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# DETERMINANTS OF JUDICIAL WAIVER DECISIONS FOR VIOLENT JUVENILE OFFENDERS\*

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## I. INTRODUCTION

The selection of jurisdiction for adjudicating juvenile crime today is one of the most controversial debates in crime control policy, reflecting differences in assumptions about the causes of crime and philosophies of jurisprudence and punishment. For adolescent offenders, especially violent youth whose behaviors may pose particular social danger, critics view the traditional goals of the juvenile court and the "best interests of the child" standard as being at odds with public concerns for retribution and incapacitation of criminals. The choice between jurisdictions is a choice between the nominally rehabilitative dispositions of the juvenile court and the explicitly punitive dispositions of the criminal courts.<sup>1</sup> The choice reflects differences between sentencing policies that assign primary importance to the individual and those that accord greater significance to the seriousness of the offense committed and the goal of proportional punishment.

Critics of the juvenile court's rehabilitative policies suggest that the court's sanctions for violent crimes are not only inappropriate and disproportionate for the seriousness of the crimes, but also inef-

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<sup>1</sup> Whitebread & Batey, *The Role of Waiver in Juvenile Court: Questions of Philosophy and Function*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 207 (J. Hall, D. Hamparian, J. Pettibone, & J. White eds. 1981) [hereinafter MAJOR ISSUES].

fective in deterring subsequent crime.<sup>2</sup> They contend that the criminal court, with its punitive sanctions, is the more appropriate forum for adjudicating violent crimes by juveniles whose offense and behavior patterns should mandate lengthy incarceration in secure facilities.<sup>3</sup> The critics further argue that treatment programs for juvenile offenders are ineffective, thereby negating the purpose of the juvenile court.<sup>4</sup> The seriousness of violent juvenile crimes suggests that these adolescents can be neither controlled nor rehabilitated in the juvenile justice system.

In contrast, supporters of the juvenile court argue that violent juvenile crime is a transitory behavioral pattern, which is unlikely to escalate to more serious or persistent crime.<sup>5</sup> They argue that adolescent offenders benefit from treatment services that pose only a minimal threat to public safety while avoiding the lasting stigmatization of criminal justice processing.<sup>6</sup> Finally, many proponents of juvenile justice processing of violent delinquents do not accept the criticisms of rehabilitative programs, arguing instead that weak evaluation research or poor program quality mask the natural strengths of juvenile corrections.<sup>7</sup>

While this policy debate continues on the appropriate judicial forum to adjudicate violent crimes by adolescents, over forty states have passed laws since 1978 that restrict the jurisdiction of the juvenile court.<sup>8</sup> The limits imposed on the juvenile court's jurisdiction, as well as the statutory and procedural approaches employed to determine which adolescents should be subject to criminal laws, vary

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<sup>2</sup> Wolfgang, *Abolish the Juvenile Court*, 2 CAL. LAW. 12 (Nov. 1982); Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195 (1983).

<sup>3</sup> See, e.g., J. WILSON, THINKING ABOUT CRIME (2d ed. 1983); C. MURRAY & L. COX, BEYOND PROBATION: JUVENILE CORRECTIONS AND THE CHRONIC DELINQUENT (1979). The critics argue that the incapacitative sanctions of the criminal court provide greater community protection, more effective deterrence of future crime, and more proportionate, retributive responses to violent behaviors.

<sup>4</sup> Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment and the Difference It Makes*, 68(5) B.U.L. REV. 821 (1988).

<sup>5</sup> D. HAMPARIAN, R. SCHUSTER, S. DINITZ & J. CONRAD, THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS (1978); D. HAMPARIAN, R. SCHUSTER, J. DAVIS, & J. WHITE, THE YOUNG CRIMINAL YEARS OF THE VIOLENT FEW (monograph prepared for the Office of Juv. Just. & Delinq. Prevention, Dep't of Just., 1985) [hereinafter D. HAMPARIAN, THE YOUNG CRIMINAL YEARS]; Rojek & Erickson, *Delinquent Careers*, 20 CRIMINOLOGY 5 (1982); Shannon, *Risk Assessment vs Real Prediction: The Prediction Problem and Public Trust*, 1 J. QUANTITATIVE CRIMINOLOGY 159 (1985).

<sup>6</sup> Gendreau & Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349 (1987).

<sup>7</sup> Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93 (1990).

<sup>8</sup> Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987).

among states. Some states have lowered the age of jurisdiction for criminal court, either for all offenders or for selected offense categories.<sup>9</sup> Other states have expanded the basis for transfer of cases from juvenile to criminal jurisdictions, either by expanding the criteria for transfer or shifting the burden of proof from the state to the defendant.<sup>10</sup> Still others have established concurrent jurisdiction for selected offenses or offenders, giving prosecutors broad discretion over the choice of forum.<sup>11</sup> These differences have significant effects on the number and types of youths waived to criminal court.<sup>12</sup>

Yet, there is little empirical guidance to determine the age threshold and offense or offender eligibility criteria for criminal court, or to inform continuing efforts to redefine the jurisdiction of the juvenile court. Similarly, no one has undertaken to systematically examine the most appropriate age-crime relationship to determine which sanctioning forum is most effective in avoiding recidivism and safeguarding public safety.<sup>13</sup> In addition, few studies have examined the decision processes for transfer<sup>14</sup> of juveniles to criminal court.<sup>15</sup>

Yet, only by analyzing the possible determinants of transfer for

<sup>9</sup> See, e.g., N.Y. CRIM. PRO. LAW § 180.75 (McKinney 1990); VT. STAT. ANN. tit. 33, § 632(a) (1989).

<sup>10</sup> See, e.g., N.J. REV. STAT. § 2C:4-11 (1987); OHIO REV. CODE ANN. § 2151.26 (Anderson 1990).

<sup>11</sup> See, e.g., MICH. COMP. LAWS § 712A.4 (1990); FLA. STAT. § 39.02 (1988).

<sup>12</sup> See D. HAMPARIAN, R. SCHUSTER, J. DAVIS & J. WHITE, *YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS* (monograph prepared for the Office of Juv. & Delinq. Prevention, Dep't of Just., 1982) [hereinafter D. HAMPARIAN & R. SCHUSTER, *YOUTH IN ADULT COURTS*].

<sup>13</sup> See D. FARRINGTON, L. OHLIN & J. WILSON, *UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY* (1986). They argue that little is known about the relative sentence severity or the effectiveness of sanctions for cases transferred to criminal court, nor whether increased deterrence, retribution, or incapacitation results from transfer. Nor has the literature on sentencing generally addressed the structural-contextual effects of court jurisdiction by comparing juvenile and criminal court sanctions. Moreover, the few studies that have compared adolescent offenders in juvenile and criminal court have relied on heterogeneous samples of violent and nonviolent offenders that were channeled from juvenile to adult jurisdictions. Thus, selection biases consistently have compromised comparisons of the two types of proceedings.

<sup>14</sup> Transfer, bindover, certify, remand, refer and waive are all words used interchangeably to describe the process whereby a youth, through a petition filed in the juvenile court, ends up in the criminal justice system to be tried as an adult.

<sup>15</sup> See, e.g., Keiter, *Criminal or Delinquent? A Study of Juvenile Cases Transferred to the Criminal Court*, 19 CRIME & DELINQ. 528, 529 (1973) (claimed absence of decision standards and operational definitions of the statutory criteria "invites abuse"); Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in MAJOR ISSUES, *supra* note 1, at 333 (found racial disparities in transfer decisions for interracial homicides—Afro-American defendants were transferred significantly more often if the victim was white).

juveniles charged with felony offenses in the criminal and juvenile courts, can appropriate plans for legal reform proceed from an empirical base. The study reported here examines the judicial transfer decision in four urban juvenile courts for youths charged with violent offenses. More generally, it addresses the issue of criteria for transfer—that is, it examines the threshold of adolescence, or factors that the courts invoke to decide when a child no longer is a child. In addition, the research and policy questions address the following issues: first, which offense and offender attributes influence the judicial decision to transfer; second, whether these variables are consistently applied in the transfer decision; and third, to identify the implicit transfer policies based on the operationalization of subjective criteria and the relative contributions of objective and discretionary criteria to transfer decisions. The conclusions address the legal and policy implications of differential determinants of transfer, and suggest criteria and procedures for invoking waiver as an ultimate or last resort juvenile court sanction.

In order to set this study in a broader historical context, the following sections provide a brief review of the philosophical and epistemological distinctions that separated the juvenile and adult courts, the concerns that led to the restructuring of the juvenile court, the issues surrounding the judicial transfer of juveniles to adult court, and recent developments in statutes authorizing judicial transfer.

#### A. HISTORICAL DISTINCTIONS BETWEEN JUVENILE AND CRIMINAL COURTS

The first juvenile court in the United States was established nearly a century ago.<sup>16</sup> Traditional historical accounts suggest that the social reformers who helped spur the creation of the courts were motivated by a progressive ideology that stressed both “humanitarianism” and positivistic beliefs that behavior was amenable to rehabilitation.<sup>17</sup> Recognizing the difficulty of convicting and punishing

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<sup>16</sup> Juvenile offenders have been treated separately and differently since the beginning of English common law in the 12th century. See Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985). The English common law recognized a legal distinction between juvenile and adult offenders based on arguments that juveniles lacked the moral development and reasoning capabilities of adults. That is, juveniles were thought to have not reached the spiritual attainment of adults, and accordingly could not distinguish right from wrong.

<sup>17</sup> See D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980). In contrast, critical theorists suggest this was part of an historical process of the search for new forms of legal and social control in response to increasing rates of crime and delinquency as unfortunate by-products of

juveniles in the criminal justice process, the social reformers advocated a separate legal setting to provide juveniles with individualized treatment.<sup>18</sup> Throughout its subsequent history, the juvenile court has maintained a goal of rehabilitation of the individual, and made custody and punishment a secondary goal in the pursuit of "remaking the child's character and lifestyle."<sup>19</sup>

The development of a separate juvenile court also reflected a fundamental distinction between sanctions based on characteristics of the offender and punishment based on the offense. The *parens patriae* philosophy emphasized treatment, supervision, and control, rather than the traditional punitive responses of the criminal law. Juvenile proceedings were defined as civil rather than criminal, and therefore less stigmatizing.<sup>20</sup> Furthermore, juvenile court dispositions were designed to determine why the child was in court, and what could be done to avoid future appearances.<sup>21</sup> The juvenile court thus eschewed the technical rules of evidence and procedure to ensure that all information about the offender was available,<sup>22</sup> rather than narrowly focusing on the facts of the case. The juvenile court's goal was to resolve the wayward youth's family, social, and personal problems and prepare the youth to be a healthy, productive, and law abiding adult.

