

NOT KIDS ANYMORE: A NEED FOR PUNISHMENT AND DETERRENCE IN THE JUVENILE JUSTICE SYSTEM

Abstract: This Note surveys the history of the juvenile justice system, including the philosophy behind its formation and its similarities and differences with the adult criminal system. Recently, many states have implemented changes to their juvenile justice systems. This Note advocates a system like that of Massachusetts, where certain juvenile defendants are automatically transferred to adult court, and where other juvenile defendants, who remain in juvenile court but meet certain requirements, may receive a blended juvenile and adult sentence. This system retains the goal of rehabilitation of juvenile delinquents while also focusing on punishment and deterrence.

INTRODUCTION

On November 17, 1999, a Michigan Circuit Court jury found thirteen-year-old Nathaniel Abraham guilty of second-degree murder.¹ Abraham was convicted of killing Ronnie Greene Jr.—a crime he committed when he was only eleven years old.² Although tried in an adult court, Abraham was sentenced by Judge Eugene Moore to juvenile detention until the age of twenty-one, at which point he automatically will be released.³

Abraham's case illustrates the current controversy over the most effective way to deal with juvenile offenders.⁴ The arrest rate for vio-

¹ See Keith Bradsher, *Michigan Boy Who Killed at 11 is Convicted of Murder as Adult*, N.Y. TIMES, Nov. 17, 1999, at A1 [hereinafter Bradsher, *Michigan Boy*]; William Claiborne, *13-Year-Old Convicted in Shooting*, WASH. POST, Nov. 17, 1999, at A3 [hereinafter Claiborne, *13-Year-Old*].

² See Claiborne, *13-Year-Old*, *supra* note 1, at A3.

³ See Keith Bradsher, *Boy Who Killed Gets 7 Years*, N.Y. TIMES, Jan. 14, 2000, at A1 [hereinafter Bradsher, *Boy Who Killed*]; William Claiborne, *Young Killer Sentenced to Juvenile Facility*, WASH. POST, Jan. 14, 2000, at A9 [hereinafter Claiborne, *Young Killer*].

⁴ See Bradsher, *Michigan Boy*, *supra* note 1, at A1; Claiborne, *13-Year-Old*, *supra* note 1, at A3. Statutes in each state determine, usually according to age, which youth fall under the original jurisdiction of the juvenile court. See *Juveniles in Court*, Office of Juvenile Justice and Delinquency Prevention, at <http://ojjdp.ncjrs.org/ojstatbb/CourtStatutes.html> (last visited Feb. 12, 2001). Most states define a "juvenile" as a youth under the age of eighteen at the time of the alleged offense or arrest. See *id.*

lent crime among juveniles has risen 62% between 1988 and 1994.⁵ Although arrests of juveniles fell 9% between 1995 and 1999, 17% of all arrests in 1999 involved a juvenile.⁶ In addition, the recent crimes committed by juveniles are "altogether more vicious" than those the juvenile court system was originally designed to face.⁷ The media's involvement in publicizing many of the violent crimes committed by juveniles has sparked public demand for stricter penalties.⁸ In response, some politicians have promoted measures to "get tough" on juvenile crime.⁹ Indeed, United States Representative Bill McCollum went so far as to say that "[i]n America today, no population poses a greater threat to public safety than juvenile criminals."¹⁰ Many state legislatures have therefore enacted laws making it easier to try juveniles as adults.¹¹ For example, in Michigan, jurisdiction over Abraham was transferred from a juvenile court to an adult court under a 1997 statute allowing prosecutors to request that a juvenile be tried as an adult for certain offenses, regardless of his or her age.¹² Before that statute was enacted, a juvenile had to be at least fourteen years old to be tried—at the judge's discretion—as an adult.¹³

On the other side of the debate over juvenile justice, some feel that juvenile offenders still can be rehabilitated if treated as juveniles

⁵ See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 120 (2000) [hereinafter JUVENILE OFFENDERS].

⁶ See *id.* at 116.

⁷ See John Cloud et al., *For They Know Not What They Do? When and How Do Children Know Right from Wrong? And How Can We Devise a Punishment to Fit Their Crime?*, TIME, Aug. 24, 1998, at 64. When the first juvenile court was founded in Chicago in 1899, the crimes juveniles were accused of committing were, for the most part, petty theft and truancy. See *id.* A hundred years later, the "juvenile court system . . . must cope with atrocities altogether more vicious." See *id.* For example, in 1994, in Chicago, a ten-year-old boy and his eleven-year-old friend tossed a five-year-old out a window. See *id.* Additionally, in 1998, two Chicago juveniles (one only nine years old) beat a five-year-old to death. See *id.*

⁸ See Shannon F. McLatchey, Note, *Juvenile Crime and Punishment: An Analysis of the "Get Tough" Approach*, 10 U. FLA. J.L. & PUB. POL'Y 401, 406 (1999).

