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ANOTHER DAY IN THE LIFE OF THE JUVENILE JUSTICE  
SYSTEM:  
THE FIGHT AGAINST THE ABOLISHMENT OF THE SYSTEM

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I. INTRODUCTION

“I spent eight years to reach him, and then another seven trying to keep him locked up because I realized that what was living behind that boy’s eyes was purely and simply evil.”<sup>1</sup>

The latter quote was a famous line in a popular 1970s horror film, but is applicable to the evolution of the juvenile justice system. In reality, Michael Myers is not just a fictional character that scares youth around the nation, but the horror of politicians who tot “get tough” on crimes. With the seemingly increase in youthful violence, politicians and the media have the public scared that it left to its vices, juvenile judges will release on the world, thousands of Michael Myers.

Consequently, America has gone from trying to reach our youth, to trying to keep them locked up for as long as possible, hoping that if the child is out of sight and out of mind, the problem will disappear along with him. The focus of the juvenile justice system has shifted from punishment to rehabilitation and back to punishment once again. Now the pendulum continues to swing in the extreme with some scholars arguing for an abolishment of the juvenile justice system, while others argue for a return to the good old days were judges has unfettered discretion. Neither side addresses the core issues, the socio-economic causes of crime that result in both adult and youthful offenders entering a life of crime. However, some states mainly Florida are seeking to take a more preventive method, focusing on strengthening the families’ ability to deal with the issues that lead children to crime.

This article seeks to evaluate that family focused approach of Florida. The first part of the article examines the history and evolution of the juvenile justice system. Part III, surveys the current method of transferring youthful offenders to adult courts and the criticisms of those

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1 HALLOWEEN (Compass Int’l 1978).

methods. Lastly, the article considers the reasons that individuals advocate for the abolishment of the juvenile justice system and the family focused model.

## II. HISTORY AND EVOLUTION OF THE JUVENILE JUSTICE SYSTEM: A BATTLE OF EXTREMES

In order to understand the changes in the juvenile justice system it is necessary to evaluate the evolution of the system. A survey of the history of the American juvenile system illustrates how the juvenile system has swung like a pendulum, “from one extreme to the next, never stopping in the middle.”<sup>2</sup>

### A. One Court Fits All: The Common Law Treatment of Juvenile Offenders

Under common law, there was no separate juvenile judicial system.<sup>3</sup> All criminals were subject to the same criminal court system, substantive law, and punishment.<sup>4</sup> The lack of distinction was based upon the treatment of criminal culpability.<sup>5</sup> Common law defined criminal culpability based on “capacity to know wrongfulness and proof of the specific *mens rea* required to commit a crime.”<sup>6</sup> However, the courts recognized that children were less able to understand the wrongfulness of their actions or possess the requisite intent necessary.<sup>7</sup> In order to resolve this conflict between culpability and the mental status of juvenile, the courts developed the defense of infancy.<sup>8</sup>

The infancy defense was a “sliding scale” that set forth a series of “rebuttable and non-rebuttable levels of culpability based upon the juvenile’s age.”<sup>9</sup> Courts presumed that children seven years old or

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<sup>2</sup> Honorable W. Don Reader, *Symposium: They Grow Up So Fast: When Juveniles Commit Adult Crimes: The Laws of Unintended Results*, 29 AKRON L. REV. 477, 477 (1996).

<sup>3</sup> Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509 (1984).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 510.

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

<sup>9</sup> Jon-Micheal Foxworth, *An Unjust Act: The Schizophrenic State of Maturity and Culpability in Juvenile Justice and Minor Abortion Rights Law; Recent Tenders in Virginia and Nationally*, 9 WM. & MARY J. OF WOMEN & L. 495, 497 (2003); see Walkover, *supra* note 3, at 510-11.

