

**Condemning Our Youth to Lives as Criminals:  
Incarcerating Children as Adults**

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## **I. INTRODUCTION**

Underlying the juvenile court system are two competing philosophies of justice which have taken predominance over the system at different historical periods in relation to the public climate. Early reformers conceptualized juvenile justice as an informal and protective system that would seek to rehabilitate disadvantaged children who had succumbed to criminal influences. In response to negative assessments noting the leniency of juvenile courts, critics began to advocate for a more punitive system which would focus on retribution rather than treatment. Measures adopted by courts to increase the criminal responsibility placed upon juveniles include minimum sentencing guidelines and transfer of offenders to criminal courts.<sup>1</sup> Today, however, many express concerns about the harsh treatment of transferred juveniles and the negative effects of transfer on the psychological well-being of minors. The more often transfer is utilized, the more often juveniles will be sentenced to incarceration in adult facilities. Such dispositions have far-reaching implications for the future of juvenile crime and recidivism rates, especially in light of the minimal options for counseling, education, and training in adult correctional centers. Adolescents comprise an impressionable population that should be protected by the justice system; yet, today's juvenile courts seem to be depriving more and more juvenile offenders of the only chance they have at rehabilitation.

## **II. HISTORICAL OVERVIEW: THE FOUNDATIONS OF THE JUVENILE JUSTICE SYSTEM**

### **A. Securing Justice for Juveniles: The Creation of a Separate System**

Until the late nineteenth century, juveniles were treated exactly as adults and could be held criminally responsible for their misdeeds.<sup>2</sup> A common law presumption saved children

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<sup>1</sup> Gordon A. Martin, *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 61-62 (1992).

<sup>2</sup> *In re Gault*, 387 U.S. 1, 16 (1967).

under the age of seven, considering them incapable of possessing criminal intent.<sup>3</sup> Progressive reformers, however, began responding to emerging theories of socialization and sources of delinquency by expressing fears that adult proceedings did not secure justice for our nation's youth.<sup>4</sup> Instead, they envisioned an arrangement in which the state would function as *parens patriae*, protecting its more vulnerable populations rather than acting as an adversary.<sup>5</sup> Thus, the concept of a separate juvenile court system was born, and states began to make more paternalistic efforts to focus on the "best interests of the child."<sup>6</sup>

Beginning with the first juvenile court established in Illinois in 1899, every state began to revise the justice system's treatment of minors.<sup>7</sup> These new courts eschewed the punitive focus of criminal courts, focusing instead on rehabilitation and treatment.<sup>8</sup> Society's duty was no longer to punish the culpability of the juvenile; it was to "save him from a downward career."<sup>9</sup> Rehabilitation was thought to be possible due to the developmental differences between children and adults. Not only are adolescents less responsible for their behavior, due to a lack of competency and experience, but they are also more corrigible and educable than adults, and thus more amenable to reform.<sup>10</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> Barry C. Feld, *The Juvenile Court Meets the Principle Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 474 (1987) [hereinafter Feld, *Legislative Changes*].

<sup>5</sup> *In re Gault*, 387 U.S. at 16; *Kent v. United States*, 383 U.S. 541, 554 (1966).

<sup>6</sup> *See* Martin, *supra* note 1 at 66; *see also* Judy Isenberg Mayo, *Dependent, Neglected and Delinquent Children: The State as Parens Patriae*, 5 J. JUV. L. 90 (1981).

<sup>7</sup> *In re Gault*, 387 U.S. at 14; Gerard F. Glynn, *Arkansas' Missed Opportunity for Rehabilitation: Sending Children to Adult Courts*, 20 U. ARK. LITTLE ROCK L. J. 77, 79-80 (1997).

<sup>8</sup> *See, e.g.*, *In re Gault*, 387 U.S. at 16-17.

<sup>9</sup> *Id.* at 15.

<sup>10</sup> *United States v. R.L.C.*, 503 U.S. 291, 315 (1992) (O'Connor, J., dissenting) (stating that "juveniles are still teachable, and not yet hardened criminals."); David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How Not to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1557-58 (2003-2004).