⁹ See *id.*

¹⁰ Richard Lacayo & Sally B. Donnelly, *Teen Crime Congress Wants to Crack Down on Juvenile Offenders. But Is Throwing Teens into Adult Courts—and Adult Prisons—the Best Way?*, TIME, July 21, 1997, at 26.

¹¹ See McLatchey, *supra* note 8, at 407.

¹² See Bradsher, *Michigan Boy*, *supra* note 1, at A1. Michigan law, however, still requires that a juvenile be at least seven years old in order to be prosecuted for a felony. See Richard Willing, *When Children Kill, Who Takes the Blame? Experts Examine Youths' Actions in Serious Crimes*, USA TODAY, Mar. 2, 2000, at 3A. According to the well-established common law, children under the age of seven are presumed to be incapable of committing crimes because they do not understand the consequences of their actions. See *id.*

¹³ See Bradsher, *Michigan Boy*, *supra* note 1, at A1.

rather than as adults and that "getting tough" on juvenile crime does not provide the answer.¹⁴ For example, although Abraham was tried in an adult court, Judge Moore believed that Abraham should be sentenced as a juvenile.¹⁵ Affirming his faith in the ability of the juvenile justice system to reform delinquents, Judge Moore called the Michigan law authorizing transfer of juveniles to adult court "fundamentally flawed."¹⁶ Similarly, Reverend Al Sharpton and Martin Luther King III argued that it is unjust to sentence children as adults and organized a protest outside the Michigan courthouse where Abraham was being tried.¹⁷ Additionally, Amnesty International USA featured Abraham on the cover of its recent report on the juvenile justice system and maintained that trying him as an adult violated "international human rights standards for the protection of children."¹⁸

The current controversy over juvenile justice results in part from the fact that many states have shifted the focus of the juvenile justice system from rehabilitation to punishment and deterrence.¹⁹ This Note maintains that in order to help reduce violent juvenile crime, states should continue to expand the focus of the juvenile justice system to include punishment and deterrence in addition to the original goal of rehabilitation. Thus, under certain circumstances, juvenile defendants should be treated more like adults.

Part I of this Note describes the history of the juvenile justice system, including the philosophy behind its formation and its similarities and differences with the adult criminal system.²⁰ Part I also examines the general types of changes that many states have recently implemented to the juvenile justice system.²¹ Part II explores some alternatives for addressing the juvenile justice controversy.²² Part III advocates a system like that of Massachusetts, where certain juvenile

¹⁴ See McLatchey, *supra* note 8, at 414–15; Bradsher, *Boy Who Killed*, *supra* note 3, at A1; Orlandar Brand-Williams & Santiago Esparza, *Groups Join Protest of Abraham Conviction: Pontiac Rally Is Planned on Day of Teen's Sentence*, DET. NEWS, Jan. 12, 2000, at C1.

¹⁵ See Bradsher, *Boy Who Killed*, *supra* note 3, at A1.

¹⁶ See *id.* Judge Moore not only expressed confidence in the ability of the juvenile justice system to rehabilitate Abraham, but also stressed that "sentencing Abraham as an adult would destroy any hope for rehabilitation of the youth." See Claiborne, *Young Killer*, *supra* note 3, at A9.

¹⁷ See Brand-Williams & Esparza, *supra* note 14, at C1.

¹⁸ See Claiborne, *13-Year-Old*, *supra* note 1, at A3.

¹⁹ See Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference It Makes*, 68 B.U. L. REV. 821, 822 (1998); McLatchey, *supra* note 8, at 406.

²⁰ See *infra* notes 25–70 and accompanying text.

²¹ See *infra* notes 71–133 and accompanying text.

²² See *infra* notes 134–180 and accompanying text.

defendants are automatically transferred to adult court, and where other juvenile defendants, who remain in juvenile court but meet certain requirements, may receive a blended juvenile and adult sentence.²³ The Massachusetts system retains the goal of rehabilitation of juvenile delinquents while also focusing on punishment and deterrence.²⁴

I. DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM

A. *Foundation of Juvenile Justice*

Although the current juvenile justice system in many states now closely resembles the adult criminal justice system, they remain two separate systems of justice, founded on different philosophies.²⁵ Generally speaking, while the adult criminal justice system emphasizes the punishment of criminals, the juvenile justice system is based on the rehabilitation of juvenile offenders.²⁶ In the early twentieth century, the Progressives began to perceive children in a new manner.²⁷ Industrialization and modernization led to the view that children were "corruptible innocents whose upbringing . . . required greater structure than had previously been regarded as prerequisite to adulthood."²⁸ Social scientists reported that because children are not fully developed, either mentally or physically, they are not accountable for their actions in the same way as adults are accountable.²⁹ Criminal behavior by children, it was believed, resulted from external forces such as impoverished living conditions or parental neglect.³⁰ Juvenile criminality was seen as a kind of youthful illness, which possibly could be cured by relocating the juvenile to a better family life in a rural

²³ See *infra* notes 181-247 and accompanying text.