The central justification for the separation of juvenile and adult jurisdiction is the distinction between punishment and treatment. Whereas punishment involves the imposition of burdens (*i.e.*, deprivation of liberty) on an individual for the purposes of retribution or deterrence, treatment focuses on the present and future well being of the individual. Disproportionate responses to comparable individuals were tolerated if underlying factors or mitigating circumstances were found. To prevent contamination of juvenile offenders

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urbanization, industrialization, and increased immigration to fill the needs for industrial workers. See A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969).

<sup>18</sup> Similarly, the "Progressives" of the late 19th century thought that the causes of juvenile and adult crime differed. All juvenile crime was viewed as resulting from external forces such as inadequate socialization within families rather than the deliberate exercise of free will. This unicausal theory negated distinctions between types of behavior. See D. ROTHMAN, *supra* note 17. The Progressives further believed that the youths, who did not possess the maturity to appreciate fully the wrongfulness of their actions, merely needed moral guidance or social reform to resume a normative developmental path.

<sup>19</sup> See D. ROTHMAN, *supra* note 17; Thomas & Bilchik, *supra* note 16.

<sup>20</sup> See Schlossman, *Juvenile Justice: History and Philosophy*, in 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 961 (S. Kadish ed. 1983).

<sup>21</sup> E. RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* (1978).

<sup>22</sup> See Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 *J. CRIM. L. & CRIMINOLOGY* 471 (1987).

by adult criminals, youth were detained and treated in separate facilities. The distinctions between juvenile and criminal sanctions thus were not limited to the nature of the proceedings, but to the very distinction between treatment and custody.

#### B. RESTRUCTURING THE JUVENILE COURT

The traditional separation of juvenile and criminal jurisdiction established the age of eighteen as the age threshold at which the young offender would be held liable for criminal actions. Eighteen years old thus became the statutory threshold of childhood for purposes of selecting a judicial forum to adjudicate illegal behaviors. However, recognizing that certain offenders under the age of eighteen may not be amenable to the rehabilitative dispositions of juvenile court, the juvenile court judges were granted broad discretionary powers to waive jurisdiction and send young offenders to the criminal courts.<sup>23</sup>

Recent years have brought challenges to the boundary between juvenile and criminal jurisdiction. Two sources of criticism have converged in calling for a restructuring of the juvenile court, with special emphasis on increasing its procedural formality while narrowing its jurisdiction. First, critics suggested that the procedural informality and offender-based decision process threatened the due process rights of juveniles,<sup>24</sup> often resulting in inequitable dispositions. Second, proponents of deterrence and incapacitation policies criticized the juvenile court as ineffective at controlling violent juvenile crime. A series of damaging studies on the apparent weakness of rehabilitation programs negated the rehabilitative purposes of the juvenile court.<sup>25</sup> Furthermore, the statutory limitations on pun-

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<sup>23</sup> The early statutes left the decision to waive jurisdiction to the court's discretion, and placed no procedural limitations on the exercise of that discretion. See Whitebread & Batey, *The Role of Waiver in Juvenile Court: Questions of Philosophy and Function*, in MAJOR ISSUES, *supra* note 1, at 207. Today, the standards for determining the appropriate judicial forum for disposition of young offenders remains inconsistent from state to state. See D. HAMPARIAN & R. SCHUSTER, *Youth in Adult Courts*, *supra* note 12; Rudman, Hartstone, Fagan & Moore, *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 75 (1986) [hereinafter Rudman]; Feld, *supra* note 22.

<sup>24</sup> See *United States v. Gault*, 381 U.S. 1 (1967); *United States v. Kent*, 383 U.S. 541 (1966); Whitebread & Batey, *supra* note 23; Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53 (1986).

<sup>25</sup> See Feld, *supra* note 22 (emphasizing the limitations of juvenile court dispositions in stopping the recurrence of violent crimes by juvenile offenders). See also Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 153 (1966); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL PROGRAMS: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67 (1971); *THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS* (L. Sechrest, S. White &

ishment in juvenile court were criticized as inappropriate given the seriousness of violent crimes by adolescents and the public danger from juvenile violence.<sup>26</sup>

### 1. *Redefining the Threshold of Adolescence*

Recent legislation suggests that the traditional age boundary of eighteen years old for criminal liability may be modified by specific behaviors. For example, a fifteen year-old offender who commits a violent offense may be held criminally responsible, while his or her cohort remains a juvenile if violations of law are less serious. Thus, recent legislation reducing the age threshold for criminal liability has created an age-behavior gradient for legal definitions of childhood.<sup>27</sup>

Offenders below the threshold age for "adulthood," or criminal liability traditionally have been viewed as "amenable to treatment," and suitable for interventions designed to change either the factors that precipitated the offenses or the offending behaviors themselves.<sup>28</sup> Juvenile justice "sanctions" are thus designed to remedy the underlying causes of youthful misconduct while retaining the youth under state control (*in loco parentis*). Sanctions in the criminal justice system, however, focus on retribution, deterrence, or incapacitation, with only minimal efforts directed at rehabilitation.<sup>29</sup>

### 2. *The Due Process Revolution*

In response to several Supreme Court decisions, a rapid movement was begun in the late-1960s to both formalize juvenile court procedures and strengthen the punitive element of juvenile court sanctions. The Court in *United States v. Kent*,<sup>30</sup> after finding that the

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E. Brown eds. 1979); Wright & Dixon, *Community Prevention and Treatment of Juvenile Delinquency: A Review of Evaluation Studies*, 17 J. RES. IN CRIME & DELINQ. 35 (1977).

<sup>26</sup> See JUVENILE COURT LAW REVISION COMMISSION, FINAL REPORT (Cal. Atty. Gen'l Office 1984).

<sup>27</sup> See Conrad, *Crime and the Child*, in MAJOR ISSUES, *supra* note 1, at 179.

<sup>28</sup> Although the state is responsible for ameliorating the antecedent conditions that gave rise to the criminal acts, the methods employed vary. Recent efforts to incorporate corporal punishment into the treatment services are based on the notion that such "social learning" is part of the rehabilitative process. For a discussion of the social meaning of sanctions, see Jensen & Erickson, *The Social Meaning of Sanctions*, in CRIME, LAW AND SANCTIONS: THEORETICAL PERSPECTIVES 119 (M. Krohn & R. Akers eds., 6 Sage Research Series in Criminology, 1978).

<sup>29</sup> The intent of criminal court is to inflict punishment through deprivation of liberty in harsh but humane surroundings. The type and severity of punishment is primarily determined by the severity of the crime committed, mediated by the defendant's criminal history as well as mitigating circumstances and background.

<sup>30</sup> 383 U.S. 541 (1966).



informality of the juvenile court violated due process guarantees, extended to juveniles the principle of due process for waiver or transfer hearings, and raised questions about the rehabilitative element of juvenile court dispositions.<sup>31</sup> Similarly, in *In re Gault*,<sup>32</sup> the Court granted juveniles the rights to receive notice of charges against them, to legal representation, to confront and cross-examine witnesses, to avoid self-incrimination, and to appeal court decisions. Later decisions introduced procedural regularity, adopted "beyond a reasonable doubt" as the standard of proof, and raised evidentiary standards and due process concerns to an equal status with the "best interests of the child."<sup>33</sup> Moreover, these actions initiated questions about the "best interests" philosophy, and whether it in fact substantively benefited juvenile offenders or the public. The result was greater attention to procedural formality, and in turn, to offense-specific dispositions.<sup>34</sup>

### 3. *Serious Juvenile Crime and the Failure of Rehabilitation*

Another challenge to the separate juvenile justice system was a consequence of rapid increases in juvenile crime rates in the 1970s, especially violent juvenile crime. Serious and violent juvenile crime rose steadily from 1974-79, and again in 1980-81.<sup>35</sup> Critics of a separate juvenile jurisdiction linked these increases to the ineffectiveness of rehabilitative programs; these criticisms were fueled by repeated findings that directly attacked the positivistic foundations of the juvenile court—that treatment interventions could forestall further juvenile offending.<sup>36</sup>

The specific critiques of the juvenile court took three forms. First, sanctions in juvenile court were feared to be less certain or severe (or inappropriately lenient, based on crime severity) than in criminal court, creating a "leniency" gap in punishment and retribution.<sup>37</sup> Second, the persistently high rates of violent juvenile

<sup>31</sup> *Id.* at 555, 560-62.

<sup>32</sup> 387 U.S. 1 (1967).

<sup>33</sup> *See, e.g., In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>34</sup> *See Feld, The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987).

<sup>35</sup> Strasburg, *Some Recent National Trends in Serious Juvenile Crime*, in *VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY 5* (R. Mathias, P. DeMuro & R. Allinson eds. 1984); Weiner & Wolfgang, *The Extent and Character of Violent Crime in America, 1969 to 1982*, in *AMERICAN VIOLENCE AND PUBLIC POLICY: AN UPDATE OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 17* (L. Curtis ed. 1985).

<sup>36</sup> *See supra* note 25.

<sup>37</sup> *See, e.g., Roysher & Edelman, Treating Juveniles as Adults in New York: What Does It Mean and How Is It Working?*, in *MAJOR ISSUES, supra* note 1, at 265 (finding evidence that

crime<sup>38</sup> led to the belief that rehabilitative dispositions in juvenile court were ineffective in curtailing further crime and violence. Finally, juvenile court sanctions were presumed to pose greater risks to the public from (inappropriately) shorter terms of incarceration, compared to the lengthy sentences meted out by the criminal courts. Accordingly, the primary motivation for relocating violent crimes by adolescents to the jurisdiction of the criminal court was the severity and length of sentences that could be imposed.<sup>39</sup>

Serious and violent juvenile offenders thus became the focus of contemporary debates on the efficacy of the juvenile court. The behaviors of violent adolescents suggest that they have attained an age where they may no longer be amenable to the "rehabilitative" ministrations of the juvenile court. The reduction of the age of majority for certain classes of offenses and offenders further suggests either that they have attained adulthood (as shown by some aspect of their behaviors), or the risks to the public are too great not to regard them as adults in adjudicating their crimes.