**B. Due Process Protections for Juvenile Court: Improvement or Interference?**

In accordance with the intended parental role of the juvenile justice system, proceedings in juvenile courts sought to be informal and protective. Adjudication was based on the offender and his background rather than the offense and punishment; sentences aspired to reflect proper diagnoses that would address the child's needs and lead to effective treatment.<sup>11</sup> Juveniles were safeguarded by confidential proceedings,<sup>12</sup> flexible sentencing,<sup>13</sup> speedy dispositions,<sup>14</sup> and the expungement of records,<sup>15</sup> but often these measures took precedence over procedural due process protections. Though the initial aim of the juvenile court system was to rehabilitate youths in a non-criminal context, free from constitutional review, the actual experience of juveniles raised alarms of procedural arbitrariness.<sup>16</sup> A series of Supreme Court cases addressed these fears,

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<sup>11</sup> Feld, *Legislative Changes*, *supra* note 4, at 477.

<sup>12</sup> Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 825 (1998) (noting that excluding the public from attendance at juvenile court proceedings helped prevent children from being stigmatized as criminals).

<sup>13</sup> Feld, *Legislative Changes*, *supra* note 4, at 477 (observing that juvenile court judges were given broad discretion in sentencing, with no set guidelines, in order to allow for the best treatment plan possible).

<sup>14</sup> See Cary Rudman, Eliot Hartstone, Jeffrey Fagan, & Melinda Moore, *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 75 (1986) (showing that proceedings for transferred juveniles took an average of 246 days versus an average of 98 days in juvenile court); John B. Leete, Symposium, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: Treatment and Rehabilitation or Hard Time: Is the Focus of Juvenile Justice Changing?*, 29 AKRON L. REV. 491, 502 (1996) (reporting a Pennsylvania study which found that on average, juvenile cases take two months from referral to disposition, while cases transferred to criminal court take 8.5 months from transfer to sentencing).

<sup>15</sup> Glynn, *supra* note 7, at 81 (noting that many states have removed the protection provided by the expungement of records).

<sup>16</sup> "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. United States*, 383 U.S. 541, 554-57 (1966).

extending many of the due process protections afforded to adults charged with crimes to juveniles as well, initiating a drastic change in juveniles proceedings.<sup>17</sup>

The pivotal holdings made by the Court in *Kent v. United States*<sup>18</sup> and *In re Gault*<sup>19</sup> had sweeping implications in the application of due process protections to juvenile offenders. These two landmark decisions were followed by a progeny of cases which delineated the scope of procedural safeguards necessary in juvenile adjudications. *Kent* concluded that a child must be afforded the right to a hearing and the right to counsel in any “critically important” proceeding, specifically the judicial decision to transfer a case to criminal court.<sup>20</sup> Furthermore, a judge must state his reasons for transferring a juvenile to adult court, so that the judicial exercise of discretion would be subject to appellate review.<sup>21</sup> The procedural framework the *Kent* court set out was accompanied by substantive criteria to be used in the transfer decision, an eight-factor test that has been incorporated in some form into the juvenile codes of most states.<sup>22</sup>

Following *Kent* came an even more revolutionary decision redefining the concept of a juvenile court system. *In re Gault* set forth the Court’s finding that juvenile court proceedings lacked certain fundamental constitutional protections, including the right to adequate notice of charges,<sup>23</sup> the right to a fair hearing, including the right to counsel,<sup>24</sup> the privilege against self-

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<sup>17</sup> *In re Gault*, 387 U.S. 1, 60 (1967) (Black, J., concurring) (expressing concern that “[t]his holding strikes a well-nigh fatal blow to much that is unique about the juveniles courts in the Nation.”); see, e.g., Feld, *Legislative Changes*, *supra* note 3, at 471.

<sup>18</sup> 383 U.S. 541 (1966).

<sup>19</sup> 387 U.S. 1 (1967).

<sup>20</sup> 383 U.S. at 553, 560.

<sup>21</sup> *Id.* at 560-61.

<sup>22</sup> *Id.* at 566-67; see Feld, *Legislative Changes*, *supra* note 4, at 490.

<sup>23</sup> *In re Gault*, 387 U.S. at 34.

incrimination,<sup>25</sup> and the right to confrontation and cross-examination.<sup>26</sup> This decision began the transition of the juvenile court system from its rehabilitative ideal to a more formal procedure that has converged with adult criminal courts.<sup>27</sup> Subsequent decisions guaranteed juveniles the standard of proof necessary for adult criminal trials<sup>28</sup> as well as protection from double jeopardy.<sup>29</sup> The Court, however, did stop short of granting minors the right to a jury trial<sup>30</sup> and the right to bail<sup>31</sup> in juvenile proceedings. While these judicial mandates were a valiant effort to ensure the rights of children in criminal proceedings, they reconceptualized the entire juvenile justice system, likening it to the adult criminal justice system.

