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BABY-FACE KILLERS: A CRY FOR UNIFORM TREATMENT FOR YOUTHS WHO MURDER, FROM TRIAL TO SENTENCING

*Jennifer A. Chin**

Juvenile Justice is meted out at every level of government in America, but their differing standards, procedures, and alternatives make these juvenile justice systems a fragmented hodge-podge of contradictory programs Under these circumstances, it is . . . [not] surprising . . . that juvenile justice is as bad as it is.¹

INTRODUCTION

Bodies lay motionless.² Victims were left bleeding and dazed.³ The public was outraged and astounded.⁴ The cause of all this: a child. This is not a scene from a movie. It is the recurring theme

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¹ CLIFFORD E. SIMONSEN & MARSHALL S. GORDON III, *JUVENILE JUSTICE IN AMERICA* 403 (1979) (writing on the history and the pros and cons of the juvenile system).

² See Rick Bragg, *5 are Killed at School; Boys, 11 and 13, are Held*, N.Y. TIMES, Mar. 25, 1998, at A1 (reporting on the murder of a teacher and four students in a schoolyard by two boys, ages 11 and 13, with guns).

³ *Id.*

⁴ See Sam Howe Verhovek, *Bloodshed in a Schoolyard: The Overview*, N.Y. TIMES, Mar. 27, 1998, at A1 (reporting on the health and condition of the two boys in the juvenile detention center and the public's reaction to the limited punishment being sought).

of recent news stories addressing the numerous accounts of murders committed by children.⁵

America's legal system treats juveniles differently than adults by creating a segregated judicial system to adjudicate juvenile criminal offenses.⁶ Juveniles are generally defined as persons who have not reached the majority age of eighteen.⁷ Because children are believed to be less culpable⁸ and to be capable of changing for the better,⁹ the national and state governments deal with delinquent

⁵ *Id.* See also Timothy Egan, *Shootings in a Schoolhouse: The Overview*, N.Y. TIMES, May 23, 1998, at A1 (describing the killing of four people when a 15 year-old student fired 51 shots into the cafeteria of his school).

⁶ See Rick Bragg, *Bloodshed in a Schoolyard: The Overview*, N.Y. TIMES, Mar. 26, 1998, at A1 [hereinafter *Bloodshed*] (supporting the proposition of a segregated system by reporting that the two young boys, because they both were under the ages of 14, were not going to be tried in a criminal court).

⁷ See, e.g., 18 U.S.C. § 5031 (1994). The Federal Juvenile Delinquency Act defines a juvenile as an individual who has not reached the age of 18. *Id.* Black's Law Dictionary defines a juvenile as "[a] young person who has not yet attained the age at which he or she should be treated as an adult for purposes of criminal law." BLACK'S LAW DICTIONARY 867 (6th ed. 1995). The age of adulthood varies by state. See *infra* notes 56-58 and accompanying text (enumerating the minimum ages, ranging from no set age limitation to the age of 16, required in order for a case to be transferred to the criminal courts).

⁸ 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, 373 (1998) (advocating the need for rehabilitative treatment of children and emphasizing that the transfer of these juvenile delinquents to adult criminal courts does not achieve that goal). See also Eric J. Fritsch & Craig Hemmens, *Juvenile Justice and the Criminal Law: An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 566 (1996) (discussing the common law position on the culpability of children).

At common law there was an irrebuttable presumption, known as the "infancy defense," that children under the age of seven were incapable of forming felonious intent. Children between the ages of seven and fourteen were presumed similarly incapable, but this presumption was rebuttable. Children over the age of fourteen were presumed to be fully responsible for their actions.

Id. (citations omitted).

⁹ See Fritsch & Hemmens, *supra* note 8, at 566 (stating that "[p]roponents of a separate juvenile justice system believed that juveniles lacked the maturity and level of culpability that traditional criminal sanctions presupposed, and that

children through rehabilitation rather than punishment.¹⁰ Congress implemented this policy by enacting the Federal Juvenile Delinquency Act ("JDA")¹¹ for federal prosecution of juveniles.¹² The fifty states and the District of Columbia have enacted their own statutes for state juvenile proceedings.¹³

The JDA and individual state statutes all emphasize that a separate, independent system should be implemented to address the different needs of children.¹⁴ However, at a time when the nation

juvenile offenders should therefore not only be treated as less blameworthy but also as more amenable to treatment and rehabilitation than hardened adult criminals."'). See also Gerard F. Glynn, *Arkansas' Missed Opportunity for Rehabilitation: Sending Children to Adult Courts*, 20 U. ARK. LITTLE ROCK L.J. 77, 80-82 (1997) (asserting the early reformers' principle that children are essentially good and are amenable to proper societal behavior changes).

¹⁰ See Glynn, *supra* note 9, at 80-81 (stating that "[a]ll fifty states, the District of Columbia . . . and the federal government have juvenile court systems which attempt to balance the need for rehabilitation with the rights of the children and their families"). Congress proposed that juvenile institutions should allow for frequent visits from friends and relatives, unlimited letters to be received, outside recreational activities and even trips to the movies or classes for those in the open institutions. H.R. REP. NO. 81-2979, at *4-*5 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3983, 3983 (discussing the proposal for a system of rehabilitation and treatment for juveniles to be implemented federally). The bill discusses these measures based on institutions already in effect in California, Minnesota, Wisconsin, Massachusetts and Texas. *Id.*

¹¹ 18 U.S.C. § 5032 (1996). The term "JDA" refers to the Federal Juvenile Delinquency Act of 1938 and not the Juvenile Justice and Delinquency Prevention Act of 1974.

¹² See Abraham Abramovsky, *Federal Prosecution of Juveniles*, N.Y.L.J., Apr. 29, 1998, at 3 (discussing the evolution of the JDA and whether New York prosecutors should seek the assistance of federal law in juvenile prosecutions).

¹³ See Adam D. Kamenstein, Note, *The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2109 (1997) (discussing the enactment of state statutes dealing with juvenile justice). All 50 states, by the early 1940's, implemented their own juvenile legal systems. *Id.*

¹⁴ See Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 138 (1997) (suggesting that juvenile justice policies should concentrate on the development of delinquent behavior and not on the offense). Juvenile justice should emphasize rehabilitating the youths to function normally in society. *Id.* at 140.

is calling for harsher punishment for severe crimes committed by its children, it is evident that a change is needed in the statutory scheme.¹⁵

This Note proposes that the federal and state governments amend their juvenile delinquency statutes to include a special provision for children twelve years of age and older to be treated as adults, from trial to punishment, in murder cases. Amending the JDA to include a provision that automatically transfers these murder cases to the adult court system would serve as a catalyst for a nationwide revision advocating harsher treatment toward juvenile killers as it did when the JDA first was enacted in 1938 and when the JDA was amended in 1974 and 1984.¹⁶ This Note does not suggest that juvenile delinquency statutes should be eliminated, nor does it propose to transfer all the juvenile crimes to criminal court. Rather, because of the violent and calculating nature of murder, and because murder is the only crime where the harm-doer intentionally sets out to take away another's life, this Note asserts that the statutes should be amended to reflect the harshness and severity of the particular crime of murder. Part I of this Note describes the JDA and state juvenile statutes generally, with an

Thus, policies that focus solely on the harm caused by youthful offenders may not be the optimal means to achieve the instrumentalist goals of their proponents. These policies fail to calculate the long-term social costs of categorical punishment, particularly the costs incurred by diminishing the prospects for productive adulthood of those offenders whose delinquent behavior reflects transient developmental influences.

Id. at 139.

¹⁵ See Klein, *supra* note 8, at 374 (stating that the "shift in focus [from rehabilitation to punishment] is largely due to a popular view of a juvenile system that coddles the young offender"). See, e.g., Fritsch & Hemmens, *supra* note 8, at 564 (writing on the different legislative proposals to make young criminals criminally liable for their crimes). The Texas legislature responded to the public concerns over the increase in crime rates of children in the state. Fritsch & Hemmens, *supra* note 8, at 564. Homicides caused by Texan children increased 171.5% in seven years (1985-1992). Fritsch & Hemmens, *supra* note 8, at 564.

¹⁶ All the states followed suit after the implementation of the JDA. See *infra* Parts I.A and I.C, discussing the history of the JDA and the current status of juvenile statutes.

emphasis on their roots, historical purposes, and current impact on children and society. Part II begins by asserting that there is a need for adult trial proceedings for juvenile murderers ages twelve and over because they are psychologically capable of understanding the extent of their actions, thereby making them morally blameworthy in the legal arena. Part II also discusses the discrepancies in treatment among the states arising from the different state laws regarding juvenile adjudication procedures. Part III suggests the need for harsher punishment for juvenile murderers because rehabilitative measures have proven to be ineffective and laws guided by deterrence too lenient to prevent future commissions of the crime. Finally, this Note concludes with the necessity for uniform treatment of juvenile murderers, in both the federal and state judicial systems, to prevent procedural and sentencing inconsistencies and to emphasize the severity of the crime.

I. THE JUVENILE DELINQUENCY ACT AND GENERAL STATE STATUTORY SCHEMES

Treating children and adults as distinct individuals was not always the policy of the United States.¹⁷ At America's beginning, children, treated as small adults, were given the same treatment as their adult counterparts, especially when it came to legal sanctions.¹⁸ A child who committed a crime was processed, prosecuted and punished under the same system as adults who committed a similar crime.¹⁹

¹⁷ See Klein, *supra* note 8, at 375 (discussing that, although special treatment of children was available, the states, for the most part, did not institute these procedures).

¹⁸ See Glynn, *supra* note 9, at 79 (stating that even with the infancy defense, children were still adjudicated and punished as adults); Scott & Grisso, *supra* note 14, at 141-43 (reasoning that the reformation to implement a separate juvenile legal system was due to society's harsh treatment of child offenders as adults).

¹⁹ See Kamenstein, *supra* note 13, at 2109 (discussing the historical treatment of child offenders).

It was not until the end of the nineteenth century that people began to change their views on the criminality of children.²⁰ A progressive reformation arose aimed at changing the national policy of punishing delinquent children to rehabilitating them into better persons.²¹ This reform movement was responsible for the nature of juvenile statutes in effect today.²²

A. History

In 1899, Illinois enacted the Juvenile Court Act to provide courts with discretion in lessening criminal liability for juveniles.²³ The Illinois Act was the first statute to transfer juvenile criminals to a separate court, recognizing the differences between juveniles and adults.²⁴ Prior to 1899, "jurisdiction over juvenile

²⁰ See Kamenstein, *supra* note 13, at 2110 (explaining that criminality was a result of societal factors surrounding the children). See also Klein, *supra* note 8, at 375 ("[I]t was not until the close of the nineteenth century that an attempt was made to organize different reforms aimed at juvenile offenders into a coherent system of criminal justice.").

²¹ See Scott & Grisso, *supra* note 14, at 142-43 (noting that as the new science of psychology came into being, a new perspective on child behavior arose which led to the decriminalization of children).

²² See Kamenstein, *supra* note 13, at 2109 (indicating that the early and contemporary juvenile statutes are a result of the reformation to create a separate juvenile legal system).

²³ Glynn, *supra* note 9, at 79-80. See also SAMUEL M. DAVIS, RIGHTS OF JUVENILES § 1.1 (2d ed. 1980) (summarizing the history of the JDA and the reasons for its creation).

²⁴ See Kamenstein, *supra* note 13, at 2109 ("The Illinois Juvenile Court Act of 1899 was the first time in American history that an entirely separate and independent court system was created solely for the adjudication of juveniles."). Although Illinois was the first to formally implement and establish a juvenile court, the origins of juvenile corrections can be traced as far back as 1825. VICTOR L. STREIB, JUVENILE JUSTICE IN AMERICA 5 (1978).

[The New York House of Refuge] was established to meet the same kinds of needs the . . . [Juvenile Justice System] of the 1970s trie[d] to meet, including avoidance of harsh criminal penalties for unfortunate children, segregating "predelinquent" children from hardened delinquents, providing "proper" moral, ethical, political, and social values and role models for deprived children, and treating such children as victims rather than offenders.

offenders was maintained by the very same courts in which an adult would be tried.”²⁵ By 1923, all but two states had implemented juvenile justice provisions in their criminal laws.²⁶ In 1938, Congress enacted the JDA,²⁷ which vested the courts with discretion to transfer a case involving a juvenile to a juvenile

Id. at 5-6.

Illinois began its movement towards juvenile reformation in 1855 when it established the Chicago Reform School as an alternative institution to prisons. *Id.* at 6. “In fact, the reform movement in Illinois leading to the 1899 establishment of the first official juvenile court was characterized partly by a desire to avoid prisons for children by establishing a special juvenile court which could not send children to prison.” *Id.* (citations omitted).

²⁵ Kamenstein, *supra* note 13, at 2109 (citing Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1194 (1970)).

²⁶ See Kamenstein, *supra* note 13, at 2109 (citing H. Warren Dunham, *The Juvenile Court: Contradictory Orientations in Processing Offenders*, 23 LAW & CONTEMP. PROBS. 508, 509 (1958)) (illustrating that Connecticut and Wyoming were the only two states that did not follow in Illinois’s footsteps in creating a separate system to handle juvenile delinquents).

²⁷ See Abramovsky, *supra* note 12, at 3 (discussing the early views of child punishment and the national reforms to institute a legal system that was focused on helping children function in society rather than putting them in prison). The Act allowed prosecutors discretion to prosecute under the juvenile system “except in cases where the defendant faced the death penalty or life imprisonment.” Abramovsky, *supra* note 12, at 3. See also D. Ross Martin, Note, *Conspiratorial Children? The Intersection of the Federal Juvenile Delinquency Act and Federal Conspiracy Law*, 74 B.U. L. REV. 859, 860 (1994) (describing the Federal Juvenile Delinquency Act (“JDA”) of 1938 and what it meant to juvenile defendants). The JDA had been changed in 1974 and 1984 to condition the transfer to criminal courts. See Abramovsky, *supra* note 12, at 3 (discussing the creation and evolution of the JDA). The JDA of 1974 provided that “[r]ather than beginning with the presumption that minor defendants should be tried as adults unless juvenile procedure was requested by the prosecutor, the . . . Act mandated that all such defendants be tried as juveniles unless judicial approval for adult trial was obtained.” Abramovsky, *supra* note 12, at 3. The 1984 JDA allowed for automatic transfers of juveniles to the adult courts for certain offenses and it also “expanded the jurisdiction of federal authorities to prosecute juveniles in cases where state courts had parallel jurisdiction.” Abramovsky, *supra* note 12, at 3. Currently, the JDA allows judicial discretion to transfer juveniles to a criminal court instead of being prosecuted in the juvenile system. 18 U.S.C. § 5032 (1996).

court.²⁸ By the mid-1940's, all states had established independent court systems for juveniles.²⁹

Legislators implemented these new state juvenile reform statutes and the JDA under the belief that juveniles were less blameworthy and less morally culpable for their actions than adults.³⁰ Proponents of these statutes believed that the actions

²⁸ See Abramovsky, *supra* note 12, at 3 (indicating that the 1938 JDA was created under the model of the Illinois Act, the first juvenile statute created in the country). "The [] JDA granted federal prosecutors unfettered discretion to offer juvenile prosecution to any defendant under the age of eighteen, except in cases in which the offense charged was punishable by death or life imprisonment." Martin, *supra* note 27, at 860.