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younger were incapable of accepting responsible for their actions, and thereby, barred from adjudication.<sup>10</sup> Juveniles over the age of fourteen years old were considered adults and capable of committing crimes.<sup>11</sup> In order to prosecute a child between the age of seven and fourteen, the state had to overcome a presumption of incapacity.<sup>12</sup> In order to overcome this presumption, the state had to illustrate that the juvenile knew his actions were wrong.<sup>13</sup>

The infancy defense served a legal purpose and a social purpose. In a legal sense, its structure was an avenue to deal with the uneasiness of punishing individuals incapable of forming the requisite intent.<sup>14</sup> The structure was based on legal notions of “responsibility, punishment and deterrence.”<sup>15</sup> Socially, the defense provided courts with a means to deal with the welfare of children and curb some of the hardships that could result if children were punished as adults.<sup>16</sup>

## B. Stops Along the Way: The Evolution of the American Juvenile System

Initially the American judicial system continued to adjudicate juveniles under the principles outlined at common law.<sup>17</sup> The judicial system processed juveniles under the same substantive laws, subjected them to the same penalties, and even incarcerated them in the same prisons.<sup>18</sup> Gradually, the American focus shifted from punishment to rehabilitation. As the focus began to shift, the first juvenile courts were enacted.

### 1. Baby Steps: The House of Refuge & Reformatories

The initial efforts to reform the criminal justice system did not result

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<sup>10</sup> Walkover, *supra* note 3, at 511.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, at 512.

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

<sup>16</sup> *Id.*

<sup>17</sup> Janet Gilbert, Richard Grimm, & John Parnham, *Applying Therapeutic Principles to a Family Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1156 (2001).

<sup>18</sup> Gilbert, *supra* note 17, at 1156. Juveniles were even subject to the death penalty. *Id.* Prior to 1900, at least ten juveniles under the age of fourteen were executed. *Id.* at 1157.

in a separate juvenile system but refuge houses.<sup>19</sup> In 1825, New York City opened the first house of refuge.<sup>20</sup> These refuge houses accepted juveniles convicted of crimes and other youth.<sup>21</sup>

The primary concern of the refuge houses was the placement of juveniles with adult offenders in prisons and workhouses.<sup>22</sup> Instead, the refuge houses attempted to instill the “principles of morality and religion; by furnishing them [the children] with a means to earn a living, and above all, by separating them [the children] from the corrupting influences of improper associates.”<sup>23</sup> Consequently, the juvenile system experienced a remarkable in focus from punishment to rehabilitation.<sup>24</sup>

As time progressed, the houses of refuge eventually developed into punitive reformatories.<sup>25</sup> However, the focus remained on rehabilitation and separating children from the bad influences of adult offenders.<sup>26</sup> The reformatories provided juveniles with education, physical exercise and supervision.<sup>27</sup> Due to the nature of the reformatories, indeterminate sentences were common.<sup>28</sup> After all the purpose was not to punish the juvenile but to ensure that the juveniles would not return to a life of crime.<sup>29</sup>

## 2. Father Knows Best: The Re-Introduction of the Concept of *Parens Patriae*

The courts sanctioned the practices of the reformatories, and were reluctant to impose such legal duties as due process.<sup>30</sup> For the courts, the reformatories were a return to the concept of *parens patriae*.<sup>31</sup> The term *parens patriae* means “father of the country” and articulates the notion that the state in its official capacity is the protector of those

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19 Gilbert, *supra* note 17, at 1157.

20 Hon. Reader, *supra* note 2, at 478.

21 *Id.*

22 Gilbert, *supra* note 17, at 1157.

23 Hon. Reader, *supra* note 2, at 478.

24 Gilbert, *supra* note 17, at 1157.

25 *Id.* at 1158.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

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unable to protect themselves.<sup>32</sup> English equity courts used the doctrine to provide protection for orphans, widows and minors.<sup>33</sup>

On American soil, the concept was the basis of courts holdings when individual challenged the concept of reformatories. An illustrative case was *Ex Parte Crouse*.<sup>34</sup> In 1838, the father of Mary Ann Crouse filed a writ of habeas corpus, on behalf of his daughter.<sup>35</sup> In the lower court, the mother of Mary Ann Crouse filed a complaint against Mary Ann and the judge committed Mary Ann to a house of refuge.<sup>36</sup> In denying the father's petition for Mary Ann's release, the Pennsylvania Supreme Court noted that the house of refuge was a school, and not a prison.<sup>37</sup> The house of refuge provided Mary Ann with aid, and not punishment.<sup>38</sup> Consequently, when parents are incompetent or corrupt, it is the province of society to provide facilities to aid the child.<sup>39</sup> To ignore the situation would "be an act of extreme cruelty."<sup>40</sup>

### 3. Child Savers: The Influence of the Progressive Movement

The Progressive movement furthered the goals of the house of refuges by advocating for a separate judicial system.<sup>41</sup> Justice Fortas summarized the views of the early Progressives:

They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child—essentially good, as they saw it—was made "to feel that

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32 BLACK LAW'S DICTIONARY (8th Edition 2004).