This criminalization of the juvenile justice system was accompanied by public outcry over increasing juvenile crime rates and intensive media coverage of particularly heinous juvenile crimes.<sup>32</sup> Many began to question the effectiveness of juvenile courts, and the general attitude towards juvenile crime became increasingly punitive.<sup>33</sup> States responded to the growing consensus that juvenile offenders should be held responsible for and punished for their actions by

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<sup>24</sup> *Id.* at 35-37.

<sup>25</sup> *Id.* at 55.

<sup>26</sup> *Id.* at 57.

<sup>27</sup> Feld, *Legislative Changes*, *supra* note 4, at 472.

<sup>28</sup> “[T]he constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* . . . .” *In re Winship*, 397 U.S. 358, 368 (1970).

<sup>29</sup> *Breed v. Jones*, 421 U.S. 519, 527 (1975) (holding that the Double Jeopardy Clause prevented the re-prosecution of a juvenile case in adult criminal court after the matter had already been adjudicated in juvenile court).

<sup>30</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1970).

<sup>31</sup> *Schall v. Martin*, 467 U.S. 253, 256-57 (1984).

<sup>32</sup> See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 83-84 (2000); Brink, *supra* note 10, at 1560-61; Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 711-12 (1997).

<sup>33</sup> Bishop, *supra* note 32, at 83-84; Brink, *supra* note 10, at 1562.

increasing the ability of the justice system to try juveniles as adults.<sup>34</sup> The process of prosecuting juveniles in adult court, known as transfer, has always been possible but was traditionally reserved for serious and repeat juvenile offenders or those so close to the age of majority that there was not time for rehabilitation.<sup>35</sup> In recent years, however, a surprising number of state statutes have begun allowing juveniles to be tried as adults even for nonviolent offenses.<sup>36</sup> As transfer has expanded, many juveniles who would otherwise be amenable to treatment have been relegated to the adult criminal courts and denied the rehabilitative measures that could help them become functional members of society—they've been doomed to serve their time in punitive institutions.

### **III. TRANSFER IN PRACTICE: TRYING JUVENILES AS ADULTS**

#### **A. Methods of Waiver**

Though juvenile courts are unique to each state, there are three primary mechanisms by which a child may be transferred to criminal court: (1) judicial waiver; (2) direct file; (3) mandatory transfer.<sup>37</sup>

#### **1) Judicial Waiver**

The traditional, and at one time the most common, method of transfer is judicial waiver.<sup>38</sup> Usually following a prosecutorial motion, a hearing is held in which a judge decides whether it is appropriate for the juvenile court to waive jurisdiction, allowing the juvenile to be transferred to

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<sup>34</sup> Redding, *supra* note 32, at 711-15.

<sup>35</sup> Martin, *supra* note 1, at 62-63.

<sup>36</sup> U.S. DEPT. OF JUST., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 13 (1998) [hereinafter OJJDP REPORT].

<sup>37</sup> Brink, *supra* note 10, at 1563-65.

<sup>38</sup> OJJDP REPORT, *supra* note 36, at 4.

criminal court.<sup>39</sup> State statutes contain specific elements necessary for transfer, often including age and seriousness of offense, as well as guidelines for the waiver decision, which are usually at least in part based on the criteria set forth in *Kent*.<sup>40</sup> These and similar factors limit the use of discretion, but judges may still exercise their own judgment in deciding which criteria to weigh most strongly to justify their preferred disposition.<sup>41</sup> Still, judicial waiver, which allows for a case by case determination of a juvenile's amenability to treatment, is the only mechanism of transfer which retains the goal of individualized rehabilitation upon which the juvenile justice system was founded.

## **2) Direct File**

Direct file, or waiver based on prosecutorial discretion, remained rare until a decade ago. This method of transfer gives prosecutors the authority to decide whether to file charges in juvenile or adult court.<sup>42</sup> Usually statutes grant both juvenile and criminal courts concurrent jurisdiction in specifically defined juvenile cases, limited by age and offense.<sup>43</sup> Though this mechanism is more efficient than judicial transfer, it raises concerns of arbitrariness, since it is not always subject to judicial review.<sup>44</sup> Even when it is reviewable, the decision frequently

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<sup>39</sup> See *id.* at 3; see also Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371 (1998).

<sup>40</sup> These criteria are: (1) the seriousness of the offense; (2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (3) whether the alleged offense was against persons or property; (4) the prosecutive merit of the complaint; (5) the desirability of the trial and dispositions of the entire offense in one court when the juveniles associates in the alleged offense are adults; (6) the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living; (7) the record and previous contacts of the juvenile with the court; (8) the prospects of adequate protection of the public and the likelihood of rehabilitation of the juvenile. *Kent*, 383 U.S. 541, 566-67.

