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A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders Is Not a Panacea

Lauren D'Ambra*

INTRODUCTION

Policy makers throughout the country are responding to the increasing sentiment that violent juvenile offenders should face the same penalties as their adult counterparts.¹ This public outcry is a direct response to the misguided perception that juvenile crime, particularly violent in nature, is escalating.² However, based on the most recent statistics of the Federal Bureau of Investigation (FBI), violent juvenile crime decreased in 1995.³ This unexpected news surprises both a public increasingly fearful of a rise in violent juvenile crime and legislators who tout the familiar mantra, "adult time for adult crime."

Repeat violent offenders comprise only a small fraction of juvenile delinquents. Some national studies suggest that as low as five percent of violent acts are committed by young people.⁴ Other studies place the statistics at thirteen percent. Despite diametric

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1. Stacey Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 *Fordham L. Rev.* 2425, 2435-36 (1996) (noting that 47 states and the District of Columbia have enacted judicial waiver statutes); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 *Minn. L. Rev.* 965, 982-83 (1995).

2. Linda F. Giardino, Note, *Youth, Family and the Law: Defining Rights and Establishing Recognition—Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 *J.L. & Pol'y* 223, 229-30 (1996).

3. Robert L. Jackson, *FBI: Violent Crimes by Youths Decline*, *Prov. J. Bull.*, Aug. 9, 1996, at A1.

4. Ted Gest & Victoria Pope, *Crime Time Bomb*, *U.S. News & World Rep.*, Mar. 25, 1996, at 36, available in 1996 WL 7810430.

statistics, the fact remains that the majority of repeat juvenile offenders who are transferred to adult courts have not committed violent crimes against persons; rather, "the majority of juveniles transferred to adult courts are typically chronic, petty property offenders sent there by judges often fed up with seeing them returning time and time again."⁵ Since most juveniles arrested once do not commit subsequent crimes, many of the recently enacted automatic waiver statutes unnecessarily target youths who have an opportunity to reform.⁶ This assertion is strongly supported by the fact that reformation and rehabilitation were at the heart of the development of juvenile courts.⁷

Today, the juvenile system is under attack.⁸ Policy makers increasingly neglect the original goals of rehabilitation and prevention in favor of retributive and punitive measures.⁹ With the general public distraught with crime and a juvenile punishment system that it believes is too brief and too lenient on crime, the public sentiment that youth offenders should suffer adult consequences persists.¹⁰ As a result, legislators gravitate toward tougher measures. Many states are passing new laws that provide for the waiver of increasing numbers of juveniles into adult court.¹¹ Moreover, the landscape is changing so rapidly, experts have not yet assessed the impact of these laws on juvenile crime.¹²

While proponents of measures which treat youths as adults acknowledge that the nation's overall crime rate is declining, they

5. Sarah Glazer, *Juvenile Justice: Should Violent Youths Get Tougher Punishments?*, CQ Researcher, Feb. 25, 1994, at 1.

6. *Id.*

7. See generally Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Court*, 90 Nw. U. L. Rev. 1254 (1996); Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 Wis. L. Rev. 375, 376-77.

8. E.g., Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 Harv. C.R.-C.L. L. Rev. 507 (1995); see Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083 (1991); Melli, *supra* note 7, at 376.

9. Melli, *supra* note 7, at 389-90; Sabo, *supra* note 1, at 2434-36. See generally Giardino, *supra* note 2.

10. "[Seventy-three] percent of the respondents to a recent *USA Today/CNN*/Gallup survey said juveniles who commit violent crimes should be punished the same as adults." Glazer, *supra* note 5, at 171.

11. *Id.* at 176.

12. Fox Butterfield, *States Revamping Laws on Juveniles as Felonies Soar*, N.Y. Times, May 12, 1996, at 24, available in LEXIS, News Library, Nyt File.

suggest that the crime rate for teens is likely to rise.¹³ They also argue that the juvenile justice system is not equipped to handle youths committing violent or "adult" crimes.¹⁴ But punitive means of dealing with juvenile offenders undermine the rehabilitative philosophy upon which the juvenile justice system was founded a century ago, and represent an abandonment of hope for our children. Abandoning the rehabilitative model for a punitive model is a weak attempt to abate the complex problem. Youths are labeled adults and turned over to the adult system "not because the juveniles have reached a level of maturity consonant with adulthood but rather because society has given up on them."¹⁵

In reality, children are much more likely to be victims of crime than offenders.¹⁶ Those who do become perpetrators often experience mitigating circumstances of neglect, abuse, violence and poverty. The solution is not tougher punishment, which could turn those who could be rehabilitated into career criminals; rather, the solution is a greater attempt at prevention, education and reform, as well as targeting guns and drugs to decrease crime.¹⁷

Waiver policies, when used, should further the original goals of the juvenile system by transferring *only* the limited number of egregious offenders who cannot be reformed, and thereby would endanger public safety. This type of determination requires individual assessment, not automatic transfer policies, because, unlike individual assessment, automatic transfer considers neither the causes of juvenile crime nor the consequences of adult treatment.¹⁸

I. THE EVOLUTION OF THE JUVENILE JUSTICE SYSTEM

In 1882, national legislation gave "criminal courts discretion either to sentence juveniles to reform school or to impose 'such

13. Richard Serrano & David Savage, *Fighting Juvenile Crime Takes on New Urgency*, Prov. J. Bull., July 21, 1996, at D1.

14. See Sen. Carol Moseley-Braun, *Should 13-Year-Olds Who Commit Crimes with Firearms be Tried as Adults? Yes: Send a Message to Young Criminals*, 80 A.B.A. J. 46, 46 (1994).

15. Guttman, *supra* note 8, at 509.

16. See generally Rhode Island KIDS COUNT, 1996 Rhode Island Kids Count Factbook 46-55 (1996) [hereinafter Kids Count Factbook].

17. Glazer, *supra* note 5, at 171.

18. Guttman, *supra* note 8, at 520.

punishment as is otherwise provided by the law."¹⁹ Legislators instituted nationwide reforms in the late nineteenth century to achieve more humane treatment of juveniles, including the establishment of houses of refuge to separate youth from adult prisoners and the eventual establishment of a separate juvenile court system. Since children were considered amenable to rehabilitation, the first juvenile courts were considered civil rather than criminal, with judges who dispensed treatment rather than punishment.²⁰

The original juvenile court was established in Chicago, in 1899, to deal with young troublemakers whose misdeeds included acts such as throwing rocks through windows. Since its inception, the juvenile justice system has been geared toward child welfare, individual assessment and treatment. The goal was to reintegrate youths into society.²¹ Accordingly, the establishment of this system was grounded in the beliefs that juveniles were inherently less guilty than adult offenders, that juvenile offenders could be rehabilitated and therefore should be "treated" rather than punished, and that youngsters should not be stigmatized and hardened by contact with adult criminals.²²

The nation's early treatment of juvenile offenders was governed by the common law presumption that a child less than seven years old was incapable of forming criminal intent.²³ A rebuttable presumption of incapacity existed for children ages seven to fourteen.²⁴ Philosophical changes in this benevolent system began in the mid-1960s, when the United States Supreme Court extended due process rights to juveniles.²⁵

As crime rates rose through the 1970s, a national trend toward making juvenile court proceedings more like adult criminal courts began,²⁶ marking the beginning of public pressure for more

19. John J. Cloherty III, Note, *The Serious Juvenile Offender in the Adult Criminal System: The Jurisprudence of Rhode Island's Waiver and Certification Procedures*, 26 Suffolk U. L. Rev. 407, 414 (1992) (quoting 1882 R.I. Pub. Laws ch. 248, § 49).

