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FEDERAL JUVENILE WAIVER PRACTICES: A CONTEXTUAL APPROACH TO THE CONSIDERATION OF PRIOR DELINQUENCY RECORDS

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INTRODUCTION

Courts today are filled with stories of troubled youth and the crime and violence they are increasingly involved in. Sixteen-year-old TLW,[1] for example, was arrested and charged with four counts of distribution of crack and cocaine.[2] But behind the seriousness of the crimes he committed lies an unstable personal history. TLW's cousin had recruited him to sell cocaine when TLW was only fourteen.[3] TLW's biological father was a convicted drug dealer and his mother was mentally ill.[4] TLW's closest family connection was to his grandfather, who passed away when TLW was only thirteen.[5] At the time of his arrest, TLW had no legal guardian and admitted to having no significant emotional relationship with anyone.[6] TLW's troubled social history, compounded with at least eighteen prior delinquency offenses ranging from aggravated assault to traffic violations, made him an ideal candidate for waiver in the federal juvenile justice system.[7] The United States District Court for the Central District of Illinois made the difficult decision to transfer TLW to adult status in the interest of justice.[8]

The TLW story is just one of many American juvenile tragedies that raise the question of how our criminal justice system should treat children who commit violent adult crimes. For many legislatures, the answer is waiver to adult status. When a juvenile is waived to adult status, he or she is tried as a criminal defendant, and an adult sentence may be imposed. Adult sentences often result in incarceration in institutions filled with adult criminals who further corrupt and take

1. TLW are the juvenile's initials, which are often used in federal juvenile court proceedings to protect the confidentiality of the juvenile defendant.
2. *See* United States v. TLW, 925 F. Supp. 1398, 1400 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).
3. *See id.* at 1402.
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* at 1403-04.
8. *See id.* at 1404.

advantage of juvenile inmates. These institutions do little to rehabilitate juvenile offenders. In the federal system, the decision of whether to waive a juvenile to adult status rests on judicial discretion, though federal law directs district court judges to consider a variety of factors in making this determination.[9] One such factor is a juvenile's prior delinquency record.[10] Courts' interpretations of "prior delinquency" have been far from uniform, however, with some courts holding that a juvenile's prior record consists solely of adjudicated conduct and others including all prior police contacts. Courts that restrict their analysis to adjudicated conduct consider only arrests that resulted in convictions, while courts that define "prior delinquency records" to include all prior police contacts consider all complaints, arrests, and convictions that have been documented by law enforcement officials in the particular juvenile's history.

This Note argues that a uniform federal standard must be adopted to prevent waiving juveniles with rehabilitative potential to adult status. Courts should not only consider all prior police contacts, but should allow attorneys to investigate the circumstances surrounding those prior contacts. When a prosecutor argues for waiver, the defense attorney should be able to provide the district court judge with a contextual analysis of the juvenile's prior delinquency record. For example, extenuating circumstances such as an influential family member who recruits a juvenile to commit the alleged offense makes the juvenile less culpable and therefore less appropriate for transfer than a juvenile who undertook criminal activity on his own. Likewise, the prosecutor should be permitted to show that the juvenile was in fact a ringleader or otherwise especially culpable. After considering all prior police contacts, district court judges will be able to make a more informed decision about the individual juvenile and the appropriateness of adjudication as an adult.

In arguing for a uniform definition of a juvenile's prior delinquency record, this Note focuses on the federal juvenile justice system, but often looks to state juvenile systems for comparison and support. Part I provides a historical overview of juvenile justice and surveys the pertinent Supreme Court decisions that have shaped procedural due process in juvenile proceedings. Part I also explores America's movement away from the traditional rehabilitative approach to delinquency toward the predominantly punitive juvenile justice system currently emerging. Part II describes the process of transferring juveniles to adult criminal status, known as judicial waiver, and discusses the impact of punitive reforms on waiver practices. Part II then presents the competing definitions federal judges assign to a juvenile's prior delinquency record when conducting

9. *See* 18 U.S.C. § 5032 (1994).
10. *See id.*

transfer hearings. Part III urges courts to define a juvenile's prior delinquency record to include all prior police contacts, thereby minimizing the likelihood that federal courts will treat similarly situated juvenile defendants differently. It further argues that attorneys should be able to present the court with extenuating circumstances surrounding prior police contacts. Part III concludes with a discussion of the future of juvenile justice in America and proposes the adoption of interim remedies to improve the federal system until Congress can draft effective legislation.

I. THE JUVENILE JUSTICE SYSTEM: FROM REHABILITATION TO PUNISHMENT

Juvenile justice has undergone extreme transformation throughout United States history. This part describes the evolution of the juvenile court system and the different philosophies that have shaped our nation's approach to juvenile justice. It then surveys the major Supreme Court due process decisions that have mandated specific protections in juvenile court, and discusses the impact that these decisions have had on the overall functioning of the juvenile system. Finally, this part analyzes the current trend toward a punishment-oriented approach to juvenile delinquency, and presents opposing viewpoints on whether a separate juvenile justice system should be abolished.

A. *A Historical Overview of the American Juvenile Justice System*

In the early nineteenth century, juveniles deemed delinquent were locked up with adult criminals and exposed to harsh adult prison conditions.[11] Convicts educated juveniles in the art of criminal activity and consequently, juvenile crime rates continued to rise.[12] During the late nineteenth century, rapid industrialization and urbanization led to a nationwide increase in poverty, disease, and crime.[13] In response to these social control problems, the Progressive Movement emerged.[14] The Progressives were greatly influenced by positivism, the theory

11. *See* Jack Klempner & Rodger D. Parker, Juvenile Delinquency and Juvenile Justice 8-9 (1981).

12. *See id.* at 9. The mid-19th century also witnessed the creation of refuge houses that eventually gave way to the creation of reform schools. For a thorough discussion of the history of juvenile justice in America, see generally Clifford E. Simonsen and Marshall S. Gordon III, Juvenile Justice in America (1979).

13. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471, 474 (1987) [hereinafter Feld, *Legislative Changes*]; David J. Rothman, Conscience and Convenience: The Asylum and its Alternatives in Progressive America 206-07 (1980).

14. *See* Feld, *Legislative Changes*, *supra* note 13, at 474; Sarah M. Cotton, Comment, *When the Punishment Cannot Fit the Crime: The Case for Reforming the Juvenile Justice System*, 52 Ark. L. Rev. 563, 565 (1999).

that "antecedent causal variables produc[e] crime and deviance."[15] Delinquent children were thus perceived as products of a corrupt environment and were thought to be in need of greater structure and supervision.[16] The Progressives spurred the development of a distinct system of justice to treat juvenile offenders.[17] The juvenile court movement removed juveniles from the criminal justice system and placed them in a corrections system that focused on individual rehabilitation.[18] Unlike the punishment-oriented criminal courts, the juvenile system's objective was to determine the best interests of the child.[19] The juvenile court system thus replaced the punitive policies of the criminal courts with a scientific and sociological approach to rehabilitating juvenile delinquents.[20]

Because progressive reformers saw the need to create a non-punitive, therapeutic system of justice for children,[21] they introduced informal, flexible, open-ended policies that required juvenile court judges to make discretionary decisions about how to treat juvenile offenders.[22] Reformers believed that judges should act paternally and discipline juveniles as they would their own children.[23] This philosophy gave rise to the legal concept of *parens patriae*, under which the state is viewed as the guardian of its delinquent youth.[24] As

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15. Feld, *Legislative Changes*, *supra* note 13, at 475. Positivism was a departure from the classic perception that criminal behavior was the product of free will. *See id.*

16. *See id.* at 474. Progressives believed that juveniles were psychologically less developed than adults and that consequently they "needed to complete their cognitive, social, and moral development before being expected to shoulder the burdens of adulthood." Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 Notre Dame J.L. Ethics & Pub. Pol'y 323, 324 (1991). For an overview of the role of the Progressives in the juvenile justice system, see generally Anthony M. Platt, The Child Savers: The Invention of Delinquency (2d ed. 1977).

17. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. Crim. L. & Criminology 68, 71-72 (1997) [hereinafter Feld, *Youthfulness*].

18. *See id.*

19. *See* Robert C. Trojanowicz & Merry Morash, Juvenile Delinquency Concepts and Control 140 (3d ed. 1983).

20. *See* Feld, *Youthfulness*, *supra* note 17, at 71-72.

21. *See* Marcia Johnson, *Juvenile Justice*, 17 Whittier L. Rev. 713, 718 (1996); *see also* Jeffrey K. Day, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 U. Puget Sound L. Rev. 399, 402 (1992) (stating that the Progressives saw the juvenile court as therapeutic); Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 Conn. L. Rev. 57, 66 (1992) (discussing the view that society would benefit from the rehabilitation of juveniles who have committed delinquent acts).

22. *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, 823-24 (1988) [hereinafter Feld, *Punishment*].

23. *See* Johnson, *supra* note 21, at 718.

24. *See* Larry J. Siegel & Joseph J. Senna, Juvenile Delinquency: Theory, Practice and Law 308 (1981). "'Parens Patriae,' literally 'parent of the country,' refers traditionally to [the] role of [the] state as sovereign and guardian of persons under [a] legal disability, such as juveniles or the insane . . . and in child custody determinations,

a result of these progressive reforms, Illinois established the first juvenile court in 1899.[25] The court's primary purpose was to protect children from the severe punishments imposed by adult criminal courts and to serve as an alternative to incarceration in reform schools.[26] Many states were quick to follow and by 1925, all but two states had a juvenile court system in place.[27]

In 1938, the federal government enacted legislation to facilitate the prosecution of juvenile offenders in federal court.[28] The Federal Juvenile Delinquency Act (FJDA)[29] set forth a procedural framework for the treatment of minors who violated a federal criminal statute.[30] The FJDA granted the Attorney General unlimited discretion to prosecute a child under eighteen as a juvenile if that child had not been surrendered to state officials or charged with an offense punishable by death or life in prison.[31]

Under the guise of *parens patriae*, state juvenile courts and federal judges emphasized supervision and treatment rather than punishment.[32] The juvenile court system, unlike the criminal courts, was considered individualistic. Judges, concerned with the child's social welfare, were assisted by social workers who investigated the child's background and made recommendations for individual rehabilitative treatment plans.[33] This informal and flexible procedure was thought to create less trauma for the juvenile and aid in a cooperative approach to rehabilitation.[34] Juvenile proceedings and records remained private to protect children from the stigma of public criminal trials,[35] and juvenile records were expunged upon reaching

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when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." Black's Law Dictionary 1114 (6th ed. 1990). For a discussion of the origins of the parens patriae doctrine and its application to the juvenile justice system, see generally Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. Rev. 205 (1971).

25. *See* Siegel & Senna, *supra* note 24, at 310; Johnson, *supra* note 21, at 718.

26. *See* Klempner & Parker, *supra* note 11, at 25.

27. *See* Howard N. Snyder & Melissa Sickmund, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report*, 86 (1999) [hereinafter 1999 Report].

28. *See* Federal Juvenile Delinquency Act, Pub. L. No. 75-666, § 2, 52 Stat. 764, 765 (1938) (codified as amended at 18 U.S.C. § 5031 (1994)); Knut S. Johnson, *Juvenile Cases in Federal Court*, *in* Defending a Federal Criminal Case § 18.00 (1995).

29. *See* 18 U.S.C. § 5031.

30. *See* William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 St. Mary's L.J. 509, 510 (1983).

31. *See id.* at 518-19; *infra* Part II.A for a discussion of federal juvenile waiver practices.

32. *See* Feld, *Punishment*, *supra* note 22, at 824.

33. *See id.* at 825.