<sup>41</sup> Feld, *Legislative Changes*, *supra* note 4, at 490-91.

<sup>42</sup> Brink, *supra* note 10, at 1564.

<sup>43</sup> Klein, *supra* note 39, at 394.

<sup>44</sup> See, e.g., *Cox v. United States*, 473 F.2d 334, 335-36 (4th Cir. 1973).



depends on the philosophy of the prosecutor and judge, the political climate, the publicity surrounding the offense, and the make-up of the community.<sup>45</sup> The effects of state expansion of transfer are most clearly evidenced in the trend of prosecutorial waiver, a practice now used more than four times as often as in the 1970's.<sup>46</sup>

### **3) Mandatory Transfer**

Though judicial and prosecutorial waiver raise concerns of arbitrariness, these measures are still discretionary and do not mandate transfer. Mandatory transfer, also referred to as statutory exclusion, includes provisions which do compel transfer and are “perhaps the most significant and disturbing aspect of the transfer trend.”<sup>47</sup> This mechanism requires that certain offenses, when committed by juveniles of certain ages, be heard in criminal court.<sup>48</sup> Thus, these cases automatically transfer to criminal court, bypassing both judicial and prosecutorial scrutiny.

There is a discrete difference in mandatory waiver and statutory exclusion. Mandatory waiver cases are initially received by the juvenile court, which will conduct a preliminary hearing to ensure that the mandatory waiver statute has been properly applied and then issues a transfer order to move the case to criminal court.<sup>49</sup> Statutory exclusion, on the other hand, actually removes certain offenses from the jurisdiction of the juvenile court.<sup>50</sup> Sometimes these statutes have provisions for “reverse waiver,” a procedure allowing a case that has been

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<sup>45</sup> Redding, *supra* note 32, at 741.

<sup>46</sup> Bishop, *supra* note 32, at 108.

<sup>47</sup> Brink, *supra* note 10, at 1564.

<sup>48</sup> Redding, *supra* note 32, at 717.

<sup>49</sup> OJJDP REPORT, *supra* note 36, at 4.

<sup>50</sup> *Id.* at 8.

transferred to be returned from criminal court to juvenile court.<sup>51</sup> Such stipulations are still problematic in that they rest the decision-making in the hands of the criminal court, a forum ill-equipped to deal with youthful offenders, and place the burden on juveniles to prove their amenability to rehabilitation.<sup>52</sup> Mandatory transfer requirements do not take into account the circumstances or competency of the juvenile involved. Instead, the decision is based on the offense, a philosophy directly in conflict with the goals of the juvenile justice system and its focus on the offender and treatment.<sup>53</sup>

### **B. Challenging Transfer: Overwhelmingly Unsuccessful**

Both direct file and automatic methods of transfer have been challenged as violations of constitutional due process; however, these challenges have generally been unsuccessful. Courts have universally rejected attacks using separation of powers, equal protection, and due process arguments on the basis that the creation of juvenile jurisdiction is a legislative function, so the legislature has the authority to modify this jurisdiction.<sup>54</sup> This may be done by statute, as in mandatory waiver and statutory exclusion, or by a legislature's decision to vest a prosecutor with the discretion to make a transfer decision.<sup>55</sup> The *Kent* protections are considered irrelevant, since both of these mechanisms prevent the juvenile offender from ever coming under the jurisdiction

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<sup>51</sup> *Id.* at 9.

<sup>52</sup> See *Hughes v. State*, 653 A.2d 241 (Del. 1994) (striking down an amendment to a juvenile transfer statute that eliminated the reverse waiver provision as unconstitutional); Bishop, *supra* note 32, at 125 (stating court judges are already overworked and lack special expertise in dealing with young offenders).

<sup>53</sup> Klein, *supra* note 39, at 391.

<sup>54</sup> *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977) (stating that treatment as a juvenile is not an inherent right, but one granted by the state legislature; therefore, the legislature may restrict or qualify that right as it sees fit).

<sup>55</sup> See *Russell v. Parratt*, 543 F.2d 1214, 1216 (8th Cir. 1976); *United States v. Quinones*, 516 F.2d 1309, 1311 (1st Cir. 1975); *Cox v. United States*, 473 F.2d 334, 338 (4th Cir. 1972); *United States v. Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972).

of the juvenile court—if there is no transfer of jurisdiction, there is no need for a transfer hearing or the due process safeguards required for such a hearing.