²⁴ See *infra* notes 181-247 and accompanying text.

²⁵ See JUVENILE OFFENDERS, *supra* note 5, at 85.

²⁶ See Janet Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 933-34 (1995).

²⁷ See Feld, *supra* note 19, at 822.

²⁸ See *id.* at 823. Industrialization changed the labor force in a way that left fewer employment opportunities for juveniles. See Ainsworth, *supra* note 26, at 931. Jobs required the skill and strength of older workers, and immigrants arrived to compete for these jobs. See *id.* at 932. Thus, one consequence of the Progressive movement was the "postponement of [young people's] attainment of full personhood within society." See *id.*

²⁹ See Ainsworth, *supra* note 26, at 932-33; Danielle R. Oddo, Note, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong with the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 114 (1998).

³⁰ See Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 405 (1999).

setting.³¹ Thus, a separate justice system was established for juveniles in order to protect them and to provide them with treatment to enable their return to society as productive citizens.³²

Illinois established the first juvenile court in the United States in 1899.³³ By 1925, all but two states had established juvenile courts, and the laws establishing these courts emphasized rehabilitation of juvenile offenders.³⁴ Judge R.S. Tuthill, the first juvenile court judge of Cook County, Illinois, prioritized the court's responsibilities as first to the welfare of the child and then to the welfare of the community.³⁵ Consistent with this view, the early juvenile court thus focused on the individual offender, not on the offense, and acted like a parent in its treatment of juveniles.³⁶ Its main goal was "not to ascertain whether the child was 'guilty' or 'innocent,' but 'what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'"³⁷

For the first half of the twentieth century, most states structured juvenile courts to support the goal of rehabilitation through individualized treatment.³⁸ First, the juvenile court retained exclusive jurisdiction over all juveniles under the age of eighteen, and a juvenile court could waive its jurisdiction and transfer a juvenile to an adult court only upon determining that waiver was in the "best interests of the child and public."³⁹ Second, juvenile court proceedings were often confidential, and the public were excluded from attendance.⁴⁰ Confidentiality, it was believed, helped prevent children from being stigmatized as criminals, which could minimize future educational and employment opportunities.⁴¹ Third, juvenile court proceedings were more informal than adult court proceedings.⁴² Because the

³¹ See Feld, *supra* note 19, at 824; Zierdt, *supra* note 30, at 406; Oddo, *supra* note 29, at 107.

³² See JUVENILE OFFENDERS, *supra* note 5, at 86.

³³ See Zierdt, *supra* note 30, at 406.

³⁴ See JUVENILE OFFENDERS, *supra* note 5, at 86.

³⁵ See Zierdt, *supra* note 30, at 407-08.

³⁶ See *id.* at 408. The rationale for the court acting like a parent was the British doctrine of *parens patrie*, the State as parent. See JUVENILE OFFENDERS, *supra* note 5, at 86. According to this doctrine, the State was responsible for protecting children whose parents did not provide necessary care. See *id.*

³⁷ Oddo, *supra* note 29, at 107.

³⁸ See Ainsworth, *supra* note 26, at 927; Feld, *supra* note 19, at 821.

³⁹ See JUVENILE OFFENDERS, *supra* note 5, at 86.

⁴⁰ See Feld, *supra* note 19, at 825.

⁴¹ See *id.*; Oddo, *supra* note 29, at 107.

⁴² See JUVENILE OFFENDERS, *supra* note 5, at 87.

court itself aimed to protect the child, states considered many adult due process protections, such as the right to an attorney, unnecessary.⁴⁵ Finally, in sentencing juvenile delinquents, juvenile court judges had broad discretion to tailor the treatment to the individual child.⁴⁶ Thus, "sentences" were indeterminate and lasted only until the child was rehabilitated or, at the latest, until the age of twenty-one.⁴⁵

Beginning in the 1960s, however, concern surfaced that the juvenile justice system was not achieving its goal of rehabilitating juvenile delinquents.⁴⁶ Some of the concern related to the fact that indeterminate sentences led to a "growing number of juveniles institutionalized indefinitely in the name of treatment."⁴⁷ Additionally, concerns that rehabilitation efforts were failing were bolstered by recidivism rates of juveniles who most likely were released from juvenile detention based on the conclusion that they were "cured."⁴⁸ Thus, while continuing to support rehabilitation as the ultimate goal, many concluded that the lack of effective rehabilitation was due to the informal nature of the juvenile justice system and the wide discretion given to juvenile court judges.⁴⁹ As a result of these concerns, the United States Supreme Court heard several cases regarding the nature of juvenile court proceedings and instituted many of the due process protections required in the adult system.⁵⁰

In 1966, in *Kent v. United States*, the Supreme Court held that in order to transfer a juvenile defendant to adult court, a judge must provide the opportunity for a hearing and must accompany a waiver of jurisdiction order with a statement listing the reasons for transfer.⁵¹ The Court then listed eight factors a juvenile court judge must con-

⁴⁵ See *id.*; Zierdt, *supra* note 30, at 408.