#### 4. *Criminalizing Adolescent Violence: Reducing the Jurisdiction of the Juvenile Court*

The perceived weakness of rehabilitation prompted the legislatures, juvenile corrections agencies, and the courts to adopt new

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young felony offenders in the criminal court in New York were treated less harshly due to their youthful standing as compared to older offenders with longer criminal histories). However, evidence of a leniency "gap" has not been found in other studies. See P. GREENWOOD, A. ABRAHAMSE & F. ZIMRING, *FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS* (monograph prepared for Nat'l Inst. of Just., U.S. Dep't of Just., Aug. 1984), who, after comparing sanction severity for adolescents in juvenile and criminal courts in three jurisdictions, found no evidence of a "leniency gap" for young offenders in the criminal court. See also Rudman, *supra* note 23, who found no differences in either sanction probability or sentence severity for violent youths retained in juvenile court with other violent adolescents transferred to criminal court.

<sup>38</sup> For over two decades, young males 16 to 18 years of age have had the highest arrest rates (per 100,000) of robbery and burglary. Weiner & Wolfgang, *supra* note 35, at 27. Cohort studies that identified that criminality was concentrated among a small number of chronic offenders further implicated the rehabilitative programs in the juvenile system as failing to effectively alter repeated violent behavior. See Shannon, *Risk Assessment vs Real Prediction: The Prediction Problem and Public Trust*, 1 J. QUANTITATIVE CRIMINOLOGY 159 (1985); M. WOLFGANG, R. FIGLIO & T. SELLIN, *DELINQUENCY IN A BIRTH COHORT* (1972); D. HAMPARIAN, R. SCHUSTER, S. DINITZ & J. CONRAD, *THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS* (1978).

<sup>39</sup> However, the primary motivation was not always realized in application. See Rudman, *supra* note 23 (concluding that incarceration of violent adolescent offenders was equally likely in juvenile and criminal court, though terms of incarceration were longer in criminal court); see also D. HAMPARIAN & R. SCHUSTER, *YOUTH IN ADULT COURTS*, *supra* note 12 (finding that for other offenses, particularly serious property crimes, the period of incarceration from criminal court was no more serious than what likely would have been received in juvenile court).

strategies to strengthen the severity and certainty of sanctions for violent juvenile offenders. The results include the adoption of both determinate sentencing statutes<sup>40</sup> and administrative guidelines mandating minimum terms of placement in secure care. The effect of determinate sentencing and mandatory confinement laws, such as those enacted in New York,<sup>41</sup> California,<sup>42</sup> and Colorado,<sup>43</sup> has been to remove the discretion in disposition, placement, and release decisions from "traditional" juvenile justice authorities (i.e., judges, juvenile corrections agencies or parole boards) to the legislative forum.<sup>44</sup>

More common, however, are efforts to remove or exclude "dangerous" or violent offenders from juvenile court jurisdiction. This has occurred in two ways. First, several states have eliminated juvenile jurisdiction for specific age/offense/offender categories, while reducing the age of majority for specified serious, violent, or repeat felony offenders.<sup>45</sup> The transfer "decision" in these locales is thus extremely sensitive to, if not determined by, the prosecutor's charging decision.

Second, other states have expanded the prosecutor's discretion to chose the adjudicatory forum by establishing concurrent jurisdiction that permits prosecutorial waiver. In Michigan, Florida, and Massachusetts, for example, prosecutors may elect the court of original jurisdiction for certain categories of adolescent offenses and offenders, often with some restrictions or guidelines imposed

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<sup>40</sup> For example, the state of Washington has enacted sweeping legislation mandating specific types and lengths of punishment for juvenile delinquents. *See* WASH. REV. CODE § 13.40.010 (1990).

<sup>41</sup> N.Y. PENAL LAW § 60.02 (McKinney 1990).

<sup>42</sup> Cal. Penal Code § 1170 (West 1990).

<sup>43</sup> COLO. REV. STAT. § 19-2-804 (1990). These state laws specify certain classes of offenses (usually violent crimes) or offenders (often persistent offenders) for placement in state corrections agencies for minimum terms.

<sup>44</sup> However, considerable discretion remains with judges for dispositions outside the guidelines. One example is the "manifest injustice" clause of the Washington statute. Analyses of juvenile court dispositions found that the manifest injustice clause was invoked in nearly 65% of juvenile court dispositions, usually to increase sanction severity where the formula otherwise dictated either a less serious placement or a shorter incarceration term than thought proportionate or justified by the judge for the offense or offender characteristics. For an analysis of the application of this option, see Schneider & Schram, *The Washington State Juvenile Justice System Reform: A Review of Findings*, 1 CRIM. JUST. POL'Y REV. 211 (1986).

<sup>45</sup> *See* Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987). For example, in New York, certain felony offenses for youth 14 or older originate in criminal court. *See* N.Y. CRIM. PRO. LAW § 1.20(42) (McKinney 1990). Homicide cases for youths 13 years of age also originate in criminal court. *See id.*

legislatively.<sup>46</sup>

Finally, and most common, many states have simplified the procedures and eased the criteria for transfer (waiver, remand) to criminal court jurisdiction. Since 1978, over forty-one states have passed legislation to expand the use of transfer. The offense categories have been expanded, age eligibility reduced for some or all offense types, and other criteria (*e.g.*, "heinousness of the offense," "dangerousness to the community," "amenability to treatment") have been simplified or added to facilitate the transfer of juveniles to criminal court for prosecution.<sup>47</sup>

In certain jurisdictions, the systematic application of prosecutorial discretion may relocate certain classes of offenses and offenders from juvenile to criminal court. In two urban juvenile courts, Phoenix and Miami, for example, prosecutors routinely file waiver (transfer) motions, most often granted, to relocate specific classes of juvenile cases to criminal court.<sup>48</sup> The intent is either longer sentences in secure environments, and/or an earlier start in the accumulation of a criminal court record. Again, the actions of prosecutors reflect a lack of confidence in the sanctioning certainty (patterns) and conditions in the juvenile jurisdiction.

### C. TRANSFER TO CRIMINAL COURT

One of the most extreme responses to serious juvenile crime involves the transfer of juveniles to adult (criminal) court for prosecution. In all but two states, a juvenile court judge is empowered to decide, with varying degrees of statutory guidance, whether or not to transfer certain juveniles charged with specified offenses to adult court for prosecution.<sup>49</sup> The judicial decision to waive a youth to criminal court recognizes that for certain offenses and offenders, juvenile justice system sanctions may be insufficient to accomplish the twin goals of punishment and rehabilitation. Waiver statutes assume, moreover, that some youths are simply beyond rehabilitation—that is, they are not amenable to treatments aimed at

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<sup>46</sup> See MICH. COMP. LAWS § 712A.4 (1990); FLA. STAT. § 39.02 (1988); MASS. GEN. L. ch. 119, § 61 (1990).

<sup>47</sup> For example, New Jersey passed transfer legislation in 1983 explicitly shifting the burden of proof on "amenability" and "dangerous" from prosecutors to defense counsel. N.J. REV. STAT. § 2A:4A-26 (1982). Accordingly, the defense counsel now must disprove prosecutorial allegations that an adolescent is ineligible for juvenile jurisdiction.

<sup>48</sup> See Rudman, *supra* note 23; D. HAMPARIAN & R. SCHUSTER, YOUTH IN ADULT COURTS, *supra* note 12.

<sup>49</sup> See D. HAMPARIAN & R. SCHUSTER, YOUTH IN ADULT COURTS, *supra* note 12.

behavioral or characterological change in the juvenile justice system.

Transfer is a severe sanction, with potentially harsh consequences: an extended detention in jail, a protracted adjudicatory process, a felony conviction resulting in social and legal sanctions, and a lengthy sentence at a secure correctional institution.<sup>50</sup> Zimring<sup>51</sup> and Emerson<sup>52</sup> regard waiver as a sanction of last resort for the juvenile court because of its low incidence, severity of likely punishment, and its ultimacy.<sup>53</sup> Accordingly, the transfer decision does more than choose a judicial forum for an accused youth. It invokes a jurisprudential philosophy that governs the nature of the proceedings as well as the purpose and severity of the sanctions. It also raises the important issue of when a child is no longer a child, specifically whether factors other than age are relevant for removing some youth from juvenile court jurisdiction.

Most of the early juvenile court statutes contained some reference to waiver of jurisdiction.<sup>54</sup> Certain youth, described as "chronic," "serious," "violent," "sophisticated," "mature" or "persistent" were thought to be out of the purview of the rehabilitative-oriented juvenile court.<sup>55</sup> Early statutes gave the juvenile court absolute discretion to dismiss a delinquency petition and transfer a youth to the criminal justice system.<sup>56</sup> Most statutes did not prescribe substantive criteria or procedures for the waiver process, thereby allowing waiver decisions to be made in an informal and subjective manner and predicated on unfettered discretion.<sup>57</sup>

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<sup>50</sup> See Rudman, *supra* note 23; Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53 (1986); D. HAMPARIAN & R. SCHUSTER, *YOUTH IN ADULT COURTS*, *supra* note 12.

<sup>51</sup> Zimring, *Notes Toward a Jurisprudence of Waiver*, in MAJOR ISSUES, *supra* note 1, at 193.

<sup>52</sup> See Emerson, *On Last Resorts*, 87 AM. J. SOC. 1 (1981).

<sup>53</sup> Most states regard a waiver of jurisdiction as an irrevocable act. Thus, once an adolescent is transferred to criminal court for a criminal offense, all subsequent charges against that juvenile are regarded as criminal offenses and are adjudicated in the criminal court. The transfer decision becomes an expulsion from the jurisdiction of the juvenile court.

<sup>54</sup> See Whitebread & Batey, *The Role of Waiver in Juvenile Court: Questions of Philosophy and Function*, in MAJOR ISSUES, *supra* note 1, at 207; Conrad, *Crime and the Child*, in MAJOR ISSUES, *supra* note 1, at 179.

<sup>55</sup> Flicker, *Prosecuting Juveniles as Adults: A Symptom of a Crisis in the Juvenile Courts*, in MAJOR ISSUES, *supra* note 1, at 351.