34. *See id.*

35. *See* Joseph F. Yeckel, Note, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 Wash. U. J. Urb. & Contemp. L. 331, 335 (1997).

the age of majority.[36]

Adhering to the notion of *parens patriae*, and the premise of the juvenile system as a civil rather than criminal arena, juvenile court judges were granted broad flexibility in addressing delinquent behavior.[37] Consequently, juvenile courts rarely utilized the formal procedures of the criminal courtroom.[38] Euphemistic terminology and separate courts served to distinguish juvenile proceedings from criminal prosecutions.[39] Government counsel thus filed a petition rather than charges, children were considered respondents rather than defendants, were "adjudicated delinquent" instead of "found guilty," and were committed rather than sentenced.[40] As a result, delinquents were often deprived of typical due process protections afforded to adult defendants.[41]

Critics of the juvenile court system had historically argued that juvenile proceedings were unconstitutional.[42] Although prior to the 1960s the prevailing theory was that constitutional notions of due process were inapplicable in juvenile courts,[43] adjudicating juveniles often resulted in outcomes resembling criminal sentences, and juveniles repeatedly claimed that the non-adversarial nature of the system violated their constitutional rights.[44] In *Kent v. United States*,[45] the Supreme Court held for the first time that juveniles are entitled to due process and to representation by counsel.[46]

Sixteen-year-old Morris Kent confessed to committing rape and robbery.[47] Kent's attorney, anticipating a prosecutorial waiver petition,[48] filed a motion requesting a hearing on the issue of jurisdiction.[49] The juvenile court judge, without ruling on the motion, entered a judgment waiving jurisdiction based on a "full investigation."[50] The judge did not describe the investigation nor did he provide a rationale for his decision to waive Kent to adult status.[51]

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36. *See id.*
37. *See* 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, 376-77 (1998).
38. *See id.*
39. *See* Feld, *Legislative Changes*, *supra* note 13, at 476-77.
40. *See* Klein, *supra* note 37, at 376-77.
41. *See* Siegel & Senna, *supra* note 24, at 315.
42. *See id.*
43. *See* Sessions & Bracey, *supra* note 30, at 511.
44. *See* Yeckel, *supra* note 35, at 341.
45. 383 U.S. 541 (1966).
46. *See id.* at 554.
47. *See id.* at 544.
48. A prosecutorial waiver petition is a motion made by the prosecutor to transfer the juvenile defendant to adult status.
49. *See Kent*, 383 U.S. at 545; *see infra* Part II.A for a discussion of juvenile transfer proceedings.
50. *Kent*, 383 U.S. at 546.
51. *See id.*

The Court held that a judge's exercise of power via *parens patriae* is not unlimited.[52] In its discussion, the Court recognized significant problems with the Juvenile Court Act,[53] including the substantial degree of discretion given to juvenile court judges.[54] Writing for the Court, Justice Fortas stated that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."[55] The Court raised a constitutional challenge to the doctrine of *parens patriae* by acknowledging that theoretically the juvenile court provided less due process but a higher degree of concern for the individual juvenile than courts provide for adult defendants.[56] In reality, however, the Court noted that juveniles may receive the "worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[57] *Kent* concluded that prior to transferring a juvenile to adult status, the juvenile must be afforded a formal hearing at which he is entitled to representation by counsel, and that the juvenile's attorney must be given access to all records considered by the court in reaching its decision.[58]

In 1967, the Court's decision in *In re Gault*[59] reaffirmed the application of due process requirements to juvenile proceedings. Gerald Gault was on probation for a minor property offense when he was arrested for making crank phone calls.[60] As punishment for the calls, he was committed to a training school for the duration of his minority.[61] Gault's attorney filed a petition for a writ of habeas corpus alleging numerous due process violations, including failure to provide the juvenile's family with notice of the charges, failure to provide the defendant with an opportunity to retain counsel, and failure to provide the juvenile with the right against self-incrimination and an opportunity for appellate review.[62] The Court held that in juvenile proceedings, "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'"[63] The Court further held that because a juvenile proceeding has the potential to result in loss of liberty and is comparable to an adult felony proceeding, the

52. *See id.* at 554-56.
53. *See* 18 U.S.C. § 5031 (1994)).
54. *See Kent*, 383 U.S. at 553.
55. *Id.* at 555.
56. *See id.* at 554; 1999 Report, *supra* note 27, at 90.
57. *Kent*, 383 U.S. at 556.
58. *See id.* at 561-62.
59. 387 U.S. 1 (1967).
60. *See id.* at 4.
61. *See id.* at 7.
62. *See id.* at 10.
63. *Id.* at 33 (citing National Crime Comm'n Report 87).

juvenile should benefit from the expertise of counsel.[64] The Court also ruled that juveniles have the right to exercise the Fifth Amendment privilege against self–incrimination,[65] and that a juvenile has a right to confront and cross-examine witnesses.[66] The Court in effect rejected the doctrine of *parens patriae*, describing the concept as "murky and of dubious historical relevance."[67]

Gault extended many significant due process protections to juveniles. In writing for the Court, Justice Fortas stated:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.... The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[68]

The *Gault* decision shifted judicial attention toward determining guilt or innocence, thereby focusing juvenile courts on punishment-oriented remedies.[69] The Court's recognition of a juvenile's right against self-incrimination increased the similarity between juvenile and adult criminal proceedings.[70]

In *In re Winship*,[71] the Court further pushed juvenile court proceedings in a punishment-oriented direction when it mandated that delinquency be proven "beyond a reasonable doubt." Samuel Winship had stolen $112 from a woman's purse and was adjudicated delinquent by a New York State court.[72] At the time of the trial, New York juvenile courts operated under a preponderance of the evidence standard.[73] Winship's counsel argued that Winship was entitled to proof of guilt beyond a reasonable doubt and that use of the preponderance standard was constitutional error.[74] The Supreme Court concluded that "reasonable doubt" is the appropriate standard for delinquency proceedings.[75] In applying such a strict standard, the

64. *See id.* at 36. To this end, the Court noted that "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.*
65. *See id.* at 55.
66. *See id.* at 56-57.
67. *See* 1999 Report, *supra* note 27, at 90.
68. *Gault*, 387 U.S. at 18-19.
69. *See* Feld, *Legislative Changes*, *supra* note 13, at 478.
70. *See id.* at 479; *supra* notes 13-23 and accompanying text.
71. 397 U.S. 358 (1970).
72. *See id.* at 359-60.
73. *See id.* at 360.
74. *See id.* at 359.
75. *See id.* at 368.

Court elevated due process requirements in juvenile proceedings to the status of adult criminal trials[76] and effectively minimized the importance of a distinct system of rehabilitation for juveniles.

Finally, in *Breed v. Jones*,[77] the Court ruled that it is unconstitutional to subject a child to a criminal trial after that child is adjudicated delinquent in juvenile court. Gary Jones was adjudicated delinquent for armed robbery at the age of seventeen.[78] At his dispositional hearing, the judge waived jurisdiction to criminal court.[79] Jones then filed a petition for a writ of habeas corpus arguing that he had "already been placed once in jeopardy and convicted of the offense charged" and that the further transfer proceedings violated the double jeopardy clause of the Fifth Amendment as applied to the states through the due process clause of the Fourteenth Amendment.[80] The Supreme Court held that trying a juvenile in both juvenile and criminal court did in fact violate the double jeopardy clause.[81]

These Supreme Court decisions of the 1960s and 1970s transformed the structure and processes of the juvenile justice system. Implementing due process guarantees diminished the rehabilitative nature of the juvenile system, replacing it with a more traditional adversarial model designed to protect the constitutional rights of minor defendants. The implementation of due process marked the failure of the *parens patriae* scheme to adequately serve the best interests of juvenile offenders.[82]

In addition to the Supreme Court, contemporary commentators, reacting to a growing juvenile crime rate, also acknowledged the failure of the rehabilitative system.[83] Programs were analyzed and findings were grim. The Cambridge-Somerville Youth Study, for example, conducted between 1936 and 1945, utilized interviews, psychiatric evaluations, and psychological tests to identify 750 boys likely to become delinquent.[84] Three hundred and twenty five of the boys were placed in a group that received individual counseling and family guidance, tutoring, recreational activities, medical treatment, and even financial assistance.[85] The other 325 were placed in a group

76. *See* Yeckel, *supra* note 35, at 341-42.
77. 421 U.S. 519 (1975).
78. *See id.* at 521-22.
79. *See id.* at 523-24.
80. *Id.* at 525-26. The double jeopardy clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.
81. *See Breed*, 421 U.S. at 541.
82. For a discussion of the breakdown of *parens patriae*, see *supra* notes 41-79 and accompanying text.
83. *See* LaMar T. Empey, American Delinquency: Its Meaning and Construction 374-75 (1982).
84. *See id.* at 380.
85. *See id.*

where no such support was rendered.[86] Thirty years after the implementation of the program, the boys who received services had, on average, higher crime rates and less occupational success than those who were left alone.[87] The Cambridge-Somerville Youth Study was one of many rehabilitative treatment programs that proved to be ineffective in controlling juvenile crime.[88]

The failure of the rehabilitative system to effectively reduce the juvenile crime problem in America led lawmakers to turn in a more punitive direction. Retributive philosophers argued that the rehabilitation system was too lenient and had broken down juvenile respect for authority.[89] They urged legislatures to adopt a more disciplinary approach to juvenile justice,[90] advocating reforms such as: (1) lowering the age of accountability for crime; (2) punishing and incapacitating offenders; and (3) abolishing the juvenile court.[91] These calls for reform in the 1960s and 1970s, together with the Supreme Court's due process holdings, increased juvenile crime rates, and the demonstrated failures of the rehabilitative approach led state legislatures to enact increasingly tougher procedural laws. For example, by the end of 1997, forty-seven states and the District of Columbia had modified or removed traditional juvenile confidentiality provisions.[92] By 1995, twenty-one states had amended legislation to allow prosecutors, law enforcement and social agencies, schools, victims, or the public access to a juvenile's records. Additional legislative reforms, including permitting the fingerprinting of juveniles, releasing a juvenile's identity, and in certain instances conducting open hearings, further reflect the punitive trend in the justice system.[93]

Statutory purpose clauses also indicate the shift from a rehabilitative to a punitive system of justice for juveniles. The purpose of the first juvenile court in Illinois reflected the initial rehabilitative mandate:

> [T]o secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of

86. *See id.*

87. *See id.*; *see also* Klempner and Parker, *supra* note 11, at 261 ("[A]s early as 1940, in the Cambridge-Somerville Youth Study, the clinical case-work approach to delinquency was shown to be unworkable."). *But see* Richard J. Lundman, Prevention and Control of Juvenile Delinquency 42 (1984) ("The Cambridge-Somerville Youth Study was clearly compromised by teachers who refused to single out juveniles headed for trouble with the law and by World War II.").

88. *See* Empey, *supra* note 83, at 380.

89. *See id.* at 383.

90. *See id.*

91. *Id.*

92. *See* 1999 Report, *supra* note 27, at 101.

93. *See* Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: 1997 Update on Violence 29 (1997) [hereinafter, 1997 Update].

> the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should be given by his parents....[94]

The Illinois statute emphasized protection of the individual child. It stressed concern for the juvenile over concern for the safety of society, reflecting the progressive notion that delinquency was caused by external environmental factors for which the juvenile was not primarily responsible. This purpose clause was used by many states in their early juvenile justice legislation.[95]

Over the past decade, more than ten state legislatures have amended the purpose clauses in their juvenile justice statutes.[96] These revisions have shifted the purpose of juvenile courts from rehabilitation and juvenile protection to public safety and individual accountability.[97] The current Florida statute, for example, states that "[I]t is the policy of the state with respect to juvenile justice and delinquency prevention to first protect the public from acts of delinquency."[98] Florida recognizes the public's need for protection and places the needs of society above those of the individual juvenile.[99] Other states have similarly revised juvenile justice purpose-clauses to include phrases such as "[h]old juveniles accountable for criminal behavior," "[p]rovide effective deterrents," "[p]rotect the public from criminal activity," and "[i]mpose punishment consistent with the seriousness of the crime."[100]

Notwithstanding the surge in punitive legislation, the distinct juvenile system and its rehabilitative goals have not completely disappeared. The Supreme Court in *McKeiver v. Pennsylvania*[101] held that the Fourteenth Amendment does not require jury trials in juvenile court.[102] The Court refused to extend due process guarantees to include trial by jury by determining that the applicable

94. Feld, *Punishment*, *supra* note 22, at 841 (citing Ill. Ann. Stat. Ch. 37, 701-02 (Smith-Hurd 1972)).

95. *See id.*

96. *See id.* at 842.