20. Cintron, *supra* note 7, at 1258-59; Guttman, *supra* note 8, at 511-15.

21. Guttman, *supra* note 8, at 510-12.

22. See generally Sabo, *supra* note 1.

23. Butterfield, *supra* note 12, at 1.

24. Cloherty, *supra* note 19, at 413 n.40.

25. Guttman, *supra* note 8, at 513 (citing *Kent v. United States*, 383 U.S. 541 (1966)).

26. *Id.* at 514-15. A comparison of the FBI's 1992 data with data from the 1970s demonstrated that overall, more youth crime and violence occurred in the

retributive measures against youth offenders. Proponents of these measures argued that the juvenile system was incapable of handling serious offenders and that "treatment" was ineffective. Rather than trying to improve rehabilitative methods, they sought to abolish the existing juvenile system altogether.²⁷

In *Kent v. United States*,²⁸ the Court held that a District of Columbia statute entitled, "Juveniles to a hearing, access to counsel, and statement of the court's reasons for waiving jurisdiction," required full investigation for juvenile waiver.²⁹ The Court delineated the following determinative factors in a waiver decision:

the seriousness of the offense; the offense's violent or wilful nature; whether the offense harmed persons or property; the complaint's prosecutive merit; the desirability of disposing of the offense in one court if adults were also charged; the juvenile's sophistication and maturity; the juvenile's record and previous history; and the prospects for adequate protection of the public or rehabilitation of the juvenile in the juvenile court.³⁰

Following *Kent* with *In re Gault*³¹ and *In re Winship*,³² the Court afforded juveniles additional rights, including notice of charges, privilege against self-incrimination, the right to confront and cross-examine witnesses, and the requirement of proof beyond a reasonable doubt in juvenile proceedings.³³ As a result of these decisions, juvenile offenders in the past three decades have been afforded the same constitutional rights as adults.

II. EVOLUTION OF A PUNITIVE PHILOSOPHY: JUVENILE COURT V. ADULT COURT

Proponents of tougher, more punitive measures against juvenile offenders argue that the juvenile court philosophy advocating the best interests of the child is from a "bygone era."³⁴ Yesterday's

1970s, a decade marked by the baby boom generation and a greater influx of young people. *Juvenile Crime Report Tells Complex Story of Violence*, Prov. J. Bull., Oct. 14, 1993, at A15.

27. Guttman, *supra* note 8, at 515.

28. 383 U.S. 541 (1966).

29. *Id.* at 554; see also Cloherty, *supra* note 19, at 418-19.

30. Cloherty, *supra* note 19, at 419 n.70 (citing *Kent*, 383 U.S. at 566-67).

31. 387 U.S. 1 (1967).

32. 397 U.S. 358 (1970).

33. *Gault*, 387 U.S. at 21-27; *Winship*, 397 U.S. at 359, 361-67.

34. Butterfield, *supra* note 12, at 1.

delinquents had fistfights, shoplifted and stole bikes and cars; today, they are armed with deadly weapons and devoid of respect for others as they commit robberies, burglaries, rapes and murders.³⁵ With demographics projecting a thirty percent rise in fifteen to nineteen year olds in the next decade, the Federal Office for Juvenile Justice predicts a corresponding doubling of juvenile arrests for violent crime.³⁶ Fearing a perceived increase in random juvenile crime, many Americans feel that juvenile waiver is necessary to protect society.

Analysis of recent trends in juvenile crime and youth violence demonstrates otherwise. Consequently, propagating more punitive measures may not be as urgent or productive as proponents suggest. FBI statistics released by the Justice Department in August 1996 demonstrated that youth arrests for violent crimes decreased in 1995 for the first time in seven years, despite a rise in violent crime arrests among adults and a rise in the youth population.³⁷ The decline in the arrest rate for murder by juveniles was even more pronounced—a 15.2% decrease from 1994. Since 1993, the decline has been 22.8%.³⁸

The report followed a 1994 National Council on Crime and Delinquency (NCCD) study which showed that juvenile crime represents a small and declining proportion of overall crime in America.³⁹ The NCCD reported that the ten year trend for 1982 to 1992 showed no increase—in fact, a slight decrease—in the proportion of crime attributable to juveniles. The juvenile proportion of total arrests decreased from 18% to 16%, while all serious crime arrests decreased from 30% to 29%.⁴⁰ While adult arrests for serious crimes increased by 15%, juvenile arrests increased just 5%. In 1994, only 19.4% of those arrested for violent crime were under

35. Glazer, *supra* note 5, at 171-72; Kids Count Factbook, *supra* note 16, at 50.

36. Serranno & Savage, *supra* note 13, at D1 (explaining that violent crime means murder, forcible rape, robbery and aggravated assault).

37. 1995 showed a 2.9% drop in arrests of 10 to 17 year olds for violent offenses, an arrest rate of 511.9 youths per 100,000, down from 527.4 in 1994. Jackson, *supra* note 3, at A1.

38. *Id.*

39. See generally Michael A. Jones & Barry Krisberg, National Council on Crime and Delinquency, *Images and Reality: Juvenile Crime, Youth Violence and Public Policy* (1994) (using 1992 data tracking crime trends from the FBI's annual Uniform Crime Report and the U.S. Justice Department's annual National Criminal Victimization Survey, which includes crimes not reported to police).

40. *Id.* at 8-9.

eighteen.⁴¹ Murder and rape comprised 7% of juvenile arrests for violent crimes (aggravated assault and robbery accounted for the other 93%) and less than 1.5% of all juvenile arrests that year.⁴²

Juvenile arrests for violent crime increased by 45% over the decade, reflecting an overall national increase in violent crime (adult arrests increased 41% during the period). The age crime curve—the tendency for offenders to commit crimes which peaks during their younger years and declines with age—showed that age-specific patterns remained about the same during the decade for all crimes except murder.⁴³ Experts attribute the sharp rise in murder by young people beginning in 1985 to the same cause which increased the nation's overall murder rate—the link between the drug trade and gun violence. Due to the rapid growth of crack cocaine markets in the 1980s, juveniles were recruited and armed, their guns disseminating into communities and increasing the murder rate.⁴⁴

Arrest statistics do not permit a completely accurate view of the juvenile crime problem because the figures include repeat arrests of single offenders, and juveniles tend to commit crimes in groups. Thus, if police arrest five youths in connection with a murder, this will appear as five homicide arrests, not one murder.⁴⁵ Juvenile crime experts conclude that a core group of violent offenders commit a disproportionate number of crimes, pushing statistics even higher.⁴⁶

Statistics on crimes also do not account for arrests cleared, so figures based on numbers of arrests distort the picture of juvenile violence.⁴⁷ Juveniles consistently account for a smaller proportion of arrests cleared than total arrests. For example, in 1992, juveniles comprised 17.5% of all arrests for violent crime, but 12.5% of arrests cleared. Arrest cleared statistics show that the proportion of violent crimes attributable to juveniles is actually

41. Kids Count Factbook, *supra* note 16, at 50.

42. Jones & Krisberg, *supra* note 39, at 10.

43. Alfred Blumstein, *Violence by Young People: Why the Deadly Nexus?*, Nat'l. Inst. Just. J., Aug. 1995, at 3.

44. *Id.* at 5-6.

