely to settle these uncertainties. One can hardly expect legislators, prosecutors and judges to systematically and accurately make these judgments.[84]

Waiver to adult court is not exactly a death sentence, but it is irreversible and has very serious consequences, as we see next, both for adolescents and for public safety. While the law moves toward waiving increasingly younger teens, social and biological suggests moving in the other direction. Perhaps it's time for the law to change course and follow the science.

IV. THE REALITY OF TRANSFER LAW AND POLICY

The Reach of Juvenile Transfer Statutes

There are no comprehensive databases to estimate the number of youths across the nation whose cases are processed criminal courts, or to characterize the populations affected by these statutes. The complexity of the statutory landscape challenges efforts to compile accurate and comprehensive estimates of the reach of transfer laws.[85] Accurate tallies would require counts in state court administrative databases of the number of cases

[84] But see, *Schall v Martin*, ___, in which Justice Powell, writing for the majority, set aside controversial social science evidence on predictions of dangerousness and said that judges were best suited to make these judgments.

[85] For example, New York and North Carolina set the age of majority at 16; youths in criminal court in those states should not be part of an estimate of the transferred population. But youths excluded by statute at age 16 in other states should be measured as part of the transferred population.

filed in the criminal court by age, race and offense, plus data on their dispositions to determine how many transferred cases remain in criminal court after reverse waiver or judicial review. These data may exist, but they are highly disaggregated by state and, in some instances, in local court records.

How Many Are Transferred?

Estimates of how many youths are tried and sentenced in the criminal courts are highly sensitive to data sources and methods of counting. Donna Bishop (2000) estimates that between 210,000 and 260,000 minors were prosecuted in the criminal courts in 1996,[86] most (80%) of whom were excluded from juvenile courts either by the statutory boundary for juvenile court or statutes that exclude specific categories of offenses and offenders. The Campaign for Youth Justice developed a similar estimate: 7,500 cases are judicially waived to criminal court each year, 27,000 are sent by direct file by a prosecutor, and 218,000 completely bypass the juvenile system and are sent via legislation that sets a lower age of adulthood than age 18.[87] After comparing this figure to the estimated 973,000 youths who received dispositions in the juvenile court in the same year, Bishop concludes that between 20 and 25% of all juvenile offenders below the age of 18 were processed in the criminal courts.

These figures are difficult to verify, however. For example, there are no comprehensive records of direct file activity by prosecutors. And records of minors prosecuted in criminal court are available only for samples from the nation's largest counties and only for some years,[88] or from surveys of prosecutors who report secondary data of uncertain reliability. These data sources are useful as lead indicators of trends over time, but are not helpful in generating point estimates of the number and rate of juvenile offenders in the criminal courts.

Although precise estimates may be elusive, there is evidence to suggest the parameters and boundaries of the reach of juvenile transfer and waiver laws. Some sources are current, but others are nearly a decade old and probably too high given recent declines in juvenile crime and arrests.

- A study by the Bureau of Justice Statistics counted the number of juveniles tried for felonies in criminal courts in the nation's 75 largest counties for one month

[86] Donna M. Bishop, D.M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, supra note __.

[87] Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform.* Washington DC: Campaign for Youth Justice (2007). They cited two sources: C. Puzzanchera et al., Juvenile Court Statistics 1999 (Washington DC: Office of Juvenile Justice and Delinquency Prevention, 2003, available at: http://ncjj.servehttp.com/NCJJWebsite/faq/transfertocourt.htm) and H. Snyder and M. Sickmund, Juvenile Offenders and Victims: 1999 National Report, *supra* note __.

[88] See, for example, Kevin Strom, et al., *Juvenile FelonyDefendants in Criminal Courts.* Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics (1998).

each year from 1990 to 1994.[89] For those months, the total was 1,638.[90] The full range of transfer mechanisms was included in the sample of counties.

- A more recent study by the Bureau of Justice Statistics estimated that 7,100 youths were tried as adults on felony charges in the 40 largest counties in the United States in 1998.[91] Both of these estimates included only felonies, overlooking the incidence of juveniles who are transferred on misdemeanor charges or other matters such as probation revocations.

- The National Center for Juvenile Justice examined judicial waiver between 1988 and 1999 in over 2,000 juvenile courts representing 70% of the U.S. population. Fig 6 shows that the rate of waiver is low and, with two exceptions, stable over time. Approximately 8 cases were waived per 1000 formally processed over the decade, fewer than one percent of all cases. Waiver rates peaked in 1992 at 1.6 percent of all cases, and declined through the rest of the decade consistent with an overall decline in juvenile arrests. Person offenses were waived most often during the decade (1.1% of all formal cases), and property cases least often.[92] Judicial waivers for drug offenses declined from a peak of 4 percent in 1991 to slightly more than 1 percent in 1999.

- In New York City, 1,289 youths ages 13-15 were charged in the felony criminal courts as Juvenile Offenders between 1987 and 2000, or just over 300 per year.[93] Many more were charged initially arrested and charged as Juvenile Offenders, but their charges were later reduced and their cases returned to the lower (misdemeanor) court for adjudication and sentencing. Others were waived back to the Family Court.

- Felony arrests in New York City from 1997 through 2006 averaged 4,130 per year for persons 16 years of age, 4,820 for persons age 17. However, many of those cases are either dismissed or the charges reduced during plea bargaining. Accordingly, were the age of majority in New York raised to 18, as was recently done in Connecticut, only a fraction of those arrests would have been excluded from the juvenile court under an expanded Juvenile Offender Law.

- In March 2000, California voters passes Proposition 21, known as the "Gang Violence and Juvenile Crime Prevention Act of 1998," excluding minors ages 14-17 charged either with murder (under special circumstances) or felony sexual

[89] http://www.ojp.usdoj.gov/bjs/pub/pdf/jfdcc.pdf

[90] Id. at 2

[91] http://www.ojp.usdoj.gov/bjs/pub/pdf/jfdcc98.pdf

[92] But as juvenile drug arrests rose during the early part of the decade, the number of waived drug cases rose. Judicial waivers for drug offenses declined in number beginning in 1992, though the rate remained stable.

[93] Marian Gewirtz, Recidivism Among Juvenile Offenders in New York City, New York City Criminal Justice Agency, 2007.

offenses, and giving prosecutors concurrent jurisdiction to directly file charges in criminal court for youths ages 16 and 17 for any of several enumerated offenses.[94] Prosecutors filed charges in criminal court on 410 youths in 2003 and 343 in 2005.[95] Prison sentences were given to 110 minors in 2003 and 234 in 2005.

These front-end statistics do not include juvenile transfers to criminal court via direct file or statutory exclusions. Yet it is difficult to count these groups. Records often are not kept, and arrest data rarely differentiate the subchapters in penal codes that trigger statutory exclusion. Nevertheless, the General Accounting Office estimated in 1995, the peak year of judicial waiver activity, that the large majority of juveniles in criminal court are transferred judicially.[96] Back-end statistics on juveniles in adult jails and prisons provides a different picture that examines the consequences of all transfer mechanisms. These data provide a different picture.

- The number of youth under age 18 in adult jails rose sharply through the 1990s to a high of almost 9,500 in 1999 and then leveled off to an average of just over 7,200 since 2000. Figure XX shows that there was a 208% increase in the number of youth under age 18 serving time in adult jails on any given day between 1990 and 2004. The proportion of youth under age 18 among total jail populations is dropping. Youth under age 18 accounted for 1.4% of the total population of state jails in 1994, 1.2% in 2000, and 1 % in 2004.

- The number of youths below 18 admitted to state prisons nationally peaked in 1995 at approximately 7,500, and declined over the next seven years. The proportion of youth under age 18 among total prison populations is also dropping. Youth under age 18 accounted for 2.3% of the total population of state prisons in 1996, which is more than double the proportion (1.1%) in 2002. Since 1995, the total prison population has risen 16%, while the number of persons under age 18 in prison has dropped 45%.

These figures may undercount juveniles in the adult courts, since many states require minors begin serving lengthy prison sentences in juvenile facilities and are transferred administratively at their 18th birthday. These figures also exclude the numbers of youths admitted to juvenile corrections facilities during the first phase of a blended sentence.

- In California, 6,629 youths were sentenced to the California Department of Corrections between 1989 and 2003 to serve sentences as adults.[97] The incarceration rate of approximately 475 per year varied from a low of 172 in 1989

[94] CITE

[95] Campaign for Youth Justice, 2007. *The Consequences Aren't Minor*, *supra* note __.

[96] U.S. General Accounting Office, Report to Congressional Requesters, Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions 1 (Aug. 1995)

[97] Data were unavailable to determine if those sentenced to prison were incarcerated in adult or juvenile facilities. *See*, Campaign for Youth Justice, supra note __, citing statists from the California Board of Corrections and the California Department of Corrections.

to a peak of 794 in 1997. In 2003, 504 minors were sentenced to adult prison in California.

Some transfers are reversed, muting the effects of criminalization.

- In New York City, approximately one in three Juvenile Offenders are waived back to the Family Court.[98]

- In Pennsylvania, where reverse waiver, or decertification hearings, are fairly common, XXX youths ages ___ were returned to the juvenile court.[99]

These front- and back-end estimates suggest that a commonly cited estimate of 210,000 youths per year transferred to criminal court[100] may be an upper bound. How much lower is difficult to determine, and any estimate is prone to error. What can be said is that there is substantial traffic between the juvenile and criminal courts, and most of it is one-way. There are thousands of youths each year newly incarcerated in prisons and jails together with adults, and that their conviction and incarceration as adults carries an irrevocable stigma and burden that truncates their future economic and social lives. By any measure, it is a large scale social "experiment" in youth policy whose effects, as we see later, are anything but positive.

Who is Transferred?

Males, disproportionately minority (see below), offenses vary but lots of property offenders (bait and switch from rhetoric focused on violence) and drugs

Many first offenders, this is a concern

When age of majority is below 18, tens of thousands of misdemeanors and marijuana arrests. East pathway to adult record

Race and Transfer

The overrepresentation of non-white youths among those transferred is not surprising, given their overrepresentation at every stage of juvenile and criminal justice

[98] Jeffrey Fagan, Aaron Kupchik, and Akiva Liberman, CITE.

[99] Data provided by David Rosen, ___.

[100] This figure is cited, for example, by the Campaign for Youth Justice in its 2007 report, in footnote 4, quoting a report by a 2005 report by the Coalition for Juvenile Justice, *Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Criminal Court.*

processing.[101] Reasonable people disagree on the extent of disparities in case processing once youths are involved in the legal system, whether these disparities are changing over time, or even how to compute disparities. Whether minority youths are overrepresented relative to their crime rates, and especially the types of crimes that are enumerated in many state transfer and exclusion laws, is a more complex question, but the balance of evidence suggests that they are.