²⁹ See H. Warren Dunham, *The Juvenile Court: Contradictory Orientations in Processing Offenders*, 23 LAW & CONTEMP. PROBS. 508, 509 (1958) (describing the history and procedure of the juvenile legal system on both national and state levels). These juvenile systems embraced five pivotal philosophical elements:

1. The superior rights of the state over the rights of the child and his parents;
2. Individualized justice for each child;
3. The juvenile status of delinquency at somewhat different from and less serious than the adult status of criminal;
4. Informal, noncriminal procedure instead of legalistic, criminal procedure; and
5. A remedial, preventive, correctional purpose rather than a punitive threatening purpose.

STREIB, *supra* note 24, at 8.

³⁰ See Kamenstein, *supra* note 13, at 2111 (discussing the early reform movements that led to the implementation of legislation concerning juvenile delinquents). See also Klein, *supra* note 8, at 373 (briefly describing the historical view of children and punishment).

The Juvenile Act created a statutory enclave for juveniles accused of criminal misconduct. Among other things, the Act shields juveniles from the ordinary criminal justice system and gives them protective treatment not available to adults accused of the same crimes. A successful prosecution under the Act, for example, results in a civil adjudication of status, not a criminal conviction. In addition, juveniles adjudged delinquent under the Act often receive far more lenient treatment than their adult counterparts.

United States v. John Doe, 53 F.3d 1081, 1083 (9th Cir. 1995) (citations omitted). Moreover, "[j]uvenile Court proceedings were viewed as civil . . . , rather than criminal[,] . . . children were not found guilty, but determined in need

children took were a consequence of scientific and sociological factors.³¹ It was these factors that forced juveniles to commit crimes.³² Further, “a child criminal was a criminal only because he lacked the necessary moral and educational structure and instruction that a healthy non-criminal child received.”³³ Accordingly, children were deemed less responsible for their actions in the eyes of the law. Advocates of the new statutes believed that a *parens patriae*³⁴ approach would be most beneficial in the reformation of juveniles.³⁵ Under this approach, an emphasis in treatment and supervision was invoked instead of penalization.³⁶ *Parens patriae* aimed to “alleviate [the] social ills”³⁷ that caused children to commit crimes.³⁸ It was widely believed that institutions that cared for and nurtured young individuals were better suited to transform the delinquents into respectable, law-abiding

of the court’s help[, the] juvenile . . . was referred to as a ‘delinquent’ and not a ‘criminal’ . . . [and] the system was paternalistic and nonadversarial.” Charles J. Aron & Michelle S.C. Hurley, *Juvenile Justice at the Crossroads*, 22-JUNE CHAMPION 10, 12 n.10 (1998) (describing the differences between judicial, statutory and automatic waivers and the positives and negatives of each).

³¹ See Kamenstein, *supra* note 13, at 2110 (listing some factors as lack of education and immigration, believing that immigrants were unable to provide education and other benefits for their children because of poverty, lack of English and unfamiliarity of the new culture).

³² Kamenstein, *supra* note 13, at 2110.

³³ Dunham, *supra* note 29, at 510 (stating the sociological reasons for delinquent behavior according to the Progressives).

³⁴ *Parens patriae* “refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles It is the principle that the state must care for those who cannot take care of themselves.” BLACK’S LAW DICTIONARY 1114 (6th ed. 1990).

³⁵ See Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 70 (1997) (proposing to eliminate the juvenile system altogether and incorporate a youth discount in the criminal system to account for the age of the young criminal).

³⁶ *Id.*

³⁷ Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693 (1991) [hereinafter *Transformation*] (discussing the *parens patriae* model, although he believes that the juvenile criminal system is not the best means to adjudicate young criminals).

³⁸ *Id.*

citizens.³⁹ The state would assume the role of the parents, who had failed in the child's upbringing, by giving the child a nurturing home and a role model.⁴⁰ *Parens patriae* was believed to be more effective in transforming the juvenile delinquent rather than ordering the juvenile into a prison cell surrounded by hardened criminals.⁴¹ In accordance with the belief that nurturing the juvenile would eliminate delinquent behavior, the government undertook more lenient disciplinary measures for juveniles.⁴² Therefore, if the individual proved capable of changing for the better, the system would aid in this development rather than focus on punishment.⁴³

³⁹ Aron & Hurley, *supra* note 30, at 12 (“[t]he thought was that by focusing primarily on rehabilitative treatment in a non-adversarial, decriminalized process, juvenile offenders would be protected, cared for and educated.”).

⁴⁰ See Glynn, *supra* note 9, at 93 (stating that, “if such [a] child cannot be properly cared for and corrected in his own home . . . , then . . . [the child] may be placed in a suitable institution where it may be helped[,] . . . educated and equipped for industrial efficiency and useful citizenship”); Kamenstein, *supra* note 13, at 2112 (describing that the child would be removed from parental custody if it was found to be unsuitable to the child's health and well-being and instead the child would be placed into a more suitable environment).

⁴¹ See Glynn, *supra* note 9, at 79-80 (explaining the reformers' philosophy of how children should be treated in the eyes of the law and the appropriate punishment for them).

⁴² See Kamenstein, *supra* note 13, at 2112 (referring to the psychological approach of nurturing to juvenile reformation). See *supra* note 29 and accompanying text (discussing how the juvenile proceedings differ from criminal proceedings).

⁴³ See Glynn, *supra* note 9, at 80 (stating that the early reformers saw children as “essentially good”). Because children were viewed as being “essentially good,” it was envisioned that the procedural process would be one where the judge speaks to the child about the acts committed and the concerns attached, and then discuss the case with sociologists and other professionals before determining what course of action to take. Kamenstein, *supra* note 13, at 2114. This would enable the court to determine whether the child would benefit from rehabilitation due to the child's capability to conform to society's standards. Kamenstein, *supra* note 13, at 2113-14.

B. Purpose

The new reformed approaches to juvenile delinquency treatment were aimed at minimizing the punishment that a child would incur for a crime.⁴⁴ It was thought that the criminal system was too harsh for a minor; the prison system threatened children rather than helped them.⁴⁵ Therefore, a separate juvenile system that emphasized rehabilitation rather than acclimating these delinquents to adhere to the adult penal system would be more beneficial to the child and society.⁴⁶ Moreover, a caring and gentle environment would be more conducive to behavioral changes.⁴⁷ The proceedings under the juvenile statutes were less adversarial and technically civil, not criminal.⁴⁸ For example, "attorneys for the government did not charge a child, but filed a petition; children were not defendants, but respondents; children were not found guilty, but adjudicated delinquent; children were not sentenced, but committed."⁴⁹ Moreover, the permissible duration that the juvenile could have been held in a juvenile institution was usually limited

⁴⁴ See Fritsch & Hemmens, *supra* note 8, at 566 (explaining why the juvenile courts were implemented to spare juveniles from the criminal courts). The state and federal juvenile systems were proposed to serve the purpose of protecting and rehabilitating the nation's children. Fritsch & Hemmens, *supra* note 8, at 567.

⁴⁵ See Glynn, *supra* note 9, at 79 ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals.").

⁴⁶ See Kamenstein, *supra* note 13, at 2110-11 (indicating that the welfare of the child was more important than balancing rights and wrongs). The reformers believed that "a child criminal was a criminal only because he lacked the necessary moral and educational structure and instruction that a healthy non-criminal child received." Kamenstein, *supra* note 13, at 2111. It was their belief that by rehabilitating the child, he could be cured "of the ill[s] of criminality cast upon him by circumstance." Kamenstein, *supra* note 13, at 2111.

⁴⁷ See Glynn, *supra* note 9, at 79-80 (discussing the change in views on how a juvenile delinquent should be treated in order to mold the child to function in society properly).

⁴⁸ See Klein, *supra* note 8, at 376-77 (describing the rehabilitative system and its implications on children compared to a criminal system).

⁴⁹ Klein, *supra* note 8, at 377.

according to his or her age, regardless of the crime committed.⁵⁰ Governments developed a separate and distinct system for adjudicating juveniles in an effort to make them feel less like criminals.⁵¹ These systems assumed that the juveniles were not criminally responsible for their actions and, therefore, could not be punished like their adult counterparts.⁵²

C. Today's Juvenile System

In recent years, the juvenile system has been revised to encompass the traditional, pre-reformation view of juvenile

⁵⁰ See, e.g., 18 U.S.C. § 5037(b)(1)(A) (1984) (stating a juvenile can only be held until he attains the age of 21); *In re Juvenile Delinquency Action No. JV95000239*, 921 P.2d 34, 36 (Ariz. 1996) (holding that in Arizona, a juvenile may be detained until he attains the age of 18).

⁵¹ See STREIB, *supra* note 24, at 5-6 (explaining that the federal and all state governments eventually adopted some kind of juvenile justice system which focused less on the criminality of the juvenile's conduct and concentrated more on helping the child eliminate the social ills that caused the delinquency).

⁵² 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, 825 (1988) [hereinafter *Juvenile Court*] (discussing that the reformers implemented juvenile justice systems to take into account that children behave delinquent because of their social surroundings and are not really at fault, therefore, they cannot be held responsible as if they were).

The system proffered by the Progressives left judges, assisted by social workers, to investigate the problematic child's background, identify the sources of the misconduct at issue, and develop a treatment plan to meet the child's needs. Juvenile court personnel enjoyed enormous discretion to make dispositions in the "best interests of the child." Principles of psychology and social work, rather than formal rules, guided decision makers. The court collected as much information as possible about the child—his life history, character, social environment, and individual circumstances—on the assumption that a scientific analysis of the child's past would reveal the proper diagnosis and cure. The overall inquiry accorded minor significance to the offense committed by the child, as it indicated little about the child's "real needs." At hearings and dispositions, the court directed its attention first and foremost to the child's character and lifestyle.

Id. at 825.

delinquents.⁵³ States have revised their juvenile statutes to allow a margin of flexibility for adult treatment of children.⁵⁴ Today, in all states, transfers to criminal courts for certain types of crimes are permitted for minors.⁵⁵ The decision is usually within the discretion of the courts.⁵⁶ Some states have not set limitations on the minimum age that a transfer can occur.⁵⁷ Others have set a

⁵³ See Abramovsky, *supra* note 12, at 3 (discussing that currently, the JDA and some state statutes require automatic transfers of children to criminal courts unless a request for juvenile adjudication is made). See Fritsch & Hemmens, *supra* note 8, at 564 (stating that the increasing trend toward juvenile offenders is to treat them like their adult counterparts). The traditional view has been to treat young criminals with the same respect as adults. See Abramovsky, *supra* note 12, at 3 (indicating that historically children and adults were viewed indifferently). Prior to Illinois's revolutionary change-over in 1899, children were subjected to criminal courts and penalized to the same extent as non-juveniles who were convicted of the same crime. See Glynn, *supra* note 9, at 79 (stating that the Illinois legislature was the first to establish a juvenile court because of the fact that children and adults were fundamentally different).

⁵⁴ See, e.g., *infra* notes 56-58 and accompanying text (referring to the ages, crimes and factors that permit transfers to adult courts).

⁵⁵ See *infra* note 56 and accompanying text (referring to the types of crimes, depending on age, permitted to be transferred to a criminal court).

⁵⁶ Unless there is a provision for automatic transfer, a waiver to criminal court is usually based upon the child's age and offense committed. See generally ARK. CODE ANN. § 9-27-318 (Michie 1998 & Supp. 1999) (ordering to criminal court children 14 and older for capital murder, first or second degree murder, kidnapping, aggravated robbery, assault, rape, first degree battery or possession of a handgun on school property; 16 and older with any felony offense); N.D. CENT. CODE § 27-20-34 (1991 & Supp. 1999) (ordering to criminal court children 14 and older for any violent felony, 16 and older with any other offense). Some states specify other factors as well (i.e. child's home life, past offenses). See, e.g., *State v. Green*, 502 S.E.2d 819, 827 (N.C. 1998) (basing the transfer on seriousness of the offense, community's need for protection against the minor, history); *Commonwealth v. Kocher*, 602 A.2d 1308, 1311 n.4 (Pa. 1992) (considering whether treatment would help, the interests of the community and whether there is mental illness).

⁵⁷ Transfers depend on the crime committed and the discretion of the court rather than the age of the juvenile. Courts take into consideration factors such as: the maturity and sophistication of the child; seriousness of the offense; violent, aggressive, premeditative or willful manner of the act committed; whether the crime is against a person or property; prior records and contacts; and public protection. These factors are evident in ALASKA STAT. § 47.12.100 (Michie

distinct standard of how old one must be to be adjudicated by the criminal courts.⁵⁸ In these states, regardless of how horrendous or

1998); ME. REV. STAT. ANN. tit. 15, § 3101 (West 1980 & Supp. 1998); MD. CODE ANN., CTS. & JUD. PROC. § 3-817 (1998 & Supp. 1999); NEB. REV. STAT. § 43-276 (1998); N.H. REV. STAT. ANN. § 169-B:24 (1994 & Supp. 1998); OKLA. STAT. ANN. tit. 10, § 7303-4.3 (West 1998); OR. REV. STAT. § 419C.349 (1997); R.I. GEN. LAWS § 14-1-7 (1994 & Supp. 1998); S.D. CODIFIED LAWS § 26-11-4 (Michie 1999); WYO. STAT. ANN. § 14-6-237 (Michie 1994 & Supp. 1999).

