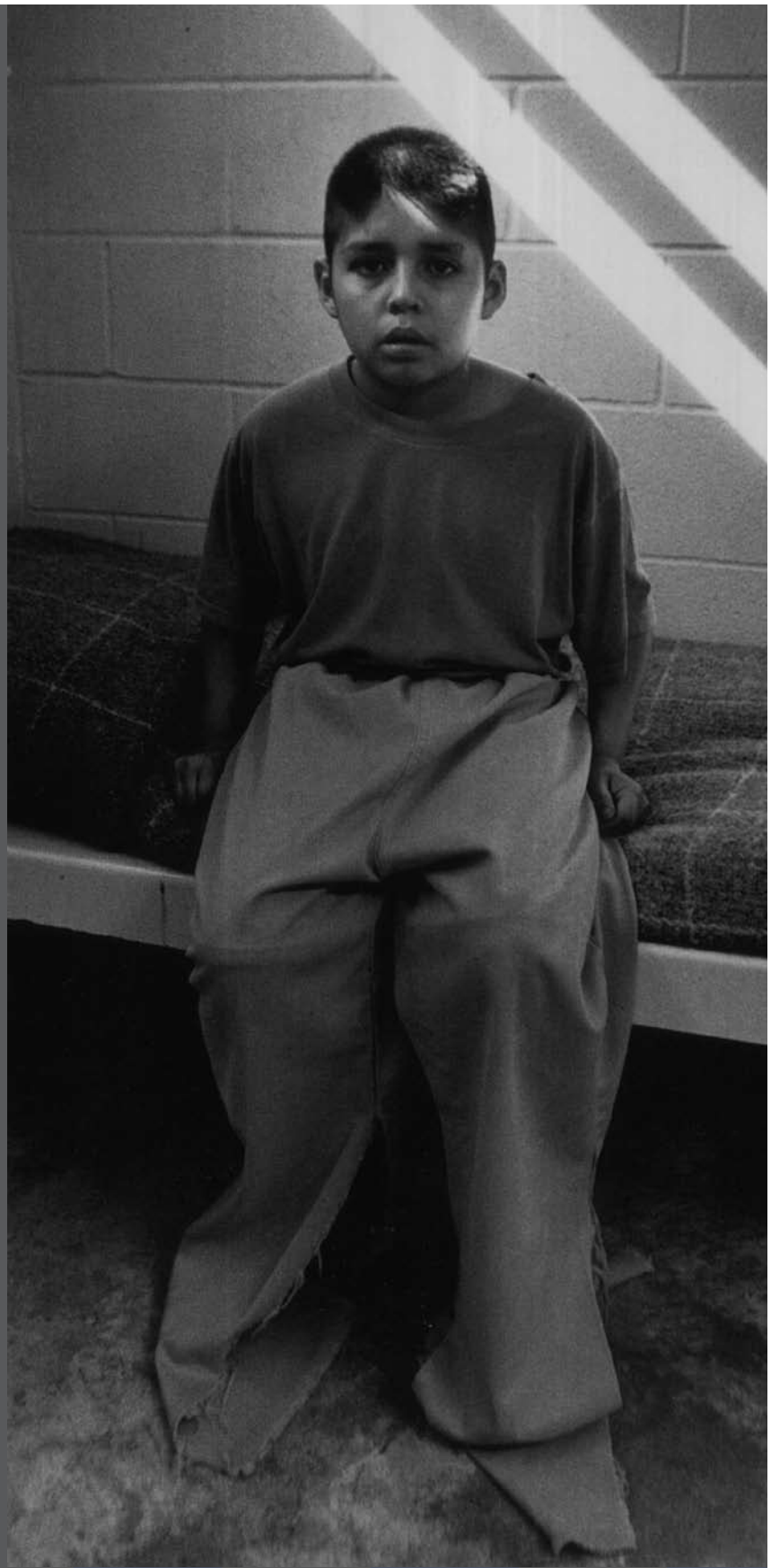


From  
**TIME OUT**  
to  
**HARD TIME**

Young Children  
in the  
Adult Criminal  
Justice System

by  
Michele Deitch  
Amanda Barstow  
Leslie Lukens  
Ryan Reyna



Special Project Report  
Lyndon B. Johnson School of Public Affairs  
The University of Texas at Austin



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Adult Criminal Justice System

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## Preface

In August 2007, the University of Texas Law School Supreme Court Clinic agreed to represent Christopher Pittman, who as a 12-year old boy had killed his grandparents. He had been tried as an adult and been given a mandatory minimum sentence of 30 years without possibility of parole. The conviction and sentence had been upheld by the South Carolina Supreme Court and the Clinic sought certiorari review, unsuccessfully, from the United States Supreme Court.

The complex case called for specialized knowledge and research about juvenile justice policy issues as well as legal matters. For that reason, the Clinic's Co-Directors collaborated with a public policy research team from the Lyndon B. Johnson School of Public Affairs at the University of Texas. The LBJ School team, led by Adjunct Professor Michele Deitch (an attorney and criminal justice policy specialist), undertook extensive research about policy issues related to the trial and sentencing of young children as adults. That background research was essential for the preparation of the legal documents in the case.

In the course of the LBJ School team's research, we discovered that little information was readily available regarding policies and practices affecting the youngest children subjected to the adult criminal justice system. Consequently, we decided to prepare this policy report documenting our research so that this information could be used by policy-makers, practitioners, and advocates outside the confines of a particular legal case.

As this report illustrates, pre-adolescents—defined as children under the age of 12—do not belong in the adult criminal justice system, regardless of the seriousness of their offense. Whatever policy-makers may think about treating older teen offenders as adults, we hope that our research demonstrates that pre-adolescents present an entirely different set of challenges. Young children are still developing their brains and personalities and are capable of rehabilitation, yet they are often denied that redemptive possibility due to the imposition of lengthy mandatory sentences. In almost half the country, children as young as age 7 can be prosecuted as adults and subjected to lengthy mandatory sentences, including life without parole. That fact should give pause to even the toughest of lawmakers.

Yet we are strong believers in the importance of holding these young children accountable for their actions. The juvenile justice system is well-equipped to handle even the most violent juveniles, and it is specially designed to meet the unique social, physical, emotional, educational, and treatment needs of this young population. In contrast, the adult criminal justice system is a poor fit in every way, and research shows that the practice of transferring juveniles to adult court not only puts these children at great physical risk but also compromises public safety.

We hope this report draws attention to this fundamentally important juvenile justice issue that raises both moral and practical concerns, and that it encourages both Congress and state legislatures to take immediate action. At the end of this report, we offer a set of recommendations directed to policy-makers. We urge lawmakers to reconsider policies that allow for the trial and harsh sentencing of pre-adolescent children in the adult criminal justice system, and to replace them with more appropriate and effective strategies that recognize that young children are different from adults.

Michele Deitch,  
LBJ School of Public Affairs, The University of Texas at Austin  
July 2009



## Executive Summary

*What should be done with young children who commit very serious crimes? This report examines the plight of pre-adolescent children—primarily those who are 12 and under—who are caught up in the adult criminal justice system.*

**In the United States, children are treated as different from adults, except when it comes to criminal law:** Most laws and policies acknowledge that children are different from adults. Children cannot drive, vote, drink, or even obtain a rental membership from a video store. We see them as in need of protection from the outside world and as insufficiently mature to justify being treated as adults. But the one glaring exception to this rule comes in the context of criminal law. Children who commit crimes are often perceived as “adults” and suddenly become “adults” for purposes of prosecution, trial, sentencing, and punishment.

Various high-profile cases have drawn recent attention to the issue of pre-adolescents in the adult criminal justice system, including the cases of the 8-year old in Arizona who allegedly shot and killed his father and another man; 11-year old Jordan Brown in Pennsylvania, accused of killing his father’s pregnant girlfriend; and 12-year old Christopher Pittman in South Carolina, who received a 30-year mandatory sentence without possibility of parole for killing his beloved grandparents following a bad reaction to anti-depressant drugs.

This report provides the first-ever comprehensive look at how the nation treats young children who commit serious crimes, analyzes the available data with regard to the transfer of young children to adult criminal court, documents the extremely harsh and tragic consequences that follow when young children go into the adult criminal justice system, examines international practices, and offers policy recommendations to address this situation.

**Harsh and arbitrary outcomes for pre-adolescent children in adult court:** More than half the states permit children under age 12 to be treated as adults for criminal justice purposes. In 22 states plus the District of Columbia, children as young as 7 can be prosecuted and tried in adult court, where they would be subjected to harsh adult sanctions, including long prison terms, mandatory sentences, and placement in adult prison. Certain states have transfer policies that increase the likelihood that young children will end up in the adult criminal justice system for their offenses. In some of these states, those transfer policies and severe adult sentencing laws combine to create particularly disturbing outcomes for these pre-adolescent offenders. Among the states with the most problematic theoretical and actual outcomes for young children who commit serious crimes are Florida, Michigan, Pennsylvania, and South Carolina. Children as young as 7 could receive a mandatory sentence of life without parole in Florida and Pennsylvania. Indeed, the United States Supreme Court is poised to consider the case of a 13-year old from Florida who received a life without parole sentence for a non-capital crime.

The vast majority of crimes committed by young children are handled in juvenile court, including a large number of serious offenses including murder. But this is not always the case. In fact, every year nearly 80 children aged 13 and younger are judicially transferred to adult court. Between 1985 and 2004, 703 children aged 12 and under, and 961 children aged 13 were judicially transferred to adult court. The total numbers of young children in adult criminal court are actually much higher than this because the data cannot capture the numbers of children sent to the adult system via automatic transfer laws or laws allowing the prosecutor to file cases directly in adult court.

## From TIME OUT to HARD TIME

Particularly troubling is the fact that these are not necessarily “headline-worthy” cases: many of these young children are being treated as adults for relatively minor offenses. There are almost as many youth treated as adults for property crimes as for crimes against persons. The statistics analyzed in this report demonstrate the extreme arbitrariness, unpredictability, and racial disparities in determinations about when and whether a young child will be treated as an adult. Our research shows that more than 50% of young children waived to adult court for person crimes were Black.

What’s more, in many states a child charged with a crime in adult court may be held in an adult jail while awaiting trial and may be sent to an adult prison upon conviction. On a single day in 2008, 7,703 children under age 18 were held in adult local jails and 3,650 in adult state prisons. In these adult facilities, the youth face vastly higher risks of physical and sexual assault and suicide than they would face in juvenile facilities. The youngest children would be at particular risk. These adult facilities are also poorly equipped to meet their needs for special programming, education, supervision, and treatment.

**The rest of the world treats children differently when they commit serious crimes:** In allowing pre-adolescent children to be treated as adults for criminal justice purposes, the United States is severely out-of-step with international law and practice. Most countries—including those Western nations most similar to the United States, countries in the developing world, Islamic nations, and even countries that we often consider to be human rights violators—repudiate the practice of trying young children as adults and giving them long sentences. All countries except for a handful of non-peer nations have laws that would prevent such severe sentencing outcomes for juveniles as have occurred in our own country. What’s more, we have found no examples anywhere in the world where juveniles under age 18 had received sentences as long as the 20- and 30-year sentences imposed on some 12-year old children in the United States. Our report provides charts detailing the relevant laws in the vast majority of countries around the world.

**Young children need to be treated differently:** Scientific research demonstrates that children’s brains are still developing in ways that affect their impulse control and their ability to choose between antisocial and acceptable courses of action. Researchers argue that children—and especially very young children—are therefore less blameworthy than adults, and are highly amenable to rehabilitation as they get older. They are also less competent to stand trial as adults. The United States Supreme Court recognized that “children are different” when it ruled in *Roper v. Simmons* (2005) that children who committed murders before age 18 should not be subjected to the death penalty.

**The adult criminal justice system does not work for children:** There are numerous ways in which the adult criminal justice system is incompatible with the needs of young children. Adult criminal courtrooms are ill-equipped to handle these young defendants; these children are too young to actively participate in proceedings and to assist in their own defense; criminal judges and public defenders often have little experience dealing with young offenders; a child’s physical appearance often changes drastically between the time of the offense and the time of trial as the child goes through puberty; and the simple fact of conviction in adult court can subject the child to a permanent loss of privacy, rights, and privileges, including permanent loss of the right to vote or to hold certain jobs.

The practice of treating children as adults for criminal justice purposes also poses serious public safety risks, as well as risks to the individual child. The research unequivocally shows that children prosecuted as adults are more likely to re-offend



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and to pose a threat to society. According to a recent report by a Task Force appointed by the Director of the Centers for Disease Control, the transfer of youth to the adult system not only has no deterrent value but typically increases rather than decreases their rates of violence.

**Juvenile Courts are better suited to handle young offenders:** The contrasts in sentencing practice between juvenile court and adult criminal court are striking. Juvenile judges have considerable leeway in deciding how to handle young offenders, and the courts aim for individual sentences that promote rehabilitation. In the case of the most serious crimes, more than half the states even offer judges the flexible option of blended sentencing, which typically provides a combination of a juvenile sentence followed by time in an adult prison if a judge determines that the youth's progress in the juvenile system is inadequate. But if a young child is sent to adult criminal court to be tried as an adult, judges often lose their discretion to structure an appropriate sentence. Most states have some mandatory sentencing schemes that set a statutorily mandated lower end of a sentencing range. Some states even require judges to impose a life without parole sentence upon conviction for certain crimes, regardless of the child's age.

In contrast to the failures of the adult criminal justice system when it comes to managing young offenders, the juvenile justice system is capable of handling the most serious offenses, of holding youths accountable for their actions, and at helping youth become productive members of society. The long-term benefits of returning children to the juvenile justice system has financial benefits for taxpayers as well. One researcher found a \$3 savings benefit for the correctional and judicial systems for every \$1 spent on juvenile justice. The report profiles both juvenile programs that work and several individuals who turned their lives around as a result of juvenile programs.

**Policy recommendations:** Children—especially those pre-adolescents under age 12—do not belong in the adult criminal justice system, regardless of the seriousness of their offense. Both Congress and state legislatures need to take immediate action to address this fundamentally important juvenile justice issue that raises both moral and practical concerns. We urge lawmakers to reconsider policies that allow for the trial and harsh sentencing of pre-adolescent children in the adult criminal justice system, and offer the following specific policy recommendations:

1. Keep young children in the juvenile justice system.
2. Eliminate automatic transfer laws and direct files laws as they apply to young children in favor of judicial waiver.
3. Enact reverse transfer laws allowing criminal court judges to return a young child to juvenile court at any stage in the trial or sentencing process.
4. Allow procedural accommodations for juveniles tried in adult criminal court.
5. Disallow mandatory sentencing of young children in adult criminal court.
6. Require judges to take a “second look” at the age of majority for young children sentenced in adult court.

## **From TIME OUT to HARD TIME**

7. Always provide an opportunity for parole for young children transferred to the adult criminal justice system, regardless of the length of the sentence.
8. Young children in the adult criminal justice system should be housed in juvenile facilities.
9. Require any adult correctional facility holding juveniles to comply with professional standards and subject these facilities to independent oversight of the conditions in which these young children are held.
10. Improve data collection on young children in the adult criminal justice system.

## Chapter 1

# Introduction

### A. Pre-Adolescents in the Adult Criminal Justice System

Most laypersons would naturally assume that young children who commit serious offenses are handled through their state's juvenile justice system. Unfortunately, such a belief is mistaken, at least in the cases of some children.

State laws permit the transfer of juveniles as young as age 7 to the adult criminal court system. A disconcerting number of young children fall in this uncharted space where the juvenile and adult criminal justice systems collide.

Numerous reports have been published in the last few years focusing on the problems juveniles face when they are handled in the adult criminal justice system.<sup>1</sup> Most of these reports have dealt with teenagers serving extraordinarily harsh sentences. This report focuses on a critical subset of that population: pre-adolescent offenders. Our primary concern is with children under the age of 12, though the lines that separate young children from adults are rarely so stark.

In recent years, a number of high-profile cases involving pre-adolescent children have been handled through the states' adult criminal justice systems.<sup>2</sup> Eleven and twelve-year-olds have been charged as adults, or have been transferred by juvenile judges to the adult criminal court where they face harsh adult criminal sanctions. These

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1. See, e.g., Bureau of Justice Assistance, U.S. Department of Justice, *Juveniles in Adult Prisons and Jails: A National Assessment*, (Washington, D.C.: October 2000); Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (Washington, D.C., November 2007); Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform* (Washington, D.C., March 2007); Coalition for Juvenile Justice, *Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Criminal Court* (Washington, D.C., 2005); Equal Justice Initiative (EJI), *Cruel and Unusual: Sentencing 13 and 14 Year Old Children to Die in Prison*, (Montgomery, Alabama, November 2007); Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005); Illinois Coalition for Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life without Possibility of Parole in Illinois* (Chicago, IL, February 13, 2008)
  2. Among the best-known cases are those involving Lionel Tate, a 12-year-old who originally received a life without parole sentence for killing a 6-year-old girl while trying out wrestling moves on her; Nathaniel Abraham, at 11 years old the youngest child ever charged with murder as an adult; Christopher Pittman, a 12-year-old who killed his paternal grandparents after he had a bad reaction to an adult dose of antidepressants; Evan Savoie, a 12-year-old who received a 26-year sentence for killing a mentally disabled playmate; Ian Manuel, a 13-year-old with a traumatic life history who was sentenced to life without parole for inflicting a nonfatal gunshot wound during a robbery; 12-year-old Djinn Buckingham tried as an adult for arson murder of his 11-year-old cousin; and Latasha Armstead, a victim of gang rape at age 12, who received a life sentence for being a party to a murder committed by her much-older boyfriend when she was 13. The shocking account of an 8-year old in Arizona who shot his father and another man to death recently grabbed the headlines. The young boy was being charged with murder, and only a tentative plea agreement has kept the case from being transferred to adult court. Still awaiting trial as an adult in Pennsylvania is 11-year old Jordan Brown, accused of shooting and killing his father's pregnant girlfriend. These and other cases involving pre-adolescent offenders will be referenced throughout the report.

## From TIME OUT to HARD TIME

children, who are scarcely tall enough to see over the edge of the witness box, are legally deemed “adult enough” to face mandatory sentences of 30 years or more. Sometimes they are even eligible for life without parole sentences. This is the only context in which these children would legally be considered adults.

While the issues and concerns raised in this report can be used to challenge the treatment of all juveniles as adults, the concerns apply with even more force in the case of young children. Whatever policy-makers may think about the applicability of adult criminal laws to older juveniles, we hope this report will lead lawmakers to take a hard look at the troubling ways in which some young children are handled when they commit serious crimes. If reform occurs incrementally, the issues addressed in this report are surely a perfect metaphor for the baby steps necessary to achieve some fundamental changes in the juvenile justice system in the United States today.

### **B. Christopher Pittman’s Story<sup>3</sup>**

Twelve-year old Christopher Pittman made national news headlines in 2001 when he killed his grandmother and grandfather and was transferred to adult court. Following his conviction for murder, the South Carolina trial judge sentenced him to the mandatory minimum sentence of 30 years without possibility of parole. He remains in prison today.

Like any human drama, however, there was far more to this tragic event than those straightforward facts convey. Christopher’s childhood was a sometimes painful one. Abandoned by his mother soon after birth, he lived with his father in Florida and sometimes with his South Carolina-based paternal grandparents while his father was on active military duty. Life with his father was often difficult and chaotic and was punctuated with the upheavals created by his father’s brief re-marriages. In contrast, his paternal grandparents provided him with some stability and a happy environment.

Life became even more complicated when Christopher’s mother briefly re-entered his and his father’s lives in the summer of 2001. It appeared to Christopher that the family was to be reunited, only to have his hopes dashed when his mother abandoned them yet again. Christopher spiraled into a deep depression, briefly ran away from home, and attempted suicide. He was committed to an inpatient psychiatric facility where he was prescribed Paxil, an antidepressant drug, to treat his mental health symptoms. After only six days in the psychiatric facility, his father removed Christopher from the treatment program and sent him to live with his grandparents in Chesterfield, South Carolina.

The initial transition was smooth and uneventful. While under his grandparents’ supervision, Christopher attended Chester Middle School and participated in church activities. When the Paxil prescription expired, Christopher’s grandmother, Joy Pittman, took the boy to a local family physician and requested a refill. Temporarily out of Paxil samples, the doctor gave Christopher a sample pack of Zoloft, an antidepressant drug that was not approved for treating pediatric depression and that has been associated with violent outbursts. Indeed, both Zoloft and Paxil now come with “black box” warnings that

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3. The authors of this report collaborated with the legal team at the University of Texas Law School Supreme Court Clinic that represented Christopher Pittman in his recent petition of certiorari to the United States Supreme Court. The research reported in this report was originally conducted as background research for that legal endeavor. The Supreme Court denied the petition on April 14, 2008. The details about Christopher’s life presented in this report come from the petition and other court documents.

## Introduction

children and adolescents who take these medications can become suicidal or aggressive, especially during the first few months of use.

Christopher's relatives reported that they noticed a change in his behavior immediately after he began taking Zoloft, noting that he "acted strangely—fidgeting, talking fast and jumping around"<sup>4</sup> and that he complained that his skin felt like it was crawling and that he was burning underneath. These are classic symptoms of drug-induced akathisia, which is a recognized side effect of antidepressant drugs such as Zoloft. These restless feelings are often a precursor to drug-induced violence.

On November 28, 2001, within a few days after Christopher started the new medication, the assistant principal at Christopher's school requested Joe and Joy Pittman to come in to discuss their grandson's behavioral problems, as the day before he had gotten into a serious confrontation with a second grader on a school bus. Later that evening, Christopher attended church with his grandparents and got into more trouble for disrupting choir practice. Upon arriving home that night, Joe Pittman sent Christopher to his room and threatened to paddle him. Later that night, Christopher used the shotgun his father had given him as a gift to kill both of his grandparents while they slept. He then took money from his grandmother's purse, set fire to the home, and fled in his grandparents' SUV. Christopher had no prior history of delinquency that could have predicted the events of that terrible night.

When two off-duty firefighters found Christopher in the woods the following day, he told them that an intruder had broken into the home, shot his grandparents, and kidnapped him. The firefighters took Christopher to the fire station where he was taken care of by Lucinda McKellar, a Chester County Sheriff's Department investigator. Over the course of four hours, McKellar gained Christopher's trust by playing games with him, sharing lunch, and discussing the horrific events of the previous night. After a while, McKellar was alerted that Christopher's story did not match the findings of the initial investigation and that he was now a suspect in the murders. McKellar thereafter transported Christopher to the sheriff's office and switched from the role of babysitter to that of interrogator. McKellar informed Christopher of his *Miranda* rights, which he waived, and began several rounds of questioning. Even though Christopher's father had arrived at the sheriff's office by this time, he was not allowed into the conference room with his son. In time, without any advice or consent from a parent or guardian, Christopher confessed to the murders and signed a confession statement. The police quickly arrested the 12-year-old, 5-foot, 96-pound child on charges of homicide and arson.

A perfunctory transfer hearing was held in Family Court. The primary focus of the hearing was the strength of the evidence against Christopher and whether he could distinguish right from wrong. There were only three witnesses called, and those who testified for the state mostly emphasized the brutality of the crime. Christopher's appointed counsel did little to make the case that this young boy belonged in juvenile court and should not be treated as an adult, and at times, the attorney appeared to concede that transfer to adult court was inevitable due to the nature of the offense. There was no discussion at this hearing of the role that the antidepressant medications could have played in Christopher's aberrant behavior. Somehow, on this minimal evidence, the judge made an explicit finding that it was not likely that Christopher could be rehabilitated.

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4. Bruce Smith, "Relatives: Pittman Acted Strangely Before Slayings," *The [South Carolina] Herald* (February 7, 2005). Online. Available: <http://www.kidsincourt.net/phpBB2/viewtopic.php?t=1059&start=50&sid=dd0d0629d5a0fd75e014f4d2f3ac5701>. Accessed: July 27, 2008.

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The juvenile judge transferred Christopher to adult criminal court, despite his age, size, and psychiatric history. Trial was not held until 2005, more than three years after the tragic events. During those intervening years, Christopher was held in a juvenile detention facility, mostly in solitary confinement under lockdown conditions due to the nature of his offense and the fact that he was to be tried as an adult. He was taken off the Zoloft, which quickly improved his behavior, and he managed to continue with his schoolwork and progress academically. At his trial, he was described as a model inmate. However, Christopher went through puberty and adolescence under extremely deprived social conditions, as he had few opportunities for social interaction with his peers during those critical years. By the time of trial, Christopher had grown into a young man, well over six feet tall with facial hair.

For his trial, Christopher acquired a new legal team. His defense attorneys argued vigorously that the side effects of Zoloft made Christopher unable to determine right from wrong, but the jury was not convinced. On February 15, 2005, more than three years after the offense, Christopher Pittman was convicted of two counts of murder. Judge Daniel Pieper sentenced the boy to 30 years in prison without the possibility of parole, South Carolina's mandatory minimum for a convicted murderer. Christopher remained in a juvenile facility until he turned 18 in 2007, and then was transferred to the adult prison where he is currently housed. Christopher is believed to be serving the longest sentence in the country, if not the world, for a crime committed at such a young age.<sup>5</sup>

*Christopher is believed to be serving the longest sentence in the country, if not the world, for a crime committed at such a young age.*

Christopher Pittman appealed his conviction to the South Carolina Supreme Court. The South Carolina high court rejected all of Christopher's grounds for appeal, including his challenge to his sentence as an Eighth Amendment violation. Christopher then sought review from the United States Supreme Court in a petition filed on December 17, 2008.<sup>6</sup> His petition for certiorari focused entirely on the Eighth Amendment issue, challenging his 30-year sentence without possibility of parole as cruel and unusual given his age at the time of the offense.<sup>7</sup> To Christopher's great

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5. Petition for Writ of Certiorari, *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436) [hereinafter Petition for Writ of Certiorari]. Available at [http://www.utexas.edu/news/2007/12/18/law\\_supreme/](http://www.utexas.edu/news/2007/12/18/law_supreme/).

6. Ibid.

7. "Law School Clinic Asks U.S. Supreme Court to Hear Major Juvenile Justice Case," Office of Public Affairs, University of Texas at Austin, (December 18, 2007). Online. Available: [http://www.utexas.edu/news/2007/12/18/law\\_supreme/](http://www.utexas.edu/news/2007/12/18/law_supreme/). Accessed: August 21, 2008. In addition to the petition for certiorari, five amicus briefs by a wide range of experts were filed in support of Christopher: Brief *Amici Curiae* of Daniel Leddy, Jeanne Meurer, and H. Ted Rubin in Support of Petitioner, *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436) [hereinafter Judges' Brief] (available at 2008 WL 320509); Brief on Behalf of Child and Adolescent Psychology, Child and Adolescent Brain Development, and Juvenile Justice Researchers Donna Bishop, Elizabeth Cauffman, Jeffrey Fagan, Thomas Grisso, Elizabeth Scott, Laurence Steinberg, and Franklin Zimring as *Amici Curiae* in Support of Petitioner, *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436) [hereinafter Scientific Experts' Brief] (available at 2008 WL 320510); Brief of *Amici Curiae* Penal Reform International, Defence for Children International, Columbia Law School Human Rights Clinic, Bluhm Legal Clinic and the World Organization for Human Rights USA in Support of Petitioner, *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436) [hereinafter International Brief] (available at 2008 WL 320511); Brief of the Council of Juvenile Correctional Administrators as *Amicus Curiae* in Support of Petitioner, *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436) [hereinafter Juvenile Correctional Administrators' Brief] (available at 2008 WL 320512); Brief of Juvenile Law Center in Support of Petition for Writ of Certiorari, *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436) [hereinafter Juvenile Law Center Brief in *Pittman v. South Carolina*] (available at 2008 WL 378899). All briefs filed in the *Pittman v. South Carolina* case, including the cert petition, brief in opposition, reply brief, and amicus briefs, are also available at [http://www.utexas.edu/news/2007/12/18/law\\_supreme/](http://www.utexas.edu/news/2007/12/18/law_supreme/).

## Introduction

disappointment, the United States Supreme Court declined to hear the case on April 14, 2008.<sup>8</sup>

Christopher will have no opportunity for release from prison until he is 42 years old, absent a court granting him habeas relief or a governor's decision to grant clemency. Having entered prison as a pre-adolescent, he has literally grown up in prison and will have missed all the experiences of youth and much of his adulthood by the time he is released. He is deeply remorseful for the irreparable harm he caused. Christopher's maternal grandmother, Delnora Duprey, is one of his most ardent supporters. As she reported in an interview with CNN, Christopher told her in a recent visit, "Grandma, I think God forgives me. Nana and Pop-Pop—that's what he called them—'forgive me. But I don't think I'll ever forgive myself.'" <sup>9</sup>

Christopher's story is not only high-profile, it is also a tragic example of everything that is wrong with treating young children as adults in the criminal justice system. While Christopher's case might stand out for the utter severity of the sanction imposed on him, he is far from alone in experiencing the inappropriate application of adult sentencing laws to young children. Throughout this report, we will make continuing reference to Christopher's situation, as well as to the cases of several other young children who were placed in the adult criminal justice system despite their very young age. Days before their offenses, these children could have been disciplined with measures like "time out;" suddenly, however, a single crime made them eligible for "hard time."

### C. A Brief History of Juvenile Justice Policy

Before moving on to consider the problems with treating pre-adolescents as adults for criminal justice purposes, it is important to understand that this relatively new phenomenon represents a sharp break with more than 100 years of juvenile justice practice in the United States. Indeed, we have come almost full circle to a much-criticized policy and practice that existed in the 1800s, a time when all juveniles were handled in adult court because juvenile courts had not yet been created. The advent of juvenile courts, beginning in 1899, revolutionized the criminal justice system as it applied to youth. For the next century, children under the age of 18 (sometimes 16 or 17) would be treated differently from adults, and the system's focus would be on rehabilitation rather than punishment.

#### The First Juvenile Courts

The nation's first juvenile court was established in Chicago in 1899 by The Illinois Juvenile Court Act of 1899, which called for a special court for neglected, dependent or delinquent children under the age of 16. The Act stressed that the court should serve a rehabilitative, rather than punitive, purpose; created a provision that juvenile court records be maintained confidentially and separately from criminal records to minimize stigma; mandated the physical separation of youths from adults when incarcerated or placed in the same institution; and included a provision barring the detention of chil-

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8. Bill Mears, "Supreme Court Turns Down Boy Killer's Appeal," *CNN.com* (April 14, 2008). Online. Available: <http://www.cnn.com/2008/CRIME/04/14/juvenile.killer/index.html>. Accessed: May 12, 2008; Linda Greenhouse, "Justices Accept Question of Prosecutors as Lawyers or Managers," *New York Times* (April 15, 2008). Online. Available: <http://www.nytimes.com/2008/04/15/washington/15immune.html?ex=1365998400&en=8479217bd4e0b36d&ei=5124&partner=permalink&exprod=permalink>. Accessed: May 12, 2008.

9. Quoted in Bill Mears, "Supreme Court Turns Down Boy Killer's Appeal," *CNN.com* (April 14, 2008). Online. Available: <http://www.cnn.com/2008/CRIME/04/14/juvenile.killer/index.html>. Accessed: May 12, 2008.

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dren under the age of twelve in jails under any circumstances.<sup>10</sup> A prominent judge at the time, Judge Julian Mack of Chicago, expressed the popular sentiment among the criminal justice community, that the juvenile court was not responsible for deciding if “this boy or girl committed a specific wrong . . . but what had best be done in his interest and in the interest of the state to save him from a downward career.”<sup>11</sup>

The idea of forming an individualized system to treat young offenders differently than adult criminals spread quickly across the United States. By 1925, 46 states, three territories and the District of Columbia had created separate juvenile courts.<sup>12</sup> The laws to establish juvenile courts specifically stated the mission of the juvenile justice system: to help children that are in trouble through treatment rather than punishment.<sup>13</sup>

### The Supreme Court and Juvenile Justice

The U.S. Supreme Court began ruling on cases involving juvenile courts in the mid-1960s.<sup>14</sup> Many of its decisions yielded juveniles the same rights of due process that adult offenders are guaranteed under the 14<sup>th</sup> Amendment.<sup>15</sup> In *Kent v. United States*, the Court ruled that a judicial transfer of a juvenile to adult court requires a hearing with the essentials of due process which include the right to counsel and the determination of maturity to face trial as an adult. Similarly, *In Re Gault* yielded a Supreme Court decision guaranteeing juveniles the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the right to remain silent. The Supreme Court dramatically changed the juvenile courts by ruling that children require many of the same protections as adults; however, it upheld that children are different than adults and hence do not have the constitutional right of trial by jury.<sup>16</sup>

### Congress and Juvenile Justice

In 1968, Congress sought to improve the individual states’ juvenile justice systems through passage of the Juvenile Justice and Delinquency Prevention Act (JJDP A). Various revisions to the JJDP A followed in 1974.<sup>17</sup> In order for states to be eligible for federal funding of juvenile justice initiatives, the current JJDP A requires the following:

- Juveniles convicted of offenses that only apply to children (such as skipping school, breaking curfew, or possession of alcohol) may not be held in secure detention or confinement.
- Juveniles may not be held in adult jails, except for a limited time before or after a trial, in rural areas without access to juvenile facilities, or in unsafe travel conditions.

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10. Building Blocks for Youth, *The Juvenile Court: One Hundred Years in the Making*. Online. Available: [http://www.buildingblocksforyouth.org/juvenile\\_court.htm](http://www.buildingblocksforyouth.org/juvenile_court.htm). Accessed: May 12, 2008.

11. Ibid.

12. Ibid.

13. Howard N. Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, NCJ-212906 (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, March 2006), p. 94.

14. Ibid., p. 96.

15. See *Kent v. United States*, 383 U.S. 541 (1966); *In Re Gault*, 387 U.S. 1 (1967).

16. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

17. Blas Nuñez-Neto, *Juvenile Justice: Legislative History and Current Legislative Issues* (Washington, D.C.: Congressional Research Service, April 2, 2007).pp. 1-37



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- In above exceptions when children are allowed to be housed in adult facilities, there must be “sight and sound” separation from adults.
- Information must be gathered and assessed regarding the disproportionate confinement of minority juveniles in secure facilities.

It is notable that Congress recognized from the start that children are fundamentally different from adults and should not be housed in the same facilities. Interestingly, however, the law contains a loophole that does not require such separation when a juvenile is tried as an adult and transferred to the adult prison system. Apparently, lawmakers did not anticipate that scenario, and thus did not think to apply to these children the same protections extended to other juveniles, despite the fact that the same rationales would apply.