⁴⁶ See JUVENILE OFFENDERS, *supra* note 5, at 87. Sentences ranged from a warning to probation supervision to training-school confinement. See *id.* Traditionally, in the juvenile justice system, defendants are not "found guilty" but rather are "adjudicated delinquent." See Ainsworth, *supra* note 26, at 934.

⁴⁷ See JUVENILE OFFENDERS, *supra* note 5, at 87.

⁴⁸ See *id.*; Feld, *supra* note 19, at 826; Zierdt, *supra* note 30, at 409.

⁴⁹ See JUVENILE OFFENDERS, *supra* note 5, at 87.

⁵⁰ See *In re Gault*, 387 U.S. 1, 22 (1967). A study by the Stanford Research Institute for the President's Commission on Crime in the District of Columbia found that in 1965, 61% of juvenile defendants had been previously referred at least once and 42% had been previously referred at least twice. See *id.*

⁵¹ See McLatchey, *supra* note 8, at 403.

⁵² See JUVENILE OFFENDERS, *supra* note 5, at 87, 90; Oddo, *supra* note 29, at 109-10.

⁵³ See *Kent v. United States*, 383 U.S. 541, 561 (1966).

sider in deciding whether to transfer a juvenile to adult court.⁵² These factors included the seriousness of the offense, the maturity of the juvenile, the previous record, if any, of the juvenile and the likelihood that the juvenile would be rehabilitated under the juvenile system.⁵³ In deciding to require these elements of due process, the Court reasoned that juvenile court judges are not licensed to act with "procedural arbitrariness."⁵⁴ Fearing the knee-jerk transfer of juveniles who might otherwise be rehabilitated in the juvenile justice system, the Court found that when such a "critically important" decision was at stake, transfer hearings and statements of the reasons for transfer were necessary.⁵⁵ The Court emphasized the serious consequences of transferring a juvenile to adult court, which in *Kent* could have exposed the defendant to the possibility of the death sentence rather than a juvenile sentence of up to five years of rehabilitative treatment.⁵⁶ The Court concluded that "society's special concern for children" does not permit juvenile defendants to be transferred to adult court without these due process protections.⁵⁷

In 1967, in *In re Gault*, the Supreme Court held that at juvenile delinquency proceedings, a juvenile has a right to counsel, a right to cross-examine witnesses, a right against self-incrimination and a right to be notified, along with his or her parents, of the pending charges.⁵⁸ Noting the lack of these protections in juvenile proceedings, the Court quoted the Chairman of the Pennsylvania Council of Juvenile Court Judges: "Unfortunately, loose procedures, high-handed methods and crowded court calendars . . . all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process."⁵⁹ The Court then connected the lack of due process protections in the juvenile justice system with the failure of rehabilitation as evidenced by the recent high rates of recidivism

⁵² See *id.* at 566-67.

⁵³ See *id.* The other four factors were: whether the alleged offense was committed in a violent manner; whether the alleged offense was committed against persons or against property; whether there was evidence upon which a Grand Jury could return an indictment; and whether it would be desirable to try the entire offense in one court when the juvenile's associates in the alleged offense were adults who would be charged in adult court. See *id.* at 567.

⁵⁴ See *id.* at 554-55.

⁵⁵ See *id.* at 553.

⁵⁶ See *Kent*, 383 U.S. at 553-54.

⁵⁷ See *id.* at 554.

⁵⁸ See *Gault*, 387 U.S. at 33, 41, 55, 56-57.

⁵⁹ See *id.* at 19.

among juveniles.⁶⁰ The Court explained that resistance to the rehabilitative treatment provided by the juvenile justice system might stem from perceptions of unfair treatment in courts where procedures were informal but sentences severe.⁶¹ By instituting these due process protections, the Court aimed to restore juveniles' faith in the system and thereby enable the system to more effectively attain its goal of rehabilitating juvenile offenders.⁶²