⁵⁸ ALA. CODE. § 12-15-34 (1995 & Supp. 1998) (14 years of age); ARIZ. REV. STAT. ANN. § 22 (West 1998) (15 years of age); ARK. CODE ANN. § 9-27-318 (Michie 1998 & Supp. 1999) (14 years of age); CAL. WELF. & INST. CODE § 707.01 (West 1998) (16 years of age); COLO. REV. STAT. ANN. § 19-2-518 (West 1999) (12 years of age); CONN. GEN. STAT. ANN. § 46b-127 (West 1995 & Supp. 1999) (14 years of age); DEL. CODE ANN. tit. 10, § 1010 (1998) (16 years of age); D.C. CODE ANN. § 16-2307 (1997) (15 years of age); FLA. STAT. ANN. § 985.226 (West 1998) (14 years of age unless voluntarily asks to be tried as an adult); GA. CODE ANN. § 15-11-39 (1999) (13 years of age); HAW. REV. STAT. § 571-22 (Michie 1993 & Supp. 1998) (14 years of age); IDAHO CODE § 20-508 (1999) (14 years of age); 705 ILL. COMP. STAT. ANN. 405/5-4 (West 1998) (13 years of age); IND. CODE ANN. § 31-30-1-4 (West 1998) (16 years of age); IOWA CODE ANN. § 232.45 (West 1997) (14 years of age); KAN. STAT. ANN. § 38-1636 (1993 & Supp. 1998) (14 years of age); KY. REV. STAT. ANN. §§ 635.020, 640.010 (Michie 1990 & Supp. 1998) (14 years of age); LA. CODE JUV. PROC. ANN. art. 857 (West 1998) (14 years of age); MASS. GEN. LAWS ch. 119, § 74 (1994 & Supp. 1999) (14 years of age); MICH. COMP. LAWS ANN. § 712A.4 (West 1993 & Supp. 1999) (14 years of age); MINN. STAT. ANN. § 260.125 (West 1998) (14 years of age); MISS. CODE ANN. § 43-21-157 (1999) (13 years of age); MO. ANN. STAT. § 211.071 (West 1996 & Supp. 1999) (12 years of age); MONT. CODE ANN. § 41-5-206 (1999) (12 years of age); NEV. REV. STAT. ANN. § 62.080 (Michie 1996) (14 years of age); N.J. STAT. ANN. § 2A:4A-26 (West 1987 & Supp. 1999) (14 years of age); N.M. STAT. ANN. § 32A-2-3 (Michie 1999) (14 years of age); N.Y. PENAL LAW § 30.00 (McKinney 1998) (13 years of age); N.C. GEN. STAT. § 7A-608 (1995) (13 years of age); N.D. CENT. CODE § 27-20-34 (Michie 1991 & Supp. 1999) (14 years of age); OHIO REV. CODE ANN. § 2151.26 (West 1994 & Supp. 1998) (14 years of age); 42 PA. CONS. STAT. ANN. § 6355 (West 1982 & Supp. 1999) (14 years of age); S.C. CODE ANN. § 20-7-7605 (Law. Co-op. 1997 & Supp. 1999) (14 years of age); TENN. CODE ANN. § 37-1-134 (1996 & Supp. 1999) (16 years of age); TEX. FAM. CODE ANN. § 54.02 (West 1996 & Supp. 1999) (14 years of age); UTAH CODE ANN. § 78-3a-601 (1996 & Supp. 1999) (16 years of age); VT. STAT. ANN. tit. 33, § 5506 (1991 & Supp. 1998) (10 years of age); VA. CODE ANN. § 16.1-269.1 (Michie 1999) (14 years of age); WASH. REV. CODE ANN.

heinous the crime, if the individual has not attained the minimum age required by statute, he must remain in the jurisdiction of the juvenile courts.

For juveniles adjudicated in a federal court, the JDA currently requires that the following factors be considered:

[T]he 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.⁵⁹

This provision allows the courts too much leeway in the determination of whether the charged juvenile should be treated as an adult or child, and results in the disparate treatment of juveniles who commit similar crimes.⁶⁰ Therefore, Congress should implement automatic waivers in the JDA, instead of a judicial waiver, to effectively eliminate the weighing of factors which lead to the disparate treatment of same crime offenders.

II. ADULT TRIAL PROCEEDINGS ARE NECESSARY FOR JUVENILES WHO COMMIT MURDER

Children without mental defects ages twelve and older possess the mental capacity to comprehend that the act of murder is morally wrong and have the physical ability to refrain from the wrongful conduct of murder.⁶¹ Thus, juveniles who commit

§ 13.40.110 (West 1993 & Supp. 1999) (15 years of age); W. VA. CODE § 49-5-10 (1999) (14 years of age); WIS. STAT. ANN. § 938.18 (West 1998) (14 years of age).

⁵⁹ 18 U.S.C. § 5032 (1996).

⁶⁰ See Kamenstein, *supra* note 13, at 2115 (citing *Juvenile Court*, *supra* note 52, at 822) ("This rehabilitative latitude resulted in great inequities of disposition between county lines. . . . It was quite possible for two youths of the same age to commit the same crime . . . in different jurisdictions [and get different punishments].").

⁶¹ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 310, 317 (2d ed. 1995) (explaining that in the legal forum, mental abnormalities and insanity are defenses to criminal liability because persons inflicted with such problems do not

murder are morally culpable and, therefore, should be subject to the criminal courts.⁶² But, juveniles who should be held criminally responsible are not always subjected to the criminal system because courts have too much discretion in determining whether to try the child in a criminal court or adjudicate the child under juvenile proceedings.⁶³ To cure this disparate treatment, statutes should impose an automatic waiver, sending juvenile murderers straight to criminal court.⁶⁴

The recent schoolhouse shootings illustrate the need to amend the current statutes to encompass tougher sanctions. One such event occurred in Jonesboro, Arkansas, on March 25, 1998.⁶⁵ Mitchell Johnson and Andrew Golden, ages thirteen and eleven, respectively, took aim at their fellow peers at Westside Middle School at 12:45 p.m.⁶⁶ The two boys stole semiautomatic rifles and other

have the capacity to appreciate the crime). A person who is incompetent may not be prosecuted in a court of law due to a lack of understanding of the proceedings against her. *Id.* at 310. "Incompetency may be the result of a physical handicap (e.g., an inability to speak) or temporary or permanent mental disability (e.g., mental illness, mental retardation, or amnesia)." *Id.*

Insanity is a legal term as well as a defense that excuses the defendant from criminal liability if it can be shown that the defendant was insane at the time of the crime. *Id.* at 317. Whereas, the terms "mental illness," "mental disease or defect," and "mental disorder" are not legal terms and are not excusable defenses unless a person suffering these mental dysfunctions can prove insanity. *Id.* If insanity cannot be proven, the defense of diminished capacity, recognized only in a few states and only for the crime of murder, provides that "a person who does not meet the state's definition of insanity, but who suffers from a mental abnormality, is less blameworthy, and therefore less deserving of punishment, than a killer who acts with a normal state of mind." *Id.* at 335, 341. *See infra* Part II.A, discussing the blameworthiness of juveniles 12 years of age and older.

⁶² *See* DRESSLER, *supra* note 61, at 103 (explaining that our legal system only holds one criminally responsible when one can understand rationally that the actions were morally wrong).

⁶³ *See infra* Part II.B, discussing the discrepancies across state lines regarding adjudication of juveniles due to the discretion given to the courts.

⁶⁴ *See infra* Part II.C, explaining that an automatic waiver system would promote consistency and fairness in the adjudication of juvenile offenders.

⁶⁵ Verhovek, *supra* note 4, at A1.

⁶⁶ Bragg, *supra* note 2, at A1.

firearms from the grandfather of one of the boys⁶⁷ and a van from the parents of the other boy.⁶⁸ They parked the van close to the school and wandered onto their school grounds dressed in camouflage.⁶⁹ As the older boy waited in the grassy area across from the entrance to the school taking cover behind the trees, the younger boy ran into the school and pulled the fire alarm.⁷⁰ As the students, ranging from eleven to thirteen years of age, filed out, the boys took aim and fired twenty-seven rounds into the crowd, resulting in five deaths (four girls and one teacher) and the wounding of ten students.⁷¹

In just the last four years, there have been a total of six mass killings by juveniles.⁷² The last of these killings occurred in

⁶⁷ John Kifner, *From Wild Talk and Friendship to Five Deaths in a Schoolyard*, N.Y. TIMES, Mar. 29, 1998, § 1, at 1 (describing the events of the day when Mitchell Johnson and Andrew Golden shot and killed four of their classmates and a teacher). The weapons came from the house of Andrew Golden's grandfather. *Id.* Apparently, the two boys snuck into Andrew's grandparents' house and took the guns without the knowledge of his grandparents. *Id.*

⁶⁸ *Id.* The two boys stole Mitchell's parents' 1991 Dodge van and packed it with sleeping bags, gear and guns. *Id.*

⁶⁹ See *Bloodshed*, *supra* note 6, at A1 (describing the incident that occurred in Jonesboro, Arkansas). See also Sam Howe Verhovek, *Bloodshed in a Schoolyard: The Suspects*, N.Y. TIMES, Mar. 26, 1998, at A1 [hereinafter *Suspects*] (profiling the two boys and describing the course they took the day they killed five people).

⁷⁰ See Bragg, *supra* note 2, at A1 (reporting on the shooting in Jonesboro, from the preparations taken by the boys to the deaths that incurred).

⁷¹ See Bragg, *supra* note 2, at A1 (reporting on the events of the day); Verhovek, *supra* note 4, at A1 (reporting the casualties from the shooting). See also David W. Chen, *Bloodshed in a Schoolyard: The Victims*, N.Y. TIMES, Mar. 26, 1998, at A22 (profiling the lives of the victims of the Jonesboro killings).

⁷² See Bragg, *supra* note 2, at A1 (supporting the proposition by delineating occurrences of mass killings by those under the age of 18); James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves*, N.Y. Times, Apr. 21, 1999, at A1 (reporting on the nation's deadliest school shooting that occurred in Littleton, Colorado, by two teenage boys attending the high school); *Death in a Middle School*, N.Y. TIMES, Mar. 26, 1998, at A26 [hereinafter *Middle School*] (describing the events of the Jonesboro incident and indicating that this was not the first occurrence of children killing numerous persons); Timothy Egan, *Where*

Littleton, Colorado, on April 20, 1999, when two seventeen-year-old boys, Eric Harris and Dylan Klebold, entered their school, Columbine High School, and took it hostage by gunpoint for five hours.⁷³ The result was fifteen deaths (Harris, Klebold, thirteen students and one teacher) and twenty-three wounded.⁷⁴ Juvenile killings are also occurring outside of the school environment.

Rampages Begin: A Special Report, N.Y. TIMES, June 14, 1998, at §1, 1 [hereinafter *Rampages*] (summarizing the recent mass killings by children no older than 16 years of age). Bragg reports that in Paducah, Kentucky, Michael Carneal, 14, shot three classmates to death and wounded five when he opened fire on a prayer group on December 1, 1997 and in Pearl, Mississippi, Luke T. Woodham, 16, stabbed his mother to death, killed his ex-girlfriend and another female and wounded seven others on October 1, 1997. Bragg, *supra* note 2, at A1. Egan reports on three additional incidents: 1) Moses Lake, Washington, February 2, 1996, Barry Loukaitis, 14, killed three and wounded one as he fired on his high school algebra class; 2) Bethal, Alaska, February 19, 1997, Evan Ramsey, 16, killed two in his high school; 3) Springfield, Illinois, May 21, 1998, Kipland Kinkel, 15, killed four and injured 22 in his high school cafeteria as well as killed his parents before opening fire on his classmates. *Rampages, supra*, at §1, 1. The last of these massacres occurred in Littleton, Colorado, at Columbine High School, where Eric Harris and Dylan Klebold took their school hostage, killing 15 and injured 23. Brooke, *supra*, at A1.

Mass killings are not the only problem anymore. Since the Columbine incident, America has seen numerous accounts of juveniles conspiring or attempting to mass murder their fellow schoolmates. See, e.g., Randal Archibold, *Boys Won't Be Prosecuted in Threat to Bomb School*, N.Y. TIMES, May 8, 1999, at B3 (reporting on the arrest of five students attending a New York City public high school for conspiracy to bomb their school); James Brooke, *Terror in Littleton: The Details; Attack at School Planned a Year, Authorities Say*, N.Y. TIMES, Apr. 25, 1999, at A1 [hereinafter *Details*] (stating that in Texas, five junior high school students were arrested for conspiracy to commit murder, arson and manufacture explosives). In Georgia, one juvenile actually tried copying Klebold and Harris. Kevin Sack, *Guns and School: The Overview; Youth With 2 Guns Shoots 6 at Georgia School*, N.Y. TIMES, May 21, 1999, at A1 (reporting on the Georgia shooting). He decided to take out his anger by shooting six people in his high school before breaking down and surrendering to his assistant principal. *Id.*

⁷³ See Brooke, *supra* note 72, at A1 (describing the Columbine shooting).

⁷⁴ See *Details, supra* note 72, at A1 (indicating that the killings were planned in advance and the boys intended to destroy the school and as many people as they could, including themselves).

Today's youths are also committing single acts of murder.⁷⁵ To diminish the occurrences of these horrible crimes of violence, the imposition of tougher sanctions for juvenile murderers is necessary.⁷⁶

A. *Juveniles are Morally Blameworthy for Their Crimes and Should Be Tried in Criminal Court*

Imposition of tougher sanctions for criminal conduct is only permitted for those who are morally blameworthy and criminally responsible for their actions.⁷⁷ Accordingly, subjecting juveniles to the criminal courts would be permitted by our legal system

⁷⁵ See, e.g., *State v. Kelsey*, 502 S.E.2d 63, 57, 60 (S.C. 1998) (holding the juvenile reachable by the criminal court because of the severity of his acts); *Commonwealth v. O'Brien*, 673 N.E.2d 552, 555 (Mass. 1996) (stating that the 15-year-old's horrific slaying of the elderly woman and his inability to be rehabilitated places the juvenile within the jurisdiction of the criminal court). In *Kelsey*, a 16-year-old boy strangled a girl to death, raped her, then placed a homemade bomb into her mouth and lit the fuse. *Kelsey*, 502 S.E.2d at 57-58. In Massachusetts, a 15-year-old juvenile stabbed a woman 66 times and slashed her 31 times, leaving her to bleed to death. *O'Brien*, 673 N.E.2d at 555.

⁷⁶ See *supra* note 14 and accompanying text (discussing the concerns over how we as a nation should treat these juvenile killers). Today, there is more emphasis placed on victims rather than on the fate of perpetrators. See William Glaberson, *Shootings in a Schoolhouse: The Justice System*, N.Y. TIMES, May 24, 1998, at §1, 1 (reporting on the reactions of the nation to the recent teenage murdering sprees). A Texas state legislator proposed to amend Texas law to allow juveniles as young as 11-years-old to be subject to the death penalty for murder. See *id.* The chief of the New York City juvenile prosecution unit expressed that "the leniency of the juvenile justice system had failed to bring any improvements." *Id.* House Representative Charles Canady emphasized that juvenile murderers "cannot be simply dealt with by putting someone in a juvenile detention home for a few years and then putting them back on the streets." *Meet the Press* (NBC television broadcast, Mar. 29, 1998) (interview with five members of the House Judiciary Committee (Robert Barr, Charles Canady, James E. Rogan, Zoe Lofgren and Mel Watt) on how to deal with juveniles that commit adult crimes).