### Shifting Tides

The move away from the child-oriented approach to juvenile justice began in the early 1980s when the public feared an epidemic of ruthless juvenile crime.<sup>18</sup> During a time when overall crime rates were dropping, youth crime rates, especially violent crimes, were rising.<sup>19</sup> Furthermore, the media fanned the notion of “juvenile super predators,” sociopathic youth with no moral conscience who believe committing crime is a rite of passage and who do not fear the stigma of arrest or the pain of imprisonment.<sup>20</sup>

The general population began to demand punishment through lengthy incarceration, rather than the rehabilitation and therapy offered through placement in the juvenile system. In response, nearly all states changed their laws applying to youthful offenders in the late 1980s and early 1990s. New policies allowed more children to be transferred to adult criminal court, granted both criminal and juvenile courts expanded sentencing options, and removed traditional juvenile court confidentiality provisions by making records and proceedings more open.<sup>21</sup> These policy changes were an attempt to ensure that especially violent juvenile offenders would be treated as adult criminals.

Notably, these moves toward treating children as adults in criminal court primarily targeted older juveniles. In 23 states, it is simply not possible to try a 12-year-old child as an adult. The legislatures in these jurisdictions have set the minimum age of transfer to the adult court for a juvenile charged with murder at age 13, 14, or 15.<sup>22</sup> Moreover, courts and prosecutors overwhelmingly recognize the need to treat young children differently from older juveniles. For example, Michael Corriero, a prominent juvenile judge in New York who authored a book on juvenile justice, recommends that 14 be the minimum age of transfer for juveniles to adult court, absent a specific finding of competence by clear and convincing evidence.<sup>23</sup> Similarly, Judge Eugene Arthur Moore, a Michigan judge who is the past president of the National Council of Juvenile and Family Court Judges,

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18. Snyder and Sickmund, p. 96.

19. John Dilulio, “The Coming of the Super Predators,” *The Weekly Standard*, vol. 1, no. 11 (November 1995).

20. Ibid.

21. Snyder and Sickmund, pp. 96-97.

22. See *infra* pp. 24-26.

23. Michael Corriero, *Judging Children as Children: A Proposal for a Juvenile Justice System*, (Philadelphia, Temple University Press, 2006), p. 174.

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has urged a minimum age of 14 for treating a juvenile as an adult for criminal justice purposes.<sup>24</sup>

The purpose of the emergence of juvenile courts a century ago was to remove children from the harsh environment and strict sentences imposed by adult criminal court. But this re-emphasis on punitive responses to juvenile crime once again makes children susceptible to prosecution and sentence in the adult criminal justice system—the very fate that the juvenile justice system was created to protect them from. Regardless of whether such responses are appropriate for older juveniles, we must determine if this type of treatment is necessary for young children who commit serious crimes.

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24. Eugene Arthur Moore, *Juvenile Justice: The Nathaniel Abraham Murder Case*, 41 Mich. J.L. Reform 215, 227 (2007).

## Chapter 2

### Children are Different

#### A. Children Under the Law

The American legal system has long recognized the difference between children and adults. The juvenile justice system arose in the United States because the adult system was inadequately prepared to adjudicate children.<sup>25</sup> Beyond the dual correctional system, state and federal legislatures have created a plethora of laws that treat children and adults differently. In restricting the rights of youth, the legislatures are legalizing basic assumptions about children's lack of responsibility. As the Supreme Court said about children in *Thompson v. Oklahoma* in 1988, "we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions."<sup>26</sup>

Although all 50 states have numerous laws clearly distinguishing children of all ages from adults,<sup>27</sup> states and the District of Columbia nevertheless treat pre-adolescent children as adults when they are charged with certain crimes. This is the only context in which these youngsters are treated as adults, and it is the only context that carries with it such dire consequences.

Before we examine those consequences of treating children as adults, it is worth scrutinizing the range of contexts in which the law recognizes the differences between these groups.

#### The Supreme Court

The Supreme Court has held in a variety of contexts that children lack the necessary maturity to make responsible decisions. From upholding parental consent laws for minors obtaining abortions to limiting free speech and privacy claims in school,<sup>27</sup> the Court has routinely sided against the notion that minors should retain the same rights as adults.

Of most immediate relevance, the Court held in *Roper v. Simmons* (2005)<sup>28</sup> that the differences between juveniles and adults are profound enough that juveniles under the age of 18 should not be eligible for the death penalty. In writing for the Court, Justice Anthony Kennedy captured the problem with treating juveniles as adults:

The differences between children and adults] render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson*, supra, at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 U.S., at 395 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved

*Twenty-seven states and the District of Columbia treat pre-adolescent children aged 12 and under as adults when they are charged with certain crimes.*

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25. See *supra* p. 5.

26. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n. 23 (1988).

27. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Morse v. Frederick*, 127 S. Ct. 2618, 551 U.S. (2007), and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), respectively.

28. *Roper v. Simmons*, 543 U.S. 551 (2005).

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character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." Johnson, *supra*, at 368.<sup>29</sup>

"A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young."

—U.S. Supreme Court in *Roper v. Simmons*

In overturning state laws allowing the juvenile death penalty, the Court relied on three principle differences between adults and children. First, youth are often cited as exhibiting reckless behavior, lack of maturity, and an underdeveloped sense of responsibility.<sup>30</sup> Thus, laws are needed to limit juveniles' ability to exercise certain rights. Second, juveniles are more vulnerable to negative influences and pressure from peers.<sup>31</sup> In being susceptible to influence, children may exhibit less control over their own environment, which is problematic when coupled with limited maturity levels. Finally, juveniles exhibit transitory personality traits, and thus their character is constantly developing.<sup>32</sup>

Outside the death penalty context, the Supreme Court has also drawn clear distinctions between juveniles and adults. For example, in *Planned Parenthood v. Casey* (1992),<sup>33</sup> the Supreme Court upheld a Pennsylvania law that required parental notification for a minor prior to receiving an abortion. In a plurality opinion, the Court found that the statute did not unduly burden juveniles. Moreover, in recent years the justices have been less willing to afford students the same rights as adults. In 1995, the Court held a school district rule in *Vernonia School District v. Acton*<sup>34</sup> that required student athletes to submit to random drug testing over students' privacy claims. The Court also found students to maintain limited speech rights in *Morse v. Frederick* (2007).<sup>35</sup> The Justices upheld the suspension of a student for holding a "Bong Hits 4 Jesus" banner outside of school property during an Olympic torch rally. In each of these cases, the Supreme Court has clearly held that children do not have the same legal rights as adults, thus reaffirming the idea that children are different.<sup>36</sup>

### State Laws

Not only the courts but state legislatures have long recognized that laws must distinguish between the rights of a juvenile and an adult. Examples of such differential treatment abound. Some examples follow.

### Legal Constraints

Every state has laws that establish the age of majority, meaning the age at which individu-

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29. *Ibid.*, p. 570 (2005).

30. "As any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Roper v. Simmons*, p. 569.

31. "Youth is more than [a] chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Roper v. Simmons* at 569 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

32. *Roper v. Simmons*, p. 570.

33. See *Supra* note 27.

34. See *Supra* note 27.

35. See *Supra* note 27.

36. See Juvenile Law Center Brief in *Pittman v. South Carolina*, *supra* note 7, pp. 4-13.

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als have the authority to create a binding legal contract, make a valid will, possess or purchase a firearm, travel internationally without parental consent, serve on a jury, serve in the military, gamble, or vote.<sup>37</sup> Currently, no state sets the age of majority below 18, and four states (Alabama, Nebraska, Mississippi, and Pennsylvania) set the age at 19 or older. Thus, state laws clearly recognize that individuals under the age of 18 are fundamentally different from adults.

Other legal constraints that limit the rights of youth under the law include:<sup>38</sup>

- In 39 states, an individual under 18 must obtain parental permission or judicial consent to obtain an abortion.
- In 36 states and the District of Columbia, children under the age of 18 cannot marry without parental consent.
- Forty-eight states prohibit the sale of pornography to minors under the age of 18 or 19 either absolutely or only with parental consent.
- In 42 states and the District of Columbia, youth under the age of 18 cannot receive a driver's license free of restrictions.
- All 50 states and the District of Columbia require an individual to be 21 years or older to purchase alcohol.
- All 50 states and the District of Columbia require an individual to be 18 years or older to purchase tobacco, with three states setting the minimum age at 19.
- Forty-two states either absolutely prohibit or require parental consent for minors to obtain a tattoo.
- In 33 states, minors are either absolutely prohibited or must obtain parental permission to receive a body piercing.
- Thirty-seven states prohibit pawnbrokers from engaging in transactions with youth under the age of 18.
- In 16 states, minors may not use artificial tanning facilities without written parental consent.
- The Fair Labor Standards Act sets 14 as the minimum age for employment for most non-agricultural work<sup>39</sup> and limits the number of hours that children under 16 can

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37. Ibid. See also Brief of Juvenile Law Center, Children and Family Justice Center, Center on Children and Families, Child Welfare League of America, Children's Defense Fund, Children's Law Center of Los Angeles, National Association for Council of Children, and 45 Other Organizations as *Amici Curiae* in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551, (2005) (No. 03-633), Appendix B [hereinafter Juvenile Law Center Brief in *Roper v. Simmons*].

38. See Juvenile Law Center Brief in *Roper v. Simmons*, *supra* note 37, pp. 7-10; see also Juvenile Law Center Brief in *Pittman v. South Carolina*, *supra* note 7, pp. 8-11.

39. U.S. Department of Labor, "What is the youngest age at which a person can be employed?," Fair Labor Standards Act Advisor. Online. Available <http://www.dol.gov/elaws/faq/esa/flsa/026.htm>. Accessed: January 24, 2008.

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work in a day.<sup>40</sup> All 50 states and the District of Columbia have enacted laws that limit the number of hours in a day, in a week, and at night that a youth can work.<sup>41</sup>

### *Non-Legal Constraints*

In virtually every facet of everyday life, children and adults do not have the same rights. The list below contains some additional examples of ways in which policies recognize that children do not have the level of maturity or responsibility it takes to be treated as adults:

- Children under the age of 18 may not view “R-rated” movies without an accompanying adult.
- Children under the age of 18 may not purchase “Explicit Lyrics” compact discs.
- Children under the age of 18 may not attend a doctor’s visit alone without parental consent.
- Children under the age of 18 may not obtain a rental membership from Blockbuster.
- Children under the age of 16 are required to attend school of some form.
- Children under the age of 18 may not participate in many contests or drawings.
- Four out of five U.S. cities with a population above 30,000 maintain a nighttime youth curfew, with the most common upper age limit of 18 years old.<sup>42</sup>

*The one glaring exception to the recognition that “children are different” arises in the context of criminal law. Children as young as 7 are eligible for hard time in the nation’s prisons.*

### **Children are Different, Except When it Comes to Criminal Law**

As the sections above illustrate so vividly, children and adults are treated differently in virtually every aspect of their lives, according to law, policy, and practice. This differential treatment is based on the recognition that children ARE different from adults, and thus they are not ready to handle the responsibilities of adulthood. Children under the age of 18 are seen as in need of protection from the wider world, and as insufficiently mature to justify being treated like adults.

The one glaring exception to this widespread acknowledgement that “children are different” arises in the context of criminal law. Children who commit certain crimes are often perceived as “adults” and suddenly become “adults” for purposes of prosecution, trial, sentencing, and punishment. The mantra in many states has become “adult time for adult crime.” As Chapter 3 will examine in more detail, every state in the country permits the transfer of some juveniles to adult criminal court, and 27 states and the District of Columbia even permit pre-adolescent children aged 12 and under to be treated as adults for criminal justice purposes. Children as young as seven are eligible for hard time in the nation’s prisons.

The dissonance between the general recognition that juveniles under age 18 require differential treatment and the policies allowing no distinction between pre-adolescent

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40. U.S. Department of Labor, “Selected State Child Labor Standards Affecting Minors Under 18 in Non-Farm Employment as of January 1, 2008.” Online. Available <http://www.dol.gov/esa/programs/whd/state/nonfarm.htm>. Accessed: January 24, 2008.

41. Ibid.

42. U.S. Conference of Mayors, *A Status Report on Youth Curfews in America’s Cities: A 347-City Survey* (1997). Online. Available: <http://www.usmayors.org/uscm/news/publications/curfew.htm>. Accessed: January 25, 2008.

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and adult offenders should generate significant concern and attention for policy-makers, courts, and citizens alike.

### **B. What the Scientific Research Shows About Pre-Adolescents**

The “children are different” argument received a new wave of support when the scientific community emerged with research proving the developmental immaturity of adolescents. It has only been in recent years, since the late 1990s, that scientists have discovered adolescent brains are far less developed than science previously believed.<sup>43</sup> Adolescence is not only a time of physical maturation; it is during the clumsy years of adolescence that key aspects of cognitive, psychological and neurobiological development take place. Leading researchers in the field argue that, based on these immaturities, juveniles should not be held to the same standards of criminal responsibility as adults.<sup>44</sup>

#### **Culpability**

Adolescent decision making is characterized by emotional and cognitive immaturity, intense peer pressure and heightened attitudes toward risk. Therefore, it is no surprise that adolescents make choices that are less responsible than those made by mature adults in similar situations. Although children may know right from wrong, their inability to consistently make responsible decisions makes them less blameworthy than adults.

#### *Neurobiological Development*

Laurence Steinberg, a psychology professor at Temple University and key researcher in adolescent brain development, explains brain development using a practical analogy: “The teenage brain is like a car with a good accelerator but a weak brake. With powerful impulses under poor control, the likely result is a crash.”<sup>45</sup>

Modern advancements in technology, specifically magnetic resonance imaging (MRI), have allowed medical experts to safely scan the brains of children without using radiation. Dr. Jay Giedd, Chief of Brain Imaging in the Child Psychiatry Branch at the National Institute of Mental Health, has studied more than 1,800 children and teenagers since the early 1990s by taking MRIs every two years to analyze the development and growth of the brain.<sup>46</sup> His team went against existing scientific beliefs and proved what parents and teachers already know: the brain of an adolescent is far from mature.

The images taken during Giedd’s longitudinal study revealed that the brain does not reach full maturation until the age of 25.<sup>47</sup> The brain develops from the back to the front. The parietal lobes typically reach full development around age 16, the temporal lobes

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43. Adam Ortiz, *Adolescent Brain Development and Legal Culpability* (Washington, DC: Juvenile Justice Center, American Bar Association, January 2004), p. 1. Online. Available: <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>. Accessed: May 12, 2008.

44. Laurence Steinberg and Elizabeth Scott, “Less Guilty by Reason of Adolescence,” *American Psychologist*, vol. 58, no. 12 (December 2003), p. 1009.

45. Malcolm Ritter, “Scientists: Teen Brain Still Maturing,” *Associated Press* (December 2, 2007). Online. Available: <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/02/AR2007120200809.html>. Accessed: May 12, 2008.

46. Robert E. Shepherd, Jr., “The Relevance of Brain Research to Juvenile Defense,” *Criminal Justice Magazine*, vol. 19, no. 4 (Winter 2005), p. 51. Online. Available: [http://www.njjn.org/media/resources/public/resource\\_241.pdf](http://www.njjn.org/media/resources/public/resource_241.pdf). Accessed: May 12, 2008.

47. Malcolm Ritter.

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Research shows that adolescents are less psychosocially mature than adults in ways that affect their ability to choose between antisocial and socially acceptable actions.

are still in development at 16 years of age, and the frontal lobe continues to develop throughout the early 20s.<sup>48</sup> Among the final parts of the human body to fully develop, the brain's frontal lobe controls the most advanced functions. The prefrontal cortex, a small area housed within the frontal lobe, is the section of the brain that controls advanced cognition, including imagination, abstract thought, judgment of consequences, planning and controlling impulses.<sup>49</sup> Dr. Elizabeth Sowell, a member of the UCLA brain research team, asserts the frontal lobe undergoes far more change during adolescence than at any other stage of life and confirms that the frontal lobe is the last part of the brain to develop.<sup>50</sup>

### *Cognitive & Psychological Development*

Harvard Medical School's Dr. Deborah Yurgelun-Todd believes the underdevelopment of the frontal lobe in adolescence may explain why children cannot reason as well as adults. She explains that adolescents use the part of the brain responsible for gut reactions (the amygdala) rather than the prefrontal cortex used for reasoning by mature adults.<sup>51</sup> Juveniles react based on emotional impulses rather than by thoroughly processing thoughts and ideas. The decision-making capacity of adolescents is impaired because youth are less likely than adults to be able to consider alternative courses of action, to understand the perspective of others, or to restrain their own impulses.<sup>52</sup>

Professor Elizabeth Cauffman from UC Irvine, together with Professor Laurence Steinberg, developed a model of maturity containing three factors that affect the ways individuals make decisions: responsibility, perspective and temperance.<sup>53</sup> The combination of these three factors determines an individual's level of psychosocial maturity. In a study of more than 1,000 youth and adults, Cauffman and Steinberg found that adolescents are less psychosocially mature than adults in ways that affect their ability to choose between antisocial and socially acceptable actions.<sup>54</sup>

The judicial system has taken note of the model developed by Cauffman and Steinberg. As discussed above, in *Roper v. Simmons*, the U.S. Supreme Court recognized that children lack maturity and are thus less culpable than adults. Citing the scientific research, the Court observed that children have "an underdeveloped sense of responsibility," which "often result[s] in impetuous and ill-considered actions and decisions."<sup>55</sup> Along the same lines, Steinberg and a fellow researcher found that children, especially those younger than 13, are not able to put facts together and draw logical conclusions, and

48. Sedra Spano, "Adolescent Brain Development," *Youth Studies Australia*, vol. 22, no. 1 (March 2003), pp. 36-38.

49. Adam Ortiz, p. 1.

50. Elizabeth R. Sowell, Paul M. Thompson, Kevin D. Tessner and Arthur W. Toga, "Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation," *Journal of Neuroscience*, vol. 21, no. 22 (November 15, 2001), pp. 8819-8829.

51. Lee Bowman, "New Research Shows Stark Differences in Teen Brains," *Scripps Howard News Service* (May 11, 2004). Online. Available: <http://www.deathpenaltyinfo.org/article.php?scid=27&did=1000>. Accessed: May 12, 2008.

52. Laurence Steinberg and Elizabeth Scott, p. 1013.

53. Elizabeth Cauffman and Laurence Steinberg, "(Im)maturity of Judgment in Adolescence: Why Adolescence May Be Less Culpable Than Adults," *Behavioral Sciences and the Law*, vol. 18, no. 6, (December 2000), pp. 745, 747-749.

54. *Ibid.*, pp. 741, 756-757.

55. *Roper v. Simmons*, *supra* note 28, p. 569 (2005).



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do not properly account for the consequences of their decisions and actions.<sup>56</sup> Abigail Baird, former Harvard Medical School researcher and now at Dartmouth College, suggests that it is not until late in adolescence, between 15 and 18 years of age, that an individual is capable of hypothesizing what might happen in the future.<sup>57</sup>

Adolescents place more weight on the value of the possible rewards or benefits associated with their actions rather than the costs of the probable risks.<sup>58</sup> Dr. Jeffrey Fagan, Professor of Law and Public Health at Columbia University and expert on adolescent criminal behavior, reports that numerous experiments and studies have shown that even when adolescents are familiar with the law, they still act as risk takers who magnify the benefits of crime and disregard the consequences associated with illegal actions.<sup>59</sup>

Adolescents are also more susceptible to peer pressure than mature adults. As researchers Margo Gardner and Lawrence Steinberg report, “individuals may take more risks, evaluate risky behavior more positively, and make more risky decisions when they are with their peers than when they are by themselves.”<sup>60</sup> The desire for peer approval or the fear of peer rejection may entice young people to act in ways they might not otherwise act.

Combining the physical immaturity of the brain with the underdevelopment of cognitive and psychological skills, adolescents are at a severe disadvantage compared to adults. In addition, adolescents experience dramatic fluctuations in hormones and emotions, which contribute to their impulsive behavior. Testosterone, the hormone that has the most significant effect on the body and is most closely associated with aggression, increases tenfold in adolescent boys.<sup>61</sup> These impairments reduce the decision-making capacity of young offenders, therefore lessening their degree of responsibility for their actions. The idea that adolescents are less blameworthy does not signify that they should not be punished; rather it means that the penalty should be more lenient and primarily focused on rehabilitation.

### Competence

The issue of whether juveniles are competent to stand trial as adults arose when nearly all states changed their laws applying to youthful offenders after the “juvenile super predator” hysteria of the early 1990s. To ensure appropriate punishment could be cast upon violent young offenders, states passed laws allowing juveniles to be tried in the adult criminal justice system. Such a shift alarmed advocates who were concerned that that very young offenders are not competent enough to be treated the same as adult offenders facing similar charges.

*Combining the physical immaturity of the brain with the underdevelopment of cognitive and psychological skills, adolescents are at a severe disadvantage compared to adults.*

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56. Laurence Steinberg, “Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question,” *Criminal Justice Magazine*, vol. 18, no. 3 (Fall 2003), pp. 20-25. Online. Available: <http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html>. Accessed: May 12, 2008.
  57. Mary Beckman, “Crime, Culpability and the Adolescent Brain,” *Science*, vol. 305, no. 5684, (July 30, 2004), p. 599.
  58. Lita Furby and Ruth Beyth-Marom, “Risk Taking in Adolescence: A Decision-Making Perspective,” *Developmental Review*, vol. 12, no. 1, (March 1992), pp. 1-44.
  59. Jeffrey Fagan, “Adolescents, Maturity and the Law: Why Science and Development Matter in Juvenile Justice,” *The American Prospect*, vol. 19, no. 9 (September 2005), p. A6.
  60. Margo Gardner and Laurence Steinberg, “Peer Influence on Risk Taking, Risk Preference and Risky Decision Making in Adolescence and Adulthood: An Experimental Study,” *Developmental Psychology*, vol. 41, no. 4 (2005), p. 632.
  61. Adam Ortiz, p. 2.

## From TIME OUT to HARD TIME

Regarding criminal offenders, competence is defined as an individual's ability to understand the nature and procedures of the trial, to consult with and assist his/her attorney, and to make decisions about important matters such as plea agreements. An offender is deemed incompetent to stand trial if he/she is impaired in the ability to reason or comprehend. According to Dr. Laurence Steinberg, it is not only that adolescents do not have the life experience to understand the system, it is also in the way they think and how they use information to make decisions that makes them deficient of the competence needed to stand trial.<sup>62</sup>

Due to immaturity, youthful individuals are vulnerable to negative and coercive influences. This is especially true in environments where the young person has little or no control. A study funded by the MacArthur Foundation placed adolescents in hypothetical situations to evaluate their abilities related to competence. This study showed that youth under the age of 15 are significantly more likely than older adolescents or young adults to obey the wishes of authority figures regardless of the outcome.<sup>63</sup> For example, adolescents may believe that a confession, even a false confession, will end the interrogation and allow them to go home to their parents.<sup>64</sup>

Furthermore, the MacArthur Foundation study revealed that adolescents are not capable of functioning in the same way as adults in any matter, let alone an intense and stressful environment, such as a trial. Based on characteristics used in determining mental illness, the study found that one-third of children between the ages of 11 and 13 would be classified as incompetent to stand trial.<sup>65</sup> This classification is due to intellectual and emotional immaturities that preclude young children from proactively participating in their own trial. For example, children may withhold important information because they do not trust their attorney, they may not have the mental capacity to successfully testify on their own behalf, and they are likely to fall victim to the prosecuting attorney's cross-examination.

Thomas Grisso, Professor of Psychiatry and Director of Forensic Training and Research at the University of Massachusetts Medical Center, reports 55% of juveniles demonstrated no adequate comprehension of the four components of the *Miranda* warnings.<sup>66</sup> For example, adolescents commonly misinterpret "the right to remain silent" to mean they should remain silent until they are told to speak.<sup>67</sup> Barry Feld, a legal scholar from the

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62. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Bringing Research to Policy and Practice in Juvenile Justice: Network Overview* (Washington, D.C., September 2006). Online. Available: [http://www.adjj.org/downloads/552network\\_overview.pdf](http://www.adjj.org/downloads/552network_overview.pdf). Accessed: May 12, 2008.
  63. Laurence Steinberg, "Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question," *Criminal Justice Magazine*, vol. 13, no. 3 (Fall 2003). Online. Available: <http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html>. Accessed: May 12, 2008.
  64. Malcolm Young, "Representing a Child in Adult Criminal Court," *Criminal Justice Magazine*, vol. 15, no. 1 (Spring 2000), p. 15-20. Online. Available: <http://www.abanet.org/crimjust/juvjus/cjmag/15-1young.html>. Accessed: May 12, 2008.
  65. Laurence Steinberg, "Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question."
  66. Delton W. Young, "Juveniles' Waiver of Miranda Rights: Competence and Evaluation," *Washington State Bar News* (April 2002). Online. Available: [www.wsba.org/media/publications/barnews/archives/2002/april-02-waiver.htm](http://www.wsba.org/media/publications/barnews/archives/2002/april-02-waiver.htm). Accessed: May 12, 2008.
  67. Thomas Grisso, "Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform," *Criminal Justice Magazine*, vol. 12, no. 3 (Fall 1997), pp. 5-11. Online. Available: <http://www.abanet.org/crimjust/juvjus/12-3gris.html>. Accessed: May 12, 2008.

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University of Minnesota, casts doubt that any adolescent is capable of making a “knowing, intelligent, and voluntary” decision to waive Miranda rights.<sup>68</sup>

In *Dusky v. United States*, the U.S. Supreme Court set the standard for determining competence.<sup>69</sup> There are two basic elements outlined in the Supreme Court decision: the defendant must fully understand the charges brought against him, and must possess the ability to assist his attorney in his own defense.<sup>70</sup> Experts point out that the *Dusky v. United States* standard provides a functional test, and it should make no difference whether an individual’s incompetence is due to mental illness (the current standard in determining adult incompetence) or immaturity.<sup>71</sup> It is unconstitutional to try defendants who do not have these basic capabilities.

### Amenability to Rehabilitation

The juvenile justice system in the United States was originally created to divert young offenders from the dangerous environment of destructive punishments and to provide rehabilitation services in order to transform the youth into a productive member of society.<sup>72</sup> The relatively unformed character of a juvenile indicates a potential for rehabilitation that greatly exceeds that of an adult who committed a similar offense. Young juveniles are less “hardened” than adult offenders and have an increased capacity to change.

Many juvenile offenders are acting out of character or going through a transient phase at the time of the offense. Adolescent criminal conduct likely results from “normative experimentation with risky behavior and not from deep-seated moral deficiency reflective of ‘bad’ character.”<sup>73</sup> Most individuals who engage in risk taking or even criminal behavior as adolescents discontinue such behavior as they reach adulthood.<sup>74</sup>

Behaviors that are indicative of psychopathy in adults (prone to boredom, lack of remorse and guilt, impulsivity, irresponsibility, failure to accept responsibility for one’s actions, and unstable interpersonal relationships) are normal traits of immature adolescents.<sup>75</sup> Children who behave similarly to adult psychopaths are likely experiencing a transitory phase of which they will quickly outgrow. For this reason, The American Psychiatric Association’s manual for diagnosing mental disorders bans physicians from issuing a diagnosis of an antisocial personality disorder in individuals under the age of 18.<sup>76</sup>

*Most adolescents who engage in risk taking or even criminal behavior discontinue such behavior as they reach adulthood.*

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68. Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (Oxford University Press US, 1999), p. 119.

69. See *Dusky v. United States*, 362 U.S. 402 (1960).

70. *Ibid.*

71. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Issue Brief 1: Adolescent Legal Competence in Court* (Washington, D.C., September 2006). Online. Available: [http://www.adjj.org/downloads/9805issue\\_brief\\_1.pdf](http://www.adjj.org/downloads/9805issue_brief_1.pdf). Accessed: May 12, 2008.

72. Joan McCord, Cathy Spatz Widom, and Nancy A. Crowell, eds., *Juvenile Crime, Juvenile Justice*, (Washington, DC: National Academy Press, 2001), p. 154.

73. Laurence Steinberg and Elizabeth Scott, p. 1015.

74. David P. Farrington, “Age and Crime,” *Crime and Justice*, vol. 7 (1986), pp. 189-250.

75. Robert D. Hare, *The Hare Psychopathy Checklist Revised* (Toronto, Ontario: Multi-Health Systems, 1991).

76. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4<sup>th</sup> ed. (Washington, DC, 2000), p. 702.

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Because a child's character is still in the midst of significant development, courts need flexibility in handling cases involving these youthful offenders. Keeping these cases in juvenile court rather than transferring them to the adult criminal justice system makes the most sense. The juvenile justice system, as we have seen, is designed to be rehabilitative in nature, and thus it is an ideal fit for the still-forming character of a pre-adolescent child. Very young children who commit crimes may still have a chance to develop into responsible adults.<sup>77</sup>

Given this vast potential for change, judges also need opportunities to re-evaluate juveniles at a designated age of maturity to determine if they have been rehabilitated or need continued incarceration. That is especially true in the cases of juveniles like Christopher Pittman who were transferred to the adult criminal court system and subjected to lengthy adult sentences. Christopher's in-prison record of good behavior and his remorse about his crime so clearly demonstrate that this is not the same person as the child who shot his grandparents in an anti-depressant-induced outburst years earlier.

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77. See, for example, the "Success Stories" highlighted *infra* in Chapter 7, pp. 68-70.

## Chapter 3

# Pre-Adolescents in Adult Court: Transfer Policies and Practices

### A. How Do Children Get Into Adult Court?

#### Overview

Despite the existence of separate, specialized juvenile courts and research that shows children to be fundamentally different from adults, not all children in conflict with the law receive the protection and benefits of the juvenile justice system. Every state has laws permitting juveniles to be sent to adult criminal court to face adult sanctions, depending on the seriousness of the alleged offense and the age of the child. These laws effectively treat a young child as a fully functioning adult for purposes of the criminal law. Commonly referred to as “waiver” or “transfer” laws, these mechanisms serve to bypass the juvenile courts, by giving either the juvenile judge or the prosecutor the discretion to transfer the case to adult court, or by automatically transferring the child for certain serious offenses. In many states, there is no minimum age specified for application of these transfer provisions.

There are four main mechanisms by which a youth’s case can be moved from the jurisdiction of the juvenile court to the adult court. See Table 1 below. Most states employ at least one or a combination of these mechanisms in order to transfer young children to adult court.

<b>Statutory Exclusion</b>	Statutory provisions that mandate that certain cases are automatically tried in adult court. In these cases, no other transfer mechanisms, or extenuating circumstances are considered.
<b>Judicial Waiver</b>	The most common provision for transfer, where the juvenile court judge has the authority to waive his court’s jurisdiction over the case, and have it sent to adult court. Some states refer to this procedure as “certification” or “remand.”
<b>Prosecutorial Discretion</b>	When prosecutors have the discretion to file juvenile cases in adult court. Such authority is also referred to as “concurrent jurisdiction”, or “direct file.”
<b>“Once An Adult, Always An Adult” (OAAA)</b>	Under such laws, youth who have been previously tried as adults are automatically prosecuted in adult court for any subsequent offense (minor misdemeanors are typically excluded). Thirty-four states have OAAA provisions in place.

78. Melissa Sickmund, *Juveniles in Court*, (Washington, DC: US Department of Justice, Office of Juvenile Justice and Delinquency Programs, 2003); Patrick Griffin, “Transfer Provisions,” *State Juvenile Justice Profiles*, (Pittsburgh, PA: National Center for Juvenile Justice). Online. Available: <http://www.ncjj.org/stateprofiles/>. Accessed: March 5, 2008.

## From TIME OUT to HARD TIME

### *Discretionary Transfers*

Every state permits a juvenile judge to exercise discretion to transfer a juvenile under specified circumstances. Depending upon the statutory minimum age for transfer in that state, upon motion of a prosecutor, a judge may decide that even a pre-adolescent child should be tried in adult court. The judge is required to hold a hearing at which he or she considers the so-called *Kent* factors, those factors identified by the United States Supreme Court in the case of *Kent v. United States*<sup>79</sup> as relevant to the transfer decision. According to the Court, in deciding whether to waive a child to adult court, the juvenile judge must consider:

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, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the prosecutor).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in that jurisdiction.
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 previous contacts with the juvenile justice agency, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.<sup>80</sup>

*Transfer hearings are often pro forma and superficial.*

Despite the importance of the transfer hearing and the need for an in-depth look at the child's maturity and appropriateness for prosecution in adult court, these hearings are often *pro forma* and superficial. Christopher Pittman, for example, had a very short transfer hearing that was captured in a mere 47 pages of transcripts.<sup>81</sup> Not even his psychologist was called to testify despite her presence in the courtroom, and the trial judge never took advantage of the opportunity to get to know this young child. Indeed, most of the hearing focused on the seriousness of Christopher's crime, rather than on his youth, lack of maturity, and capacity for change.

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79. *Kent v. United States*, 383 U.S. 541 (1966).

80. *Ibid.* pp. 566-7.

81. Juvenile Correctional Administrators Brief, *supra* note 7, p. 8.

## Pre-Adolescents in Adult Court

But even those transfer hearings that are more substantial are inadequate to address concerns about the propriety of transferring a particular child to adult court. The transfer decision also is an inadequate mechanism for handling young children, such as Christopher, because transfer determinations are made prior to trial – before a judge has a complete grasp of the facts or the accused individual’s culpability. For example, after Christopher was transferred to the adult system, he exhibited evidence of his stability and the effects that Zoloft had had on his mental health, but this mitigating evidence was no longer relevant to the transfer decision.<sup>82</sup> Similarly, it may come out in a trial that a juvenile played a relatively minor role in a crime committed by a group, yet this evidence of diminished culpability is essentially irrelevant since the transfer determination was already made.

Whatever the flaws in the process that allows judges to decide whether a pre-adolescent child should be transferred to adult court, at least this process allows for some guidance in decision-making and some level of accountability and review by higher courts. Far more troubling are those methods of transfer that do not allow for any judicial discretion in considering individual circumstances.