The picture of disparity varies at different viewpoints of the juvenile and criminal justice systems. A back end view, for example, suggests strong disparities. In 1997, Bureau of Justice Statistics data shows that between 1985 and 1997, 58% of the persons admitted to state prisons under 18 year of age were Black, and 15% were Hispanic.[102] The Campaign for Youth Justice[103] cites data from the California Department of Corrections that in 2003, Black youths were 4.7 times more likely to be transferred than white youths, and Hispanic youths 3.44 times more likely. These populations would include youths transferred judicially to criminal court, as well as those excluded by statute under Proposition 21. The same report cites Virginia Department of Corrections data from 2005 that Black youths comprise less than 50% of youths arrested but more than 73% of youths entering adult prisons.

A front-end view suggests fewer disparities in waiver. For example, Puzzanchera (2003)[104] reports that 46% of the judicially waived population from 1990-99 were non-white. Yet most analyses duck the question of whether waiver is racially disproportionate to race-specific crime rates. Instead, they more often compute race differences based on prior stages of case processing, mooting the effects of how youths of different races enter the system. For example, Snyder and Sickmund (2006), as part of the federal Disproportionate Minority Confinement (DMC) program, computed a Relative Rate Index to estimate disparities at each stage of juvenile justice processing. Figure XX reproduces the chart for 2002 from their most recent report. Large disparities between Black and white youths are evident at arrest and at detention. But there are fewer disparities for judicially waived cases. And the disparity seems to be declining: the percentage of white defendant cases in juvenile court that were waived increased from 1990 to 1999 by 9%, compared to a decline of 24% for Black youths.

Analyzing data on waiver decisions, some studies report that there are no race differences in waived versus non-waived cases after introducing controls for legally-relevant variables such as prior record and offense seriousness.[105] But these indicia are misleading: they filter out cumulative disadvantages by race from the outset of a case in the juvenile court – decisions in charging, detention, charge reduction, and the decision to

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[101] Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE (Darnell Hawkins and Kimberly Kempf-Leonard, eds) (Chicago: University of Chicago Press).

[102] Bureau of Justice Statistics, Profile of State Prisoners under Age 18, 1985-97. NCH 176989 (200).

[103] CFYJ, *The Consequences Aren't Minor*, supra note __

[104] CITE

[105] See Bishop (2000) for a review.

seek waiver itself – and look only at the decision to waive. This selection bias seriously limits our understanding of race and waiver.

This picture is limited in another way: cases waived by the juvenile court most likely understate disparities due to censoring of youths excluded by statute from juvenile court jurisdiction. A more comprehensive dataset used by Bishop (2000), including data on all three routes of transfer,[106] reports that 69% of the tens of thousands of youths excluded each year by statute are non-white. There is no estimate of race differences in youth crime, apart from homicide, that suggests minority youths account for that share of any crimes other than perhaps homicide.

Stepping back, though, the issue is not whether disparities in waiver exist because minority youths are more often involved in crime, or whether they are arrested at disproportionately higher rates per crime than are white youths relative to their involvement in crime. Janet Lauritsen's (2006) careful review of the evidence using multiple data sources to confirm patterns observed in arrest records suggests that offending rates for non-white youths may in fact be higher for violence and weapons charges, but not for drug crimes.[107,108] Instead, Donna Bishop (2006) suggests that racial disparities in police contacts and arrests *per crime* may be the case, based on strategic decisions about where and how to deploy police, and observed biases in police decision making.[109]

Rather, the essential question about race and transfer is whether there is disparate treatment given the fact of contact with the juvenile or criminal court. We might expect more black youths to be judicially waived or in adult prison relative to white youths if their offending rates are higher. But *disparity* might better be viewed in terms of the balance across racial and ethnic groups in the rate of transfer relative to each group's *arrest* rate, rather than their offending rate. The critical question, then, is how much higher? We would hope that the proportion of juvenile arrests of whites that result in processing in criminal court would be the same for Black and Hispanic and other racial and ethnic groups. This measure is akin to the ways that epidemiologists compute relative risk ratios given exposure to an agent.

There are reasons to think that these ratios are not balanced, and that there is racial disparity in the back end data on incarceration of persons under age 18 that cannot

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[106] Bishop relied on the State Courts Processing System (SCPS), which includes all cases processed in the criminal courts and disaggregates by age.

[107] Janet Lauritsen, Racial and Ethnic Differences in Juvenile Offending, in *Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice* (Darnell Hawkins and Kimberly Kempf-Leonard, eds) (Chicago: University of Chicago Press).

[108] This is important in the discussion of racial disparity, since drug crimes are one of the most commonly waived offenses for Black youths, according to Snyder and Sickmund (2006).

[109] Donna Bishop, *supra* note __. See, for example, Geoffrey Alpert John MacDonald and Roger Dunham, Police Suspicion and Discretionary Decision Making During Citizen Stops**,** *Criminology* 43: 407 – 434 (2005). See, also, Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Race, Terry and isorder in New York City*" . FORDHAM URBAN LAW JOURNAL, Vol. 28, P. 457, 2000

be explained simply by differences in offending. The back end disparities are produced by an entanglement of discretionary processes at each stage of the criminal justice process whose cumulative effects are observed in the race differentials in incarceration of youths below 18 in state prisons. Social science evidence suggests the banal and commonplace influence of racial biases in everyday case processing in the juvenile and criminal courts, much of it influenced by implicit biases.[110] Graham and Lowery (2003) show evidence from experiments with police and probation officers that their attributions of culpability in vignettes with offenders of ambiguous racial identity are influenced by simple primes that evoke stereotyped racial images of youths. Racialized primes also influenced race-specific predictions of recidivism. Bridges and Steen (1998) report strong differences in the attributions of culpability, risk of reoffending and, in turn, recommended sentences for white and non-white youths in juvenile courts. Evidence from other parts of criminal law and criminal justice also shows the cumulative effects of racial bias from which youth are not exempt. Jennifer Eberhardt and colleagues (2006) showed that Black defendants in capital cases were more often judged "deathworthy" after controlling for characteristics of the offender and the crime. William Pizzi and colleagues showed similar processes at work in criminal sentencing. And a long line of studies showing how race influences police officers' decision making and judgment about suspicion and dangerousness.[111]

Beyond racial profiling, there is consistent evidence of selective enforcement that targets minorities well beyond what any difference in their crime rates might predict.[112] For example, there are attributes of minority neighborhoods that more often tend to activate suspicion and police action against suspects at a lower level of behavioral provocation compared to how police patrol and respond in predominantly white neighborhoods.[113] Sampson and Raudenbush (2004) showed that minority neighborhoods were more often perceived as "disorderly" and dangerous than white neighborhoods, even after controlling for objective measures of physical and social disorder. Police strategies also tend to be overly inclusive, even when targeted at serious crime problems. For example, gang ordinances in cities like Charlotte, North Carolina, produce large numbers of arrests of gang members on felony drug and weapons charges,

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[110] For a thorough review of studies on racial profiling, sentencing, police shootings, etc., *see* Richard Banks, Jennifer Eberhardt, and Lee Ross, *Discrimination And Implicit Bias In A Racially Unequal Society*, CALIFORNIA LAW REVIEW 94: 1169-1190

[111] Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY. 83: 1314 (2002); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, JOURNAL OF EXPERIMENTAL SOC. PSYCHOLOGY 39: 399 (2003); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, PSYCHOLOGICAL SCIENCE 16:180 (2005); E. Ashby Plant et al., *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic For Responses to Criminal Suspects*, JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 41: 141 (2005).

[112] Andrew Gelman, Jeffrey Fagan and Alex Kiss, *An Analysis of the New York City Police Department's by "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION, (2007, forthcoming).

[113] Alpert, MacDonald and Dunham, Formation of Suspicion, *supra* note __.

but also large numbers of arrests of innocent bystanders whom police cannot distinguish from gang members based on clothing or appearance.[114]

Racial disparity in transfer or exclusion exceeds what we would predict knowing differences in crime rates. Instead, disparites are produced by a cumulative process that involves the systematic and cascading application of discretion across the juvenile and criminal justice systems. Either directly or through surrogates and substitutes such as clothing, demeanor, neighborhood, or other racialized cues, unconscious and conscious biases influence decisions about whom to arrest and how to charge and sentence them. Both discretionary and statutory routes for youths to the criminal court pass through these gates.

The Punitive Reach of Transfer

Since the passage of the New York Juvenile Offender Law in 1978, the primary goal of transfer policy has been to increase the certainty, length and severity of punishment. Leniency was one of the lightning rods for those hostile to the juvenile court who advocated for tougher measures for juvenile crime. The evidence suggests that these advocates only partially achieved their goals, with a far more complex and contingent pattern of sentencing and punishment than they might have anticipated.

Several studies illustrate the variability and contingencies in sentencing of transferred cases in the criminal courts. For example, Roysher and Edelman[115] showed sanctions were no more severe in criminal court than criminal court in the years immediately following passage of the J.O. law in New York; in many cases, and in some upstate counties, sentences were less harsh. Research by Gillespie and Norman (1984), Champion (1989, and Feld (1988) in different locales showed similar patterns.[116] In the Florida studies, Bishop and colleagues (1996) reported that youths charged with violent

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[114] See, Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Washington DC: Justice Policy Institute, July 2007, available at: http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf. These tactics were brought to life in a recent and disturbing account by Solomon Moore, a reporter for the New York Times, of his experience in a gang sweep by police officers on a streetcorner in Charlotte. See, Reporting While Black, *New York Times*, September 30, 2007, at Section 4, p.4. Despite showing his press credentials and regardless of his age (mid-30s) and traditional casual clothing, Mr. Moore was handcuffed, accused of being a potential gang member, and detained for some time before being uncuffed.

[115] Martin Roysher & Peter Edelman, *Treating Juveniles as Adults in New York: What Does it Mean and How is it Working?*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING (J.C. Hall et al. eds., 1981).

[116] Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1988); L.K. Gillespie & M.D. Norman, *Does Certification Mean Prison? Some Preliminary Findings From Utah*, 35 JUV. & FAM. CT. J. 23 (1984). See also Dean Champion, *Teenage Felons and Waiver Hearings: Some Recent Trends, 1980-1988*, 35 CRIME AND DELINQUENCY 577-585 (1989).

crimes were more likely to be incarcerated if sentenced in the adult court.[117] Kupchik et al. (2003) showed a similar pattern comparing structured sentencing of transferred youths in New York with discretionary sentencing of youths in the juvenile court in New Jersey.[118]

In some cases, this prong of transfer policy failed. Contrary to the retributive intent of waiver, Houghtalin and Mays (1984) showed that juveniles are sanctioned less severely in criminal court than their counterparts in juvenile court, via relatively lenient sanctions and higher case attrition.[119] Peter Greenwood (1984) offered several explanations for a why adolescents might face more lenient sanctions in criminal court.[120] Based on recent studies in Florida, Minnesota and New York, these explanations seem accurate today. Young offenders in criminal court may appear less threatening – physically smaller and younger, shorter criminal records – than their older counterparts with longer records. Moreover, even though juvenile records are unshielded legally in many jurisdictions, Barry Feld (1991) showed that the juvenile's criminal history often may be unavailable to the criminal court due to the functional and physical separation of juvenile and criminal court staffs who must compile and combine these records, and sheer bureaucratic ineptitude.[121] As a result, the same juvenile recidivist who appears incorrigible to the juvenile court may appear to be a less chronic and less serious offender to the criminal court.