<sup>56</sup> *Id.*

<sup>57</sup> See Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978); Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment and the Difference It Makes*, 68(5) B.U.L. REV. 821 (1988).

In 1966, the Supreme Court, in *Kent v. United States*,<sup>58</sup> struck down the arbitrary procedures implicit in a District of Columbia waiver provision, and held that a juvenile was entitled to a waiver hearing, representation by counsel, access to information upon which the waiver decision was based, and, a statement of reasons upon which the waiver decision can be supported. In a non-binding memorandum attached to the opinion in *Kent*, the majority indicated eight factors that a waiver decision-maker might consider.<sup>59</sup> However, the court did not, and to this day has not, struck down legislation providing for judicial waiver based on inherently general and vague phrases such as: "amenability to treatment," "dangerousness," "protection of the public," "best interests of the public welfare," or, the nature of a youth's "family, school and social history."

Between 1978 and 1982, half of the state legislatures amended their juvenile codes to simplify and expedite the transfer of juveniles to criminal court for trial as adults.<sup>60</sup> While a few states have assigned discretion to prosecutors to determine whether a complaint originates in juvenile or criminal court, the primary mechanism for referring youth to the criminal court remains the juvenile court's waiver of jurisdiction. Forty-eight states, the District of Columbia, and all federal jurisdictions authorize the juvenile court judge to make the transfer decision. The judge must identify, often within vague statutory guidelines, those juvenile offenders amenable to the rehabilitative ministrations of the juvenile justice system and those whose behaviors require the punitive sanction of the criminal justice system. Irrespective of the *Kent* memorandum and the descriptive criteria found in the majority of statutory provisions on judicial

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<sup>58</sup> 383 U.S. 541 (1966).

<sup>59</sup> The *Kent* decision, although a procedural decision, cited specific factors and substantive criteria that a juvenile court might consider. They are as follows: (1) the seriousness of the alleged offense to the community and whether the protection of the community requires waiver; (2) whether the alleged offense was committed in an aggressive, violent, or premeditated manner; (3) whether the offense was against persons or property, with greater weight afforded to the offense against persons; (4) the probable cause that the alleged complaint is founded in fact, and that a grand jury might return an indictment; (5) the desirability of trial and disposition of the entire offense in one court, when the juvenile's associates are adults; (6) the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living; (7) the record and previous history of the juvenile, including prior contacts with the juvenile court and other law enforcement agencies, probation supervision, or prior commitments to juvenile institutions; and (8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by use of the rehabilitative facilities and services currently available to the Juvenile Court. 383 U.S. at 566-68.

<sup>60</sup> See D. HAMPARIAN, *THE YOUNG CRIMINAL YEARS*, *supra* note 5.

waiver, broad discretion surrounds the transfer decision.<sup>61</sup> The important issue this raises is whether this type of discretion results in decisions that are inequitable, discriminatory, or inconsistent.

In most states, the substantive rules that govern the decision to transfer provide both objective and discretionary criteria. While age, charge and prior record are objectively defined, vague criteria such as "dangerousness" or "amenability to treatment" provide fertile ground for subjective interpretation in judgment. As the number of subjective or standardless factors to be considered increase, so too do opportunities for selection and emphasis of discretionary factors that then shape the outcome of individual cases.<sup>62</sup> On the other hand, as the severity of the offense becomes paramount in the waiver decision, discretionary and subjective standards of culpability and *mens rea* become secondary considerations as waiver becomes the ultimate outcome of a retributive juvenile "sentencing" decision.

Despite the common use of transfer, there has been little empirical research that has examined the determinants of the judicial transfer decision for violent juvenile offenders. Specifically, there have been few attempts to empirically discern the types of offenses or offenders that meet judicial perceptions of the "dangerousness" or "amenability to treatment" standards found in transfer statutes. Hamparian analyzed the application of judicial waiver statutes and found they were arbitrary, capricious, and discriminatory.<sup>63</sup> Further, she found little explanation for the high degree of variation in transfer decisions.<sup>64</sup> Keiter studied characteristics of youth transferred to criminal court in Cook County, Illinois.<sup>65</sup> Keiter's study, a retrospective analysis, suggested that lack of decision-making criteria "invites abuse" in the transfer decision.<sup>66</sup> Eigen examined the determinants of waiver in Pennsylvania for homicide and robbery.<sup>67</sup> For interracial offenses, the accused juvenile's race carried significant weight in the outcome of the transfer decision, as did the youth's prior incarceration history.<sup>68</sup>

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<sup>61</sup> Rudman, *supra* note 23.

<sup>62</sup> Zimring, *Notes Toward a Jurisprudence of Waiver*, in MAJOR ISSUES, *supra* note 1, at 193.

<sup>63</sup> See D. HAMPARIAN, *THE YOUNG CRIMINAL YEARS*, *supra* note 12.

<sup>64</sup> *Id.*

<sup>65</sup> Keiter, *Criminal or Delinquent? A Study of Juvenile Cases Transferred to the Criminal Court*, 19 CRIME & DELINQ. 528 (1973).

<sup>66</sup> *Id.*

<sup>67</sup> Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in MAJOR ISSUES, *supra* note 1, at 333.

<sup>68</sup> *Id.*; see also D. HAMPARIAN, *THE YOUNG CRIMINAL YEARS*, *supra* note 12 (finding that minority youth were a majority of those transferred in 11 states); Fagan, Slaughter &

However, selection bias has been a pervasive shortcoming of prior research on comparative sanctions in juvenile and criminal court.<sup>69</sup> Prior research on juveniles in criminal court has relied on samples that were purposively channeled from juvenile to adult jurisdictions, introducing selection biases into comparisons of the two types of proceedings. For example, Osbun and Rode compared transfer decisions for a heterogeneous offender population, but did not control for the seriousness of prior and current offenses in assessing the efficiency of objective versus discretionary criteria in making transfer decisions.<sup>70</sup> Rudman compared sentencing for violent delinquents in juvenile court with those transferred to criminal court pursuant to a judicial determination regarding "amenability to treatment" and "dangerousness."<sup>71</sup> Both Fagan *et al.* and Eigen found that race influenced the transfer decision only for homicides, but other factors (*e.g.*, victim age) were influential for other types of charges.<sup>72</sup> Thomas and Bilchik included data on juveniles either selected into criminal court by prosecutors with concurrent jurisdiction (*i.e.* direct filing) or waived by juvenile court judges pursuant to a prosecutorial motion.<sup>73</sup>

#### D. THE PRESENT STUDY

Little empirical research has been completed on the factors that guide transfer decisions to determine whether transfer decisions are based on standards derived from statutory criteria or other extra-legal discretionary factors. The lack of empirical evidence makes it unclear whether the statutorily-based transfer criteria are applied in a way that selects a qualitatively more appropriate class of defendants for eligibility for the harsher sanctions of the criminal court. Whether these criteria in fact guide transfer decisions, or whether extra-legal or other unstated factors explain the differences in trans-

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Hartstone, *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 (1987) (finding substantial disparities in the transfer rates of minority and white violent juveniles).

<sup>69</sup> McCarthy & Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 (1986).

<sup>70</sup> Osbun & Rode, *Prosecuting Juveniles as Adults: The Quest for Objective Decisions*, 22 CRIMINOLOGY 187 (1984).

<sup>71</sup> Rudman, *supra* note 23.

<sup>72</sup> Fagan, Forst & Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youths in the Criminal Court*, 33 CRIME & DELINQ. 259 (1987); see also Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in MAJOR ISSUES, *supra* note 1, at 333 (on racial bias in transfer decision).

<sup>73</sup> Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985).



fer decisions, remains a critical question to assess whether the policy goals and theories of justice are met through current transfer procedures. That is the purpose of the study reported here.

## II. DATA AND METHODS

Data were collected in four urban juvenile courts (Boston, Detroit, Newark, and Phoenix) in 1981-84 for a sample of (N=201) youth against whom prosecutors filed petitions for transfer.<sup>74</sup> Eligible subjects were selected from an offense-based definition of violent juvenile offender using the following criteria: first, the current offense must have been violent (murder/attempted murder, rape/attempted rape, aggravated assault, armed robbery, arson of an occupied dwelling, kidnapping); and second, the subjects must have had a prior adjudication for a felonious person or property offense. Only those youth who faced a current charge of murder in the first degree were exempt from the prior adjudication requirement. In each court, the judge decided on the motions. Fewer than half the youths considered for transfer (76, or 38%) were removed to criminal court; the remainder (125, or 62%) were retained by the juvenile court for adjudication.

To identify the determinants of the transfer decision, characteristics of those youth transferred to the criminal court were compared with those youth retained by the juvenile court. Data were collected from juvenile court records, police arrest reports, and court histories. Information was recorded on the following: the date of offense, the charges filed at apprehension and at conviction, the dates of various hearings and court appearances, the date of the transfer decision, the date of conviction, and the final transfer decision. Information about the offense (*e.g.*, number of victims, age and race of victims, number of co-participants) and information about the offender (*e.g.*, race, age, mental health history, offense record and placement history) were also recorded.

Statutory criteria and prior empirical research on transfer<sup>75</sup>

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<sup>74</sup> Data collection, which began in 1981, included cases filed in three sites, and was expanded to Detroit cases filed in 1982. Data collection continued for varying periods at each site due to anomalies in access and record keeping systems, ending in 1983 in Boston, Phoenix and Newark, and 1984 in Detroit. Though period effects may possibly influence sample characteristics, the rigid legal characteristics for sample selection and narrow time frames minimized these threats. There were no changes in statute during the study period in any of the states, limiting contextual effects on transfer decisions.

<sup>75</sup> Eigen, *supra* note 72; D. HAMPARIAN, *THE YOUNG CRIMINAL YEARS*, *supra* note 12; Osburn & Rode, *Prosecuting Juveniles as Adults: The Quest for Objective Decisions*, 22 *CRIMINOLOGY* 187 (1984); Rudman, *supra* note 23; Rudman, Hartstone, Fagan & Moore, *Violent Youth in Adult Court: Process and Punishment*, 32 *CRIME & DELINQ.* 75 (1986); Feld, *The*

were examined to identify operational definitions that represent the decision standards for "amenability to treatment," "dangerousness," and other characteristics of the offense and offender mentioned in waiver statutes.<sup>76</sup> Analyses comparing transferred and retained youth were conducted to examine the relationships between the transfer decision and the statutory criteria and extra-legal characteristics of the offenses and offenders. As might be assumed, the specific statutory provisions have a direct impact on transfer practices.