In recent years, there has been a trend away from judicial discretion and towards methods that give discretion to the prosecutor when it comes to decisions whether to file a case in juvenile or adult court. This is problematic for a few reasons, particularly because very little data is collected with regard to transfers other than those based on judicial discretion. Therefore, it is difficult to estimate accurately the number of children transferred to adult court through prosecutorial waiver because these individuals are not included in juvenile court statistics. Research has indicated that the transfer of juveniles is becoming an increasingly important aspect of a prosecutor’s job. A Bureau of Justice Statistics survey found that nearly one-third of all prosecutors’ offices sampled reported having a specialized unit or attorney to handle juvenile transfer cases.<sup>83</sup>

### *Automatic Transfers*

In addition to these discretionary choices about trying a juvenile in adult criminal court, numerous state laws operate to require mandatory transfers, based either on the juvenile’s crime or his or her age. Such automatic transfers of children to adult court are not tracked, and thus it is difficult to assess with any certainty the numbers of children affected by such laws.

Many states now have laws that exclude the juvenile court from jurisdiction over certain crimes, depending upon the age of the child. For example, in Georgia, any youth aged 13 or older will be sent to adult criminal court if charged with murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and armed robbery committed with a firearm.<sup>84</sup>

*Transfer determinations are made before a judge has a complete grasp of the facts or the child’s culpability.*

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82. Judges’ Brief, *supra* note 7, p. 10.

83. Howard N. Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 1999 National Report* (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, September 1999), p. 176. Online. Available: <http://www.ncjrs.gov/html/ojdp/nationalreport99/chapter6.pdf>. Accessed: April 24, 2008.

84. Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Georgia’s Transfer Laws*. Online. Available: <http://ojdp.ncjrs.org/pubs/tryingjuvasadult/states/ga.html>. Accessed: April 7, 2008.

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In some states, once a juvenile has been tried as an adult he or she will be automatically sent to the adult system for any subsequent offenses, regardless of how benign the subsequent offense. These statutes are often referred to as “once an adult, always an adult” laws.

### *Lowered Maximum Age of Juvenile Court Jurisdiction*

Some states have set the age of juvenile court jurisdiction below age 18 so that after that age, juveniles are automatically sent to adult court regardless of their offense. While 40 states continue to demonstrate a commitment to use of juvenile courts for juveniles under age 18, using 17 as the maximum age of juvenile court jurisdiction, 10 states have lower ages.<sup>85</sup> Three states—Connecticut,<sup>86</sup> New York, and North Carolina—automatically try all children over the age of 15 as adults, regardless of the seriousness of the crime. There is no opportunity for the court to take individual circumstances into account. Rhode Island recently lowered the maximum age of juvenile court jurisdiction from 18 to 17, but that new law was rescinded a few months later when legislators discovered that the policy led to increased costs associated with having these juveniles held in protective settings within the adult prisons.<sup>87</sup>

### **State-by-State Policies on Transfer of Young Children**

While information is readily available with regard to state policies regarding transfers of juveniles generally, information is harder to come by with regard to policies that affect young children, especially those charged with serious offenses.

Table 2 provides a state-by-state breakdown of policies related to the transfer of juveniles to the adult criminal justice system. Because the ages of juveniles eligible for transfer varies depending upon the seriousness of the offense, we include separate categories for youth charged with murder and those charged with other felonies.

This table reveals that each of the 50 states and the District of Columbia try juveniles in adult court; however, the differences in the methods used for transfer, in conjunction with the type of offense and the child’s age, highlight the patchwork of juvenile trans-

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85. The states with a maximum age of juvenile court jurisdiction of 15 are Connecticut, New York, and North Carolina. The states with a maximum age of juvenile court jurisdiction of 16 are Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin. The states with a maximum age of juvenile court jurisdiction of 17 are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Melanie King and Linda Szymanski, “National Overviews: Oldest age for original juvenile court jurisdiction in delinquency matters as of the end of the 2005 legislative session,” *State Juvenile Justice Profiles*, National Center for Juvenile Justice (Pittsburgh, PA, 2006). Online. Available: <http://www.ncjj.org/stateprofiles/overviews/uppage.asp>. Accessed: February 11, 2008.

86. The Connecticut General Assembly recently passed a law that will increase the maximum age of jurisdiction of the juvenile courts to 18 beginning July 2009. National Conference of State Legislatures, “State Sentencing and Corrections Legislation: 2007 Action Outlook,” By Alison Lawrence, Washington, D.C., (January 2008), p. 10. Online. Available: <http://www.ncsl.org/print/cj/07sentencingreport.pdf>. Accessed: May 5, 2008.

87. Ibid. See also, Steve Peoples, “Teens’ days at ACI may soon be over,” *Providence Journal*, October 27, 2007; Katie Zezima, “Tough Young-Offender Law Is Set Back in Rhode Island,” *The New York Times*, November 1, 2007. Online. Available: <http://www.nytimes.com/2007/11/01/us/01juvenile.html?scp=11&sq=Zezima+Rhode+Island&st=nyt>. Accessed: November 18, 2008.



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fer policies in the nation. This state-by-state breakdown of transfer policies will enable policy-makers and advocates to better understand the extent to which their own state allows for the treatment of pre-adolescent children as adults.

Reading this national chart, one troubling conclusion is inescapable: 27 states and the District of Columbia allow for the transfer of pre-adolescent children age 12 and under to adult criminal court, at least for some crimes. What's even worse, 22 of these states plus the District of Columbia have no minimum age specified in statute. Such policies must be read in conjunction with laws that set minimum ages for the forming of criminal intent—usually at age seven. This suggests that in at least 23 jurisdictions, 7-year-old children can be prosecuted and tried in adult court, where they would be subjected to harsh adult sanctions.

*In at least 22 states and the District of Columbia, 7-year-old children can be prosecuted and tried in adult court, where they would be subjected to harsh adult sanctions.*

### **B. National Data on Transfer Practices Involving Young Children**

Table 2 provides a helpful review of state-by-state juvenile transfer policies, but does not address the issue of actual practice. Any meaningful assessment of juvenile justice policy in the United States also needs to examine the frequency and context of juvenile transfers to adult court. This is especially true when the focus is on application of these laws to the youngest children. We need to know if the laws are “on the books” but ignored, or if states do subject pre-adolescents to these harsh penalties.

Using data collected by the National Center for Juvenile Justice (NCJJ) on behalf of the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, we have compiled these statistics to provide a close look at the extent to which young children are caught up in the adult criminal justice system. These data present a troubling and little known picture of the crimes committed by young children and the ways that they can be punished in the United States.

Research on this subject is hindered by the fact that data is only available at a national level, with the data aggregated by state. The data presented in the following section come from the “Easy Access to Juvenile Court Statistics: 1985-2004” database, which is comprised of data reported annually from a sample of approximately 40 states and 2,000 court jurisdictions.<sup>88</sup> We were able to obtain a wide array of information about national practices involving the transfer of young children, but only a limited amount of data about state practices, as the state information is not readily released to the public. Thus, our conclusions implicate the United States as a whole, but we recognize that the figures may be driven by the actual practices of a limited number of states.

Additionally, our analysis of national practices in this report only captures information about judicial waivers of young children into the adult criminal justice system. Data about automatic transfers and direct filings by prosecutors to adult criminal court are not reported by the states. Thus, the actual practices are worse than we report. Young children are sent to adult criminal court more frequently than our statistics indicate.

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88. National Center for Juvenile Justice, “Easy Access to Juvenile Court Statistics: 1985-2004” database. Online. Available: <http://www.ojjdp.ncjrs.org/ojstatbb/ezajcs/>. Accessed: February 11, 2008.

Table 2  
State Policies on Transfer of Juveniles

State	MINIMUM AGE FOR TRANSFER		METHOD FOR TRANSFER				MAXIMUM AGE FOR JUVENILE COURT JURISDICTION
	Murder Cases	Non-murder Cases	Judicial	Statutory	Prosecutorial	OAAA *	
Alabama	14	14 any criminal offense	✓			✓	17
Alaska	NS	NS	✓	✓			17
Arizona	NS^	NS	✓	✓	✓	✓	17
Arkansas	14	14 certain felonies, capital crimes, person offenses, and weapon offenses	✓		✓		17
California	14	14 capital crimes, person offenses, property offenses, drug offenses; 16 any criminal offense, certain felonies	✓	✓		✓	17
Colorado	12	12 certain felonies, and certain person offenses	✓		✓		17
Connecticut	14	14 certain felonies and capital crimes					15
District of Columbia	15	15 certain felonies; 16 any criminal offense; NS for weapon possession	✓		✓	✓	17
Delaware	NS	15 certain felonies; 16 certain property offenses and certain drug offenses	✓	✓		✓	17
Federal	13						15
Florida	NS	14 any criminal offense	✓	✓	✓	✓	17
Georgia	NS	13 capital crimes; 14 certain person offenses; 15 any criminal offense and certain property offenses	✓	✓	✓		16
Hawaii	NS	14 certain felonies	✓		✓	✓	17
Idaho	NS	14 for any criminal offense	✓	✓		✓	17
Illinois	13	13 any criminal offense; 15 certain felonies	✓	✓		✓	16
Indiana	NS	NS certain felonies; 14 any criminal offense; 16 certain drug offenses	✓	✓		✓	17
Iowa	14	14 any criminal offense; 15 certain felonies	✓	✓		✓	17
Kansas	10	10 any criminal offense; 14 certain felonies, certain person offenses and certain drug offenses	✓			✓	17
Kentucky	14	14 certain felonies and capital crimes	✓				17
Louisiana	14	14 certain person offenses	✓	✓	✓		16
Maine	NS		✓			✓	17

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Pre-Adolescents in Adult Court

Table 2 continued—

State	MINIMUM AGE FOR TRANSFER		METHOD FOR TRANSFER				MAXIMUM AGE FOR JUVENILE COURT JURISDICTION
	Murder Cases	Non-murder Cases	Judicial	Statutory	Prosecutorial	OAAA *	
Maryland	NS	15 any criminal offense	✓	✓		✓	17
Massachusetts	14	14 certain felonies and certain person offenses	✓	✓			16
Michigan	14	14 certain felonies	✓		✓	✓	16
Minnesota	14	14 certain felonies	✓	✓		✓	17
Mississippi	13	13 any criminal offense	✓	✓		✓	17
Missouri	12	12 certain felonies	✓			✓	16
Montana	12		✓	✓	✓		17
Nebraska	NS	16 any criminal offense			✓		17
Nevada	NS	14 any criminal offense, certain felonies and certain person offenses	✓	✓		✓	17
New Hampshire	13	13 certain person offenses; 15 certain felonies	✓			✓	16
New Jersey	14	14 any criminal offense	✓				17
New Mexico	15			✓			17
New York	13	14 certain property and certain person offenses		✓			15
North Carolina	13	13 certain felonies and capital crimes	✓			✓	15
North Dakota	14	14 certain felonies and person offenses; 16 any criminal offense	✓			✓	17
Ohio	14	14 certain felonies; 16 certain person and property offenses	✓			✓	17
Oklahoma	NS		✓	✓	✓	✓	17
Oregon	NS	15 certain felonies and certain property offenses	✓	✓		✓	17
Pennsylvania	NS	14 any certain felonies; 15 certain person and property offenses	✓	✓		✓	17
Rhode Island	NS	16 certain felonies; 17 certain person and property offenses	✓			✓	16
South Carolina	NS	14 certain felonies, certain drug, and certain weapon offenses; 16 any criminal offense	✓	✓			16
South Dakota	NS		✓	✓		✓	17
Tennessee	NS	16 any criminal offense	✓			✓	17

continued on next page—

Table 2 continued—

State	MINIMUM AGE FOR TRANSFER		METHOD FOR TRANSFER				MAXIMUM AGE FOR JUVENILE COURT JURISDICTION
	Murder Cases	Non-murder Cases	Judicial	Statutory	Prosecutorial	OAAA *	
Texas	14	14 certain felonies and capital crimes	√			√	16
Utah	14	14 certain felonies; 16 certain person, property and weapon offenses	√	√		√	17
Vermont	10	10 certain property and person offenses	√	√	√		17
Virginia	14	14 for certain felonies and certain person offenses	√		√	√	17
Washington	NS		√	√		√	17
West Virginia	NS	NS	√				17
Wisconsin	NS	14 certain felonies, person, property and drug offenses; 15 any criminal offense	√	√		√	16
Wyoming	13		√		√		17

NS^ - No Statutory Minimum Age

OAAA\* - Once an Adult Always an Adult

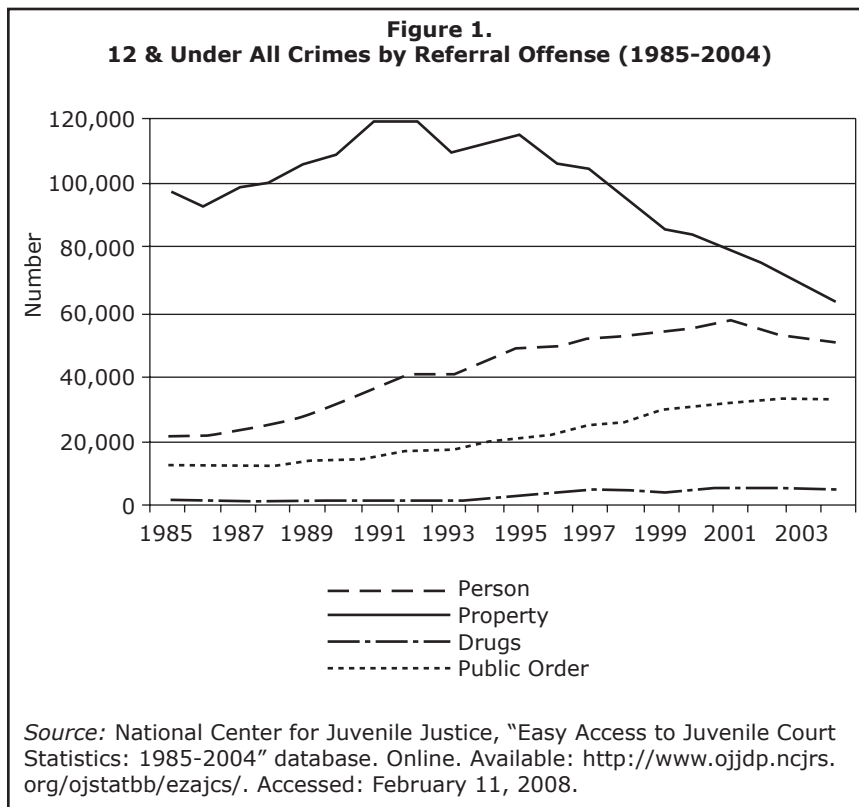
Source: Author's adaptation and updating of Griffin, et. al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*. (Table: Summary of Transfer Provisions, 1977), OJJDP, 1998, and Griffin, *Transfer Provisions: State Juvenile Justice Profiles*, National Center for Juvenile Justice, 2007.

## Pre-Adolescents in Adult Court

### Young Children and Crime

Unfortunately, young children commit a significant number of crimes in the United States each year. In 2004 (the most recent year for which data is available), approximately 150,000 children aged 12 and younger came into contact with the justice system. Contrary to popular perception, the data shows a decrease in juvenile crime as compared to 10 years prior (Figure 1). Figure 1 below illustrates the types and numbers of crimes for which young children have been referred to the justice system over the twenty-year period from 1985-2004. The types of offenses committed by these pre-adolescents include person crimes, property crimes, public order offenses, and drug crimes. Property crimes are by far the most common type of offense for this age group. In contrast, drug crime in this age group is almost negligible. Figure 2 below provides comparative information about the numbers of crimes committed in each offense category in 1995 and in 2004.

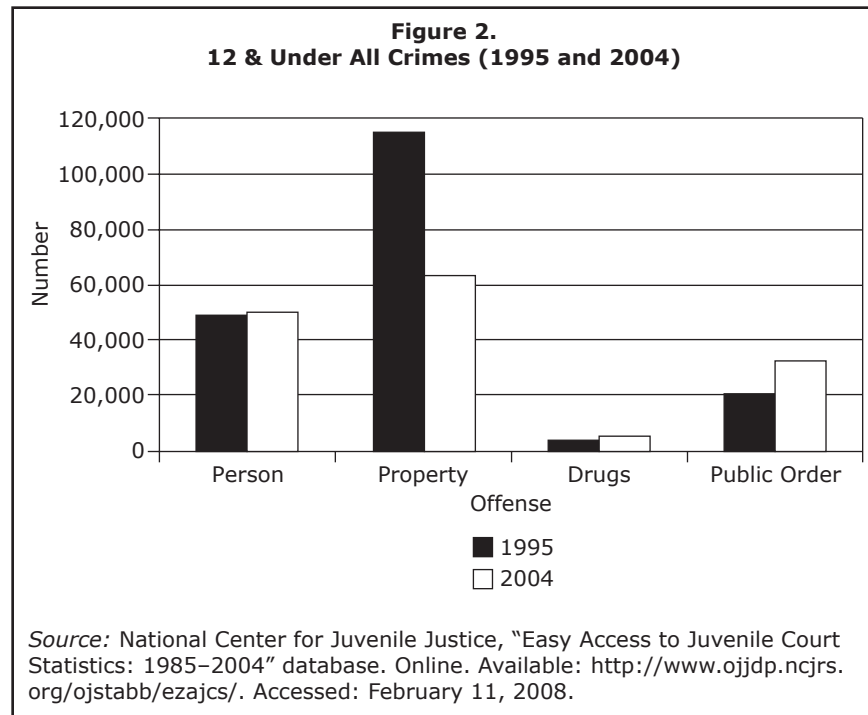
Since 1985, the number of person offenses committed by very young children has increased, though the increase leveled out in the mid-1990s (Figure 1). Between 1995 and 2004, there were 92 known murder offenders in the United States below the age of 12.<sup>89</sup> Although this number is disturbing, it is important to note that the total number of offenders is trending downward since the late 1990s. Because person offenses are often the most serious crimes, including murder and rape, these cases gain notoriety, which may lead to the erroneous public perception that young children are becoming more violent. Ultimately, however, it does not appear that there has been a substantial increase in violent crime committed by young children over the last decade (Figure 1; Figure 2), thus



89. National Center for Juvenile Justice, "Easy Access to the FBI's Supplementary Homicide Reports: 1980-2005" database. Online. Available: <http://ojjdp.ncjrs.gov/ojstatbb/ezashr/>. Accessed: February 12, 2008.

## From TIME OUT to HARD TIME

*Young children do commit a significant number of crimes, including violent crimes against persons; the overall number of crimes committed by young children is down in the last decade; and young children have not become significantly more violent in recent years.*



refuting Professor John Dilulio's highly-touted claim in 1995 that our country would soon be full of juvenile "super-predators."<sup>90</sup>

Figure 2 shows us that crimes committed by young children have not substantially increased over the last decade in any category except for public order offenses. And notably, property crime has fallen off substantially. The overall decrease in crime coupled with an increase in public order crimes may be attributable to certain policing efforts, such as the "Broken Windows" theory. Rather than necessarily indicating a shift in the types of crimes committed by young children, this data may simply display a change in the types of crimes drawing arrest and prosecution. Public order crimes, ranging from spitting to public drunkenness, have been the focus of certain police departments, most notably in New York City. In only 10 years, there has been an almost two-fold increase in the number of public order crimes reported, which likely reflects the growing police emphasis on these crimes.

Thus, as we proceed in our analysis of how young children are punished for criminal offenses, we know several important details: young children do commit a significant number of crimes, including violent crimes against persons; the overall number of crimes committed by young children is down in the last decade; and young children have not become significantly more violent in recent years.

We now turn to a review of national statistics regarding the practice of transferring young children to adult criminal court.

### **Young Children and Transfer to Adult Criminal Court**

The vast majority of the youths who commit the crimes discussed above are handled in the juvenile justice system of each state. However, one facet of the juvenile crime problem that has been largely ignored by the media is the transfer of some of these young children to the adult court system. Such transfers occur in each crime category.

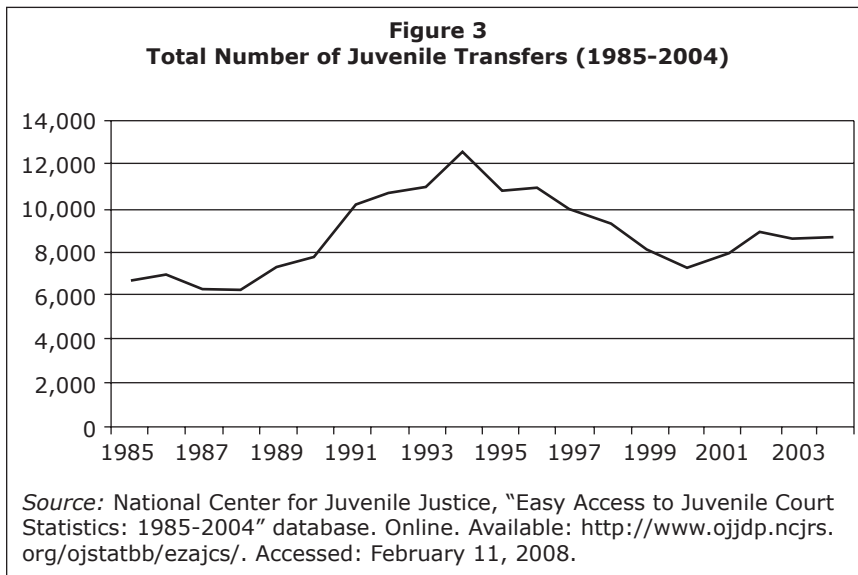
90. See *supra* note 19.

## Pre-Adolescents in Adult Court

While they represent only a fraction of the total number of crimes adjudicated yearly, the transfer cases are highly significant. Transfer to adult court subjects young children to harsh sentences intended for adults as well as to court processes for which they are ill-equipped. Therefore, it is important to get a clear understanding of the frequency of transfer for this young age group and the kinds of crimes for which transfer occurs. Limitations of the statistics only allow us to analyze the frequency of judicial waiver.

Figure 3 below illustrates the trend line with regard to judicial transfer to adult court of all juveniles below age 18 over the last 20 years. During that time period, the total number of juveniles transferred to adult court annually has fluctuated between 6,000 and nearly 12,000, with a peak in 1994.<sup>91</sup> The jump in the mid-1990s can be attributed to a movement during that time frame to toughen responses to juvenile crime.

As Figure 3 illustrates, since 1994 there has been relatively significant reversal in the use of judicial transfer as a method to deal with juvenile offenders. This reversal may be attributed at least in part to a rise in the use of blended sentencing statutes,<sup>92</sup> which allow juvenile judges to sentence youth to sentences beyond the child's 18<sup>th</sup> birthday without transferring the individual to adult court.



*There is a sharp break in transfer practices when comparing young children—those 14 and younger—with older teens.*

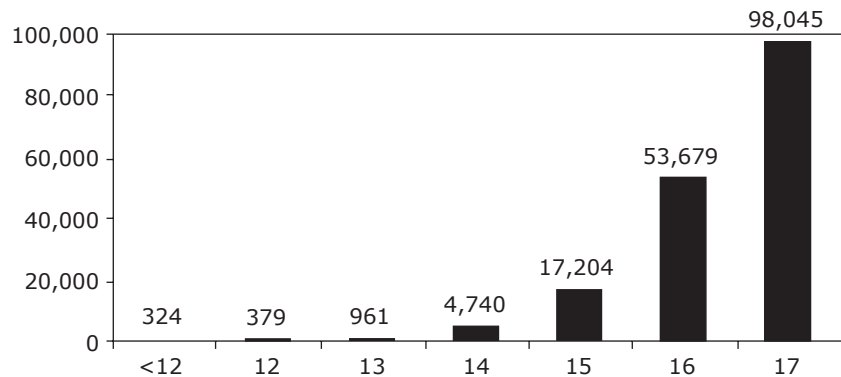
Although the yearly totals of transferred juveniles may seem high, the total number of juveniles waived does not tell the whole story. As Figure 4 shows, states have largely focused their use of the judicial transfer provisions on the oldest children considered juveniles. From 1985 to 2004 more than 175,000 children under the age of 18 were judicially waived to adult court in the United States; however, approximately 168,000 of those youth were above the age of fourteen. There is a sharp break in transfer practices when comparing young children—those 14 and younger—with older teens.

91. National Center for Juvenile Justice, "Easy Access to Juvenile Court Statistics: 1985-2004" database. Online. Available: <http://www.ojjdp.ncjrs.org/ojstatbb/ezajcs/>. Accessed: February 11, 2008.

92. See *infra*, text accompanying notes 105-110.

## From TIME OUT to HARD TIME

**Figure 4**  
**Total Number of Juveniles Transferred by Age (1985-2004)**



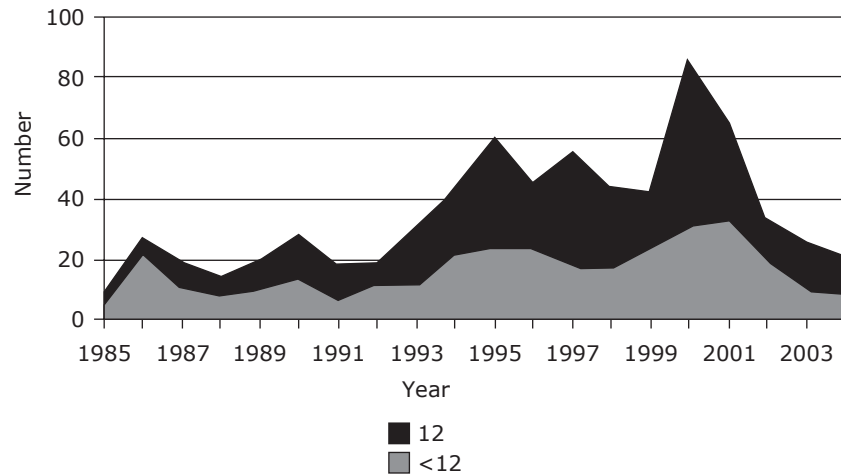
Source: National Center for Juvenile Justice, "Easy Access to Juvenile Court Statistics: 1985-2004" database. Online. Available: <http://www.ojjdp.ncjrs.org/ojstatbb/ezajcs/>. Accessed: February 11, 2008.

*More than 1,600 children judically waived to adult court in the last 20 years were 13 and under.*

While it provides some comfort to realize that transfers of young children to adult court are not happening with overwhelming frequency when compared to transfers involving older juveniles, it is nevertheless troubling to see that more than 1,600 of the children waived to adult court in the last 20 years were 13 and younger (Figure 4). Thus, nearly 80 young children 13 and younger are tried in adult court yearly as a result of judicial waiver. Rather than facing the individualized sentences offered by juvenile courts, these 80 children are subjected to adult consequences, which often include lengthy mandatory sentences.

Although young children represent only a fraction of the total number of juvenile waivers, the number of young children tried as adults has also varied over time. The number of children aged 12 years old or younger waived to adult court sharply rose in the early 1990s (Figure 5).

**Figure 5**  
**12 & Under Waived to Adult Court for All Offenses (1985-2004)**



Source: National Center for Juvenile Justice, "Easy Access to Juvenile Court Statistics: 1985-2004" database. Online. Available: <http://www.ojjdp.ncjrs.org/ojstatbb/ezajcs/>. Accessed: February 11, 2008.



## Pre-Adolescents in Adult Court

In response to a number of high profile murder cases involving young children, states began to implement harsher criminal statutes aimed at youth. The increasing number of transfers of young children, which peaked in 2000, also coincided with the rash of school shootings that culminated in the Columbine High School tragedy. But in the following five years, there was a huge decline in the number of 12-year-olds waived in the United States, in stark contrast to practices involving older juveniles. It appears that prosecutors, judges, and state legislatures are slowly becoming aware of the dangers of transferring young children to adult court, and gradually have been adjusting policy and practice to return to a framework where children are treated as children in the juvenile justice system.

As the total number of children 12-years old and younger transferred to the adult criminal justice system has greatly changed in the last 10 years, so too has there been a change in the types of crimes for which they are transferred. While it is more likely for a young child to be adjudicated in adult court for a person offense than for any other type of crime (Figure 6), it is astonishing to note the variety of crimes for which they are considered transfer-worthy. The number of property offenses dealt with in the adult court is nearly identical to the number of person offenses, and the number of public order crimes is more than half the number of person offenses.

The information conveyed by this chart is clearly troublesome because it disabuses us of any notion that only the “worst of the worst” offenses are transferred. Indeed, many young children are transferred by judges for relatively minor offenses. Moreover, even amongst children who commit person offenses, often considered the most heinous crimes, there is a negligibly small number that are waived to adult court (Figure 7). Children who commit person offenses are overwhelmingly placed on probation or released.

This table illustrates that, far from transfer being used only when dealing with the “headline-worthy” criminals, when a young child is waived to adult court it is extremely arbitrary and unpredictable. The arbitrariness of transfer may result in a life sentence for one child, while another child who commits the same crime may be placed on probation by the juvenile court. Such arbitrariness in transfer decisions should make us uncomfortable with the even-handed quality of justice in these types of cases.

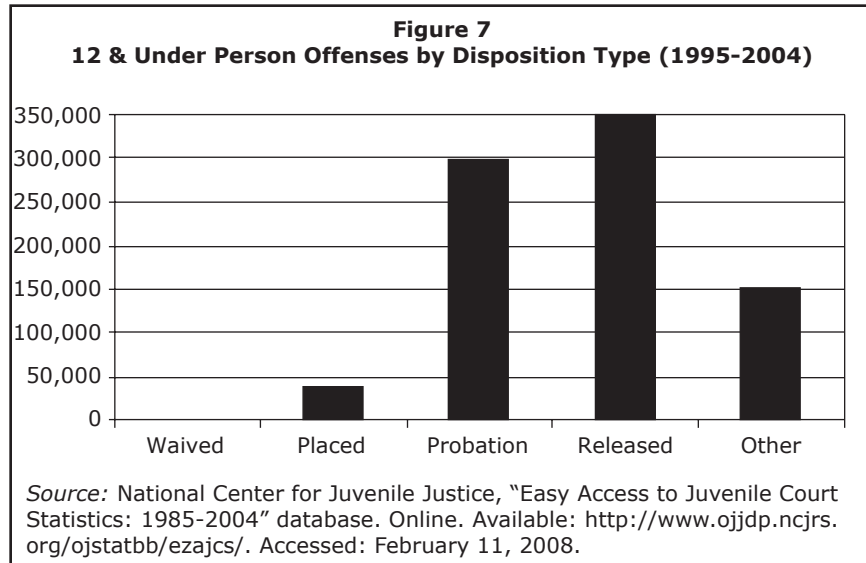
*These children are not necessarily the “worst of the worst,” since many juvenile murderers remain in juvenile court, and many relatively minor offenders get transferred to adult court.*

**Figure 6.  
12 & Under Waived by Offense Type (1995-2004)**

<b>Year</b>	<b>Person</b>	<b>Property</b>	<b>Drugs</b>	<b>Public Order</b>
1995	16	23	5	15
1996	17	25	0	3
1997	24	23	2	5
1998	18	15	4	8
1999	8	19	0	15
2000	32	24	7	23
2001	35	22	0	8
2002	20	8	1	3
2003	9	7	0	9
2004	11	4	0	7
<b>Total</b>	<b>190</b>	<b>170</b>	<b>19</b>	<b>96</b>

Source: National Center for Juvenile Justice, “Easy Access to Juvenile Court Statistics: 1985–2004” database. Online. Available: <http://www.ojjdp.ncjrs.org/ojstatbb/ezajcs/>. Accessed: February 11, 2008.

## From TIME OUT to HARD TIME



*Over the last 20 years, more than 50% of the young children judicially transferred to adult court for person offenses were Black.*

### Demographics

It is now incumbent on us to examine the demographics of the population of young children who are transferred to adult court. The analysis reveals deeply troubling patterns of racial and gender imbalance.

The overall population of 12-year-olds and under transferred to adult court is disproportionately male and African American. While males commit approximately 72% of all juvenile offenses, 91% of all juveniles transferred to adult court are male.<sup>93</sup> Although males commit more serious crimes at a greater rate than females (77% of all person offenses of children age 12 or younger are committed by males),<sup>94</sup> that figure is still disproportionate to the 91% of transfers who are male. It is troubling to see a significant imbalance between the offense and transfer rates. This ratio further points to the arbitrariness of transfer as prosecutors and judges may deem young males more threatening to society, and thus prefer to deal with them in the adult system.