In many jurisdictions, structured sentencing determines the disposition in criminal court: the seriousness of a young adult's present offense and prior adult criminal history are the calculus of sentencing. This is one reason why nearly one in three of the youths ages 16-17 in New York with no prior record were sentenced to adult prison under the New York J.O. law.[122] This reflects the emphasis on *violent* crimes in expanded transfer laws and procedures across the states. National trends on judicial waivers show that adolescents charged with and waived for violent crimes receive substantial sentences as

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[117] *See* Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQ. 171 (1996);

[118] Aaron Kupchik, Jeffrey Fagan and Akiva Liberman, *Punishment, Proportionality and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypotheses*, 14 STAN. L. & POL'Y REV. 57 (2003). See, also, Simon Singer, Jeffrey Fagan and Akiva Liberman, *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York's Juvenile Offender Law, in* THE CHANGING BORDERS OF JUVENILE JUSTICE (Jeffrey Fagan and Frank Zimring, eds.) (Chicago, University of Chicago Press).

[119] *E.g.*, M. Houghtalin & G.L. Mays, *Criminal Dispositions of New Mexico Juveniles Transferred to Adult Court*, 37 CRIME & DELINQ. 393 (1991); See also, Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985).

[120] Peter W. Greenwood, Alan Abramhamse, & ___, FACTORS AFFECTING SENTENCING SEVERITY FOR YOUNG ADULT OFFENDERS (Santa Monica, CA: Rand Corporation ,1984).

[121] Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965 (1995); Barry C. Feld, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (New York: Cambridge University Press, 1999).

[122] Aaron Kupchik, Jeffrey Fagan and Akiva Liberman, *Punishment, Proportionality and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypotheses*, 14 STAN. L. & POL'Y REV. 57 (2003).

adults.[123] Local studies show the same. For example, Rudman et al. (1984), looking only at adolescents charged with violent crimes in four jurisdictions, found that the criminal court was more punitive. [124] The likelihood of incarceration was the same in juvenile and criminal court, but juveniles waived to criminal court received longer sentences – almost always in adult prisons – since there was no upper age boundary for incarceration. Podokpacz and Feld (1996) found that waived youth in Minneapolis received longer sentences for violent crimes, but shorter sentences for property crime, than retained youth.[125] Fagan (1995), comparing sentences in New York and New Jersey for offenders ages 15-16 in 1981 –1982, found that youth adjudicated on robbery or assault in adult than juvenile court were more likely to be incarcerated, and received longer sentences.[126] But in a second cohort from five years later, the gap between juvenile and criminal court sanctions narrowed significantly from 1981-82 to 1986.

Thus, the age-offense relationship apparently produces a peculiar disjunction in the sentences of juveniles as adults. When sentenced as adults, young property offenders may receive shorter sentences than do their juvenile counterparts, though youth waived for violent offenses may receive dramatically longer sentences and under more punitive conditions than do their juvenile counterparts.

Comparative Correctional Experiences

There is little research on the correctional experiences of transferred youths. The few studies have examined experiences of the portion of transferred youths sentenced to state prisons. We know little about the experiences of transferred youths serving short sentences in county jails. We know nothing about how transferred youths experience probation supervision, including whether they are linked to services that can help them avoid a return to crime. We also know nothing about how youths receiving blended sentences, or contingent punishment, experience their bifurcated correctional stays. For those released from prison, there is little research on their re-entry experiences and outcomes. We need much more information about these regions of transfer policy to fully understand why transfer itself, not just the experiences of the group that goes to adult prison, seems to produce worse outcomes.

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[123] *See* Patricia Torbet et al., State Responses to Serious and Violent Juvenile Crime (U.S. Dep't of Justice,1996). Melissa Sickmund, HOW JUVENILES GET TO CRIMINAL COURT (U.S. DEP'T OF JUSTICE, 1994); Barry C. Feld, Bad Kids(1999).

[124] Cary S. Rudman, Jeffrey Fagan, and Eliot C. Hartstone, *Violent Youth in Adult Court: Process and Punishment*, CRIME & DELINQUENCY 32: 75-96 (1986).

[125] Marcy R. Podkopacz & Barry C. Feld, *The End of the Line: An Empricial Study of Juvenile Waiver,* 86 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 449-492, 1996, studying 1986-1992 waiver in Hennepin County, MN.

[126] Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Impacts of Juvenile and Criminal Court Sanctions on Recidivism of Adolescent Felony Offenders, in* YOUTH VIOLENCE AND PUBLIC POLICY (James C. Howell et al. eds., 1995).

If incarceration cannot explain the higher recidivism rates of transferred youths, why should we care about their correctional experiences? There are two reasons. The first is that the thrust of transfer laws was to increase the length and severity of punishment. A serious assessment of transfer as a policy has to engage the retributive component of transfer policy, not just its consequentialist or instrumental goals. One reason for transfer was the challenge to the juvenile court to attain penal proportionality in its punishments, and the popular perception that the punishment tools in the juvenile court were mismatched to the increasing severity of youth crime. A careful analysis of transfer, then, should consider the quality of retribution, and the possibility that for adolescents, lengthy stays in harsh conditions of confinement can be disfiguring.

A second reason is one of principle: the corrective component of punishment often is invoked to justify its effects, yet there seems to be little correctional impact of incarceration. No modern criminologist or correctional administrator maintains the illusion that there are broad therapeutic benefits from incarceration, or a strong deterrent effect. Recidivism rates in adult prisons are simply too high – more than two prisoners in three released in 1994 returned to prison within three years[127] – to sustain beliefs either in the rehabilitative or deterrent component of adult corrections. What is the principle and corresponding youth policy that mandates exposure to conditions that are likely to produce failure, a failure with perhaps lasting impacts on social development and well-being further into the life course? We already know that incarceration experiences in adolescence essential mortgage social, economic and psychological development with effects felt over the life course.[128] Do incapacitation or retribution concerns justify these mortgages? These policy goals tell us what to punish and perhaps whom, but they do not inform a policy of how to punish.

The scattering of facts about correctional experiences of incarcerated youths can be connected to describe the contours (if not the dimensions) of the correctional experiences of incarcerated youths. In one component of the Florida studies, Winner and colleagues suggest that the absence of procedural justice and low evaluations of legitimacy in the criminal courts may engender resistance and defiance among transferred youths.[129] Juveniles in the criminal court are likely to the labels of "criminal" that is signaled by adult court proceedings, language and settings.[130] Bishop and Frazier (2000) reported strong feelings of injustice and resentment among 45 youths incarcerated in adult facilities in Florida that translated into self-derogation and a reflected appraisal of their absence of social value in the wider society. Their views of staff and fellow inmates contrasted sharply with those of their counterparts in juvenile facilities, who perceived

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[127] Among inmates released at ages 18-24, 75.4% were rearrested within three years, 52.0% were re-convicted, and 52.0% were returned to prison. Among inmates ages 14-17 at release, the rates were higher: 82.1% rearrested, 55.7% re-convicted, and 56.6% returned to prison. Patrick Langan and David Levin, Recidivism of Prisoners Released in 1994, Bureau of Justice Statistics, NCJ 193427, June 2002.

[128] See, Sampson and Laub, supra note __; Freeman, supra note __.

[129] See, for example, Tom R. Tyler and __ Ho, ; Lawrence Sherman, Defiance … , *Journal of Research in Crime and Delinquency*, ___

[130] Thomas & Bishop, 1984;

therapeutic content in their everyday lives and empathy among staff and fellow inmates.[131]

Other comparisons of juvenile and adult correctional settings suggest that youths in prisons face higher risks of violence. Forst et al. (1989) compared the experiences of 140 youths in adult and juvenile facilities over four locales. Youths in adult prisons reported higher rates of physical and sexual assault compared to matched samples of youths in juvenile corrections. Using standardized scales, youths in juvenile settings reported that staff was more involved and helpful in social and behavioral services. They reported stronger educational programs and employment training, and rated therapeutic case management services higher. They also noted that staff in the juvenile facilities were far more attentive to building and strengthening ties to family and other social networks that would be influential upon release. Bishop and Frazier reported nearly identical responses in their Florida sample: the juvenile corrections group had more positive evaluations of staff, stronger and more effective therapeutic services, and better educational and employment training programs aimed at increasing their human capital. And in each study, the juvenile corrections group were more likely to forecast no further criminal activity.

In a replication a decade later, Fagan and Kupchik (2006) fewer differences in vicitimization than did Forst and colleagues. In fact, juvenile facilities appeared to be more chaotic, with higher levels of drug use and self-reported offending and victimization. But they also found that youths in adult prisons felt less safe, and reported significantly higher levels of mental health symptoms and post-traumatic stress disorder. Even in the more outwardly stable contexts of adult prisons, where the social organization is maintained by rigid inmate networks, the perceptions and consequences of being surrounded by cohorts of older inmates who often are in the business of violence, produced stronger feelings of insecurity and collateral mental health consequences.

Forst and colleagues attributed the different views of youths to what the researchers characterized as sharp policy and atmospheric differences between the security orientation in adult prisons and the therapeutic and educational orientations of juvenile facilities. Bishop and Frazier noted that the juvenile facilities paid strong attention to reintegration, planning for release very soon after the youths arrived.

Other (descriptive) data .. prison experiences of rape, joining gangs for self-protection

How Effective Are Transfer Laws?

Research on the deterrent effects of transfer on public safety divides into studies of general and specific deterrence. Figure XX summarizes the results of several studies in each category. While the evidence on general deterrence is mixed, there is consistent

[131] Bishop and Frazier, 2000

evidence in specific deterrence studies of higher crime rates among adolescents transferred to criminal court. Rarely in social science or policy analysis is there such consistency and agreement across studies under such widely varying sampling, measurement and analytic conditions.

General Deterrence

General deterrence research estimates differences in rates of offending under varying sanctioning and punishment regimes. Study designs sort into two approaches. Econometric models estimate age-specific crime rates for across states with different age thresholds for criminal court eligibility, controlling also for punishment contingencies and other covariates of crime and justice system performance. Figure XX summarizes the results for a sample of studies. The evidence tips against the claim that offenders are sensitive to age-specific boundaries for eligibility for punishment in the criminal courts. The consensus cuts across studies that vary in study designs, time periods, locales and methods of analysis.

Only one study – Levitt (1998) – reports that adolescent offenders are sensitive to the age boundary for adult punishment. Levitt used state-year fixed effects models to estimate differences in age-specific crime rates from 1978-93.[132] He reports significantly lower juvenile crime rates in states where the age of majority is 17 compared to states where offenders are eligible for criminal court at age 18. But this is not true across the board: the effects of juridictional age are conditioned on the comparative likelihood of incarceration in the respective courts. Juvenile crime rates are lower in states that have higher juvenile incarceration ratios, and marginal increases in the juvenile incarceration rate have more leverage on juvenile crime rates than does the age of jurisdiction.