33 Gilbert, *supra* note 17, at 1158.

34 *See* 4 Whart. 9 (Pa. 1839).

35 *Id.* at 11.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 12.

41 The Progressives movement began around the turn of the twentieth century. It was a response to the problems the nation faced as a result of industrialization. There were many faces of progressivism, but the overall goal was to make the "government more democratic, eradicate dangerous condition in cities and factories and curb corporate power." PAUL BOYER ET AL., *THE ENDURING VISION: A HISTORY OF AMERICAN PEOPLE VOLUME 2: FROM 1865 641* (Houghton Mifflin Company, New York, 5th Edition 2004).

he is the object of [the state's] care and solicitude," not that he was under arrest or on trial.<sup>42</sup>

The Progressives envisioned a system were "a specialized judge trained in social science and child development whose empathic qualities and insight would enable him or her to make individualized therapeutic dispositions of the 'best interests' of the child."<sup>43</sup> For Progressives, a separate system was a natural extension of the concept of *parens patriae*.<sup>44</sup> The juvenile's crimes were considered a signal of the child's real needs.<sup>45</sup> Accordingly, Progressives wanted to impose a rehabilitative objective to the correction of delinquent juveniles.<sup>46</sup>

#### 4. Down Goes Punishment: The First Juvenile Courts

The efforts of the reformers cultivated in the establishment of the first juvenile court in Illinois.<sup>47</sup> The focus of the courts was rehabilitation rather than punishment.<sup>48</sup> The foundation of the juvenile system rested on the notion of *parens patriae*, it was the duty of the state and the courts to protect children.<sup>49</sup> The philosophy of the court was stated by one of its first judges:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings.<sup>50</sup>

The Illinois Juvenile Court marked the decline of the penal approach and the start of the preventive approach.<sup>51</sup>

The structure of the proceeding supported the rehabilitative goal of

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<sup>42</sup> *In re Gault*, 387 U.S. 1, 15 (1967).

<sup>43</sup> Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses To Youth Violence*, 24 CRIME & JUST. 189, 193 (1998).

<sup>44</sup> *Id.* at 192.

<sup>45</sup> *Id.* at 193.

<sup>46</sup> 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, 376 (1998).

<sup>47</sup> *Id.* By 1925 all but two states had enacted legislation creating a juvenile system. *Id.*

<sup>48</sup> Foxworth, *supra* note 9, at 498.

<sup>49</sup> Gilbert, *supra* 17, at 1160.

<sup>50</sup> *Id.* at 1160.

<sup>51</sup> *Id.* at 1159-60.

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the system.<sup>52</sup> In fact the hearing were more similar to a civil proceeding than criminal.<sup>53</sup> All juveniles under the age of eighteen were under the “exclusive jurisdiction” of the court.<sup>54</sup> All members worked in the “best interests” of the child.<sup>55</sup> Prosecutors filed petitions to the court, and the children were characterized as respondents.<sup>56</sup> Judges conducted hearings in private and records were sealed, to avoid “stigma of criminal prosecution.”<sup>57</sup> Since the goal was not to determine guilt, children were not “sentenced but committed.”<sup>58</sup> Recommendation from probation officers and social workers were considered key development of the juvenile.<sup>59</sup> The judges were more counselors or therapists.<sup>60</sup> The process was a fact finding mission. Information was gathered in order to serve the best interests of the child.<sup>61</sup>

However, the jurisdiction of the court was not limited to crimes. The court had jurisdiction over truancy, vagrancy, immorality, disobedience to parents and teachers, “profane and indecent language” and “growing up in idleness.”<sup>62</sup> Additionally, since the proceedings were not considered criminal, the formal procedures of the adult criminal court were not observed.<sup>63</sup> The process was highly individualized, therefore, judges had wide discretion in determining the disposition of the case.<sup>64</sup>

### C. No Kangaroo Courts on Our Watch: The Influence of the United States Supreme Court

The disposition of juveniles cases were subject to actions that limited their freedom and rights.<sup>65</sup> While state judges and legislators were

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52 Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 395 (2001); see Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference It Makes*, 68 B.U. L. REV. 821, 823 (1998).