97. *See id.*

98. Fla. Stat. Ann. § 985.02(3) (West Supp. 1999).

99. *See also* Cal. Welf. & Inst. Code § 202 (West 1997-98) ("The purpose of this chapter is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court....").

100. *See* 1999 Report, *supra* note 27, at 89. The 1999 Report stated that as of 1997, Arkansas, Georgia, Hawaii, Illinois, Iowa, Louisiana, Michigan, Missouri, and Rhode Island emphasize punishment as the philosophical goal behind their juvenile justice systems. *See id.* at 87.

101. 403 U.S. 528 (1971).

102. *See id.* at 545.

"fundamental fairness" standard requires only "accurate factfinding."[103] The Court's decision prevented the juvenile system from merging wholesale into a highly structured and procedurally driven criminal court, thereby maintaining all that is left of the progressive model. Nonetheless, the overall shift in focus in the juvenile justice system has spawned debate over the future of juvenile justice in America, with some arguing for its complete abolition. The next section explores this debate.

B. *The Debate Between Abolition and Reform*

There are two predominant schools of thought that take opposing positions on the future of the American juvenile justice system. One school believes that abolishing the juvenile court or implementing strict punitive reform is the answer to the problem of violent juvenile crime. The second school argues that a separate system for juveniles is an integral part of treating delinquency and that it is possible to incorporate both rehabilitation and punishment into an effective system of juvenile justice.

1. Abolish the Juvenile Court

Proponents of punitive juvenile justice argue that rehabilitation programs have overwhelmingly failed, and point to rapidly increasing juvenile crime rates for support.[104] They maintain that there is no proof that rehabilitation programs or the juvenile court system have ever been effective.[105] Abolitionists argue that an independent juvenile court is no longer necessary because it amounts to no more than a criminal court with lesser procedural protections.[106] They thus perceive the criminal system as a more effective institution for handling juvenile offenders.[107]

Professor Feld has suggested, and others agree, that punishment and rehabilitation cannot coexist.[108] A punishment-oriented philosophy views the offender as morally responsible for his or her actions, and holds that the offender deserves sanctions appropriate to

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103. *See id.* at 543.

104. *See* Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, Kan. J.L. & Pub. Pol'y, Fall 1995, at 135, 139 ("Rehabilitation has not been shown to have any predictably beneficial effect."); Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 Wis. L. Rev. 375, 397 (1996) ("[R]eformers who advocate the abolition of a separate system for juveniles . . . regard the promise of the juvenile court to rehabilitate as an empty one, never fulfilled in the past and unattainable in the future . . . .").

105. *See* Melli, *supra* note 104, at 397.

106. *See* Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 Vand. L. Rev. 479, 492 (1995).

107. *See* Melli, *supra* note 104, at 397.

108. *See* Feld, *Punishment*, *supra* note 22, at 833.

his or her past offenses.[109] A rehabilitative philosophy, on the other hand, views external circumstances as the cause of delinquent behavior, thus focusing on the possible treatment methods available to change the child's future behavior.[110] Because of the fundamental incongruity between these approaches, Professor Feld believes that the juvenile court should be collapsed into the criminal system.[111] This philosophy supports Justice Fortas's concern that juveniles receive the worst of both worlds in juvenile court: minimal procedural protections and ineffective treatment programs.[112]

Professor Feld maintains that the juvenile court system was doomed from the start because it combines social welfare with penal social control functions.[113] He argues that social welfare is a societal responsibility and not a judicial one.[114] Courts have no control over the resources they need to effectively manage juvenile delinquency, and in practice, crime control considerations come before a juvenile's individual welfare.[115] Professor Feld has proposed that states "uncouple social welfare from social control" and allow the criminal court to try juvenile offenders.[116]

In *In re Gault*,[117] Justice Stewart also expressed the view that punishment and rehabilitation are mutually exclusive goals.[118] "[A] juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other

109. *See id.*

110. *See* Sheffer, *supra* note 106, at 493.

111. *See id.* at 493-94.

112. *See* Kent v. United States, 383 U.S. 541, 556 (1966); *supra* notes 46-58 and accompanying text. Professor Feld has implied, however, that the common law infancy defense would serve as a protective vehicle for juveniles prosecuted in criminal court. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 724 (1991) [hereinafter Feld, *Transformation*]. The common law infancy defense states that children between the ages of seven and fourteen are presumably incapable of committing criminal offenses. *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. Rev. 503, 505 (1984). Professor Walkover points to the Washington criminal code to illustrate the age variations associated with the defense. The Washington Code codifies the infancy defense but reduces the maximum applicable age limit to twelve. *See id.* at 505 n.8. The code states that "[c]hildren under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong." Wash. Rev. Code Ann. § 9A.04.050 (1975).

113. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 Minn. L. Rev. 327, 381 (1999) [hereinafter Feld, *Race*].

114. *See id.*

115. *See id.*

116. *Id.* at 383.

117. 387 U.S. 1 (1967).

118. *See id.* at 79 (Stewart, J., dissenting); *see supra* notes 59-66 and accompanying text.

is conviction and punishment for a criminal act."[119] Justice Stewart did not consider the possibility of combining rehabilitative and punitive principles to reform the juvenile justice system.

2. Maintain a Separate System for Juvenile Justice

Proponents for retaining the juvenile justice system argue that the system should incorporate a balance between the modern punitive trend and the traditional rehabilitative approach to confronting delinquent behavior.[120] Under this approach, the juvenile court remains an important institution even with the shift in emphasis. These theorists argue that punitive reforms have not been effective in reducing juvenile crime rates or controlling the delinquency problem in America.[121]

Even though judicial decisions and legislative amendments often *formally* reject retribution as the primary goal of the juvenile justice system, recent reforms stress a "get tough" punitive approach to juvenile crime.[122] Proponents of a "just desserts" standard believe in the punishment of juveniles according to past behavior and the nature of the alleged offense.[123] Critics argue that such an approach fails to consider the individual and his likelihood for successful rehabilitation. Juvenile offenders in similar situations are sanctioned equally on the basis of "objective and legally relevant characteristics such as seriousness of offense, culpability, or criminal history."[124] "Get tough" legislation does not address the juvenile's individual circumstances, the consequences of placing youths in adult correctional facilities, or the quality and effectiveness of the programs available to them.[125]

Contrary to current belief, the rehabilitation model was not completely unsuccessful. The lack of statistical evidence of success indicates that reformers were so committed to protecting juveniles from the harsh conditions of the criminal court that they failed to thoroughly research which rehabilitation programs showed promise and which were destined to fail. When the system proved ineffective, legislatures opted to abandon it. There were, however, several promising programs that showed varying rates of success. The Sacramento County Diversion Project, for example, had moderate

119. 387 U.S. at 79 (Stewart, J., dissenting).
120. *See* Sheffer, *supra* note 106, at 506-10.
121. *See* Forst & Blomquist, *supra* note 16, at 361-63.
122. *See* Sheffer, *supra* note 106, at 481. For an explanation of the "get tough" punitive approach, *see* Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 Fordham L. Rev. 3109, 3120-23 (1999).
123. *See* Feld, *Punishment*, *supra* note 22, at 836.
124. *Id.*
125. *See* Feld, *Legislative Changes*, *supra* note 13, at 519.

success rates. The project was created in 1970 to determine whether short-term family crisis therapy would prevent delinquency.[126] Special training of deputy probation officers using crisis-intervention skills replaced overnight detention and referral to juvenile court.[127] Only 13.9% of the juveniles subject to diversion intake were detained overnight compared to 55.5% of the juveniles processed through regular intake.[128] Additionally, only 3.7% of the program's targets ended up in juvenile court, compared to 19.8% of the regular probation intake.[129] Though the program was only moderately successful, it did slightly reduce recidivism rates.[130] Thorough research and scrutiny of additional prevention and intervention programs will aid the juvenile system in formulating effective treatment plans.

Several states have successfully implemented serious and habitual juvenile offender statutes (SHJOs). These statutes create multi-agency programs that combine an initial detention period with intensive supervision and services designed to rehabilitate and reintegrate the juvenile back into society.[131] The success of a few initial SHJOs indicates that the goal of a mixed punitive and rehabilitative treatment plan is not an impossible one to achieve.[132]

In addition, Professor Rosenberg of the University of Houston Law Center, a staunch supporter of preserving the juvenile justice system, argues that abolitionists such as Professor Feld overstate the disparity of procedural protections between the juvenile and adult justice systems.[133] Professor Rosenberg argues that abolitionists idealize the degree to which procedural due process functions in adult criminal court.[134] She concludes that maintaining a juvenile system is imperative because adult courts will not adequately consider youth and immaturity in determining guilt.[135]

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126. *See* Lundman, *supra* note 87, at 84-86.
127. *See id.* at 86.
128. *See id.* at 89.
129. *See id.*
130. *See id.* at 90. Follow-up programs, however, were unsuccessful. Lundman points out an evaluation flaw in the study: "Most of the experimental subjects involved in the Sacramento County Diversion Project were exposed to a multiple-treatment package consisting of three distinct elements: (1) no overnight detention; (2) no referral to juvenile court; and (3) crisis intervention and family crisis counseling." *Id.* at 95. Lundman indicates that the multi-treatment package makes it impossible to determine whether the modest success rate was the result of the lack of overnight detention, less contact with the juvenile court, short-term crisis intervention, or any combination of these factors. Consequently, he points out that while follow–up programs failed, there is good reason to probe deeper into the preventive philosophies. *See id* at 95-96.
131. *See* Sheffer, *supra* note 106, at 510.
132. *See id.*
133. *See* Irene Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 Wis. L. Rev. 163, 165-66 (1993).
134. *See id.* at 173.
135. *See id.* at 175-85.

Finally, psychological research indicates that juveniles move through developmental stages of cognitive functioning with respect to legal reasoning, internalization of societal expectations, and ethical decision-making.[136] By the time a juvenile reaches the age of fourteen, he has acquired most of the moral values and reasoning capacity that will guide his adult behavior.[137] If a fourteen-year-old knows right from wrong, then he may possess the requisite mens rea to be convicted of a criminal offense.[138] But a psychological analysis must not stop there. Developmental psychologists have found that, where a juvenile has an awareness of right and wrong, he may still be less capable than an adult of making moral distinctions or sound judgments.[139] Juveniles have less of a capacity to appreciate the consequences of their actions than do adults.[140] Juveniles, especially during their adolescent years, are more impulsive, more vulnerable, and less self-disciplined than most adults.[141] Juveniles also have a lesser capacity to control their conduct and to think in long-range terms than do adults.[142] Crimes committed by children may be just as harmful to victims as those committed by adults, but they arguably deserve different consequences.[143]

Notwithstanding the current movement toward a more punitive system of juvenile justice, juvenile court caseloads are increasing and juvenile crime is becoming more violent.[144] Because the strictly

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136. *See* Feld, *Legislative Changes*, *supra* note 13, at 523-24. (citing J. Piaget, The Moral Judgment of the Child (1932); Kohlberg, *Stage and Sequence: The Cognitive Developmental Approach to Socialization*, *in* Handbook of Socialization Theory and Research 347 (D. Goslin ed., 1969); Tapp & Kohlberg, *Developing Senses of Law and Legal Justice*, *in* Law, Justice, and the Individual in Society 90 (J. Tapp & F. Levine eds., 1977); Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 Stan. L. Rev. 1 (1974)).

137. *See id.* at 523-24. (citing Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 Vita Humana 11, 16 (1963)).

138. *See id.* at 524 (citing J. Hall, General Principles of Criminal Law 212-22 (2d ed. 1960)).

139. *See id.* at 525.

140. *See id.*

141. *See id.* (citing Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 56 (1978)).