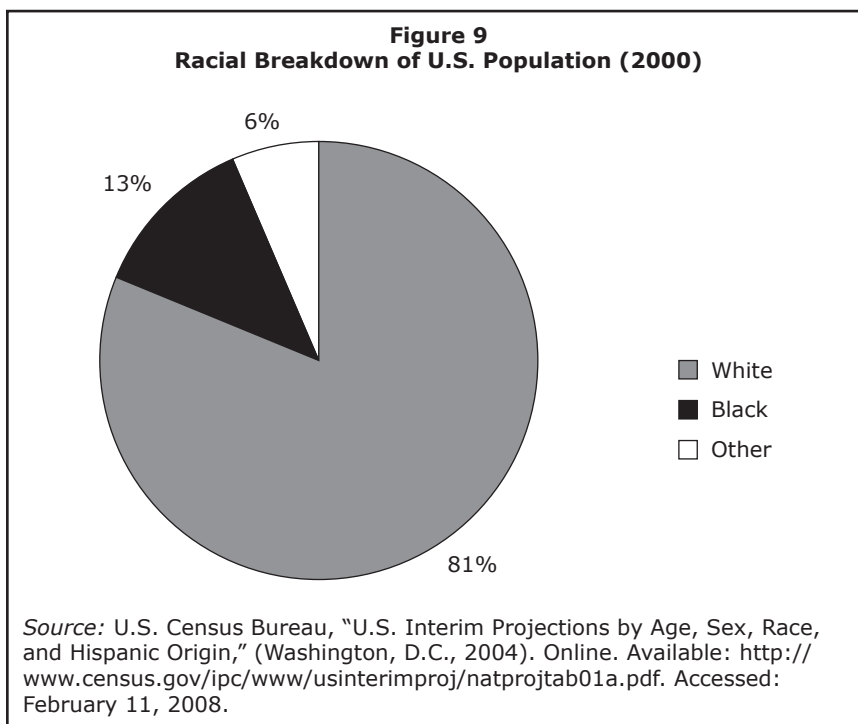
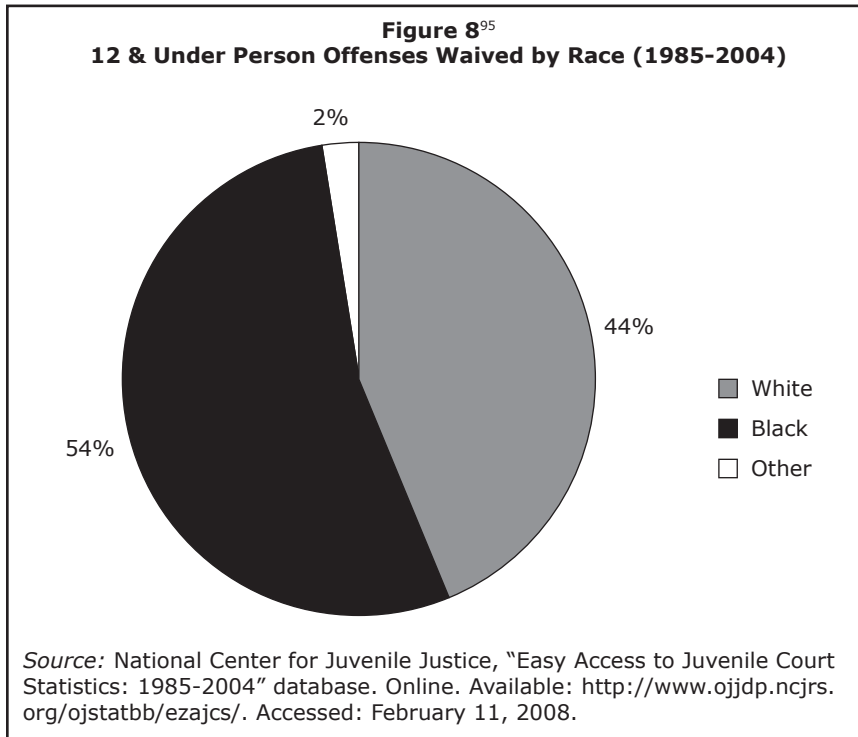
Turning to the racial breakdowns of transferred youths, we find that over the last 20 years, more than 50% of the young children judicially transferred to adult court for person offenses were Black (Figure 8). This number is astonishing when compared to the percentage of Blacks in the United States (13%) (Figure 9). The imbalance becomes even more significant when we consider the limitations of the data. Because of data collection limitations, Hispanic youth are classified as White, and thereby "inflate" the relative proportion of White children who have been transferred. Thus, the ratio of young Black children transferred to that of White children is certainly larger than what the pie chart displays. The racial discrepancies between the number of young children tried as adults are even more problematic when coupled with the fact that young, Black men are already overrepresented in the criminal justice system as a whole. The immense number of young, Black men incarcerated in America has long been documented. As with the adult criminal system, Black youth are overrepresented in the juvenile justice system when compared to national population data, meaning that the starting point even before transfer is uneven. For instance, in 2002, a disproportionate number of

93. National Center for Juvenile Justice, "Easy Access to Juvenile Court Statistics: 1985-2004" database. Online. Available: <http://www.ojjdp.ncjrs.org/ojstatbb/ezajcs/>. Accessed: February 11, 2008.

94. Ibid.

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juvenile delinquency cases involved Black youth (29%) compared to their percentage of the population (16%).<sup>96</sup>



95. For the purposes of Figures 8 & 9, the category "White" includes Hispanics. Moreover, the category "Other" includes Asians and Native Americans.

96. Snyder and Sickmund, p. 163.

## From TIME OUT to HARD TIME

The disproportionate number of transfer cases involving Black youth is even more upsetting when considered in conjunction with the fact that Black youth often receive harsher sentences than their White counterparts. In states such as California and Pennsylvania, Black youth are more than 20 times as likely to receive life without parole sentences when compared to White youth.<sup>97</sup>

The overrepresentation of Black youth in the criminal justice system is troubling. As mentioned above, Black youth are more likely to be waived to adult court for their offenses and often receive much harsher sentences than their counterparts. The racial imbalance is but one example of the arbitrary nature of transferring and sentencing children as adults.

In providing this analysis of national crime and transfer statistics, we move forward with a clearer sense of the scope of the problem: Very young children—those aged 12 and under—continue to commit crime on the order of nearly 150,000 offenses a year. At the same time, every year, approximately 35 children, aged 12 and under, face adult consequences for their crimes (Figure 5). We now know that these children are not necessarily the “worst of the worst,” since many juvenile murderers remain in juvenile court, and many relatively minor offenders get transferred to adult court. The apparent arbitrariness of the transfer decision is compounded by concerns about racial disparities in those same transfer decisions. We also know that the problems are of even greater magnitude than we report here, since our analysis only captures those cases judicially waived to adult court. The number of young children whose cases go to adult criminal court as a result of automatic exclusion laws or direct filings by the prosecutor may dwarf the number reported here. We simply do not have access to that important data.

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97. Human Rights Watch (HRW) and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005), p. 40. Online. Available: <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>. Accessed: February 12, 2008.

## Chapter 4

# Sentencing Policies and Practices Affecting Young Children in Adult Court

Now that we have discussed the various policies and practices relating to the transfer of young children to adult court, it is important to understand the implications of such waiver decisions. When children are transferred from the juvenile justice system to the adult criminal justice system, they are subjected to vastly different sentencing laws. Serious violent offenders in the juvenile system often receive probation or relatively short sentences, whereas these same offenders when tried in adult courts can receive lengthy prison terms with little or no possibility for parole. Even the youngest children—those who are prepubescent—who are transferred to adult court may be subject to these harsh punishments without any consideration for their age or stage of mental and social development. Indeed, sometimes these harsh sentences are mandatory for anyone convicted of the charges, regardless of age.

The sections below provide a striking look at the contrasts between sentencing policies applicable in juvenile and adult courts, when young children are involved.

### A. Sentencing in Juvenile Court

In contrast to most adult criminal court judges, juvenile judges have considerable leeway when dealing with young offenders. If a child is found to be delinquent, the judge may order residential placement, probation, other sanctions such as community service, or release. Regardless of the offense type, probation and placement are the sentencing options most often used. According to the Office of Juvenile Justice and Delinquency Prevention (OJJDP), in 2002, residential placement or formal probation was ordered in 85% of adjudicated cases.<sup>98</sup>

#### Probation

When a judge places a child on probation in juvenile court, much like in adult criminal court, the youth is released and the case is terminated, contingent upon successful compliance with any conditions imposed by the court and completion of the probationary period without re-offending. If the child does commit another offense within the probation period, he or she is also charged with the original offense. In 2002, juvenile judges ordered youth to serve probation in approximately 62% of cases nationwide.<sup>99</sup> Significantly, probation is not solely reserved for the least serious crimes, as 43% of juveniles who committed criminal homicide were placed on probation for their offense.<sup>100</sup> Judges may only order probation for a limited time, a period often capped by the state's age of majority or maximum age allowed in juvenile facility.

#### Residential Placement

The second most common sentencing option in juvenile court is residential placement, which removes the youth from his or her home and places the child into some form of juvenile facility. Nationally, juvenile judges sentenced about 23% of all adjudicated juveniles to be placed in a residential facility.<sup>101</sup> These facilities range from locked cells in pu-

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98. Snyder and Sickmund, p. 174.

99. Ibid.

100. Ibid.

101. Ibid.

## From TIME OUT to HARD TIME

nitive, boot-camp style programs to open facilities that require offenders to contribute to the surrounding community. Almost all juvenile facilities offer programs to rehabilitate and educate the children, as well as provide counseling and support staff for specialized treatment for mental and behavioral issues.<sup>102</sup>

When sentencing a child to a residential facility, depending upon the options in a given state, a juvenile judge may give the youth either a “determinate” or “indeterminate” sentence. A determinate sentence is for a specified period of time, for instance 18 months, that the individual will be required to serve in the facility. If given an indeterminate commitment, the child will be held for an indefinite period, with a minimum incarceration time set according to the specific crime committed. Regardless of the juvenile’s age at the time of the offense, a juvenile given an indeterminate sentence may remain incarcerated only until he or she reaches the state’s maximum age of juvenile jurisdiction, which ranges from 18 in most states to 24 in California.<sup>103</sup> The actual time served will be determined by the individual’s successful rehabilitation, participation in programming, and institutional behavior.

Thus, a 12-year-old found guilty of murder in Tennessee may receive an 8-year juvenile sentence, but the state would have to release the child on his 18<sup>th</sup> birthday because the juvenile system no longer retains jurisdiction after that age.<sup>104</sup> While this upper age of court jurisdiction often determines indirectly the maximum sentence a child tried in juvenile court can receive, juvenile judges maintain a significant amount of flexibility over the length of stay in a juvenile facility. Once a child has served a minimum sentence, juvenile judges (taking into account the recommendations of juvenile correctional administrators) may evaluate the youth’s programmatic and rehabilitation progress to determine whether he or she should be released back into society. This ability to evaluate progress offers juvenile judges the flexibility to consider the cases of these children individually and then tailor specific programs and sentences as appropriate.

### Blended Sentences in Juvenile Court

A final sentencing option that has garnered national favor in recent years is blended sentencing in juvenile court. While state schemes differ, blended sentencing typically combines a juvenile sentence with a further sentence to be served in the adult system after the age of majority, should a judge determine that the youth’s progress in the juvenile system is inadequate. Twenty-seven states offer such blended sentencing options for juvenile judges.<sup>105</sup>

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102. See *infra* pp. 63-64.

103. Three States (Colorado, Hawaii, and New Jersey) do not maintain a maximum age, rather they specify the juvenile can remain in a juvenile facility until they serve out their full sentence. Melanie King and Linda Szymanski, “National Overviews: Extended age over which the juvenile court may retain jurisdiction for disposition purposes in delinquency matters as of the end of the 2005 legislative session,” *State Juvenile Justice Profiles*, National Center for Juvenile Justice (Pittsburgh, PA, 2006). Online. Available: <http://www.ncjj.org/stateprofiles/overviews/extendedage.asp>. Accessed: February 11, 2008.

104. However, blended sentencing or transfer to adult criminal court could also be an option, depending upon the jurisdiction. See Table 2, *supra* pp. 24-26.

105. Patrick Griffin, “National Overviews: Which states try juveniles as adults and use blended sentencing?,” *State Juvenile Justice Profiles*, Pittsburgh, PA: National Center for Juvenile Justice, 2007. Online. Available: [http://www.ncjj.org/stateprofiles/overviews/transfer\\_state\\_table.asp](http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp). Accessed: March 5, 2008. Note that Maine recently changed its law to allow for a blended sentencing option. *An Act To Allow Blended Sentencing for Certain Juveniles*, Maine Statutes, L.S. 1897, S.P. 691 (2008).

## Sentencing Policies and Practices Affecting Young Children in Adult Court

This type of alternative sentencing structure arose from a variety of concerns. First, policy makers believed that the juvenile justice system was not capable of applying harsh enough sentences for certain crimes, and that older juveniles were in effect receiving short sentences because of the maximum age of juvenile court jurisdiction. Conversely, some worried that the adult sentencing structure was too rigid, resulting in very long prison terms even for young juveniles. Blended sentences, usually reserved by statute for the most heinous offenses, provide juvenile judges with an opportunity to sentence youth to adult prison terms without having to transfer him or her to adult court.

While there are a number of different blended sentencing schemes,<sup>106</sup> generally, a juvenile judge will sentence an offender to a suspended adult sentence, such as 20 years, and send the child to the juvenile system. The juvenile will be reevaluated upon his or her 18<sup>th</sup> birthday (or later, depending upon the state) to determine whether significant rehabilitation progress has been made. If the judge determines the child is ready to reenter society, then the rest of the sentence is dropped; however, if the child has not shown remorse or completed the rehabilitation process, and the judge believes he or she is still a threat to society, then the youth will be transferred to an adult prison to serve out the suspended adult sentence. A child may also be transferred early if not showing any signs of progress or cooperation with the rehabilitation programs. An example of early transfer occurred in Texas, when juvenile Judge Jeanne Meurer ordered Marcus McTear, a 19-year old who was serving a 40-year blended sentence for murder, to be transferred to the adult prison system two years early after he had shown no evidence of progress after three years in the juvenile facility.<sup>107</sup> Blended sentencing in juvenile courts is novel because it allows judges to order a longer sentence, but still retain the power to give the child a “second look” before sending the youth on to adult prison.

While all blended sentencing schemes are similar in concept, certain states’ schemes have unique features. For example, in Michigan, a child may be tried as an adult in juvenile court (using adult court procedures), and yet still receive a juvenile punishment.<sup>108</sup> Upon conviction, the juvenile judge has three options: (1) sentence the child as an adult under the state sentencing guidelines; (2) sentence the child as a juvenile, meaning that any sentence could not last longer than the youth’s 21<sup>st</sup> birthday; or (3) provide a blended sentence, which would include a stayed adult sentence that could be imposed if rehabilitation were not successful.<sup>109</sup> Thus, the judge has power to sentence in the juvenile, adult, or both justice systems, providing even greater judicial discretion and flexibility. Nathaniel Abraham, the youngest child ever tried as an adult for a murder committed at age 11, was sentenced under this scheme, and received a juvenile sentence that lasted until he was 21. According to the judge who sentenced and eventually released him, this sentence appears to have been a successful approach to meeting the rehabilitative needs of this very young child.<sup>110</sup>

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106. Ibid.

107. See Judge’s Brief, *supra* note 7, p. 23; Claire Osborn, *Teen Serving Out Penalty in Prison; Ex-Reagan High School Student Who Killed a Girl Isn’t Showing Signs of Improvement*, *Judge Rules*, *Austin American-Statesman*, January 27, 2006, p. B1.

108. Mich. Comp. Laws § 712A.2d(1).

109. Mich. Comp. Laws § 712A.18(1)(m).

110. See Eugene Arthur Moore, *Juvenile Justice: The Nathaniel Abraham Murder Case*, *supra* note 24, pp. 230-33 (2007) (containing a version of Judge Moore’s January 18, 2007 order releasing Abraham from custody); see also Judges’ Brief, *supra* note 7, pp. 17-19.

## From TIME OUT to HARD TIME

### Parole

Youth may also receive parole prior to their completion of the required sentencing range if they are shown to exhibit exceptional behavior and rehabilitation. When released from residential placement, they receive either a conditional or unconditional release, which affects their parole status. If awarded unconditional parole, the child is released from the facility without any parole requirements. However, a conditional release may require the child to comply with certain conditions as well as remain under parole supervision. If the child violates the conditions of parole, similar to violating conditions of probation, he or she may be returned to a juvenile residential facility according to the terms of the parole agreement.

### B. Sentencing in Adult Court

In sharp contrast to the flexible sentencing options available in the juvenile system, when children are transferred to adult criminal court, they typically face the harsh realities of adult sentencing. The average sentence length for all defendants in adult court is 64 months,<sup>111</sup> which is longer than most youth can even face in juvenile court. The toughening of adult sentences across the country over the last two decades has led to the availability of much longer sentences for every crime. This is especially problematic for young children in adult court as under many sentencing schemes, judges are not allowed to take their age into as a mitigating factor in sentencing decisions.

Although the Supreme Court has outlawed the practice of sentencing children to death, virtually every other sentencing option is on the table when it comes to youth tried in adult court. Many states continue to authorize sentencing juveniles to “die in prison” by allowing and sometimes requiring a sentence of life without parole. Very young children, those who have yet to reach puberty, can also receive lengthy mandatory sentences that will keep them in prison for the bulk of their lives. The availability and imposition of such harsh and inappropriate sentences highlight why the adult sentencing structure is especially problematic for young children transferred to adult criminal court.

### Mandatory Minimums

Mandatory sentencing provisions present one of the most troubling features of many states’ adult sentencing schemes. Such sentences provide judges with no discretion to sentence both youth and adults below a statutorily mandated floor. Some states (and the federal government) have sentencing guidelines in place that require sentences within a certain range. In some states, these guidelines permit deviations under specified circumstances, but youth is not always a factor that can justify such departures from the guidelines. Even those states without sentencing guidelines often have minimum sentences established for certain crimes, or, for example, use of a gun.

Although mandatory sentences run the gamut in length depending upon the offense involved, those of greatest concern for purposes of this report are mandatory sentences requiring the imposition of extremely long terms of imprisonment, or even life without possibility of parole. Such sentences are typically imposed in cases of murder and other serious, violent offenses, though drug crimes also can result in such harsh punishments. Many mandatory sentences do not offer the offender an opportunity to be considered for parole, as is the case in South Carolina where a conviction for murder will net a mandatory minimum sentence of 30 years without possibility of parole.

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111. Tom Bonczar, “State prison admissions, 2003,” U.S. Department of Justice, Bureau of Justice Statistics, National Corrections Reporting Program. Online. Available: <http://www.ojp.usdoj.gov/bjs/dtdata.htm#corrections>. Accessed: March 1, 2008.



## Sentencing Policies and Practices Affecting Young Children in Adult Court

Mandatory sentences, by their nature, are intended to disallow consideration of individual circumstances relating to the offense or the offender. This is especially problematic when a young child is the subject of an adult criminal court proceeding. A judge may recognize that a harsh, multi-decade sentence is inappropriate for a 12-year-old, for example, but the judge's hands are tied when it comes to alternative sentencing options. Many judges have decried the lack of discretion they have to tailor a sentence for a child who has committed a serious crime. South Carolina Judge Daniel Pieper, for example, lamented his inability to sentence Christopher Pittman to less than the mandatory minimum 30-year sentence for killing his grandparents when he was 12 years old.<sup>112</sup> And in Colorado, a judge cried while sentencing a juvenile to die in prison, saying, "I have no ability to do anything about this except give you life without parole."<sup>113</sup>

As discussed above in Chapter I. B. of this report, pre-adolescents have diminished culpability for their crimes due to their still-forming brains and their immature social and emotional development. Their developing brains also make them more likely to benefit from rehabilitation, and they are highly likely to change their personalities and behavior by the time they reach adulthood. Yet these factors cannot be taken into account by a criminal court judge as justifying mitigation of a sentence, when mandatory sentences apply. All the research shows that children are different from adults, but mandatory sentences do not allow such differences to be taken into account.

### Life Without Possibility of Parole

The sentence of life without possibility of parole is permitted in 48 states.<sup>114</sup> Nearly one-fourth of all prisoners serving life sentences will die in prison since they will never have the opportunity to be released on parole regardless of their rehabilitative efforts. That figure has risen from one in six in 1992.<sup>115</sup> Nationwide, more than 2,000 juveniles are serving life without the possibility of parole sentences.<sup>116</sup>

Life without possibility of parole ("LWOP") sentences are imposed on juveniles more than three times as frequently as happened 15 years ago.<sup>117</sup> Some of that growth is accounted for by the imposition of LWOP sentences on 13- and 14-year old children. The Equal Justice Initiative has identified 73 13- and 14-year olds sentenced to die in prison for their crimes.<sup>118</sup> Seven of these youths received their punishment for non-homicide crimes.<sup>119</sup> These young children are serving out their death in prison sentences in 19

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112. See Petition for Writ of Certiorari, *Pittman v. South Carolina*, p. 30 and App. 70a, and Reply Brief, *Pittman v. South Carolina*, p. 12.

113. "When Kids Get Life: Interview with Maureen Cain," *Frontline* (May 8, 2007). Online. Available: <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/interviews/cain.html>. Accessed: May 5, 2008. See also Online. Available: <http://www.kktv.com/home/headlines/18330874.html>. Accessed: May 5, 2008.

114. "Life Without Parole," Death Penalty Information Center. Online. Available: <http://www.deathpenaltyinfo.org/article.php?did=555&scid=59>. Accessed: March 5, 2008.

115. Marc Mauer, Ryan S. King, and Malcolm C. Young, "The Meaning of 'Life': Long Prison Sentences in Context," *The Sentencing Project* (May 2004), p. 3. Online. Available: [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc\\_meaning-of-life.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_meaning-of-life.pdf). Accessed: March 5, 2008.

116. Equal Justice Initiative (EJI), *Cruel and Unusual: Sentencing 13 and 14 -year-old Children to Die in Prison*, (Montgomery, Alabama, November 2007), p.5.

117. HRW, *The Rest of Their Lives*, *supra* note 97, p. 32.

118. EJI, *Cruel and Unusual*, p. 20.

119. *Ibid.*, p. 24.

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states, with the largest numbers in Pennsylvania and Florida.<sup>120</sup> The children serving LWOP sentences are largely racial minorities, with Black youth representing the largest group.<sup>121</sup>

The life without parole sentence option is especially problematic in states that require it as a mandatory sentence for certain crimes. For instance, the Florida legislature has designated murder as a capital crime, punishable by death or life imprisonment without the possibility of parole.<sup>122</sup> This statute alone has led to the imprisonment of 15 children under the age of 15 serving LWOP or “death in prison” sentences in Florida.<sup>123</sup> While it is unsettling that 12-year old Lionel Tate was originally sentenced to life without parole,<sup>124</sup> it is even more disturbing that a child as young as 7 could receive a mandatory LWOP sentence in Florida.

Until a new law takes effect in September 2009, Texas also has a capital murder statute similar to that in Florida, permitting only a death sentence or an LWOP sentence for anyone convicted of that crime.<sup>125</sup> As a result, any child transferred to adult court for capital murder from 2005 to 2009 had to be sentenced to die in prison if convicted, since he or she was ineligible for the death penalty under the Supreme Court’s 2005 ruling in *Roper v. Simmons*. The new law, signed by Texas Governor Rick Perry in June 2009, prospectively eliminates the LWOP sentence for these youth, imposing instead a 40-year sentence.

The United States Supreme Court has recently granted certiorari in two juvenile life without parole cases, both involving non-homicide crimes. The cases—*Sullivan v. Florida*<sup>126</sup> and *Graham v. Florida*<sup>127</sup>—will be considered by the Court in the Fall 2009 term. These cases offer the justices their first vehicle for considering the proportionality of a life without parole sentence imposed on a young child who has not taken the life of another person.

### Blended Sentences in Adult Court

In 17 states, a child transferred to adult court and found guilty of a crime may receive a blended sentence from the adult sentencing judge. Blended sentencing in adult court is similar to juvenile blended sentences insofar as the juvenile would initially be sentenced to a juvenile facility and would have his or her need for further incarceration re-evaluated upon reaching the age of majority. However, in some states criminal judges are allowed to choose among an adult sentence, a juvenile sentence, or a blended sentence for the offender. For example, in West Virginia, a criminal judge may sentence a

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120. Ibid., p. 20.

121. Ibid., p. 21.

122. FL. STAT. ANN. §§ 782.04 and 775.082.

123. EJI, p. 20.

124. Lionel Tate’s LWOP sentence was overturned by the Florida Supreme Court. “Lionel Tate Released: Florida teenager free after three years in prison,” *CNN.com*, January 27, 2004. Online. Available: <http://www.cnn.com/2004/LAW/01/26/wrestling.death/>. Accessed: April 24, 2008.

125. Texas Penal Code, ch. 12, sec. 31.

126. *Sullivan v. Florida*, 129 S. Ct. 2157 (2009) (granting cert. to 987 So. 2d 83 (Fla. App. 2008)).

127. *Graham v. Florida*, 129 S. Ct. 2157 (2009) (granting cert. to 982 So. 2d 43 (Fla. App. 2008)).

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juvenile transferred to adult court to a juvenile disposition, or some combination of a juvenile and adult sentence. In the latter framework, the juvenile would be housed in a juvenile facility until his or her 18<sup>th</sup> birthday. The original sentencing court must conduct a review and reconsideration of the imposed sentence prior to transferring the juvenile to an adult correctional facility.<sup>128</sup> This framework provides the sentenced youth with an opportunity to rehabilitate without serving his or her full sentence and offers the judge an opportunity to determine whether it is in the best interests of the child and public to release him or her from continued detention. Such a blended sentence also exempts the child from the unmitigated harshness of a mandatory adult sentence.

This chapter has illustrated the differences in sentencing practices between the juvenile and adult justice systems. By focusing largely on the individual offender, the juvenile courts aim to rehabilitate children in preparation for reintroduction into society. In contrast, judges in the adult courts often have no choice but to punish even young children with extremely long sentences, regardless of mitigating factors such as youth and the likelihood that the child could be rehabilitated.

Unless a judge at either the juvenile or adult level has the option of imposing a blended sentence, juvenile judges are typically forced to make a Hobson's choice between keeping the child in juvenile court, where the available juvenile sentence is potentially inadequate, or transferring the child to adult court, where he or she would be subject to an unduly harsh adult sentence. When faced with a pre-adolescent child who committed a serious offense, the starkness of that choice is extremely apparent to a juvenile judge weighing a transfer decision. Similarly, adult judges handling such cases due to automatic transfer provisions are likely to bemoan their lack of discretion in sentencing.

The following chapter examines how the harsh sentencing options available in adult court play out in various states when applied to pre-adolescent children transferred to the adult criminal system.

*In contrast to juvenile courts, judges in adult criminal courts often have no choice but to punish even young children with extremely long sentences, regardless of mitigating factors such as youth and the potential for rehabilitation.*

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128. Griffin, "Transfer Provisions."



## Chapter 5

# When Transfer Policies and Adult Sentencing Statutes Collide: A Focus on States with Harsh Outcomes for Pre-Adolescent Offenders

There are a number of states that maintain transfer policies that increase the likelihood that young children will end up in the adult system. In some of these states, those children face especially harsh and restrictive sentencing laws once they are transferred to the adult system. We have identified four states where the combination of transfer and sentencing policies and practices stand out as providing the worst possible outcomes for pre-adolescent offenders.

### A. Florida

Florida is near the top of the national chart when it comes to the number of youth transferred to adult court each year. From 2001 to 2006, the Florida tried between 2,500 and 3,000 youth as adults.<sup>129</sup> Beyond the high number of transfers, Florida is one of 22 states that have not created a statutory minimum age for transfer to adult court in murder cases, which means that theoretically a 7-year old accused of murder could stand trial in the adult criminal system in the state. Indeed, there are examples of children as young as 11 being tried as adults in Florida.

Florida has four mechanisms that allow a young child to be tried and potentially sentenced in adult court. First, Florida stands in line with nearly every other state in allowing for judicial transfer, whereby a judge decides whether a child will be kept in the juvenile system or waived into the adult judicial system. Second, the state allows the automatic transfer of juveniles charged with certain offenses to adult court. Third, prosecutors in Florida may rely on the concurrent jurisdiction provision for certain crimes, which allows them to docket the case in either a juvenile or adult court at their discretion.<sup>130</sup> The automatic transfer provision for a capital offense is the only transfer statute in Florida that does not include a minimum age. Finally, the state has a “once an adult, always an adult” statute on its books, which means that if a child was ever tried in adult court, without consideration of the trial outcome, the child will be handled in the adult system for any future crimes, regardless of severity.

Each of these transfer laws increases the likelihood that a child accused of committing a crime will find himself or herself in front of a judge in adult court – an outcome that is evidenced by the state’s transfer statistics. According to our research, Florida has been one of the most active states in the U.S. in trying young children as adults. Data obtained

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129. Florida Department of Juvenile Justice, “2005-2006 Department of Juvenile Justice State Profile” database. Online. Available: [http://www.djj.state.fl.us/Research/Delinquency\\_Profile/0506\\_Profile.html](http://www.djj.state.fl.us/Research/Delinquency_Profile/0506_Profile.html). Accessed: January 24, 2008.

130. According to the National Center for Juvenile Justice, “if a child is accused of a capital offense, the State’s Attorney may present the case to a grand jury and seek an indictment. If the State’s Attorney does not wish to seek an indictment, or if the grand jury does not return an indictment, the State’s Attorney may inform the court in writing to that effect and the case will proceed in juvenile court.” Griffin, “Transfer Provisions.”

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from the Florida Department of Juvenile Justice shows that approximately 15 children age 13 years and younger are waived to adult court per year.<sup>131</sup>

Our review of the popular press yields findings consistent with the data showing the relatively large numbers of young children transferred to adult court. Some of the most highly-publicized cases from around the country were based in Florida:

*Some of the country's most highly-publicized cases of young children tried in adult courts arose in Florida.*

- In 1989, 11-year-old Arva Betts was charged and convicted as an adult in the murders of her two-year old and fifteen-month old siblings. A victim of abuse herself, she indicated that she was overwhelmed by her babysitting responsibilities when the children started crying. Despite her age, she was indicted on first-degree murder charges.<sup>132</sup> Eventually, a judge threw out her confession and she pleaded guilty on lesser charges, for which she was placed on 12 years' probation plus time served.
- Twelve-year old Lionel Tate was wrestling with his 6-year old neighbor in 1998 when he performed a maneuver that killed her. Tate was originally tried as an adult and sentenced to life without parole, but the case was later overturned.<sup>133</sup>
- Derek and Alex King, 12- and 13-years old respectively, were tried as adults for murdering their father in 2001.<sup>134</sup>
- Thirteen-year old Nathaniel Brazill was tried and convicted in adult court for his role in the shooting death of his middle school teacher.<sup>135</sup>

These are just a few of the documented cases of young children treated as adults in the Florida court system. As cases continue to arise in the state – including a recent one involving a 12-year old accused of beating to death with a baseball bat his toddler cousin, whom he was babysitting<sup>136</sup>—prosecutors and judges must decide whether each case should be heard in the juvenile or adult court system.

Unfortunately, Florida's current transfer laws send more children to the adult system than most other states, and the state's sentencing structure leads to inappropriately harsh treat-

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131. Florida Department of Juvenile Justice, "2005-2006 Department of Juvenile Justice State Profile" database. Online. Available: [http://www.djj.state.fl.us/Research/Delinquency\\_Profile/0506\\_Profile.html](http://www.djj.state.fl.us/Research/Delinquency_Profile/0506_Profile.html). Accessed: January 24, 2008.

132. Paula McMahon and Macollvie Jean-Francois, "Lauderhill Boy Accused of Killing Toddler had Baby-sat Before," *South Florida Sun-Sentinel* (January 9, 2008). Online. Available: <http://www.sun-sentinel.com/news/local/broward/sfl-flbbeating0109sb-jan09,0,4677486.story>. Accessed: February 1, 2008. See also Cara Elizabeth Richards, *The Loss of Innocents: Child Killers and Their Victims*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2000), pp. 125-6.

133. "Lionel Tate Released: Florida teenager free after three years in prison," CNN.com, January 27, 2004. Online. Available: <http://www.cnn.com/2004/LAW/01/26/wrestling.death/>. Accessed: April 24, 2008.

134. Dana Canedy, "Florida Boys Admit They Killed Father; Shorter Term is Set," *The New York Times*, November 15, 2002. Online. Available: <http://query.nytimes.com/gst/fullpage.html?res=9403EFD91430F936A25752C1A9649C8B63>. Accessed: April 24, 2008.

135. "National Briefing: South: Florida: Court Upholds Boy's Sentence," *New York Times* (May 15, 2003). Online. Available: <http://query.nytimes.com/gst/fullpage.html?res=9A02E2DF163EF936A25756C0A9659C8B63>. Accessed : May 9, 2008.

136. McMahon and Jean-Francois.

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ment of these young children. Florida is one of 26 states that offer criminal judges a blended sentencing statute, which allows youth tried as adults to receive juvenile punishments with the potential to serve an adult portion of the sentence following completion of the juvenile sentence. However, a criminal judge is not allowed to impose a “blended sentence” if the child is (1) being tried for an offense punishable by death or life in prison, (2) the child was waived to adult court through the automatic transfer provision, or (3) the prosecutor was required to waive the child to adult court because of previous offenses.<sup>137</sup> Thus, young children committing the most heinous crimes, such as murder or rape, are not eligible for blended sentences, despite the fact that these youths are the most appropriate candidates for such treatment.

Upon conviction for capital murder, Florida judges are required to sentence children, regardless of their age, to life without parole.<sup>138</sup> As of 2005, Florida had almost 300<sup>139</sup> children under the age of 18 sentenced to life without parole in its correctional system, with 15<sup>140</sup> of those individuals under the age of 15. Two of those 15 children were convicted of non-homicide crimes at the age of 13.<sup>141</sup> Of particular concern is that black juveniles receive LWOP sentences nearly seven times as often as white juveniles.<sup>142</sup> The Florida laws allowing LWOP sentences to be imposed on juveniles in non-capital cases are currently being evaluated by the United States Supreme Court.<sup>143</sup>

During his term in office, Florida Governor Jeb Bush expressed dismay over the law requiring lengthy mandatory sentences even for young children. He said, “I am also concerned about the law which can require a life sentence—without any possibility of parole—for a crime committed by a 12-year-old child. I am not sure it is right to consign such a young child to a life without any hope.”<sup>144</sup>

The confluence of mandatory transfer laws and extremely harsh, mandatory adult sentences, even for pre-adolescent children, make Florida a prime focus for reform in this arena. Both juvenile and adult court judges need more discretion in responding appropriately to the offenses committed by these children, and in getting these youth the treatment they so desperately need. No child this young should be subjected to such rigidity without opportunity for consideration of his or her youth and individual circumstances at both the trial and sentencing stages. Yet in Florida, a child as young as 7 is potentially an adult in the eyes of the law.

*Florida has 15 children serving life without parole sentences for crimes committed when they were 14 and under.*

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137. Griffin, “Transfer Provisions.”

138. FL. STAT. ANN. § 775.082.

139. HRW, p. 35.

140. EJI, p. 20.

141. At the age of 13, Ian Manuel non-fatally wounded a woman during a botched robbery attempt. He turned himself into the police, and upon instruction from his attorney that he would only receive a sentence of 15 years, pled guilty to the crime. Unfortunately, the judge sentenced Ian to life without the possibility of parole. The victim has since forgiven him and appealed for his release to no avail. Joe Sullivan, a severely mentally disabled boy, broke into a house with an older child at the age of 13. At trial, the older child blamed Joe for the sexual battery that was committed during the break-in, which Joe to this day disputes. Despite his youth and mental capacity, Joe was sentenced to life without the possibility of parole. EJI, p. 28-9. Joe Sullivan’s case is soon to be considered by the United States Supreme Court. See *supra* note 126.

142. HRW, p. 40.

143. See *supra* note 126.

144. Campaign for Youth Justice, *The Consequences Aren’t Minor: The Impact of Trying Youth as Adults and Strategies for Reform* (Washington, D.C., March 2007), p. 55.

### B. Michigan

Michigan's laws are unusual insofar as they allow juvenile judges to impose adult penalties on young offenders, even when these children are too young to be transferred to adult criminal court. The transfer statute in Michigan prohibits any child under the age of 14 from being waived to adult court. Yet Michigan juvenile court judges have the ability to employ adult criminal court procedures and to sentence young children to adult penalties under the state's blended sentencing scheme.<sup>145</sup> Thus, a 12-year old child on trial for murder in Michigan would be handled in juvenile court, but could face potential penalties of up to life without parole. The law would even permit a 7-year old to face such extreme penalties.