### III. RESULTS

#### A. STATUTORY ANALYSIS

Within each state, the juvenile court's authority to waive jurisdiction is derived from statutes that define which juvenile offenders may be excluded from the juvenile court process based on a motion or nomination by the prosecutor, and the granting of the motion by the judge. To understand the determinants of transfer in these four locales, it is first necessary to outline the statutory structure for judicial waiver within each state. Statutes in all four study states provide age, offense and "other" criteria to guide the judicial waiver decision.<sup>77</sup> Table 1 describes the criteria for Massachusetts, Michigan, New Jersey, and Arizona.

The four statutes provide a mix of specific and non-specific criteria that serve as the only "official" guidelines for the juvenile court judge's transfer decision. While the age of initial criminal court jurisdiction is precise, as is the minimum age at which judicial waiver is allowed (in all states but Arizona), offense restriction criteria contain vague terminology. The statutes do not provide operational definitions of the criteria that serve as the standards for the judges decision. Such vagueness, however, is tempered by interpretations found in case law.<sup>78</sup>

The range of legal criteria is broad, from any offense (in Arizona) to specific penal code statutes or lists of violent offenses (in

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*Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987); Keiter, *Criminal or Delinquent? A Study of Juvenile Cases Transferred to the Criminal Court*, 19 CRIME & DELINQ. 528 (1973); Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53 (1986).

<sup>76</sup> In some of the cross-classification analyses, the independent variables were dichotomized not only to simplify analyses, but also to increase cell sizes.

<sup>77</sup> MASS. GEN. L., ch. 119, § 61 (1990); MICH. COMP. LAWS § 712A.4 (1990); N.J. REV. STAT. §§ 2A:4A-48, -49 (1990); ARIZ. R. OF PRO. FOR JUVENILE CT., R. 12-14 (1988).

<sup>78</sup> Feld, *supra* note 75.

**TABLE 1**  
**STATUTORY PROVISIONS FOR JUDICIAL WAIVER**

	Age of Initial Criminal Court Jurisdiction	Minimum Age for Which Judicial Waiver Is Allowed	Offense Restrictions	Other Statutory Criteria
MASSACHUSETTS (Boston)	17	14	Previously committed to DYS as delinquent and present offense punishable by imprisonment or Present offense involved infliction or threat of serious bodily harm	If the court finds probable cause, it shall then consider, but shall not be limited to, evidence of the following factors: <ul style="list-style-type: none"> <li>• Seriousness of the alleged offense</li> <li>• The child's family, school and social history, including his court and juvenile delinquency record</li> <li>• Adequate protection of the public</li> <li>• The nature of any past treatment efforts for the child</li> <li>• The likelihood of rehabilitation of the child</li> </ul>
MICHIGAN (Detroit)	17	15	Any felony	If the court finds probable cause, it shall consider the following criteria <ul style="list-style-type: none"> <li>• The prior record and character of the child, his physical and mental maturity and his pattern of living</li> <li>• The seriousness of the offense</li> <li>• Whether the offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under existing juvenile programs and statutory procedures</li> <li>• The relative suitability of programs and facilities available to the juvenile and criminal courts for the child</li> <li>• Best interests of the public welfare and protection of the public security</li> </ul>
NEW JERSEY (Newark)	18	14	Homicide; treason; offense against the person committed in an aggressive, violent, or willful manner; or violation of the Controlled Dangerous Substances Act or Juvenile charged with delinquency may elect to be tried as an adult	If the court finds probable cause, and is satisfied that: <ul style="list-style-type: none"> <li>• Adequate protection of the public requires waiver, and</li> <li>• There are no reasonable prospects for rehabilitation of the juvenile prior to his attaining the age majority by use of the procedures, services and facilities available to the court</li> </ul>
ARIZONA (Phoenix)	18	Not specified, presumably any age	Any offense	The court may transfer the action to criminal court, if it finds probable cause and reasonable process to believe that: <ul style="list-style-type: none"> <li>• The child is not amenable to rehabilitation through available facilities, and</li> <li>• The child is not committable to an institution for mentally deficient, defective or ill persons, and</li> <li>• The safety or interest of the public requires transfer</li> </ul>

New Jersey and Massachusetts). Massachusetts further qualifies this restriction by including a prior juvenile corrections commitment. Still other qualifiers include attributions of intent or malice. Such provisions may increase the burden of proof to prosecutors by encompassing extra-legal factors. Nevertheless, "legal" meaning may be attributed to such phrases as "threat of bodily harm," or offenses committed in an "aggressive, violent or willful manner."

It is when the statutes attempt to set out general criteria such as "amenability to treatment" and "dangerousness" that the degree of judicial discretion is revealed. Two states, Massachusetts and Michigan, include in their statutes the seriousness of the alleged offense, despite concurrent committing offense restrictions.<sup>79</sup> Though all four states mention "amenability," only two, Massachusetts and Michigan, specifically mention criteria that operationalize the concept. These operational definitions are vague, however, and are expressed in language such as "maturity," "patterns of living," and "character." Two states, Michigan and Arizona, include an assessment of the appropriateness of available placements for rehabilitation of the offender.<sup>80</sup> Past treatment efforts and public safety are also mentioned, though not consistently, as statutory criteria. Thus, the four states' statutory schemes vary extensively in the breadth, specificity, and generality of extra-legal as well as legal criteria for the transfer decision.

Not only are the criteria discretionary, but so is the manner in which the judges are to consider such criteria (see Table 1). For example, in Massachusetts the court shall consider but "shall not be limited to" a list of criteria.<sup>81</sup> In Michigan, the court must only "consider" certain criteria.<sup>82</sup> The same element of discretion is also found in the New Jersey statute that mandates that the court must be "satisfied" that certain determinants are met.<sup>83</sup> In Arizona, the court "may" transfer a youth if "reasonable grounds" are present to "believe" that specified elements are present.<sup>84</sup> The extent to which these criteria must be met differs depending on whether the court merely "considers" them versus when the court is "satisfied" on "reasonable grounds." In turn, the disparities in burden of proof lead to differing procedures for transfer and judicial interpretations of criteria.

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<sup>79</sup> See MASS. GEN. L., ch. 119, § 61 (1990); MICH. COMP. L. § 712A.4 (4)(b) (1989).

<sup>80</sup> See MICH. COMP. L. § 769.1(10) (1989); ARIZ. REV. STAT. § 8-241 (1988).

<sup>81</sup> See MASS. GEN. L. ch. 119, § 62 (1990).

<sup>82</sup> See MICH. COMP. LAWS § 712A.4 (1990).

<sup>83</sup> See N.J. REV. STAT. § 2A:4-48 (1990).

<sup>84</sup> See ARIZ. REV. STAT. ANN. § 8-241 (1988).

## B. CHARACTERISTICS OF TRANSFERRED YOUTH

The possible determinants of transfer decisions through the application of the statutory criteria were analyzed by comparing the characteristics of transferred offenders with those retained in juvenile court.

1. *Operational Definitions of Statutory Criteria*

The statutory and discretionary clauses from Table 1 were operationalized for the following factors: age at offense, type of violent offense, and prior offense history. Other factors associated with decision-making in the juvenile court were also included as candidate determinants of the transfer decision; these factors were the age at onset of the first offense, and the number of co-participants and victims in the committing offense.<sup>85</sup> Race, a factor associated with disparity in judicial decision-making,<sup>86</sup> also was included.

There appears to be a general consensus of the predictive relationship between early psychosocial development, age at onset of delinquency, and subsequent delinquency and aggression.<sup>87</sup> Psychologists suggest that the development of cognitive functioning with respect to legal reasoning and ethical decision-making occurs about the age of fourteen when youth have acquired moral and legal values.<sup>88</sup> The ability to understand the difference between right and wrong is a necessary component for *mens rea*, which often is a factor applied in selecting the forum for adjudication. In addition, official crime statistics show an increase in criminal activity starting at age thirteen.<sup>89</sup> In longitudinal research, age at onset has been shown to be related to severity and chronicity of delinquency and adult criminality; juveniles who begin their criminal careers at earlier ages are more likely to commit serious or violent offenses and to be frequent

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<sup>85</sup> McCarthy & Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 (1986).

<sup>86</sup> Thornberry, *Race, Socioeconomic Status and Sentencing in the Juvenile Justice System*, 64 J. CRIM. L. & CRIMINOLOGY 90 (1973); Thornberry, *Sentencing Disparities in the Juvenile Justice System*, 70 J. CRIM. L. & CRIMINOLOGY 164 (1979); Fagan, Forst & Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youths in the Criminal Court*, 33 CRIME & DELINQ. 259 (1987); McCarthy & Smith, *supra* note 85.

<sup>87</sup> See Loeber & Dishion, *Early Predictors of Male Delinquency: A Review*, 94 PSYCH. BULL. 68 (1983).

<sup>88</sup> J. PIAGET, *THE MORAL JUDGEMENT OF THE CHILD* (M. Gabain trans. 1966); Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11 (1963).

<sup>89</sup> Weiner & Wolfgang, *The Extent and Character of Violent Crime in America, 1969 to 1982*, in AMERICAN VIOLENCE AND PUBLIC POLICY: AN UPDATE OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 17 (L. Curtis ed. 1985).

offenders.<sup>90</sup> Therefore, age at onset was dichotomized as thirteen or younger or fourteen and older.

Statutory criteria limit the transfer decision to a specific subset of offense types. The study sample further limits the subset of offenses, since only violent offenses have been examined. However, the offense categories capture several types of violent offenses, including aggravated assault, sexual assault, instrumental violence against persons (*e.g.*, robbery), and capital offenses. Megargee suggests a taxonomy of violence that distinguishes the etiology, correlates, and context of these four types of violence.<sup>91</sup> Their variability suggests possible differentials in both offender characteristics and the perceptions of public danger or seriousness; accordingly, the variability may contribute to patterns of judicial decision-making. The analyses therefore examine differences by type of offense.

Two other characteristics of the offense—the number of co-participants and victims—are hypothesized to affect the transfer decision. That youth violence occurs in groups is one of the well established factors in criminality.<sup>92</sup> A greater number of offenders may increase the desire to transfer for a deterrent effect, while a greater number of victims may increase the desire for retributive justice or public protection. Both these variables were dichotomized—co-participants as none or some and victims one or multiple.