142. *See id.* (citing Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 56 (1978)). Professor Feld notes:

> [T]he crimes of juveniles are seldom their fault alone; society shares at least some of the blame for their offenses as a result of juveniles' limited opportunities to learn to make correct choices. Indeed, even though the ability to make responsible choices is learned behavior, the dependent status of juveniles systematically deprives them of opportunities to learn to be responsible. Finally, even if a youth is aware of the abstract criminal prohibition, juveniles are more susceptible to peer group influences and group process dynamics than are their older counterparts.

Id. at 526 (citations omitted).

143. *See id.* at 525.

144. *See* 1999 Report, *supra* note 27, at 144. "Juvenile court caseloads increased

rehabilitative approach to delinquency was unsuccessful, and the strictly punitive approach is also failing, the answer may lie in striking a balance between these competing theories in order to optimize deterrence and rehabilitation.[145] Proponents of maintaining a distinct system of juvenile justice thus urge legislatures to incorporate successful rehabilitation programs in addition to adding punitive sanctions.[146]

The practical application of these warring theories is reflected in juvenile transfer proceedings. The next part discusses the role of waiver provisions throughout the history of the juvenile court and outlines the structure and processes of juvenile cases in the federal juvenile justice system. It then presents federal courts' competing interpretations of "prior delinquency records" in determining whether to transfer juveniles to adult status in the interest of justice.

II. JUDICIAL WAIVER: INCONSISTENT FEDERAL APPROACHES TO DETERMINING JURISDICTION

This part defines the waiver provisions that allow judges to transfer juveniles to adult status. It then analyzes the federal transfer provision, contained in 18 U.S.C. § 5032, and explains the process by which a juvenile becomes subject to criminal prosecution in federal court. This part then discusses the differing definitions that federal district court judges apply when considering a juvenile's prior delinquency record in the context of juvenile waiver hearings.

A. *The Transfer of Juveniles to Adult Status and the Impact of Punitive Reform*

Since its inception, the juvenile justice system has provided for "waiver" of juveniles to adult criminal jurisdiction. Transferring young offenders charged with serious crimes to criminal courts served initially as a "safety valve" that helped insulate juvenile court systems from public and political criticisms that they "coddled" juveniles charged with highly visible or violent crimes.[147] Ten states had transfer provisions in place prior to the 1920s.[148] By 1940, another ten states had added such provisions. Today, every juvenile justice system

49% between 1987 and 1996. The juvenile population increased only 11% in that time." *Id.* Additionally, there was a 100% increase in person offenses within the same time span. *See id.*

145. *See* Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 Conn. L. Rev. 57, 59-60 (1992); Rosenberg, *supra* note 133, at 165-66.

146. *See* Rosenberg, *supra* note 134, at 165-66.

147. Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 Law & Ineq. J. 73, 82-83 (1995).

148. *See* 1997 Update, *supra* note 93, at 29.

includes a transfer provision of some kind.[149]

Transferring a juvenile to adult status is a sentencing decision that represents a choice between the punitive disposition of criminal court and the rehabilitative disposition of juvenile court.[150] Juvenile courts traditionally assigned fundamental importance to individualized treatment, while criminal systems accord greater significance to the seriousness of the alleged offense and proportional punishment.[151] Studies have shown that the consequences of transfer may be drastic. As of 1995, forty-two jurisdictions required or permitted juveniles waived to adult status to be transferred from juvenile detention facilities to adult jails pending trial.[152] In some of these states, juveniles are not separated from the adult criminal population even though they have yet to be convicted of any offense.[153] In addition, juveniles transferred to adult status often receive harsher sentences than do adults in the same jurisdiction. In 1994, the average prison sentence of juveniles waived to adult status and convicted of a felony was nine-and-a-half years.[154] The average sentence for adults convicted of the same crimes was five-and-three-quarter years.[155]

Statistics reveal that juveniles transferred to adult court and housed in adult prisons are five times more likely to become victims of sexual assault and at least 50% more likely to be attacked with a weapon than those juveniles housed in rehabilitation facilities.[156] Additionally, counseling programs and efforts to improve family relations are rated much lower in adult facilities than in juvenile detention centers.[157] A 1987 study revealed that upon release, juveniles incarcerated in adult facilities had higher rates of re-arrest, committed more serious re-arrest offenses, and were re-arrested more promptly than those housed in juvenile facilities.[158]

Juvenile institutions, on the other hand, make rehabilitation their primary purpose.[159] Though public institutions vary from state to state, they are generally located in rural areas and have a campus-style layout.[160] Housing is generally broken down into cottage units that create small groups for professionals to work with.[161] Nearly all delinquency institutions include group or individual counseling,

149. *See id.*
150. *See* Feld, *Legislative Changes*, *supra* note 13, at 487.
151. *See id.* at 487-88.
152. *See* Robert E. Shepherd, Jr., *The Rush to Waive Children to Adult Court*, 10 Criminal Justice 39, 41 (1995).
153. *See id.*
154. *See* 1999 Report, *supra* note 27, at 178.
155. *See id.*
156. *See* Shepherd, *supra* note 152, at 42.
157. *See id.*
158. *See* 1999 Report, *supra* note 27, at 182.
159. *See* Siegal & Senna, *supra* note 24, at 450.
160. *See id.* at 448.
161. *See id.*

educational and vocational training, recreational programs, and religious counseling.[162] Thus, placement in an adult rather than a juvenile facility can have a profound impact on an inmate's intellectual and psychological development, and even on his personal safety.[163]

The most common form of juvenile transfer is judicial waiver, a practice employed in almost every jurisdiction.[164] Most state waiver statutes authorize discretionary transfer based on a juvenile court judge's assessment of a youth's "amenability to treatment" or "dangerousness."[165] Most commonly, a prosecutor makes the decision to move for a waiver hearing.[166] As guaranteed by *Kent v. United States*,[167] the juvenile has a right to a formal hearing to determine whether he or she is a candidate for adult jurisdiction. Judges are typically instructed to consider the offender's age, the seriousness of the offense charged, any prior delinquency record, clinical evaluations, and treatment prognoses.[168] After weighing and balancing all of these factors, juvenile court judges determine whether the individual juvenile has the potential to be rehabilitated. If it is

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162. *See id.* at 450.

163. There are a small number of states, however, that continue to incarcerate juveniles in isolated sections of adult prisons. *See id.* at 448. Other types of juvenile sentences include probation, restitution, group homes, and foster care. *See id.* at 418-34.

164. *See* Brenda Gordon, Note, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 Ariz. L. Rev. 193, 204-05 (1999). There are three methods that states use to transfer juveniles to adult status: (1) judicial waiver; (2) prosecutorial waiver or concurrent jurisdiction; and (3) statutory or legislative exclusion. *See* 1999 Report, *supra* note 27, at 102. Judicial waiver gives the judge discretionary authority to determine the juvenile's amenability to treatment. *See id.* at 103. Prosecutorial waiver permits the prosecutor to file the case in either criminal or juvenile court. *See id.* at 102. The practice of statutory exclusion excludes certain juvenile offenders from the jurisdiction of the juvenile court. *See id.*

165. Podkopacz & Feld, *supra* note 147, at 83.

166. *See, e.g.*, Hidalgo v. Texas, 983 S.W.2d 746, 748 (Tex. Crim. App. 1999) (stating that the government moved to transfer the juvenile defendant to adult status); State of New Jersey in the Interest of A.L., 638 A.2d 814, 816 (N.J. Sup. Ct. 1994) (same); *In re* Ralph M., 559 A.2d 179, 183 (Conn. 1989) (same); *In re* E.H., 276 S.E.2d 557, 561 (W. Va. 1981) (same).

167. 383 U.S. 541 (1966); *see also supra* notes 46-58 and accompanying text.

168. *See* Podkopacz & Feld, *supra* note 147, at 83. The District of Columbia statute, for example, provides that a judge should consider:

> (1) the child's age; (2) the nature of the present offense and the extent and nature of the child's prior delinquency record; (3) the child's mental condition; (4) the child's response to past treatment efforts including whether the child has absconded from the legal custody of the Mayor or a juvenile institution; (5) the techniques, facilities, and personnel for rehabilitation available to the Division and to the court that would have jurisdiction after transfer; and (6) [t]he potential rehabilitative effect on the child of providing parenting classes or family counseling for one or more member's of the child's family or for the child's caregiver or guardian.

D.C. Code Ann. § 16-2307(e) (1981).

determined that the juvenile is a threat to public safety and that state rehabilitation programs will likely be ineffective, the judge will often waive the juvenile to adult status. The decision is thus a fact-specific determination subject to the education and expertise of the presiding judge.

Over the past decade, the use of judicial waiver provisions has changed, signaling America's movement toward a more punitive system for juveniles.[169] Between 1985 and 1994, for example, the number of cases judicially waived increased by 71%,[170] and the proportion of younger juveniles transferred to criminal court jurisdiction also increased dramatically.[171] Between 1992 and 1995, forty-one states passed laws making it easier to transfer juveniles to adult status.[172] This is likely the result of laws that lower the minimum age for transfer or exclude older juveniles charged with specified crimes from juvenile jurisdiction altogether.[173] Some states have relaxed the government's burden of proof in transfer hearings, thereby making transfer more probable.[174] Additional trends in recent amendments include expanding the list of crimes eligible for waiver and prior-record provisions that make repeat offenders eligible for waiver under certain circumstances.[175] A number of states provide that once a juvenile is waived to adult status, he or she will thereafter be tried as an adult for any subsequent offenses.[176] Furthermore, nine states have enacted "presumptive waiver" provisions that require the juvenile to prove his or her eligibility for rehabilitation in order to remain in juvenile court.[177]

The federal transfer provision, governed by 18 U.S.C. § 5032,[178] functions similarly to the state waiver laws. Because federal juvenile proceedings are less common than state proceedings, there is minimal binding authority on interpreting the federal transfer provision.[179] The federal justice system has no distinct juvenile court, no judges exclusively educated in the problems associated with juvenile delinquency, and no specialized probation officers.[180] In determining

169. *See* 1999 Report, *supra* note 27, at 170.

170. *See* 1997 Update, *supra* note 93, at 31. During the same time period, delinquency cases increased 41%. *See id.*

171. *See id.*

172. *See id.* at 30.

173. *See id.*

174. *See* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol., Pub. Pol'y & L. 3, 5 (1997).

175. *See* 1997 Update, *supra* note 93, at 30.

176. *See* 1999 Report, *supra* note 27, at 103.

177. *See* 1997 Update, *supra* note 93, at 30; *see also supra* note 164 for a discussion of the three forms of waiver provisions.

178. *See* 18 U.S.C § 5032 (1994).

179. *See* United States v. TLW, 925 F. Supp. 1398, 1400 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).

180. *See* Johnson, *supra* note 28, § 18.01. Additionally, the Federal Bureau of

whether waiver is suitable, district court judges are expected to determine the best interests of a juvenile defendant using only the guidelines provided by statute.

In 1974, Congress amended federal juvenile legislation to include many of the Supreme Court-mandated due process guarantees.[181] Thus, when a district court judge tries a juvenile offender as a juvenile, protections such as the right to counsel are afforded. The Juvenile Justice and Delinquency Prevention Act (JJDPA)[182] amended the FJDA[183] by requiring judicial approval before prosecuting a juvenile as an adult, restricting the number of offenses for which a juvenile can be tried as an adult, and stripping federal courts of unlimited criminal juvenile jurisdiction.[184] This amendment created a more structured federal juvenile justice system and attempted to limit the number of cases transferred to adult status. The Congressional Declaration of Purpose and Policy, contained in 42 U.S.C. § 5602, states that the purpose of the JJDPA is to aid state and local governments in improving the administration of their juvenile justice systems.[185] The JJDPA "reflects a legislative perception that accused juvenile offenders generally belong in the hands of state authorities,"[186] which offer specialized courts, judges, and rehabilitation facilities to meet the special needs of a convicted child.

The general philosophy behind the federal juvenile justice system reflects individualized treatment.[187] District courts exercising jurisdiction over a juvenile must strike a balance between providing

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Prisons has no distinct juvenile facilities. *See* United States v. Dion L., 19 F. Supp. 2d 1224, 1227 (D.N.M. 1998). The federal government is forced to contract with state and private juvenile facilities that provide counseling and rehabilitation services. *See id.* Unfortunately, "juveniles are often assigned depending on where space is then available" and there is no guarantee that they will be incarcerated conveniently for family members. *Id.*

181. *See supra* notes 46-81 and accompanying text.