53 Chamberlin, *supra* note 52, at 395.

54 *Id.*

55 Gilbert, *supra* note 17, at 1160.

56 Klein, *supra* note 46, at 377.

57 *Id.* at 376; Chamberlin, *supra* note 52, at 395.

58 Klein, *supra* note 46, at 377.

59 Vanessa L. Kolbe, *A Proposed Bar To Transferring Juveniles With Mental Disorders To Criminal Court: Let the Punishment fit the Culpability*, 14 VA J. SOC. POL'Y & L. 418, 422 (2007).

60 *Id.*

61 Gilbert, *supra* note 17, at 1160.

62 Klein, *supra* note 59, at 376.

63 *Id.* at 377.

64 *Id.*

65 Foxworth, *supra* note 9, at 498.

intoxicated by the libation of *parens patriae*, the United States Supreme Court became concerned with the potential for abuse within the juvenile system. As a result, series of United States Supreme Court ruling, changed the landscape of the juvenile justice system.<sup>66</sup>

In *Kent v United States*,<sup>67</sup> the United States Supreme Court held that the trial court judge denied Kent, a minor, due process of the law when the trial judge failed to hold a hearing before transferring Kent to adult court.<sup>68</sup> The court was concerned that the child was receiving the “‘worst of both worlds’ he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>69</sup> Therefore, the court listed eight factors a juvenile judge must consider when determining whether to transfer a child to an adult criminal court.<sup>70</sup> The Court in *Kent* was concerned about the serious consequences that resulted from the transfer of juveniles. The Court noted that society had a “special concern for children,” however, as long as judges observed the minimal due process requirements the court did not see a problem with allowing transfers.<sup>71</sup>

In 1967, *in re Gault*,<sup>72</sup> the United States Supreme Court took another step in furthering the procedural safeguards for youthful offenders. The Court stated, “Under our Constitution, the condition of being a boy does not justify a kangaroo court.”<sup>73</sup> Therefore, a juvenile had a right to counsel, right to cross-examine witnesses, a right against self-

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66 Gilbert, *supra* note 17, at 1164.

67 383 U.S. 541 (1966).

68 Gilbert, *supra* note 17, at 1163; *Kent v. United States*, 383 U.S. 541, 546 (1966). Morris A. Kent, Jr. came under the authority of the Juvenile Court of the District of Columbia when he was 14. *Id.* at 543. He was placed on probation, however when he was 16 years old he was accused on rape. *Id.* at 543. Under the Juvenile Code of the District of Columbia, Kent was subject to the exclusive jurisdiction of the Juvenile Court. *Id.* Kent was not attained nor was their any determination that there was sufficient probable cause for his arrest. *Id.* at 544-45. After an examination by psychiatrists and a psychologist, Kent’s counsel challenged the waiver. *Id.* at 545.

69 *Kent*, 383 U.S. at 555-56.

70 *Id.* at 566-67. “(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.” *Id.*

71 *Id.* at 554.

72 387 U.S. 1 (1967)

73 *Id.* at 28.



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incrimination, a right to be notified of pending charges.<sup>74</sup> Again, the court was concerned with the lack of procedural safeguards to protect the youth. According to the justices, the informal proceeding led to the perception that the proceeding were unfair, and the sentences to severe.<sup>75</sup> By affording the youth additional safeguards, the justices hoped to restore some. In *In re Winship*, the court stated that the standard of proof was beyond a reasonable doubt, and not through a preponderance of evidence.<sup>76</sup>