## 2. Transfer Rates

Table 2 shows that the rate of youths transferred varies extensively by juvenile court. Fewer than half the youths considered for transfer were eventually transferred in Boston (21%), Detroit (31%) and Newark (41%). However, in Phoenix the majority (71%) of violent delinquents considered for transfer were judicially waived to the criminal court. Several factors may explain the differences in decision patterns by site. The prevailing philosophy and crime control policy will certainly influence the rate of transfer. There may also be varying definitions and interpretations of extra-legal factors

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<sup>90</sup> See M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972); Farrington, *Self-Reports and Deviant Behavior: Predictive and Stable?*, 64 J. CRIM. L. & CRIMINOLOGY 99 (1973); D. HAMPARIAN, R. SCHUSTER, S. DINITZ & J. CONRAD, THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS (1978); D. HAMPARIAN, THE YOUNG CRIMINAL YEARS, *supra* note 5; D. FARRINGTON, L. OHLIN & J. WILSON, UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY (1986).

<sup>91</sup> Megargee, *Psychological Determinants and Correlates of Criminal Violence*, in CRIMINAL VIOLENCE 112 (M. Wolfgang & N. Weiner eds. 1982).

<sup>92</sup> See, *e.g.*, Piper, *Violent Recidivism and Chronicity in the 1958 Philadelphia Cohort*, 1 J. OF QUANTITATIVE CRIMINOLOGY 319 (1985).

**TABLE 2**  
**OFFENSE AND OFFENDER CHARACTERISTICS OF WAIVED AND RETAINED YOUTHS BY JUVENILE COURT JURISDICTION (PERCENT)<sup>a</sup>**

	Juvenile Court Jurisdiction							
	Boston		Detroit		Newark		Phoenix	
	Retained	Waived	Retained	Waived	Retained	Waived	Retained	Waived
<b>Race</b>								
White	77.8	22.2	87.5	12.5	0	0	40.0	60.0
Nonwhite	80.0	20.0	67.1	32.9	58.8	41.2	26.1	73.9
<b>Age at Offense</b>								
14	50.0	50.0	0	0	0	100.0	0	100.0
15	100.0	0	78.0	22.0	66.7	33.3	100.0	0
16	75.0	25.0	61.5	38.5	61.5	38.5	50.0	50.0
17	0	0	0	0	58.1	41.9	0	100.0
<b>Type of Offense</b>								
Murder	0	0	60.6	39.4	33.3	66.7	20.0	80.0
Kidnap	0	0	33.3	66.7	33.3	66.7	50.0	50.0
Forcible Rape	0	100.0	75.0	25.0	100.0	0	0	0
Aggravated Assault	75.0	25.0	77.5	22.6	94.1	5.9	33.3	66.7
Armed Robbery	100	0	71.4	28.6	41.2	58.8	14.3	85.7
<b>Number of Victims</b>								
One	84.2	15.8	72.1	27.9	65.9	34.1	20.0	80.0
Two or more	70.0	30.0	60.0	40.0	30.0	70.0	38.5	61.5
<b>Number of Co-Participants</b>								
None	75.0	25.0	72.4	27.6	75.0	25.0	36.4	63.6
One or more	81.0	19.0	67.2	32.8	53.8	46.2	25.0	75.0
<b>Age at First Court Appearance</b>								
Less than 14	71.4	28.6	63.6	36.4	29.4	70.6	30.0	70.0
14 - 17	86.7	13.3	71.7	28.3	73.5	26.5	27.8	72.2
<b>N</b>	23	6	64	29	30	21	8	20

<sup>a</sup> Percentages are calculated for waived and retained youths within each offense or offender characteristic.

such as "amenability to treatment." Additionally, there may be differences in offender characteristics across sites, despite the fact that all youth in the sample were adjudicated for violent offenses.

Differences in local custom and the comparative characteristics of the justice systems also may bear on the transfer decision. Interviews with prosecutors in each site indicated quite clearly that the primary purpose of the transfer decision was to obtain longer sentences in secure care than could be obtained in the juvenile justice system.<sup>93</sup> For example, the statutory limitations in Phoenix constrain the dispositional options of juvenile court judges, specifically in the length of incarceration. Juvenile court jurisdiction for corrections ends at eighteen years of age. Consequently, prosecutors

<sup>93</sup> Rudman, *supra* note 23.

sought transfer on nearly all juvenile offenders over seventeen years of age.<sup>94</sup> In other sites, the availability of secure placement or long-term incarceration in the juvenile system may afford longer terms of commitment and broader options within the juvenile system.

### 3. *Legal and Extra-Legal Characteristics of Transferred Youths*

The relationship between race and transfer is examined in Table 2. No white youths were considered for transfer in Newark. In Detroit and Phoenix, transfer rates were higher for minority youths than for whites. This hints broadly at racial discrimination. There are competing explanations for these initial findings, however. It is possible, for example, that African-American youths are more likely to have committed specific crimes or possess some other personal characteristics that are more closely associated with transfer. Minority adolescents have a proportionately higher participation in violent crimes.<sup>95</sup> The number of prior charges and adjudications also may contribute to differences by race.<sup>96</sup> Thus, the relationship between race and prior record may obscure important relationships between race and the transfer decision.

Age at offense by itself is associated with the transfer decision in only one site, Phoenix. Because the statutory age of maximum juvenile jurisdiction varies among the states, age at offense also can be examined as a function of the time interval between the offense and the jurisdictional age limit. Accordingly, the closer the proximity of the age at offense to the age ceiling for juvenile court jurisdiction, the greater the number of youths for whom transfer will be sought. In Boston and Detroit, the age limit is seventeen, but Newark and Phoenix have a court age-jurisdiction of eighteen.

Table 2 shows that in Boston, Detroit and Phoenix, a greater percentage of youths whose age was within one year of the court jurisdictional limit were transferred to adult court. The interval from age at offense to the juvenile corrections jurisdiction limit does appear to be related to the transfer decision in three of four sites. Age at offense, therefore, is likely to covary with its proximity to the

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<sup>94</sup> This practice was formalized in policy. A policy memorandum from the chief prosecuting attorney for juvenile court instructed assistant prosecutors to automatically file transfer motions when if the juvenile was 17 years of age. See Rudman, *supra* note 23.

<sup>95</sup> Weiner & Wolfgang, *The Extent and Character of Violent Crime in America, 1969 to 1982*, in *AMERICAN VIOLENCE AND PUBLIC POLICY: AN UPDATE OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* 17 (L. Curtis ed. 1985).

<sup>96</sup> McCarthy & Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 *CRIMINOLOGY* 41 (1986).



maximum punishment term in juvenile corrections as an influence on judicial transfer decisions.

Table 2 also suggests that factors other than age and race may explain the judicial waiver decision. The type of violent offense in the petition to transfer may also be a determinant. Statutory language suggests that transfer is more likely for a more serious committing offense. Even among a homogeneous group of violent offenses, there are differences in victim injury and perceptions of crime severity.<sup>97</sup> Accordingly, a more heinous offense or greater injury to the victim is more likely to result in a decision to transfer. Such logic would presume a higher transfer rate for capital offenses. However, as found earlier, the patterns vary. For example, none of the youths charged with murder in Boston were transferred. In Detroit, 40% of youth charged with murder were transferred compared to 67% in Newark and 80% in Phoenix.<sup>98</sup>

Other committing offenses showed similar variability. None of the eight youths in Boston charged with armed robbery were transferred; in comparison, Detroit transferred 29%, Newark 59%, and Phoenix 86%. Similar variation exists for youths charged with aggravated assault. In Newark, only 6% of youths charged with aggravated assault were transferred; however, in Boston, 25% were transferred, in Detroit 23%, and in Phoenix 67%.<sup>99</sup> For Newark, there was a significant statistical difference between homicide, kidnapping and robbery as opposed to aggravated assault and rape.

Accordingly, the juvenile courts appear to view violent juvenile crime as a heterogeneous category with respect to its bearing on the limits of juvenile jurisdiction. While for some cases the type or consequence of the offense determines the transfer decision, for others, the age at offense mediates that decision. The trends for homicide are particularly noteworthy for understanding the age-crime relationship to the transfer decision: murder, a capital offense, resulted in extreme variation.

Two situational factors that surround the committing offense also were examined—the number of victims and co-participants. If

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<sup>97</sup> Rossi, Waite, Boise & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974); M. WOLFGANG, R. FIGLIO, P. TRACY & S. SINGER, *THE NATIONAL SURVEY OF CRIME SEVERITY* (monograph prepared for the Bureau of Justice Statistics, U.S. Dep't of Just., 1985).

<sup>98</sup> In Phoenix, two of the youths charged with murder were 17 years of age, and were subject to the systematic filing of transfer motions consistent with prosecutorial policy. With routine granting of the motion, this procedure was tantamount to a prosecutorial waiver.

<sup>99</sup> In Phoenix, nearly all transferred youths were 17 years of age or older, and were likely to be considered for transfer regardless of their committing offense.

the alleged offense involved multiple victims, we hypothesized that youths would more likely be transferred since the numbers of victims may be viewed as a measure of the severity of the offense and the implied threat to public safety.<sup>100</sup> Table 2 shows that there is, in fact, a significant association between the number of victims and the likelihood of transfer; in Newark, 70% of the offenders with multiple victims were transferred compared to 34% of those with only one victim. In Boston, 16% of the youths were waived when the committing offense involved only one victim, compared to 30% when two or more victims were involved. In Detroit, 28% were waived with only one victim, while 40% were waived with two or more victims. However, in Phoenix, a reverse pattern was found: 80% were waived where the offense had only one victim, compared to 62% with two or more victims.

A second factor, the presence of co-participants, may influence the decision to transfer in one of two ways. Juvenile offending is often viewed as a group or "wolfpack" phenomenon,<sup>101</sup> and a large number of co-participants may induce the juvenile courts to effect a transfer because of the perceived public threat of group criminal activity. On the other hand, the absence of accomplices may be viewed by the juvenile courts as a sign of a shift from juvenile to adult behavior patterns, indicating the lone offender is a fit candidate for transfer. However, as is shown in Table 2, the number of co-participants was not an important factor in most sites.