**C. Expanding Transfer: Trying More Juveniles as Adults**

Efforts to increase the culpability of juveniles by adjudication in criminal court have led to the broadening and expansion of juvenile transfer statutes. Many states have eliminated the requirement that a juvenile must be found to be “unamenable to treatment” prior to transfer, effectively abandoning the rehabilitative ideal of the juvenile justice system.<sup>56</sup> Basically all states have decreased the age at which juveniles may be transferred to fourteen or younger, and at least five states have no minimum age or offense—any child may be transferred for any crime.<sup>57</sup> Twelve other states as well as the District of Columbia have placed the burden on juveniles to prove amenability to rehabilitation in judicial transfer hearings; thus, in these states, the juvenile is presumed to be untreatable.<sup>58</sup> The consequence of these changes is that more juveniles are being transferred to adult court at younger ages for a broader variety of crimes.<sup>59</sup> Though the public demand that juveniles be held culpable for their behavior may have been mollified,<sup>60</sup> the repercussions felt by the juvenile offenders serve to compromise the integrity of our justice system.

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<sup>56</sup> Redding, *supra* note 32, at 714-15.

<sup>57</sup> *Id.* at 715.

<sup>58</sup> Klein, *supra* note 39, at 387.

<sup>59</sup> Brink, *supra* note 10, at 1564.

<sup>60</sup> *See* Klein, *supra* note 39, at 383-84 (explaining public opinion that juvenile justice system was too lenient).

#### IV. TRANSFERRING JUVENILES: IS JUSTICE REALLY SERVED?

##### A. Diminished Capacity: Juvenile Incompetency

Despite recent pressures to hold juvenile offenders criminally responsible for misdeeds, minors have long been considered less morally reprehensible for their irresponsible conduct than adults.<sup>61</sup> Adolescents differ significantly in their mental capacity from their adult counterparts due to a lack of life experience as well as a lack of psychosocial maturity.<sup>62</sup> The decision-making ability of children is greatly inferior to that of adults—juveniles lack the aptitude to consider options, foresee consequences, and assess the credibility of information.<sup>63</sup> Furthermore, delinquents as a class tend to have a higher incidence of learning disabilities and mental illness, as well as lower Intelligent Quotients, educational attainment, and moral development, than their non-offending peers.<sup>64</sup> There is overwhelming evidence that juveniles lack the normative competence required for complete culpability.<sup>65</sup> This data highlights the injustice of holding these youths to an adult standard of responsibility in criminal court. Since juveniles lack the capacity to function as “rational calculators of utility,” the transfer trend cannot be rationalized by claims of deterrence;<sup>66</sup> instead, transfer focuses on retribution and ignores the differential

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<sup>61</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (explaining the lessened culpability of juvenile offenders with the reasoning that children are not entrusted with the privileges and responsibilities of adults).

<sup>62</sup> Deborah L. Johnson, Debra E. Banister, & Michelle L. Alm, *The Violent Youth Offender and Juvenile Transfer to the Adult Criminal Court*, 2004 J. INST. JUST. & INT’L STUD. 84, 86 (2004); Redding, *supra* note 32, at 725.

<sup>63</sup> Johnson et al., *supra* note 62, at 86.

<sup>64</sup> Redding, *supra* note 32, at 725.

<sup>65</sup> “Juveniles tend to be less competent in discriminating right from wrong and in being able to regulate successfully their actions in accord with the discriminations.” Brink, *supra* note 10, at 1557.

<sup>66</sup> *Id.* at 1573-74.

development of children and adults and the diminished responsibility that follows, thus rejecting the basic principle of a separate juvenile justice system.<sup>67</sup>

**B. *Un-Justifications: Severity of Sentencing & Continuing Jurisdiction***

The transfer trend is often justified by claims that juveniles who have committed serious offenses should be punished more severely for their crimes than the usual sanctions of the juvenile court system. Transfer may also be used to ensure that the justice system will continue to have jurisdiction over a juvenile past the age of majority, since the juvenile court system loses jurisdiction over a youth at the age of twenty-one. In practice, however, neither of these claims serves as a valid explanation for transfer. Not only do most studies show that adult court sentencing is frequently similar to that of the juvenile courts,<sup>68</sup> juveniles may even be treated with more leniency in criminal court because it is their first appearance or because juries are more sympathetic to children.<sup>69</sup> Despite evidence which shows that younger repeat-offenders are more likely to become career criminals than first-time offenders near the age of majority,<sup>70</sup> criminal courts generally impose more heightened sanctions upon more serious offenses without regard to the offender's prior record, failing to take into account the possibility of rehabilitation during sentencing.<sup>71</sup> In contrast, prior record is weighed more heavily than offense seriousness

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<sup>67</sup> See *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”).