#### D. The Sky is Falling: The 1960s and The Willie Bosket Effect

Despite the involvement of the Supreme Court, the focus of the juvenile system did not change.<sup>77</sup> Judges still “deferred” to the recommendation of mental health professionals.<sup>78</sup> The changes in the juvenile system were largely the result of a change in public opinion. In the 1960s and the early 1970s, a perception emerged that there was an epidemic of youth violence.<sup>79</sup> One such case that enjoyed significant national attention was the story of Willie Bosket. Willie Bosket’s first experience with the juvenile system was at age nine when his mother filed a complaint stating she could not control Willie.<sup>80</sup> Willie spent eighteen months in state agency placements.<sup>81</sup> Six months after being released from a maximum-security youth facility, Willie, at age fifteen, killed two New York City subway passengers during a robbery.<sup>82</sup> Under then existing state of the law, the maximum penalty Willie was eligible to receive was placement with the Division for Youth until his twenty-first birthday.<sup>83</sup> However, the people of New York wanted severe punishment.<sup>84</sup>

As a result of Willie and similar stories across the nation, legislative bodies began passing legislation to responding the votes outcry for harsher sentencing. Politicians championed extensive prosecution of

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74 *Id.* at 33, 41, 55-57.

75 *Id.* at 26.

76 *See generally* *In re Winship*, 397 U.S. 359 (1970).

77 Kolbe, *supra* note 59, at 423.

78 *Id.*

79 *Id.* at 424.

80 Klein, *supra* note 46, at 383.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

youthful offenders.<sup>85</sup> States passed laws to streamline the transfer of juveniles to adult courts,<sup>86</sup> and other states toughened the penalties and imposed minimum sentencing guidelines.<sup>87</sup> The once informal setting was replaced by an adverbial system.<sup>88</sup> As a result, the number of juveniles in adult prisons “increased by 50% between 1979 and 1984.”<sup>89</sup>

### III. SCARED STRAIGHT: THE TRANSFER OF JUVENILES TO ADULT CRIMINAL COURT

The “tough on crime” movement reached its height in 1990s. The focus of the juvenile system shifted from protection of the youth to the protection of the community and accountability.<sup>90</sup> It became easier to transfer children; additionally the new laws expanded sentencing options, minimized confidentially protections, and overall became more punitive in nature.<sup>91</sup> Lawmakers argued that if juveniles were finally processed through adult court, it would result in increased deterrence and decrease in the rate of recidivism.<sup>92</sup> As a result of the streamlining of the process, the number of juvenile cases waived to criminal courts grew seventy-three percent between 1988 and 1994.<sup>93</sup> Consequently, states adopted one of three main forms of transfer laws, (1) automatic or statutory transfer, (2) prosecutorial transfer and (3) judicial waiver.<sup>94</sup>

#### A. Always With Us: A Brief History of Transfer Laws

The option to transfer juveniles to adult courts was not a twentieth-first century practice.<sup>95</sup> Since the first juvenile court in 1899, there had existed a structure to transfer juveniles.<sup>96</sup> The court could waive jurisdiction and transfer the juvenile upon a determination that it was in

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<sup>85</sup> Gilbert, *supra* note 17, at 1165.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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

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

<sup>90</sup> *Id.* at 1166.

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

<sup>92</sup> Amy M. Thorson, Note, *From Parens Patriae to Crime Control: A Comparison of the History and Effectiveness of the Juvenile Systems in the United States and Canada*, 16 ARIZ. J. INT'L & COMP. L. 845, 855 (1999).

<sup>93</sup> Klein, *supra* note 46, at 384

<sup>94</sup> Klein *supra* note 46, at 377.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 376.

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the “Best interests of the child and public.”<sup>97</sup>In Cook County, the system transferred approximately fifteen boys per year.<sup>98</sup> Nonetheless, in the new era of punitive reforms, the system witnessed a sharp increase in the likelihood that juveniles would be transferred.<sup>99</sup>

#### B. Do Not Pass Go, Straight to Adult Court: Statutory or Automatic Waiver

Statutory waivers are what most statutes are using to transfer juvenile offenders.<sup>100</sup> Statutory waivers focused on the seriousness of the offense, not the individual offender.<sup>101</sup> These statutes were enacted to curb the discretion of juvenile judges.<sup>102</sup> The legislator has excluded certain offenses from the juvenile court’s jurisdiction.<sup>103</sup> As a result, there is no hearing.<sup>104</sup> The criteria for waiver were age, nature and severity of offense and offender’s prior history.<sup>105</sup> Automatic transfers were based upon the juvenile committing certain enumerated offenses, “including murder, manslaughter, kidnapping, rape, aggravated assault, arson and crimes committed with a firearm.”<sup>106</sup> Currently, thirty-six states and the District of Columbia impose a form of statutory waiver.<sup>107</sup>

While statutory waivers on their face provide for more uniformity, the statutes are often written broadly.<sup>108</sup> However, the main criticism of statutory waivers is that such legislation does not fit with the purpose of the juvenile court system.<sup>109</sup> Since the waiver is based on statutory defined offenses, it does not allow for an individualized assessment of the juvenile offender.<sup>110</sup>

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97 Chamberlin, *supra* note 52, at 395.