For all intents and purposes, then, a child age 7 or older who has committed any crime may be treated as an adult in sentencing. Either a prosecutor exercises discretion to try the child as an adult, or the judge can "designate the case as a case in which the juvenile is to be tried in the same manner as an adult."<sup>146</sup> The child will be afforded all of the procedural protections of the juvenile court, but will face either a juvenile disposition or – if the judge determines that it would be in the interest of the public – an adult sentence. This provision is at once helpful and harmful for young children committing serious crimes. On the one hand, the ability to apply a blended sentence allows the juvenile judge the opportunity to re-evaluate a child whom he or she believes is open to rehabilitation; thus the law is positive because the judges' hands are not tied. On the other hand, this legislation is exceedingly detrimental because it subjects very young children to the harshest sentences available in the adult criminal justice system.

This blended statute legislation was placed in the national spotlight in 1997 with the tragic case of Nathaniel Abraham. Nathaniel was 11 years-old when he was arrested for fatally shooting his teacher, Ronnie Greene, Jr. He is believed to be the youngest child ever to stand trial for murder in the United States. Although he could not be tried in adult court for the crime because of his young age, his case highlighted the potentials and pitfalls of blended sentencing in Michigan. After Nathaniel was found guilty of second-degree murder, Judge Eugene Arthur Moore was presented with the option of sentencing him to an adult sentence. Instead, he chose to sentence Nathaniel to eight years in a juvenile facility with mandatory release on his 21<sup>st</sup> birthday. Nathaniel's case reflects the benefit of blended sentencing, as the young child was able to turn his life around in juvenile custody where he earned his GED and enrolled in college upon his release.<sup>147</sup> "I owe a debt to everybody involved in this case," Nathaniel told Judge Moore at his release hearing, adding "I'd like to thank you for taking that chance and believing in me. You saw something in me before a lot of people did. I'm going to make the best of it."<sup>148</sup> Rather than be forced to spend his childhood and part of his adulthood behind bars, this young child was given an opportunity to turn his life around, which is a testament to the benefits of treating young offenders as children in the juvenile justice system.

In contrast, sentencing a young child in the same manner as an adult is very problematic in Michigan because of its harsh sentencing laws. In Michigan, a young child convicted of first-

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145. Griffin, "Transfer Provisions."

146. Ibid.

147. Jennifer Chambers, "State pays Abraham's housing, college tabs: young killer free after 8 years, wants a fresh start," *The Detroit Free Press*, (January 19, 2007). Online. Available: <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20070119/METRO/701190397/>. Accessed : February 21, 2008.

148. Ibid.



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degree murder receives the same sentence as an adult—a mandatory sentence of life in prison without possibility of parole.<sup>149</sup> As of 2005, 306 juveniles were serving life without parole sentences in Michigan’s correctional facilities, thereby giving Michigan the dubious distinction of having the country’s second largest population of juveniles sentenced to die in prison.<sup>150</sup> Michigan’s sentencing scheme is focused on the seriousness of the crime and provides no judicial discretion to consider the individuality of the offender.

### C. Pennsylvania

Pennsylvania has three methods for trying juveniles as adults. Statutes allow for judicial discretion in transfer decisions, automatic transfer, and “once an adult, always an adult” exclusions from juvenile court. One aspect of the transfer laws distinguishes Pennsylvania from other states. Most states that lack a minimum statutory age for waiver proceedings only allow transfer of young juveniles if a judge so orders. In contrast, Pennsylvania will not allow a judge to transfer any child under the age of 14 who is charged with most serious felonies, but sets no statutory minimum age for automatic transfer in murder cases. Thus, a child of any age who is accused of murder will be sent automatically to the adult court system. This situation is troublesome because it removes discretion from the transfer judge. Rather than allowing a judge to examine the specifics of the case and the accused child, the legislature requires the child to be tried as an adult, regardless of the circumstances. Fortunately, Pennsylvania does allow reverse waiver in adult court (allowing the adult criminal court judge to return a case to juvenile court when appropriate), which has minimized the number of young children in adult prison.

Some highly publicized cases involving very young offenders arose out of Pennsylvania, including the current nationally-profiled case of 11-year old Jordan Brown, awaiting trial as an adult for shooting and killing his father’s pregnant girlfriend. In 1989, 9-year old Cameron Kocher used his father’s rifle to shoot his 7-year old neighbor as she rode on the back of a snowmobile. Kocher was originally transferred to the adult court, but the waiver was overturned on appeal, and he was sentenced by a juvenile judge to a juvenile facility until his 21<sup>st</sup> birthday.<sup>151</sup> In 2005, 11-year old Djinn Buckingham set fire to a house, killing his 9-year old cousin. Although the case was automatically transferred to adult court, the adult criminal court judge chose to send the Buckingham case back to the juvenile court system. According to a newspaper account of the trial, “Murder in Pennsylvania is an adult offense, regardless of the age of the accused, but [Judge Jon] Mark was convinced in this case that the defendant was not entirely at fault for the circumstances leading to the fire. The judge noted the boy’s youth, troubled childhood and unstable home environment.”<sup>152</sup> In 2000, 13-year old Kareem Watts stabbed a neighbor to death and was charged with first-degree murder. After analyzing confinement and treatment options, the adult court judge decided to transfer Watts back to the juvenile

*In Pennsylvania, a child of any age who is accused of murder will be sent automatically to the adult court system, where the mandatory sentence is life without parole.*

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149. Mich. Comp. Laws § 750.316(1), § 791.233b(n), § 791.234(6)(a) (2006).

150. HRW, p. 35.

151. Andrew Scott, “Buckingham case has echoes of child-on-child killing of ’89,” *Pocono Record*, (April 28, 2006). Online. Available: <http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20060428/NEWS/60428004/-1/NEWS0902>. Accessed: February 14, 2008.

152. Andrew Scott, “Buckingham will be tried as a juvenile,” *Pocono Record*, (May 4, 2006). Online. Available: <http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20060504/NEWS/60504006/-1/NEWS0902>. Accessed: February 14, 2008.

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system<sup>153</sup> While none of these young children was actually convicted as an adult, these three cases highlight the potential for very young children to be tried and sentenced as adults under Pennsylvania's legal system.

Should those children have been convicted under adult sentencing laws, they would have experienced some of the harshest sentencing laws in the country for their offenses. Pennsylvania is well known nationally for its harsh treatment of young children who commit serious criminal offenses. In first-degree murder cases, regardless of the age of the defendant, judges are required to sentence the offender either to death or life imprisonment without the possibility of parole.<sup>154</sup> The Supreme Court's decision in *Roper v. Simmons* outlawed the juvenile death penalty, thus any youth regardless of age convicted of first-degree murder will be sentenced to life without parole. As of 2007, Pennsylvania led the nation in both total number of juveniles serving LWOP sentences (332)<sup>155</sup> and the number of youth under the age of 15 serving LWOP sentences (18).<sup>156</sup> More so than any state in the union, Pennsylvania imprisons young children for excessive periods of time.

### D. South Carolina

South Carolina has the worst record in the country when it comes to trying pre-adolescent children as adults and sentencing them to long, mandatory prison terms. In recent years, the state has transferred two 12-year old children to the adult criminal court system, with Christopher Pittman holding the national record for the longest sentence currently being served by someone convicted of a crime committed at such a young age (age 12). South Carolina's laws would permit the transfer of even younger children to the adult criminal justice system, since there is no minimum age for transfer specified in the statute. While South Carolina is one of 22 states that has not created a statutory minimum age for judicial transfer, it is the only state that has actually sentenced a 12-year old child as an adult to 30 years in prison.

The South Carolina legislature has created two mechanisms by which children may be tried as adults. First, a judge can transfer children to adult court at any age for murder, and above age 14 for other felony offenses. Although this judicial waiver decision is in theory discretionary, in 2000 the South Carolina Supreme Court ruled in *State v. Corey D.* that transfer is required in certain cases, based upon the heinousness of the crime, rather than the characteristics of the offender.<sup>157</sup> Corey, a 12-year old boy, was arrested on charges of robbery, rape and murder. After a waiver evaluation by the state, the family court decided against waiving Corey to adult court because of his young age. The South Carolina Supreme Court overturned the family court's refusal to transfer as an abuse of discretion, and ruled that the heinousness of the crime should be given more weight in transfer hearings. In effect, then, the South Carolina Supreme Court concluded that transfer of young children is mandatory for the most serious crimes.

The second way that children can get sent to adult court is through the state's automatic transfer law, which excludes certain crimes, such as first-degree murder, from juvenile court juris-

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153. "Judge's Choice: Prison or Second Chance for Teen Killer?" *USA Today*, (December 23, 2007). Online. Available: [http://www.usatoday.com/news/nation/2007-12-23-youth-on-trial\\_n.htm](http://www.usatoday.com/news/nation/2007-12-23-youth-on-trial_n.htm). Accessed: May 6, 2008.

154. 42 Pa.C.S.A. Sec. 9711 and 61 P.S. Sec. 331.21.

155. HRW, p. 35.

156. EJI, p. 20.

157. *State v. Corey D.*, 529 S.E.2d 20, 26 (S.C. 2000).

## When Transfer Policies and Adult Sentencing Statutes Collide

diction for children older than 15. Thus, any youth aged 16 or older committing an excluded crime will automatically be tried as an adult, without a hearing in which there is an opportunity for consideration of the offender's maturity or threat to the community.<sup>158</sup>

When those two transfer laws are considered in conjunction with each other, there is essentially a mandatory transfer requirement for any child who commits murder. According to the South Carolina Department of Juvenile Justice's Legal Counsel, the state uses these mechanisms to waive approximately 40 to 50 children each year into the adult system, with two to three of those waivers occurring annually for 13- and 14-year olds.<sup>159</sup>

Making South Carolina's system even more troubling is the way these transfer mechanisms intersect with the state's sentencing laws. South Carolina has mandatory sentences in place for first-degree murder and anyone sentenced under this statute—including a child transferred from juvenile to adult criminal court—will be subject to a mandatory minimum 30-year sentence without possibility of parole. Such children could even be sentenced to die in prison, as a life sentence without possibility of parole is also an option for the sentencing judge. This harsh sentencing scheme offers no possibility for the sentencing judge to consider the defendant's youth as a mitigating factor that exempts the juvenile from this sentencing range. Thus, even a 7-year-old who was transferred to adult court in South Carolina for murder would face a minimum 30 years in prison, and could even be sentenced to life without parole. This unconscionable position was defended by the South Carolina Attorney General in his brief opposing Christopher Pittman's request to have his case considered by the United States Supreme Court.<sup>160</sup>

This mandatory sentencing scheme is problematic for two reasons. First, the mandatory sentence for murder removes discretion from the hands of the sentencing judge. Rather than applying a sentence that the judge determines to be appropriate to the crime and to the offender after considering mitigating factors such as the youth of the child, the state forces the adult judge to abide by a minimum floor of punishment for these pre-adolescent children.

Second, the nature of the sentence prohibits the state from reassessing the child at the age of majority, through either parole or a blended sentencing mechanism. As previously discussed, young children's brains are constantly changing. As a child grows older, he or she gains greater control over impulses, becomes more mature, and often displays a greater sense of remorse.<sup>161</sup> Indeed, young children are often very different individuals by the time they turn 18. In South Carolina, young children who are sentenced to long terms of imprisonment have no opportunity to display the results of their rehabilitation efforts when they reach the age of majority. Providing a "second-look" by the state would enable the sentencing judge to reevaluate each child to determine whether it is in the best interest of the community to release the child or to continue to hold him or her through the duration of the original sentence. Unfortunately, in South Carolina, judges are not afforded this discretion.

*The South Carolina Attorney General defended the state's authority to transfer a 7-year old to adult court for murder and to sentence the child to life without parole.*

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158. Griffin, "Transfer Provisions."

159. Phone interview by Ryan Reyna with Larry Vanderbilt, Chief Counsel, South Carolina Department of Juvenile Justice, Columbia, South Carolina, September 25, 2007.

160. Respondent's Brief in Opposition, pp. 25-26, *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436) (available at 2008 WL 649222)

161. Laurence Steinberg and Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty," *American Psychologist*, vol. 58, (2003), p. 1009.

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The mandatory nature of such sentences for juveniles transferred to adult court and the subsequent lack of opportunity for juveniles to show they have been rehabilitated is of deep moral concern, and raises constitutional issues as well. Christopher Pittman raised such constitutional challenges to South Carolina's sentencing scheme as it applies to juveniles, when he filed his petition for certiorari before the United States Supreme Court, in the case of *Pittman v. South Carolina*.<sup>162</sup> The petition argued that the Eighth Amendment to the Constitution does not permit the implementation of such a harsh sentence on such a young child, and contended that a 30-year mandatory sentence without the possibility of parole is an excessive and disproportionate punishment when imposed on a 12-year old child. The petition pointed to the evolving standards of decency in this country that reject the imposition of such harsh punishments on young children. Christopher also challenged the inability of the trial judge to take his youth into account as a mitigating factor. Unfortunately, the Supreme Court declined to hear Christopher's case; however, the legal issues raised in his petition are still viable and are likely to resurface in future cases.

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162. Petition for Writ of Certiorari, *Pittman v. South Carolina*, *supra* note 5; see also Reply Brief, *Pittman v. South Carolina*, *supra* note 112 (briefs available at [http://www.utexas.edu/news/2007/12/18/law\\_supreme/](http://www.utexas.edu/news/2007/12/18/law_supreme/)).

## Chapter 6

# Problems Associated with Trying Young Children as Adults

The political appeal of transferring children to adult court and subjecting them to hard time for adult crimes may be understandable, but the practice is problematic at numerous levels. The adult criminal justice system is designed for adults, and is ill-equipped to meet the special needs presented by young child offenders. Simply labeling young children as adults does not render them appropriate for this system. In this section of the report, we examine the myriad ways the adult criminal justice system is incompatible with the needs of young children transferred there. Problems are evident both in the courtroom during trials of young children, and in the housing of young children in adult jails and prisons. A growing body of research also makes it abundantly clear that public safety needs are ill-served by transfer of children to the adult criminal justice system.

### A. Courtroom Issues

#### Children Are Too Young to Actively Participate in Proceedings

According to the MacArthur Foundation's Network on Adolescent Development and Juvenile Justice, children under the age of 14 "are as poorly prepared to participate in their trials as adults with severe mental illness."<sup>163</sup> In other words, young children have a diminished mental capacity and should be declared incompetent to stand trial as adults. The network's study of over 1,400 youth and adults in the criminal court system found that the younger adolescents were more likely to defer to authority figures and were not able to recognize the long-term consequences of their legal decisions.<sup>164</sup> In a criminal trial, this translates to children being more likely to accept plea bargains placed before them by prosecutors. At an even earlier stage, such deference to authority figures can lead to their willingness to confess to the crime—even falsely—so that they can go home and be with their family. One study found that 11- to 13-year olds are significantly more likely than adults to cooperate with law enforcement authorities and confess their participation in criminal activities.<sup>165</sup> The pre-adolescent brain is typically concerned with the immediate present and not the consequences resulting from the situation as a whole. Most 12-year-olds cannot comprehend the gravity of a two-year sentence—let alone one that would last thirty years.

Research has shown that in a courtroom setting, children seldom show emotion, often make inconsistent statements, are easily manipulated by leading questions by the prosecution, and tend to filter out information that they think will hurt their case or have an effect on their family members. They also tend to tell idealized versions of the events that occurred, and unwittingly perjure themselves.<sup>166</sup>

*Children under age 14 are as poorly prepared to participate in their trials as adults with severe mental illness.*

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163. The John D. and Catherine T. MacArthur Foundation, "Juvenile Justice: New Models for Reform," *MacArthur Newsletter*, vol. 3 (Fall 2005), p. 13.

164. *Ibid.*

165. Thomas Grisso, et. al., "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants," *Law and Human Behavior*, vol. 27 (2003), p. 357.

166. Patricia Allard and Malcolm Young, "Prosecuting Juveniles in Adult Court: Perspectives for Policy-makers and Practitioners," *Journal of Forensic Psychology Practice*, vol. 65, no. 73 (2002).

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These factors all make it very difficult for children to effectively assist their attorneys in preparing for trial and arguing their case. In order to provide adequate counsel to their clients, defense attorneys need as much information as possible about the circumstances surrounding the crime, yet children often have difficulty remembering names and addresses, and sorting out the facts that are most pertinent to their case. As one report indicated, “[Children] frequently filter out information they think is damaging and embellish whatever they think helps, under total misconception as to which is which. . . . The very rules of evidence that work to get at the truth for adults may obscure the truth when children speak in their own defense.”<sup>167</sup>

### **Criminal Judges and Attorneys Often Have Little Experience With Young Offenders**

The adult criminal court process is built around a highly structured, confrontational process that is hard for young minds to understand. Pre-adolescents on trial for serious offenses are reliant on their legal counsel to explain the complexities of the court proceedings and to advise them on how to proceed. The majority of children who are transferred to adult court do not use private counsel and are provided instead with court-appointed attorneys. In many states, these attorneys are not required to have any criminal defense training or expertise and they are paid some of the lowest rates in the field.<sup>168</sup> Even where there are experienced public defenders, they tend to have heavy caseloads that afford them very little time to spend with each client and they often have little time for investigation in a case. First interviews often last only a few minutes and take place in a crowded lock-up area or holding cell.<sup>169</sup> This is particularly problematic when dealing with extremely young clients who take much longer to interview than adults.

A child who is transferred to adult criminal court will likely encounter a judge with little experience in trying pre-adolescents. Expertise in trying adult cases does not necessarily translate to knowledge of the needs of juvenile defendants, and so the judge may not be sensitive to those routine procedures that cause difficulty for the child.

Once a child is convicted, the inexperience of the adult court system in this regard is particularly harmful to the youth. Judges and probation officers may not be familiar with appropriate programs and available resources that could help rehabilitate the child, assuming that the judge even has flexibility in designing an appropriate sentence. But far more likely, the judge will assess punishment without having the opportunity to take the child’s youth into account, due to the prevalence of mandatory sentences.

### **Change in Child’s Appearance as Trial Progresses**

Due to the fact that criminal cases can span many months, or even years, by the time the youth get to the sentencing phase of their trials, their physical appearances may have drastically changed. In the case of Christopher Pittman, for example, he was barely five feet tall at the time he killed his grandparents; however, when his case was finally brought to trial three years later, he stood at over six feet tall with signs of facial hair. It is easy to see how a jury would find it hard to view this as a case involving a very young boy, when a seemingly full-grown individual stood before them in the courtroom. Considering the fact that the youngest offenders have not yet reached puberty, if their cases

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167. Ibid.

168. *The Consequences Aren’t Minor*, p.11.

169. Malcolm Young, “Representing a Child in Adult Criminal Court,” *Criminal Justice Magazine*, vol. 15, Issue 1 (Spring 2000), p.3.

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take even a year to be brought to trial, it is likely that their appearance will have changed significantly, thereby prejudicing them in front of a jury.

### Permanent Loss of Privacy and Privileges

There are significant long-term legal, political and socio-economic repercussions for children tried or convicted in adult criminal court. While juvenile proceedings are normally closed to the public and the records are sealed, adult trials are often open to the general public and the media. Thus, the child's criminal history is a matter of public record, even if the child is ultimately cleared of the charge. In a practical sense, this means that upon release from prison, regardless of the fact that the sentence is complete, children convicted as adults are required to report their felony conviction on every job or housing application they fill out. Depending on which state they live in, they could have their voting rights permanently revoked, be barred from holding certain jobs, be denied access to educational loans and grants, and be denied access to federally funded programs for the rest of their lives.<sup>170</sup> For such lifetime consequences to attach to an 11- or 12-year-old child who committed an offense, however heinous, is distressing. Those consequences seem especially disproportionate when we consider that a significant number of the pre-adolescents transferred to adult court are charged only with property or public order offenses and are likely to be released to the community in a relatively short period of time.<sup>171</sup>

*Young children convicted in adult court can have their voting rights permanently revoked, be barred forever from holding certain jobs, and be denied educational loans for the rest of their lives.*

## B. Locking Children in Adult Jails and Prisons

### Consequences

Once a child is transferred to adult court, many states no longer take his or her age into consideration when deciding where the child is to be housed before trial and after sentencing. This results in a large number of youth locked up for days, months, and even years in adult facilities, often with no separation from the older inmates, while they await trial and/or serve their time. Although federal law requires separation of children and adults in correctional facilities, a loophole in the law does not require its application when those children are certified as adults.<sup>172</sup>

On any given day, a significant number of youth are housed in adult facilities, both in local jails and state prisons. A single-day census of local jails in 2007 recorded a youth population of 7,703.<sup>173</sup> A census of state-run adult prisons that same year found a total of 3,650 state prisoners under the age of 18, with a significant degree of variability across states.<sup>174</sup> A handful of states (e.g. Maine, Kentucky, West Virginia) reported that they had no juveniles within their adult state prisons, while ten states, including Texas, Connecticut, Florida, and New York, reported that they had over 100 juveniles being held in their adult state prisons. Georgia leads the country with over 1,100 juveniles in adult prisons.<sup>175</sup>

170. Allard and Young, p.7.

171. See Figure 6, *supra* p. 31.

172. See discussion in text, *supra* p. 7.

173. Bureau of Justice Statistics, U.S. Department of Justice, *Jail Inmates at Midyear 2008*, by Todd D. Minton and William J. Sabol, NCJ 225709 (Washington, D.C.: 2009), Table 13, p. 9. Online. Available: <http://www.ojp.gov/bjs/pub/pdf/jim08st.pdf>. Accessed: July 11, 2009.

174. Bureau of Justice Statistics, U.S. Department of Justice, *Prison Inmates at Midyear 2008*, Heather West and William J. Sabol, NCJ 225619 (Washington, D.C.: 2009), Table 21, p. 20. Online. Available: <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf>. Accessed: July 11, 2009.

175. *Ibid.* See also Jennifer L. Woolard, Candice Odgers, Lonn Lanza-Kaduce, and Hayley Daggis, "Juveniles within Adult Correctional Settings: Legal Pathways and Developmental Considerations," *International Journal of Forensic Mental Health*, vol. 4, (2005), pp. 1-18.

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This widespread practice of housing children in jails, detention centers, and prisons that are designed for a much older population not only provides them with only limited access to educational services and rehabilitative therapy, it also puts the child at serious risk and has long-term effects on his or her mental and physical well-being. The sections below examine these risks and consequences in more detail. Even public safety is compromised by the practice of housing juveniles in adult jails and prisons.

### *Lack of Special Programming and Treatment*

Adult jails and detention centers are intended as temporary, transitional housing and so there is little focus on specialized programming or therapy for anyone housed in such facilities. In reality, many children stay in detention for unreasonably long periods of time, due to either a backlog in the criminal courts or the complexities of their case. This practice is particularly detrimental for children in need of treatment and medication for behavioral management or mental illness. A recent survey of educational programs in adult jails found that 40% provided no educational services at all, only 11% provided special education classes, and 7% provided vocational training.<sup>176</sup> At one adult prison facility in Illinois, enrollment in GED classes has a waiting list, where preference is given to inmates with shorter sentences.<sup>177</sup> This is particularly damaging to youth who will be in the facility for a long period of time and who will continue to fall behind their peers in the free world.

The situation is equally grim once the child is convicted and sent to adult prison, where the emphasis is often on punishment rather than treatment and rehabilitation. Estimates suggest that more than 40% of incarcerated youth are in need of special education classes, which should be guaranteed by the 14<sup>th</sup> Amendment to the U.S. Constitution,<sup>178</sup> and yet adult facilities do not have the resources to provide this service. Although the majority of prisons have GED programs, there are limited program offerings when it comes to higher education and specialized therapy, as well as long waiting lists. Budget cuts have often led to the elimination of such programs, and staffing tends to be inadequate to meet the demand for services. Such constraints are true regardless of whether the prisoner is an adult or a child. At the very least, one would be hard-pressed to find any specialized treatment and education programs for youths in adult prisons.

### *Inadequate Staff Training and Staffing Levels*

The adult criminal justice system does not require that corrections officers in either jails or prisons receive appropriate training to deal with the juvenile populations housed there. There is no specialized training on the social, emotional, and psychological needs of young children housed in adult facilities, nor are staff taught any adjustments to the physical techniques used to control much larger inmates. Security officers in the adult system are taught to use chemical agents, physical restraints, and forced cell extractions to confront disruptive inmates and maintain control—these methods are not appropriate for young children.<sup>179</sup> Unfortunately, even if corrections officers did receive adequate training to deal with the youngest inmates, staffing ratios suggest that officers would be

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176. Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (November 2007), p.7. See also U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Education and Correctional Populations*, by C.W. Harlow (Washington, D.C.: January 2003).

177. *Categorically Less Culpable*, p. 21.

178. Bureau of Justice Assistance, U.S. Department of Justice, *Juveniles in Adult Prisons and Jails: A National Assessment*, (Washington, D.C.: October 2000), p. 67.

179. *Ibid.*, p.66.



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unable to give these children any special attention. Unlike the juvenile system, where facilities typically operate with 1 staff member for every 8 youth, adult jails and prisons often have as little as 1 corrections officer for every 64 inmates.<sup>180</sup> This disproportionate ratio makes it nearly impossible for children to receive any individualized attention and so they are subject to the same harsh conditions as men and women twice their age and size.

### *Sexual and Physical Assault*

High inmate-to-staff ratios and overcrowding are particularly problematic when it comes to providing protections for incarcerated children in adult facilities. Many youth are routinely physically and sexually abused by older prisoners and often resort to violence themselves in an attempt to assert authority. Young children are commonly targets of physical and sexual abuse due to the fact that they are smaller than their adult counterparts, do not have a social network in place to protect them, and are easily intimidated. This abuse comes at the hands of both adult inmates and prison staff. According to a comprehensive study led by Professor Jeffrey Fagan of Columbia University, children placed in adult prison have been found to be 50 percent more likely to be physically attacked by fellow inmates with a weapon of some sort,<sup>181</sup> and twice as likely as adults to be physically assaulted by staff members.<sup>182</sup> One in ten youth reports an instance of abuse by staff.<sup>183</sup>

The statistics are even more alarming when it comes to sexual abuse, especially considering the fact that many cases go unreported. According to the Prison Rape Elimination Act of 2003, “young first-time offenders are at increased risk of sexual victimization” and youth held in adult facilities are five times as likely to be victims of sexual abuse and rape as youth who are kept in the juvenile system.<sup>184</sup> According to one adult corrections officer who was interviewed for an article in the *New Republic*, young inmates have little hope of avoiding rape: “He’ll get raped within the first twenty-five to forty-eight hours. That’s almost standard.”<sup>185</sup>

A recent report by the Equal Justice Initiative highlights one particularly tragic case involving a juvenile who has been repeatedly raped in adult prison:

One young inmate housed in an adult prison in Alabama told attorneys from the Equal Justice Initiative that he had been raped repeatedly since entering prison at age 15. In order to avoid further attacks he resorted to prostituting himself in exchange for protection from beatings and sexual assault by other inmates. His so-called “protectors” then forced him to have their names tattooed on his body to assert ownership over him. As a result, he has been nicknamed “Brown Sugar” and is the frequent target of beatings and verbal harassment by the guards who ridicule him for the subordinate role he has been forced in to.<sup>186</sup>

*Youth held in adult facilities are five times as likely to be victims of sexual abuse and rape as youth kept in the juvenile system.*

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180. Ibid.

181. Jeffrey Fagan, Martin Forst and T. Scott Vivona. “Youth in Prisons and Training Schools: Perceptions and Consequences of Treatment-Custody Dichotomy.” *Juvenile and Family Court*, no.2 (1989), p.10.

182. Ibid.

183. Ibid.

184. *Prison Rape Elimination Act of 2003*, PL 108-79, 117 Stat. 972 (2003), [hereinafter PREA 2003]

185. S. Lerner. “The Rule of the Cruel,” *The New Republic*, (October 15, 1984), p.17, cited in Press Release: The Risks Juveniles Face When They Are Incarcerated With Adults, Center on Juvenile and Criminal Justice, (1997), p.3. Online. Available: <http://www.cjcj.org/pubs/risks/risks/html>. Accessed: March 29, 2008.

186. EJI, *Cruel and Unusual*, p. 15.

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It would be fair to assume that these horrific patterns of sexual and physical abuse would be even more prevalent when the incarcerated youth are pre-adolescents, given their often diminutive stature.

### *Mental Health Issues and Suicide*

The collateral consequences of sexual violence against youth are startling as well. Victims often receive inadequate treatment for both the physical and emotional effects of the assault, if they receive any treatment at all. Most prison staff do not receive specialized training on the prevention, reporting, or treatment of victims of sexual abuse. Victims are not only at risk for a multitude of sexually transmitted diseases, they are also likely to suffer from severe psychological stress that hinders their ability to successfully integrate into society upon release and increases the likelihood they will continue to commit crimes. According to the Prison Rape Elimination Act of 2003, victims of rape had increased rates of post-traumatic stress disorder, depression and suicide.<sup>187</sup>

*Children are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.*

Fear for their personal safety and emotional trauma caused by these attacks often result in youth intentionally acting out in order to be placed in segregated cells that are reserved for violent inmates. After being abused or threatened by other inmates or staff, the only place they feel safe is in complete isolation. According to Dr. Barry Krisberg, President of the National Council on Crime and Delinquency, youth will go so far as to assault staff members or engage in abnormal behavior, such as smearing feces on themselves or pretending to hear voices, in order to be removed from their cells.<sup>188</sup>

“Administrative segregation,” as these separate cells are commonly called, consists of a tiny cell, less than 80 square feet in area, with no natural light and no contact with the rest of the prison population for as many as 23 hours a day. This level of intense isolation is hard for anyone, let alone a young child, to endure. Even after very short periods of segregated confinement, research has shown that youth develop symptoms of paranoia, anxiety, and depression,<sup>189</sup> which can lead to serious mental disorders and suicidal tendencies. According to the Campaign for Youth Justice, “[y]outh in adult jails are 19 times more likely to commit suicide than are their counterparts in the general population and 36 times more likely to commit suicide in adult jail than in a juvenile detention facility.”<sup>190</sup>

The Centers for Disease Control and Prevention estimates that for every suicide committed by young adults between the ages of 15 and 24, there were over 100 attempts.<sup>191</sup> Unfortunately, most jails are not equipped with adequate screening and assessment tools to identify youth with mental health needs, nor do they have staff on hand to respond. According to a Department of Justice investigation in Baltimore, Maryland, a 15 year-old inmate who was found to be suicidal during his intake screening was placed in custody without access to his medication and did not see a doctor for days.<sup>192</sup>

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187. PREA 2003

188. *Jailing Juveniles*, p.13.

189. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Suicide and Homicide in State Prisons and Local Jails*, by C.J. Mumola (Washington, D.C., August 2005).

190. *Jailing Juveniles*, p.10

191. *Ibid.*

192. *Ibid.*, p.11.

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### Housing Children with Adults

#### *Overview of Relevant Standards*

The American Correctional Association (“ACA”), the leading standard-setting organization for juvenile and adult correctional institutions in the United States, “supports separate housing and special programming for youth under the age of majority who are transferred or sentenced to adult criminal jurisdiction.”<sup>193</sup> The Juvenile Justice Prevention and Delinquency Act (“JJPDA”), which was reauthorized in 2002, also establishes that children should be separated from adults while incarcerated and should not be held in adult detention centers or jails. Similarly, the American Bar Association Task Force on Youth in the Criminal Justice System also recommends that ‘youth who are detained or incarcerated before, during, or pursuant to, proceedings in the criminal justice system should be held in separate detention or correctional facilities from adults.’<sup>194</sup> Unfortunately, adherence to ACA standards is voluntary and the JJPDA does not apply to youth who have been prosecuted in adult court,<sup>195</sup> resulting in thousands of youth housed with adult inmates in prisons and jails all over the United States.

#### *State Policies and Practices*

Most states have statutes governing where transferred youth are to be housed while awaiting trial and post-disposition. These policies also include provisions mandating whether young offenders sent to adult facilities can be housed with the general adult population, or need to be separated by sight and sound.

State practices are all over the map. Some states, such as West Virginia and Kentucky, will place youth in juvenile detention centers and secured juvenile facilities until they reach a designated age, regardless of the severity of the crime.<sup>196</sup> But in ten other states, waived juveniles are required by law to be housed in adult jails, although the statutes typically do not specify where they are housed after sentencing.<sup>197</sup> After conviction, children as young as 13 or 14 who are tried as adults in Oklahoma<sup>198</sup> and Utah respectively, are housed in adult prison, with no special protections for them in place.<sup>199</sup>

In Texas, any child certified as an adult will be housed in an adult jail while awaiting trial, unless local officials work out an unofficial arrangement to hold a particular child in a juvenile facility. Once the youth is convicted, however, he or she is always sent to adult prison to serve out the sentence. There is a designated facility in the adult prison system designed to hold youthful convicted offenders, however this facility only holds roughly

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193. American Correctional Association, *Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction*, Delegate Assembly (Congress of Correction: Nashville, Tennessee, August 21, 1996).

194. American Bar Association, Task Force on Youth in the Criminal Justice System, *Youth in the Criminal Justice System: Guidelines for Policy-makers and Practitioners* (Washington, D.C.: 2001).

195. Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) p. 67.

196. *Jailing Juveniles*, p. 24.

197. Alabama, Alaska, Connecticut, Florida, Hawaii, Louisiana, Maryland, New Hampshire, New Mexico and Oklahoma have laws mandating that waived juveniles are to be housed in adult jails. *Jailing Juveniles*, p. 24.

198. *Juveniles in Adult Prisons and Jails*, p. 111.

199. *Ibid*, p. 118.

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two-thirds of the juveniles in the prison system.<sup>200</sup> Some youth are not even eligible for placement there due to conviction for a low-level (state jail) felony offense, instances of violence against staff members, or a need for specialized treatment not available in the youthful offender facility. Juveniles not placed in this specialized facility will be housed either in general population with adult prisoners or in administrative segregation, where they are locked up in isolation 23 hours per day.

*A few states have begun to promote reforms to ensure that children sentenced as adults will be kept in specialized juvenile facilities.*

A report by the Bureau of Justice Assistance indicates that 17 states and the District of Columbia have separate housing in prison for young offenders, but that many of these separate facilities in large states are full to capacity. Consequently, many children end up being sent to facilities where they are housed with adults.<sup>201</sup> Conversely, in small counties that lack resources and physical space, there is often no separate jail or detention center for youth. In these states, all persons awaiting trial who are considered a threat to society or themselves are housed together.