45. Jones & Krisberg, *supra* note 39, at 13.

46. *Juvenile Crime Report Tells Complex Story of Violence*, Prov. J. Bull., Oct. 14, 1993, at A15.

47. An offense is cleared, or solved, when at least one person is arrested, charged and prosecuted. Jones & Krisberg, *supra* note 39, at 14.

lower than the proportion of the youth population in the United States, though the proportion of juvenile property crimes is higher than the proportion of the youth population.⁴⁸

III. NATIONAL TRENDS: LEGISLATIVE INITIATIVES DEVELOP IN RESPONSE TO PUBLIC PRESSURE

Recently, many state legislatures have revised their respective juvenile codes in order to increase penalties for juvenile criminals, including transfer into the adult correctional system to serve longer sentences under more punitive conditions. These changes include instituting various waiver mechanisms; opening previously confidential records or juvenile court proceedings to the public; making parents accountable for children's crimes;⁴⁹ extending victims' rights so that they may attend proceedings or get restitution; and enacting "three-strikes" laws (i.e., after three crimes, the court treats a defendant as an adult).⁵⁰ Of forty-four states that have juvenile laws, or have revised their juvenile laws in the past two years, thirty-five have enacted provisions for juvenile waiver.⁵¹

Waiver laws take various forms, which many states use in combination. Judicial waiver grants the juvenile court discretion to waive jurisdiction over a juvenile after a hearing, usually upon request of the prosecutor in light of statutory criteria such as likelihood of rehabilitation (guidelines often follow those enunciated in the *Kent* decision). Judicial waivers increased sixty-eight percent from 1988 to 1992, with the number of waivers nearly doubling for all offense categories except property offenses.⁵² Prosecutorial waiver, or concurrent jurisdiction, allows the prosecutor to choose, based on age and offense criteria, whether to file charges in juvenile or criminal court, thus avoiding a waiver hearing. Legislative waiver, or statutory exclusion, excludes certain offenses from juvenile court jurisdiction by statute. These statutes typically base au-

48. *Id.*

49. Maggie Gallagher, *Sins of the Children are Visited on Their Parents*, *The Sacramento Bee*, May 14, 1996, available in 1996 WL 3297804; Kathy Lally, *Punish thy Mothers and Fathers*, *Baltimore Sun*, May 21, 1996, available in 1996 WL 6619743; Ellen Goodman, *Should Society Punish Parents when They Fail?*, *State J. Reg.*, May 20, 1996, available in LEXIS, News Library, Stjreg File.

50. Butterfield, *supra* note 12, at 24.

51. *Id.*

52. Melissa Sickmund, *How Juveniles Get to Criminal Court*, *OJJDP Update on Statistics*, *Juv. Just. Bull.* 1 (Oct. 1994).

omatic transfer to adult court on age, type of offense and/or prior record. This scheme effectively lowers the upper age limit of juvenile court for certain crimes, especially murder and other offenses against persons.⁵³

In some states, courts may try youths as young as twelve as adults; and in some extreme instances, age is irrelevant.⁵⁴ Twenty states automatically transfer juveniles to adult court if they commit certain offenses.⁵⁵ Florida's waiver laws typify recent changes—1994 legislation gave prosecutors authority to try juveniles as young as fourteen as adults; moreover, courts automatically try delinquents with three previous convictions as adults. Florida now sends more juveniles to adult court than all other states combined.⁵⁶

Many waiver laws are too harsh. In particular, prosecutorial and statutory forms, which do not allow discretion in transferring youths and thus increase the risk that youths who may have been receptive to treatment are inappropriately sent to the adult system, oppress youths. Experts note that the tendency to commit crimes is age-specific, typically peaking in the late teen years and declining thereafter.⁵⁷ Research exhibits that the involvement in serious violent crimes peaks for males between ages sixteen and seventeen, and drops dramatically after age twenty. The likelihood that individuals will commit violent crimes between ages twenty-one and twenty-seven is approximately the same as for twelve and thirteen year olds.⁵⁸ Therefore, offenses at a young age do not indicate future criminality, but rather suggest that rehabilitation can be effective, and longer sentences for juvenile offenders have little impact on crime or public safety.⁵⁹

Waiver statutes must not allow blind waiver of juveniles into adult court. The waiver process must allow for a fact-specific in-

53. Cloherty, *supra* note 19, at 411-12; see also Guttman, *supra* note 8, at 521-22; Sickmund, *supra* note 52, at 1, 3.

54. See Jeffrey B. Pine, *Juvenile Waiver in Rhode Island*, 2 Roger Wms. U.L. Rev. 257, 269 n.105 (1997).

55. Glazer, *supra* note 5, at 176.

56. Butterfield, *supra* note 12, at 24. Florida waived 7000 juveniles in 1995 alone. *Id.*

57. Blumstein, *supra* note 43, at 3.

58. Jones & Krisberg, *supra* note 39, at 35.

59. *Id.*

quiry into the juvenile's situation.⁶⁰ Automatically sentencing juveniles to adult terms constitutes an overreaction that "will unfairly penalize kids who would have grown out of their criminal tendencies or responded to counseling."⁶¹ Legislators who pass drastic laws are responding not to a juvenile crime wave, but rather to the cases of youths who commit exceptionally severe offenses.⁶²

IV. AN OVERVIEW OF THE RHODE ISLAND JUVENILE JUSTICE SYSTEM

The development of Rhode Island's juvenile justice system generally mirrors the evolution of American juvenile justice.⁶³ In 1898, Rhode Island was the first state to legislatively mandate segregated, juvenile adjudicatory hearings. This new legislation provided for separate hearings, calendars and dockets for juvenile cases in Providence and Newport.⁶⁴ These procedures were extended to the rest of the state in 1915 with the enactment of the Juvenile Court Act.⁶⁵ Remaining in force until 1944, the Act established a juvenile court within the district court. Young offenders were not subject to criminal prosecution except for the offenses of murder or manslaughter.

In *Knott v. Langlois*⁶⁶ and *In re Correia*,⁶⁷ the Rhode Island Supreme Court adopted the *Kent* due process guarantees and guidelines for judicial waiver. The court held that the full investigation statutorily required for waiver involved a waiver hearing, a

60. Cf. Guttman, *supra* note 8, at 525.

61. Glazer, *supra* note 5, at 177-78.

62. See Cloherty, *supra* note 19, at 430.

63. Butterfield, *supra* note 12, at 24. The early juvenile courts made no procedural or substantive distinction between offenders' criminal and noncriminal behavior. Children could be adjudicated without criminal due process safeguards since, the court based its authority on *parens patriae*, "the role of the state as surrogate parent for those unable to care for themselves." Cloherty, *supra* note 19, at 414 n.45. Judges always have had discretion to waive jurisdiction over serious juvenile offenders. *Id*; see also Guttman, *supra* note 8, at 511-12 (discussing *parens patriae*).

64. Rhode Island Governor's Justice Commission Statistical Analysis Center, Rep. No. 35, Juveniles in Rhode Island: An Overview of the State's Juvenile Justice System and a Data Analysis/Statistical Summary Thru Year 1993 (Feb. 1995) [hereinafter Statistical Summary].

65. 1915 R.I. Pub. Laws ch. 1185.

66. 231 A.2d 767 (R.I. 1967).