182. *See* 18 U.S.C. §§ 5031-5042 (1976)).

183. *See supra* notes 29-31 and accompanying text.

184. *See* 18 U.S.C. § 5032 (1994); Yeckel, *supra* note 35, at 339. The purpose of the JJDPA is to prevent juvenile offenders from suffering the stigma of adult criminal prosecution and to encourage treatment and rehabilitation. *See* United States v. Doe, 94 F.3d 532, 536 (9th Cir. 1996); United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990). Congress later amended the JJDPA when it passed the Comprehensive Crime Control Act of 1984. *See* Pub. L. No. 98-473, 98 Stat. 764 (1984) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.). Responding to the growing number of violent crimes committed by juveniles, the Act increased the number of offenses for which a juvenile could be tried as an adult. *See id.* Additionally, the Act imposes mandatory adult status under certain circumstances. *See* 18 U.S.C. § 5032 (1994).

185. *See* 42 U.S.C. § 5602 (1994).

186. United States v. Chambers, 944 F.2d 1253, 1258 (6th Cir. 1991).

187. *See, e.g.*, United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990) ("The purpose of the federal juvenile delinquency proceeding is to . . . encourage treatment and rehabilitation."); United States v. Dion L., 19 F. Supp. 2d 1224, 1227 (D.N.M. 1998) ("The purpose of the Federal Juvenile Delinquency Act is to remove juveniles from the ordinary criminal process and to encourage treatment and rehabilitation." (citations omitted)).

rehabilitation for juvenile offenders and protecting society from dangerous individuals.[188] While sanctions exist for "anti-social acts,"[189] a juvenile with rehabilitative potential (as determined by the district court judge) within the period of minority should generally remain in the juvenile system.[190] If there is no realistic chance of rehabilitation, the balance tips in favor of prosecution as an adult criminal.[191]

The JJDPA limited federal jurisdiction over a juvenile[192] and delineated three possibilities under which a juvenile may be tried as an adult in federal court: (1) the juvenile consents;[193] (2) the juvenile falls under the umbrella of a mandatory transfer provision;[194] or (3) the Attorney General requests criminal jurisdiction in "the interest of justice" where the juvenile is charged with a violent felony or specified drug offense.[195] Transfer "in the interest of justice" is permissible only where the juvenile allegedly committed a crime of violence or an enumerated narcotics offense.[196] It is the "interest of justice" transfer

188. *See* United States v. Doe, 871 F.2d 1248, 1253 (5th Cir. 1989); United States v. Alexander, 695 F.2d 398, 401 (9th Cir. 1982); United States v. TLW, 925 F. Supp. 1398, 1401 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).

189. *See TLW*, 925 F. Supp. at 1401; United States v. E.K., 471 F. Supp. 924, 932 (D. Or. 1979).

190. *See, e.g.*, United States v. Doe, 94 F.3d 532, 536 (9th Cir. 1996) (stating that the purpose of the juvenile justice system is to encourage the treatment and rehabilitation of juvenile defendants); United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990) (same).

191. *See Doe*, 871 F.2d at 1253; *Alexander*, 695 F.2d at 401.

192. *See* 18 U.S.C. § 5032 (1994). The statute provides for three situations in which a prosecutor may invoke federal jurisdiction over a juvenile: (1) a state lacks or refuses to assert jurisdiction over the juvenile offender; (2) state programs do not meet the needs of the juvenile; or (3) certain specified offenses are charged and there is a substantial federal interest in the case. *See id.*

193. *See id.* A juvenile might request transfer because he believes that he will receive a lighter sentence under adult criminal standards. This is especially true in a case where the juvenile believes he will benefit from a jury trial, as there is no constitutional right to trial by jury in juvenile court. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545-46 (1971).

194. *See* 18 U.S.C. § 5032. Paragraph four of section 5032 mandates transfer when a juvenile 16 years of age or older commits a violent act that would be considered a felony if committed by an adult, and the juvenile has previously been convicted of a delinquent act that would be considered a felony if the juvenile had reached the age of majority. *See id.*

195. *See id.* Paragraph four of section 5032 states that a juvenile 15 years of age or older who has committed a violent act that would be deemed a felony if committed by an adult, or committed an act that falls under the umbrella of specified sections of the Controlled Substances Act, may be proceeded against in a criminal prosecution initiated by the Attorney General in a motion to transfer the juvenile to adult status in the interest of justice. *See id.* The federal system does not dramatically differ from many of the state systems. Most states, like the federal legislation, have a combination of transfer provisions. *See* 1999 Report, *supra* note 27, at 102. Fourteen states have mandatory transfer provisions and 46 have discretionary waiver statutes. *See id.* A growing number of states, however, have no minimum age requirement for waiver. *See id.* at 104.

196. *See* 18 U.S.C. § 5032.

prong that is the focus of this Note.

The vagueness of the "interest of justice" transfer provision has raised interpretative difficulties for the courts and there is sparse legislative history to guide them.[197] To aid courts in defining what is in "the interest of justice," Congress has delineated six factors for district court judges to consider when assessing an individual case for transfer:

> the age and social background of the juvenile; the nature of the alleged offense; *the extent and nature of the juvenile's prior delinquency record*; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; [and] the availability of programs designed to treat the juvenile's behavioral problems.[198]

Section 5032 further instructs judges to consider whether the juvenile played a leadership role in the criminal activity and whether the juvenile's offense involved controlled substances or the use of a firearm.[199] If these factors are present in the given disposition, they should weigh in favor of transfer to adult status.[200]

Unfortunately, applying section 5032's balancing test is rarely an easy task.[201] In *United States v. TLW*,[202] for example, the district court applied each of the six factors in determining that the nature of TLW's alleged offenses warranted transfer.[203] TLW allegedly distributed crack and cocaine on four separate occasions and on one of those occasions possessed a gun,[204] indicating that he had the capacity for violence.[205] The court's analysis of the age and social background of the juvenile revealed the instability of TLW's home life and led the court to determine that the juvenile had rehabilitative

197. *See* United States v. TLW, 925 F. Supp. 1398, 1400 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998); *see also* United States v. Brian N., 900 F.2d 218, 221 (10th Cir. 1990) (stating that section 5032's legislative history "is scant and capable of differing interpretations"). Attacks on section 5032's constitutional validity have proven fruitless, *see, e.g.*, United States v. J.D., 525 F. Supp. 101, 104 (S.D.N.Y. 1981) (holding that section 5032 is not unconstitutionally vague), leaving courts with a federal statutory provision that is far from precise and is open to varying degrees of interpretation. *See* 18 U.S.C. § 5032; United States v. Doe, 871 F.2d 1248, 1252 (5th Cir. 1989); United States v. Hemmer, 729 F.2d 10, 18 (1st Cir. 1984); United States v. Alexander, 695 F.2d 398, 400 (9th Cir. 1982); *TLW*, 925 F. Supp. at 1400.

198. 18 U.S.C. § 5032 (emphasis added).

199. *See id.*

200. *See id.*

201. *See, e.g.*, United States v. Anthony Y., 172 F.3d 1249, 1252 (10th Cir. 1999) (stating that the decision to transfer a juvenile to adult status is often a difficult one); *TLW*, 925 F. Supp. at 1404 ("[S]triking the balance between rehabilitation, protection, and punishment is not easy. . . .").

202. 925 F. Supp. 1398 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998); *see also supra* notes 2-8 and accompanying text for a discussion of the facts of the case.

203. *See id.* at 1403.

204. *See id.*

205. *See id.*

potential pending a change of environment.[206] In its analysis of TLW's prior delinquency record, the court considered charges filed against the juvenile for eighteen prior offenses ranging from aggravated battery to traffic violations.[207] TLW, however, had only been convicted of minor traffic offenses.[208] The court found that this factor weighed both ways because, "[o]n one side, there is a pattern of violence beginning at a very young age. On the other side, there is the fact that TLW has never been convicted of a serious offense."[209] As to intellectual development and psychological maturity, the court found that TLW was manipulative, but of a low average intellectual ability.[210] The court concluded that TLW's immaturity would not preclude rehabilitation.[211] TLW showed no evidence of any failed prior attempts at treatment, and therefore this prong weighed in favor of TLW's treatment as a juvenile.[212] Finally, the court found that there were available treatment programs to accommodate TLW.[213] The court concluded, based on the totality of the circumstances, that determining the appropriateness of transfer was a difficult task. Nonetheless, TLW was waived to adult status in the interest of justice.[214]

TLW's case illustrates the lack of precision with which section 5032 is applied and the enormous case-by-case discretion practiced in federal waiver proceedings. Additionally, *TLW* hints at the potential unfairness of the federal transfer statute's application to juveniles capable of rehabilitation. Courts' differing interpretations of a juvenile's prior delinquency record, one of section 5032's factors, is an area of special contention and is vulnerable to judicial misapplication and abuse.

B. *Competing Definitions of a Juvenile's Prior Delinquency Record*

While legislative amendments have added crimes for which a juvenile may be waived to adult jurisdiction in the interest of justice,[215] no objective standard for federal judicial waiver has been delineated. Though due process guarantees have made the juvenile system less discretionary, district court judges maintain an enormous amount of control over which juveniles are tried as adults.[216] Judges subjectively

206. *See id.* at 1402.
207. *See id.* at 1403.
208. *See id.*
209. *Id.* at 1404.
210. *See id.*
211. *See id.*
212. *See id.*
213. *See id.*
214. *See id.*
215. *See supra* note 184 and accompanying text.
216. *See, e.g.*, United States v. I.D.P., 102 F.3d 507, 514 (11th Cir. 1996) ("The decision whether to transfer a juvenile to trial as an adult under section 5032 is within

weigh and balance section 5032's factors in order to determine the most appropriate jurisdiction for juvenile offenders. The lack of legislative guidance beyond the mere listing of the six factors, however, can lead to disingenuous reasoning or misinterpretation.

Prior delinquency records, one of the six statutory factors that district court judges are instructed to consider under section 5032, have never been clearly defined in the history of the federal juvenile justice system. Courts have thus been unable to agree on a uniform definition of a juvenile's prior delinquency record, and have generally utilized their transfer discretion by defining that record in one of two ways: some define the record solely by prior adjudicated conduct, while others define a juvenile's prior delinquency record to include all prior police contacts.[217] Consequently, differing definitions of a juvenile's prior delinquency record may result in different outcomes for similarly situated offenders.

1. Juvenile's Prior Delinquency Record Consists Solely of Adjudicated Conduct

Courts holding that a juvenile's prior delinquency record consists solely of adjudicated conduct consider only prior convictions when assessing whether transfer would be in the interest of justice. Advocates for this position, more often defendants than prosecutors, reason that when prior unadjudicated conduct is admitted, there is a risk that the trial judge will presume that the juvenile had indeed committed the offense. They further argue that this risk violates due process.[218] Notwithstanding the presumption of guilt for the alleged offense for purposes of the transfer hearing, there is no such presumption applicable to allegations of past conduct.[219] Proponents of this position believe that holding juveniles accountable for unadjudicated conduct violates due process because a juvenile has no opportunity to present a defense on his behalf, and should be deemed innocent for failure to be proven guilty.[220] Absent adjudication on the merits, there is no way to accurately determine whether the juvenile committed the prior delinquent act and judges may be biased by its inclusion. Consequently, a court cannot reliably determine the appropriateness of transfer based on unadjudicated incidents.

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the sound discretion of the trial court provided the court makes findings as to the criteria outlined in the Act.").

217. *See* United States v. Anthony Y., 172 F.3d 1249, 1253 (10th Cir. 1999).

218. *See* United States v. Juvenile LWO, 160 F.3d 1179, 1183 (8th Cir. 1998).

219. *See* United States v. Leon, 132 F.3d 583, 589-90 (10th Cir. 1997) (stating that "the court may assume the truth of the government's allegations regarding the defendant's commission of [the] crime" for purposes of a transfer hearing).