⁷⁷ See DRESSLER, *supra* note 61, at 101 (discussing that criminal responsibility and punishment are beneficial to society and, therefore, only permitted for those who are knowledgeable about their actions and appreciative of the consequences therefrom).

because juveniles ages twelve and older possess the mental capacity and physical ability to refrain from the unlawful conduct.⁷⁸

*Actus non facit reum nisi mens sit rea.*⁷⁹ Translated, “an act does not make [a person] guilty, unless the mind be guilty.”⁸⁰ Society imposes moral and legal expectations which everyone is expected to adhere to.⁸¹ When a person is “unable *rationally* to *understand morally*” what he is doing, he is unable to “grasp and be guided by the good reason not to breach . . . [the] moral and legal expectation” society accepts.⁸² It is only when a person cannot rationally understand the actions he has just taken that he is relieved of any criminal liability.⁸³ For one to be rational, normatively, one must have “the ability to act for good reasons” and the ability not to act if doing so would be wrong.⁸⁴ Put more simply, persons are criminally responsible only when they can rationally comprehend and recognize the consequences of their actions.⁸⁵ Therefore, criminal responsibility arises from cognition.⁸⁶

So, when is a person cognizant? To answer this question, it is first necessary to understand what cognition entails.

Cognition comprises the processes by which an individual obtains knowledge of an object or of its environment. It

⁷⁸ See *infra* Part II.A, discussing the moral blameworthiness of juveniles 12 years of age and older, making them criminally responsible for their actions, and allowing tougher sanctions to be imposed on them.

⁷⁹ DRESSLER, *supra* note 61, at 101 (summarizing and defining the different concepts of criminal law).

⁸⁰ DRESSLER, *supra* note 61, at 101.

⁸¹ DRESSLER, *supra* note 61, at 101.

⁸² Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 25 (1997) (discussing juvenile behavior and moral blameworthiness) (emphasis added).

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ See *id.* (explaining that a person will not be held criminally liable only when he is unable to rationally comprehend his actions).

⁸⁶ See *Method: Development of Logical Thinking* (visited Nov. 17, 1999) <<http://www.altavista.telia.com/cgi>> (discussing cognitive development of children).

includes: perception, discovery, recognition, imagining, judging, memorizing, learning, thinking, and frequently speech. These processes develop through a series of stages from birth onwards giving rise to a progressive increase in the ability to construct and express fundamental physical concepts . . . and logical concepts. Mental growth may therefore be defined as the progressive expansion of an individual's ability to deal effectively with encountered environmental situations.⁸⁷

Accordingly, a person becomes cognitive when that person has the intellectual capacity and ability to reason logically.⁸⁸

It has been the belief that youngsters do not have the ability to control their actions, even if they know it is morally wrong to act in such a manner.⁸⁹ It was therefore believed that they lacked control over themselves and could not be held responsible for their actions.⁹⁰ But, scientific research in developmental psychology tells a different story, that juveniles do have the capability of exerting self-control, they just choose not to exercise it.⁹¹

Jean Piaget, a renowned psychologist in the field of child psychology, identified a four-stage youth development process from birth to adolescence: (1) the sensorimotor stage (birth to age two), when development of motor controls and cognitive skills occurs; (2) the preoperational stage (two to seven), when the child develops verbal skills; (3) the concrete operational stage (seven to twelve), when cognition of abstract concepts form; and (4) the formal operational stage (twelve to adult), when the development of logical and systematic reasoning occurs.⁹² The formal operational

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Morse, *supra* note 82, at 23. “[C]hildren lack normative competence because they are generally unable to grasp the good reasons not to breach an expectation [to infringe on another’s freedom].” *Id.*

⁹⁰ *See id.* at 45-50 (explaining the public perception that “being out of control” is synonymous with “lack of culpability”).

⁹¹ *See id.* at 53 (discussing the misconceptions concerning juvenile rationalizing capabilities).

⁹² *See* Department of Psychology, University of Alberta, *Piaget’s Stage Theory of Development* (visited Nov. 17, 1999) <http://web.psych.ualberta.ca/~mike/Pearl_Street/dictionary/contents/P/piaget’s_stages.html> (describing

stage is important in determining how to treat juveniles, since this is where one distinguishes between acting for a good reason and not acting at all.⁹³ “At this level of development, people can solve problems in their minds by isolating the important variables and manipulating them mentally [T]he individual can draw

Piaget’s four-stage theory of child development).

The Sensorimotor Period

During this time, . . . a child’s system is limited to motor reflexes at birth, but the child builds on these reflexes to develop more sophisticated procedures. They learn to generalize their activities to a wider range of situations and coordinate them into increasingly lengthy chains of behavior.

Preoperational Thought

At this stage, . . . children acquire representational skills in the areas mental imagery, and especially language. They are self-oriented, and have egocentric view; that is, pre-operational children can use these representational skills only to view the world from their own perspective.

Concrete Operations

As opposed to Preoperational children, children in the concrete operations stage are able to take another’s point of view and take into account more than one perspective simultaneously. They can also represent transformations as well as static situations. Although they can understand concrete problems, . . . they cannot perform on abstract problems, and that they do not consider all of the logically possible outcomes.

Formal Operations

Children who attain the formal operation stage are capable of thinking logically and abstractly. They can also reason theoretically [A]lthough the children would still have to revise their knowledge base, their way of thinking was as powerful as it would get.

Id. For a more comprehensive discussion on child development through the four stages, see BARBEL INHELDER & JEAN PIAGET, *THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE* (1958) (explaining the process of child development and the stages of mental maturation from birth to adulthood).

⁹³ See Morse, *supra* note 82, at 25 (determining that an individual thinks rationally when he is “flexible” or able to decide when it is good to act and when he should refrain).

meaningful conclusions from purely abstract or hypothetical data.”⁹⁴ This means that at twelve, juveniles, absent some mental defect, begin to comprehend the difference between right and wrong and the consequences of their actions.⁹⁵ Therefore, an individual, without mental defects, at the age of twelve is cognizant because the person begins to have the capacity and ability to reason logically, even though this capacity and ability may not yet be fully developed.

Professor Stephen Morse⁹⁶ expands on this idea by stating that, although there are some characteristic differences between adults and children that affect the juvenile’s self-control and judgment, juveniles are “able to control . . . [their actions] to a substantial degree, although it may be harder for them than for adults.”⁹⁷ In other words, even if juveniles act on impulse more than the average adult does, they are mentally capable and physically able to prevent themselves from acting on such an impulse because they have the same rationalizing capabilities as an adult.⁹⁸ This is an indication that juveniles are rational beings.⁹⁹

This rationalizing ability thereby eliminates peer pressure as an excuse for criminal liability. Peer pressure has frequently been

⁹⁴ JAMES V. MCCONNELL & RONALD P. PHILIPCHALK, UNDERSTANDING HUMAN BEHAVIOR 380 (7th ed. 1992) (explaining the development of a child’s mind in relation to Piaget’s development model).

⁹⁵ *Id.*

⁹⁶ Morse, *supra* note 82, at 15. The author is a professor of psychology and law at the University of Pennsylvania. Morse, *supra* note 82, at 15. Morse expresses that although there are differences between juveniles and adults, the differences may not be significant enough to treat the two groups as separate entities. Morse, *supra* note 82, at 66. He emphasizes that this differentiation in “treatment is a normative judgment that only society can make.” Morse, *supra* note 82, at 66.

⁹⁷ Morse, *supra* note 82, at 53.

⁹⁸ See Morse, *supra* note 82, at 53 (addressing the issue of moral responsibility and blameworthiness in relation to juvenile criminal liability).

⁹⁹ See Morse, *supra* note 82, at 53 (discussing the mental capacity of juveniles and common misconceptions concerning the rationalizing capabilities they have). In Professor Morse’s own words, “[H]olding people morally responsible involves the susceptibility to a set of reactive emotions that are inherently linked to the practices that express those emotions.” Morse, *supra* note 82, at 22.

presumed to be the culprit of teenage criminal behavior.¹⁰⁰ Although peer influence affects the decision-making power of the teenager, it does not destroy the cognitive ability of teenagers to rationalize the act and decide not to go through with it.¹⁰¹ The fact that teenagers are more prone to risk-taking, especially on the advice of others, does not warrant or justify decriminalizing their conduct.¹⁰²

Since juveniles have the capability to rationally decide whether to engage in criminal behavior or not, even if this rationalizing ability may not be developed fully, they are capable of appreciating the crime. Therefore, they should be held accountable for their actions as adults. The assumption that juveniles are not equipped to exert self-control, and that teenagers are not morally blameworthy because of the influence of peer pressure, is erroneous.¹⁰³ Based on the above reasoning, juveniles twelve years of age and older are cognitive beings and have the capability to exert self-control if they so choose. Therefore, if twelve-year-olds all have the mental capacity and physical ability to understand and refrain

¹⁰⁰ See Scott & Grisso, *supra* note 14, at 162 (expressing that peer pressure is a major part of teenage behavior and is assumed to be the reason for deviant behavior).

¹⁰¹ See Morse, *supra* note 82, at 55 (“If the primary variable adolescent offenders underestimate is the risk of getting caught for their wrongdoing, this is hardly [a] reason to think that they are less responsible.”). “[A] child’s capacity to master impulses roughly parallels cognitive maturation, the achievement of a basic knowledge of right and wrong, and the internalization of that knowledge.” Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 543 (1984) (proposing that the state should have the burden of proof to demonstrate that a child between the ages of seven and 14 is morally blameworthy).

¹⁰² See Morse, *supra* note 82, at 55 (advocating that although teenagers may prefer to take risks, committing a serious crime is not the normal mode of behavior teenagers use to illustrate their preference for risk).

¹⁰³ See Morse, *supra* note 82, at 55 (“Although poor judgment may be characteristic of adolescent risk-taking, there is no evidence that such judgment also infects intentional criminal behavior.”). Morse supports the proposition by stating that treating a juvenile murderer as simply one looking for risk is to decriminalize the conduct, which is not justified nor morally warranted. Morse, *supra* note 82, at 55.

from criminal conduct, they should all be treated the same regardless of their geographical location.

B. State Law Discrepancies

Although the federal and state governments have made it easier for juveniles to be transferred to criminal courts, discrepancies in the juvenile laws between jurisdictions have resulted in disparate judicial treatment.¹⁰⁴ Offenders of the same crime are treated differently across state lines and offenders of lesser crimes are sometimes subject to harsher treatment than those who commit more violent crimes.¹⁰⁵ But, the mental capacity of juveniles to comprehend their actions is the same despite the location in which they committed the crime.¹⁰⁶ It is therefore unfair to subject one juvenile to harsh adult adversarial proceedings but allow another accused of the same offense to be given special treatment just because of geographical location.¹⁰⁷

Many states statutorily prohibit treating child murderers as adults. For instance, in Arkansas, a murderer under the age of

¹⁰⁴ See *supra* notes 108-115 and accompanying text (discussing differences in juvenile proceedings between states and resulting disparate treatment of offenders).

¹⁰⁵ See *supra* notes 116-129 and accompanying text (discussing the discrepancies concerning treatment of juvenile offenders by the states). It is absolutely unjust and illogical to subject a juvenile to prosecution as an adult for committing a lesser crime of, for instance, rape, but not subject a juvenile of the same age who committed murder to the criminal courts as well. See, e.g., *United States v. John Doe*, 53 F.3d 1081 (4th Cir. 1995) (holding that a 17-year-old who killed a woman was not to be subjected to the criminal court, but instead adjudicated in the juvenile court); *State v. Green*, 502 S.E.2d 8-19 (N.C. 1998) (holding that a 13-year-old defendant was correctly tried as an adult for the crimes of first degree rape, first degree burglary and first degree sexual assault).

¹⁰⁶ See generally RICHARD I. EVANS, *JEAN PIAGET: THE MAN AND HIS IDEAS* (1973) (discussing Piaget's stages of cognitive development and explaining Piaget's belief that every child passes through the four stages of development in exactly the same order within the same age frame). See also *supra* note 92 and accompanying text (describing the four stages of youth development according to Piaget).

¹⁰⁷ See SIMONSEN & GORDON, *supra* note 1, at 415 (stating that dispensing justice on an individual basis does not further our justice system).

fourteen must be tried as a juvenile,¹⁰⁸ while in Illinois anyone under thirteen is not to be transferred to a criminal court.¹⁰⁹ A one-year differential seems trivial, but it can mean the difference between criminal responsibility and juvenile delinquency. As in the case of the Jonesboro murders, the one-year differential precluded the older boy from facing criminal penalties.¹¹⁰ The defendants in the Jonesboro case were not adjudicated as adults.¹¹¹ Although the two juveniles murdered five people, four being young girls between the ages of eleven and twelve, and wounded ten others with semiautomatic weapons, the laws of Arkansas prohibited the prosecutor from seeking criminal proceedings.¹¹² Instead, the two boys were prosecuted in a juvenile court.¹¹³ They were saved from the harsh and adversarial proceedings common in criminal

¹⁰⁸ ARK. CODE ANN. § 9-27-318(b)(4) (Michie 1998 & Supp. 1999). "A circuit court and a juvenile court have concurrent jurisdiction and a prosecuting attorney may charge a juvenile in either court when a case involves a juvenile . . . [a]t least fourteen (14) years old when he engages in conduct that, if committed by an adult, would [constitute a felony]." *Id.* (emphasis added).

¹⁰⁹ See 705 ILL. COMP. STAT. 405/5-4(3)(a) (West 1998):

If a petition alleges commission by a minor 13 years of age or over of an act that constitutes a crime under the laws of this State and, on motion of the State's Attorney, a Juvenile Judge . . . finds that it is not in the best interests of the minor or of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.

Id.

¹¹⁰ See Lois Romano, *Arkansas Pair Found Guilty of 5 Slayings; School Shooters Can Go Free at Age 21*, WASH. POST, Aug. 12, 1998, at A3 (reporting on the juvenile court's sentencing of the convicted defendants of the Jonesboro case).

¹¹¹ See Romano, *supra* note 110, at A3 (stating that the boys were prosecuted in a juvenile court since the criminal court had no jurisdiction over them because of their young ages).

¹¹² See ARK. CODE ANN. § 9-27-318(b)(4) (Michie 1998 & Supp. 1999) (mandating that the juvenile be at least 14 to be prosecuted as an adult for capital murder); Verhovek, *supra* note 4, at A1 (reporting on the casualties from the Jonesboro incident).