98 Klein, *supra* note 46, at 377.

99 Kolbe, *supra* note 59, at 425.

100 Thorson, *supra* note 91, at 854-55.

101 *Id.*, at 854.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 Kolbe, *supra* note 59, at 428.

107 *Id.* In 1986, only 18 states had such provisions and in 1975, only four states had such provisions.

108 Thorson, *supra* note 91, at 854.

109 *Id.*

110 *Id.*

### C. In the Hands of the Enemy?: Prosecutorial Waiver

The second type of transfer is the prosecutorial transfer. Prosecution waiver is the least common of the three methods.<sup>111</sup> It allows a prosecutor to exercise discretion between filing in either juvenile or criminal court.<sup>112</sup> Typically, the juvenile must meet certain age and offense requirements.<sup>113</sup> In some states, the process is non-reviewable while others allow for “reverse transfer”, meaning that a criminal court judge has discretion to waive jurisdiction and remand to juvenile court.<sup>114</sup>

Critics are concerned with the concentration of power in the hands of the prosecution.<sup>115</sup> However, such criticism ignores the major role that prosecutors play minus the use of the waiver.<sup>116</sup> Prosecutors have discretion over whether to charge the juvenile offender at all, and if they do file charges prosecutors decide under which crime.<sup>117</sup> Such discretion has a significant effect on the juvenile before the prosecutor even considers transferring.<sup>118</sup>

### D. Let the Judge Decide: Judicial Waiver

Judicial waiver is the “most common” form of transfer.<sup>119</sup> Judicial waiver provides the juvenile court judge with “discretion” to transfer a juvenile to adult court.<sup>120</sup> “Thirteen jurisdictions have ‘presumptive waiver’ statutes,” meaning that the juvenile offender must “rebut a presumption” that he is not suitable for rehabilitation.<sup>121</sup> This process usually “involves a hearing.”<sup>122</sup> Consequently, scholars have viewed the judicial waiver as the “most consistent” with the initial mission of the juvenile justice system because it allows the courts to make an “individualized assessment of the juvenile

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111 *Id.* at 855.

112 Kolbe, *supra* note 59, 428.

113 *Id.*

114 *Id.*

115 Thorson, *supra* note 91, at 855.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.* at 853.

120 *Id.*

121 *Id.*

122 *Id.*

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offender.”<sup>123</sup>

Additionally, the United States Supreme Court has provided guidance for judges in the case of *Kent v. United States*.<sup>124</sup> Nonetheless, individuals continue to be skeptical of the seemingly unchecked judicial discretion.<sup>125</sup> Studies have indicated that judicial waivers can be “arbitrary, discriminatory (based on race) and that certain factors may be given greater weight than other in the judicial decision making process.”<sup>126</sup>

#### E. Same Old, Same Old: The Deterrence Value of Transfer Laws

The main goals of criminal law in general are deterrence and a reduction in recidivism rate.<sup>127</sup> The juvenile system was not immune to such notions, and when scholars evaluate the effectiveness of the shift to a punitive model, they consider the deterrence effect and recidivism rates as the markers of success.<sup>128</sup> As a result, the verdict on the punitive model is mixed. While arrested rates for certain crimes were lower, studies question whether the changes serve their true purpose, deterrence.

##### 1. The Forms of Deterrence

There are two forms of deterrence, specific and general. General deterrence is “crime prevention for the masses.”<sup>129</sup> The focus on general deterrence is to provide the public with information of potential offenders and enact punishments that are punitive “enough to compel

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<sup>123</sup> *Id.*

<sup>124</sup> “(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. at 566-567.