Other studies find either no effects or increases in offending rates among adolescents once they reach age-defined eligibility for the criminal court. Most use time series methods, comparing crime rates before and after the passage of laws lowering the age of majority for specific categories of offenses and offenders. Singer and McDowall (1988)[133] reported no general deterrent effects when New York State passed the Juvenile Offender Law in 1978, despite widespread publicity and enforcement of the law across the state. This is surprising, since young people in New York evidently were well aware of the law, a fundamental prerequisite for deterrence.[134] For example, one youth interviewed in an ethnographic study in upstate New York shortly after the JO law was passed said that: "[When] you are a boy, you can be put into a detention home. But you can go to jail now [as an adult]. Jail ain't no place to go."[135] Nevertheless, the results

[132] Steven D. Levitt, *Juvenile Crime and Punishment, JOURNAL OF POLITICAL ECONOMY* (1998).

[133] cite

[134] Robinson and Darley, Oxford Journal of Criminal Law

[135] Barry Glassner, Glassner, Barry, Margret Ksander, Bruce Berg, and Bruce Johnson, *"A Note on the Deterrent ffect of Juvenile vs. Adult Jurisdiction,"* SOCIAL PROBLEMS, *31* (2), 219–221 (1983). According to Singer (1996), brochures were sent to public schools announcing the new law and its harsh consequences, and juvenile court judges routinely issued warnings about the serious punishment that awaited anyone who violated the new law.

were mixed, especially among older cohorts of youths who were closer to the age of majority. The results were uneven across the state, as well, with little effect on youth crime rates in the higher crime areas of the state, including New York City.

Two other single-state studies – in Idaho and Washington State -- reported similar results. Each used time series analysis with controls for concurrent trends in surrounding states or nationwide. Jensen and Metzger (1994) used time series analysis to estimate differences in juvenile crime rates three years before and five years after Idaho passed a law that mandated transfer for youths ages 14-17 charged with any of five violent crimes. Juvenile crime rates increased in the period after the law was passed, while crime rates in the neighboring states declined during the same period. Barnowski (2003) used time series models to estimate changes in juvenile crime rates before and after passage of the 1994 Washington (state) Violence Reduction Act and a 1997 amendment expanding the law. Barnowski analyzed juvenile arrest rates for youths ages 10-17 from 1989-2000 in Washington and compared trends in the state to national trends. He reports no differences between the Washington and the national trends; juvenile arrest rates for the target crimes peaked in 1994 for each.

Another single-state study, in Florida, combined age of majority and changes in sanctioning probabilities to estimate the effects of reaching the age of majority on age-specific crime rates. Lee and McCrary (2006) used panel methods to estimate the probabilities of rearrest for a sample of youths arrested prior to age 17 between 1989 and 2002 in Florida. They constructed complete criminal histories going back to their date of first arrest, and tracked them over time, controlling for punishment experiences. They report little change in offending rates once youths turned age 18, when they faced more severe and longer terms of punishment as adults. They also report no effects of transfer to criminal court. They conclude that none of the mechanisms to toughen punishment for adolescents – whether transfer to criminal court, or longer sentences, or even aging out of the juvenile jurisdiction – show marginal deterrent effects.

These studies agree that young offenders seem unresponsive to sharp changes in the risk of harsher penalties, and the age at which they are exposed to these penalties seems to matter little if at all. For adolescents, their appetites for crime and its rewards seems inelastic with respect to punishment threats. Lee and McCrary characterize young offenders as myopic, unphased by the threat of short prison sentences and discounting the consequences and likelihood of longer ones. It is hardly unreasonable to assume that knowledge of the law diffuses efficiently through adolescent peer networks that are, in effect, information markets to manage a variety of adolescent risk behaviors.[136] Yet in these highly localized and efficient networks, law's consequences are discounted in a manner that typifies adolescent reasoning and planning. A generalized change in the risk environment seems unable to leverage changes in behavior.

Why, then, does Levitt reach different conclusions? XXXXX

[136] Jonathan Gruber, RISKY BEHAVIOR AMONG YOUTH: AN ECONOMIC ANALYSIS (University of Chicago Press, 200_).

Specific Deterrence

As a policy matter, the critical test for transfer is its capacity to produce marginal declines in recivism and re-incarceration compared to youths retained in the juvenile court. Recidivism rates are for youths in each jurisdiction, but the new research on transfer suggests that, controlling for individual characteristics and correctional experience, the rates are either the same or significantly higher for transferred youths. Accordingly, the several studies on the specific deterrent effects of criminal court sanctions show no evidence public safety benefits from transfer.

The *Task Force on Community Preventive Services*, a standing committee including policy experts from government, academia and private research that sponsors periodic reviews preventive services across a range of health and social behaviors, reviewed seven studies and concluded that transfer increases the rate of violence among transferred youths.[137] Fig XX, from the Task Force report, illustrates the effect sizes across several of the studies. Some suggest that transfer to the criminal court worsens criminal behavior and increases public safety risks. Figure XX illustrates graphically the range of effects. The consistency of the results, across a variety of sampling, measurement, and analytic conditions is rare in policy science.

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[137] Andrea McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile to the Adult Justice System*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE, 32(4S): 7-27. The Committee standardized published results of transfer studies by computing point estimates for the relative change in the violent crime rates attributable to the interventions. The reviewers calculated baselines and percent changes using the following formulas for relative change. For studies with before-and-after measurements and concurrent comparison groups, the effect size was computed as:

(Ipost/Ipre)/(Cpost/Cpre) -1

where:

Ipost = the last reported outcome rate in the intervention group after the intervention;
Ipre = the reported outcome rate in the intervention group before the intervention;
Cpost = the last reported outcome rate in the comparison group after the intervention;
Cpre = the reported outcome rate in the comparison group before the intervention.

If modeled results were reported from logistic regressions, odds ratios were adjusted for comparability to relative rate changes estimated from other studies:

$$RR = OR/([1 - P_0] + [P_0 \times OR]),$$

where:

RR=relative risk;
OR=odds ratio to be converted;
P_0 = incidence of the outcome of interest in the unexposed population (i.e., juveniles retained in the juvenile justice system).

The studies typically compared court outcomes and recidivism rates for groups of transferred and retained youths. These were either matched samples designs from the same time period (e.g., Podkapacz and Feld, 2001) or different time periods spanning law changes (e.g., Myers et al., 2001; Barnowski, 2003). Some studies used matched cases designs (Bishop et al., 1996; Winner et al., 1997; Lanza-Kaduce, 2002) comparing waived and retained youths matched on several factors thought to be related to the transfer decision. Other studies compared youths from adjoining jurisdictions with different statutes that created the conditions for a natural experiment[138] The studies vary in their construction of the independent variable. Most limit their tests to the court jurisdiction, while some others control for both court disposition and correctional intervention. Dependent variables include crime-specific measures, such as violence or drug offenses, or global recidivism measures. The studies vary in the lengths of the follow-up periods, with some reporting short-term differences that disappear after several years.[139]

How confident can we be in these studies and the conclusions of the Task Force? Most introduce selection biases that confound comparisons of the two types of proceedings and sanctions. Selection – whether judicial, prosecutorial, or legislative – may serve as a proxy for criminal propensity. Differences in the samples may reflect more about that propensity than the differential effects of court jurisdiction. Comparisons across jurisdictions introduce important contextual influences that may interact with the deterrent effects of punishment.[140]

Only a portion of the studies cited by the Task Force addressed these issues. The Florida studies used two different procedures to control for selection. Winner et al. (1997)[141] matched cases in the juvenile and adult courts on seven criteria [142] Matches

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[138] In a subsequent study, Fagan, Kupchik and Liberman (2007) used a similar design with more counties and an expanded list of sampled offenses. Their results were similar to the Fagan (1996) study. The more recent study was not included in the Task Force analysis, which included only published studies.

[139] *See* Jeffrey Fagan, "The Comparative Impacts of Juvenile and Criminal Court Sanctions On Adolescent Felony Offenders." *Law and Policy* 18 (1): 77-119 (1996); Jeffrey Fagan, Fagan, Jeffrey, Kupchik, Aaron and Liberman, Akiva, "Be Careful What You Wish for: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court" (July 2007), presented at Second Annual Conference on Empirical Legal Studies, New York University, November 2007, available at SSRN: http://ssrn.com/abstract=491202; Donna Bishop Charles E. Frazier, Lonn Lanza-Kaduce, and Lawrence Winner,. *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?* CRIME AND DELINQUENCY 42: 171-191 (1996).

[140] John C. Hagan & Kristin Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research*, *in* RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (Alfred Blumstien et al. eds., 1983); *see also* CHARLES R. TITTLE, SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE (1980); Charles R. Tittle, *Evaluationg the Deterrent Effects of Criminal Sanctions*, *in* HANDBOOK OF CRIMINAL JUSTICE EVALUATION 381 (Malcolm Klein & Kathie Teilmann eds., 1980).

141. Lawrence Winner et al., *The Transfer of Juveniles To Criminal Court: Reexamining Recidivism Over the Long Term*, CRIME & DELINQUENCY 43: 548 - __(1997).

[142] The criteria were: (1) most serious offense for which the transfer was made, (2) the number of counts included in the bill of information for the committing offense, (3) the number of prior referrals to the juvenile court, (4) the most serious prior offense, (5) age at the time of the committing offense, (6) gender, and (7) race (coded dichtomously as white or non-white).

were successful for the first six variables, but transfers including matches by race were less successful. Only two-thirds of the white transfers could be matched to white non-transfers, and only about half of the non-white transfers could be matched to non-white non-transfers. When the race criterion was relaxed, successful matches were obtained in 92% of the cases. There were no controls for court or community context. Lanza-Kaduce (2002)[143] computed a risk index based on 12 items and used propensity score matching to adjust for selection effects in the transfer process. He was able to match 475 pairs overall, and 315 "best matched pairs" that excluded transferred youths whose criminal history was longer or more severe than his matched contemporary in the retained sample. The effect sizes using these two variations on matching produced similar results that again show substantially higher recidivism rates for retained youths, particularly in the three to five years following sentencing.

Fagan (1996) and Fagan et al. (2007) compared recidivism rates among samples recruited from New York City whose cases originated in the criminal court with samples from bordering areas in northeastern New Jersey whose cases were processed in the juvenile court. In each study, the researchers estimated a logistic regression to compute a selection parameter or propensity score to control for differences in the samples. The selection parameter was included as a predictor in the analyses of recidivism rates. SIGNIFICANT??