¹¹³ See *Bloodshed*, *supra* note 6, at A1 (reporting that because of the boys' ages, 11 and 13, they were outside the criminal court's jurisdiction because of Arkansas's juvenile statute). See also *supra* note 108 and accompanying text (stating the juvenile law of Arkansas).

court and the stigma of being labeled a criminal.¹¹⁴ It is illogical and unfair to allow two Arkansas boys who intentionally and viciously gun-downed five people to be given protection from criminal prosecution solely because the killings occurred in Arkansas and not, for example, in Missouri.¹¹⁵ The severity of the crime is still the same and should therefore be treated the same. However, this type of disparate treatment occurs more frequently than most people would expect.

The states vary as to how they treat juveniles offenders. Some states allow the criminal prosecution of children, regardless of their age.¹¹⁶ In Pennsylvania, a nine-year-old boy who was accused of murdering an individual was convicted by the state's criminal courts.¹¹⁷ Just recently, authorities in Michigan prosecuted an eleven-year-old boy as an adult for first-degree murder for the intentional shooting of an eighteen-year-old.¹¹⁸ Additionally, two

¹¹⁴ See *supra* note 29 and accompanying text (describing the difference between juvenile and adult treatment).

¹¹⁵ See Verhovek, *supra* note 4, at A1 (reporting on the deaths in the Jonesboro incident). Compare ARK. CODE ANN. § 9-27-318(b)(4) (Michie 1998 & Supp. 1999) (requiring a minimum age of 14 for criminal prosecution) with MO. ANN. STAT. § 211.071 (West 1996 & Supp. 1999) (setting the minimum age for transfer at 12). Had the attack by the two boys occurred across the border, in Missouri, there may have been a drastically different result. The prosecutors in Missouri would not be barred from seeking criminal adjudication of the older boy. See MO. ANN. STAT. § 211.071 (West 1996 & Supp. 1999). And, if judicial discretion permitted such a prosecution, the boy would be subject to criminal adult sanctions, such as adversarial proceedings and criminal status. See Aron & Hurley, *supra* note 30, at 12 n.10 (distinguishing the criminal court proceedings from the juvenile court proceedings).

¹¹⁶ See, e.g., State v. Jensen, 579 N.W.2d 613, 614 (S.D. 1998) (affirming the trial court's conviction of the 14-year-old as an adult for the shooting death and robbery of a cab driver).

¹¹⁷ Commonwealth v. Kocher, 602 A.2d 1308, 1313 (Pa. 1992) (opining on the use of criteria for the denial of transfer to a juvenile court of a nine-year-old accused of murder). The boy, Cameron Kocher, was charged with murder in 1989 and was later convicted. Pam Belluck, *Chicago Boys, 7 and 8, Charged in the Brutal Killing of a Girl, 11*, N.Y. TIMES, Aug. 11, 1998, at A1 (reporting the story of two boys who allegedly murdered an infant girl). The two Chicago boys may be tried in an adult court for the criminal charge of murder. *Id.*

¹¹⁸ See David Zeman, *Lawyer May Be Issue at Child's Murder Trial; Appointment Reveals Irony in Laws on Juveniles, Adults*, TIMES-PICAYUNE

fourteen-year-olds are being prosecuted as adults for conspiring to commit mass murder against students attending their middle school.¹¹⁹ Similarly, in North Carolina, a thirteen-year-old boy accused of first degree rape, first degree burglary and first degree sexual assault was transferred to the criminal courts and denied access to a juvenile proceeding.¹²⁰ That court held that “[t]he cruelty of the attack, its predatory nature toward an essential stranger, [and the] defendant’s refusal to accept full responsibility . . . all suggest [that the] defendant is not particularly suited to the purpose and type of rehabilitation dominant in the juvenile justice system.”¹²¹ Further, fourteen and fifteen-year-olds, who commit murders in Arkansas, California, Florida, Illinois and Massachusetts

(MICHIGAN), June 28, 1998, at A17 (reporting on Nathaniel Abraham’s upcoming murder trial in Michigan). Nathaniel Abraham was convicted on November 16, 1999, of second-degree murder. See Keith Bradsher, *Michigan Boy Who Killed at 11 Is Convicted of Murder as Adult*, N.Y. TIMES, Nov. 17, 1999, at A1 (reporting on the second-degree murder verdict of Abraham). Nathaniel could be sentenced to up to life in prison as an adult or sentenced as a juvenile and be detained until age 21. Jim Irwin, *Boy, 13, Convicted of Murder in Michigan*, CHI. SUN-TIMES, Nov. 17, 1999, at 32.

¹¹⁹ See *National News Briefs; Teenagers Plotted to Kill At School, Police Say*, N.Y. TIMES, May 17, 1999, at A14 (briefing on the mass-murder plot). The judge ordered that the two boys, Justin Schnepp and Jedaiah (David) Zinzo, be tried as adults for the charge of conspiracy to commit first-degree murder. See *2 in Michigan Face Adult Trial in School Plot*, CHI. TRIB., June 24, 1999, at 21 (stating the orders of the court concerning jurisdiction for adjudication). There were two other boys, age 13, arrested with Schnepp and Zinzo under the same charges, but a judge ordered them to juvenile court. *Id.* The four were planning to kill more people than Klebold and Harris had in Columbine. See *4 Boys Charged With Plotting Attack on Middle School in Michigan*, CHI. TRIB., May 16, 1999, at 3 (reporting on the arrest of the boys). The Michigan statute allows for the court to try 14-year-olds in criminal court. MICH. COMP. LAWS ANN. § 712A.4 (West 1998).

¹²⁰ See *State v. Green*, 502 S.E.2d 819, 832 (N.C. 1998) (holding that the juvenile was correctly transferred to stand trial as an adult and a mandatory life sentence was not excessive). North Carolina allows for the transfer of 13-year-olds to criminal court. N.C. GEN. STAT. § 7A-608 (1995). This court found that after balancing the factors for transfer, the juvenile was rightly transferred out of juvenile court. *Green*, 502 S.E.2d at 832.

¹²¹ *Green*, 502 S.E.2d at 832.

are also treated as adults.¹²² Other courts have even extended adult status to those individuals that commit lesser crimes, such as first-degree assault and armed robbery.¹²³

In contrast, some states have chosen the opposite direction, protecting all persons not of majority from the criminalization inherent in adult treatment. In 1989, a seventeen-year-old boy from Washington was found "guilty of the delinquent act of second degree murder."¹²⁴ The boy apparently killed a woman on the Sauk-Suiattle reservation located in the State of Washington.¹²⁵ He was not tried as an adult, but adjudicated through the juvenile system.¹²⁶ Although the State of Washington allows for the transfer of fifteen-year-olds to criminal court, it also provides for judicial discretion, which permitted the court to keep the case

¹²² See *Ponder v. State*, 953 S.W.2d 555, 556 (Ark. 1997) (subjecting a 14-year-old to prosecution as an adult for capital murder of a 75-year-old woman); *People v. Superior Court of L.A. County*, 958 P.2d 393, 395 (Cal. 1998) (holding two 15-year-olds fit to stand trial in criminal court); *Petithomme v. State*, 610 So. 2d 450, 451 (Fla. Dist. Ct. App. 1992) (holding a 15-year-old accountable to criminal liability for vehicular homicide); *People v. Lockett*, 692 N.E.2d 1345, 1346-47 (Ill. App. Ct. 1998) (trying a 15-year-old for second-degree murder in criminal court); *Commonwealth v. O'Brien*, 673 N.E.2d 552, 555 (Mass. 1996) (holding a 15-year-old criminally responsible for the gruesome death of a woman). Arkansas, Florida, Illinois and Massachusetts all have statutes setting minimum ages for transfer at 13 or 14. ARK. CODE ANN. § 9-27-318 (Michie 1998 & Supp. 1999) (14 years of age); FLA. STAT. ANN. § 985.226 (West 1998) (14 years of age unless voluntarily asks to be tried as an adult); 705 ILL. COMP. STAT. ANN. 405/5-4 (West 1998) (13 years of age); MASS. GEN. LAWS ch. 119, § 74 (1994 & Supp. 1999) (14 years of age).

¹²³ See *State v. Ladd*, 951 P.2d 1220 (Alaska Ct. App. 1998) (permitting the transfer of a 16-year-old out of juvenile court for the offense of first-degree assault); *State v. Jose C.*, No. CR6-421185, 1996 Conn. Super. LEXIS 754, at *2 (D. New Haven Mar. 21, 1996) (holding a 14-year-old criminally liable for armed robbery). See also *State v. Hall*, No. 16549-3-III, 1998 Wash. App. LEXIS 815, at *1 (3d Div. June 2, 1998) (opining on the pleas of a 13-year-old being arraigned in a criminal court for burglary).

¹²⁴ See *United States v. John Doe*, 53 F.3d 1081, 1082 (9th Cir. 1995) (holding that the juvenile was guilty of a delinquent act of murder and sentencing him to a maximum sentence of five years).

¹²⁵ *Id.*

¹²⁶ *Id.*

within the jurisdiction of the juvenile court.¹²⁷ In New Mexico, a seventeen-year-old juvenile murdered a toddler and the United States District Court for the District of New Mexico denied a motion to transfer the minor accused of murder to a criminal court.¹²⁸ And, in Alabama, the state supreme court declined to transfer a juvenile, age fourteen, to criminal court even though the juvenile was charged with committing murder.¹²⁹

Although some seventeen-year-olds are treated as juveniles in murder cases, the federal and most state governments treat sixteen and seventeen-year-olds as adults.¹³⁰ These legislatures and courts believe that persons who have attained the age of sixteen and seventeen are fully capable of assuming the full moral responsibilities of an adult.¹³¹ Therefore, holding them to the same standards

¹²⁷ WASH. REV. CODE ANN. § 13.40.110 (West 1993 & Supp. 1999) (allowing 15-year-olds to be transferred to the criminal courts). WASH. REV. CODE ANN. § 13.40.110 also provides that the court has the authority to decide what is in the best interests of the juvenile and the public. *Id.* This means that the court can decline a transfer regardless of the age of the juvenile. *Id.*

¹²⁸ *United States v. Leon*, 132 F.2d 583, 584 (10th Cir. 1997) (holding that a 17-year-old charged with murdering a three-year-old child was not permitted to be transferred to criminal court). The court denied a transfer even though the statute permitted the court to do so with minors 14 years of age and older. *See* N.M. STAT. ANN. § 32A-2-3 (Michie 1999).

¹²⁹ *See Ex parte J.D.G.*, 604 So. 2d 378, 384 (Ala. 1992) (holding that a 14-year-old boy was not to be tried as an adult for shooting an unarmed 18-year-old in a motel parking lot). *But see Ex parte J.R.*, 582 So. 2d 444 (Ala. 1991) (holding a 15-year-old to be adjudicated in a criminal court for the offense of capital murder).

¹³⁰ *See United States v. Lanny B.*, No. 93-30202, 1994 U.S. App. LEXIS 9404, *4-*7 (9th Cir. Apr. 20, 1994), *aff'd*, 24 F.3d 251 (9th Cir. 1994) (holding a 16-year-old to adult status for murder and assault); *United States v. Alexander*, 695 F.2d 398, 402 (9th Cir. 1982) (holding that the defendant, who was 16 at the time he committed the crime, was not improperly transferred for four counts of first-degree murder committed during a felony). *See also Stanford v. Kentucky*, 492 U.S. 361, 366, 381 (1989) (holding that sentencing to death a 17-year-old who committed murder, sodomy, robbery and received stolen property was not cruel and unusual punishment); *supra* notes 57, 58 (indicating the statutory ages that juveniles will be transferred to the criminal courts).

¹³¹ *Stanford*, 492 U.S. at 380.

as an adult is not only fair and just, but more importantly, acceptable.¹³² Examples of such states that hold sixteen and seventeen-year-olds criminally liable are Alabama, Alaska, Arkansas and South Carolina. The Supreme Court of Alabama determined that a sixteen-year-old who participated in cutting a man's throat and then covering the body with bags was subject to the jurisdiction of the criminal courts of the state.¹³³ Similarly, in Alaska, a seventeen-year-old boy was prosecuted as an adult for burglary, robbery and murder.¹³⁴ The Alaska Court of Appeals held that the juvenile was appropriately waived to the criminal court.¹³⁵ And, in Arkansas, the Supreme Court decided that a sixteen-year-old who murdered, raped, burglarized and committed theft was eligible for waiver to the criminal courts.¹³⁶ Furthermore, in South Carolina, a sixteen-year-old, who murdered a girl by strangulation, was transferred out of the juvenile court.¹³⁷

The lack of uniformity among the states in the adjudication of crimes committed by juveniles is problematic. Although, currently, all fifty states and the District of Columbia allow for the transfer of juveniles from the juvenile system to criminal court, depending

¹³² See *Thompson v. Oklahoma*, 487 U.S. 815, 823 n.4 (expressing that the Court considers evolving standards of decency when determining how to treat juveniles in the law).

¹³³ *Ex parte Brown*, 540 So. 2d 740, 745 (Ala. 1989) (holding the juvenile defendant to adult status for participating in the murder of a man and then disposing of the body by wrapping it up in a sleeping bag and a garbage bag).

¹³⁴ *P.K.M. v. State*, 780 P.2d 395, 396-98 (Alaska Ct. App. 1989) (determining that the juvenile should be subjected to the criminal court for his crimes).

¹³⁵ *Id.* at 400. The court based its conclusion on such factors as amenability to treatment, seriousness of the offense, history of delinquency, probable causes of the behavior, and availability of facilities. *Id.* at 396.

¹³⁶ *Sanford v. State*, 962 S.W.2d 335, 342-43 (Ark. 1998) (holding that the lower court properly determined whether to allow the juvenile to be tried in the adult courts or adjudicated in the juvenile system).

¹³⁷ *State v. Kelsey*, 502 S.E.2d 63 (S.C. 1998) (opining on the transfer of a juvenile into criminal court). This teen not only murdered a girl by strangulation, but he proceeded to rape her post-mortem and then blew up her body with a pipe bomb. *Id.* at 68.

on the age of the offender and the offense committed,¹³⁸ each jurisdiction espouses a different view regarding the adjudication of juvenile delinquents.¹³⁹ This discrepancy, coupled with the discretion given to the courts, causes disparate treatment for the commission of murder.¹⁴⁰ Similar treatment of juvenile murderers would be assured through the immediate transfer of juveniles to criminal court in all states.¹⁴¹

C. The Call for Automatic Transfer of Juveniles to Criminal Court Everywhere

To eliminate the disparate treatment from state to state of juvenile delinquents for similar criminal offenses, society requires uniformity in the law by employing the same juvenile procedures nationwide. Currently, each individual state implements its own standards,¹⁴² resulting in statutes that vary in requirements as to which cases are adjudicated in the criminal courts.¹⁴³ These

¹³⁸ See *supra* notes 56-58 and accompanying text (referring to state statutes and the criteria to be satisfied for transfer to adult status).