<sup>125</sup> Thorson, *supra* note 91, at 853.

<sup>126</sup> *Id.*

<sup>127</sup> Jill M. Ward, *Deterrence’s Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Courts*, 7 U.C. DAVIS J. JUV. L. & POL’Y 253, 260 (2003).

<sup>128</sup> *Id.*

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

law-abiding behavior.”<sup>130</sup> “Specific deterrence is recidivism control.”<sup>131</sup> Specific deterrence focuses on the law-breaking individual and attempts to enact punishments that “dissuade future criminal conduct.”<sup>132</sup>

The studies evaluating the general deterrence effect of transfer laws are scare.<sup>133</sup> In 1988, Simon Singer and David McDowell studied the New York Juvenile Offender Law of 1978. The law lowered the age of criminal court jurisdiction to thirteen if the crime was murder and if the crime was rape, robbery, assault and violent burglaries the age was lowered to fourteen.<sup>134</sup> While the legislation was well published and implemented, Singer found little evidence that it affected the behavior of the juveniles.<sup>135</sup> A comparison of juveniles affected by the new law and older juveniles in similar jurisdictions found “no measureable impact.”<sup>136</sup>

In 1981, Eric Jensen and Linda Metsger conducted a second study.<sup>137</sup> Their study examined the impact of Idaho’s mandatory transfer statute. The Idaho law required juveniles as young as fourteen to be tried as adults if they committed the offenses of murder, attempted murder, robbery, forcible rape or mayhem.<sup>138</sup> Researcher collected data for five years before and five years after the implementation of the law and compared the results with juvenile arrests in Montana and Wyoming.<sup>139</sup> The study noted “no notable evidence of general deterrence.”<sup>140</sup> Montana and Wyoming actually exercised a lower number of juvenile arrests than Idaho.<sup>141</sup> Ninety one percent of juveniles incarcerated in criminal court were re-arrested in Montana and Wyoming while seventy-three percent of juveniles incarcerated in the juvenile system in Idaho were re-arrested.<sup>142</sup>

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130 *Id.*

131 *Id.*

132 *Id.* at 260-261.

133 *Id.* at 261. Only two studies have evaluated general deterrence effect of transfer. *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 262. The researchers choice Montana and Wyoming since these two states were economically and demographically similar and also used discretionary waiver before Idaho changed the law in 1981. Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 99 (1994).

140 *Id.* at 262.

141 *Id.*

142 JEFFREY FAGAN, SEPARATING THE MEN FROM THE BOYS: THE COMPARATIVE ADVANTAGE OF JUVENILE VERSUS CRIMINAL COURT SANCTIONS OF RECIDIVISM AMONG ADOLESCENT FELONY

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With respect to specific deterrence, studies showed that the transfer laws were not yielding significant changes. Studies began to show that instead of decreasing the rate of youthful offenders, studies indicated that juveniles transferred to criminal court tend to recidivate more quickly and more frequently than juveniles that were kept in the juvenile system.<sup>143</sup> In Florida, a study of three thousand juvenile offenders that were transferred to adult court showed a higher recidivism rate in every statistical category.<sup>144</sup> Likewise, a study in Minnesota showed that the judicial waiver method failed to reduce recidivism.<sup>145</sup> Juvenile offenders transfer to adult court were more likely to commit another crime with greater frequency.<sup>146</sup> Furthermore, the legislative waiver method yielded similar results.<sup>147</sup> However, the rate of juvenile arrests for violent crimes—murder, forcible rape, robbery and aggravated assault, continue to decline.<sup>148</sup>

#### IV. PROPOSALS FOR CHANGE

The overall failure of the transfer to reduce recidivism suggests that once arrested and placed in the adult system, many youth fail to exit the system. Additionally, the *parens patriae* method was not serving the needs of the juveniles. While here have been several proposals that deal with this issue, this article will only deal with two of proposals; abolishment of the juvenile system and the family therapeutic approach.

##### A. One System Under the Sun: Abolishment of The System

Some scholars consider the juvenile justice system to be a lost cause and advocate its abolishment. These scholars argue that the system failed to achieve its original goals.<sup>149</sup> Additionally, these scholars noted that the United States Supreme Court ruling and legislative changes created a system that already closely resembles the adult criminal

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OFFENDERS, IN SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS: A SOURCE BOOK 250-51 (USRA Institute 1987).