Despite the similarities now shared by the juvenile and adult courts, the juvenile justice system retains several unique features reflecting its initial goals of individualized treatment and rehabilitation.⁶³ For example, although the Supreme Court added many due process protections to the juvenile justice system, the Court refused to require structural changes it believed would destroy the unique benefits of the juvenile justice system.⁶⁴ As a result, juveniles are not afforded a right to a jury trial in all states, unlike adults who have a constitutional right to a trial by jury.⁶⁵ The Court found that juries "could be disruptive to the informal atmosphere of the juvenile court, tending to make it more adversarial."⁶⁶ In addition, the Supreme Court held that juveniles may be detained without bail pending adjudication because preventive detention protects the juvenile and society and is not intended to punish the juvenile.⁶⁷ Adult defendants, however, have a right to apply for bond or bail release.⁶⁸ Finally, the Supreme Court decisions did not address the disposition phase of juvenile court proceedings, and consequently, juvenile court judges retain a broad range of sentencing authority, as distinct from adult court judges.⁶⁹ The sanctions that juvenile court judges impose may be indeterminate and based on both legal and non-legal factors, un-

⁶⁰ See *id.* at 22, 26.

⁶¹ See *id.* at 26. The Court quoted the National Crime Commission Report: "[T]he informal procedures . . . may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges . . ." See *id.* at 26 n.37.

⁶² See *id.* at 22, 26.

⁶³ See JUVENILE OFFENDERS, *supra* note 5, at 92.

⁶⁴ See *Gault*, 387 U.S. at 22.

⁶⁵ See JUVENILE OFFENDERS, *supra* note 5, at 92.

⁶⁶ *Gault*, 387 U.S. at 22.

⁶⁷ See *id.*

⁶⁸ See JUVENILE OFFENDERS, *supra* note 5, at 95.

⁶⁹ See *id.* at 96; Zierdt, *supra* note 30, at 409.

like adult sentences, which are usually determinate and based on the severity of the current offense and the criminal's prior history.⁷⁰

B. Recent Changes in Juvenile Justice

In the 1990s, many states, responding to public concern over incidents of violent crime committed by juveniles, moved beyond the Supreme Court's changes to the structure of the juvenile justice system by amending their juvenile justice laws to reflect a greater emphasis on punishment and deterrence and less of a focus on the rehabilitation of the individual juvenile.⁷¹ States' recent revisions to juvenile justice laws have taken several different forms.⁷² Many state laws now provide for an increase in transfers of jurisdiction over juvenile defendants from juvenile court to adult court, an expansion of the types of sentences juvenile defendants may receive, and a reduction in the level of confidentiality of juvenile court proceedings.⁷³

One major change to the juvenile justice system has been the increase in transfers of jurisdiction from juvenile court to adult court, where punishments often are more severe and less individualized.⁷⁴ Between 1992 and 1997, forty-four states and the District of Columbia enacted legislation expanding the transfer of jurisdiction over juveniles.⁷⁵ Several states did so by lowering the minimum age at which a juvenile court may waive jurisdiction.⁷⁶ In Missouri, for example, in 1996, the legislature lowered the minimum age for transfer from fourteen to twelve.⁷⁷ In 1997, Indiana lowered the minimum age for transfer from sixteen to ten.⁷⁸ As of 1997, twenty-two states and the District of Columbia no longer impose any minimum age requirement for at least one method of transferring jurisdiction to adult court.⁷⁹

⁷⁰ See JUVENILE OFFENDERS, *supra* note 5, at 96.

⁷¹ See *id.* at 89; Feld, *supra* note 19, at 822; Zierdt, *supra* note 30, at 415. These changes illustrate a desire to hold juveniles accountable for their actions. See Zierdt, *supra* note 30, at 415.

⁷² See JUVENILE OFFENDERS, *supra* note 5, at 89.

⁷³ See *id.*; Zierdt, *supra* note 30, at 414, 420.

⁷⁴ See JUVENILE OFFENDERS, *supra* note 5, at 103; McLatchey, *supra* note 8, at 407.

⁷⁵ See JUVENILES IN COURT, *supra* note 4.

⁷⁶ See Zierdt, *supra* note 30, at 419.

⁷⁷ See *id.*

⁷⁸ See IND. CODE ANN. § 31-30-3-4 (Michie 1997). The minimum age of ten for transfers of juveniles to adult court applies only to juveniles charged with acts that would be considered murder if committed by an adult. See *id.*

⁷⁹ See JUVENILE OFFENDERS, *supra* note 5, at 106.