The age at onset of delinquency is thought to be a predictor of adult criminality.<sup>102</sup> Table 2 shows that in three of four sites, age at onset is associated with the transfer decision. In Newark, 71% of those who began their criminal careers at an early age were transferred, compared to 26% of those who began at age fourteen or older. In Boston and Detroit, a larger proportion of youths with a younger age at onset were more likely to be transferred than youths with later initiation into delinquency. Phoenix again offers a different trend from the other sites as there appear to be no differences between those fourteen years old and over and those thirteen and under. Accordingly, juvenile court judges apparently regard the length of the delinquent career and an early start as important in-

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<sup>100</sup> M. WOLFGANG, R. FIGLIO, P. TRACY & S. SINGER, *supra* note 97.

<sup>101</sup> Piper, *Violent Recidivism and Chronicity in the 1958 Philadelphia Cohort*, 1 J. OF QUANTITATIVE CRIMINOLOGY 319 (1985).

<sup>102</sup> See, e.g., P. GREENWOOD, SELECTIVE INCAPACITATION REVISITED: WHY THE HIGH-RATE OFFENDERS ARE HARD TO PREDICT (monograph prepared for Nat'l Inst. of Just., U.S. Dep't of Just., 1982); Loeber & Dishion, *Early Predictors of Male Delinquency: A Review*, 94 PSYCH. BULL. 68 (1983).

dicators of statutory guidelines such as "amenability to treatment." Moreover, an early start also provides a longer period of time for youths to accumulate a record of offenses, reciprocally contributing to the important influence of prior record in the interpretation of "amenability."

A direct relationship between the mean number of prior offenses and the percentage of youths transferred exists in three of the four sites. However, this finding may be redundant with the previous finding: an early age of onset is highly correlated with the length of career and in turn the number of prior petitions. Overall, in Boston, Detroit, and Newark, the higher the mean number of prior offenses, the more likely was a transfer. The opposite was true in Phoenix.

Figure 1 compares the mean number of prior juvenile court petitions for waived and retained youths in each locale. The differences in the aggregate rates across locales illustrates the importance of local customs in comparative analysis of juvenile justice processing of youths considered for transfer. Newark youths have far more prior petitions and prior adjudications than similar youths in the other sites.<sup>103</sup> Whether the lengthier prior histories in Newark are products of criminal activity, intensive police activity, or prosecutorial focus cannot be discerned from the data sources available to the study. In Boston and Detroit, there appears, on simple observation, to be much less prior offense activity than in Newark.

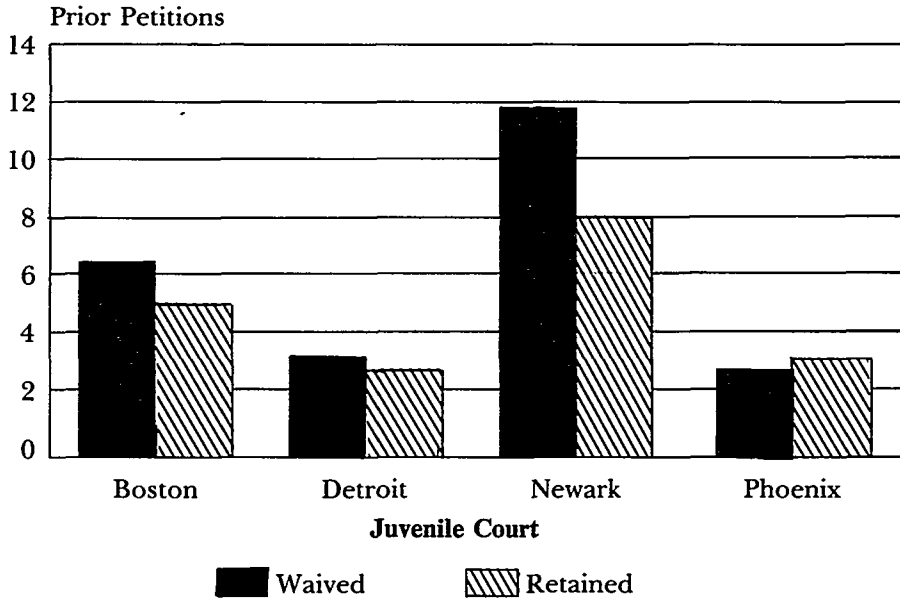
Phoenix differs here as elsewhere in these analyses. It is the only site where the youths transferred to criminal court have fewer prior offenses and adjudications than those retained by the juvenile court. The automatic prosecutorial transfer policy offers a salient explanation of the Phoenix phenomenon, where the age ceiling on juvenile jurisdiction eclipses other factors in explaining the transfer decision. Such prosecutorial aggressiveness may also explain the higher rate of adjudication in Phoenix relative to the number of prior petitions. In other sites, the ratio of adjudications to petitions is considerably lower.<sup>104</sup> The varying rates across sites also may reflect the unique aspects of the norms and social organization of juvenile justice processing across jurisdictions. Stapleton, Aday and

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<sup>103</sup> Analysis of prior adjudications revealed identical patterns. There also are interactions between prior record and age with respect to the transfer decision. Prior record becomes less important as a determinant of transfer for youths with less than one year to the age limit of juvenile court jurisdiction. See Fagan, Forst & Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youths in the Criminal Court*, 33 *CRIME & DELINQ.* 259 (1987).

<sup>104</sup> *Id.*

**FIGURE 1**  
**JUDICIAL WAIVER DECISIONS BY PRIOR JUVENILE COURT PETITIONS**



Ito<sup>105</sup> and Rudman<sup>106</sup> documented the contributions factors such as the formality of system processing and the standards of documentation required to enter a court petition have made to court decisions. Such varied practices contribute to divergent case outcomes for both violent and non-serious offenses.

### C. PREDICTION AND CLASSIFICATION OF WAIVER DECISIONS

There is substantial variation across jurisdictions in the factors that differentiate transferred and retained youths among violent adolescent offenders. This suggests important differences in the application of statutory criteria and the definitions of the threshold of adult responsibility for crime. However, differences in the relative importance of the statutory criteria imply significant differences in implicit policies regarding the underlying theories of waiver and interpretations of the limits of juvenile jurisprudence and the *parens patriae* philosophy.

Accordingly, discriminant analysis was used to determine the relative contributions of extra-legal and offense criteria to judicial

<sup>105</sup> Stapleton, Aday & Ito, *An Empirical Typology of American Metropolitan Juvenile Courts*, 88 AM. SOC. REV. 549 (1982).

<sup>106</sup> Rudman, *supra* note 23.

waiver decisions.<sup>107</sup> From the actual criteria that explain or predict the judicial transfer decision, we may infer the policies or theories that guide waiver practices. Table 3 presents results of discriminant models developed individually for each site, and for an aggregate model combining data for all sites.

**TABLE 3**  
**DISCRIMINANT ANALYSIS OF TRANSFER DECISION BY OFFENSE AND OFFENDER CHARACTERISTICS (STANDARDIZED DISCRIMINANT COEFFICIENTS)**

Offense and Offender Characteristics	Juvenile Court Jurisdiction				
	Boston	Detroit	Newark	Phoenix	Total
Race		.35			
Age at Onset	-.67		-.75		-.49
Age at Offense	.71	.42		1.02	.58
Type of Offense:					
- Rape	1.01				
- Armed Robbery	-.69		.53	.58	.23
- Murder		.64	.80	.58	.62
- Aggravated Assault					
Number of Victims		.41	.40		.22
Prior Adjudications		.70			
Site <sup>a</sup>	NA	NA	NA	NA	.60
<b>STATISTICS</b>					
% Correctly Classified	86.2	67.7	66.7	85.7	70.7
Eigenvalue	.57	.17	.57	.51	.24
Wilkes Lambda	.64	.85	.64	.66	.81
Canonical Correlation	.60	.39	.60	.58	.44
Chi Squared	11.3	14.4	21.1	10.2	42.2
p	.02	.01	.000	.02	.000

<sup>a</sup> Each site was entered as a dummy variable in the aggregate model. Only Phoenix entered the final discriminant function.

The most consistent contributors across sites were the age at offense (older youths were transferred more often), age at onset (youths whose delinquent histories started at an earlier age were transferred more often), and youths charged with murder. In fact, specific offense types (murder and armed robbery) contributed to the models in two of the four sites as well as the aggregate model. However, the negative coefficient for armed robbery in Boston indicated that this offense type was less likely to be transferred. In two sites, Boston and Newark, offense type contributed more than other

<sup>107</sup> W. KLECKA, *DISCRIMINANT ANALYSIS* (1980); W. COOLEY & P. LOHNES, *MULTIVARIATE PROCEDURES FOR THE BEHAVIORAL SCIENCES* (1962). Other multivariate methods were not used due to the nonskewed distribution of the dependent variable.

characteristics. In Boston, rape was the strongest contributor, whereas murder was the strongest contributor in Newark.

Race entered the model in only the Detroit site, but it had the lowest coefficient of the discriminating variables. Detroit had the highest percentage of homicide cases, and minority youths charged with homicide were transferred more often than their white counterparts. Race did not enter the aggregate model, though race may be associated with prior criminal history.<sup>108</sup> However, prior petitions did not enter any of the models, and prior adjudications contributed to transfer only in Detroit. The absence of race as an explanatory variable may be the result of the sample population of violent offenders with high participation of minority youths. Other offenses or individual characteristics did not consistently enter across sites. For example, the number of victims in the committing offense was a relatively weak discriminator in two sites.

The models ranged in classification efficiency from moderate in two sites (about two in three cases correctly classified) to very strong (seven in eight cases correctly classified) in two other sites. The aggregate model also had a moderate classification score. Among the offense characteristics, only the number of victims was a salient discriminator—though a weak one—in any of the models. Finally, only Phoenix was a discriminator in the aggregate model among the sites. This last finding suggests that factors which were not included in this model contributed to transfer in Phoenix. The stringent jurisdictional limit for juvenile corrections (at age eighteen) distinguished Phoenix from the other locales and may explain its unique contribution to the explanatory model.