The use of matching routines adds confidence to these studies, and reflects well on the consistency of their results with other studies that did not use more rigorous controls. Yet none of the studies use more refined and powerful methods of propensity score matching to control for selection biases. These biases are present when there is collinearity between treatment assignment and the factors that predict treatment assignment.[144] Rosenbaum and Rubin (1995)[145] elaborate the procedures for propensity score matching: differences between experimental and control groups are estimated by computing the likelihood of each subject – or the propensity – to be exposed to the treatment itself. Rosenbaum and Rubin discuss the importance of achieving balance at both ends of the distribution of propensity scores. Accordingly, the propensity scores

[143] CITE

[144] The identification task to estimate propensity scores requires the selection of variables that approximate the matrix of information available to judges or prosecutors and the logic they use in deciding whether to transfer. Two challenges complicate the identification process. First, judges or prosecutors following *Kent* guidelines will typically weigh factors such as dangerousness, maturity - sophistication, and treatability. Yet each construct itself is multidimensional, and this complexity makes measurement difficult; weighting becomes highly subjective and individualized as the number of factors increases. Second, researchers often have limited access to the specific information that is available to judges or prosecutors. Their information is limited to administrative or observational data, which occludes the actual basis for transfer decisions from systematic analysis. The selection or propensity models estimated under these conditions may be artifactual at best and, under extreme conditions, inaccurate. See, for example, Randall Salekin et al., (2002), *Juvenile Transfer to Adult Courts: A Look at Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment through a Legal Lens*, PSYCHOLOGY, PUBLIC POLICY AND LAW 8(4): 373-410. Salekin and colleagues surveyed juvenile court judges and identified four dimensions of dangerousness, two dimensions of sophistication-maturity, and four dimensions of treatability.

[145] Cite

often are arrayed in quintiles or deciles, and each group may be analyzed separately to estimate treatment effects at each level of propensity. An alternate method is to include the propensity score as a predictor in estimating the effects of treatment (as an adult) on some measure of recidivism[146], though this is less sensitive than the procedure using disaggregated comparisons.

Nevertheless, even when we narrow the inclusion criteria to studies that address selection issues, we observe consistency in the strength and direction of results that suggests – when joined with other studies showing similar results – robust evidence of the perverse effects of both wholesale and retail transfer to the criminal court. Moreover, these studies reject the notion that these effects are limited to the subset of transferred youths who are incarcerated in adult prisons. Fagan (1996) and Fagan et al. (2007) specifically test for incarceration effects and finds no evidence that either the fact of incarceration nor its length significantly predicts recidivism. Similar results were obtained in several of the other studies. Increasing the risk or length of confinement offers no return to crime control for transferred youths.

3. Social and Mental Health Outcomes

There is no information about social and mental health outcomes of youths whose cases are tried in the criminal court. Some studies have noted the adverse effects of incarceration as a minor on marriage, employment, and transition to other (adult) social roles over the life course, but none distinguish between punishment as a juvenile or adult.[147] Others have noted that incarceration as a juvenile seems to shift the social networks that adolescents develop while incarcerated, attenuating their ties to peers in positive social roles and activities and skewing their friendships toward others involved in crime, with lasting consequences beyond their juvenile confinement.[148] But again, there is little comparative data to weigh the effects of transfer along these dimensions.

These considerations were secondary, if that, during the expansion of waiver laws beginning in the late 1970s. The impetus for these laws obviously was crime control, whether through deterrence or incapacitation. But the available evidence suggests the potential for negative externalities from transfer through these other dimensions of youth

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[146] Bang and Robins (2005) recommend using the *inverse* probability of treatment as the propensity score for the treatment group, and the inverse of one minus the probability for the control group (2005:965). See, Heejung Bang & James M. Robins (2005) "*Doubly Robust Estimation Data and Causal Inference Models,"* BIOMETRICS *61:* 962-974.

[147] Robert J. Sampson and John H. Laub, *Crime in the Making* (Harvard University Press); Richard Freeman, "Crime and the Employment of Disadvantaged Youths", in *Urban Labor Markets and Job Opportunity*, by George Peterson and Wayne Vroman (eds) (Washington, DC: Urban Institute Press, 1992); Richard Freeman, "Why Do So Many Young American Men Commit Crimes and What Might We Do About It?", *Journal of Economic Perspectives* Vol 10:1; pp 25-42 (Winter 1996); Jeffrey Fagan and Richard Freeman, "Crime and Work", in *Crime and Justice: A Review of Research, Volume 25*, edited by Michael Tonry (Chicago: Univ of Chicago Press, 1999) pp: 113-78.

[148] Patrick Bayer, Randi Pintoff, and David Pozen (2007), "Building Criminal Capital Behind Bars: Social Learning in Juvenile Corrections," NBER Working Paper 12932.

development and adult life.[149] Effects of marital and economic stability can affect the formation of social ties which, when aggregated, have potentially negative effects on the capacity of communities for social regulation. The effects may further diffused across generations through complications and deficits in child rearing and supervision. And the potential for persistence of substance abuse problems can have adverse affects on physical and mental health.[150] Given the influences of transfer for recidivism, and other social outcomes that attach to the increased risk of incarceration following transfer, the consequences of transfer may multiply social disadvantages already present in the lives of minority youths. The importance of transfer not just as a crime policy but as a youth policy suggests that transfer as a policy instrument be evaluated along multiple dimensions of human development.[151]

Summary

Two decades of legislative activism have sharply increased the number of juveniles prosecuted as adults and sentenced to adult criminal punishments. According to Bishop, these studies showed that many of them are below the age of 17, had no history of violence that would pose a public safety threat, and were convicted of nonviolent or misdemeanor crimes. The increase in transfer has disproportionately affected minority youths, well in excess of their contribution to the population of adolescent offenders.

Reviewing two decades of research on transfer, Bishop condemns the "recent and substantial expansion of transfer" as harmful and ineffective,[152] while Redding says that "[t]he short-term benefits gained from transfer and imprisonment may be outweighed by the longer-term costs of (increased) criminal justice system processing" from higher recidivism rates.[153] The convergence in this body of research, despite differences in sampling, measurement and analytic methods among the studies, suggests that policies promoting transfer adolescents from juvenile to criminal court often fail at deterring crime among the affected individuals, and may actually worsen public safety risks. The weight of empirical evidence strongly suggests that there are no general deterrent effects of increasing the scope of transfer on the incidence generally of serious juvenile crime.[154] Nor are there marginal specific deterrent effects on offending rates of youths transferred to and sentenced in the adult court. In fact, Bishop shows that in two studies, juveniles prosecuted as adults had higher rates of rearrest for serious felony crimes such as robbery

[149] See, for example, Jeffrey Grogger, [negative effects on wages over the life course]

[150] See Patrick Bayer et al., Criminal Capital, *supra* note __. They note that close ties to drug offenders during incarceration predicts sustained involvement in felony drug crimes for years following incarceration.

[151] Jeffrey J. Shook, *Contesting Childhood in the U.S. Justice System: The Transfer of Youths to Adult Criminal Court*, CHILDHOOD 12(4): 461-478.

[152] D. Bishop & C. Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 1; Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, *in* 27 CRIME & JUSTICE 81 (2000).

[153] Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults*, 1 YOUTH VIOLENCE & JUV. JUST. 128 (2003)

[154] *But see* S. Levitt, *Juvenile Crime and Punishment*, J. POL. ECON. 106: 1156 (1998).

and assault, were rearrested more quickly, and were more often returned to incarceration.[155]

The broad reach of new transfer laws and policies captures both those whose crimes and reoffending risks may merit harsher punishment, but also many more who are neither chronic nor serious offenders, pose little risk of future offending, and who seem to be damaged by their exposure to the adult court. Whatever the gains of short-term incapacitation, they are more than offset by the iatrogenic and toxic effects of adult punishment for the larger group of adolescent offenders.

V. PRINCIPLES FOR TRANSFER POLICY

Three Strikes Against the New Transfer

The transfer trend of the past three decades eclipses the normative, instrumental and ethical rationales for a juvenile court.

Surveying the states and the statutory aftermath of the transfer mobilization, the new legislative activism has rolled back the age at which we (and the law) normatively assume maturity to a threshold that strains the credibility of the laws themselves. All scientific evidence of the scalar nature of normative maturity suggests that the removal of youths at that age inverts our assumptions about the capacities of adolescents before the law, and in nearly ever other age-graded social task. Laws such as New York's Juvenile Offender Law or California's Proposition 21 create unrebuttable assumptions of maturity and responsibility that flaunt new social and scientific facts about adolescence. To be sure, retributive interests benefit both from wholesale and more permissive transfer regimes, but at the cost of vastly multiplying the number of individual injustices from proportionality miscalculations.[156]

The proliferation of promiscuous transfer regimes has failed to enhance public safety, despite repeated promises by prosecutors and legislators insisting the opposite. Instead, prosecuting adolescents as adults, no matter what the pathway to adult court, leads to more, not less, crime, inviting avoidable public safety risks. To be sure, more youths are incapacitated for longer periods of time once in the criminal court, in many instances for the rest of their natural lives. Yet there is no evidence that the incarceration of minors for any length of time deters crime either by those locked up or by others. This is true for almost all studies asking this question, regardless of method and study design.

Had the large-scale legal mobilization to increase transfer been subject to federal (and university) standards for the ethical treatment of human subjects, it would have been shut down long ago. One might argue that the benefits of penal proportionality and

[155] Bishop, *supra* note __.

[156] Douglas Brink, Immaturity, *Normative Competence and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, TEXAS LAW REVIEW, 82: 1555-1585 (2004).

incapacitation justify over-inclusiveness and poor performance, but even here, the calculus fails. Transfer, whether retail or wholesale, runs a high risk of exposing not just its subjects to harm, but also the public that hosts these measures. These harms are multiplied by the mortgaging effects of a criminal record on the possibility of reformation or prosocial development. A transfer regime calibrated at age 17 may be over-inclusive or under-inclusive at the margins, but transfer policies that exclude youths at age 14 will categorically be over-inclusive and weighted toward over-punishment. These policies endure in the face of good evidence of the possibility of these harms, perhaps animated by deep biases about youth among legislators if not the public.[157] The racial skew in transfer and its effects, a result in part of the conflation of youth crime and race in the popular and political imagination,[158] multiplies the ethical tensions in transfer policy.

The Politics of Transfer and the Politics of Crime

Policy makers have taken notice of the convergent and robust evidence on the negative effects of transfer, creating a political space for reform. Advocates and reformers have pushed back on transfer. Connecticut passed legislation in July 2007 that will raise the age of majority incrementally from age 16 to age 18 by 2010. In the past two years, legislators in Missouri, Illinois, and New Hampshire have had extensive debates over whether to to raise the age to 18. Legislators in North Carolina have convened hearings and formed a study commission to address this issue.[159] The question in these debates focuses less on whether to raise the age than on the strategies and details to do so effectively. The research evidence on transfer and the decrease in serious juvenile crime have convinced most legislators, policy-makers, practitioners, and other stakeholders that 18 may get again be the appropriate age for juvenile court jurisdiction.