¹³⁹ See *supra* notes 56-58 and accompanying text (evidencing the difference in state allowance of transfer based upon the ages and offenses of the juvenile offender).

¹⁴⁰ Age and offense are not the only factors to determine whether to transfer a juvenile offender to adult status. Factors such as living environment, prior record, the effectiveness of rehabilitation and mental maturity are also considered. See, e.g., ALASKA STAT. § 47.12.100 (Michie 1998); ME. REV. STAT. ANN. tit. 15, § 3101 (West 1980 & Supp. 1998); MD. CODE ANN., CTS. & JUD. PROC. § 3-817 (1998 & Supp. 1999); NEB. REV. STAT. § 43-276 (1998); N.H. REV. STAT. ANN. § 169-B:24 (1994 & Supp. 1998); OKLA. STAT. ANN. tit. 10, § 7303-4.3 (West 1998); OR. REV. STAT. § 419C.349 (1997); R.I. GEN. LAWS § 14-1-7 (1994 & Supp. 1998); S.D. CODIFIED LAWS § 26-11-4 (Michie 1999); WYO. STAT. ANN. § 14-6-237 (Michie 1994 & Supp. 1999).

¹⁴¹ Fritsch & Hemmens, *supra* note 8, at 580 (describing automatic transfer as the immediate transfer of the juvenile offender to a criminal court without any judicial discretion or considering any extenuating factors or circumstances).

¹⁴² See *supra* note 57 and accompanying text (discussing the factors the courts use to determine whether a case will be heard in a juvenile court or adjudicated in a criminal court).

¹⁴³ See *supra* note 56 and accompanying text (listing some examples of cases that are transferred to criminal court in relation to age and the crime committed).

inconsistent statutes must be uniformly redrafted to accommodate the severity of the crimes juveniles are committing today, especially murder.¹⁴⁴ Amending the JDA is a good starting point as it would act as a catalyst for a national reformation of all juvenile statutes in relation to the violent offense of murder.¹⁴⁵

For children twelve years of age and older who are accused of murder, the law should be amended to mandate immediate transfer¹⁴⁶ to the criminal courts without any consideration of extenuating factors.¹⁴⁷ The criminal courts then would evaluate,

¹⁴⁴ See Klein, *supra* note 8, at 373-74 (discussing that juvenile law is slowly shifting back to a focus on punishment instead of rehabilitation). “[W]ith the increased public outcry to ‘get tough’ on juvenile crime, . . . [f]ormality, restrictiveness, and punishment are gradually becoming the contemporary principles of the juvenile justice system.” Fritsch & Hemmens, *supra* note 8, at 564. “[State] legislatures retreated from a belief in the concept of *parens patriae* and instead embraced a belief in deterrence and retribution, the main principles of the ‘just desserts’ model.” Fritsch & Hemmens, *supra* note 8, at 569 (emphasis in original).

¹⁴⁵ See *Meet the Press*, *supra* note 76 (interviewing house representatives to elicit their reactions to the Jonesboro murders). “[T]he federal government . . . play[s an important role] in encouraging the states to develop more effective policies, particularly to deal with violent children.” *Meet the Press*, *supra* note 76. After the JDA was implemented in 1938, all the states by the mid-1940’s enacted their own juvenile statutes. See Dunham, *supra* note 29, at 509 (describing the history and the procedures of the federal and state juvenile justice systems).

¹⁴⁶ Immediate transfer removes the youth automatically to criminal court “without a motion by the prosecutor or a decision by the juvenile court judge.” Fritsch & Hemmens, *supra* note 8, at 580.

¹⁴⁷ See, e.g., 18 U.S.C. § 5032 (1996). Factors to be considered are: 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 the past treatment efforts and the juvenile’s response to such efforts; the availability of programs designed to treat the juvenile’s behavioral problems.

Id.

Some states have already enacted such laws for automatic transfer, like Arizona, New York and North Dakota. Arizona mandates that juveniles ages 15 and older who are “accused of murder, forcible sexual assault, armed robbery or other violent felony offenses . . . shall be prosecuted as adults.” ARIZ. REV.

at the request of the prosecution, defense, or at the discretion of the trial court, whether the juvenile has any mental dysfunctions, such as insanity, that would prevent the juvenile from standing trial.¹⁴⁸ After psychological evaluation, the judge and the prosecutor could then decide whether to proceed with the trial or send the delinquent to an institution where the defendant would be given the proper medical attention required.¹⁴⁹ Importantly, there would be no

STAT. ANN. § 22(1) (West 1998). NEW YORK PENAL LAW § 30.00(1) (McKinney 1998) provides that “[e]xcept as provided in subdivision two of this section, a person less than sixteen years old is not criminally responsible for his or her conduct.” Section 30.00(2) states “a person thirteen, fourteen or fifteen years of age is criminally responsible for acts constituting murder in the second degree.” Holding the juvenile criminally responsible means that he or she is subject to the criminal courts instead of the juvenile courts and is subject to criminal liability, not just juvenile detention. *See Morse, supra* note 82, at 25 (expressing that a juvenile’s act is not criminal unless he or she is able to rationally and morally understand the actions taken). N.D. CENT. CODE § 27-20-34(1)(b) (1991 & Supp. 1999) states that when there is probable cause to believe a child 14 years or older committed the offense of murder, that child shall be transferred to the criminal courts.

¹⁴⁸ DRESSLER, *supra* note 61, at 310. It is a common procedure to evaluate the alleged murderer’s mental health before proceeding with the trial. DRESSLER, *supra* note 61, at 310. “The issue of competency to stand trial may be raised by the prosecutor, the defense, or by the trial court on its own motion.” DRESSLER, *supra* note 61, at 310. This is a procedural safeguard to protect those who are psychologically disturbed from being penalized from that which they are not mentally responsible for. DRESSLER, *supra* note 61, at 310. Juveniles accused of murder will be evaluated in the same fashion as their adult counterparts. The juvenile would be evaluated to see if he or she has the capacity to consult her attorney “with a reasonable degree of rational understanding” and if he or she understands the proceedings against her. DRESSLER, *supra* note 61, at 310. The determination of capacity is usually elicited through a psychiatric evaluation which is then submitted to the courts to allow for the judge to decide whether the individual is competent to stand trial. DRESSLER, *supra* note 61, at 311.

¹⁴⁹ *See* DRESSLER, *supra* note 61, at 312 (describing the procedures to determine one’s ability to stand trial). A person is determined to be fit to stand trial if the person has the mental capacity to appreciate what he or she has committed. *See* DRESSLER, *supra* note 61, at 103. One has to have a “morally culpable state of mind” before he or she can be tried. DRESSLER, *supra* note 61, at 103.

option to send the child back to the juvenile courts for adjudication.¹⁵⁰

Minors who have not reached the minimum required age for automatic transfer would remain subjected to the juvenile courts.¹⁵¹ These juveniles would not be held accountable as adults for their actions because they are not capable of logical thought.¹⁵² Our legal system is based on adjudicating individuals who are capable of appreciating the wrong and not acting purely on impulse.¹⁵³ Therefore, because children under the age of twelve cannot appreciate their malevolent behavior, they must be adjudicated in juvenile court, whereas children twelve and older can appreciate such behavior and must be tried in a criminal court.

III. ADULT PUNISHMENT FOR JUVENILES TRIED IN THE CRIMINAL COURTS

Even with the imposition of an automatic waiver to criminal court for juvenile offenders charged with the crime of murder, the severity of the crime may still be diminished if the courts later impose lesser sentences upon conviction.¹⁵⁴ Due to the public's concern over the well-being of juvenile criminals, the courts have

¹⁵⁰ The state legislatures provided the courts with discretionary powers that permit the courts to allow a juvenile proceeding even though the statute provides for transfer. *See supra* note 57 and accompanying text (listing the factors courts take into consideration when contemplating whether to adjudicate the child under a juvenile proceeding or try the child as an adult).

¹⁵¹ *See supra* notes 56-58 and accompanying text (stating the ages that states allow transfers to occur); *see also* Romano, *supra* note 110, at A3 (stating that the Jonesboro murderers were prosecuted in juvenile court because the criminal court had no jurisdiction over them due to the fact they were under the age of 14 at the time they were being tried).

¹⁵² *See supra* Part II.A, discussing the mental development of children and when juveniles are capable of rationally understanding their actions and consequences.

¹⁵³ *See* DRESSLER, *supra* note 61, at 103. Punishing those who do not understand their actions does not benefit the individual or society as a whole since the individual does not know that he committed a wrong. *See* DRESSLER, *supra* note 61, at 103.

¹⁵⁴ *See infra* Part III.B, discussing how the current legal system allows for lesser punishment for juveniles, thereby treating them as victims.

either shortened the sentences of these criminals or mandated that juveniles serve out their sentences in a rehabilitative center rather than a prison.¹⁵⁵ These sentences neither deter future criminal conduct nor compensate the family of the deceased victim.¹⁵⁶ By implementing a prison system that segregates juvenile criminals from their adult counterparts, justice can be achieved by subjecting these juveniles to longer sentences, carried out in a prison, thereby punishing them, and at the same time protecting their well-being.¹⁵⁷

A recent example of the implementation of harsher punishment for juveniles occurred in Oregon. Kipland Kinkel, a sixteen-year-old, was sentenced to life imprisonment for a similar crime as the one committed in Jonesboro.¹⁵⁸ Kinkel murdered two of his

¹⁵⁵ See Feld, *supra* note 35, at 115-18 (discussing that criminal courts consider youthfulness as a mitigating factor in the determination of sentences).

Criminal courts in some jurisdictions already consider "youthfulness" in the context of aggravating and mitigating factors, and may impose shorter sentences on a discretionary basis. Although the federal sentencing guidelines explicitly reject "youthfulness" as a justification to sentence outside the guidelines range, sentencing statutes in some states recognize "youthfulness" as a mitigating factor at sentencing.

Feld, *supra* note 35, at 116. McKinley DaWayne Moore, who pleaded guilty to killing a man, received a sentence of juvenile rehabilitation and the possibility of going to prison dependent on his cooperation with the rehabilitative efforts. See also *Another Teen Serving Adult Time in State*, GRAND RAPIDS PRESS, Nov. 18, 1999, at A25 (comparing Abraham's potential sentencing to another recent juvenile offender).

¹⁵⁶ See *infra* Part III.B, discussing the three theories of punishment: retribution, deterrence and rehabilitation.

¹⁵⁷ See Dunham, *supra* note 29, at 509 (stating that the reform movement was also a response to keep children and hardened criminals separated). The juvenile court was a response "to the need long-felt by the reform element in American Society that a child who had been convicted of violating a law should not be confined with hardened criminals in jails and penitentiaries, where, it was believed, only further demoralization and corruption could ensue." Dunham, *supra* note 29, at 509.

¹⁵⁸ See Jeff Barnard, *Oregon School Shooter Gets 112 Years*, ASSOCIATED PRESS, Nov. 11, 1999, available in 1999 WL 28138383 (reporting Kinkel received a 112 year sentence for the murders). Kinkel was obsessed by death, killing and guns. See Don Terry & Frank Bruni, *Shootings in a Schoolhouse: The Suspects*, N.Y. TIMES, May 24, 1998, § 1, at 14 (providing a biographical

classmates and injured twenty-two, and it was later discovered that Kinkel had killed his parents prior to the school shooting.¹⁵⁹ Kinkel, tried as an adult, was charged with “[four] counts of aggravated murder, [twenty-six] counts of attempted aggravated murder, [six] counts of first-degree assault, [eighteen] counts of second-degree assault [and] unlawful possession of a firearm.”¹⁶⁰

Courts do not always apply such tough sanctions to juvenile murderers. Both the Arkansas and Oregon schoolhouse killings involved juveniles who deliberately and successfully set out to kill their classmates.¹⁶¹ However, only in Kinkel’s case did the court attempt to punish the murderer by subjecting him to a long prison sentence after being found guilty of murder.¹⁶² Kinkel’s punishment resulted from the fact that he was treated as an adult and, therefore, tried in the criminal court, while the Jonesboro offenders, for nearly the same crime, were given juvenile status and only subjected to juvenile court.¹⁶³ The disparate results were due to

perspective on Kipland Kinkel). He recorded his violent fantasies in a journal. *Id.* Kinkel decided to carry out his fantasies in May 1998, when he opened fire in his school cafeteria. *See Oregon School Shooting Suspect Arraigned*, N.Y. TIMES, June 17, 1998, at A14 [hereinafter *Oregon School*] (reporting on the legal proceedings against Kipland Kinkel for opening fire on his classmates inside his high school and for killing his parents in their house).

¹⁵⁹ *See Terry & Bruni*, *supra* note 158, § 1, at 14 (describing the details of the shooting in the Thurston High cafeteria).

¹⁶⁰ *See Oregon School*, *supra* note 158, at A14 (reporting on the legal charges brought by the state against Kinkel).

¹⁶¹ *See supra* notes 66-72 and 159-61 (describing the Jonesboro and Oregon incidents).

¹⁶² *See Oregon School*, *supra* note 158, at A14 (stating that Kinkel could be sentenced to life if convicted as an adult). Kipland Kinkel pleaded guilty to the charges against him on September 25, 1999. Sam Howe Verhovek, *Teenager Pleads Guilty in School Shooting*, N.Y. TIMES, Sept. 25, 1999, at A9 (discussing the recent developments in the Kinkel trial). Kinkel can be sentenced to 25 years plus an additional seven-and-a-half years for each of the 26 counts of attempted murder. *Id.* On November 11, 1999, Kipland Kinkel was sentenced to 112 years in prison without parole. *See Barnard*, *supra* note 158 (discussing the sentence). Kinkel’s defense attorneys had agreed to a plea of 25 years for the four killings and an indeterminate sentence for the 26 attempted murder counts.