67. 243 A.2d 759 (R.I. 1968).

minor's counsel access to a client's social service records, and a court statement of reasons for waiving jurisdiction. In *Langlois*, the court, addressing public safety, held that in determining waiver, "the juvenile court must strike a balance between the desirability of rehabilitating the offending child and the need to protect the security of the community."⁶⁸

Rhode Island case law continued to hold that the state's juvenile justice system retained its traditional philosophy that juveniles should not be treated as adults.⁶⁹ *In re Joseph T*⁷⁰ and *State v. Mastracchio*⁷¹ reaffirmed the emphasis on a waiver hearing as the appropriate method of determining when a court should treat a juvenile as an adult.⁷² The supreme court noted that the waiver hearing judge, upon determining probable cause existed that the juvenile had committed the crime charged, must weigh the potential for rehabilitation with the need to protect society.⁷³

In 1944, the juvenile court was removed from the district court and a chief justice was appointed.⁷⁴ The juvenile court exercised original jurisdiction over children under eighteen charged with waywardness or delinquency; the court would then retain jurisdiction until the juvenile was twenty-one.⁷⁵ Judges had discretion to

68. *Langlois*, 231 A.2d at 772. The Rhode Island Supreme Court did not establish subjective waiver standards in *Langlois*. However, in referencing a survey of 50 juvenile courts, it identified five factors to be considered in determining juvenile waiver: (1) whether the factual issues are contestable, (2) whether the offense occurred after correctional treatment for a previous transgression, (3) the juvenile's "hopeless" condition, (4) the juvenile's attitude and (5) the resources of the criminal court and the juvenile court for treatment and public safety. *Id.*

69. *Morris v. D'Amario*, 416 A.2d 137, 139-40 (R.I. 1980).

70. 575 A.2d 985 (R.I. 1990).

71. 605 A.2d 489 (R.I. 1992).

72. *In re Joseph T*, 575 A.2d at 986; *Mastracchio*, 605 A.2d at 494.

73. Barbara A. Dillon, Topical Survey, *Family Law: De Novo Hearing Proper Mechanism for Waiving Juvenile Jurisdiction*—*State v. Mastracchio*, 27 Suffolk U. L. Rev. 540, 540 (1993) (summarizing *Mastracchio*, 605 A.2d 489). In *Mastracchio*, the defendant was tried as an adult. A waiver hearing was not held because, at the time he was charged, the defendant was 23 years old. Defendant's appeals asserted that he should have been afforded a waiver hearing. He based this claim on the fact that he was only 17 years old at the time he committed the offense. Even so, the adult trial was deemed proper. The court found that because of the cold-blooded nature of the murder, family court jurisdiction would have been waived. That type of crime suggests a seasoned, mature and hardened criminal who is not likely to be rehabilitated in three years until mandatory release at age 21. *Mastracchio*, 605 A.2d at 494.

74. Cloherty, *supra* note 19, at 416-17.

75. *Id.* at 417.

waive to adult court a juvenile sixteen or older who committed an offense that would subject an adult to indictment.⁷⁶ Children under sixteen remained immune from prosecution. Jurisdiction over juvenile offenders was assumed by the Rhode Island Family Court upon its creation in 1961.⁷⁷

The intent of Rhode Island's pre-1990 laws to protect the best interests of children was reflected in state supreme court decisions from the time the family court was established. In *State v. Cook*,⁷⁸ the court held that the special jurisdiction of the family court to adjudge a juvenile wayward or delinquent was intended to protect children from criminal responsibility and conviction.⁷⁹ Before 1990, Rhode Island law protected all children under eighteen from criminal court sanctions except those over sixteen whom the family court had waived in a hearing. However, the state enacted a form of statutory exclusion in 1972, providing automatic prosecution as adults for juvenile offenders over sixteen charged with a felony after being found delinquent for two prior felony offenses after age sixteen.⁸⁰ In 1981, the legislature lowered the maximum age for family court original jurisdiction from twenty-one to eighteen.⁸¹

V. THE CRAIG PRICE CASE: RHODE ISLAND'S WAIVER AND CERTIFICATION LAWS REVISED

In 1990, responding to public perception that the state juvenile system could not handle serious offenders, Rhode Island's legislature revised the state's waiver and certification laws.⁸² The change allowed family court to waive certain juveniles of any age to superior court.⁸³ It also created a certification procedure that increased the court's sentencing power over non-waived youths.

The catalyst for this legislative initiative was the highly publicized Craig Price case.⁸⁴ Price pled guilty to having murdered four

76. *Id.* at 419-22.

77. *Id.* at 417-18 (citing 1961 R.I. Pub. Laws ch. 73, §§ 1, 20).

78. 210 A.2d 577 (R.I. 1965).

79. *Id.* at 579 (citing *Givardi v. Juvenile Court*, 142 A. 542 (R.I. 1928)).

80. R.I. Gen. Laws § 14-1-7.1 (1981), *repealed* by 1990 R.I. Pub. Laws ch. 15, § 1, ch. 18, § 1.

81. *Id.* § 14-1-6, *repealed* by 1990 R.I. Pub. Laws ch. 15, § 1, ch. 18, § 1.

82. *Id.* §§ 14-1-7 to -7.4 (1994).

83. *Id.*

84. Tony Depaul, *Youth, 15, is Charged with Slaying Warwick Woman, Her Daughters*, *Prov. J. Bull.*, Sept. 18, 1989, at A1; *House Approves Bill on Juvenile*

neighbors: a mother and her two young daughters when he was fifteen and another woman when he was thirteen.⁸⁵ Because he committed all of the crimes before age sixteen, he received the maximum sentence then available under the Rhode Island juvenile law: detention at the Rhode Island Training School until his twenty-first birthday.⁸⁶

Rhode Island's 1990 legislation was in part a response to mandatory release at age twenty-one of youth offenders, like Craig Price, adjudicated for serious crimes committed before age sixteen. The new waiver and certification procedures were intended to toughen penalties for youth offenders of any age by increasing the likelihood of transfer to superior court. Once transferred, juveniles are likely to receive longer sentences.

Rhode Island law now provides the family court jurisdiction over juveniles under eighteen years of age who are charged with any offense. Unless the juvenile is waived, the family court retains jurisdiction until age twenty-one.⁸⁷ Pursuant to the 1990 legislation,⁸⁸ waiver is effective for the offense upon which the motion is based and other offenses pending adjudication. It remains in effect for subsequent offenses unless the juvenile is acquitted.⁸⁹

In general, Rhode Island's waiver process provides a fair mechanism for the transfer of hard-core offenders to the adult system because it preserves family court discretion. The family court retains discretion to determine, on a case-by-case basis, whether the offense committed is serious enough to warrant waiver and whether rehabilitation of the offender is unlikely to occur. Waiver to the superior court then forever terminates family court jurisdiction. Juvenile waiver, once initiated by the Attorney General may be approved after a waiver hearing. Waiver hearings require the Attorney General to establish probable cause by a preponderance of the evidence. It also must be shown, by means of the juvenile's

Punishment, Prov. J. Bull., Mar. 29, 1990, at D7; *Young Killer Spurs Senate Action*, Prov. J. Bull., Jan 3, 1990, at A7.

85. Cloherty, *supra* note 19, at 407.

86. *Id.* (citing *In re Richard P.*, 451 A.2d 274, 278 (R.I. 1982)).

87. R.I. Gen. Laws § 14-1-6(a) (1994).

88. *Id.* §§ 14-1-7 to -7.4.