<sup>68</sup> Elizabeth W. McNulty, *The Transfer of Juvenile Offenders to Adult Court: Panacea or Problem?*, 18 *LAW & POL’Y* 61, 65 (1996) (citing studies which report that most transferred juveniles receive sentences of probation, a penalty that could be easily applied by juvenile courts and that less than half of these juveniles received incarcerative sentences).

<sup>69</sup> Klein, *supra* note 39, at 402; Redding, *supra* note 31, at 738.

<sup>70</sup> Redding, *supra* note 32, at 739.

<sup>71</sup> See Bishop, *supra* note 32, at 116.

in juvenile court, allowing the focus of adjudication to be amenability to treatment.<sup>72</sup> Though many of the juveniles who are tried in adult court are close to age eighteen, most of those transferred to criminal court and sentenced to incarceration were released long before they reached age twenty-one, defeating claims that transfer facilitates continued jurisdiction past the age of majority.<sup>73</sup> Further, the sentences imposed through criminal court dispositions, whether incarceration or probation, lack the rehabilitative emphasis of the juvenile courts. The severity of sentencing issue serves as additional evidence that transfer fails to serve any justification of punishment other than retribution, a goal that is quite out of place in the context of juvenile justice.

#### **V. IMPLICATIONS OF TRANSFER: THE SWEEPING CONSEQUENCES OF YOUTH INCARCERATION IN ADULT CORRECTIONS**

The failure of transfer to accommodate the rehabilitative aims of the juvenile justice system in favor of more retributive objectives is only one of its shortcomings. Once transferred, juveniles receive sentences of incarceration to be served in adult corrections, and the unjust implications of the practice of transfer become even more alarming. Though occasionally housed in segregated or separate facilities, these offenders are most often exposed to the general adult population.<sup>74</sup> This exposure, as well as other ill effects suffered by juveniles transferred to the adult criminal justice system, leads to only one conclusion: the adult corrections system fails young offenders.

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<sup>72</sup> *See id.*

<sup>73</sup> Leete, *supra* note 14, at 503.

<sup>74</sup> “In a majority of states, [transferred offenders] are housed with the general adult population (thirty-one states), with youthful offenders up to age twenty-one or twenty-five (seven states), or some combination of the two (five states).” Bishop, *supra* note 32, at 138.

**A. Creating Victims: Placing Juveniles at a High Risk of Abuse**

Incarceration in an adult facility greatly increases the risk that a juvenile will suffer psychological, physical, or sexual abuse.<sup>75</sup> Juveniles, who generally lack the experience to cope with the predatory environment of jail, are highly susceptible to physical and sexual assault.<sup>76</sup> This type of abuse greatly effects the psychological well-being of juvenile offenders and may impede their amenability to treatment.<sup>77</sup>

**B. Creating Offenders: Criminal Socialization & Modeling of Violence**

Juveniles sentenced to adult jail are exposed to more experienced and more violent offenders over an extended period of time.<sup>78</sup> Prison populations tend to be older, and while only twenty percent of juveniles in custody are violent offenders, almost fifty percent of prison inmates have been incarcerated for a violent offense.<sup>79</sup> These levels of brutality lead to an environment where aggressive behavior is the norm and easily-influenced adolescents are especially affected by this culture of violence.<sup>80</sup> Prison also provides increased opportunities for private interactions, facilitating criminal socialization of juvenile offenders confined in adult facilities.<sup>81</sup> In contrast, juveniles programs often center around small-group activities guided by staff, giving offenders little time for unsupervised interaction and facilitating staff-resident

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<sup>75</sup> See *id.* at 145-46 (reporting increased rates of weapons attacks, sexual assault, and beatings by staff experienced by juveniles in adult correctional centers compared with those confined in prisons).

<sup>76</sup> *Id.* at 146.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 139.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 145.