In addition to lowering the age at which jurisdiction over a juvenile may be transferred to adult court, state legislatures also have expanded the types of transfer mechanisms available to juvenile courts.⁸⁰ Recently, states have included not only traditional judicial waivers of jurisdiction, where the juvenile court judge may transfer the juvenile at the judge's discretion, but also, under certain circumstances, waiver at the discretion of the prosecutor or, alternatively, mandatory waiver required by specific legislation.⁸¹ These prosecutorial and legislative waivers of jurisdiction to adult court, moreover, are largely a result of legislators' tough-crime measures and illustrate the trend of imposing more punishment on juveniles in an effort to deter juveniles from committing violent crime.⁸²

Under judicial waiver—the most traditional and still most common method of transfer used by states—the juvenile court judge retains the authority to waive jurisdiction over the juvenile and transfer him or her to adult court.⁸³ Most statutes defining judicial waiver limit the judge's decision to juveniles of a minimum age who have been charged with specific offenses.⁸⁴ For example, New Jersey allows judicial waiver of juveniles at least fourteen years old who have been charged with murder or certain person, property, drug or weapon offenses.⁸⁵ Most statutes also enumerate several factors that the juvenile judge must consider in making the decision to transfer a juvenile.⁸⁶ Some states leave the final waiver decision entirely to the discretion of the judge and provide factors for the judge to consider. Others, such as California and Minnesota, create a presumption of transfer for certain crimes, with the juvenile bearing the burden of rebutting that presumption.⁸⁷

⁸⁰ See Zierdt, *supra* note 30, at 415–18.

⁸¹ See JUVENILE OFFENDERS, *supra* note 5, at 102.

⁸² See Zierdt, *supra* note 30, at 415–16; McLatchey, *supra* note 8, at 406–07.

⁸³ See JUVENILE OFFENDERS, *supra* note 5, at 102–03. Judicial waiver is available in the District of Columbia and all states except Massachusetts, Nebraska, New Mexico and New York. See *id.* at 102.

⁸⁴ See *id.* at 103.

⁸⁵ See *id.* at 104.

⁸⁶ See *id.* at 103. Judicial waiver statutes usually require the judge to consider the seriousness of the offense, the age of the offender, the juvenile's previous record and the amenability of the juvenile to rehabilitative treatment. See Zierdt, *supra* note 30, at 418.

⁸⁷ See JUVENILE OFFENDERS, *supra* note 5, at 103; Zierdt, *supra* note 30, at 418–19. In California, a presumption of transfer exists for twenty-eight offenses, including murder, robbery with a dangerous weapon, sexual crimes and kidnapping. See Zierdt, *supra* note 30, at 418. In Minnesota, a presumption of transfer exists for a juvenile who is at least sixteen years old and is charged with "any felony offense while using . . . a fire-arm." See *id.* at 419.

Another method of transferring jurisdiction over juveniles to adult court relies upon the initiative of the prosecutor.⁸⁸ Under these statutes, jurisdiction rests concurrently with the juvenile and adult criminal courts, and the prosecutor, with little statutory guidance, may decide where to pursue the case.⁸⁹ Most statutes authorizing prosecutorial waiver limit it to serious offenses.⁹⁰ For example, Florida prosecutors may file directly in adult court for cases involving juveniles who are at least sixteen years old and are charged with a misdemeanor (if they have a prior adjudication) or a felony.⁹¹ Florida prosecutors also may file directly in adult court for cases involving juveniles who are at least fourteen years old and who are charged with murder or certain person, property or weapon offenses.⁹² Although only a few states authorize prosecutorial waiver, prosecutors in those states transfer many juveniles to adult court.⁹³

A third mechanism for transferring jurisdiction over juveniles to criminal court is legislative waiver, under which state statutes exclude certain juveniles from the jurisdiction of the juvenile court altogether.⁹⁴ Although this type of waiver is not as common among states as judicial waiver, it accounts for the largest number of juveniles tried as adults.⁹⁵ Legislative waiver statutes usually require automatic transfer if the defendant has attained a specific age and is accused of a crime specified in the statute.⁹⁶ For example, in Massachusetts, jurisdiction over juveniles between the ages of fourteen and seventeen accused of committing murder in the first or second degree exists only in adult criminal court.⁹⁷

States not only are expanding ways to transfer jurisdiction, but also are broadening the types of sentences juvenile offenders may re-

⁸⁸ See *Juveniles in Court*, *supra* note 4. As of 1997, this method of transferring juveniles to adult court is allowed in fourteen states and the District of Columbia. *See id.*

⁸⁹ See *JUVENILE OFFENDERS*, *supra* note 5, at 105; *Juveniles in Court*, *supra* note 4.

⁹⁰ See *JUVENILE OFFENDERS*, *supra* note 5, at 105.

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.* In Florida, for example, approximately 5000 juveniles are transferred to adult court each year by prosecutorial waiver. *See JUVENILE OFFENDERS*, *supra* note 5, at 105.

⁹⁴ See *JUVENILE OFFENDERS*, *supra* note 5, at 102.

⁹⁵ *See id.* at 103, 106. As of 1997, legislative waiver existed in only twenty-eight states, in contrast to judicial waiver, which existed in all but four states. *See id.* at 104, 106.

⁹⁶ See Zierdt, *supra* note 30, at 415.