Additionally, there are states that use a combination of these methods and house youth in juvenile detention pre-trial, but send them directly to adult facilities after sentencing. In Colorado, for example, youth tried as adults and therefore not eligible for the Youthful Offender program are typically housed in juvenile detention centers at the county level before trial.<sup>202</sup> Once sentenced, these children are sent to the adult prison system, with no sight and sound separation from the general adult prisoner population.<sup>203</sup>

Although most states still have a long way to go in ensuring that pre-adolescent offenders charged as adults would be kept in specialized juvenile facilities until they reach the age of adulthood, a few jurisdictions have started to promote much-needed reforms in this area. Officials in California, for example, recently entered into a Memorandum of Understanding to ban the practice of sending young children to adult prison.<sup>204</sup> Instead, transferred youth are sent to a juvenile prison facility until they turn 18. Also, Virginia has given adult court judges the authority to order youth who were convicted as adults to serve their time in juvenile facilities.<sup>205</sup>

Clearly, these policies regarding the housing of children tried and sentenced as adults are confusing; they vary from county to county and from state to state and make it difficult to estimate the sheer numbers of youth who are affected by this process nationwide. A

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200. Terry Schuster, "Managing the Special Needs of TDCJ's Youthful Offenders," pp. 13-14, unpublished paper dated May 27, 2008 (on file with the author), citing the Texas Department of Criminal Justice's Executive Services' response to an open records request dated April 1, 2008.

201. *Juveniles in Adult Prisons and Jails*, p.36.

202. Colorado Department of Corrections Office of Planning and Analysis, *Youthful Offender System Annual Report: Fiscal Years July 2005-June 2007*, (August 2007). Online. Available: <http://www.doc.state.co.us/Statistics/pdfs/OPARReports/YOSReports/OPYOSRPT07.pdf>. Accessed: April 18, 2008.

203. Phone interview by Amanda Barstow with Jim Moore, Classification Officer, Offender Services, Colorado Department of Corrections, May 6, 2008. Mr. Moore noted that the Colorado DOC is currently housing two offenders who were adjudicated before their 18<sup>th</sup> birthdays. One of them was committed to the DOC at the age of 14.

204. Phone interview by Amanda Barstow with Bob O'Neil, Community and Court Liaison, California Department of Corrections and Rehabilitation Division of Juvenile Justice, May 6, 2008.

205. *The Consequences Aren't Minor*, p. 9.

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county-by-county assessment of juvenile detention practices has yet to be conducted and state statutes are often hard to decipher, but first-person accounts and national studies are hard to ignore. Reports published by the Justice Policy Institute, the Campaign for Youth Justice, and a Task Force appointed by the Director of the Centers for Disease Control, to name a few, address the negative impacts of housing youth in adult facilities and the prevalence of this practice. The Council of Juvenile Correctional Administrators, an association representing the heads of juvenile corrections agencies in all 50 states, also opposes the practice of placing youth tried as adults in adult penal facilities where they cannot access appropriate treatment services.<sup>206</sup> Even at the federal level, the Federal Advisory Committee on Juvenile Justice has recommended to the OJJDP that each state house transferred youth in juvenile facilities until the maximum age allowed.<sup>207</sup> Virtually every group that has researched and written on this issue counsels strongly against the practice of holding juveniles in adult facilities.

### C. The Failure of the Adult System to Address Public Safety Needs

Children housed in both adult detention facilities and adult prisons receive few of the protections that they would have been afforded if they were housed in the juvenile system. Prison and jail staff and adult facilities in general are not adequately equipped to handle these young populations. The children have limited access to educational programs, there is little focus on specialized therapy and treatment, and there are not enough staff members in place to protect the children from physical and sexual abuse.

Instead of rehabilitating youth and releasing productive members of society back into the community, the adult system produces youth that are more likely to re-offend and pose a threat to society. Research indicates that “juveniles prosecuted as adults reoffend more quickly and at rates equal to or higher than comparable youths retained in the juvenile system.”<sup>208</sup>

A report published by the Centers for Disease Control and Prevention and conducted by the Task Force on Community Preventive Services (an independent group of professionals appointed by the CDC’s Director) [“CDC Task Force Report”] extensively reviewed all published scientific evidence spanning multiple states and various cohorts and control populations in assessing the impact of transfer on violence reduction. The Task Force not only found that the transfer of youth had no deterrent effect on youth, it also concluded that: “transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth.”<sup>209</sup>

*“[J]juveniles prosecuted as adults reoffend more quickly and at rates equal to or higher than comparable youths retained in the juvenile system.”  
—CDC Task Force Report*

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206. Council of Juvenile Correctional Administrators, *Position Paper on Waiver and Transfer of Youths to Adult Systems*. Online. Available: <http://cjca.net/photos/content/documents/Waiver.pdf>. Accessed: April 7, 2008.
  207. U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Federal Advisory Committee on Juvenile Justice. *2005 Annual Recommendations Report to the OJJDP Administrator and Responses* (Washington, D.C., April 2006), p. 31. Online. Available: <http://www.facjj.org/pdf/2005annualrecfacjj.pdf>. Accessed: November 25, 2008.
  208. Children’s Action Alliance, *Prosecuting Juveniles in the Adult Criminal Justice System: Key Issues and Recommendations for Arizona* (June 2003), p. 12.
  209. Angela McGowan, et al. “Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services,” *American Journal of Preventive Medicine* (2007), pp. S7-S21, Online. Available: <http://www.thecommunityguide.org/violence/mcgowanarticle4.pdf>. Accessed: July 28, 2008 [hereinafter CDC, *Effects on Violence*].

## From TIME OUT to HARD TIME

*According to a task force appointed by the Director of the Centers for Disease Control and Prevention, "transferring juveniles to the adult system is counter-productive as a strategy for preventing or reducing violence."*

One study cited in the CDC Task Force Report compared transferred juveniles in New York with retained juveniles in New Jersey and found that the transferred youth, whose sentences did not include time in prison, were 39% more likely to be rearrested for violent offenses than those that stayed in the juvenile system. Even more disturbing is the finding that transferred juveniles who served at least a year in prison, had a 100% greater rate of violent recidivism.<sup>210</sup> Similarly, a Pennsylvania study illustrated that transferred youths were 77% more likely to be rearrested compared to those that stayed in the juvenile justice system.<sup>211</sup> Studies in New York and New Jersey had similar findings.<sup>212</sup>

The report ultimately determined that "transferring juveniles to the adult system is counterproductive as a strategy for preventing or reducing violence."<sup>213</sup> The negative conclusions of the research were so stark and incontrovertible that the Task Force took the highly unusual step of recommending the repeal of laws or policies facilitating the transfer of juveniles from the juvenile to the adult judicial system.<sup>214</sup> The Task Force also recommended banning the placement of all children under the age of 18 in adult jails, regardless of their transfer to adult court.<sup>215</sup>

For youth who have been victims of brutal physical and sexual assault, especially those who do not receive adequate therapy, the risk of committing serious, violent offenses also increases.<sup>216</sup> The rise in recidivism and the commission of violent crimes specifically is likely due to anti-social and criminal behavior learned while in the adult system. In these adult institutional settings, youth are "more likely to learn social rules and norms that legitimate[] domination, exploitation and retaliation. . . . In addition, youth in prison [are] exposed to an inmate subculture that [teaches] criminal motivations as well as techniques of committing crime and avoiding detection . . . what they learned in prison provide[s] a destructive counterbalance to their positive intentions."<sup>217</sup> In other words, by housing children in adult facilities, the system is not only failing them, it is failing the public as well.

The evidence shows, then, that public safety is compromised by the transfer and sentencing practices discussed in this report. Without a public safety rationale for the policies allowing the prosecution and sentencing of preadolescent children in the adult criminal court system, the policies lack justification and credibility and cannot withstand scrutiny. Policy-makers should take account of the harmful impact that transfer has on both the youth who end up in the adult system and the communities to which they will return, and re-evaluate these laws accordingly.

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210. Ibid., p. S7. See also Michael Tonry, "Treating Juveniles as Adult Criminals: An Iatrogenic Violence Prevention Strategy If Ever There Was One," *American Journal of Preventive Medicine* (2007), pp. S3-S4.

211. Ibid., p. S14.

212. Building Blocks for Youth, "Children in Adult Jails." 210. CDC, *Effects on Violence*, p. S15.

214. Ibid.

215. Ibid.

216. PREA 2003, p. 3.

217. Donna Bishop and Charles Frazier, "Consequences of Transfer," in *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court*, eds. Jeffrey Fagan and Franklin E. Zimring (Chicago: University of Chicago Press, 2000), p.263.

## Problems Associated with Trying Young Children as Adults

### D. Summary

This chapter has highlighted the various problems that arise when pre-adolescent children are transferred to the adult criminal court system. The procedures in adult court are ill-designed for children of this age, and put a child defendant at serious disadvantage compared to an adult. Even the courtroom itself is a poor physical fit for a child. More disturbing still is the fact that many children certified as adults are forced into housing with adult prisoners, in prison and jail facilities where they are at significant risk of physical and sexual assault. Moreover, these institutions simply cannot meet these children's needs for specialized programming. As if these problems alone were not sufficient to signal the need for change, the research also shows that these practices run counter to our goal of enhancing public safety. Children transferred to adult court, sentenced as adults, and housed in adult facilities come out worse than when they went in, with higher rates of violence and recidivism.

Fortunately, as the next chapter illustrates, there is a very plausible alternative to treating pre-adolescent child offenders as adults—they can instead be handled effectively through the juvenile system. In contrast with the failures evidenced by the adult criminal court system, “juvenile courts are not only capable of handling cases involving violent crimes committed by young juveniles, but they have done so with great success.”<sup>218</sup> We know from the research and experience that young children, no matter how violent, are amenable to treatment, and they deserve a chance to change.

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218. Judges' Brief, *supra* note 7, p. 17.





## Chapter 7

# The Juvenile Justice System Works

### A. Why the Juvenile Justice System Works

Historically, the juvenile justice system has had more success in dealing with violent young offenders than the adult criminal justice system and is well-equipped to prosecute even the most serious crimes. Juvenile court judges are trained specifically to understand the complexities of cases involving children and to use their expertise to decide what will be in the best interests of both the child and the general public.<sup>219</sup> They can assess culpability and amenability to rehabilitation, while their counterparts in the adult system do not have experience dealing with young children and are focused on the punitive goals of adult corrections. Research has shown that juveniles who are prosecuted in the adult system are more likely to re-offend than those who stay in the juvenile system.<sup>220</sup> In fact, the juvenile justice system is not only capable of handling the most serious offenses, it has proven successful at holding youth accountable for their actions, while helping them become productive members of society.

#### Accountability

The juvenile justice system has a long history of finding the balance between rehabilitating youth and using punitive measures to hold them accountable for their actions. There is constant tension between those in the general public who want to see justice for victims and their families and who feel public safety would be compromised if young criminals were not locked up, and advocates who see all young offenders as victims themselves, in need of help. Fortunately, most secure juvenile facilities in the country attempt to reconcile these disparate viewpoints. The very nature of placing children under constant surveillance with regimented schedules and limited contact with their families is clearly punishment. However, unlike in the adult system, there is also a fundamental understanding that youth are amenable to treatment and have the capacity to be reformed individuals. They have the capacity to take responsibility for their actions. It is therefore in the best interests of both the child and the general public to provide them with as much specialized programming as possible.

#### Rehabilitation

##### *Access to Education and Vocational Programs*

Depending on the nature of the crime committed and the medical assessment determined during intake to a juvenile facility, each youth is prescribed a specialized program including mandatory elements like education, vocational classes (if available), recreation time, and group and individualized therapy (i.e. sex offender, chemical dependency, mental health and serious violent offender programs). The National Youth Employment Coalition (NYEC) recently completed a study in collaboration with the Youth Development and Research Fund and the Justice Policy Institute, and found that employment and career-focused programs prepare these youth for successful integration back into the workforce as long as they have participated in programs that further education or long-term career opportunities.<sup>221</sup> Academic and employment-based programs offered

*The juvenile justice system is not only capable of handling the most serious offenses, it has proven successful at holding youth accountable for their actions, while helping them become productive members of society.*

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219. See Correiro, pp. 15-16, 49-52; Judges Brief, *supra* note 7, p. 14.

220. CDC, *Effects on Violence*, *supra* note 209.

221. National Youth Employment Coalition, et. al., *Barriers and Promising Approaches to Workforce and Youth Development*, (Annie E. Casey Foundation, Baltimore, Maryland, 2002). Online. Available: <http://www.aecf.org/upload/PublicationFiles/barriers%20and%20promising.pdf>. Accessed: July 11, 2009.

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in juvenile facilities are an integral part of the rehabilitation process. Classroom time gives all youth an opportunity to keep up with their peers, earn a GED or even credit toward college. When such classroom work is coupled with training in vocational skills such as auto-body repair and welding and therapy, there is an increased likelihood that a youth will find legitimate employment once out of detention.

### *Access to Treatment Programs*

The majority of youth who end up in the juvenile system suffer from some form of mental illness, and/or were victims of physical and sexual abuse. Without treatment, many of these children will have little hope of becoming productive members of society. The provision of specialized treatment is an integral part of the rehabilitation process and represents a fundamental difference between juvenile and adult secure facilities. In contrast to the juvenile facilities, adult facilities often do not have specialized or sufficient treatment programs in place, if only because of budget cuts, and tend to be more focused on punishment as opposed to reform and rehabilitation.

*Returning youth to the jurisdiction of the juvenile courts will result in a "\$3 savings benefit for the correctional and judicial systems for every \$1 spent."*

### *Balanced and Restorative Justice*

In addition to offering intensive therapy and educational programming, many facilities are incorporating restorative justice programs into their curriculum. The Balanced and Restorative Justice ("BARJ") principle derived from the belief that crimes harm the community and the justice system is responsible for repairing that harm. It is built around the fundamental issues of "public safety, juvenile accountability and juvenile competency development."<sup>222</sup> Although there is no universal BARJ system, most facilities that practice BARJ principles provide opportunities for youth to have mediated meetings with their victims, and to provide restitution to the victims and their family through monetary payments. Some programs also allow for community service projects, which the juvenile can complete as a condition of their parole. In Philadelphia, for example, there is a crime repair crew that restores damage to victims' property. Instead of receiving monetary compensation for the hours of service they perform, a comparable sum is given to victims and their families.<sup>223</sup> When coupled with such parole programs, BARJ principles allow for youth to take responsibility for their actions, give back to the community, and continue the rehabilitation process even after they have been released.

### **Savings for Taxpayers**

The long-term benefits of keeping children in the juvenile system far outweigh the short-term costs, according to juvenile justice advocates and economists alike. According to a senior researcher and economist at the Urban Institute, returning youth to the jurisdiction of the juvenile courts will result in a "\$3 savings benefit for the correctional and judicial systems for every \$1 spent."<sup>224</sup>

Although no comprehensive study has been conducted to calculate the exact monetary effect of one more employed individual in a community and one fewer child behind bars, it remains clear that the juvenile justice system is much more successful at rehabilitating youth than the adult system. The juvenile justice system has the ability to release mature, law-abiding citizens back into the community. Effective treatment programs for serious

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222. H. Ted Rubin, *Return Them to Juvenile Court*, Policy Brief: Adulthood Series Volume 1 (Campaign for Youth Justice), p.22.

223. *Ibid.*, p.23.

224. John Roman, *Assessing The Economic Consequences of Juvenile Versus Adult Justice* (Washington, D.C.: The Urban Institute, July 2005), p.39.

## The Juvenile Justice System Works

and violent offenders have resulted in a 40% reduction in recidivism rates,<sup>225</sup> which in turn means fewer tax dollars spent sending those youth back into the system. Incarceration costs vary among different facilities and states, with the average cost of incarcerating a youth for one year in a juvenile facility at \$43,000, or approximately \$117 per day.<sup>226</sup> This expense is due to the extensive programming involved in rehabilitating youth, which will lower costs in the long-run. Educational programs are thought to lower prison costs due to the fact that youth in the classroom environment require less supervision than youth not participating in structured activities. Recreation programs are also thought to have an impact on expenses because they keep youth healthy, resulting in reduced medical costs both during incarceration and after they are released.

While the average cost of housing an adult prisoner is significantly lower than this juvenile per diem, that fact is misleading. Not only does the adult per diem not include the provision of specialized rehabilitation services, but the cost per day of housing a young child in an adult prison or jail is noticeably greater than this juvenile expense. Many juveniles sent to the adult system will be placed in high-security settings for their own protection, at exceptional cost. Rhode Island learned this lesson the hard way. After passing a law lowering the age of juvenile court jurisdiction and thereby requiring 17-year-old offenders to be sent to adult prison, the increased prison costs were found to be intolerably high. Prison officials estimated the cost of housing these 17-year-olds at more than \$100,000 per year.<sup>227</sup> Unwilling to bear this increased financial burden, the Rhode Island legislature quickly repealed the new law, leaving these juveniles to be housed in the less expensive juvenile system.<sup>228</sup>

### B. Juvenile Programs That Work

Models for successful rehabilitation of chronic and violent juvenile offenders can be found all over the country. Juvenile agencies offering such programs recognize that youth who commit particularly serious crimes need a combination of discipline and intensive personalized treatment in order to be held accountable for their actions and become productive, law-abiding members of society. These programs, a few which are profiled below, provide youth with academic and vocational skills, intensive group and individual therapy for behavioral problems and mental health disorders, and around the clock supervision. This level of care has proved to be hugely effective in rehabilitating youth and in turn, protecting society. Recognizing the success of these programs, juvenile justice professionals around the country have begun replicating these programs in their home states. Such programs offer a promising, productive alternative to sending violent juveniles off to the adult system, especially for pre-adolescents who are most receptive to rehabilitative efforts.

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225. M.W. Lipsey and D.B. Wilson, *Effective Intervention for Serious Juvenile Offenders; A Synthesis of Research, Serious and Violent Offenders: Risk Factors for Successful Interventions* (Loeber & Farrington, eds, 1998), p. 338.

226. National Legal News, *Juvenile Justice FAQs*. Online. Available: [http://www.juvenilejustice-fyi.com/juvenile\\_justice\\_faqs.html](http://www.juvenilejustice-fyi.com/juvenile_justice_faqs.html). Accessed: March 1, 2008.

227. Steve Peoples, "Teens' days at ACI may soon be over," *Providence Journal*, October 27, 2007. Online. Available: [http://www.projo.com/news/content/17-year-olds\\_reversed\\_10-27-07\\_6F7L00C\\_v8.3229328.html](http://www.projo.com/news/content/17-year-olds_reversed_10-27-07_6F7L00C_v8.3229328.html). Accessed: May 2, 2008.

228. Katie Zezima, "Tough Young-Offender Law Is Set Back in Rhode Island," *The New York Times*, November 1, 2007. Online. Available: <http://www.nytimes.com/2007/11/01/us/01juvenile.html>. Accessed: May 2, 2008.

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### Capital Offender Program, Giddings State School, Texas

The Giddings State School is a maximum security facility in Giddings, Texas, run by the statewide juvenile justice agency, the Texas Youth Commission. Giddings houses many violent juvenile offenders and is well-known for its Capital and Serious Violent Offender Treatment Program (“COP”). COP was first implemented in 1988 as a group treatment program for juveniles who committed homicide. In order to qualify for the program today, youth must have been at Giddings for at least a year and have at least six months remaining on their sentences; they must be committed for capital murder, murder, or voluntary manslaughter; they must be at least sixteen years old; and they must not be diagnosed with any mental disorders. The program takes up to five months to complete and runs on a strict 16 hour-a-day schedule that includes correctional therapy, education, vocational and discipline training. Only eight or nine youth are enrolled in the program at a time, with all students living together in a residential dorm.

Therapy sessions are twice a week and students “are required to role-play critical events in their upbringing which had a significant impact on their development and juvenile delinquency. The purpose is not to excuse the offending behavior, but rather to promote individual responsibility for distorted thinking patterns, which they used to excuse their behavior.”<sup>229</sup> As part of the process they also re-enact the crimes they committed from the perspective of the perpetrator and then the victim. This intense exercise not only promotes a sense of responsibility for the crime committed, it also fosters a sense of empathy for the victim. In addition, youth have shown decreased levels of hostility and aggression.

According to Stan DeGerolami, the superintendent of the school:

Kids do hard time here. They have to face themselves. They have to deal with the events that put them here. They have to examine what they did and take responsibility for it. Kids who go through that do not go out and reoffend. That needs to be screamed out loud: they do not reoffend. The bottom line is public safety, and I can tell you, I'd much rather have a kid who has been through the programs at Giddings move in next to me than I would a kid who was just released from prison.<sup>230</sup>

The success of the Giddings program is widely known in the juvenile justice community. Touted as a model program by the Office of Juvenile Justice Prevention and Delinquency, a recent study of COP showed an overall 55% reduction in re-incarceration for any offense and 43% reduction in re-incarceration for felonies.<sup>231</sup> This pattern remains statistically significant three years following release, with youth who complete the program reoffending at a rate of 15.2 percent, compared with 35.6 percent for young capital offenders not receiving specialized treatment services.<sup>232</sup>

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229. Texas Youth Commission, *Giddings State School: Specialized Treatment Programs*. Online. Available: <http://www.tyc.state.tx.us/programs/giddings/treatment.html>. Accessed: June 29, 2009.

230. John Hubner, *Last Chance in Texas: The Redemption of Criminal Youth* (Random House, 2005), p. xxiii.

231. *Ibid.*, p. 263.

232. Stone, Sandra S., “Changing Nature of Juvenile Offenders,” paper presented at a conference on “Juvenile Justice at the Crossroads” at the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C., December 1996. Online. Available: <http://ojjdp.ncjrs.org/conference/track1.html><http://ojjdp.ncjrs.org/conference/track1.html>. Accessed: March 8, 2008.

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### Florida Environmental Institute, Florida

The Florida Environmental Institute (FEI) is a small ranch based in the Everglades that serves as a correctional facility for chronic and violent juvenile offenders. Instead of locked cells and a punitive, boot camp style regimen, the facility uses intensive behavior management and ongoing follow-up to rehabilitate violent youth. Over the past four years, this program has enabled 85 percent of participants to avoid re-arrest, compared to a 58 percent success rate in Florida's more conventional juvenile prisons.<sup>233</sup> The youth work with national park staff to maintain and restore parts of the wildlife refuge, perform unpaid community service and participate in an educational program emphasizing environmental preservation. Youth receive compensation for working in the refuge, however restitution amounts (or contributions to a victims fund) are deducted from their paychecks. Victim panels help youth become more aware of victims' needs and perspectives.<sup>234</sup> These program efforts continue for six months after youth return home. Youth have at least four contacts per week with an FEI community coordinator, receive frequent calls from their case managers, and must adhere to a strict curfew. FEI coordinators also take an active role in assisting with admission to school or employment opportunities,<sup>235</sup> again addressing a public safety goal.

### Missouri Department of Youth Services

The juvenile corrections system in Missouri in recent years has become a model for juvenile justice reforms all over the country. All of Missouri's juvenile correctional facilities house no more than 85 youth, with the majority containing 33 beds or fewer. This is in stark contrast to the rest of the country where 62% of youthful offenders are housed in facilities with more than 110 residents.<sup>236</sup> Created with the understanding that children need both constant supervision and support, these facilities provide treatment 24 hours-a-day. All activities the youth engage in, not just their therapy sessions, are overseen by at least two skilled staff members who reinforce the importance of individual responsibility and discipline. The majority of youth held in these facilities were charged with felonies, and even the most serious offenders are housed in open dormitories with staff members who are not equipped with handcuffs or restraints.

At Riverbend, a high security facility for serious and violent offenders in St. Joseph, Missouri, residents are organized into groups of ten or twelve based on their treatment needs, and stay with this same cohort for group therapy and academic classes. The youth, who call staff members by their first names, attend six classes every weekday, all year round and break into smaller groups for GED instruction or special projects. In addition, they attend ninety-minute group sessions five times per week and when possible, have family members visit for family therapy sessions.

This emphasis on treatment, peer-support, and education has proven hugely successful, both for the well-being of the youth involved and the community as a whole. Although

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233. "New Study Highlights Juvenile Justice Initiatives that Reduce Crime and Save Money," American Youth Policy Forum, June 6, 2001 (press release).

234. George Bazemore, "Charting the Future of the Juvenile Justice System: Reinventing Mission and Management," *Spectrum: The Journal of State Government*, Vol. 68 No.2 (1995) pp.51-66.

235. Office of Juvenile Justice and Delinquency Prevention, *Comparison of Six Promising After-care Programs*. Online. Available: <http://www.ncjrs.gov/html/ojjdp/201800/page5.html>. Accessed: March 18, 2008.

236. Richard A. Mendel, *Less Cost, More Safety: Guiding Lights for Reform in Juvenile Justice*, (Washington, D.C.: American Youth Policy Forum, June 6, 2001), p. 9.

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long-term recidivism rates have not been tracked, in 2001 and 2002, only 11 percent of youth released from the custody of the Division of Youth Services (“DYS”) were rearrested or returned to juvenile custody during their first year home.<sup>237</sup> This is particularly impressive considering the fact Missouri spends an average of \$94/day for each young person under the jurisdiction of DYS (approximately \$61 million/year), while comparable states average \$140/day per youth.<sup>238</sup>

### **Mendota Juvenile Treatment Center, Wisconsin**

The Wisconsin Department of Health and Family Services Mendota Juvenile Treatment Center (“MJTC”) is a unique, secured residential facility that provides mental health treatment to serious and violent juveniles. It was established by the Wisconsin Legislature in 1995 in order to provide housing for youth who were too disturbed or unruly to be placed in traditional correctional centers. Located on the grounds of a state mental health center, MJTC is able to combine the resources of a private psychiatric facility, with the security and confinement of a juvenile prison.

*Even the most violent youth, given the appropriate treatment, is capable of rehabilitation.*

The main goal of the program is to encourage positive social development by emphasizing treatment in an environment that is nurturing as opposed to antagonistic. The majority of MJTC’s staff members are experienced mental health professionals, ranging from psychologists to psychiatric social workers and nurses. The residents are housed in single bedrooms within 15 person units, and undergo intensive individualized therapy based on their mental health issues. If they act defiant or violent, they receive additional therapy and security is stepped up.<sup>239</sup>

The effectiveness of the program was recently evaluated and compared to two groups of serious and violent offenders housed in traditional juvenile facilities in Wisconsin. All participants were tracked for at least two years after release and the children who completed treatment at MJTC were about half as likely to commit new violent offenses, as the control groups. The authors of the study concluded that their findings “provide a challenge to the notion that this population is untreatable.”<sup>240</sup> On the contrary, it seems that even the most violent youth, given the appropriate treatment, is capable of rehabilitation.

## **C. Success Stories**

### **Throwaway Children or Late Bloomers?**

The juvenile justice system can be credited with turning around the lives of many individuals whose early brushes with the law belied their later contributions to society. Among the most prominent are:<sup>241</sup>

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237. Ibid., p.12.

238. Ibid., p. 13.

239. M.F. Caldwell and Greg J. Van Rybroek, “Reducing Violence in Serious Juvenile Offenders Using Intensive Treatment”, *International Journal of Psychiatry and Law*, vol. 28, no. 6 (November 2005), pp. 622-36.

240. Ibid., p. 633.

241. Office of Juvenile Justice and Delinquency Prevention, *Second Chances: Giving Kids A Chance To Make A Better Choice*. Online. Available: [http://www.ncjrs.gov/html/ojj-dp/2000\\_5\\_1/contents.html](http://www.ncjrs.gov/html/ojj-dp/2000_5_1/contents.html). Accessed: March 13, 2008.

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- Olympic Gold Medalist Bob Beamon
- Former U.S. Senator Alan Simpson
- DC Superior Court Judge Reggie Walton
- San Francisco District Attorney Terence Hallinan
- Singer Ella Fitzgerald
- Author Claude Brown

Imagine if these young offenders had been transferred to the adult criminal justice system and had been sentenced to hard time for their offenses. But one need not become a celebrity to be a successful product of the juvenile justice system. The individuals profiled below are all shining examples of the rehabilitative potential of juvenile justice programming.

### Kareem Watts

Kareem Watts was only 13 years-old when he stabbed a neighbor to death in Morrisville, Pennsylvania in 2000. The youngest person in Bucks County, PA to be charged with first-degree murder, Kareem faced automatic transfer to the adult criminal justice system under Pennsylvania law. His attorney requested a reverse transfer to have Kareem's case handled through the juvenile system. Judge Kenneth Biehn, a prominent adult criminal court judge with many years' experience presiding over both adult and juvenile cases, heard the argument and considered the confinement and treatment options that the defendant would receive if sentenced as an adult or a juvenile. Judge Biehn decided to keep Kareem in the juvenile system where he would be housed until his 21<sup>st</sup> birthday and would receive specialized treatment for mental health issues, anger management and substance abuse. Judge Biehn took both the troubled childhood of Kareem and his young age into consideration when choosing an appropriate sentence and acknowledged that Kareem was not a "finished product" and the juvenile system would provide "a realistic opportunity for rehabilitation."<sup>242</sup>

Judge Biehn followed up with Kareem every six to nine months to check on his progress, and authorized his release in June of 2007. Today, Kareem is a counselor assistant at the juvenile facility that housed him for seven years, has earned his GED, and was recently appointed by the governor's office to sit on a juvenile justice committee for the state of Pennsylvania.<sup>243</sup>

### Paul Winauski

Paul Winauski of Barre, Vermont was 14 when he was charged in a brutal group assault on a homeless man that left the victim almost dead. Growing up in a home where his mother had recently died of cancer and his father was heavily into drug use, Paul's life quickly spiraled downwards into patterns of drinking and drugging. Though Paul could have faced a lengthy period of incarceration for his crime, a social worker assigned to the case arranged for the Judge to send Paul to a group home where he received counseling and treatment. Fortunately, the Judge had the discretion to handle the case in this way, as the program turned out to be a perfect fit for Paul. Paul emerged from the program sober and prepared to start anew, and his social worker remained a powerful influence in his life.<sup>244</sup>

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242. "Judge's Choice: Prison or Second Chance for Teen Killer?" *USA Today*, *supra* note 153.

243. *Ibid.*

244. Paul Winauski's story was profiled in a newscast on WPTZ-TV in Burlington, Vermont (March 28, 2008). Online. Available: [http://www.youtube.com/watch?v=ls2xXi\\_RORw&feature=related](http://www.youtube.com/watch?v=ls2xXi_RORw&feature=related). Accessed: June 29, 2009.

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Today, Paul is in his late twenties, holds a responsible management position, and is married. He says there is “no way” he would regress to the lifestyle he led previously.<sup>245</sup>

### Gina Grant

At age 14, Gina Grant brutally murdered her alcoholic mother by beating her to death with a lead candlestick. The tragic incident took place in Lexington, South Carolina in 1990. Gina’s father had died when she was 11. Evidence suggested that Gina’s mother had been abusive towards her, though prosecutors described the murder as a result of a disagreement over Gina’s boyfriend. Under South Carolina law, Gina could have been transferred to adult court and could have faced a life sentence. Family Court Judge Marc Westbrook kept her in juvenile court, however, and allowed Gina to plead guilty to a charge of voluntary manslaughter. State sentencing guidelines called for her to serve a minimum of 18 months in juvenile prison, but after Gina had served 6 months, Judge Westbrook took the unusual step of overruling a state parole board decision to retain her longer. The Judge released Gina to the custody of an aunt and uncle in Massachusetts and placed her in a special probation program there.<sup>246</sup>

During her time living in Massachusetts, Gina excelled in her studies at a top high school, co-captained her school’s tennis team, and tutored underprivileged children. She was offered early admission to Harvard University and several other top schools, but her admission was rescinded when school officials learned about her past crime through an anonymous source.<sup>247</sup> Harvard’s decision generated extensive national publicity. Ultimately, Tufts University offered Gina a spot in its entering class and she graduated from there in 1999. There is no indication that Gina has gone on to lead anything but a law-abiding life.

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245. Ibid.

246. Fox Butterfield, “After Rejection by Harvard, Questions in Mother’s Death,” *The New York Times* (April 25, 1995). Online. Available: <http://www.nytimes.com/1995/04/25/us/after-rejection-by-harvard-questions-in-mother-s-death.html>. Accessed: June 29, 2009.

247. Fox Butterfield, “Woman Who Killed Mother Denied Harvard Admission,” *The New York Times* (April 8, 1995). Online. Available: <http://www.nytimes.com/1995/04/08/us/woman-who-killed-mother-denied-harvard-admission.html?pagewanted=all>. Accessed: June 29, 2009.



## Chapter 8

# Considering the Global Context: An International Consensus Against Treating Pre-Adolescent Children as Adults

Treating children as adults in the criminal justice system is clearly a problem that must be addressed in each of the 50 states, but even more so, it is a problem of international proportion. In the eyes of the world, the United States stands nearly alone in its harsh treatment of young children. Much as there was a global consensus against sentencing juveniles to death highlighted during the Supreme Court's deliberations in *Roper v. Simmons* case, there currently exists a global consensus against trying and sentencing children as adults.<sup>248</sup> Punishing young children violates international norms of human rights and juvenile justice, and yet the United States continues to lead the world in both policies and practices aimed at treating young children as adults.

The way the United States punishes pre-adolescents who are waived to the adult criminal justice system is of special concern in light of the basic principles of international human rights law. From the U.N. Convention on the Rights of the Child to the International Covenant on Civil and Political Rights, the United States has disregarded international laws and norms providing that children should be treated differently than adults. A number of international laws offer support for increasing the minimum age of criminal responsibility and argue against long, mandatory minimum sentences for children.

Nearly all nations in the world follow both the spirit and letter of these international instruments. As a result, most countries—including those Western nations most similar to the United States—repudiate the practice of trying young children as adults and giving them long sentences. Our research has yielded no findings of any young children elsewhere in the world who are imprisoned for as long as some children in the United States. Moreover, the international community is seeing a trend whereby juvenile punishments are being rolled back, at the same time that certain states in America are increasing the possible array of punishments for children. Ultimately, while international norms do not control the criminal justice policy of the United States, they do signal the extent to which the U.S. is out of step with the global consensus that children should be treated as children.

### A. Basic Principles of International Human Rights Law

There are a number of international instruments that aim to protect the rights of young children in the criminal justice system. Together, these instruments establish three important requirements: (1) a country must establish a separate juvenile system for all children under the age of 18; (2) judges must have discretion in determining sentences for children, thus mandatory minimums should not be used; and (3) judges should choose the shortest possible sentences for children, with a focus on rehabilitation. Although these standards are considered important international guidelines for protecting the rights of children, the United States fails to follow these principles.