Reformers face a difficult task. Historically, and especially in the past three decades, crime control hasn't often been ratcheted down. But transfer and youth policy raise complex questions that are not just about youth crime. Transfer is one front in a longstanding tension between the judiciary and other branches of government during successive legislative efforts to control crime, and an important symbolic front in showing toughness on crime. For example, efforts to reduce judicial discretion have expanded since the early 1970s, when legislatures in Washington and Indiana enacted determinate sentencing statutes. Increases in penalties for all crimes also were designed (in part) to remove sentencing discretion from judges. Mandatory minimum sentences, restrictions on parole eligibility, three-strikes laws, mandatory life sentences (with or without parole eligibility), and truth-in-sentencing laws all were enacted during the same era, all signaling not just that legislators were tough on crime but that judges were not tough enough.

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[157] Emens, Aggravating Youth, *supra* note __.

[158] Lawrence Bobo and Devon Johnson, *A Taste for Punishment, Black and White Americans' Views on the Death Penalty and the War on Drugs*, DU BOIS REVIEW 1: 151-180 (2004).

[159] North Carolina is one of the nation's two remaining states that set the age of majority for criminal responsibility at 16. Connecticut legislators used the study commission model to create its own political space for reform and to build consensus among stakeholders during the three year planning process.

This hostility extended toward the juvenile court, which historically has been a judge-centric institution. This tension was evident in the Gault decision. Under Gault, the role of the prosecutor and defense attorney was to insure procedural regularity, not to restrict the wide authority of judge and probation staff.[160] Balancing community protection and individualized justice was central role of the judge and her probation staff. The sharp restriction of judicial authority in favor of enhanced prosecutorial power (as in Prop 21) or legislative authority (as in the Juvenile Offender Law) resulted in the expansion of prosecutorial power at the expense of judicial authority. The accretion of authority to prosecutors in this regime is clear: the prosecutor has the unreviewable discretion to select charges, and in turn, to select jurisdiction. While direct file provisions offer some degree of transparency, exclusion statutes (which account for a large number of transfer) offer none.[161]

Restoring Principle to the Transfer Debate

Prosecutors are unlikely to yield this power without a fight. And legislators, who have consistently aligned their interests in crime control with the interests of prosecutors, are unlikely to limit prosecutorial authority and discretion without risking their own electoral capital.[162] After all, the proponents of tougher transfer laws were motivated by results, and the assumption that increased punishments of juveniles created a social good. Proponents of juvenile courts were equally results oriented.[163] They too are influenced by the biases and rhetoric about dangerous youth. The debate, then, is based neither on principles, nor on jurisprudential theory, nor on an empirically or even normatively grounded youth policy. [164] It is about the substitution of toughness for principle.

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[160] Justice Fortas was explicit on the intention of *Gault* in this respect: "While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite...(*In Re Gault*, 387 U.S. 1 at 27 (1967).

[161] Under the Juvenile Offender Law n New York, if the prosecutor charges the 14 year old offender with robbery in the 3rd degree, the case remains in the Family Court. If she charges the same juvenile with robbery in the 2nd degree, the case initiates in the Criminal Court. Following the passage of Prop 21 in California, if the prosecutor charges the 14 year old with manslaughter, the juvenile stays put in the juvenile justice system; if classified as murder, the same conduct gets tried in criminal court. The result of Prop 21 was the accretion of power to prosecutors at every juncture of the juvenile justice system: transfer to criminal courts, the power to decide initial detention of accused delinquents, the authority to screen into diversion projects, the treatment of delinquents, and the dispositional placement of offenders. See Amicus Brief, *Mandalay v State of California*, CITE.

[162] Jonathan Simon, GOVERNING THROUGH CRIME (Oxford University Press, 2007)

[163] Franklin Zimring and Jeffrey Fagan, *Transfer Policy and Law Reform*, Chapter 12 in CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Fagan and Zimring, eds.) (Chicago, University of Chicago Press, 2000).

[164] Even as juvenile crime rates had begun their decade long decline, inaccurate facts were cited to militate for yet tougher measures. For example, Representative Bill McCollum, chair of the House subcommittee on crime in the 106th Congress, argued for tougher transfer laws by stating that "in America, no population poses a greater threat to public safety than juvenile offenders." Putting Consequences Back into Juvenile Justice at the Federal, State, and Local Levels: Hearings Before the Subcomm. on Crime, House Comm.

No scholar or practitioner or advocate denies the necessity of transferring some adolescents to criminal court – this is necessitated by the principle of penal proportionality, which would be violated by all violent adolescents receiving punishment through the traditionally more lenient juvenile court.[165] An unrebuttable assumption of immaturity for all old robbery suspects below age 18 would be as silly as an unrebuttable assumption of their maturity at 14. Thus the community must be protected from dangerous youth who are unlikely to be helped by treatment-oriented or supervisory sanctions. But the iatrogenic effects of transfer show that delinquent youth also must be protected from the overreach of wholesale waiver. And the reduced decision making capacity of juveniles provides a retributive justification for fine-tuning the borders to avoid unnecessary risk.

In practice, the normative and empirical tension in setting these boundaries poses a challenge to lawmakers that is simply ignored when legislators retreat to the simplistic overreach of legislative exclusion, or by ceding discretion to (elected) prosecutors. There are competing risks in the development of transfer policy, and calibration of the threshold itself and also the mechanism for crossing it, are complex questions. Some transfer mechanisms may invite higher error rates than others, regardless of where the boundary is actually set. The prediction of seriousness and risk cannot occur without entertaining two types of error, both those over-predicted to re-offend and those whose recidivism risks are underestimated. The two predictions are linked, and the evaluation of waiver or transfer as public policy requires that both types of risk be considered. Such is the dilemma and ethical responsibility of the regulator.[166]

Principles for transfer can produce hard choices and conflicting results. A legislative waiver regime may reduce racial disparities for youths under the criminal law compared to retail waiver by judges. But legislative waiver raises substantial risks and social costs. The choice between legislative waiver and blended sentencing raises other choices and dilemmas. Why should we assume that a 40 year blended sentence is preferable to a 20 year sentence for a transferred youth? Do the ameliorative benefits of blended sentences justify the expansive reach of these statutes to far more youths than are touched by a judicial transfer scheme?[167] And do the benefits of blended sentencing offset their built-in compromises in equal protection and due process? Are longer sentences in the juvenile court preferable to shorter sentences in the criminal courts? When we pile on redundant reforms – blended sentences, presumptive transfer, longer juvenile court sentences – do the cumulative and cascading effects produce the intended consequences, or does some less desirable outcome develop?

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on the Judiciary, 106th Cong. (1999) at 5, available at http://commdocs.housegov/committees/judiciary/hju63893.000/hju63893_0.htm

[165] F. Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 1.

[166] C. CRANOR, THE REGULATION OF TOXIC SUBSTANCES (1993).

[167] See, Zimring and Fagan, Transfer Policy, *supra* note __. See, also, Barry Feld, Extended Juvenile Jurisdiction, Journal of Crim Law and Criminology

The future of reform depends on the prospects for restoring principle and discipline to the legislative debate. Lessons from Connecticut and the other states now planning for reform will become essential in charting future policy options. Where Connecticut and the other transitional states seem likely to end up is in a rollback to the primacy of a post-*Gault* juvenile court that embraces the realities of the politics of juvenile justice together with the protections of a firmer boundary. There are some states – New Jersey, for example – that never abandoned that model, and can serve as useful case studies for envisioning the counter-reformed juvenile court.

Returning to discretionary transfer rather than "wholesale waiver" would limit the number of youth subjected to criminal court prosecution while identifying those whose plasticity suggests juvenile court intervention (or avoidance of the adverse effects of the criminal court). Yet this method would also ensure proportional punishment for adolescents whose crimes are too serious to maintain the legitimacy of adjudication in the juvenile court.

Of course, suggesting a return to discretionary transfer begs the question of how youth should be selected for transfer. Volumes of prior research suggest that past attempts to select youth for transfer often are unsuccessful at selecting the most serious offenders,[168] and reinforce racial discrimination in the selection process.[169] Therefore, a more careful screening process for selecting youth to be prosecuted as adults is crucial. Such a system must minimize both false negatives and false positives. False negatives, or failing to select youth who are likely to re-offend, have been the main concern of policy makers who facilitate the transfer of youths to criminal court. The fear that predatory children are treated with "kid gloves" in the juvenile court is the reason for the recent erosion of the juvenile court's jurisdiction through transfer laws.[170] But new evidence suggests that the ethical regulator must balance two types of error.

A more sensible system for jurisdictional transfer would return the discretion to juvenile court judges to select juveniles based on more criteria than age and instant offense. The weight of evidence points toward returning this function to judges, whose decisions are less influenced by the politics of crime and the electoral pressures to avoid risks while exacting retribution.[171] Judges should be able to decide which adolescents should be transferred, within an open and transparent forum and using *Kent*-like criteria and social scientific knowledge of adolescent development. A jurisprudence of discretionary decision making on transfer would also promote two ancillary goals: it would promote accountability for decision makers that is diffused in a statutory context where legislators surgically remove entire classes of offenders from the juvenile court. A regime of individualized decision making would take seriously the responsibility for mistakes on both sides of the decision threshold.

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[168] *See* Bishop, *supra* note 84.

[169] *See* M.A. Bortner et al., *Race and Transfer: Empirical Research and Social Context*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 1.

[170] See, e.g., Simon Singer, RECRIMINALIZING DELINQUENCY (Cambridge University Press, 1996).

[171] Katherine Beckett, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997)

A now extensive portfolio of empirical research suggest that past attempts to individually select youth for transfer often are unsuccessful at selecting the most serious offenders,[172] and reinforce racial discrimination in the selection process.[173] These processes are correctable by regulatory mechanisms that can anticipate these trends and offer corrective interventions. Strong commitments to transparency and ongoing analysis can provide real time knowledge of patterns and rationales for decisions. Through routinization of analysis, judges and other juvenile justice stakeholders can calibrate where the borders should be set and measure the performance of those making transfer decisions. Such a system will take seriously the risks both false negatives and false positives, risks that are inherent in modern juvenile and criminal justice.

The opportunity for reform lies at the intersection of declining crime rates, the intellectual and political exhaustion of the "toughness" paradigm in juvenile justice, and new gains in the science of adolescent development. The declines in juvenile crime, and the new science of adolescent development, present an opportunity for experimentation on waiver and transfer as a public policy question. Opening the transfer process to regulation and deliberation can lay the foundation for more effective and principled policies. While the law moves toward waiving increasingly younger teens, social and biological suggests moving in the other direction. Perhaps it's time for the law to change course and follow the science.

[172] *See* Bishop, *supra* note __; Fagan, *Comparative Advantage*, *supra* note __.

[173] *See* Bortner et al., *supra* note __.