89. *Id.* §§ 14-1-6, -7.1(c) (1994 & Supp. 1996). These provisions would have precluded Mastracchio's two appeals. Cloherty, *supra* note 19, at 426 n.105.

history of offending, the heinousness of the crime, and the need to protect public safety, that the waiver is necessary.⁹⁰

The 1990 law also created a certification process by which the family court may sentence a child of any age to the maximum penalty for an offense, to be served in the Rhode Island Training School (RITS) while the offender remains a juvenile, followed by transfer to an adult facility.⁹¹ While a hearing must still be conducted for waivers, the minimum age and prior offense requirements are eliminated where the offense, if committed by an adult, would be punishable by life imprisonment.⁹² For a felony level offense, the offender must be at least sixteen to be waived, but can be certified at any age.⁹³

Certification requires a showing of probable cause and necessity. In addition, the Attorney General must show that family court jurisdiction until age twenty-one provides insufficient time to rehabilitate.⁹⁴ However, the procedure makes family court proceedings functionally equivalent to superior court criminal trials, the only occasion on which a juvenile is afforded a jury trial in family court. Conviction results in two mandatory sentencing alternatives: (1) the certified and convicted juvenile may be sentenced to the RITS until age twenty-one or (2) the juvenile may be held at the RITS until the court decides to transfer the juvenile to an adult facility, with transfer hearings held annually.⁹⁵

A 1992 amendment lowered from twenty-one to eighteen, the age at which the family court must schedule reviews of certified, adjudicated youths' cases.⁹⁶ It also specified that the youth must prove sufficient efforts at rehabilitation by clear and convincing evidence in order to avoid transfer of jurisdiction over the sentence to

90. R.I. Gen. Laws § 14-1-7.1 (Supp. 1996). In actual practice most waivers are not by hearing, but are voluntary as a result of negotiation. In some cases, an adult sentence is also negotiated.

91. *Id.* §§ 14-1-7.2 to -7.3 (1994).

92. *Id.* § 14-1-7(a).

93. *Id.* §§ 14-1-7.2(c), -7(b). Certification is mandatory for a juvenile charged with a felony with two prior felony-level offenses since age 16. *Id.* Waiver or certification is mandatory for a juvenile charged with a felony drug offense who had committed one prior drug offense since age 16. *Id.* §14-1-7.4.

94. *Id.* § 14-1-7.2(a)(3).

95. *Id.* § 14-1-7.3.

96. *Id.* § 14-1-42 (establishing transfer hearing procedures for certified and adjudicated juveniles).

the Department of Corrections.⁹⁷ Without efforts at rehabilitation, the youth is remanded to the Rhode Island Training School to await further hearings.

A 1994 amendment mandates transfer of a juvenile who has been certified and adjudicated to the Department of Corrections if the family court determines he poses a threat to public safety or to others at the training school.⁹⁸ The law was further amended in 1995 to provide for a hearing to consider probable cause by the same family court judge conducting the waiver hearing. The hearing is predicated upon findings at a prior detention hearing that the offense had been committed by the youth charged.⁹⁹

In keeping with the national trend, Rhode Island law has shifted away from its previous rehabilitative emphasis by expanding legal provisions for treating juveniles as adults. Waiver hearings are still required, but now focus on offense type and past record of offending. Certification retains rehabilitation as a goal, but as a mechanism for long-term "adult" sentences, it is not generally in the child's best interest. In addition, automatic certification of repeat offenders over age sixteen creates an irrebuttable presumption that these offenders are unlikely to be rehabilitated. Finally, certification also may result in reverse effects on punishment, if the family court imposes harsher sentences than the superior court.¹⁰⁰

VI. IMPACT OF RHODE ISLAND'S WAIVER STATUTE: HAS IT AFFECTED JUVENILE CRIME TRENDS?

In the first two years after the 1990 legislation passed, fourteen juveniles were waived or certified.¹⁰¹ According to data tracked by the Attorney General's Juvenile Prosecution Unit, 125 waiver petitions have been filed since 1993.

In contrast to the waiver alternative, certification is rarely used. Some motions for certification actually result in voluntary waivers. Of three certifications filed in 1995, two resulted in voluntary waivers, and one was pending. In addition, three certification filings in each of the previous two years also did not result in

97. *Id.*

98. *Id.*

99. *Id.* § 14-1-7.1 (Supp. 1996).

100. See Glazer, *supra* note 5, at 176.

101. Cloherty, *supra* note 19, at 425 n.96.

actual certifications. One youth who was certified in 1993 withdrew his plea and was waived.¹⁰²

While public perception in Rhode Island regarding an increase in the juvenile crime rate is supported by numerical data collected from the family court reporter, no analysis compares profiles of waived and non-waived youths' cases. According to a Rhode Island Governor's Justice Commission compilation of crime data for the period from 1970 to 1994, the Rhode Island crime rate reached a twenty-five year low in 1994 and was projected to continue decreasing.¹⁰³ Consistent with FBI figures for the early 1990s,¹⁰⁴ numbers of total crimes and property crimes in Rhode Island decreased in the early 1990s. Violent crimes of rape, robbery and assault also decreased in the 1990s.¹⁰⁵ This decline occurred after a period of state statistics which paralleled national trends of increased violent crime in the mid-to-late 1980s.¹⁰⁶

The Justice Commission does not specify how many of the total number of crimes were committed by juveniles, but it does issue statistics on juvenile arrest rates.¹⁰⁷ The Commission's 1995 report, compiling data through 1993, showed that total juvenile arrests have shown slight increases and decreases annually, from 8343 in 1987 to 9000 in 1993; with a low of 7825 in 1988 and a high of 9586 in 1990.¹⁰⁸ Total property and other non-violent crime arrests showed a similar fluctuation, but total violent crime arrests greatly increased from 266 in 1989 to 660 in 1993.¹⁰⁹ Juvenile violent crime offenses in 1995 numbered 9802, or 6% of juvenile crimes that year.¹¹⁰

102. Statistics were acquired from the Rhode Island Department of the Attorney General and are on file with the *Roger Williams University Law Review*.

103. Rhode Island Governor's Justice Commission Statistical Analysis Center, Rep. No. 37, Highlights and Analysis from 25 Years of Collecting Serious Crime Data, at 9 (1995) (citing numbers and rates of various crimes in the state) [hereinafter Highlights].

104. Jones & Krisberg, *supra* note 39, at 10 (showing the serious and violent crime rate declining).

105. *Id.* Homicide rates, however, after decreasing from 1990 to 1992, increased between 1992 and 1994.

106. Highlights, *supra* note 103, at 9.

107. *Id.* at 20-23.

108. *Id.*

109. Statistical Summary, *supra* note 64, at 20.

110. Kids Count Factbook, *supra* note 16, at 50.

The caution with which total crime statistics must be examined is illustrated by the comparison of the 1993 data showing nineteen juvenile homicides in Rhode Island to previous years' data, which showed an annual average of three homicides involving juveniles. The data from 1993 included six deaths in a single arson incident.¹¹¹ In addition, one shall remember the flow of youths charged with multiple offenses.¹¹²

The 10,563 juvenile family court charges in 1993 represented an 18% increase over the number of 1990 charges and a 32.5% increase since 1988.¹¹³ In 1995, 4191 juveniles were referred to family court for a total of 9802 charges.¹¹⁴ Violent crime offenses accounted for only 6% of the offenses referred to family court, while property offenses constituted 35% of the total.¹¹⁵

The Attorney General's Juvenile Prosecution Unit reported a 36.6% increase in cases disposed in family court, from 1013 in 1987 to 1599 in 1993. The number of trials increased 6.7% from 30 (with 15 not guilty verdicts) to 32 (12 not guilty). Plea bargains increased by 56.9%; cases dismissed by 182.7%.¹¹⁶ Those receiving probation decreased 20%. The number of juveniles sent to the RITS as a result of family court proceedings increased 175% from 44 to 121.¹¹⁷ All of these statistics have been steadily increasing, while the probation statistics decreased before the new waiver and certification legislation was passed.