The United Nations' Convention on the Rights of the Child (CRC) is a set of international guidelines created for the purpose of protecting children who are in conflict with the law and ensuring that their best interests are upheld. Ratified by every country in the world except for

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248. See generally International Brief, *supra* note 7.

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the United States and Somalia—which cannot ratify the Convention because it lacks a “recognized” government—the CRC establishes principles for how young offenders are to be treated. These tenets stress that the “best interests of the child shall be the primary consideration” in legal matters and that “the imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>249</sup> The provisions are based on the fundamental understanding that young children have the capacity for change and deserve an opportunity to be rehabilitated and eventually reintegrated to society.

The Convention rules were implemented with the understanding that children are fundamentally different from adults and therefore need to be treated differently by the criminal justice system. This special protection is a well-established principle of international law and is reflected in all major human rights treaties that apply to children. The International Covenant on Civil and Political Rights (ICCPR), recognized in the international community as one of “the most important human rights instruments adopted since the U.N. Charter and The Universal Declaration of Human Rights,”<sup>250</sup> and ratified by the United States, declares that “every child shall have . . . the right to such measures of special protection as are required by his status as a minor.”<sup>251</sup> Finally, the ICCPR states that the main focus of sentencing children should be on rehabilitation, not punishment through long sentences.<sup>252</sup>

Beyond simply providing special protections to children, international law focuses on minimizing the punishment of children. The 1985 UN Standard Minimum Rules for Juvenile Justice (the Beijing Rules) and the 1990 UN Rules for Juveniles Deprived of their Liberty (the JDL Rules) establish clear guidelines for the detention and sentencing of juveniles. They both recommend that children under the age of 18 should not be tried as adults and should be housed in separate judicial and detention facilities, if punishment is warranted. Furthermore, the Beijing Rules call for the need “to avoid institutionalization to the greatest extent possible.”<sup>253</sup>

Although the United States has adopted or ratified international treaties regarding juvenile justice, it has done so under its own provisions. When the U.S. ratified the ICCPR, it attached a limiting stipulation that allows the criminal justice system to treat juveniles as adults *in exceptional circumstances*.<sup>254</sup> This stipulation defies the purpose of the ICCPR by allowing the U.S. to subject children to the same proceedings and penalties as adult offenders. Furthermore, the United States is out of step with the rest of the world in terms of sentencing young children. The JDL Rules assert that a sentence for a child

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249. United Nations Convention on the Rights of the Child (UNCRC), (November 20, 1989), Article 37(b).

250. Speech by Matthew Waxman, Principal Deputy Director of Policy Planning, U.S. Department of State, to the U.N. Human Rights Committee on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR), Geneva, Switzerland, July 17, 2006. Online. Available: <http://www.state.gov/g/drl/rls/70392.htm>. Accessed: April 24, 2008.

251. United Nations, International Covenant on Civil and Political Rights (ICCPR), (March 23, 1976), Article 24.

252. ICCPR, Article 14(4)

253. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), Adopted by General Assembly resolution 40/33 of 29 November 1985, Office of the High Commissioner of Human Rights, paragraph 18.1. Online. Available: [http://www.unhchr.ch/html/menu3/b/h\\_comp48.htm](http://www.unhchr.ch/html/menu3/b/h_comp48.htm). Accessed: April 1, 2008.

254. International Brief, *supra* note 7 at 13, citing United Nations Treaty Collections, International Covenant on Civil and Political Rights, U.S. Reservations, Declarations and Understanding: Reservations, Paragraph 5 (emphasis added); 138 Cong. Rec. 54781-01 (Daily Ed. April 2, 1992).

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should not “preclude[e] the possibility of . . . early release,”<sup>255</sup> which is a direct critique of “without possibility of parole” laws. While juvenile transfer and sentencing laws may not be a direct violation of the ICCRP or the JDL Rules given the limiting stipulation of the U.S., the treatment of children in the United States does not send a positive signal to the international community regarding America’s stance as a human rights leader.

### B. International Juvenile Justice Practices

Nearly every nation in the world other than the U.S. refuses to subject young children to trial as adults or to adult-level mandatory minimum sentences. Those countries that reject this treatment of juveniles include “nations that share our Anglo-American heritage” and “leading members of the Western European community”—those countries to which the U.S. should be compared, according to the United States Supreme Court.<sup>256</sup> But in more than half of the 50 states in America, as well as in the District of Columbia, a child—often as young as 7—can be prosecuted in the adult system and subsequently be subjected to lengthy minimum sentences disproportionate to the child’s age.

Attached as Appendix A to this report are two detailed charts containing the policies of each country with regard to the treatment of juveniles as adults. The charts make clear that in the vast majority of countries around the world, pre-adolescent children could never be treated as adults for criminal justice purposes. In the majority of industrialized nations, the minimum age of criminal responsibility (“MACR”) is 18, consistent with the recommendation of the United Nations and requirements of international human rights laws. This MACR is considered a protection for children who are too young to understand the consequences of their actions and who would benefit more from staying with their families than by being punished within the criminal justice system.<sup>257</sup>

The charts in Appendix A also illustrate that, even in those rare instances where prosecution in adult court is theoretically possible, criminal judges do not have the option to impose excessively long sentences on these children. The available sentences are noticeably shorter than those that American judges can apply when children are tried as adults.

Most significantly, life without parole for juveniles is a sentence available only in the United States. Israel, for a long time the only other country that permitted juvenile life without parole sentences, recently modified the sanction so that periodic parole reviews are held.<sup>258</sup> But even sentences for a term of years are much shorter in other countries when juveniles are involved. Even if the sentences that would be applied to adults are long, there are special sentences tailored for any juveniles convicted under these laws.<sup>259</sup>

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255. United Nations Rules for Juveniles Deprived of Their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990, Office of the High Commissioner of Human Rights, paragraph 1.2 Online. Available: [http://www.unhchr.ch/html/menu3/b/h\\_comp37.htm](http://www.unhchr.ch/html/menu3/b/h_comp37.htm). Accessed: April 1, 2008.

256. *Thompson v. Oklahoma*, 487 U.S. 815, 830 n. 31 (1988).

257. Donald Cipriani, “Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective,” December 10, 2007 (draft Ph.D. dissertation on file with the author).

258. See University of San Francisco School of Law, Center for Law and Global Policy, “New Information on Juvenile LWOP Global Practice,” February 2008. Online. Available: <http://www.law.usfca.edu/home/CenterforLawandGlobalJustice/Juvenile%20LWOP.html>. Accessed July 18, 2008.

259. International Brief, *supra* note 7, pp. 24-25.

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*In prosecuting young children as adults, the United States finds itself out-of-step not only with other Western democracies, but also with countries in the developing world, Islamic nations, and countries that are often viewed as human rights violators.*

The United States finds itself out-of-step not only with other Western democracies, but also with countries in the developing world, Islamic nations, and countries that are often viewed as human rights violators. For instance, China will not prosecute in any court a child younger than 14.<sup>260</sup> Moreover, under Egyptian law, a child younger than 15 who commits even the most violent offense is not held criminally responsible for his or her actions.<sup>261</sup> Albania will not try as an adult anyone under 18 at the time of the offense.<sup>262</sup>

Anecdotal evidence supports these findings about international practices. In researching cases of juveniles prosecuted for serious offenses around the globe, we found no instances where juveniles under age 18 outside the United States had received 20- or 30-year sentences. In most countries, such long sentences are not even theoretically possible where older juveniles are concerned. Typically, a juvenile will be ordered to pay fines or spend a brief time in a juvenile facility in those countries that comply with international treaties.<sup>263</sup> Yet in the United States, Christopher Pittman in South Carolina and Evan Savoie in Washington State, both only 12 at the time of their crimes, received sentences of 30 years without possibility of parole and 26 years respectively. Such harsh treatment of pre-adolescent children is stunning to most international observers.<sup>264</sup>

Moreover, mandatory minimum sentencing is nearly nonexistent globally except in the United States. The nations that do have mandatory minimum sentences available for children are gradually moving to outlaw these sentences. The Supreme Court of Appeal of South Africa, for example, recently held that mandatory sentencing legislation in that country should not apply to children of any age. According to South Africa's highest court, "The overriding message of the international instruments . . . is that child offenders should not be deprived of their liberty except as a measure of last resort and, where incarceration must occur, the sentence must be individualized with an emphasis on preparing the child offender . . . for his or her return to society."<sup>265</sup>

Similarly, in May 2008, the Supreme Court of Canada ruled that juveniles cannot be automatically punished as adults. The burden must be on the prosecutor to show that such a sentence is justified in a particular case.<sup>266</sup> The Court struck down specific provisions of the Youth Criminal Justice Act, which treated youth who committed serious crimes as adults unless they could persuade the judge otherwise. According to Justice Abella in the majority opinion: "The principle of fundamental justice at issue here is that young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment. That is why there is a separate legal and sentencing regime for them."<sup>267</sup>

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260. See Appendix A (citing Criminal Law of the People's Republic of China (1997), art. 17, available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>; UNICEF, *THE PROGRESS OF NATIONS* 56 (1997)).

261. See Appendix A (citing Committee on the Rights of the Child, *Periodic reports of States parties due in 1997: Egypt*, CRC/C/65/Add.9, 11 November 1999, Par. 191).

262. International Brief, *supra* note 7, p. 23.

263. *Ibid.*, p. 24.

264. *Ibid.*

265. *Brandt v. State* 2005 (2) All SA 1 (SCA) (S. Afr.).

266. Janice Tibbetts, "Court's youth crime decision a blow to Tory crime agenda," *Canwest News Service* (May 16, 2008). Online. Available: <http://www.nationalpost.com/nationalpost/story.html?id=520100>. Accessed: June 8, 2008.

267. *R. v. D.B.*, 2008 SCC 25.

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As illustrated by the high court rulings in South Africa and Canada, this emphasis on individualization cannot co-exist with the imposition of mandatory minimum sentences, as often occurs in the United States when young children are tried as adults.

### **C. Summary**

Thus, we see a global consensus that children should not be held to the same standards of criminal responsibility as adults. International law also recognizes that children are entitled to special protection and treatment. Such beliefs translate into policies in almost every country that do not allow for the trial and harsh sentencing of pre-adolescent children, regardless of their offense.

American policies that allow very young children to be tried and sentenced as adults, with sentences up to and including life without possibility of parole, set the United States apart from its peer countries—indeed, from all countries—in ways that are deeply troubling.



## Chapter 9

# Policy Recommendations

Policies and practices allowing pre-adolescent children to be tried and sentenced as adults are grounded in nothing more than disprovable myths about the risks presented by juvenile “super-predators.” Evidence-based research, discussed throughout this report, leads to the inescapable conclusion that such policies are flawed and counter-productive to the goal of public safety. Policy-makers would be well-advised to re-evaluate, revise, and repeal as necessary any laws that permit children who commit crimes to be treated as adults, and the recommendations below focus specifically on the youngest children in the adult system.

Changes are needed in several areas, including laws pertaining to transfer, sentencing, courtroom procedures, housing of children in adult correctional facilities, and data collection. Set out below are specific policy recommendations that follow from our research and that can be used to guide policy-makers as they undertake reforms in this arena.

### 1. Keep young children in the juvenile justice system

States should amend laws to ensure pre-adolescent children remain in the jurisdiction of the juvenile justice system. These children are fundamentally different from adults, as well as from older juveniles. In nearly every other situation, children are treated differently than adults, yet in the eyes of the criminal law, some children are adults. This practice, however, contradicts scientific research, ignores the strength of the juvenile justice system, flouts international consensus, and is inconsistent with public safety goals.

Studies show that children tried as adults have an increased likelihood of recidivism.<sup>268</sup> Research has also shown that transferring children to adult court does not reduce juvenile crime or increase public safety.<sup>269</sup>

Young children have brains that are still evolving and they have less ability to control impulses and understand the consequences of their behavior. While they need to be held accountable for wrongdoing, they cannot be held to the same level of responsibility as adult offenders. Nor are they unredeemable, regardless of how heinous their offense. Children are capable of making great changes, and should be left in the juvenile justice system, which is better equipped than the adult system to meet the rehabilitative needs of these youth.

Adult courts are inappropriate settings for these children because physical, cognitive, and emotional immaturities put them at a disadvantage throughout the entire process. Even more troubling is that adult criminal court judges often have their hands tied when it comes to shaping appropriate sentences for children who appear in their courts.

The United States is one of the only countries in the world that allow pre-adolescent children to be tried in adult court, and the only one where these children could be subjected to such inappropriately harsh sentences for someone of that age. International standards set the minimum age for criminal responsibility at 18. While a cutoff of 18 for placement

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268. CDC, *Effects on Violence*, *supra* note 209.

269. *Ibid.*

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in adult court is desirable, this report has demonstrated that steps must be taken to protect the youngest and most vulnerable offenders eligible for transfer.

This recommendation is consistent with the recommendations made by numerous organizations and experts who have examined the issue of juvenile transfer to adult court. The American Bar Association, for example, opposes the transfer of youth younger than 15.<sup>270</sup> Similarly, the Council of Juvenile Correctional Administrators, an organization representing the juvenile correctional executives in all 50 states, has a policy stating: “The Council of Juvenile Correctional Administrators (CJCA) strongly opposes the expansion of eligibility criteria for the waiver and transfer of youths into the adult criminal justice system. These policies have resulted in the placement of hundreds of youths into adult penal facilities without adequate treatment services. . . .”<sup>271</sup> Scientific expert Laurence Steinberg and his colleagues with the MacArthur Foundation Network on Adolescent Development and Juvenile Justice have also recognized the critical differences between adolescents aged 15 and above and younger children, calling for transfers of younger children to the adult criminal justice system to be extremely rare, based on findings from socio-psychological and neurological research on adolescent development.<sup>272</sup>

## 2. Eliminate automatic transfer laws and direct file laws as they apply to young children in favor of judicial waiver

Many states have laws that require juveniles to be tried in adult court if they are charged with certain crimes. The juvenile judge is automatically precluded from hearing these cases. Similarly, 14 states plus the District of Columbia allow prosecutors to decide whether to file charges in juvenile or adult court—so-called “direct file” provisions.<sup>273</sup> Most instances where juveniles are tried in adult court arise from either such mandatory transfer requirements or direct file laws.<sup>274</sup>

Juveniles transferred to adult court via statutory exclusion or prosecutorial discretion are not given any opportunity for consideration of their individual circumstances by a trained juvenile judge. When a pre-adolescent child is charged with an offense, the need to take account of such individual circumstances is even more compelling. The crime alone does not provide sufficient evidence that a case belongs in adult court.

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270. American Bar Association, “Youth in the Criminal Justice System: An ABA Task Force Report,” Summary of *Youth in the Criminal Justice System: Guidelines for Policy-makers and Practitioners*, (Washington, D.C. February, 2002), p. 2. Online. Available: <http://www.abanet.org/crimjust/juvjus/jjpolicies/YCJSReport.pdf>. Accessed: March 28, 2008 (citing IJA-ABA JUVENILE JUSTICE STANDARDS RELATING TO TRANSFER BETWEEN COURTS, Standard 1.1 Subsection b).

271. Council of Juvenile Correctional Administrators, “Position Paper on Waiver and Transfer of Youths to Adult Systems.” Online. Available: <http://cjca.net/photos/content/documents/Waiver.pdf>. Accessed: July 21, 2008. See also *Consequences Aren’t Minor*, p. 9.

272. MacArthur Juvenile Competency Study Results. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Online. Available: [http://www.adj.org/content/related\\_resources.php?cat\\_id=2&page\\_id=2](http://www.adj.org/content/related_resources.php?cat_id=2&page_id=2). Accessed : May 2, 2008; see also MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief Number 5: “The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Adult Criminal Court.” Online. Available: [http://www.adj.org/downloads/3582issue\\_brief\\_5.pdf](http://www.adj.org/downloads/3582issue_brief_5.pdf). Accessed: November 18, 2008.

273. See Table 2, *supra* pp. 24-26. Also see *Childhood on Trial*, *supra* note 1, p. 14.

274. *Childhood on Trial*, p. 17.



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Moreover, judicial waiver is the only method of transferring children to adult criminal court that grants the child the rights of due process guaranteed in *Kent v. United States*.<sup>275</sup>

This recommendation that discretion regarding transfer be returned to juvenile judges is consistent with standards adopted by the American Bar Association, which require that a judge make the decision on whether to transfer a youth to adult court.<sup>276</sup> Similarly, policy guidelines adopted by the National Council on Juvenile and Family Court Judges recommend that the “waiver and transfer of juveniles to adult court should be rare and only after a very thoroughly considered process.”<sup>277</sup>

Only five states currently follow these recommended policies by limiting transfer to situations where a juvenile judge has discretion in these matters.<sup>278</sup>

While this report recommends that pre-adolescent children be precluded from transfer to the adult criminal justice system, at the very least, decisions to transfer these children should be in the hands of juvenile judges, following an extensive hearing at which the judge can consider factors such as the child’s background, the circumstances of the offense, and the child’s likelihood to rehabilitate. State legislatures should repeal laws that allow for automatic transfers of youth to adult court, especially where pre-adolescent children are concerned. Furthermore, legislatures should eliminate prosecutors’ direct file authority to try pre-adolescent children in adult criminal court.

### **3. Enact reverse transfer laws allowing adult criminal court judges to return a young child to juvenile court at any stage in the trial or sentencing process**

As discussed above, many states have statutes that require children charged with certain offenses to be tried in adult court without opportunity for consideration of their individual circumstances. But many of these children, upon closer examination, clearly do not belong in the adult criminal court system, regardless of their offense. States therefore should ensure that adult criminal court judges have the authority to transfer a child back to juvenile court.

Currently, 25 states provide a mechanism known as “reverse waiver” that permits a juvenile who is being prosecuted as an adult to be transferred back to juvenile court.<sup>279</sup> The

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275. See *supra* note 15.

276. American Bar Association, “Youth in the Criminal Justice System: An ABA Task Force Report,” p. 1 (citing IJA-ABA JUVENILE JUSTICE STANDARDS RELATING TO TRANSFER BETWEEN COURTS, Standard 1.1).

277. National Council of Juvenile and Family Court Judges, “Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases” (2005), p. 102. Online. Available: <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf>. Accessed: September 1, 2008; see also National Council of Juvenile and Family Court Judges, “Resolution Regarding the National Council of Juvenile and Family Court Judges on the Issue of Waiver to Adult Court” (2003).

278. Patrick Griffin, “Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws.” (National Center for Juvenile Justice, October 2003).

279. Patrick Griffin, “National Overviews,” *State Juvenile Justice Profiles* (Pittsburgh, PA: National Center for Juvenile Justice) Online. Available: <http://www.ncjj.org/stateprofiles/overviews/transfer6.asp>. Accessed: May 12, 2008.

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remaining states should pass similar legislation granting adult criminal court judges the authority to return any individual within the age of juvenile court jurisdiction back to the juvenile system. Reverse waiver provisions provide a safeguard for young offenders by increasing judicial oversight. Many youth prosecuted in adult criminal court were transferred without judicial review or after a cursory transfer hearing during which little information about their case was available to the court. Granting adult criminal court judges the right to order a reverse waiver provides an opportunity for the court to take account of the age of a pre-adolescent offender, as well as the child's lack of emotional maturity and intellectual development. Because such individual characteristics may not be revealed until a late stage in the trial or sentencing process, judges should have the ability to order the reverse transfer at any point in the proceedings.

### **4. Allow procedural accommodations for juveniles tried in adult criminal court**

Young offenders have limited life experiences and immature minds, causing experts to question the extent to which these children understand their legal rights or the trial process. Not only are children that are tried in adult criminal court disadvantaged compared to their counterparts remaining in the juvenile system, but they are also at a disadvantage when compared to adults tried in adult criminal court. To mitigate these disadvantages, young children tried in adult criminal court should have access to a combination of services provided in both adult and juvenile courts; these services should take into consideration the logistics of having children in criminal courtrooms and the special needs of children as they participate in their own defense.<sup>280</sup> The following are examples of ways courts can accommodate young children in adult criminal court:<sup>281</sup>

- A multidisciplinary team of experts made up of social workers, child psychologists, investigators and attorneys should work to defend the child in order to cover all the issues unfamiliar to most defense attorneys.
- The same team should represent the child from start to finish in order to gain and maintain the child's trust.
- Additional time should be devoted to ensure that children fully comprehend the charges against them, their rights and the entire trial process.
- The bail or bond amount set for juveniles transferred to adult court should take into account the fact that most children are not employed and cannot pay the amounts adults could easily pay.
- Probation officers and other sentencing authorities should be educated about the needs of children and the programs that will work to rehabilitate children. These are very different than the needs of programs designed for convicted adult offenders.
- Courtrooms should be structured to adapt to the small physical size of some youthful offenders.

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280. Malcolm Young, "Providing Effective Representation for Youth Prosecuted as Adults," *Bureau of Justice Assistance Bulletin* (Washington, D.C.: United States Department of Justice). Online. Available: <http://www.ncjrs.gov/pdffiles1/bja/182502.pdf>. Accessed: May 12, 2008.

281. Allard and Young, *supra* note 166.

### 5. Disallow mandatory sentencing of young children in adult criminal court

One of the main reasons that children are treated so harshly when they are transferred to the adult criminal justice system is that they often face the imposition of mandatory sentences intended for adult offenders. Despite the vast developmental differences between young children and adults, judges often cannot consider age as a mitigating factor in sentencing and they are required in many states to sentence children to long prison terms without the possibility of parole.

Restricting judges from considering the specifics of the young offender in sentencing is in direct conflict with the American Bar Association's guidelines for dealing with youth in the criminal justice system. The ABA recommends that "[j]udges should consider the individual characteristics of the youth during sentencing . . . [and] collateral consequences normally attendant to the adult criminal justice process should not necessarily apply to all youth arrested for crimes committed before the age of eighteen."<sup>282</sup> Thus, judges should not be required to abide by mandatory minimum sentences in cases where the offender is a child.

In 2006, the State of Washington passed legislation outlawing mandatory minimum sentences for all juveniles tried as adults—legislation that can be used as an example for other states developing similar laws. Two years after 12-year-old Evan Savoie was sentenced to 26 years in jail for his role in the murder of a friend,<sup>283</sup> the Washington legislature recognized the cruelty of subjecting children to severe mandatory punishments and amended its law to exclude juveniles from the applicability of mandatory sentences.<sup>284</sup> In passing the law, the legislature found that:

Emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults. The legislature further finds that applying mandatory minimum sentences for juveniles tried as adults prevents trial court judges from taking these differences into consideration in appropriate circumstances.<sup>285</sup>

Montana and Oregon also prohibit, at least in some cases, the application of mandatory minimum sentences to juveniles who are certified as adults.<sup>286</sup>

Ultimately, all states should follow the lead of these states in abolishing mandatory minimum sentences for youth tried in adult courts. All sentencing judges should have the ability to craft individual sentences for young children tried as adults and should not be bound by laws that restrict their discretion in making sentencing decisions.

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282. American Bar Association, "Youth in the Criminal Justice System: An ABA Task Force Report," p. 2.

283. "Boys Next Door: 13 Year Olds Charged with Murder Talk Exclusively to 60 Minutes II," *CBSNews.com*, July 22, 2005. Online. Available: <http://www.cbsnews.com/stories/2005/07/22/60II/main710981.shtml>. Accessed: April 24, 2008.

284. Wash. Rev. Code. Ann. § 9.94A.540(3). See also Reply Brief, *Pittman v. South Carolina*, *supra* note 112, p. 7.

285. 2005 Wash. Legis. Serv. ch. 437(1)(H.B. 1187). See also Reply Brief, p. 7.

286. Mont. Code. Ann. §46-18-222 (2005); Or. Rev. Stat. §161.620 (2005).

## 6. Require judges to take a “second look” at the age of majority for young children sentenced in adult court

In many states, when a pre-adolescent child is sentenced as an adult, he or she is eligible for extremely long sentences that afford no opportunity for re-evaluation of that child’s rehabilitative progress or need for continued incarceration. Yet a 12-year-old who is sentenced as an adult may bear little resemblance to that same individual at age 18 or 21. Research tells us that children continue to make fundamental changes in their personalities and behavior, especially once they are exposed to appropriate treatment programs. Once their brains develop and their emotions mature, many of these children end up presenting little continuing risk to society. There are numerous examples of child offenders who went on to lead productive lives after their incarceration during their juvenile years.<sup>287</sup>

No child should be sentenced to a lengthy term of imprisonment without an opportunity for a judge to take a “second look” at them once they reach the age of majority in that state. Blended sentencing is a mechanism that affords judges this opportunity for review. It should be available to judges in both juvenile and adult court whenever there is the potential for a sentence to last into a child’s adulthood. Essentially, the adult portion of the child’s sentence should be suspended pending this re-evaluation by the judge of the child’s progress, potential, and risk. Judges should have the opportunity to release the child from or re-craft the adult portion of the sentence once this review is complete. Almost half the states, including Minnesota, Michigan, and Texas, offer examples of what blended sentencing schemes can look like.

While adult court judges need this sentencing option in order to avoid injustices in sentencing juveniles who have been transferred to adult court, juvenile judges should also be offered the opportunity to impose blended sentences as it affords them more flexibility in crafting an appropriate sentence that can protect public safety while respecting the child’s need for rehabilitative services.<sup>288</sup> Juvenile judges who do not have this sentencing option are likely to be more inclined to transfer a juvenile to adult court because of the potential for a longer sentence.

When a judge will take a “second look” at the individual at the age of adulthood, it provides the juvenile with a real incentive to fully participate in rehabilitative programming and to demonstrate the ways in which he or she has changed sufficiently so that there is no longer a threat to public safety. It also provides the judge with the opportunity to reconsider the sentence based upon a more complete picture of the juvenile. Moreover, such a review can occur in an environment removed from the heat of public opinion that may have attended the original trial and sentencing of the child.

Judges recognize that youth change, and that sentencing very young children to long prison terms without a “second look” is simply punishment for the sake of punishment. As Judge Eugene Moore, the juvenile judge in Michigan who handled the case of 11-year old Nathaniel Abraham, so eloquently put it: “We cannot treat a portion of our children as “throw away” youth. Safety for the people in our society as well as the humane treatment of children depends on a system that focuses on rehabilitation.”<sup>289</sup>

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287. See *supra* pp. 68-70.

288. See Judges’ Brief, *supra* note 7, pp. 21-23.

289. Moore, *Juvenile Justice: The Nathaniel Abraham Murder Case*, p. 234 (citing Opinion Closing Case, *People v. Abraham*, No. 1997-063787-FC (Oakland County Probate Court, January 18, 2007)).

## Policy Recommendations

### **7. Always provide an opportunity for parole for young children transferred to the adult criminal justice system, regardless of the length of the sentence.**

Children who are convicted of crimes committed at very young ages should be given an incentive to mature and take responsibility for their actions as well as to prove that they are capable of changing. Lengthy sentences without eligibility for parole do not take into consideration a child's amenability to rehabilitation. States should develop a process that allows for a parole board to review sentences of juveniles ordered to incarceration for substantially long periods. This proposal is consistent with the recent policy recommendations of the American Bar Association.<sup>290</sup>

The following are examples of actions that states are taking to address this issue:

- As of June 2009, seven states and the District of Columbia prohibit juvenile LWOP. These states are: Alaska, Colorado, Kansas, Kentucky, New Mexico, Oregon, and Texas.<sup>291</sup>
- The Texas Legislature in 2009 eliminated life without parole for anyone under 17, requiring instead that a juvenile convicted of capital murder serve 40 years before becoming parole-eligible.<sup>292</sup>
- The Colorado Legislature in 2006 amended its juvenile life without parole law to allow parole consideration after 40 years in the case of any juvenile tried as an adult.<sup>293</sup>
- In January of 2008 the California Legislature considered Senate Bill 999, which would have eliminated life sentences without parole for juveniles who are tried as adults and guaranteed the right to review by a parole board after serving 25 years in prison. Although the bill did not pass, versions of this bill continue to be reconsidered by the legislature.<sup>294</sup>
- There is proposed legislation in Illinois (House Bill 4384) that would grant 103 people sentenced as juveniles to life without possibility of parole a chance for a parole hearing and would ban LWOP sentences for future young offenders.<sup>295</sup> Further, the Illinois Coalition for the Fair Sentencing of Children is advocating for policy-makers to pass legislation that

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290. Resolution adopted by the ABA House of Delegates, February 2008. See also Report Accompanying Resolution. Online. Available: <http://www.adi-sandiego.com/PDFs/ABA%20Juv%20Sentencing%20Report.pdf>. Accessed: July 24, 2008.

291. Michelle Leighton and Connie de la Vega, *Sentencing Our Children to Die in Prison: Global Law and Practice* (San Francisco, CA: University of San Francisco School of Law, November 2007), p. 34. Online. Available: [http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP\\_Final\\_Nov\\_30\\_Web.pdf](http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf). Accessed: March 30, 2008.

292. Texas Senate Bill 839, Texas Legislature, 81<sup>st</sup> Legislative Session (2009) (amending Texas Penal Code, sec. 12.31).

293. 2006 Colo. Legis. Serv. Ch. 228 §(2) (H.B. 06-1315) (West).

294. "A Shameful Record," *New York Times*, (February 6, 2008) Online. Available: <http://www.nytimes.com/2008/02/06/opinion/06wed5.html>. Accessed: March 29, 2008.

295. Amanda Paulson, "States Reconsider Life Behind Bars for Youth," *The Christian Science Monitor* (March 12, 2008). Online. Available: <http://www.csmonitor.com/2008/0312/p01s03-usju.html>. Accessed: March 29, 2008.

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would set the maximum time a child would serve before eligibility for parole as the age of the child at the time of his or her offense plus one year.<sup>296</sup>

- The Nebraska Legislature is considering legislation that would allow offenders convicted of murder before their 18<sup>th</sup> birthday to be considered for parole after serving 25 years and those convicted of murder before their 16<sup>th</sup> birthday to be eligible for parole after serving 20 years.<sup>297</sup>
- Michigan lawmakers in both the House and Senate are considering legislation to prohibit sentencing juveniles to life in prison without parole and to provide parole eligibility for the 306 inmates serving life terms for crimes they committed while under the age of 18. These bills were introduced in 2007 and remain under review.<sup>298</sup>

In addition, Congress is considering legislation that would effectively ban juvenile life without parole across the country.<sup>299</sup>

Importantly, providing serious youthful offenders with an opportunity for parole does not suggest that the individual will or should be granted parole at any specified date. Instead, the opportunity for parole simply indicates that the child would have the chance at some point in the future to demonstrate that they have been rehabilitated and no longer present a risk to public safety. Children sentenced to life without the possibility of parole report they feel helpless and often consider suicide because it is a daily struggle to find some purpose to their lives when they know there is no hope of ever leaving the prison facility.<sup>300</sup> Similarly, a child like Christopher Pittman, incarcerated since the age of 12 and serving a 30-year sentence without possibility of parole, needs to see some realistic benefit from his years of good behavior in prison. The possibility of parole provides incarcerated youth a sense of hope and the motivation to exhibit good behavior while working towards rehabilitation so they can become functioning members of society.

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296. Illinois Coalition for Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life without Possibility of Parole in Illinois* (Chicago, IL, February 13, 2008). Online. Available at: [http://www.law.northwestern.edu/cfjc/jlwop/JLWOP\\_Report.pdf](http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf). Accessed: March 29, 2008. 293. Leslie Reed, "Bill Would Give Youngsters Sentenced to Life in Prison Hope for Parole," *Omaha World Harold* (January 11, 2008). Online. Available: [http://www.omaha.com/index.php?u\\_page=2798&u\\_sid=10228813](http://www.omaha.com/index.php?u_page=2798&u_sid=10228813). Accessed: March 30, 2008.
297. Leslie Reed, "Bill Would Give Youngsters Sentenced to Life in Prison Hope for Parole," *Omaha World Harold* (January 11, 2008). Online. Available: [http://www.omaha.com/index.php?u\\_page=2798&u\\_sid=10228813](http://www.omaha.com/index.php?u_page=2798&u_sid=10228813). Accessed: March 30, 2008.
298. Rob Dale, "Groups Press Relief for Juvenile Lifers," *Capital News Service* (January 25, 2008). Online. Available: [http://blog.mlive.com/cns/2008/01/groups\\_press\\_relief\\_for\\_juveni.html](http://blog.mlive.com/cns/2008/01/groups_press_relief_for_juveni.html). Accessed: March 30, 2008.
299. H.R. 2289, Juvenile Justice Accountability and Improvement Act of 2009. Online. Available: [http://sentencingproject.org/userfiles/file/inc\\_hr2289.pdf](http://sentencingproject.org/userfiles/file/inc_hr2289.pdf). Accessed: June 30, 2009.
300. *Categorically Less Culpable*, p. 22.

### **8. Young children in the adult criminal justice system should be housed in juvenile facilities.**

This report clearly details the risks to juveniles who are housed with adults in either jails or prisons. Federal law prohibits the commingling of juveniles and adults in correctional facilities, but there is a loophole that exempts juveniles who are tried as adults from the protections of this law.<sup>301</sup> That loophole needs to be fixed by Congress as soon as possible during the process of reauthorizing the federal Juvenile Justice and Delinquency Prevention Act.<sup>302</sup> All the rationales for separating children and adults are equally applicable for those children who are tried in adult court—they continue to have special needs regardless of the venue in which they are prosecuted.

While federal action is extremely important, state lawmakers are also capable of passing legislation addressing this problem. State laws should require that youth transferred to adult court be housed in juvenile detention facilities while awaiting disposition. This is especially important in the case of a pre-adolescent charged as an adult, whose needs for protection and programming are magnified when compared to older teens. If a child is convicted, he or she should be housed in a juvenile residential facility until the maximum age allowed by each state, at which time the individual can be transferred to adult prison.

The American Bar Association (ABA), the American Jail Association (AJA), the Council of Juvenile Correctional Administrator (CJCA), the American Correctional Association (ACA), and the National Commission on Correctional Health Care (NCCHC) all maintain policy positions against the housing of youth in adult correctional facilities and jails.<sup>303</sup> The ACA encourages “the adoption of legislation in each state that authorizes correctional authorities to place people under the age of majority who are detained or sentenced as adults in an appropriate juvenile detention/correctional system or youthful offender system distinct from the adult system.”<sup>304</sup> Similarly, the CJCA opposes the placement of juveniles in adult correctional facilities where they do not get adequate treatment services.<sup>305</sup> The ABA too has weighed in on this issue: “If detained or incarcerated, youth in the adult criminal justice system should be housed in institutions or facilities separate from adult facilities until at least their eighteenth birthday.”<sup>306</sup>

Some states provide models for reform in this area. Virginia, for example, recently changed its transfer policies to allow adult criminal court judges to sentence youth to

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301. See *supra* p. 7.