Figure 1. Transfer Mechanisms by State, 2003

	Judicial Waiver			Direct File	Statutory Exclusion	Reverse Waiver	Once Adult/ Always Adult	Juvenile Blended	Criminal Blended
	Discretionary	Presumptive	Mandatory						
Total States	45	15	15	15	29	25	34	15	17
Alabama	X				X		X		
Alaska	X	X			X			X	
Arizona	X			X	X	X	X		
Arkansas	X			X		X		X	X
California	X	X		X	X	X	X		X
Colorado	X	X		X		X		X	X
Connecticut			X			X		X	
Delaware	X		X		X	X	X		
District of Columbia	X	X		X			X		
Florida	X			X	X		X		X
Georgia	X		X	X	X	X			
Hawaii	X						X		
Idaho	X				X		X		X
Illinois	X	X	X		X	X	X	X	X
Indiana	X		X		X		X		
Iowa	X				X	X	X		X
Kansas	X	X					X	X	
Kentucky	X		X			X			X
Louisiana	X		X	X	X				
Maine	X	X					X		
Maryland	X				X	X	X		
Massachusetts					X			X	X
Michigan	X			X			X	X	X
Minnesota	X	X			X		X	X	
Mississippi	X				X	X	X		
Missouri	X						X		X
Montana				X	X	X		X	
Nebraska				X		X			X
Nevada	X	X			X	X	X		
New Hampshire	X	X					X		
New Jersey	X	X	X						
New Mexico					X			X	X
New York					X	X			
North Carolina	X		X				X		
North Dakota	X	X	X				X		
Ohio	X		X				X	X	
Oklahoma	X			X	X	X	X		X
Oregon	X				X	X	X		
Pennsylvania	X	X			X	X	X		
Rhode Island	X	X	X				X	X	
South Carolina	X		X		X				
South Dakota	X				X	X	X		
Tennessee	X					X	X		
Texas	X						X	X	
Utah	X	X			X		X		
Vermont	X			X	X	X		X	
Virginia	X		X	X		X	X		X
Washington	X				X		X		
West Virginia	X		X						X
Wisconsin	X				X	X	X		X
Wyoming	X			X		X			

Source: Patrick Griffin, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws. Pittsburgh, PA: National Center for Juvenile Justice (2003)

Figure 2. Eligibility for Judicial Waiver by State, Age and Offense Type, 2003

State	Any Offense	Certain Felonies	Capital Crime	Murder	Person Offense	Property Offense	Drug Offense	Weapons Offense
Alabama	14							
Alaska	NS							
Arizona		NS						
Arkansas		14	14	14	14			14
California	16							
Colorado		12		12	12			
Delaware	NS							
District of Columbia	16	15						NS
Florida	14							
Georgia	15		13		13			
Hawaii		14		NS				
Idaho	14	NS		NS	NS	NS	NS	
Illinois	13							
Indiana	14	16		10			16	
Iowa	14							
Kansas	10							
Kentucky		14	14					
Louisiana				14	14			
Maine		NS						
Maryland	15		NS					
Michigan		14						
Minnesota		14						
Mississippi	13							
Missouri		12						
Nevada		14						
New Hampshire		15		13	13			
New Jersey	14			14	14	14	14	14
North Carolina		13						
North Dakota	16				14			
Ohio		14						
Oklahoma		NS						
Oregon		15		NS	NS	15		
Pennsylvania		14						
Rhode Island		16	NS					
South Carolina	16	14		NS	NS		14	14
South Dakota		NS						
Tennessee	16			NS	NS			
Texas		14	14				14	
Utah		14						
Vermont				10	10	10		
Virginia		14						
Washington	NS							
West Virginia		NS		NS	NS	NS	NS	
Wisconsin	15	14		14	14	14	14	
Wyoming	13							

Note: An entry in the column below an offense category means that there is some offense or offenses in that category for which a juvenile may be waived for criminal prosecution. The number indicates the youngest possible age at which a juvenile accused of an offense in that category may be waived. "NS" means no age restriction is specified for an offense in that category.

Example: In Tennessee, a juvenile may be waived for criminal prosecution of any offense committed after reaching the age of 16 (Any Offense—16). In addition, a juvenile of any age may be waived for prosecution of first or second degree murder or attempted first or second degree murder (Murder—NS). Finally, a juvenile of any age may be waived for prosecution of rape, aggravated rape, aggravated or especially aggravated robbery, kidnapping, aggravated or especially aggravated kidnapping, or the attempt to commit any of these offenses (Person Offense—NS).

Source: Patrick Griffin, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws. Pittsburgh, PA: National Center for Juvenile Justice (2003)

Figure 3. State Array of Statutory Exclusions of Minors from Juvenile Court by Age and Offense Type, 2003

State	Any Offense	Certain Felonies	Capital Crimes	Murder	Person Offense	Property Offense	Drug Offense	Weapons Offense
Alabama		16	16				16	
Alaska					16	16		
Arizona		15		15	15			
California				14	14			
Delaware		15						
Florida				16	NS	16	16	
Georgia				13	13			
Idaho				14	14	14	14	
Illinois		15		13	15		15	15
Indiana		16		16	16		16	16
Iowa		16					16	16
Louisiana				15	15			
Maryland			14	16	16			16
Massachusetts				14				
Minnesota				16				
Mississippi		13	13					
Montana				17	17	17	17	17
Nevada	16*	NS		NS	16			
New Mexico				15				
New York				13	14	14		14
Oklahoma				13				
Oregon				15	15			
Pennsylvania				NS	15			
South Carolina		16						
South Dakota		16						
Utah		16		16				
Vermont				14	14	14		
Washington				16	16	16		
Wisconsin				10	NS			

Note: An entry in the column below an offense category means that there is some offense or offenses in that category that are excluded from juvenile court jurisdiction. The number indicates the youngest possible age at which a juvenile accused of an offense in that category is subject to the exclusion. "NS" means no age restriction is specified for an offense in that category.

* In Nevada, the exclusion applies to any juvenile with a previous felony adjudication, regardless of the current offense charged, if the current offense involves the use or threatened use of a firearm.

Source: Patrick Griffin, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws. Pittsburgh, PA: National Center for Juvenile Justice (2003)

Figure 4. State Array of Concurrent Jurisdiction Statutes Permitting Direct File by Prosecutor by Age and Offense, 2003

State	Any Offense	Certain Felonies	Capital Crime	Murder	Person Offense	Property Offense	Drug Offense	Weapons Offense
Arizona		14						
Arkansas		16	14	14	14			
California		14	14	14	14	14	14	
Colorado		14		14	14	14		14
District of Columbia				16	16	16		
Florida	16	16	NS	14	14	14		14
Georgia			NS					
Louisiana				15	15	15	15	
Michigan		14		14	14	14	14	
Montana				12	12	16	16	16
Nebraska	16	NS						
Oklahoma		16		15	15	15	16	15
Vermont	16							
Virginia				14	14			
Wyoming		14		14	14	14		

Note: An entry in the column below an offense category means that there is some offense or offenses in that category which may be handled in juvenile or criminal court, at the prosecutor's option. The number indicates the youngest possible age at which a juvenile accused of an offense in that category is subject to criminal prosecution at the prosecutor's option. "NS" means no age restriction is specified for an offense in that category.

Example: Wyoming provides for concurrent jurisdiction of the following offenses committed by 14-year-olds: any felony committed by a juvenile with at least two previous felony adjudications (Certain Felonies—14); murder or manslaughter (Murder—14); kidnapping, first- or second-degree sexual assault, robbery, aggravated assault, or aircraft high-jacking (Person Offense—14); first- or second-degree arson and aggravated burglary (Property Offense—14).

Source: Patrick Griffin, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws. Pittsburgh, PA: National Center for Juvenile Justice (2003).

Figure 5. State Array of Blended Sentencing Statutes by Age and Offense Type, 2003

State	Statute Type*	Any Offense	Certain Felonies	Capital Crime	Murder	Person Offense	Property Offense	Drug Offense	Weapons Offense
Alaska	I					16			
Arkansas	I		14		NS	14			14
Colorado	C		NS			NS			
Connecticut	I		14			NS			
Illinois	I		13						
Kansas	I	10							
Massachusetts	I		14			14			14
Michigan	I	NS	NS		NS	NS	NS	NS	
Minnesota	I		14						
Montana	I		12		NS	NS	NS	NS	NS
New Mexico	E		14		14	14	14		
Ohio	I		10		10				
Rhode Island	C		NS						
Texas	C		NS		NS	NS		NS	
Vermont	I†								

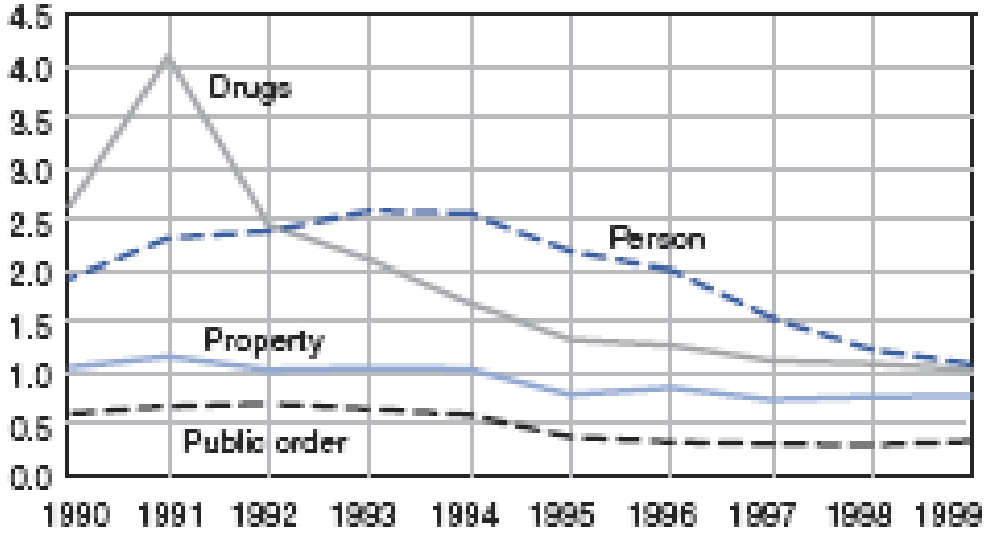
Note: An entry in the column below an offense category means that there is some offense or offenses in that category for which a juvenile may receive a blended sentence in juvenile court. The number indicates the youngest possible age at which a juvenile committing an offense in that category is subject to blended sentencing. "NS" means no age restriction is specified for an offense in that category.

* Statute types are coded "I" for Inclusive, "E" for Exclusive, and "C" for Contiguous.

† Vermont has an anomalous juvenile blended sentencing provision, which permits a juvenile entering a plea of guilty or nolo contendere in a *criminal* proceeding to petition for transfer to family court for disposition. Following the transfer, the family court must impose both a juvenile disposition and a suspended criminal sentence. However, there is no minimum age/offense threshold for juvenile blended sentencing in such a case—the provision applies to all juveniles transferred from criminal court for Youthful Offender disposition.