¹⁶³ *See The Jonesboro Case*, WASH. POST, Aug. 14, 1998, at A24 [hereinafter *Jonesboro*] (reporting on the sentencing of the two juveniles that murdered four of their classmates); *Oregon School*, *supra* note 158, at A14 (discussing the

both the differences in the ages of the juveniles and the state statutes governing juvenile adjudication.¹⁶⁴

A. *Federal and State Inconsistencies in the Sentencing of Juvenile Offenders*

It is unreasonable for a person, capable of understanding and appreciating his actions, therefore morally culpable and blameworthy, to receive special treatment because he has not attained a certain age.¹⁶⁵ In fact, the Supreme Court of the United States holds this belief since prohibiting capital sentencing of those under the age of sixteen is the only restriction the Court has imposed on the states.¹⁶⁶ Once a juvenile is prosecuted in the criminal court,

trial proceeding that Kinkel will face); Romano, *supra* note 110, at A3 (stating that the boys were prosecuted in a juvenile court since the criminal court had no jurisdiction over them because of their young ages). The policy in Arkansas is to keep juvenile delinquents in a juvenile detention facility until they attain the age of 18. *Id.* The statute actually regulates that juvenile delinquents be held until 21, but because all the juvenile facilities in Arkansas only house inmates until they turn 18, the state cannot detain the juvenile past 18. *Id.* Until Arkansas builds accommodations for those 18 to 21, all juvenile convicts will only be detained until their 18th birthday. *Id.* Since the oldest boy was 14 at the time of his conviction, the state is only permitted to institutionalize him in the juvenile detention facility for a maximum of four years. *Jonesboro, supra*, at A24.

¹⁶⁴ See ARK. CODE ANN. § 9-27-318 (Michie 1998 & Supp. 1999) (stating only those age 14 and over are allowed to be waived to the criminal courts); OR. REV. STAT. § 419C.349 (1997) (allowing a juvenile of any age to be transferred to the criminal courts at the determination of the court). Because the two juveniles in *Jonesboro* were not old enough to be tried as adults, they were tried in a juvenile court, which only permitted the judge to sentence the boys to a maximum of four years in a juvenile facility. See *Jonesboro, supra* note 163, at A24 (indicating that since the state does not have a facility to hold those between the ages of 18 and 21, the juvenile delinquents can only legally be held until the age of 18).

¹⁶⁵ See *supra* Part II.A, discussing moral culpability.

¹⁶⁶ *Thompson*, 487 U.S. at 832-33 (holding that those under the age of 16 cannot be subjected to capital punishment). However, the Court did not state that life imprisonment for a 12-year-old was considered cruel and unusual punishment. *Id.* “[C]ontemporary morality is not ready to permit the regular imposition of the harshest of sanctions in such cases.” See *id.* at 821 n.7. “The road we have traveled during the past four decades—in which thousands of juries have tried

he should be subject to a prison term similar to ones shared by others that have reached the majority that committed the identical crime of murder. There is no need for a juvenile to get a “youth discount,”¹⁶⁷ whereby after conviction in a criminal court, he receives a reduced sentence based solely on his age.¹⁶⁸

It is not uncommon for a court to subject a juvenile to criminal punishment after it has been determined that the juvenile is guilty of an adult crime.¹⁶⁹ Some courts have even gone so far as to impose the maximum sentences available, barring in certain cases

murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.” *Id.* at 832. Both the American Bar Association and the American Law Institute oppose the imposition of capital punishment on children. *Id.* at 830 nn.32, 33 (citing American Bar Association, *Summary of Action Taken by the House of Delegates* 17 (1983 Annual Meeting); MODEL PENAL CODE § 210.6, commentary, at 133 (Official Draft and Revised Comments 1980)).

¹⁶⁷ Feld, *supra* note 35, at 115. The term “youth discount” describes a proposal to minimize the length of a juvenile’s criminal imprisonment by subtracting or discounting the sentence imposed to reflect the youthfulness of the individual. Feld, *supra* note 35, at 115-16. Feld uses this as a compromise to treat juveniles as adults in the criminal system, thereby eliminating the need for a separate juvenile justice system. Feld, *supra* note 35, at 115.

¹⁶⁸ Feld, *supra* note 35, at 115-22. Feld proposes to eliminate the entire juvenile justice system and implement a discount system to accommodate the juveniles in criminal court. Feld, *supra* note 35, at 117-18. His system would allow the courts to search for special punishment treatment of minors, thereby treating the minors differently from their adult counterparts. Feld, *supra* note 35, at 117-18.

¹⁶⁹ *See, e.g.,* *Petithomme v. State*, 610 So. 2d 450, 451 (Fla. Dist. Ct. App. 1992) (reversing the trial court’s decision to sentence a 15-year-old, who had just been convicted of murder, as an adult); *People v. Luckett*, 692 N.E.2d 1345, 1346 (Ill. App. Ct. 1998) (sentencing a 15-year-old convicted murderer to 20 years imprisonment).

capital punishment.¹⁷⁰ For example, in *State v. Green*,¹⁷¹ the Supreme Court of North Carolina sentenced a thirteen-year-old convicted defendant to life imprisonment and held that it was “not grossly disproportionate to the crime he committed.”¹⁷² The Supreme Court of Minnesota held the same when it sentenced a fifteen-year-old defendant to life imprisonment without parole for thirty years for committing murder.¹⁷³ In a more recent case, a fifteen-year-old Florida boy was tried and convicted of the adult crime of first degree murder, resulting in a mandatory life sentence with no chance of parole.¹⁷⁴

¹⁷⁰ See *infra* notes 172-173 and accompanying text (discussing cases imposing life sentences on juveniles). See also *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that imposing the death penalty on 16 and 17-year-olds is not cruel and unusual punishment and, therefore, does not violate the Eighth Amendment of the Constitution); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (prohibiting a 15-year-old from facing the death penalty because a juvenile under the age of 16 is not mature enough to assume all the responsibilities of an adult).

¹⁷¹ 502 S.E.2d 819 (N.C. 1998).

¹⁷² *Id.* at 832 (holding that a sentence of life imprisonment for a 13-year-old is not disproportionate to the crime committed and also is not considered cruel and unusual punishment as prohibited by the United States Constitution). In *Green*, the defendant was accused of first-degree rape, first-degree burglary and first-degree sexual offense. *Id.* at 822. The defendant apparently broke into the woman's apartment, attacked her and then raped her in front of her son. *Id.* at 823.

¹⁷³ See *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998) (upholding that life imprisonment, as opposed to capital punishment, is not prohibited by the Constitution when it comes to a 15-year-old). *Mitchell* follows the reasoning in *Green* and *Thompson* that if the punishment is not disproportionate to the crime and does not violate the “evolving standards of decency,” the sentence will be upheld. *Id.* at 489. *Mitchell* fatally shot a 19-year-old store clerk during a convenience store robbery. *Id.* at 483. He unsuccessfully appealed his sentence, arguing that sentencing a minor his age to life imprisonment was cruel and unusual punishment prohibited by the Constitution. *Id.* The court opined that life imprisonment is neither disproportionate to the crime nor violative of society's “evolving standards of decency” and, therefore, not prohibited by law. *Id.* at 489-90.

¹⁷⁴ See *National News Briefs; 15-Year-Old Killer Gets Life in Prison*, N.Y. TIMES, Aug. 21, 1999, at A14 (discussing the sentencing of Joshua Phillips for first degree murder). On November 3, 1998, Joshua Phillips, 14, stabbed his eight-year-old neighbor, Maddie Clifton, to death. See Bryan Robinson, *Florida*

However, when the Oklahoma Court of Criminal Appeals affirmed the sentencing of a fifteen-year-old defendant to death, the Supreme Court of the United States declared this type of punishment unconstitutional because it was in violation of the Eighth Amendment.¹⁷⁵ The Court held that although the juvenile did commit the reprehensible act of murder, invoking the death penalty on those under the age of sixteen would violate society's "evolving standards of decency"¹⁷⁶ and be considered "generally abhorrent

Teen Faces Trial for the Death of 8-Year-Old Neighbor (visited July 9, 1999) <http://www.courtvtv.com/trials/phillips/070299_ctv.html> (reporting on the murder of Maddie Clifton). After the killing, Joshua hid the body under his mattress to keep his actions from being discovered. *See id.* The body was discovered seven days later by his mother. *See id.*

In Florida, a 14-year-old accused of murder is tried as an adult. *See* FLA. STAT. ANN. § 985.226 (West 1998). Joshua was tried as an adult for the charge of first-degree murder. A jury quickly convicted him of the crime. *See* Bryan Robinson, *Florida Teen Found Guilty of First-Degree Murder, Faces Mandatory Life Sentence in 8-Year-Old Neighbor's Death* (visited July 9, 1999) <<http://dailynews.yahoo.com/headline>> (stating that it took the jury only two hours to convict Joshua Phillips of murder in the first degree for the death of Maddie Clifton). Because Florida mandates a life sentence without parole for a first-degree murder conviction, Joshua was later sentenced to prison for life with no chance of parole. *See* Bill Heery, *Trial in Girl's Killing Moves from Jacksonville to Bartow*, TAMPA TRIB., Apr. 23, 1999, at Florida/Metro-4 (stating that if Phillips is convicted of the crime, he faces a sentence of life imprisonment without parole); *National News Briefs; 15-Year-Old Killer Gets Life in Prison*, N.Y. TIMES, Aug. 21, 1999, at A14 (reporting on the sentencing of Joshua Phillips).

¹⁷⁵ *See Thompson*, 487 U.S. at 838. The court draws a line for the infliction of capital punishment at the age of 16. *Id.* The Court was "not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is therefore, 'nothing more than the purposeless and needless imposition of pain and suffering,' . . . and thus an unconstitutional punishment." *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). The Court affirmed this ruling a year later in *Stanford v. Kentucky*, 492 U.S. 361 (1989). There, the Court denied the appeals of 16 and 17-year-old defendants who claimed that the death sentence for 16 and 17-year-old defendants violated "evolving standards of decency" and, thus, constituted cruel and unusual punishment. *Id.* at 377-78.

¹⁷⁶ *Thompson*, 487 U.S. at 823 n.4. The Court consistently considers evolving standards of decency, as settled in *Weems v. United States*, 217 U.S.

to the conscience of the community.”¹⁷⁷ The Court affirmed its under-sixteen limitation on the death penalty a year later when it denied the appeals of a sixteen and seventeen-year-old defendant to declare their death sentences unconstitutional.¹⁷⁸ It held that there was no national consensus that forbids imposing capital punishment on these juveniles under the reasoning that persons of at least sixteen years of age have the full mental capacity to assume all adult responsibilities.¹⁷⁹

The severity and brutality of the crime is not lessened because of the youthfulness of the individual. Thus, the consequences of the crime must not be trivialized. To ensure substantive punishment, courts should penalize these juveniles as adults and adopt a penal and prison system to accommodate minors.

*B. Proposed Change to the Punishment System-
Rehabilitation Does Not Work*

The present penal system is not strong enough in the area of juvenile criminal punishment. The system is lopsidedly focused on rehabilitating the juvenile, trying to transform the child into an acceptable member of society, rather than punishing the child for the crime committed.¹⁸⁰ A better system incorporates both rehabilitative ideals as well as retributive and deterrence concepts,

349 (1910), in invoking the death penalty. *Id.* In determining what comports with these standards, courts look at legislation and jury sentences. *Id.* at 823 n.7.

¹⁷⁷ *Id.* at 816.

¹⁷⁸ *Stanford*, 492 U.S. at 380.

¹⁷⁹ *Id.*

¹⁸⁰ See SIMONSEN & GORDON, *supra* note 1, at 415.

[T]he entire conception of ‘individualized justice’ requires reassessment. . . . [T]he basic notion of ‘treating’ the child’s broad problems, rather than reacting to a specific law violation, appear[s not] to further the aim of ‘rehabilitation’ in any meaningful way. In fact the sense of injustice to which this approach gives rise may . . . actively reinforce attitudes that breed delinquency.

SIMONSEN & GORDON, *supra* note 1, at 415.

thereby seeking to reform the juvenile and punishing him concurrently.¹⁸¹

An explanation as to why the juvenile justice system seems to be so lenient on youths who commit serious offenses, like murder, is that “[t]he youngsters whom the founders of the juvenile court sought to help were, for the most part, charged with minor offenses.”¹⁸² But, as the juvenile court reformation evolved, the goal became one of helping all juveniles.¹⁸³ Rehabilitation may be a satisfactory approach to correct or treat minors that steal from a store or graffiti a wall, but when addressing violent crimes like murder, rehabilitation is not beneficial for the minor or society.¹⁸⁴

By treating the juvenile convict as a victim, the seriousness of the crime is diluted.¹⁸⁵ Such treatment does not compensate the victim, nor does it prevent the crime from being committed again.¹⁸⁶ Punishment of the convict as the perpetrator achieves the opposite result. It exemplifies society’s lack of tolerance for the

¹⁸¹ See *Transformation*, *supra* note 37, at 708 (stating “individualization neither reduces recidivism nor provides a principled basis for coercive intervention”). Feld further states that such treatment “[m]oreover, . . . produces unequal results among similarly situated offenders and punishes minor offenders excessively and serious ones leniently.” *Transformation*, *supra* note 37, at 708 (citations omitted).

¹⁸² Thomas Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 215 (1997) (proposing that the juvenile justice system be reinvigorated to deal with juvenile offenders ranging from minor offenses to the most serious of offenses).

¹⁸³ *Id.*

¹⁸⁴ See *United States v. NJB*, 104 F.3d 630, 637 (4th Cir. 1997) (stating there is a “growing recognition that for some of these juveniles, the rehabilitation theory upon which the current juvenile justice system is based is not always adequate to protect the public interest”) (citation omitted).

¹⁸⁵ See Kamenstein, *supra* note 13, at 2111 (discussing criminal behavior as a disease). The child is placed in a rehabilitative center in order to correct society’s negative influence on the juvenile, which is thought to be the cause of child misconduct. Kamenstein, *supra* note 13, at 2111. By making the child believe that it was the illness that caused the actions he took, we are enforcing the idea that they are faultless and without recourse. See Kamenstein, *supra* note 13, at 2111.

¹⁸⁶ See Fritsch & Hemmens, *supra* note 8, at 568 (expressing that a study done on juvenile delinquency found that about 18% of the juvenile offenders were the cause of more than half of the crimes committed by juveniles).

behavior and forces the victim to own up to his acts through incarceration.¹⁸⁷ It also emphasizes that juveniles are not different than other criminals, placing the deserved stigma of criminality on the youths instead of that of helplessness.¹⁸⁸

Punishment should serve three purposes: retribution, deterrence and rehabilitation.¹⁸⁹ Retribution demands that when one takes something away from another, one must compensate the victim for that loss by having something taken away from him.¹⁹⁰ Deterrence, a more utilitarian concept, entails punishing people as a means to improve society.¹⁹¹ Under a deterrence rationale, certain individuals are used as examples to illustrate to all that a particular behavior will not be tolerated without penalization in an attempt to defer future commissions of a crime.¹⁹² Rehabilitation aims to change individuals to conform to society's expectations.¹⁹³ All of these purposes combined form the ideal punishment system since it "right[s] a wrong, . . . reaffirms the victim's worth as a human being,"¹⁹⁴ and prevents others from committing the same crime.¹⁹⁵

The adult penal system satisfactorily incorporates these three purposes by mandating a sentence long enough to compensate for the loss of the victims' lives, making the prison experience unpleasant in an effort to dissuade others from committing similar crimes and establishing programs within the prison system to

¹⁸⁷ See DRESSLER, *supra* note 61, at 12 (discussing the retributive theory of punishment which emphasizes society's want for balance, i.e., an eye for an eye).