The impact of the Rhode Island waiver statute may be reflected in a comparison of the RITS population before and after 1990. In 1987, 64.6% of the RITS population were violent juvenile offenders.¹¹⁸ In 1993, 57% of the RITS population were adjudicated for property crimes and 43% for violent crimes. Comparatively, 53% of adults incarcerated at the ACI were violent offenders.¹¹⁹ The public defender's caseload of juveniles defended for misdemeanors and status offenses remained stable between the

111. Statistical Summary, *supra* note 64, at 15.

112. Kids Count Factbook, *supra* note 16, at 50; *see text accompanying notes* 45-46.

113. Statistical Summary, *supra* note 64, at 24.

114. Kids Count Factbook, *supra* note 16, at 50.

115. *Id.*

116. Statistical Summary, *supra* note 64, at 24.

117. *Id.* at 31.

118. Cloherty, *supra* note 19, at 424-25 n.96.

119. Statistical Summary, *supra* note 64, at 17.

two comparison years of 1989 and 1993; however, the caseload of juveniles defended for felonies decreased 10% from 1048 to 943 (possibly a result of waiver of more of these cases).¹²⁰

A national comparative study of youths who are waived into the adult system may suggest that many of these offenders are not hard-core criminals who cannot be rehabilitated. The nationwide increase in the use of waiver as well as the 43% increase in the rate of incarceration of juveniles¹²¹ is likely attributable more to burgeoning "tough-on-crime" measures than to increased juvenile crime, since the crime rate has remained stable or decreased in recent years.¹²² There is increasing sentiment that these laws may overcompensate for a violent, remorseless few by abandoning efforts to reform the majority of young offenders. A punitive approach may not serve either society in general or the specific youngsters serving time in adult prisons.¹²³

VII. THE CONSEQUENCES OF WAIVER ENACTMENTS: THE ADULT SYSTEM DEALING WITH YOUTHFUL OFFENDERS

Proponents of tougher laws argue that the juvenile system was not designed and is not able to handle youths who commit violent crimes. However, neither is the adult system equipped to deal with younger offenders.¹²⁴ Those advocating punitive measures without treatment are endangering children and risking the consequences of perpetuating violence and criminal behavior.¹²⁵ Laws aimed at lengthy incarceration of youth without rehabilitation dehumanize children. In addition, these laws are counterproductive to society, and deny youths the chance to lead a productive life.¹²⁶

120. *Id.*

121. Cloherty, *supra* note 19, at 424 n.96 (The increase spans from 1977 to 1987.).

122. *Id.*

123. See Laura Murphy Lee, *Should 13-Year-Olds Who Commit Crimes With Firearms Be Tried as Adults? No: Avoid Simplistic Solutions*, 80 A.B.A. J. 47, 47 (1994); Sam Skolnik, *Trying Kids as Adults Proves Trying*, *Legal Times*, Feb. 19, 1995, at 7.

124. Glazer, *supra* note 5, at 172.

125. Butterfield, *supra* note 12, at 1.

126. Skolnik, *supra* note 123, at 7; see Cloherty, *supra* note 19, at 435 n.156 (discussing five year sentences as more harmful to juveniles than to adult, virtually destroying positive life chances for teen offender) (citing Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 Notre Dame J.L. Ethics & Pub. Pol'y 323, 374 (1991); Frank-

There are numerous reasons why most juveniles do not belong in the adult correctional system. The foremost reason is that attaining a certain age or committing a certain type of offense does not transform a juvenile into an adult. Most youths are still maturing mentally and emotionally and are more amenable to treatment than adults. This is the philosophy upon which the juvenile system was founded.

Secondly, those seeking tougher punishment for juveniles may not be sated by sending them to adult court. Evidence suggests the opposite is true in many instances; youths, appearing less dangerous compared to hardened adult criminals, are treated less harshly in the adult system. Many judges are reluctant to send youths to adult prisons because the prisons may expose the juveniles to extreme danger, and the prisons are unprepared to meet the educational and other special needs of the juveniles. Therefore, offenders are more likely to emerge as potential career criminals than rehabilitated individuals ready to reenter society. Furthermore, incarcerating juvenile populations comes at an increased cost to the adult correctional system and further strains already overcrowded prisons.

Roughly half of the juvenile cases transferred to adult court get dismissed for lack of evidence. NCCD research indicates that conviction rates in juvenile courts surpass those for comparable crimes in adult courts, and that penalties administered by juvenile courts are no more lenient—and in some cases harsher—than those given transferred juveniles in adult court.¹²⁷ Big-time juvenile actors become small-time adult criminal actors and are more often acquitted or given lighter sentences or probation.¹²⁸ For juveniles who are tried and convicted as adults, age becomes a mitigating factor because they appear less threatening to judges and juries compared to hardened adult criminals.¹²⁹

lin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 Notre Dame J.L. Ethics & Pub. Pol'y 267, 270 (1991); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference it Makes*, 68 B.U. L. Rev. 821, 911 (1988).

127. Jones & Krisberg, *supra* note 39, at 1.

128. Glazer, *supra* note 5, at 177; see also Guttman, *supra* note 8, at 529 (citing Ira M. Schwartz et al., Center for the Study of Youth Policy, *A Study of New Mexico's Youthful Offenders* 4 (1995)).

129. Glazer, *supra* note 5, at 177. Research regarding how violent offenders were processed through juvenile courts in 10 states showed that 57% of robbery, 55% of violent sex offense, 53% of murder and 44% of aggravated assault referrals

Third, juvenile offenders sent to adult prison are subjected to more brutality and contagion effects of older, hardened criminals who teach them new criminal tricks.¹³⁰ Adult prisons have fewer treatment services, such as psychological counseling or job training and education. Thus, instead of rehabilitating juveniles, they have the opposite effect of ushering juveniles into the world of adult crime.¹³¹ "It's kind of scary to think what kind of monster may be created" when a youth incarcerated at thirteen is released at age thirty-three after having been raised in prison,¹³² ill-equipped to become a productive member of society. Sending a youth for an adult trial may stigmatize him as a lost cause in society's eyes and his own. Harsh treatment, rather than scaring youths straight, may have the opposite effect, by making matters worse and engendering bitterness, leading youths to take pride in criminal exploits.¹³³

Furthermore, the effectiveness of waiving juveniles to the adult system is questionable. There is no evidence that tougher laws have any deterrent effect or protect the public any better, and the effect on recidivism is undetermined.¹³⁴ Prevention, rehabilitation and appropriate aftercare programs are less costly and more socially desirable goals.