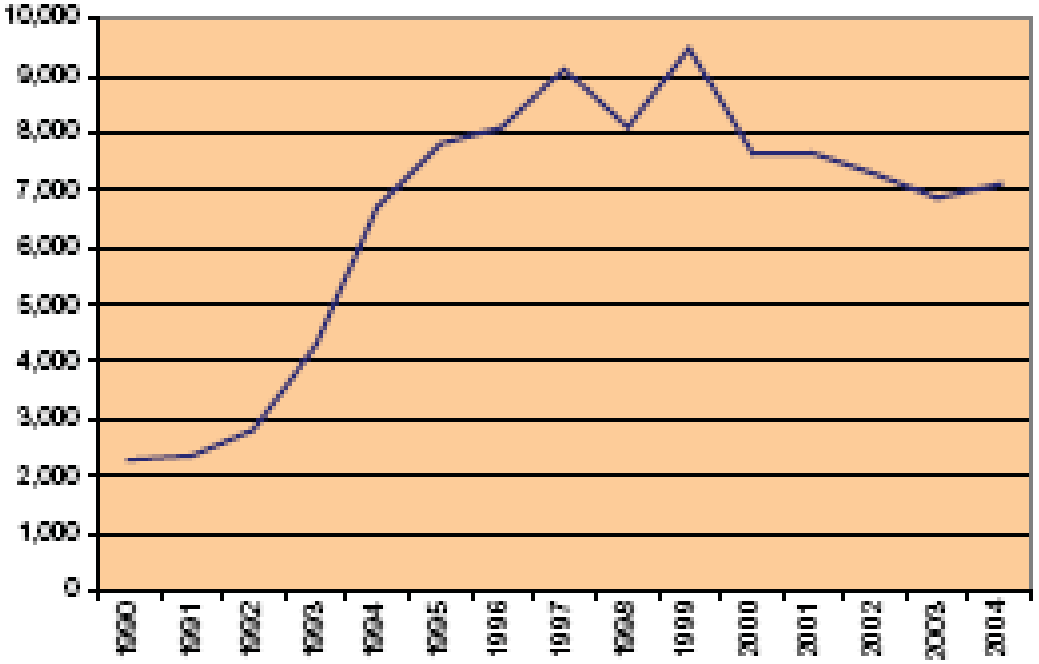
Source: Patrick Griffin, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws. Pittsburgh, PA: National Center for Juvenile Justice (2003)

Figure 6. Percent of Cases Judicially Waived to Adult Court, 1990-1999



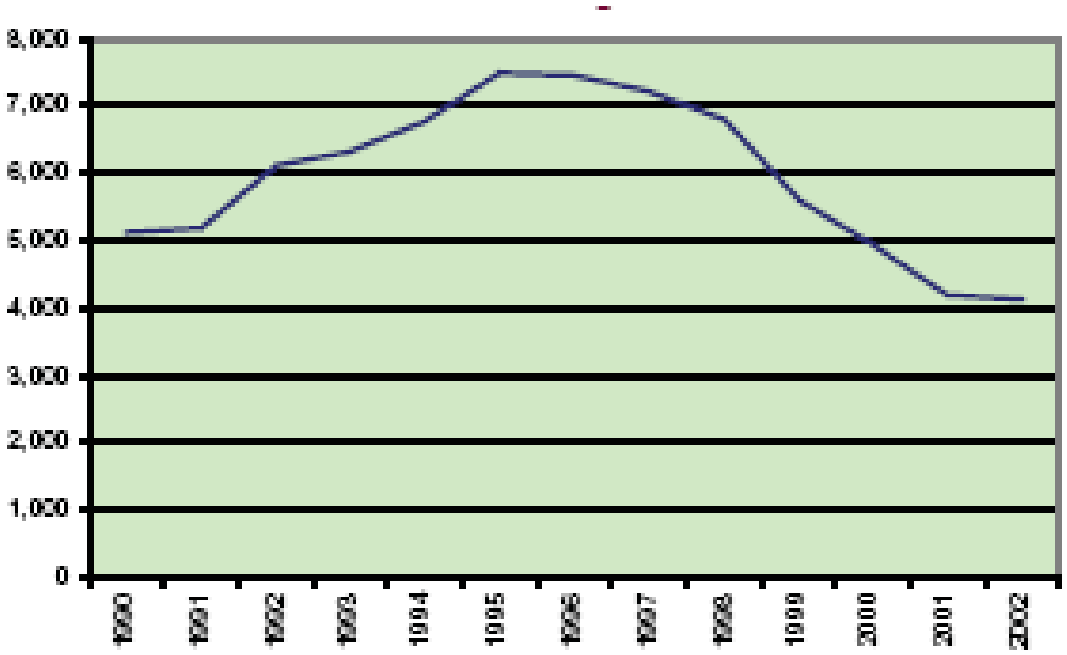
Source: National Center for Juvenile Justice, Delinquency Cases Waived to Adult Court, 1990-1999

Figure 7. State Jail Inmates Under Age 18



Source: Snyder, H.N. & Sickmund, M. (2006).

Figure 8. New Admissions of Youths under Age 18 to Adult Prisons



Source: Snyder, H.N., and Sickmund, M. (2006)

Figure 9. Comparison of Effects of Transfer on Recidivism Rates in Five Studies of Specific Deterrence

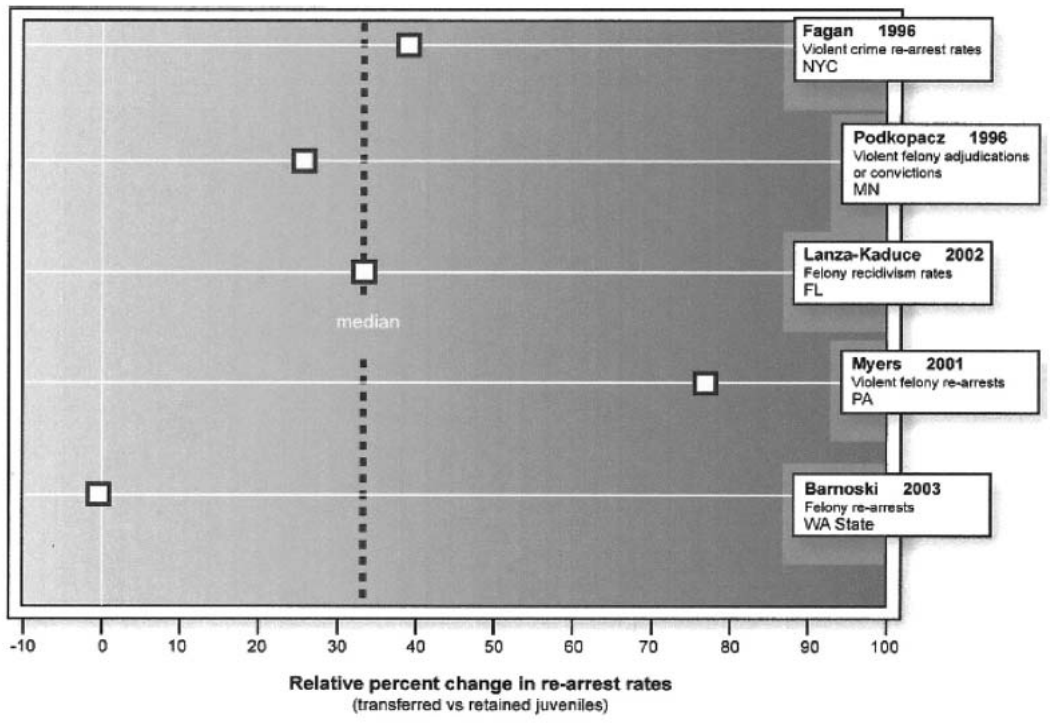


Figure 1. Effects of transfer on re-arrests of transferred juveniles. (Results of study by Winner et al. (1997) were not presented here because of complex effect modification by initial offense and other status characteristics.)

Source: McGowan, et al., 2006

Appendix A. Summary of Studies Testing Specific Deterrent Effects of Transfer

Study Citation	Design	Time	Location	Follow Up	Results
Barnoski (2003)	Matched samples of youths ages 16-17 eligible for automatic transfer before 1994 legislation, concurrent comparison with retained youths	1992-4	Washington State	18 months	No significant difference in recidivism rates (effect size=0%)
Bishop et al. (1996) Winner et al. (1997)	Matched cases of youths transferred, concurrent comparison with retained youths (six matching criteria)	1985-7	Florida	6 years	No significant difference in recidivism rates (effect size=5%)
Fagan (1996)	Matched samples of serious juvenile offenders two counties in states with different jurisdiction laws	1981-2	New York City, Northern New Jersey	7 years, minimum 2 years at risk	Significant increase in recidivism for violence (effect size=28%) for transferred youth
Fagan et al. (2007)	Matched samples of serious juvenile offenders in three counties in states with different jurisdiction laws	1992-4	New York City, Northern New Jersey	7 years, minimum 2 years at risk	Significant increase in recidivism for violence (effect size=28%) for transferred youth; Significant decrease in recidivism for drug offenses (effects size = __) for transferred youth
Lanza-Kaduce et al. (2002)	Matched cases based on "seriousness" metric for 14-15 year olds eligible for prosecutorial waiver	1995-6	Florida (6 of 20 judicial circuits)	1-4+ years	Significant increase in recidivism transferred youth (effect size=33.7%)
Myers (2001)	Matched samples of youths ages 15-18 eligible for exclusion from juvenile court under 1996 Act, concurrent comparison with retained youths	1994	Pennsylvania	4 years	Significant increase in violence for transferred youths (effect size = 77%)
Podkopacz & Feld (2001)	Comparison of retained and transferred youths among sample motioned for transfer,	1986-92	Hennepin County (Minneapolis)	2+ years at risk	Signficant increase in reconviction for transferred youths (effect size=26.5%)

Source: McGowan et al., 2006

Appendix B. Summary of Studies Testing General Deterrent Effects of Transfer

Study Citation	Design	Time	Location	Results
Jensen & Metzger (1994)	Pre-post 1981 law change analysis of statewide juvenile arrest rates, comparison to bordering states	1976-86	Idaho	Increase in juvenile arrest rates for violence following law change compared to neighboring states
Singer & McDowall (1988)	Pre-post 1978 law change, comparisons of NYC target age group 13-15) with older cohort (16-19), comparison to nearby large city; statewide analysis	1974-84	New York City and State	Mixed, no significant differences between juveniles and older cohorts in NYC, increase in statewide assault rate for juveniles but not adults
Levitt (1998)	State panel comparison of relative punitiveness of juvenile and adult courts and age-specific offending rates for ages , controlling for variation in state age boundaries	1978-92	Nation	Lower adult arrest rates in states with more punitive criminal justice systems (relative to juvenile systems) and lower juvenile jurisdiction boundary
Lee & McCrary (2005)	Age-specific arrest rates before and after turning age 18 for persons with arrests prior to age 17	1989-2002	Florida	No significant effect of transfer on juvenile arrest rates, but some evidence of incapacitation effects from longer prison sentences; no deterrent effects from higher likelihood of imprisonment