⁹⁷ See MASS. GEN. LAWS ch. 119, § 74 (1996). Oregon has gone even further and requires automatic waiver of juveniles age fifteen to seventeen charged with aggravated murder, attempt or conspiracy to commit murder, manslaughter, assault, kidnapping, rape, sodomy, unlawful sexual penetration, sexual abuse, robbery, compelling prostitution and arson. *See OR. REV. STAT. § 137.707* (1999).

ceive, whether tried in a juvenile or adult court.⁹⁸ By imposing more severe sanctions on juveniles for certain crimes, states have made punishment and deterrence the focus of their juvenile justice systems.⁹⁹ States have expanded the types of dispositions and sentences imposed on juvenile offenders in four ways.¹⁰⁰ First, many states permit the extension of juvenile court dispositions until the juvenile is twenty-one years old.¹⁰¹ Traditionally, the jurisdiction of the juvenile court lasted only until the juvenile turned eighteen.¹⁰² In Arkansas, for example, the prosecutor may request extended jurisdiction in the sentencing of juveniles who were thirteen years old or younger at the time of the offense and who are charged with capital murder or murder in the first degree.¹⁰³ Arkansas prosecutors may also request extended jurisdiction in the sentencing of juveniles who were fourteen or fifteen years old at the time of the offense and who are charged with certain enumerated crimes.¹⁰⁴

Second, juvenile courts in many states now issue more determinate dispositions based upon the nature of the offense, as specified by statute.¹⁰⁵ Traditionally, because juvenile court dispositions focused primarily on rehabilitation and the individual needs of the juvenile, dispositions varied in both severity and duration.¹⁰⁶ The trend of being "tough on crime," however, has led to more uniform, statutorily-defined sentences for juveniles that are based primarily on the type of offense committed, in an effort to punish the juvenile and to deter future juvenile offenders.¹⁰⁷ For example, from 1992 through 1997, sixteen states added or strengthened statutes requiring juvenile courts to impose mandatory minimum confinement for juvenile defendants adjudicated delinquent of certain violent crimes.¹⁰⁸ Similarly, in Texas,

⁹⁸ See Cathi J. Hunt, Note, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 632-33 (1999); see also JUVENILE OFFENDERS, *supra* note 5, at 108.

⁹⁹ See JUVENILE OFFENDERS, *supra* note 5, at 108.

¹⁰⁰ See *infra* notes 101-122 and accompanying text. "Sentences" imposed on juveniles adjudicated delinquent are referred to as "dispositions." See JUVENILE OFFENDERS, *supra* note 5, at 96.

¹⁰¹ See JUVENILE OFFENDERS, *supra* note 5, at 108.

¹⁰² See *id.* at 86. Between 1992 and 1997, seventeen states extended the possible duration of juvenile court dispositions to age twenty-one. See *id.* at 108.

¹⁰³ See S.B. 505, § 1, 1999 Ark. Acts 1192.

¹⁰⁴ See *id.*

¹⁰⁵ See Zierdt, *supra* note 30, at 420; Hunt, *supra* note 98, at 640-41.

¹⁰⁶ See Zierdt, *supra* note 30, at 420.

¹⁰⁷ See *id.*; see also JUVENILE OFFENDERS, *supra* note 5, at 108.

¹⁰⁸ See JUVENILE OFFENDERS, *supra* note 5, at 108.

if a court adjudicates a juvenile delinquent of at least one of fourteen statutorily-defined felonies, the court may commit the juvenile to the Texas Youth Commission with a possible transfer to adult prison.¹⁰⁹ The adult prison sentence may consist of up to ten, twenty or forty years depending on the offense.¹¹⁰

Third, many states allow juvenile offenders to receive adult punishment.¹¹¹ Naturally, if jurisdiction over a juvenile is transferred to adult court and the juvenile is found guilty of the offense, the court may impose upon the juvenile the adult sanction appropriate for the offense.¹¹² In addition, in New Mexico, even if jurisdiction over a juvenile has not been transferred, a juvenile court judge may invoke an adult sentence on a juvenile delinquent.¹¹³ New Mexico provides the juvenile court discretion to impose either an adult sentence or juvenile sanctions on a youthful offender.¹¹⁴ To impose an adult sentence, the court must find that the juvenile is not amenable to treatment or rehabilitation in the juvenile facilities.¹¹⁵

Fourth, many states permit courts to impose blended sentences on juvenile offenders.¹¹⁶ Through blended sentencing, an adult or juvenile court with jurisdiction over a juvenile offender may impose a sentence consisting of *both* juvenile *and* adult sanctions.¹¹⁷ For instance, in Michigan, an *adult* court judge may impose either a juvenile disposition, an adult criminal sentence (if it would best serve the interests of the public), or a blended sentence combining juvenile and adult sanctions—such as juvenile detention with a suspended adult sentence.¹¹⁸ The suspended adult sentence, however, may only be imposed if the juvenile has not been reformed by the juvenile system by

¹⁰⁹ See TEX. FAM. CODE ANN. §§ 53.045, 54.04 (Vernon 2000).