220. *See Survey of Recent Cases*, 47 U. Kan. L. Rev. 937, 971 (1999) (stating that the right to present a defense is fundamental).

In *United States v. Juvenile LWO*,[221] the Eighth Circuit confronted the issue of whether a district court could consider evidence of arrests that fail to result in convictions when determining a juvenile's transfer status.[222] Juvenile LWO allegedly shot a woman with a rifle that he stole from her trailer.[223] He was charged with assault with a dangerous weapon, assault resulting in serious bodily injury, first-degree burglary, and use of a firearm in the commission of a felony.[224] LWO had previously been arrested for public intoxication.[225] His tribal record listed additional offenses including profanity, assault, and resisting lawful arrest. None of these offenses had been adjudicated.[226] LWO's tribal court record also included convictions for malicious mischief, intoxication, spousal abuse, resisting arrest, and driver's license violations.[227] The district court took LWO's prior unadjudicated conduct into consideration and decided to transfer him to adult status in the interest of justice.[228]

The Eighth Circuit remanded the case and held that "it is erroneous for a district court to consider evidence of incidents or behavior for which there has been . . . no conviction. . . . Such evidence may be considered in analyzing the other . . . factors."[229] The court stated that "the plain language of the term 'the juvenile's prior *delinquency record*' cannot plausibly be interpreted . . . to encompass evidence of conduct which has not been adjudicated or admitted to be *delinquent* or *criminal*."[230] The court reasoned that the provision is unambiguous and that district courts exceed their statutory authorization when they consider crimes charged without a resulting conviction under the "prior delinquency record" prong.[231]

Similarly, in *United States v. Jarrett*,[232] the Seventh Circuit held that arrests that do not result in convictions are not part of the "juvenile court records" that the government is required to submit under section 5032.[233] In *Jarrett*, seventeen-year-old Jamie Key was transferred to adult status in the interest of justice and convicted of

221. 160 F.3d 1179 (8th Cir. 1998).
222. *See id.* at 1182-83.
223. *See id.* at 1180-81.
224. *See id.* at 1181.
225. *See id.*
226. *See id.*
227. *See id.*
228. *See id.* at 1180.
229. *See id.* at 1184. The other factors that the court referred to were: (1) "the juvenile's present intellectual development and psychological maturity," (2) "the age and social background of the juvenile," and (3) "the nature of past treatment efforts and the juvenile's response to such efforts." *Id.* at 1183.
230. *Id.* at 1183 (emphasis in original).
231. *See id.*
232. 133 F.3d 519 (7th Cir. 1998), *cert. denied*, 523 U.S. 1112 (1998).
233. *See id.* at 537.

ten counts of possessing heroin with intent to distribute.[234] Key had previously been arrested for criminal trespass to a vehicle, trespass to state land, battery, aggravated sexual assault, possession of cannabis, mob action, and heroin possession.[235] None of these arrests resulted in convictions.[236] The Seventh Circuit held that a juvenile's prior delinquency record is comprised solely of adjudicated conduct that resulted in conviction and therefore the district court was correct in not considering Key's past arrests when determining the suitability of transfer.[237] The Seventh Circuit did, however, determine that the district court's decision to waive Key to adult criminal status was not an abuse of discretion because the determination was based on the totality of the circumstances.[238]

In general criminal law vernacular, "criminal records" refer to prior offenses that resulted in convictions. The ordinary meaning of "records" would thus support this camp's viewpoint. Section 5032, however, refers to "delinquency records," rather than "criminal records." It therefore remains ambiguous whether delinquency refers to adjudicated findings of guilt, or extends to records of arrests, intake, and treatment. By analogizing "delinquency records" to "criminal records," one could argue that delinquency refers to "convictions" for delinquent behavior in the juvenile court system. Because a juvenile's prior delinquency record is a fundamental element in determining transfer under section 5032, courts holding that such a record is comprised only of adjudicated conduct argue that the federal transfer statute would have incorporated a more specific definition if courts were meant to consider all prior police contacts.[239] This view, however, is challenged by those who maintain that the juvenile system should be and continues to be individualistic and treatment-oriented. Those taking a broader view of "records" believe that counsel should be able to paint the most complete picture possible of the minor defendant so that the district court judge can make an informed jurisdictional determination.

2. Prior Delinquency Records Consist of all Prior Police Contacts

Advocates for considering all of a juvenile's prior police contacts in determining the suitability of transfer to adult status maintain that all juvenile interaction with law enforcement has the potential to educate a district court judge as to a child's criminal tendencies.[240] All prior

234. *See id.* at 527.
235. *See id.* at 537.
236. *See id.*
237. *See id.*
238. *See id.*
239. *See* United States v. Juvenile LWO, 160 F.3d 1179, 1183-84 (8th Cir. 1998).
240. *See* United States v. Wilson, 149 F.3d 610, 611-12 (7th Cir. 1998); United States v. John Doe #1, No. 98 CR 438, 1999 WL 642828, at *4 n.5 (S.D.N.Y. Aug. 23,

police contacts include charges, arrests, and convictions documented by law enforcement officials. Courts taking this position have held that district court judges, in conducting transfer hearings, should limit their review to the record itself and not inquire into the circumstances surrounding the alleged prior offenses.[241] These courts indicate that it is improper to litigate the merits of a previous arrest in the context of a transfer hearing.[242] Thus, even those espousing a broader reading of "prior delinquency records" limit their analysis to written police and court reports.

In *United States v. Wilson*,[243] for example, the Seventh Circuit discussed the scope of a juvenile's prior delinquency record when it reviewed the district court's decision in *United States v. TLW*.[244] Wilson was sixteen-years-old when he was charged with three counts of distributing cocaine and one count of distributing crack.[245] The district court held a transfer hearing in response to the government's motion to try Wilson as an adult.[246] The district court considered Wilson's prior delinquency record in determining that Wilson should be transferred to adult status.[247] Wilson's record, however, was void of convictions for any serious offenses.[248] Wilson had been charged with, but never convicted of, more than eighteen separate offenses including aggravated battery.[249] Other than being placed under court supervision for traffic offenses, however, Wilson had never been subject to court-ordered punishment.[250]

Wilson's counsel argued that the court could not consider arrests that did not result in convictions.[251] The Government argued that Wilson's prior delinquency record consisted of all prior police contacts, not solely adjudicated conduct.[252] The court concluded that the juvenile's entire record could be considered so long as review was limited to the record itself, but gave no support for its reasoning.[253] The government was, therefore, not permitted to present evidence in

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1999); United States v. TLW, 925 F. Supp. 1398, 1404 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).

241. *See Wilson*, 149 F.3d at 611-13; *John Doe #1*, 1999 WL 642828 at *4 n.5.

242. *See TLW*, 925 F. Supp. at 1404.

243. 149 F.3d 610 (7th Cir. 1998).

244. 925 F. Supp 1398 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998); *see supra* notes 202-14 and accompanying text; *see also supra* notes 2-8 and accompanying text for a more complete description of the facts of the case.

245. *See Wilson*, 149 F.3d at 611.

246. *See id.*

247. *See id.*

248. *See id.* at 611-12.

249. *See TLW*, 925 F. Supp. at 1403.

250. *See id.*

251. *See id.*

252. *See id.*

253. *See Wilson*, 149 F.3d at 612; *TLW*, 925 F. Supp. at 1404.

connection with previous arrests.[254] The Seventh Circuit later reviewed and affirmed the district court's transfer order.[255]

Statutory ambiguity aside, interpreting prior delinquency records to refer solely to convictions can truncate a transfer inquiry and in many instances defeat the purpose of careful review. State statutory definitions of a juvenile's prior delinquency record lend support to the argument that despite the ambiguous drafting of section 5032, federal courts should consider all prior bad acts, and that the term "delinquency record" should not be used interchangeably with "criminal record." Arizona legislation, for example, delineates criteria for juvenile court judges to consider in discretionary transfer hearings.[256] The statute provides in pertinent part: "the record and previous history of the child, including previous *contacts* with juvenile courts and law enforcement agencies in this and other jurisdictions, prior periods of probation in any court and their results, and any prior commitments to juvenile residential placements and secure institutions."[257] The Arizona legislature drafted this provision with specificity and seemingly intended juvenile court judges to consider every relevant aspect of the juvenile's prior delinquency record in determining whether transfer is appropriate.[258]

Those courts that define a juvenile's prior delinquency record to include all prior police contacts maintain that the more information a court has on an individual juvenile, the more informed the jurisdictional decision will be. An individual's case may be greatly influenced by the court's defining criteria. For example, if a court chooses to limit its review to adjudicated conduct, there is less chance that the juvenile will be transferred. The same juvenile in a court that incorporates prior police contacts into its prior-record review may be transferred based on findings of violent tendencies or recurring anti-social behavior. The lack of uniformity in the federal approach to

254. *See Wilson*, 149 F.3d at 612.

255. *See id.* at 614.

256. *See* 17B A.R.S. Juv. Court. Rules of Proc., Rule 14(c) (1970).

257. *See id.* (emphasis added). The Virginia provision instructs judges to consider "the record and previous history of the juvenile in this or other jurisdictions, including... the number and nature of previous *contacts* with juvenile or circuit courts...." Va. Code Ann. § 16.1-269.1 (1999) (emphasis added). Florida's statute similarly instructs juvenile courts to consider previous "*contacts*" with governmental departments and judicial institutions. *See* Fla. Stat. Ann. § 985.226 (West Supp. 2000) (emphasis added); *see also* Az. St. Juv. Ct. Rule 14 ("[T]he record and previous history of the child, including previous contacts with juvenile courts and law enforcement agencies."). *But see, e.g.*, Del. Code Ann. Tit. 10, § 1010 (1999) (stating that the juvenile court is directed to consider "[w]hether the child has been convicted of any prior criminal offense... or... [w]hether the child has previously been subjected to any form of correctional treatment by the Family Court").

258. The Eighth Circuit's argument that Congress's intent was unambiguous in *United States v. Juvenile LWO* was unpersuasive. Comparing 18 U.S.C. § 5032 to Arizona's juvenile transfer provision signifies that the federal provision is far from determinative.

judicial waiver thus results in different dispositional outcomes for similarly situated offenders. "Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public,"[259] and therefore may result in violations of due process. In response to this disparate treatment, the next part proposes the adoption of a uniform definition of a juvenile's prior delinquency record that can be applied to all federal juvenile waiver hearings.

III. PRIOR DELINQUENCY RECORDS AND THE FUTURE OF AMERICAN JUVENILE JUSTICE

This part proposes a temporary solution to the inconsistent definitions that federal judges apply to a juvenile's prior delinquency record in juvenile waiver hearings. It urges federal courts to incorporate all prior police contacts into their interpretation of "prior delinquency records" under 18 U.S.C. § 5032, and furthermore to allow attorneys to present contextual information about those prior contacts. This part also urges Congress to adopt more effective juvenile justice legislation by providing courts with detailed transfer criteria. It then analyzes pending federal legislation pertaining to juvenile crime and determines why specific proposed reforms are inadequate to meet the demanding needs of our juvenile justice system. Finally, it concludes by discussing interim remedies available to state and federal governments that can improve the efficiency and fairness of their juvenile justice systems.

A. *Adoption of a Uniform Definition That Includes all Prior Police Contacts*

Section 5032 instructs federal district court judges to consider a juvenile's prior delinquency record in determining whether a juvenile should be waived to adult status, but fails to define either "prior delinquency" or "record." Courts have interpreted this provision in differing ways: some considering only adjudicated conduct resulting in conviction and others considering all prior police contacts. The lack of a uniform standard for determining suitability of waiver results in the disparate treatment of similarly situated offenders, violating constitutional notions of due process.[260] In addition, formulating a more narrow view of prior delinquency records can serve to defeat Congressional intent to limit transfer to only those juveniles deemed unlikely to benefit from juvenile rehabilitation programs. The interpretative problem is starkly apparent in two recent Seventh

259. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3228-29.