Demonstrative of the effectiveness of waiver is a study by Professor Jeffrey Fagan showing that New York youths sentenced as adults for robbery or burglary were much more likely to be re-arrested than New Jersey youths sentenced as juveniles for comparable crimes.¹³⁵ Florida, which leads the nation in sending youths

resulted in guilty dispositions. By comparison, a study of adult felony sentences in state courts showed that 37% of sex offense, 53% of murder and 13% of aggravated assault charges resulted in conviction; see also Jones & Krisberg, *supra* note 39, at 24-25. *But see* Forst & Blomquist, *supra* note 126, at 351.

130. Peter Reinharz & Jerome G. Miller, *Face Off: The Carrot or the Stick*, Scholastic Update, at 12.

131. Butterfield, *supra* note 12, at 24; Lee, *supra* note 123, at 47.

132. Richard Lacayo, *When Kids Go Bad*, *Time*, Sept. 19, 1994, at 60.

133. Reinharz & Miller, *supra* note 130, at 12; Gest & Pope, *supra* note 4, at 36.

134. Guttman, *supra* note 8, at 528.

135. Butterfield, *supra* note 12, at 24. Jeffrey Fagan, Director of the Center for Violence Research and Prevention at the Columbia University School of Public Health, compared cases of 15 and 16 year olds charged with robbery or burglary in New York and New Jersey. The New York youths were treated as adults, while the New Jersey youths were treated as juveniles. The study found the juvenile system no more lenient than adult courts, with youths in both systems incarcerated for equal amounts of time. *Id.*

to adult prison, provides an even more drastic example of the criminalizing effects of adult prison. According to a study of juvenile offenders tried in adult courts by two University of Florida professors, those sentenced to adult prisons reverted to a life of crime sooner after release and committed an increased number of and more serious crimes than those incarcerated in juvenile institutions.¹³⁶ Furthermore, they were more likely than adults to return to a life of crime after release.¹³⁷

Dangers to youth go beyond turning them to a life of crime. They may end up victims of sexual predators, racial attacks or other violence, like the seventeen year old Ohio youth stabbed to death in an adult prison by members of a white supremacist group.¹³⁸

Finally, one may view the serious juvenile offender as a symptom of societal problems that extend beyond the scope of the juvenile justice system.¹³⁹ Child offenders are also victims deserving an opportunity to be rehabilitated.¹⁴⁰ The solution is not a quick fix. Abandoning the hope of reform for swifter retributive methods by targeting the causes of youth crime, which include family breakdowns and the prevalence of drugs and guns, is not a complete solution.

While sending teens to adult prisons may give the community a sense of security, public safety is not served by adult treatment of youths that has no superior deterrent or incapacitating effects compared to juvenile court treatment.¹⁴¹ The Center for Youth Policy declared, after a recent study, that it found no compelling evidence that either enhanced prosecution or stiffer penalties can prevent or control violent and serious youth crime.¹⁴² The Florida study demonstrated that transfer has little deterrent value, which is shown by the rate of youths' reversion to criminal behavior.¹⁴³ While the prospect of jail could make a difference in some youths' decisions of the crimes they are willing to commit, few young offenders are so calculating as to plan their criminal acts while tak-

136. Glazer, *supra* note 5, at 176.

137. *Id.*

138. *Id.*; Butterfield, *supra* note 12, at 24.

139. Cloherty, *supra* note 19, at 435.

140. Guttman, *supra* note 8, at 510.

141. *Id.* at 528.

142. Lee, *supra* note 123, at 47.

143. Butterfield, *supra* note 12, at 24.

ing into account the consequences.¹⁴⁴ Since evidence shows youths receive equal or more harsh treatment in juvenile courts, trying youths in adult courts has not produced any incapacitative benefits that enhance public safety.¹⁴⁵ Because young offenders who receive adult sentences are more likely to return to society to commit additional crimes, public safety is better served by the rehabilitative approach of the juvenile system.

Those who advocate putting more youths into the adult system ignore the fact that the adult system also has problems and has been criticized for releasing too many criminals.¹⁴⁶ Critics of the new laws call them fiscally irresponsible,¹⁴⁷ and trend watchers who combine rising numbers of youth arrests with the projected increase in the youth population realize that there will not be enough money or enough prisons to lock up an ever-increasing number of young people.¹⁴⁸ According to the NCCD, overcrowding in juvenile facilities only adds to the problem.

The director of the Florida Juvenile Justice Advisory Board, lamenting that some detention centers are at 200% capacity with a cost of ninety-three dollars a day per youth, concluded that it would be cheaper to place a child in a hotel or send him to Harvard for a year.¹⁴⁹ Rather than waiving them to adult court, many youths with offenses of low severity who are detained in juvenile detention centers might safely be referred to non-institutional programs. This would make the juvenile institutions available to accommodate more serious offenders.¹⁵⁰ The juvenile offender should not be penalized with "adult" treatment because of the lack of available services in the juvenile system. High costs may result in more revisions in juvenile justice policy, leading to cheaper and more effective alternatives to incarceration.¹⁵¹

144. Lacayo, *supra* note 132, at 62.

145. Butterfield, *supra* note 12, at 24.

146. *Id.*

147. *E.g.*, Lee, *supra* note 123, at 47.

148. Gest & Pope, *supra* note 4, at 36.

149. Butterfield, *supra* note 12, at 24.

150. National Council on Crime and Delinquency, Juv. Just. Pol'y Statement 5-6 (1991).

151. Butterfield, *supra* note 12, at 24.

VIII. PROFILE OF JUVENILE OFFENDERS: NO SIMPLISTIC SOLUTIONS

Non-discretionary transfer of young people to adult court fails to assess: (1) the individual juvenile's background, (2) reasons for offending and (3) amenability to treatment. Approaches to the juvenile offender problem must go beyond the simplistic approach of incapacitating the offender before the court to those measures that recognize that the juvenile offender is one product of a society which fails to meet all of its children's needs. "Get-tough" policies try to solve the problem of juvenile crime by lowering the age of adulthood rather than recognizing the problem as a failure of society.¹⁵² If treatment has thus far been ineffective, the incentive should be to develop better approaches, not to avoid the problem through waiver.¹⁵³

Indicators of future delinquency are well-known, since youthful offenders have similar backgrounds and risk factors. Profiles of youths who commit violent crimes are strikingly similar: (1) impoverished upbringing, (2) sub-standard housing and health care, (3) inadequate education and (4) serious domestic problems ranging from parental absence and neglect to physical and sexual abuse.¹⁵⁴ In a 1989 study, children born in the same hospitals and living in the same communities were compared, and it was discovered that those abused or neglected were significantly more likely

152. *Id.*

153. Guttman, *supra* note 8, at 536.

154. Lee, *supra* note 123, at 47. A 1993 Office of Juvenile Justice and Delinquency Prevention report identified five categories of causes and correlates of delinquency:

(1) individual characteristics such as alienation, rebelliousness, and lack of bonding to society; (2) family influences such as parental conflict, child abuse, and family history of problem behavior (substance abuse, criminality, teen pregnancy, and school dropout); (3) school experiences such as early academic failure and lack of commitment to school; (4) peer group influences such as friends who engage in problem behavior (minor criminality, gangs, and violence); and (5) neighborhood and community factors such as economic deprivation, high rates of substance abuse and crime, and low neighborhood attachment.