<sup>81</sup> “Youths in prison reported that they spent much of their time talking to more skilled and experienced offenders who taught them new techniques of committing crime and methods of avoiding detection.” *Id.* at 144.

connections.<sup>82</sup> When adolescents are incarcerated in adult facilities they are indoctrinated into the social rules and norms of criminal behavior and become more susceptible to “prisonization” due to the deprivation of meaningful contacts with positive social influences and the prolonged exposure to a cycle of victimization and retribution.<sup>83</sup>

**C. Impeding Change: The Lack of Rehabilitation Opportunities**

Adolescence is a pivotal period of cognitive and emotional growth and maturation when enduring social habits are formed.<sup>84</sup> It is at this point in development that youth are most amenable to positive change, making rehabilitation an especially imperative and consequential goal.<sup>85</sup> Incarceration itself does not serve to turn juvenile offenders into productive and law-abiding social entities; treatment has a much more long-lasting and positive impact.<sup>86</sup> Facilities organized around therapeutic models offer a full list of daily activities, including academic classes, vocational training, social skills training, counseling sessions, substance abuse treatment, and recreational activities.<sup>87</sup> Juveniles overwhelmingly reported having positive rapport with program staff and this development of egalitarian relationships, both with staff and with other juveniles, serves to facilitate post-release resocialization.<sup>88</sup> Conversely, young inmates at prisons that do not emphasize treatment spend little time engaged in programs aimed at personal and

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<sup>82</sup> *Id.*

<sup>83</sup> Martin Forst, Jeffrey Fagan, & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 11 (1989).

<sup>84</sup> Brink, *supra* note 10, at 1573.

<sup>85</sup> *Id.*

<sup>86</sup> Bishop, *supra* note 32, at 141-43.

<sup>87</sup> *Id.* at 141-42.

<sup>88</sup> *Id.*



social development despite their desire to participate in rehabilitative programming.<sup>89</sup> Though there is some reported involvement in remedial education classes or vocational training, most inmates describe having a great amount of idle time.<sup>90</sup> Staff-resident interactions were classified as hostile and derisive and inmates reported feeling threatened and humiliated by correctional officers.<sup>91</sup>

Juvenile institutions tend to be more treatment-oriented than adult correctional centers.<sup>92</sup> The generally larger and more dangerous populations of adult prisons require that most resources be devoted to security concerns.<sup>93</sup> Prisons employ a much greater proportion of custody staff than juvenile institutions, which expend more resources to staff educational and therapeutic programs.<sup>94</sup> Juveniles sentenced to adult prisons may lose access to these educational and therapeutic services, which are crucial for any chance at rehabilitation.<sup>95</sup>

**D. Preventing Rehabilitation: The Post-Release Stigma of Criminal Courts**

Unlike juvenile proceedings, which have traditionally been kept confidential, criminal court processing is a matter of public record. The stigma that accompanies a criminal record often destroys a juvenile's chance at reform and re-entry into a network of more positive influences. Job possibilities are likely to be limited since criminal convictions must be reported

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<sup>89</sup> *Id.* at 143.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 144.

<sup>92</sup> *Id.* at 141.

<sup>93</sup> *Id.* at 143.

<sup>94</sup> *Id.* at 140 (Reporting that the teacher inmate ration of adult institutions is 1:100, but in 95% of juvenile institutions, it's 1:15).

<sup>95</sup> Forst et al., *supra* note 83, at 7-8.

on most applications for employment.<sup>96</sup> This effect cannot be underestimated, as studies provide strong evidence that stable employment is a crucial factor in resisting continued criminal behavior.<sup>97</sup> Access to social networks may also be limited, and ex-offenders attempting to avoid their former social influences may find themselves shunned by other social groups.<sup>98</sup>

A criminal record isn't the only debilitating effect felt by transferred juveniles. The criminal court system often engenders a sense of injustice that destroys the legitimacy of the criminal punishment. Juveniles give relatively favorable reviews of the juvenile court system, reporting that judges appear motivated to help them and engage in personal interaction, allowing them to become involved in the adjudication.<sup>99</sup> Criminal court processing, on the other hand, is described as formal, hurried, and adversarial.<sup>100</sup> Juveniles perceive criminal court judges as uninterested in them and their problems and also express a lack of understanding of the proceedings and legal terminology.<sup>101</sup> The lasting impression made by criminal court is overwhelmingly negative—in fact, most individuals believe that the criminal court wanted to punish them based on the perception that they were wicked and incorrigible individuals, a sentiment that could be very psychologically damaging as a self-fulfilling prophecy.<sup>102</sup>

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<sup>96</sup> Bishop, *supra* note 32, at 148.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 149.

<sup>99</sup> *Id.* at 136.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 137.