302. See S. 3155, The Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008. Online. Available: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s3155is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s3155is.txt.pdf). Accessed: July 24, 2008. 298. *Jailing Juveniles*, p. 40.

303. *Jailing Juveniles*, p. 40.

304. American Correctional Association, *Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction*, Delegate Assembly, Congress of Correction, New Orleans, Louisiana. January 14, 2004. Online. Available: <http://www.aca.org/government/policyresolution/view.asp?ID=51>. Accessed: November 25, 2008.

305. See Council of Juvenile Correctional Administrators’ Position Paper on Waiver and Transfer of Youths to Adult Systems. Online. Available: <http://cjca.net/photos/content/documents/Waiver.pdf>. Accessed: May 2, 2008. See also Juvenile Correctional Administrators’ Brief, *Pittman v. South Carolina*, *supra* note 7, pp. 18-19.

306. American Bar Association, *Youth in the Criminal Justice System: Guidelines for Policy-makers and Practitioners*, *supra* note 194, p. 2.

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serve their time in juvenile facilities.<sup>307</sup> Even more dramatically, Florida (by legislation) and California (through a Memorandum of Understanding) have both banned the placement of juveniles in adult prisons.<sup>308</sup> And Maine recently passed a law that requires juveniles sentenced as adults to be housed in juvenile facilities until they reach adulthood and are eligible for transfer to adult prisons.<sup>309</sup>

The juvenile correctional system is the appropriate venue for holding all children caught up in the criminal justice system, regardless of their offense, the venue in which they are prosecuted, or their sentence. Housing them in adult facilities puts them at physical risk, and denies them the opportunity for essential education and treatment programs that they can obtain in juvenile facilities.

### **9. Require any adult correctional facility holding juveniles to comply with professional standards and subject these facilities to independent oversight of the conditions in which these children are held.**

While juveniles should not be allowed to be housed in adult correctional facilities (see Recommendation 8 above), at the very least, adult facilities housing juveniles should be required to be accredited by the American Correctional Association (ACA) and the National Commission on Correctional Health Care (NCCHC). These organizations have highly regarded standards reflecting best practices in the correctional field. Unfortunately, compliance with the standards administered by ACA and NCCHC are strictly voluntary. Only 120 out of the 3,365 jails in the country are accredited by the ACA.<sup>310</sup> A higher percentage of prisons are accredited, but there is still a long way to go before policy-makers and the public can be assured that any adult facilities in which juveniles are held meet appropriate standards in the field.

Of course, compliance with standards for purposes of accreditation does not ensure that individual children are not subjected to risks or ill-treatment. For that reason, it is important that there be various mechanisms for independent oversight of conditions in these facilities. Such oversight should include routine inspections of the conditions of these facilities, as well as opportunities for an Ombudsman or outside investigator to look into and address any concerns raised by youth held in adult facilities.<sup>311</sup>

### **10. Improve data collection on young children in the adult criminal justice system**

In conducting the research for this report, we encountered a number of difficulties gathering relevant statistical information from all 50 states. Pertinent information is hard to

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307. *The Consequences Aren't Minor*, p.9.

308. *Ibid.*

309. *An Act To Allow Blended Sentencing for Certain Juveniles*, *supra* note 105.

310. *Jailing Juveniles*, p. 40.

311. See Report, National Prison Rape Elimination Commission. (June 2009). Chapter 4. Online. Available: [http://www.nprec.us/publication/report/part\\_1.php](http://www.nprec.us/publication/report/part_1.php). Accessed: July 11, 2009. See also American Bar Association, Resolution on Correctional Oversight, 104B (2008). Online. Available: <http://abanet.org/crimjust/policy/am08104b.pdf>. Accessed: July 11, 2009. See also Michele Deitch, et. al., *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Study*, *\_Pace Law Review\_* (forthcoming 2010).



## Policy Recommendations

obtain because much of it simply is not collected and compiled in any central database. This data limitation severely hampered efforts to conduct a state-by-state breakdown of the number of young children tried in adult court and currently serving time in prison. No state maintains reliable data as to the number of juveniles tried in adult court as a result of automatic exclusion or direct file laws; most states collect only the most basic information about juveniles transferred to adult court; and only a very small handful of states—most notably, Florida—were able to provide the authors with data disaggregated by age, sex, race, and offense type. While many states provide relevant information to the federal government, these disaggregated data either are not readily available for public consumption or provide only a sampling of state practices. Consequently, we were required to rely on national data from the federal government (aggregated by state) to offer a picture of juvenile transfer practices throughout the United States.

This lack of data collection not only hinders research efforts, but also means that these trends are not being analyzed and tracked by state-level officials. This lack of information about the practices involving the handling of young children in the adult criminal justice system is deeply troubling. Every state ought to know how often these cases arise and what happens to these children once they are convicted. The absence of data or concern about these cases confirms that these are “lost children” in the eyes of the criminal justice system. But no young child should be forgotten so easily.

Legislatures should require the state court administrator and the state correctional agency to collect and disseminate information annually regarding juveniles transferred to adult court and sentenced to adult prisons. This will serve three main goals: (1) to collect relevant information for public, media, researchers, and policy makers; (2) to create uniform data collection requirements across states, thereby allowing easier collection of national data; and (3) to allow lawmakers and agency officials to track the frequency of juvenile transfers in the state and any changes in transfer practices. The state agencies should produce annual reports that, at a minimum, highlight:

- Number of children transferred to adult court, broken down by the method of transfer (e.g., judicial waiver, direct file by prosecutor, or automatic transfer)
- Demographic characteristics (e.g., age, sex, race, and county of conviction) of each child transferred to adult court
- Type of offense for each child transferred to adult court
- Sentence length for each child transferred to adult court
- Average sentence length by age, sex, race, offense type, and county of conviction
- Number of juveniles housed in adult correctional facilities, broken down by demographics

Such information should be of interest to researchers, policy-makers, justice system stakeholders, and the public alike.



## Appendix A

# International Practices Regarding the Treatment of Children as Adults

**Chart 1.**  
**Countries Where Pre-Adolescent Children Could Not Be Punished as Harshly as in Parts of the United States**

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Afghanistan	12	Maximum sentence for children aged 12-16 is one third of the sentence stipulated for adults.	JUVENILE CODE, 2005, arts. 5(1), 39(1), available at <a href="http://www.moj.gov.af/recentlegislation.html">http://www.moj.gov.af/recentlegislation.html</a> .
Albania	14		Committee on the Rights the Child, Initial periodic report of States parties due in 1994: Albania, CRC/C/11/Add.27, 5 July 2004, par. 455.
Algeria	13		UNICEF, THE PROGRESS OF NATIONS 56 (1997); Committee on the Rights of the Child, Second periodic reports of States parties due in 2000: Algeria, CRC/C/93/Add.7, 3 March 2005, par. 332.
Andorra	12	Children under the age of 16 are not subject to long prison sentences.	See Committee on the Rights of the Child, Concluding Observations: Andorra, CRC/C/15/Add.176, 7 February 2002, par. 45 (expressing concern that 16- and 17-year-olds are subject to a 15-year maximum sentence).
Angola	12	Maximum prison sentence for a juvenile is 8 years.	CRIM. CODE, art. 108; Committee on the Rights of the Child, Initial reports of States parties due in 1993: Angola, CRC/C/3/Add.66, 10 August 2004, pars. 76-77.
Argentina	16		UNICEF, THE PROGRESS OF NATIONS 56 (1997); Act No. 22,278, art. 1; Committee on the Rights of the Child, Periodic reports of States parties due in 1998: Argentina, CRC/C/70/Add.10, 26 February 2002, par. 615.

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Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Armenia	14		CRIM. CODE, 2003, art. 24(2); Committee on the Rights of the Child, Second periodic reports of States parties due in 2000: Armenia, CRC/C/93/Add.6, 17 July 2003, par. 389.
Australia	10	For murder, the Australian states range from discretionary sentencing to a mandatory term of 20 years without parole. We have not found any report of a child as young as 12 being tried as an adult and subjected to a long mandatory term.	N. Terr. Youth Justice Act § 82(3); N.S.W. Crimes (Sentencing Procedure) Act § 21; W. Austl. Crim. Code § 282; S. Austl. Youth Offenders Act § 29(4); S. Austl. Crim. Law (Sentencing) Act § 32(5); Queensl. Criminal Code § 305; Austl. Cap. Terr. Crimes (Sentencing) Act § 32 (all available at <a href="http://www.austlii.edu.au/">http://www.austlii.edu.au/</a> ).
Austria	14		Committee on the Rights of the Child, Second periodic reports of States parties due in 1999: Austria, CRC/C/83/Add.8, 8 July 2004, Par. 618.
Azerbaijan	14		CRIM. CODE, art. 20(2); Committee on the Rights of the Child, Second periodic reports of States parties due in 1999: Azerbaijan, CRC/C/83/Add.13, 7 April 2005, par. 410.
Bahamas	7	Juveniles convicted of murder are sentenced to a flexible term of detainment "during Her Majesty's pleasure."	PENAL CODE, § 291, available at <a href="http://www.bahamas.gov.bs/">http://www.bahamas.gov.bs/</a> .
Bahrain	0	Maximum sentence for child under the age of 15 is 10 years confinement in a social welfare center.	Juveniles Act No. 17 of 1976, Art. 12; Committee on the Rights of the Child, Initial reports of States parties due in 1994: Bahrain, CRC/C/11/Add.24, 23 July 2001, pars. 114-15; see also Committee on the Rights of the Child, Concluding observations: Bahrain, CRC/C/15/Add.175, 7 February 2002, par. 47.

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## Appendix A: International Practices Regarding the Treatment of Children as Adults

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Bangladesh	9	Judge retains discretion to sentence a child under 16 to detention in a juvenile facility until the age of 18.	Children Act, 1974, art. 52; Government of Bangladesh, Ministry of Women and Children Affairs, Third and Fourth Periodic Reports under the Convention of the Rights of the Child, CRC/C/BGD/4, August 2007, p. 65.
Barbados	12	Judge retains discretion to impose a more lenient penalty than imprisonment.	Juvenile Offenders Act (1998), arts. 7, 15-16, available at <a href="http://www.caricomlaw.org/docs/Juvenile%20Offenders.pdf">http://www.caricomlaw.org/docs/Juvenile%20Offenders.pdf</a> .
Belarus	14		CRIM. CODE, art. 10; Committee on the Rights of the Child, Periodic reports of State parties due in 1997: Belarus, CRC/C/65/Add.15, 26 September 2001, par. 279.
Belgium	16		DEFENCE FOR CHILDREN INTERNATIONAL, VIOLENCE AGAINST CHILDREN IN CONFLICT WITH THE LAW 37-38 (2008).
Belize	9	Children under the age of 14 cannot be sentenced to imprisonment.	CRIM. CODE, § 25; Committee on the Rights of the Child, Initial reports of States parties due in 1992: Belize, CRC/C/3/Add.46, 7 February 1997, par. 272
Benin	13		Ordinance 69-23 of 10 July 1969, art. 23; Committee on the Rights of the Child, Initial reports of State parties due in 1992: Benin, CRC/C/3/Add.52, 4 July 1997, par. 205.
Bhutan	10	Juveniles are only liable to half the sentence of an adult.	Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Bhutan, CRC/C/BTN/2, 16 July 2007, par. 387-88.
Bosnia	14		CRIM. CODE, 2003, art. 8, available at <a href="http://www.ohr.int/ohr-dept/legal">www.ohr.int/ohr-dept/legal</a> .

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## From TIME OUT to HARD TIME

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Botswana	8	A sentence of imprisonment may not be passed on any child under the age of 14.	PENAL CODE, § 27(1); Committee on the Rights of the Child, Initial reports of States parties due in 1997: Botswana, CRC/C/51/Add.9, 27 February 2004, par. 332.
Brazil	12	Maximum sentence for persons under the age of 18 is 3 years.	Statute of the Child and Adolescent, Law No. 8069 (1990), arts. 2, 112, 121; Committee on the Rights of the Child, Initial reports of States parties due in 1992: Brazil, CRC/C/3/Add.65, 17 December 2003, par. 575.
Bulgaria	14		PENAL CODE (2002), arts 31-32, available at <a href="http://www.legislationline.org">www.legislationline.org</a> .
Burundi	13		Committee on the Rights of the Child, Initial reports of States parties due in 1992: Burundi, CRC/C/3/Add.58, 31 July 1998, par. 243.
Cambodia	0	Persons under the age of 18 are only subject to half of the adult penalty. (Also, the MACR is set at 14 in the new draft penal code under consideration.)	Committee on the Rights of the Child, Initial reports of States parties due in 1994: Cambodia, CRC/C/11/Add.16, 24 June 1998, par. 234.
Cameroon	10	Maximum sentence for children aged 10-14 is placement in a "boarding school or charitable institution" until the age of 18.	Committee on the Rights of the Child, Initial reports of States parties due in 1995: Cameroon, CRC/C/28/Add.16, 26 March 2001, par. 223.
Canada	12	Children under the age of 14 may receive a maximum 6-year custodial term for murder.	Youth Criminal Justice Act 2002, §§ 2(1), 42(2), 62
Chile	14		Law No. 20.084 (2005), arts. 1, 3.
China	14		Criminal Law of the People's Republic of China (1997), art. 17, available at <a href="http://www.cecc.gov/pages/newLaws/criminalLawENG.php">http://www.cecc.gov/pages/newLaws/criminalLawENG.php</a> ; UNICEF, THE PROGRESS OF NATIONS 56 (1997).

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## Appendix A: International Practices Regarding the Treatment of Children as Adults

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Colombia	14		CHILD AND ADOLESCENT CODE, 2006, arts. 142-43.
Congo (Republic of)	13		Committee on the Rights of the Child, Initial reports of States parties due in 1999: Congo, CRC/C/COG/1, 20 February 2006, pars. 428.
Costa Rica	12	Maximum sentence for minors between 12 and 15 years of age is 10 years.	DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 52 (2003); see Committee on the Rights of the Child, Third periodic reports of States parties due in 2002: Costa Rica, CRC/C/125/Add.4, 13 October 2004, par. 587, 601.
Croatia	14		CRIM. CODE, art. 10; Juvenile Courts Act, 1997, art. 2; Committee on the Rights of the Child, Second periodic reports of States parties due in 1998: Croatia, CRC/C/70/Add.23, 28 November 2003, pars. 68, 364.
Cuba	0	Children under 16 are not handled in the legal system. Rather, "child welfare councils" have discretion to impose a variety of measures, including commitment to re-education institutions.	Committee on the Rights of the Child, Initial reports of States parties due in 1993: Cuba, CRC/C/8/Add.30, 15 February 1996, par. 128-29, 139.
Czech Republic	15		Committee on the Rights of the Child, Periodic reports of States parties due in 1999: Czech Republic, CRC/C/83/Add.4, 17 July 2002, par 306-08.
Dem. Republic of the Congo	16		Decree of 6 December 1950, arts. 1, 5; Committee on the Rights of the Child, Initial reports of States parties due in 1992: Democratic Republic of the Congo, CRC/C/3/Add.57, 8 August 2000, par. 181, 184.

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Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Denmark	15		DANISH CRIM. CODE, § 15.
Dominican Republic	13		Code for the System of Protection of the Fundamental Rights of Children and Adolescents 2003, (Act No. 136 03), art. 223; Committee on the Rights of the Child, Second periodic reports of States parties due in 1998: Dominican Republic, CRC/C/DOM/2, 16 July 2007, par. 481.
Egypt	7	Children under the age of 15 are not subject to criminal penalties like imprisonment.	Committee on the Rights of the Child, Periodic reports of States parties due in 1997: Egypt, CRC/C/65/Add.9, 11 November 1999, Par. 191.
Estonia	13		Committee on the Rights of the Child, Initial reports of States parties due in 1993: Estonia, CRC/C/8/Add.45, 11 July 2002, par. 440.
Finland	15		PENAL CODE, 2003, Ch. 3, § 4(1).
France	0	Children under the age of 13 are not subject to penal sanctions.	Ordinance Concerning Delinquent Children, 2 February 1945, arts. 18, 20; see DEFENCE FOR CHILDREN INTERNATIONAL, VIOLENCE AGAINST CHILDREN IN CONFLICT WITH THE LAW 49 (2008).
Georgia	12	Maximum sentence for a minor is 10 years.	CAROLYN HAMILTON, ANALYSIS OF THE JUVENILE JUSTICE SYSTEM IN GEORGIA 42 (2007), available at <a href="http://www.unicef.org/georgia/Assessment_Report.ENG-FINAL.pdf">http://www.unicef.org/georgia/Assessment_Report.ENG-FINAL.pdf</a> .
Germany	14		CRIM. CODE, 1999, § 19; Youth Court Act, 1953, §§ 1, 3.
Ghana	12	Children under the age of 15 may not be sentenced to imprisonment.	Criminal Procedure (Amendment) Act, 1963 (Act 177), § 1; see AFRIMAP ET AL., GHANA: JUSTICE SECTOR AND THE RULE OF LAW 34, 109 (2007).

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## Appendix A: International Practices Regarding the Treatment of Children as Adults

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Greece	13		PENAL CODE (2003), arts. 121, 126-27.
Guatemala	13		Law of Integral Protection of Children and Young People, 2003, art. 138.
Guyana	10	Juveniles convicted of capital offense are sentenced to a flexible term of detainment "during the President's pleasure."	Committee on the Rights of the Child, Initial reports of States parties due in 1993: Guyana, CRC/C/8/Add.47, 6 August 2003, pars. 386, 390.
Haiti	13		PENAL CODE, 1961, art. 51.
Honduras	12	Maximum sentence for a juvenile is 8 years.	Committee on the Rights of the Child, Third periodic reports of States parties due in 2002: Honduras, CRC/C/HND/3, 27 July 2006, par. 370-71.
Hungary	14		CRIM. CODE, 1978, § 23, available at <a href="http://www.legislationline.org">http://www.legislationline.org</a> .
Iceland	15		GEN. PENAL CODE, art. 14, available at <a href="http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/1145">http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/1145</a> .
India	7	Persons under the age of 18 are handled in the juvenile justice system with full discretion to impose custodial or non-custodial sentences.	Juvenile Justice Act 2000, § 15; see also Ved Kumari, Children and the Criminal Justice System (2007), <a href="http://infochangeindia.org/agenda8_19.jsp">http://infochangeindia.org/agenda8_19.jsp</a> (explaining that even serious offenses must be handled under the Juvenile Justice Act); DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 40-42 (Paul C. Friday & Xin Ren eds., 2006).
Indonesia	8	Maximum sentence for juveniles convicted of capital crimes is 10 years.	Juvenile Court Act (No. 3/1997), art. 26; see DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 62 (2003)

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## From TIME OUT to HARD TIME

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Iraq	9	Although the current state of the law is unclear, children under the age of 15 were previously only subject to a 5 year sentence for capital crimes.	Committee on the Rights of the Child, Initial reports of States parties due in 1996: Iraq, CRC/C/41/Add.3, 9 December 1996, pars. 132, 134, 139.
Italy	14		Committee on the Rights of the Child, Periodic reports of States parties due in 1998: Italy, CRC/C/70/Add.13, 12 July 2002, par. 529; UNICEF, THE PROGRESS OF NATIONS 56 (1997).
Israel	12	Children under the age of 14 cannot receive a prison sentence; minimum sentencing legislation does not apply to juveniles.	Youth (Trial, Punishment and Modes of Treatment) Law 1971, art. 25(b), (d); Committee on the Rights of the Child, Periodic reports of States parties due in 1993: Israel, CRC/C/8/Add.44, 27 February 2002, par. 1372.
Italy	14		PENAL CODE, arts. 97-98; Committee on the Rights of the Child, Periodic reports of States parties due in 1998: Italy, CRC/C/70/Add.13, 12 July 2002, par. 529; UNICEF, THE PROGRESS OF NATIONS 56 (1997).
Jamaica	12	Courts retain full discretion to determine punishment for children under the age of 14.	Child Care and Protection Act 2004, arts. 72, 76, 78, available at <a href="http://www.moj.gov.jm/law">http://www.moj.gov.jm/law</a> .
Japan	14		PENAL CODE, art. 41; see DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 220-22 (Paul C. Friday & Xin Ren eds., 2006).
Jordan	7	Courts retain discretion in sentencing juveniles; a juvenile sentence is one third of the prescribed adult sentence.	Committee on the Rights of the Child, Third periodic reports of States parties due in 2003: Jordan, CRC/C/JOR/3, 2 March 2006, par. 306(1).
Kazakhstan	14		CRIM. CODE, art. 15(2), available at <a href="http://www.legislationline.org">www.legislationline.org</a> .

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## Appendix A: International Practices Regarding the Treatment of Children as Adults

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Kenya	8	Courts retain variety of custodial and non-custodial adoptions for sentencing juveniles.	DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 67-68 (2003)
Korea (Republic of)	14		Criminal Procedure Act, art. 9; Committee on the Rights of the Child, Periodic reports of States parties due in 1998: Republic of Korea, CRC/C/70/Add.14, 26 June 2002, pars. 36, 196.
Kyrgyzstan	14		CRIM. CODE, 1998, art. 18; see DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 71 (2003)
Latvia	14		Criminal Law (2004), § 11.
Lebanon	7	Children under the age of 15 are not subject to prison sentences.	Committee on the Rights of the Child, Third periodic reports of States parties due in 2003: Lebanon, CRC/C/129/Add.7, 25 October 2005, pars. 503-04.
Lithuania	14		CRIM. CODE, 2003, art. 13; Committee on the Rights of the Child, Second periodic reports of States parties due in 1999: Lithuania, CRC/C/83/Add.14, 15 July 2005, par. 533.
Luxembourg	16		Committee on the Rights of the Child, Second periodic reports of States parties due in 2001: Luxembourg, CRC/C/104/Add.5, 19 July 2004, par. 257.
Macau	12	Children aged 12-16 may only be committed to educational institution; length of commitment reviewed after 1 year.	Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: China (Macau), CRC/C/83/Add.9 (Part II), 27 September 2004, pars. 419-21, 445-48.

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## From TIME OUT to HARD TIME

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Madagascar	13		Ordinance 62-038 of 19 September 1962, arts. 35-37; Committee on the Rights of the Child, Second periodic reports of States parties due in 1998: Madagascar, CRC/C/70/Add.18, 25 March 2003, pars. 1040-42.
Mauritius	0	Maximum sentence for children under the age of 14 is commitment until the age of 18.	Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Mauritius, CRC/C/65/Add.35, 19 July 2005, par. 477; DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 74 (2003).
Mexico	11	Persons under the age of 14 are not subject to the penalty of detention.	Committee on the Rights of the Child, Written replies by the Government of Mexico, CRC/C/MEX/Q/3/Add.1, 6 April 2006, par. 220.
Moldova	14		CRIM. CODE, 2002, art. 21(1), available at <a href="http://www.transparency.md/laws.htm">www.transparency.md/laws.htm</a> .
Monaco	13		Committee on the Rights of the Child, Initial reports of States parties due in 1995: Monaco, CRC/C/28/Add.15, 17 July 2000, par. 37.
Mongolia	14		Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Mongolia, CRC/C/65/Add.32, 15 November 2004, par. 66.
Morocco	12	Children under the age of 16 are only subject to placement in institution until the age of 18.	Committee on the Rights of the Child, Second periodic reports of States parties due in 2000: Morocco, CRC/C/93/Add.3, 12 February 2003, pars. 586-88.

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## Appendix A: International Practices Regarding the Treatment of Children as Adults

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Myanmar	7	Maximum sentence for children under the age of 16 is 7 years.	Child Law, 1993, arts. 2(a), 28, 46, available at <a href="http://www.blc-burma.org/html/myanmar%20law/lr_e_ml93_09.html">http://www.blc-burma.org/html/myanmar%20law/lr_e_ml93_09.html</a> .
Nepal	10	Maximum sentence for children under the age of 15 is six months.	Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Nepal, CRC/C/65/Add.30, 3 December 2004, par. 331.
Netherlands	12	Maximum sentence for children aged 12-15 is one year.	DUTCH PENAL CODE, art. 77a-h; DEFENCE FOR CHILDREN INTERNATIONAL, VIOLENCE AGAINST CHILDREN IN CONFLICT WITH THE LAW 54 (2008).
New Zealand	10	Minimum term without parole is 10 years for murder, 17 years for double murder.	Sentencing Act 2002, No. 9, §§ 103-04, available at <a href="http://www.legislation.govt.nz/">http://www.legislation.govt.nz/</a> .
Nicaragua	13		Code of Childhood and Adolescence, 1998, art. 95.
Niger	13		PENAL CODE, art. 45; Committee on the Rights of the Child, Initial reports of States parties due in 1992: Niger, CRC/C/3/Add.29/Rev.1, 17 October 2001, par. 38.
Northern Ireland	10	Persons under the age of 18 are sentenced to a reviewable term of "during the pleasure of the Secretary of State" for murder.	Justice (Northern Ireland) Act 2002, §§ 63, 65; Criminal Justice (Children) (Northern Ireland) Order 1998, § 45(1).
Norway	15		CIVIL PENAL CODE (1994), § 46.
Oman	9	Maximum sentence for children aged 9-13 is placement in a juvenile correctional institution until the age of 18.	PENAL CODE (1974), arts. 104-05; Committee on the Rights of the Child, Second periodic reports of States parties due in 2004: Oman, CRC/C/OMN/2, 8 May 2006, par. 479.
Panama	14		Special Regime of Criminal Responsibility for Adolescence, Law No. 40 of 26 August 1999, arts. 6-7.

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## From TIME OUT to HARD TIME

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Paraguay	14		Law No. 1.702/01, art. 1; Code of Childhood and Adolescence, 2001, arts. 192, 194; Committee on the Rights of the Child, Periodic reports of States parties due in 1997: Paraguay, CRC/C/65/Add.12, 15 March 2001, par. 1058.
Peru	12	Maximum sentence for any juvenile is 3 years of institutionalization (6 years for terrorism offenses only).	Committee on the Rights of the Child, Periodic reports of States parties due in 1997: Peru, CRC/C/65/Add.8, 3 August 1998, pars. 821, 827-29.
Philippines	15		Juvenile Justice and Welfare Act of 2006, arts. 6, 20; UNICEF, Philippines Enacts Law on Juvenile Justice System, May 16, 2006, available at <a href="http://www.unicef.org/philippines/archives/news/060405.html">http://www.unicef.org/philippines/archives/news/060405.html</a> .
Poland	0	Judges retain discretion to impose variety of custodial or non-custodial measures on juveniles.	Committee on the Rights of the Child, Periodic reports of States parties due in 1998: Poland, CRC/C/70/Add.12, 6 February 2002, pars. 359-62.
Portugal	12	Maximum sentence for children aged 12-16 is 8 years.	Committee on the Rights of the Child, Periodic reports of States parties due in 1997: Portugal, CRC/C/65/Add.11, 26 February 2001, par. 489.
Qatar	7	Children under the age of 14 cannot be sentenced to imprisonment.	Committee on the Rights of the Child, Initial reports of States parties due in 1997: Qatar, CRC/C/51/Add.5, 11 January 2001, pars. 164-66.
Romania	14		CRIM. CODE, 2004, art. 113, available at <a href="http://www.legislationline.org">www.legislationline.org</a> ; DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 102 (2003).
Russian Federation	14		CRIM. CODE, art. 20, available at <a href="http://www.legislationline.org">www.legislationline.org</a> .

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## Appendix A: International Practices Regarding the Treatment of Children as Adults

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Rwanda	14		PENAL CODE, art.77; Committee on the Rights of the Child, Second periodic reports of States parties due in 1998: Rwanda, CRC/C/70/Add.22, 8 October 2003, par. 92.
Senegal	13		PENAL CODE (2000), arts. 52-53.
Serbia	14		CRIM. CODE, 2005, art. 4(3), available at <a href="http://www.legislationline.org">www.legislationline.org</a> .
Sierra Leone	16		Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Sierra Leone, CRC/C/SLE/2, 8 September 2006, par. 286; UN News Center, UN Welcomes Child Rights Bill in Sierra Leone, 13 June 2007, <a href="http://www.un.org/apps/news/story.asp?NewsID=22884&amp;Cr=Sierra&amp;Cr1=Leone">http://www.un.org/apps/news/story.asp?NewsID=22884&amp;Cr=Sierra&amp;Cr1=Leone</a> .
Singapore	7	Court retains broad discretion to determine sentence of child convicted of murder.	PENAL CODE, art. 82; Children and Young Persons Act, Art. 38.
Slovakia	14		PENAL CODE, 2005, §§ 94-96.
Slovenia	14		CRIM. CODE, 1995, art. 71.
South Africa	7	In 2004, the Supreme Court of Appeal held that minimum sentencing legislation on serious crimes did not apply to juveniles.	Brandt v. State, 2005 (2) All SA 1 (SCA) (S. Afr.)
Spain	14		Law 5/2000 (of Jan. 12) Regulating the Criminal Responsibility of Minors, arts. 1(1), 3, 5(3); DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 106-07 (2003).
Sweden	15		PENAL CODE, § 6.

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## From TIME OUT to HARD TIME

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Switzerland	10	Children under the age of 15 are not subject to the penalty of imprisonment.	Committee on the Rights of the Child, Initial reports of States parties due in 1999: Switzerland, CRC/C/78/Add.3, 19 October 2001, pars. 645-653.
Taiwan	14		CRIM. LAW, art.18.
Tajikistan	14		CRIM. CODE, art. 23, available at <a href="http://www.legislationline.org">www.legislationline.org</a> .
Thailand	7	Children under the age of 14 are not subject to punishment.	DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 242, 245 (Paul C. Friday & Xin Ren eds., 2006).
Tunisia	13		PENAL CODE, arts. 38, 43.
Turkey	12	Maximum sentence for children aged 12-14 is 12 years.	PENAL CODE, art. 31(2), available at <a href="http://www.legislationline.org">www.legislationline.org</a> ; Committee on the Rights of the Child, Initial reports of States parties due in 1997: Turkey, CRC/C/51/Add.4, 8 August 2000, par. 479.
Ukraine	14		CRIM. CODE, 2001, art. 22, available at <a href="http://www.legislationline.org">www.legislationline.org</a> .
United Kingdom	10 (8 in Scotland)	Juveniles are sentenced to a term of "during Her Majesty's pleasure" for murder; judge retains discretion to adjust the minimum term to be served.	Powers of the Criminal Court (Sentencing) Act, 2000, § 90; Criminal Justice Act, 2003, schedule 21 at ¶ 9.
Uruguay	13		Code of Childhood and Adolescence, 2004, art. 74.
Uzbekistan	13		CRIM. CODE, 1994, art. 17, available at <a href="http://www.legislationline.org">www.legislationline.org</a> .
Venezuela	12	Judge retains wide discretion in sentencing persons under the age of 18.	Protection of Children and Adolescents (Organization) Act, 1998, arts. 2, 528, 532, 551, 620; Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Bolivarian Republic of Venezuela, CRC/C/ VEN/2, 5 April 2007, pars. 301-02.

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## Appendix A: International Practices Regarding the Treatment of Children as Adults

Chart 1 continued—

Country	Minimum Age of Criminal Responsibility	Other Protections for Children	Citation
Vietnam	14		PENAL CODE, 1999, arts. 12, 68; UNICEF, THE PROGRESS OF NATIONS 56 (1997).
Yemen	7	Persons under the age of 15 cannot be sentenced to imprisonment.	Juveniles Act, art. 36(2); Committee on the Rights of the Child, Third periodic reports of States parties due in 2003: Yemen, CRC/C/129/Add.2, 3 December 2004, pars. 31, 281.



## Appendix A: International Practices Regarding the Treatment of Children as Adults

**Chart 2.  
Countries Where We Cannot Rule Out That a Pre-Adolescent Child  
Could be Treated as Harshly as in Parts of the United States**

Country	Minimum Age of Criminal Responsibility	Notes	Citation
Ecuador	12		Code for Children and Adolescents, 2003, Art. 4, 307.
Ethiopia	9		UNICEF, THE PROGRESS OF NATIONS 56 (1997).
Iran	15 for males 9 for females	Islamic Penal Code, 1991, Art. 49; Civil Code, Art. 1210, Note 1; UNICEF, THE PROGRESS OF NATIONS 56 (1997).	
Kuwait	7		PENAL CODE, 1960, ART. 18.
Nigeria	7	In several northern Nigerian states following Islamic law, a child determined to have reached puberty appears to be subject to harsh mandatory penalties.	See Zamfara State of Nigeria Shari'ah Penal Code Law, 2000, secs. 47, 71, 199-204, available at <a href="http://www.zamfaraonline.com/sharia/">http://www.zamfaraonline.com/sharia/</a> ; DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 40-42 (Paul C. Friday & Xin Ren eds., 2006).
Pakistan	0	Under some penal legislation, children may be subject to harsh mandatory penalties regardless of age.	E.g. Anti-Terrorism Act, 2002; 1979 Hudood Ordinances; see DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 179-80 (Paul C. Friday & Xin Ren eds., 2006).
Saudi Arabia	0		DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 149 (Paul C. Friday & Xin Ren eds., 2006).
Somalia	0	Although Somalia currently has no effective centralized government, the former penal code set the MACR at 14.	See SOMALI PENAL CODE, art. 59.
Sri Lanka	8		PENAL CODE, art. 75-76.

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## From TIME OUT to HARD TIME

Chart 2 continued—

Country	Minimum Age of Criminal Responsibility	Notes	Citation
Sudan	7	Sudan appears to have conflicting legislation: The Criminal Procedures Act stipulates limited punishments available for minors, but the Criminal Code appears to authorize mandatory (even capital) punishment on children.	Committee on the Rights of the Child, Periodic reports of States parties due in 1997: Sudan, CRC/C/65/Add.17, 6 December 2001, pars. 354-55.
Swaziland	7		Committee on the Rights of the Child, Initial report of States parties due in 1997: Swaziland, CRC/C/SWZ/1, 16 February 2006, par. 456
Tanzania	10		PENAL CODE, § 15; DEFENCE FOR CHILDREN INTERNATIONAL, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 110 (2003).
Uganda	12		UNICEF, THE PROGRESS OF NATIONS 56 (1997).
United Arab Emirates	7		Committee on the Rights of the Child, Concluding Observations: United Arab Emirates, CRC/C/15/Add.183, 13 June 2002, par. 42.
Zambia	8		PENAL CODE, art. 14.

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