Guttman, *supra* note 8, at 516 (quoting John J. Wilson & James C. Howell, Office of Juv. Just. & Delinq. Prevention, U.S. Dep't of Just., *A Comprehensive Strategy for Serious, Violent and Chronic Juvenile Offenders* 9 (1993)).

to be arrested for violent crimes.¹⁵⁵ A separate study of delinquents under age ten in Hennepin County, Minnesota, showed that four and five year olds were often reported for arson—an act common among sexual abuse victims.¹⁵⁶

Reports of very young offenders—children less than twelve committing serious crimes, like the six year old California boy who beat an infant—are alarming. In 1994, 110,000 children under thirteen were arrested in the United States for acts considered felonies: 11,700 of those for crimes against people, including thirty-nine murders.¹⁵⁷ Adult treatment is even less adequate to deal with these pre-adolescents. Offending at an extremely young age indicates the need for early intervention, not earlier punishment. It is essential that resources be allocated for children who start committing crimes early while they are more treatable and before they evolve into superpredators that the public fears and writes off as not worth saving.¹⁵⁸ Experts may be better able to deal with children's problems at three or five years old than at fifteen. Early treatment is better and less costly than having today's five year old end up before a court for more serious offenses in another decade.¹⁵⁹

Transfer based on age alone is improper without consideration of maturity level. Attainment of a certain age or commission of a certain type of offense does not mean the offender has mentally reached adulthood.¹⁶⁰ Psychologists note that amenability to rehabilitation depends on the offender's stage of development. A child still in the adolescent phase is more open to change, modification and guidance. Children deprived of nurturing in their early years, those who live in urban areas plagued by poverty and violence or who come from abusive homes—the most likely profile of juvenile offenders—are also those most likely to be immature and amena-

155. *Rise in Younger Offenders Alarms Child Welfare Officials*, Prov. J. Bull., May 5, 1996, at A18; see also Cathy Spatz Widom, *The Cycle of Violence*, 244 Science 160 (1989).

156. *Rise in Younger Offenders Alarms Child Welfare Officials*, Prov. J. Bull., May 5, 1996, at A18.

157. *Id.*

158. *Id.*

159. *Id.*

160. Guttman, *supra* note 8, at 527.

ble to rehabilitation.¹⁶¹ Segregation from other social services handicaps the juvenile justice system's ability to rehabilitate.

United States Attorney General Janet Reno stresses the need for a continuum of government attention, beginning with prenatal care and involving the school system, housing authority, health services and job training. She also recommends delinquency prevention programs, including mentoring, dispute resolution and truancy prevention.¹⁶² Reno attributed the 1995 drop in juvenile crime arrests to more successful community intervention and prevention efforts, and the identification of truly violent young offenders for trial as adults.¹⁶³ While Reno supports giving prosecutors more discretion to prosecute youth offenders as adults, she also emphasizes the importance of efforts to eliminate drugs and guns to reduce youth crime.¹⁶⁴

Too often, policy discussions on tougher measures for juvenile offenders fail to address the fact that juveniles are victims of violence much more often than they are perpetrators, and many juvenile offenders have been victims themselves. For every youth arrested for a violent crime, there are fourteen youth victims of violent crime, and the overwhelming majority of the nearly one million young victims each year are victims of crimes by adults, not other juveniles.¹⁶⁵

During the past decade the single most important impact on youth violence and homicide has been the availability of firearms. Children are being killed by guns in increasing numbers—a rise of 144% between 1986 and 1992.¹⁶⁶ Four times as many youths were murdered with guns in 1994 than in 1984.¹⁶⁷ Laws permitting confiscation of guns from juveniles, while almost universal, need more aggressive, skillful enforcement. Proposals include better means of detecting guns from a distance, and better efforts to diminish illegal gun markets commensurate with the aggressive pursuit of illegal drug markets in the past fifteen years.¹⁶⁸ One

161. *Id.* at 533-34.

162. Attorney General Janet Reno, *Fighting Youth Violence: The Future Is Now*, 11 *Crim. Just.* 30, 33 (1995).

163. *Id.*

164. *Id.*

165. Jones & Krisberg, *supra* note 39, at 18-19.

166. *Id.* at 16.

167. Jackson, *supra* note 3, at A5.

168. Blumstein, *supra* note 43, at 6-9.

successful program is being conducted by the Boston Police Department in cooperation with the United States Bureau of Alcohol, Tobacco and Firearms. It traces guns used in crimes and uses follow-up procedures to reduce illicit gun sales.¹⁶⁹

CONCLUSION

A model juvenile justice system protects society from violent juvenile criminals and effectively reforms youths who can be saved, but it must differentiate between the two. This does not require, as some advocate, disposing of the juvenile system and transferring youths with little or no discretion.¹⁷⁰ Under *Kent*, the juvenile transfer policy was meant to remove only those juveniles, described as chronic, serious, violent, sophisticated and mature, who are beyond the purview of juvenile court.¹⁷¹ Punishing young people as adults holds them to adult standards when imposing sanctions, while in larger society juveniles are considered morally, educationally, and socially immature, and are denied privileges of adulthood. Furthermore, the impact of a lengthy, adult-type sentence differs qualitatively for a youth in formative years from a similar sentence imposed on an adult.¹⁷²

Many current juvenile transfer policies consider neither the causes of juvenile violence nor the consequences of long-term incarceration.¹⁷³ Both causes and effects must be taken into account by policy makers revising juvenile offender laws.¹⁷⁴ About sixty percent of teens caught by police are not arrested again. Those who do, return to the system quickly and then it becomes evident that tougher measures are warranted.¹⁷⁵ Experts, who point out that treating too many youths as adults inappropriately targets some youths who could be managed in the juvenile system, suggest escalating penalties; if youths do not stop committing crimes after modest sanctions, then tougher penalties will be imposed.

169. Jackson, *supra* note 3, at A5.

170. Lacayo, *supra* note 132, at 61.

171. Guttman, *supra* note 8, at 525-26.

172. Cloherty, *supra* note 19, at 434-35.

173. Guttman, *supra* note 8, at 520.

174. *E.g.*, *id.*

175. Glazer, *supra* note 5, at 177. The United States Justice Department recently funded "Safe Futures" plans in six cities to establish escalating penalties for juveniles. Gest & Pope, *supra* note 4, at 36.

Reduction of youth crime and violence will not be best accomplished by punitive and politically popular but ineffective policies that automatically transfer juveniles to the adult correctional system. There is no reliable evidence that transferring juveniles to adult court deters crime or recidivism or has incapacitative effects superior to those of juvenile court disposition. In fact, the juvenile system may better promote public safety through rehabilitation. The juvenile courts are better equipped and more experienced in handling juvenile offenders and can improve with investment in methods that focus on prevention and treatments that promote positive transitions from youth to adulthood.¹⁷⁶ Indeed, "both the public and the juvenile are better served when the juvenile court retains jurisdiction"¹⁷⁷ because of the investment society has made in its youth.

Judicial waiver statutes that provide clear guidelines for assessing the individual's situation before transfer can protect the goals of the juvenile system by preventing unnecessary and inappropriate transfers. Policies and statutes encouraging or mandating systematic transfer without close scrutiny on a case-by-case basis of each youth's particular circumstances belie the overall goals of our criminal justice system and invite more devastating long-term consequences. Both prosecutorial and statutory waiver risk inappropriate transfers. Discretionary waiver, on the other hand, based on the offender's maturity, dangerous propensity and likelihood of rehabilitation, allows the juvenile system to serve those amenable to treatment more appropriately so that they may be better prepared to become productive adults when they rejoin society.

176. Jones & Krisberg, *supra* note 39, at 42.

177. Guttman, *supra* note 8, at 531.