260. *See id.*

Circuit decisions. In *United States v. Jarrett*,[261] the court held that a juvenile's record consists solely of adjudicated conduct.[262] In *United States v. Wilson*,[263] decided six months later, the same circuit held that a juvenile's prior delinquency record consists of all prior bad acts.[264] These contradictory findings illustrate the pressing need for a uniform definition of a juvenile's prior delinquency record.

Courts should adopt a definition of a juvenile's prior delinquency record that includes all prior police contacts. Courts that currently apply this definition do not go far enough because they limit their review of prior police contacts to the record itself in order to prevent attorneys from litigating the merits of prior alleged offenses in the context of a waiver hearing.[265] In doing so, courts substantially limit their ability to develop a comprehensive understanding of the juvenile defendant and therefore decrease the chances of accurately identifying which juveniles are appropriate candidates for rehabilitation. Courts should allow attorneys to present information about prior unadjudicated conduct where necessary. For example, if a juvenile has a prior arrest for selling drugs, a defense attorney should be allowed to illustrate that the child's father runs a drug-dealing operation and forced his son to participate. This information is relevant in determining whether the juvenile is a threat to public safety or whether he is a victim of environmental circumstance. Likewise, a prosecutor should be allowed to establish, for the purposes of transfer, that a juvenile is especially culpable, such as where he was the ring-leader of a prior conspiracy to deal drugs. This contextual analysis does not seek to litigate the merits of the prior police contacts, but rather provides the necessary background for a district court judge to determine the most appropriate jurisdiction over the juvenile. In addition, allowing a contextual analysis can cut both ways, at times assisting the juvenile defendant and at other times assisting the prosecutor.

Considering the juvenile's entire delinquency record in context will aid courts in determining whether an individual poses a threat to public safety. By limiting the scope of review to adjudicated conduct, courts minimize the likelihood of accurately identifying the child's developmental necessities and deficiencies. In *United States v. TLW*,[266] for example, the court noted that TLW had been charged with at least eighteen prior offenses, many of which were never

261. 133 F.3d 519 (7th Cir. 1998), *cert. denied*, 523 U.S. 1112 (1998); *supra* notes 232-38 and accompanying text.

262. *See Jarrett*, 133 F.3d at 537.

263. 149 F.3d 610 (7th Cir. 1998); *supra* notes 241-55 and accompanying text.

264. *See Wilson*, 149 F.3d at 612-13.

265. *See id.* at 611-12; United States v. John Doe #1, No. 98 CR 438, 1999 WL 642828, at *7 n.5 (S.D.N.Y. Aug. 23, 1999).

266. 925 F. Supp. 1398 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998); *see supra* notes 2-8 and accompanying text.

adjudicated.[267] TLW had only been subject to court-ordered punishment for traffic offenses.[268] The court held that it could consider arrests and charges that did not result in convictions when determining whether TLW was an appropriate candidate for transfer.[269] Without considering these prior police contacts, the district court would have been unable to assess the danger that TLW truly posed to society. Regardless of whether the discretionary decision to transfer TLW was right or wrong, it is apparent that both the judge and the juvenile can benefit from the presentation of additional information.

Limiting the scope of review to adjudicated conduct forces courts to develop mechanisms to evade legislated standards. For example, in *United States v. Anthony Y.*,[270] the court pointed out:

> Even if we limited Anthony Y.'s prior delinquency to the three adjudicated offenses, the additional conduct considered by the district court was relevant to several of the other statutory factors, like 'the age and social background of the juvenile,' 'the juvenile's present intellectual development and psychological maturity,' or 'the nature of past treatment efforts and the juvenile's response to such efforts.' . . . '[T]he plain language of those terms is broad enough to authorize the admission of evidence regarding almost any action, criminal or otherwise, the juvenile has taken,' as long as it is relevant.[271]

The court thus found a way to admit all prior police contacts even though it was unsure of whether they were admissible as part of the juvenile's prior delinquency record.[272] The Eighth Circuit used similar reasoning in *United States v. Juvenile LWO*[273] when it held that unadjudicated conduct should be considered in the context of the other factors delineated by section 5032.[274]

The purpose of the federal juvenile system is to rehabilitate juveniles amenable to treatment and to determine an individual child's best interests.[275] Though there is little legislative history on the subject, it seems evident on a basic level that Congress would not have delineated specific criteria for district court judges to consider if it intended that courts merge the categories into each other or

267. *See id.* at 1403.
268. *See id.*
269. *See id.* at 1404.
270. 172 F.3d 1249 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 228 (1999).
271. *Id.* at 1253 (citation omitted).
272. The District of Oregon followed the *Anthony Y.* approach in *United States v. One Juvenile Male*, 51 F. Supp. 2d 1094, 1096-97 (D. Or. 1999). The court stated that the statutory factors are broad enough to cover any of the juvenile's relevant previous conduct. *See id.* at 1097.
273. 160 F.3d 1179 (8th Cir. 1998); *see supra* notes 221-31 and accompanying text.
274. *See LWO*, 160 F.3d at 1184.
275. *See* Kent v. United States, 383 U.S. 541, 554 (1966).

manipulate their definitions.[276] If, for example, a juvenile shot a perfect stranger but was never prosecuted, it would be difficult for a court to find that the action was part of the juvenile's "social background." If the social background category includes blatantly delinquent acts, there is no need for a juvenile's prior delinquency record to be independently reviewed.[277] In addition to the argument of textual explicitness, section 5032's delineation of separate criteria argues against judicial manipulation of the categories in order to reach an intellectually dishonest result. Whether intended or not, judicial aggression in making up the content of the criteria leads to inconsistent analyses and allows judges to skew a transfer decision in the direction they personally favor.

Although states have historically incorporated transfer provisions into their juvenile justice statutes,[278] waiver was originally intended to be a last resort for juvenile delinquents.[279] In both the federal and state systems, the rehabilitative orientation of juvenile courts still indicates that judges should not transfer juveniles with signs of rehabilitative potential to adult status.[280] Waiver has not proven to be the answer to the juvenile crime problem in America, as higher juvenile transfer rates have failed to result in a decrease in juvenile crime.[281] Connecticut, for example, has one of the nation's highest transfer rates, and yet it has nearly the same juvenile homicide rate as Colorado, which has a transfer rate of nearly zero.[282] Between 1989 and 1993, the number of juveniles transferred to adult status increased by 41% nationwide.[283] Despite the increased transfer rate, juvenile homicide arrests in major cities across the nation continue to increase.[284]

In addition, more juveniles are transferred for non-violent crimes than for violent ones.[285] This illustrates that the transfer process does not isolate those juveniles who pose the most severe threat to society. In order for a punitive system to be effective, it must be able to identify those individuals who require severe punishment. Allowing

276. *See* United States v. TLW, 925 F. Supp. 1398, 1400 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).

277. It would be equally inappropriate to consider prior delinquency under "present intellectual development" or "nature of past treatment" prongs.

278. *See supra* Part II.A.

279. *See* Shephard, *supra* note 152, at 39.

280. *See id.*

281. The Juvenile homicide arrest rates come from the FBI. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics–1991 tbl. 4.4 (Timothy Flanagan & Kathleen Maguire eds., 1992).

282. *See id.*

283. *See id.*

284. *See* U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: A National Report* (Aug. 1995).

285. *See* U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1996 Update on Violence* (Feb. 1996).

courts to consider all of a juvenile's prior police contacts will aid judges in determining whether there is hope for treatment. District court judges should be looking to minimize unnecessary transfers and effectively pinpoint those individuals who pose an irreversible threat to society.

Notwithstanding the nation's shift from a rehabilitative to a punitive system of juvenile justice,[286] courts should determine eligibility for transfer carefully. Carefully considering the methods by which juveniles are transferred to adult status is of special importance in light of increasing crime rates and the correlative failures of the transfer process. Currently, the number of younger and more immature juveniles transferred to adult status is rapidly increasing as a result of punitive reform.[287] As of 1995, twelve states had no minimum age for criminal prosecution.[288] Between 1984 and 1990, the number of juveniles annually admitted to adult prisons under state law increased by 30%.[289] As of 1995, forty-two states required or permitted juveniles transferred to adult status to be placed in an adult jail pending trial.[290] Thus, although the individual juvenile has yet to be convicted of the alleged offense, he or she is exposed to an environment proven to be injurious to adolescent development.[291] Statistics reveal that juveniles in adult prisons are five times more likely to be victims of sexual assault, 50% more likely to be attacked with a weapon, and twice as likely to be beaten by prison personnel than juveniles housed in youth facilities.[292] Courts should therefore consider a juvenile's prior delinquency record in its entirety and pay careful attention to the context of prior alleged offenses before subjecting the juvenile offender to the harsher adult environment.

Legislative changes in waiver statutes that lower the age requirement for transfer and expand the list of offenses for which a juvenile can be transferred shift the focus of district courts to the juvenile's prior delinquency record.[293] When assessing the record based solely on adjudicated conduct, courts enforce the new punitive developments of the juvenile court by placing less emphasis on the individual juvenile. Because the punitive system alone will not solve the growing juvenile crime rate,[294] it is important to use the prior

286. *See supra* Part I.

287. *See* Eric Lotke, National Center on Institutions and Alternatives, *An Analysis of Juvenile Homicides: Where they Occur and the Effectiveness of Adult Court Intervention* 1 (1996); Grisso, *supra* note 174, at 5. This increase is placing a strain on an already overcrowded criminal court system. *See* Lotke, *supra*, at 1.

288. Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. Rev. 1037, 1044 (1995).

289. *See* Shepherd, *supra* note 152, at 40.

290. *See id.* at 41-42.

291. *See id.*

292. *See id.* at 42.

293. *See* 1999 Report, *supra* note 27, at 89.

294. *See* Forst & Blomquist, *supra* note 16, at 324, 361-62.

delinquency record in a more traditional manner. Courts should consider all prior police contacts to determine whether the juvenile poses a threat to public safety and whether the system should abandon efforts toward rehabilitation. Considering the context of prior events will lead to a more complete picture of the juvenile's needs and future prospects.

In order to prevent courts from construing the statute in an unintended manner, Congress should revise section 5032 to include a uniform definition of a juvenile's prior delinquency record, and that definition should include all prior police contacts.[295] Furthermore, the government and the defense attorney should be permitted to research the circumstances surrounding prior alleged offenses. In implementing these standards, the court will gain a better understanding of the individual juvenile and will therefore be in a position to more accurately determine the child's best interests. District court judges will be less likely to transfer juveniles with rehabilitative potential, and the system will consequently conform to the standard set forth in the JJDPA's purpose clause.[296]

Admittedly, administrative problems exist with respect to requiring more information on each case that moves through the system. Because the time of both prosecutors and defense attorneys is in high demand and funding is limited, they may not be able to thoroughly investigate a juvenile's prior conduct. In addition, lengthy presentations of evidence and witnesses will result in court backlog if transfer proceedings are turned into mini-trials of each prior police contact.[297] Additional mechanisms, therefore, must be implemented to provide for efficient accumulation and presentation of information. While courts can limit the time that attorneys have to brief and argue circumstances of prior contacts, a more systemic solution would be to establish a reporting system at each juvenile intake. When taken into custody, juveniles could be screened by a prosecutor who determines

295. Congressional revision should not stop here. The entire juvenile justice waiver provision should be revamped to provided district court judges with more detailed criteria for determining jurisdiction.

296. *See supra* note 185 and accompanying text. Defining a juvenile's prior delinquency record to include all prior police contacts will also make the juvenile justice system more effective. Transcripts of waiver hearings will include more accurate information on the juvenile defendant because district court judges will conduct a thorough review of past conduct. Though proceedings are often confidential, a defendant's name and any other identifying criteria can be redacted. If there is more accurate information on juvenile delinquents available for review, legislatures, and juvenile justice organizations will have more comprehensive materials with which to develop and implement new programs. Agencies will be more effective in pinpointing where, why, and how juveniles become delinquent.