**E. Consequences of Transfer: Increasing Recidivism Rates**

Despite claims that heightened punishments and juvenile transfer are the only way to handle youth crime, most evidence reveals that there is no real deterrent value to transfer.<sup>103</sup> In fact, harsher punishments actually appear to increase recidivism.<sup>104</sup> Multiple studies show that those sentenced in juvenile courts are less likely to re-offend than those sentenced in criminal court, regardless of whether the sentence was incarceration or probation; on the other hand, transferred youths display significantly higher rates of rearrest.<sup>105</sup>

**VI. REDUCING THE USE OF TRANSFER: GIVING JUVENILES A CHANCE TO REFORM**

While there is no clear strategy to address increasing rates of juvenile crime, one thing is obvious: retribution is not working. Severe punitive measures must be abandoned in favor of the original rehabilitative goal of the juvenile justice system. While punishment for juvenile crimes is a vital element of reforming juvenile offenders, it is only one of the necessary elements. Sentences must not just focus on incarceration; they must also incorporate treatment. It is evident from the success of treatment-oriented programs and the ill effects of adult incarceration on juveniles that adult correctional facilities may actually criminalize juveniles who would otherwise be amenable to rehabilitation. A renewed focus on rehabilitation will both deter juvenile crime and teach juvenile offenders how to live a life free from criminal behavior.

Concerns about the cessation of juvenile court jurisdiction at the age of majority may be addressed in at least two ways that would prove more beneficial to juveniles than transfer to criminal court. Statutory amendments continuing jurisdiction after the age of twenty-one will

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<sup>103</sup> *Id.* at 129.

<sup>104</sup> Brink, *supra* note 10, at 1574.

<sup>105</sup> Bishop, *supra* note 32, at 131-33.

decrease the need for transfer since many cases of transfer are justified by the worry that the juvenile will not be done with treatment in time.<sup>106</sup> Since most criminal sentences do not effectively provide treatment for defendants, transfer is a highly ineffective way to deal with the cases. Another option is blended sentencing, a two-tiered system which mandates juvenile detention with a suspended adult sentence.<sup>107</sup> The juvenile would only become subject to this adult sentence if he or she has not been reformed by the age of majority, when the juvenile court jurisdiction ends.<sup>108</sup> Though critics worry that blended sentencing fails to answer questions about the competing philosophies of justice which run through the juvenile court system,<sup>109</sup> proponents maintain that blended sentencing does not over-penalize offenders, since it bases the need to extend the sentence into adulthood on the juvenile's individual rehabilitative progress.<sup>110</sup> This approach allows juveniles who would otherwise be transferred to have access to the treatment programs of the juvenile justice system, thus restoring the principle of rehabilitation and extending it to juvenile offenders who commit more serious crimes.

Transfer should only be used when concerns of public safety outweigh a juvenile's amenability to reform. Mandatory transfer laws should be abolished in favor of statutory guidelines which govern judicial waiver.<sup>111</sup> Direct file of juvenile charges in circuit court should also be abandoned; all prosecutorial discretion in transferring charges should be subject to judicial review. Though prosecutorial waiver is a discretionary method of transfer and more

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<sup>106</sup> Martin, *supra* note 1, at 86-87.

<sup>107</sup> Brink, *supra* note 10, at 1562-63.

<sup>108</sup> *Id.*

<sup>109</sup> Bishop, *supra* note 32, at 126.

<sup>110</sup> See Feld, *Legislative Changes*, *supra* note 4, at 495.

<sup>111</sup> Redding, *supra* note 32, at 744.

favorable than automatic transfer, it is still too arbitrary, and, just as judicial discretion is subject to appellate review, must be submitted for re-assessment by a higher authority. Discretionary tactics are the key to reforming transfer. Juvenile justice will never be served until we return to a case-by-case system that allows for adjudication based on an individualized assessment of each juvenile's circumstances and amenability to treatment and rehabilitation.<sup>112</sup>

## VII. CONCLUSION

It is time for transfer to reclaim its rightful place as the “safety valve” of the juvenile justice system.<sup>113</sup> Only those youths who have proven themselves to be completely unamenable to rehabilitation, as evidenced by either repeated criminal offenses with no attempt at reform or a single heinous offense of willful and malicious violence, should be filtered into criminal courts. The indiscriminate practice of transfer will only serve to worsen the trend towards retribution in juvenile justice, losing sight of the goal of rehabilitation and denying treatment to those vulnerable children who need it the most. In order to fulfill its ideal role as *parens patriae*, the juvenile justice system must stop shaming and start saving our nation's youth.

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<sup>112</sup> “It is implicit in the [Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases.” *Kent v. United States*, 383 U.S. 541, 560-61 (1966) (quoting *Harling v. United States*, 295 F.2d 161, 164-65 (D.C. Cir. 1961)).

<sup>113</sup> Martin, *supra* note 1, at 62-63.