143 Gilbert, *supra* note 17, at 1166.

144 Thorson, *supra* note 91, at 857.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 Chamberlin, *supra* note 52, at 406.

system.<sup>150</sup>

These scholars tot the benefits of one system for all offenders. Adjudication under one system would provide the juvenile with all the benefits of the adult criminal justice system.<sup>151</sup> The juvenile would be entitled to a jury trial, and provided with better counsel.<sup>152</sup> Advocates argue that the integration of the juvenile criminal system would allow juveniles to be evaluated individually, with age as one of the factors in sentencing.<sup>153</sup>

The problem with the abolitionist philosophy is that it assumes that the mission of the adult criminal court system is rehabilitative. However, the adult criminal court system has been subject to the same harsh realities as the juvenile system. The “get tough” on crime slogans was not limited to juvenile offenders. Sentencing guidelines, three strike laws<sup>154</sup> and other such legislation has increased the severity of punishment for adult offenders. While, abolitionists acknowledge the problems with the adult criminal court system, they offer little in how practically the system will become reformed.

#### B. Family-Focused System Model

The family focused system approach attempts to tackle the factors that shepherd juveniles into the juvenile justice system. Particularly the family focused approach relies upon research conducted by the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Researchers identified drug abuse, academic performance, truancy, dropping out rate, and delinquency as indications that contribute to the youthful offender rate.<sup>155</sup> However, the family focused system attempts to tackle many of these difficult issues.

The model had two primary objectives: (1) “to motivate, with a positive approach, the family’s participation in the treatment of the child and (2) provide the family invention in a positive and supportive

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150 *Id.*

151 *Id.*

152 *Id.*

153 Chamberlin, *supra* note 52, at 406.

154 *See generally* Ewing v. California, 583 U.S. 11, 14 (2003) (describing how the purpose of California’s three strike’s law was to “ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.”)

155 Gilbert, *supra* note 17, at 1167.



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approach without alienating the parent or custodian.”<sup>156</sup> Its purpose is to “achieve a fundamental change in the lifestyle of youth and families that will, at a minimum, substantially reduce the likelihood of their further involvement with the justice system.”<sup>157</sup> Consequently, the family focused system approach is a return to rehabilitation model.

Instead of charging the courts with the responsibility of creating good citizens, the family focused approach places the duty back at the footsteps of the parents.<sup>158</sup> If the family fails its mandates the community to accept responsibility and support the family so the family can improve the situation for the child.<sup>159</sup> Scholars believe this approach is supported by research from OJJDP that indentifies environmental issues as contributing to the juvenile offender rates.<sup>160</sup>

In Florida, the state has adopted a “multi-systemic therapy model.” Interventions are directed towards “individuals, family relations, peer relations, school performance and other social system that are involved in the identified problems.”<sup>161</sup> The program attempts to attack most of the socioeconomic issues that correlate to juvenile arrest rates. By identifying the needs of the family and the child, the program hopes to build a structure that will eventually allow the parents and the child to handle issues effectively before the child enters the juvenile justice system.<sup>162</sup>

## V. CONCLUSION

As a society we are aware of the causes of crime, but yet we choice to continue to be reactionary instead of putting more resources into preventive measures. If America truly wants to save its youth it must find the middle ground, and practically treat the problems that plague our youth. The abolishment of the juvenile justice system would not achieve those goals. Instead it would continue to subjugate the youth to harsher treatment. Additionally, the integration of the juvenile system into the adult system assumes that the adult criminal justice system still

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<sup>156</sup> *Id.* at 1172.

<sup>157</sup> *Id.* at 1173.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1173-74

<sup>160</sup> *Id.* at 1174.

<sup>161</sup> *Id.* at 1182.

<sup>162</sup> *Id.* at 1178.

focuses on rehabilitation. However, adult offenders are continually subjected to harsh treatments as society becomes less concerned with their rehabilitation as well. Consequently, the system needs to remain separate but that does not mean that the current juvenile system should not be reformed. If left to its current deceives the system will not cure itself. As a result, more resources should be allocated to such programs as a family focused model. The system must become more preventative and less reactionary.