#### IV. DISCUSSION

Children have traditionally been given special consideration in our society. Yet the boundaries of childhood are at best artificial.<sup>109</sup> Society has varying definitions of the end of childhood for different purposes or responsibilities: the right to vote (at age eighteen) or marry (as young as age sixteen without parental consent), the authority to drive an automobile unaccompanied by an adult (as young as age sixteen in some states), eligibility for the armed forces (age eighteen), the right to drink alcohol (age twenty-one in nearly all states), and so forth. Obviously, the debate is unending as to when

<sup>108</sup> McCarthy & Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 *CRIMINOLOGY* 41 (1986); Fagan, Slaughter & Hartstone, *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 *CRIME & DELINQ.* 224 (1987).

<sup>109</sup> Conrad, *Crime and the Child*, in *MAJOR ISSUES*, *supra* note 1, at 179.

the notion of childhood as a "state of unreadiness" ends and the age threshold when sanction sensitivity is sufficient to merit criminal or punitive responses.<sup>110</sup>

The changes in court jurisdiction and transfer practices in delinquency matters signal shifts in the philosophical and theoretical underpinnings of juvenile justice policy. This in turn suggests changes in society's views of adolescence and the limits of the state's power to affect moral development. At its core is a debate over who is a child, and therefore, who is deserving of special consideration or protection. The once clear demarcation at age eighteen between the juvenile and criminal justice systems is moving steadily toward a more varied approach encompassing features both of the offense and the offender. The general trend is toward a lower age of criminal jurisdiction, especially for violent juvenile offenders.<sup>111</sup> Behind this trend is a fairly explicit policy goal, namely to punish more severely violent juvenile offenders through longer terms of incarceration. Evidently, the criminal court presents the most efficient forum for achieving this goal.

The downward trend in the age of adult responsibility for criminal acts and the increasing use of transfers suggest that there are a variety of behaviors and personal attributes that may signal an end to adolescence, and that efforts aimed at moral or social development are no longer appropriate. Furthermore, the variation in ideas about the end of adolescence is reflected in a variety of statutory schemes regarding transfer criteria. In some states, policies to put these new social concerns into operation are keyed to the offender (in terms of age, prior crimes, and earlier attempts to rectify delinquency). In other states, the limits of juvenile jurisdiction are defined by the offense: those charged with certain offenses are deemed beyond rehabilitation. In these states, transfer to criminal court may serve the goals of retributive justice, deterrence, or incapacitation.<sup>112</sup> Still other states have chosen to combine age, background, and crime in a "flexible" policy that embraces parts of both systems. These discretionary policies suggest that there is an age-crime relationship that may inform decisions as to whether rehabili-

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<sup>110</sup> P. GREENWOOD, J. PETERSILIA & F. ZIMRING, AGE, CRIME AND SANCTION: THE TRANSITION FROM JUVENILE TO ADULT COURT (monograph prepared for the Office of Juv. and Delinq. Prev., Dep't of Just., 1980).

<sup>111</sup> Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987).

<sup>112</sup> Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985).

tation or punishment is more likely to reduce crime for certain offenders.

There are important questions regarding the threshold of adolescence. To the extent that the correlates of crime are unrelated to age, it may matter little at what age we choose to punish, rather than to provide assistance for, an offender. We know that age alone is not an efficient predictor of sustained involvement in crime. Why then should policy be linked to age-offense thresholds when the decline in crime with age characterizes even the most active and violent offenders?<sup>113</sup> There appears to be little empirical justification for age-based definitions of juvenile jurisdiction. Similarly, imposing behavior-specific limits on juvenile jurisdiction suggests that there are salient etiological distinctions between juvenile and adult criminality. Such policies rely on an age-behavior relationship that indicates when rehabilitative intervention becomes extraneous to the causes of crime. Accordingly, some sixteen year old offenders may be less amenable to treatment than others based either on extra-legal factors or patterns of prior delinquency.

The contributions of age to the transfer decision do not imply that judges consider factors in adolescent development regarding age and its relation to amenability to treatment. Age also is related to jurisdiction. As youths approach the maximum age of juvenile corrections jurisdiction, or the ceiling of punishment, prosecutors and judges evidently weigh the capacity for punishment as a juvenile. Judges may view the limits on punishment as insufficient for certain categories of offenses or offenders. This was particularly evident in Phoenix, where the state Supreme Court held that juvenile corrections jurisdiction ends at age eighteen, the age of majority.<sup>114</sup> Accordingly, the salient age-related factor for transfer is not only a developmental consideration, but also the age/punishment calculus.

The operationalization of age, offense, and amenability criteria poses further complex questions. In most states, the burden of proof remains on the state to provide convincing evidence that processing an adolescent in juvenile court would be either ineffective or pose a threat to the community.<sup>115</sup> What is the age threshold when certain behaviors signify that character is formed beyond the intervention of contemporary treatment programs? How have the juvenile courts and the legislatures codified these empirical questions? And what have been the consequences in consistency of deci-

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<sup>113</sup> Hirschi & Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. Soc. 552 (1983).

<sup>114</sup> See *In the Matter of the Appeal in Pima County Juvenile Action*, 149 Ariz. 35, 716 P.2d 404 (1986) (en banc).

<sup>115</sup> Thomas & Bilchik, *supra* note 112.



sion-making from the current statutes that define the legal limits of adolescence?

This paper has examined the judicial transfer decision for violent youths in four urban juvenile courts. Violent youths account for less than one-third of all youths transferred, yet they are a central focus of juvenile justice attention. Accordingly, initial expectations that virtually all violent youths would be transferred were not met. Nor was there consistency across site: the percentage of youths transferred varied from a low of 21% in Boston to a high of 71% in Phoenix.

In order to test the variance in judicial decision-making, seven offense and offender variables associated with amenability to treatment and dangerousness were analyzed to identify determinants of the transfer decision. Neither multivariate analysis nor simple explorations identified strong or consistent determinants of the judicial transfer decision. Except for a relationship between extensive prior offense history and the transfer decision, none of the identified variables could significantly describe differences between youths who were or were not transferred. Furthermore, classification and prediction models of the transfer decision were not successful. Large differences in transfer criteria were found across sites.

The absence of uniform criteria used by juvenile court judges in making the transfer decision is, by itself, an important finding. A number of possible explanations may apply. First, because of the small number of cases at each site, the wide variation in the proportion of cases transferred and the lack of variation in the explanatory variables, analyses may mask actual trends. We examined only violent offenders, yet they are not a homogeneous group, exhibiting great diversity in age, delinquent careers, prior interventions, and contexts surrounding their offenses. Second, it is likely that juvenile court judges used additional criteria, not applied in this study, factors that may or may not be legally justified. Probation reports, family histories and psychological evaluations may contribute to the transfer decision. Outcomes of previous court interventions also weigh on judges. It is difficult to measure empirically the extent to which the nature and type of such reports, histories, and evaluations may have influenced the judicial waiver decision. Other factors that may be related to the transfer decision, such as the youth's dress or demeanor in court, are difficult to assess quantitatively.

These informal criteria and the statutory language that seem to guide the transfer decision are subjective and may invite disparity, if

not capriciousness by prosecutors and judges.<sup>116</sup> The absence of formal criteria, coupled with the apparent "natural" transfer criteria, has two central implications for juvenile justice policy and delinquency theory. First, even when guided by broad, non-specific standards lacking operational criteria, judges appear to focus on rational, concrete factors in the transfer decision. To the extent that criteria for transfer should be formalized to support uniformity and reduce disparity in the decision making process, such legislative criteria should reasonably relate to the offender's age and the severity of the charged offense. Feld, for example, argues that the determinative factors should be restricted to a narrow range of offense-specific factors.<sup>117</sup>

Second, transfer is a process resulting from multiple discretionary screening points. The sensitivity of the transfer decision to prosecutorial charging decisions has increased as legislatures have broadened the criteria for transfer eligibility. Transfer is a serious decision that addresses jurisdiction for sentencing and punishment, not guilt; in the end, it focuses on the severity of punishment. Vague and broad legislative criteria may invite prosecutors to regard transfer as a disguised plea bargain. Perhaps this explains the variation in the rate of transfer motions granted. This was not the intent of the juvenile court reformers who, nearly a century ago, granted judges the authority to waive jurisdiction. Statutory change regarding transfer should state criteria sufficiently concrete to discourage such behaviors among prosecutors who diminish the significance of the transfer decision.

This study does challenge some pre-existing notions. The assumption that judicial transfer decisions may be biased by age at offense was not borne out by the data, except for a prosecutorial policy in Phoenix to move for remand of seventeen-year-olds. More important, unless there was prosecutorial racial selection, the decision to transfer youths in Boston, Detroit, Newark, and Phoenix was not motivated by race. Additionally, circumstances surrounding the offense, co-participation, and victimization did not contribute to judicial decisions to retain youths in the juvenile court or transfer them to criminal court. Prior offense history and proximity to the ceiling of juvenile jurisdiction appear to have the strongest relationship to the judicial transfer decision. For violent delinquents, these

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<sup>116</sup> Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41 (1984).

<sup>117</sup> Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987).

factors appear to be independent of age, race, or committing offense in determining transfer.

Judicial waiver statutes empower the juvenile court judge to make a transfer decision without applying objective criteria. This is not surprising for a system of justice that has traditionally individualized its decisions. The question remains, what are the effects of "individualized justice" on violent youths considered for transfer? For those youths subject to transfer consideration, the data show that judicial decisions were not discriminatory toward retaining a youth within the juvenile justice system or waiving him to the criminal justice system. We found no bias with respect to race. However, neither did we find a strong relationship between transfer and most offense-related variables, including the nature of the offense, number of co-participants or number of victims. What we found was a rash of inconsistent judicial waiver decisions, both within and across sites. Inconsistent and standardless decisions for youths retained in the juvenile court are not surprising in a judicial context that cherishes individualized justice, although even this notion is increasingly subject to challenge.<sup>118</sup> But for youths who may be tried and convicted in criminal court and subjected to years of imprisonment in a secure institution, such subjective decision-making is no longer justified. This is not to suggest that there should be no variation in decision-making criteria and practices among states. Each state has, naturally, lawful authority to decide which offense and offender characteristics are relevant to the transfer decision. Within states, however, the doctrines of fundamental fairness and equal protection suggest that formal, articulated criteria should be established to promote equitable and consistent transfer decision-making.

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<sup>118</sup> Forst, Fisher & Coates, *Indeterminate and Determinate Sentencing of Juvenile Delinquents: A National Survey of Approaches to Commitment and Release Decision-Making*, 36 *JUV. & FAM. CT. J.* 1 (1985).