¹⁸⁸ See Kamenstein, *supra* note 13, at 2111 (stating that rehabilitation was implemented to make juveniles feel less like criminals and more like victims of society).

¹⁸⁹ DRESSLER, *supra* note 61, at 7-17.

¹⁹⁰ DRESSLER, *supra* note 61, at 12. Punishment serves to create a moral balance in society, not to hurt criminals. See DRESSLER, *supra* note 61, at 12 (explaining the philosophical and theoretical reasons for punishment).

¹⁹¹ See DRESSLER, *supra* note 61, at 14-15 (describing the theories of utilitarian punishment and the criticisms surrounding them).

¹⁹² DRESSLER, *supra* note 61, at 10.

¹⁹³ DRESSLER, *supra* note 61, at 15.

¹⁹⁴ DRESSLER, *supra* note 61, at 13.

¹⁹⁵ DRESSLER, *supra* note 61, at 10.

educate criminals.¹⁹⁶ This is the kind of punishment needed for juveniles convicted of murder in a criminal court. Trying minors as adults and then giving them reduced sentences or sentencing them to juvenile institutions defeats the purpose of criminal punishment.¹⁹⁷ Criminal proceedings and criminal punishment go hand in hand.¹⁹⁸ Without subjecting the juvenile delinquent to the punishment worthy of the crime, the juvenile will not understand how severe his actions truly were.¹⁹⁹

¹⁹⁶ See generally *Drug Treatment: Less Help in Prison Will Boomerang*, DALLAS MORNING NEWS, Jan. 11, 1999, at 10A (opining that educational programs established to treat inmates will be cut if the budget is used to accommodate an increase in prisoners); Richard P. Jones, *State Leads Nation in Housing Inmates at Out-of-State Sites Wisconsin Moves from Third to First Place After Tripling Prisoner Relocations in 1988*, MILWAUKEE J. SENTINEL, Dec. 6, 1998, at 1 (indicating that Wisconsin's prisons offer education programs and drug-abuse and alcohol rehabilitation); Phil Kabler, *First Female Warden Surprised By Posting*, CHARLESTON GAZETTE, Dec. 14, 1998, at 1C (reporting that Northern Correctional Center in Moundsville is the only state facility whose medical and educational programs are accredited by the American Correctional Association); Randy Ludlow, *Prison to House Chronic DUIs*, CINCINNATI POST, Dec. 3, 1998, at 1A (discussing a new innovative substance program being instituted in Hamilton County, Ohio). See, e.g., N.Y. PENAL LAW §§ 70.00(2), 125.25, 125.27 (McKinney 1998) (setting the prison sentence for murder to a minimum term of 15 years). The federal government sentences its worst criminals to the ADX center in Florence, Colorado, which has the harshest and strictest program in the nation. Michael Taylor, *The Last Worst Place: The Isolation at Colorado's ADX Prison is Brutal Beyond Compare*, S.F. CHRON., Dec. 28, 1998, at A3. ADX keeps its inmates in cells 23 hours a day (even during meals) for the first year and eventually inmates are allowed to socialize. *Id.* This kind of prison is known as the "supermax" prison and is becoming the nationwide trend to deal with dangerous prisoners. *Id.* Currently, there are 36 states that have supermax prisons. *Id.*

¹⁹⁷ Aron & Hurley, *supra* note 30, at 12 ("[T]he call for juvenile offenders to be treated as adult offenders is because society believes this is the only forum capable of meting out punishment harsh enough to address the severity of the crimes committed.").

¹⁹⁸ See Aron & Hurley, *supra* note 30, at 12 (stating that transfer occurs because of the want for harsher punishment).

¹⁹⁹ See Kamenstein, *supra* note 13, at 2111 (stating that the juvenile is led to believe that the leniency in punishment is due in part to the fact that his behavior was not the product of his doing, but caused by an illness beyond his control).

C. Separate Prison Accommodations for Juveniles

For juveniles tried and convicted in the criminal courts, three different types of incarceration are available: straight adult incarceration,²⁰⁰ graduated incarceration,²⁰¹ or segregated incarceration.²⁰² In straight adult incarceration, juveniles are placed in adult prisons and subject to the same treatment and programs as adult convicts.²⁰³ Graduated incarceration places the juveniles in a separate institution from adults until they reach a specified age, as dictated by statute.²⁰⁴ Upon reaching that age, the juveniles are removed from the separate facility and placed into an adult facility.²⁰⁵ The segregated system of incarceration isolates the youthful offenders from older offenders by housing them in separate facilities for the term of their stay.²⁰⁶ Juveniles under the segregated system will never co-habitate with adult offenders, even after they have reached the age of majority.²⁰⁷

²⁰⁰ PATRICIA TORBET ET AL., NATIONAL CENTER FOR JUVENILE JUSTICE, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 1, 25 (1996) (discussing the different types of punishment implemented by the courts).

²⁰¹ *Id.* (referring to the various sentencing structures the courts use).

²⁰² *Id.* (describing the punishments of the courts).

²⁰³ *Id.* (citing national statistics on the number of youths being housed in adult facilities as well as the states that use this sentencing structure). The juveniles are intermingled with adults with very little differentiation between them. Klein, *supra* note 8, at 404.

²⁰⁴ TORBET, *supra* note 200, at 25-27.

²⁰⁵ See TORBET, *supra* note 200, at 25-27 (describing the procedures and programs for juveniles in correctional facilities).

²⁰⁶ Klein, *supra* note 8, at 404. See also TORBET, *supra* note 200, at 25-28 (describing juvenile programming for correctional facilities and the states that incorporate the segregated system).

²⁰⁷ See TORBET, *supra* note 200, at 25-27 (describing juvenile programming for correctional facilities). The segregated system is similar to the juvenile facilities used for sentencing juvenile delinquents in that the juveniles will only be detained with other juveniles and never placed with adult criminals. TORBET, *supra* note 200, at 25-27. However, the segregated system operates in the same fashion as an adult prison except that there is more emphasis on retribution and punishment rather than on rehabilitation. TORBET, *supra* note 200, at 25-27.

The graduated system is the best form of incarceration because juveniles are not threatened by adult convicts, assuring their safety and, thus, allowing adult punishment for juvenile murderers. The graduated system allows juveniles to be housed only with other juveniles until adulthood, at which time they would be transferred to an adult facility. Under the graduated system, the juvenile delinquent is sentenced for a term of years in a separate facility.²⁰⁸ This facility is operated and managed the same way as the adult facility but only houses juveniles.²⁰⁹ Juveniles remain there until they reach the majority age of eighteen.²¹⁰ Once eighteen, the generally accepted age of adulthood,²¹¹ the individual is transferred to an adult facility.²¹²

Under the graduated system, no contact occurs between juvenile convicts and adult convicts.²¹³ Although the public's inclination is to treat juvenile murderers as adults, the possibility of incarceration with hardened criminals tends to sway the public toward the reformers' policy of special juvenile treatment.²¹⁴ The public is concerned with the possible abuse juveniles may encounter in adult

²⁰⁸ See Klein, *supra* note 8, at 404.

²⁰⁹ See Fritsch & Hemmens, *supra* note 8, at 568-570 (comparing adult and juvenile institutions). The main difference between a juvenile facility and an adult facility is that the juvenile detention centers have rehabilitation as their sole and main focus while adult facilities (prisons) concentrate on retribution and deterrence as well as rehabilitation. See Fritsch & Hemmens, *supra* note 8, at 568-70.

²¹⁰ See TORBET, *supra* note 200, at 25 (describing the different procedures for juvenile incarceration).

²¹¹ The definition of adult is "one who has attained the legal age of majority: generally eighteen years." BLACK'S LAW DICTIONARY 51 (6th ed. 1995).

²¹² See TORBET, *supra* note 200, at 25 (describing the procedures of juvenile graduated incarceration).

²¹³ See Klein, *supra* note 8, at 404 (discussing that juveniles would be kept separate from adults until attaining the age of adulthood).

²¹⁴ See Dunham, *supra* note 29, at 509 (explaining that the reform movement started, in part, to keep juvenile offenders away from hardened adult criminals so that further delinquent or criminal behavior would not ensue). See also *supra* Part I.A, describing the rehabilitative approach to juvenile treatment as the best approach to reforming youthful offenders into law-abiding citizens.

persons.²¹⁵ The thought of juvenile offenders being sexually and physically abused by older inmates forces people to look unfavorably at harsher measures for young murderers. The graduated system relieves the public from worrying that juvenile convicts will be abused or attacked by adult criminals. At the same time, the system allows for the juvenile criminals to serve longer sentences because the state does not have to construct a separate facility to hold the juveniles after they reach the maximum age of detention permitted in a juvenile institution.²¹⁶ When juveniles reach majority, they will be transferred to an adult prison to serve out the rest of their sentences.²¹⁷ Thus, the graduated system is the best because it is the safest for juveniles and appeases the public's concern over their safety while allowing the public to remain convicted to treating juvenile criminals as adults.

CONCLUSION

While our penal system acts to punish adults who commit murder, there seems to be no compensatory consequences for children who do the same. The former are subject to capital punishment or long prison sentences, while the latter are subject to

²¹⁵ See Klein, *supra* note 8, at 404-05 (citations omitted) (illustrating, through statistics, the likelihood that the juvenile will be abused in prison).

Studies show that sexual and physical assault of juveniles is much more likely in adult facilities. While 36.7% of juveniles in juvenile facilities report being victims of violent attack[s], 45.7% of juveniles in adult facilities report such abuse. In addition, sexual assault of a juvenile is five times more likely in an adult facility than in a juvenile one. Also, beatings by staff are nearly twice as likely for juveniles in adult facilities than for those housed in juvenile facilities, and attacks with weapons are nearly 50% more common.

Klein, *supra* note 8, at 404-405.

²¹⁶ See, e.g., *Bloodshed*, *supra* note 6, at A1 (reporting on the juvenile court's sentencing of the Jonesboro boys). The boys, although adjudicated in the juvenile system, would have been given a longer sentence, but because the state does not have a facility to house those between the ages of 18 and 21, they could only be held until the age of 18. *Bloodshed*, *supra* note 6, at A1.

²¹⁷ See Klein, *supra* note 8, at 404 (describing the graduated incarceration system of punishment).

rehabilitative state control until they reach the majority age of eighteen or twenty-one, with the exception of those minors who may be transferred to criminal courts. Therefore, an injustice is occurring and a modification of our approach to juvenile murderers is required to address this injustice.

The common view is that juveniles are not mature or mentally developed enough to receive adult-like responsibilities and, thus, when charged with murder, should not face the same consequences as adults.²¹⁸ But, these juveniles are not as irresponsible and irrational as they are purported to be.²¹⁹ Minors as young as twelve are capable of understanding their actions and the consequences that result therefrom.²²⁰ Legally, this rationalizing ability allows for these young individuals to appreciate their actions.²²¹ Accordingly, juveniles of at least the age of twelve are blameworthy and morally responsible for their crimes. Therefore, children twelve years of age and older should be subject to criminal liability.

Since those over twelve should be criminally responsible for their actions, the legal system should not take measures to protect them as if they are not responsible. Subjecting these juveniles to the adult system for only the specific act of murder would not violate the evolving standards of decency because of the violent and abhorrent nature of the crime.²²² Lately, due to the recent and

²¹⁸ See *Juvenile Court*, *supra* note 52, at 911 (indicating the reason for infancy defenses and juvenile systems is to reflect developmental differences between adults and children).

²¹⁹ See *supra* Part II.A, discussing Piaget's developmental model. See also Walkover, *supra* note 125, at 533-44 (discussing the culpability of a child to determine whether he or she is blameworthy).

²²⁰ See MCCONNELL & PHILIPCHALK, *supra* note 94, at 380 (stating that at the age of 12, children are capable of logical thinking and, therefore, able to rationally understand the consequences of their actions).

²²¹ See DRESSLER, *supra* note 61, at 104 (stating that unless the individual appreciates the end result of his actions, punishment would be useless because one cannot be deterred from that which he does not know is wrong). Therefore, if the juvenile can weigh the factors of doing an act and not doing an act, he understands the end result of that act and can be punished. DRESSLER, *supra* note 61, at 104.

²²² See *Thompson v. Oklahoma*, 487 U.S. 815, 816, 823 (1988) (stating that

numerous accounts of deaths at the hands of children, there has been a public outcry for tougher sanctions for those that kill, regardless of the age of the accused. Therefore, it is necessary for state and federal governments to amend their statutes to mandate that minors twelve years of age and older who kill be transferred to criminal courts. Automatic waivers, not judicial or statutory waivers, should be implemented because they prevent inconsistencies by eliminating judicial discretion.

Primarily, the JDA must be amended to catalyze juvenile reform towards harsher standards. According to Representative Charles Canady, "the federal government . . . play[s an important role] in encouraging the states to develop more effective policies, particularly to deal with violent children."²²³ Federal enactment of a statute that treats twelve-year-old murderers as adults would act a catalyst and move the states toward adopting similarly strict juvenile criminal statutes. Eventually, all states likely would adopt a statute similar to that of the federal government as they did when the JDA first was enacted and when the JDA was amended in 1974 and 1984.²²⁴

If America's goal is to decrease the frequency of murder, it cannot ignore the fact that its children are part of the problem. We must acknowledge that harsher procedures and heavier penalties are required for juveniles who murder. We also must realize that treating these individuals as if they are not at fault only perpetuates the problem and does not solve it. It is time to tell all juveniles that murder will not be tolerated by prosecuting them as adults to the fullest extent of the law.

punishment will only be upheld if it does not violate the "evolving standards of decency" of society or held to be "abhorrent to the conscience of the community").

²²³ See *Meet the Press*, *supra* note 76 (quoting from a transcript of the debate between the five house judiciary members on the question of how to deal with juveniles who kill). The question on juvenile killers erupted from the recent Jonesboro incident, where two boys caused the death of five people. See Bragg, *supra* note 2, at A1.

²²⁴ See *supra* Parts I.A and I.C, discussing the history of the JDA and the current status of juvenile statutes.