297. *See* United States v. Wilson, 149 F.3d 610, 613 (7th Cir. 1998); United States v. John Doe #1, No. 98 CR 438, 1999 WL 642828, at *7 n.5 (S.D.N.Y. Aug. 23, 1999); United States v. TLW, 925 F. Supp. 1398, 1404 (C.D. Ill. 1996), *aff'd sub nom.*, United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).

whether to file charges. That prosecutor would then write up an informational report describing the circumstances of the arrest and the prosecutor's reasons for either pursuing or dismissing charges. This intake report could then be placed into the juvenile's file or, ideally, entered into a national database. When an attorney begins defending or prosecuting a juvenile in a subsequent waiver hearing, detailed information about the individual's prior police contacts will then be available to facilitate a contextual analysis.

In keeping with Congressional intent to construct a juvenile justice system that balances rehabilitative treatment with penal sanctions,[298] defining a juvenile's prior delinquency record to include all prior police contacts will create a more uniform process by which to treat juvenile offenders. In addition, allowing counsel to present a contextual analysis of a juvenile's prior delinquency record will result in a more just and effective approach to transfer because juveniles who appear amenable to rehabilitation will remain in the juvenile system, and those deserving harsher sanctions will be punished accordingly. This contextual consideration need not and should not result in litigation of the merits of prior incidents. Implementing the proposed intake system to identify those juveniles who are truly appropriate for waiver will also facilitate identification of those transfers that are truly in "the interest of justice." Careful screening will ultimately minimize the number of juveniles who are unjustly prosecuted as adults.

B. *The Future of Juvenile Justice*

In 1997, 2.8 million juveniles were arrested, accounting for one in every five arrests made across the country.[299] Juvenile crime is in the news, in our communities, in our schools, and for some of us, in our homes. The long-term solution to juvenile crime in America falls outside the scope of law enforcement agencies.[300] "It requires strengthening those basic institutions—the family, schools, religious institutions, and community groups—that are responsible for instilling values and creating law-abiding citizens."[301] In the meantime, juvenile justice systems require extensive reform. We must strike a balance between punishing juvenile offenders and treating those juveniles who are candidates for rehabilitation. Legislators must revise their

298. *See, e.g.*, United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990) ("The purpose of the federal juvenile delinquency proceeding is to . . . encourage treatment and rehabilitation."); United States v. Dion L., 19 F. Supp. 2d 1224, 1227 (D.N.M. 1998) ("The purpose of the Federal Juvenile Delinquency Act . . . is to remove juveniles from the ordinary criminal process and to encourage treatment and rehabilitation.").

299. *See* 1999 Report, *supra* note 27, at 115-16.

300. *See* William P. Barr, *Recommendations to Strengthen Criminal Justice as it Relates to Juveniles* (on file with the *Fordham Law Review*).

301. *Id.*

budgets to make effective rehabilitation programs available to juvenile offenders. State and federal governments should also instruct juvenile justice organizations to develop delinquency prevention programs based on already existing prediction studies. This will yield effective mechanisms for early childhood intervention. Finally, judges conducting juvenile court proceedings should hear from expert sociologists and psychologists, and should be required to take continuing legal education classes on issues pertaining to juvenile justice. These reforms will ensure a better future for America's youth.

While the federal juvenile justice system remains primarily rehabilitative,[302] pending legislation proposes to implement increased punitive changes. The proposed Violent and Repeat Offender Accountability and Rehabilitation Act of 1999,[303] for example, authorizes juveniles fourteen years of age or older to be tried as adults in federal court with the consent of the U.S. Attorney. The bill proposes that Congress adopt a reverse waiver provision, similar to legislation currently in effect in twenty-three states.[304] This provision prohibits a court from mandating *juvenile* jurisdiction unless a juvenile establishes by clear and convincing evidence that trying him in juvenile court is in the interest of justice.[305] Additionally, the bill proposes that violent juvenile offenders be held separately from non-violent juveniles. The proposal also requires the Department of Justice to establish an Office of Juvenile Crime Control and Prevention that will, among other things, set forth incentives and standards for states to formulate prevention programs for at-risk youths.[306]

This proposed bill is problematic in several respects. First, while the bill attempts to create prevention and intervention programs, it does not account for the difficulties previously encountered in establishing effective treatment plans. It fails to specify prediction work that can accurately identify at-risk youths and the treatments that they need. Additionally, reverse waiver provisions are harsh jurisdictional requirements that place the burden on the juvenile to establish amenability to treatment. This burden shift does not abandon the discretionary transfer process, yet the proposal fails to more clearly define waiver criteria. Consequently, the provision does not solve the problems that district court judges face under current federal law as discussed in this Note. Finally, the proposed reforms are bundled with controversial gun legislation.[307] The country cannot

302. *See* United States v. Doe, 94 F.3d 532, 536 (9th Cir. 1996).
303. *See* Violent and Repeat Offender Accountability and Rehabilitation Act of 1999, H.R. 1501, 106th Cong.
304. *See* 1999 Report, *supra* note 27, at 102.
305. *See* H.R. 1501, 106th Cong. (1999).
306. *See id.*
307. *See id.*

wait for Congress to agree on appropriate standards for the control and distribution of firearms. Juveniles are in trouble and the system merits immediate attention.

Recent studies indicate that post-adjudication intervention can be effective if programs are designed correctly. Based on meta-analysis, "a quantitative technique for coding, analyzing, and summarizing research evidence," researchers have delineated criteria that comprise effective treatment programs.[308] Specific service types, the appropriate role of the juvenile justice system, frequency and duration of treatment, and characteristics of the participating juveniles are all important considerations in designing effective rehabilitation plans.[309] Meta-analysis illustrates the potential for future reform and supports the argument for maintaining a juvenile system of justice with increased resources aimed at rehabilitating young offenders.

While statistics show that courts are beginning to waive more violent offenders, there remain a large number of non-violent offenders prosecuted as adults.[310] It is difficult to reconcile the waiver of non-violent cases with the maintenance of a juvenile court system,[311] because many property, drug, and public order offenders likely have rehabilitative potential.[312] Limited resources, impatience, and budget restraints, however, make programs unavailable to young offenders.[313] Consequently, transfer decisions may be a reflection of economic considerations.[314] Legislatures should consider revising local and federal budgets to allocate funds toward more effective

308. Mark. W. Lipsey, *Can Rehabilitation Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 Va. J. Soc. Pol'y & L. 611, 613 (1999).

309. *See id.* at 632-34. Lipsey's study reveals:

(1) The most effective service types included probation in the form of supervision, counseling and restitution programs; aftercare in the form of intensive supervision; community-based, school-sponsored, counseling, academic, and service brokerage programs.

(2) The most effective role of the juvenile justice system embodied three or more of the following characteristics: Services were generally not delivered from a law enforcement facility; juveniles participating in the program were referred by a juvenile law enforcement agency and attendance was mandatory; services were administered by juvenile justice personnel instead of teachers, school administrators, psychiatrists or lay person; the program was sponsored by a juvenile justice agency.

(3) The most effective programs had at least three of the following characteristics: a minimum of 18 weeks in duration; distinct periodic treatment sessions; a minimum of five hours per week of treatment; no uncontrolled variation in treatment delivery.

(4) Juveniles with two of the following characteristics were more amenable to treatment: over 15 years of age; predominantly not a status offender; predominantly not a property offender. *See id.*

310. *See* Jeffrey A. Butts, Office of Juvenile Justice and Delinquency Prevention Fact Sheet #52, *Delinquency Cases Waived to Criminal Court* (Feb. 1997).

311. *See* Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 Wis. L. Rev. 447, 486 (1996).

312. *See id.*

313. *See id.*

314. *See id.*

treatment programs.

Prediction studies have also proven to accurately pin-point at-risk juveniles.[315] Investigators have found that certain characteristics of the child are powerful predictors of future antisocial behavior.[316] Early childhood factors commonly associated with delinquent behavior include low socioeconomic status, neighborhoods associated with violence and social disorganization, parental criminality and substance abuse, low cognitive ability, and exposure to media violence.[317] Intervention programs designed around these factors focus on minimizing their effect, and can prevent later delinquent behavior.[318] Successful early childhood intervention programs have led to the following advantages for program participants: improved educational processes and outcomes for the child; increased emotional and cognitive development; improved parent-child relationships; decreased criminal activity; and enhanced economic self-sufficiency, initially for the parent and later for the child.[319] If legislatures focus their attention on younger children, they may be able to prevent the onslaught of future delinquency.

Finally, one of the juvenile system's primary aims must be to prevent delinquents from becoming adult criminals. By considering all personal and social characteristics without assigning a single factor controlling significance, individualized justice relies heavily on the discretion of juvenile court administrators.[320] Without incorporating principles of psychology and sociology, there is little chance that courts will be able to determine the best interests of the juvenile. In addition, juvenile and district court judges should be required to take continuing legal education courses in sociological or psychological juvenile development.

The future of juvenile justice requires us to incorporate both punitive and rehabilitative mechanisms into state and federal systems. Neither punishment nor rehabilitation alone have proven effective. Legislatures must create effective rehabilitation programs based on meta-analysis that will treat post-adjudication juveniles. Greater emphasis should be placed on prediction studies and on early childhood intervention programs in order to minimize the number of

315. *See* Jennifer L. White et. al., *How Early Can We Tell?: Predictors of Childhood Conduct Disorder and Adolescent Delinquency*, 28 Criminology 507 (1990).

316. *See id.*

317. *See* Richard E. Tremblay & Wendy M. Craig, *Developmental Crime Prevention*, 19 Crime & Just. 151, 158 (1995); Jane Watson, *Crime and Juvenile Delinquency: Time for Early Childhood Intervention*, 2 Geo. J. on Fighting Poverty 245, 248 (1995).

318. *See id.*

319. *See* Peter W. Greenwood, Office of Juvenile Justice and Delinquency Prevention Fact Sheet #94, *Costs and Benefits of Early Childhood Intervention* (Feb. 1999).

320. *See* Feld, *Legislative Changes*, *supra* note 13, at 485-86.

juveniles that end up in the justice system. Additionally, juvenile court judges should have access to expert assistance and should be required to take continuing legal education classes in order to understand the needs of juvenile defendants. This is especially true in the federal system where district court judges have no formal training on delinquency issues.

CONCLUSION

The primary goal of the juvenile justice system should be the prevention of juvenile crime. Prediction work and early intervention programs will effectively minimize the number of children who grow up to be juvenile delinquents. Law enforcement agencies must not, however, give up on today's youth. We must strike a balance between rehabilitative and punitive approaches to adjudicating juvenile crime. We should learn from the past and develop rehabilitation programs with the potential to effectively treat juvenile offenders. Simultaneously, we must ensure that the system is taken seriously and that sanctions are meted out in proportion to the delinquent acts committed.

Part of this federal reform means that transfer proceedings should be conducted based on uniform, fair criteria. When juveniles are inappropriately transferred to adult status they may become subject to the harsh conditions of adult prisons. Juveniles become prey in a system characterized by sexual assault, physical abuse, and higher recidivism rates. Absent Congressional amendment, federal courts should adopt a uniform definition of a juvenile's prior delinquency record to include all prior police contacts. This definition will provide a consistent standard to apply to similarly situated offenders and prevent inappropriate transfer wherever possible. Furthermore, federal courts should permit both prosecutors and defense attorneys to present a contextual analysis of those prior contacts to aid in a more thoughtful and just waiver decision. While a contextual analysis increases the subjectivity of the judge's transfer decision, it allows for a more equitable determination that will further the rehabilitative goals of the federal juvenile justice system.

To ease the administrative pressures that these requirements will create, an "intake-prosecutor" should be assigned to each police station. This individual can evaluate cases as they are brought in to determine the circumstances of the arrest, the juvenile's participation in the alleged offense, and the basis for the prosecutorial decision to charge or dismiss. This reporting system will provide judges conducting future transfer proceedings with a more comprehensive view of the juvenile's amenability to rehabilitation, and will help to identify those juveniles who are threats to themselves and to society. While defining a juvenile's prior delinquency record to include all prior police contacts is only one element in the rehabilitation of

federal juvenile law, it can provide crucial uniformity and fairness in an otherwise arbitrary waiver process.