¹¹⁰ See *id.* § 54.04. The adult prison sentence may not be more than ten years for a felony of the third degree, not more than twenty years for a felony of the second degree and not more than forty years for a felony in the first degree, a capital felony or an aggravated controlled substance felony. See *id.*

¹¹¹ See JUVENILE OFFENDERS, *supra* note 5, at 108.

¹¹² See Hunt, *supra* note 98, at 633.

¹¹³ See JUVENILE OFFENDERS, *supra* note 5, at 108.

¹¹⁴ See N.M. STAT. ANN. § 32A-2-20 (Michie 1978).

¹¹⁵ See *id.* In order to make these findings, the judge must consider eight factors listed in the statute. See *id.*

¹¹⁶ See JUVENILE OFFENDERS, *supra* note 5, at 108.

¹¹⁷ See Hunt, *supra* note 98, at 639; see also JUVENILE OFFENDERS, *supra* note 5, at 108.

¹¹⁸ See MICH. COMP. LAWS ANN. § 712A.18 (West 1993); 1999 Mich. Legis. Serv. 86 (West).

the time that he or she is twenty-one years old.¹¹⁹ Juvenile court judges may also issue blended sentences.¹²⁰ For example, in Kansas, if an extended jurisdiction juvenile is adjudicated delinquent, a juvenile court must impose a sentence of juvenile detention coupled with a suspended adult sentence.¹²¹ The juvenile will only serve the suspended sentence if he or she violates conditions of the juvenile detention or re-offends.¹²²

In addition to expanding the types of sanctions imposed on juvenile offenders, many states have reduced the level of confidentiality involved in juvenile court proceedings.¹²³ Traditionally, juvenile court proceedings and records remained closed to the public in an effort to keep the identity of juveniles confidential and to protect them from being labeled as criminals.¹²⁴ Anonymity, however, increased the public's perception that the juvenile court system was too lenient in its sentencing.¹²⁵ State legislatures responded by requiring that juvenile records and proceedings be more open, thereby providing less protection to juveniles and creating a more punitive juvenile justice system.¹²⁶ Statutes in forty-seven states and the District of Columbia now allow information in juvenile court records to be released to at least one of several sources: prosecutors, law enforcement agencies, social services agencies, schools, victims or the general public.¹²⁷ Although access still may be restricted to certain parts of the record or made available only by a court order, state legislation has significantly eroded the confidentiality of juvenile proceedings.¹²⁸

There are several ways in which statutes have mandated that juvenile proceedings be more open to members of the public, but "in general, the more serious the crime, the less protection is afforded to

¹¹⁹ See § 712A.18. An adult sentence provides additional punishment for the juvenile delinquent; even a suspended adult sentence, it is argued, helps deter other juveniles from committing crimes. See Hunt, *supra* note 98, at 633, 634, 670, 673.

¹²⁰ See JUVENILE OFFENDERS, *supra* note 5, at 108.

¹²¹ See KAN. STAT. ANN. § 38-16,126 (Supp. 1999). An extended jurisdiction juvenile is a juvenile who was age fourteen, fifteen, sixteen or seventeen at the time of the offense and who meets one of the following two conditions: The juvenile must be charged with either an offense that would be considered a felony if committed by an adult or an offense committed while in possession of a firearm; or the juvenile must be charged with a felony after being adjudicated delinquent in a prior juvenile proceeding. See *id.*

¹²² See *id.*

¹²³ See Zierdt, *supra* note 30, at 420.

¹²⁴ See *id.*

¹²⁵ See *id.* at 420-21.

¹²⁶ See *id.* at 421; Oddo, *supra* note 29, at 119.

¹²⁷ See JUVENILE OFFENDERS, *supra* note 5, at 101.

¹²⁸ See *id.*

a juvenile's confidentiality."¹²⁹ For example, all juvenile proceedings in Maryland remain open to the general public if they involve offenses that are considered felonies when committed by an adult.¹³⁰ Cases involving offenses that are misdemeanors when committed by an adult may be closed to the general public but only at the discretion of the judge.¹³¹ Some states, moreover, require the juvenile court to release to schools the names of juveniles who have committed violent crimes.¹³² In addition, in forty-two states, names of juvenile defendants and occasionally pictures and court records may be released to the media.¹³³

II. ALTERNATIVES FOR ADDRESSING THE JUVENILE JUSTICE CONTROVERSY

Many scholars agree that the juvenile justice system is not dealing effectively with juvenile crime.¹³⁴ Scholars disagree, however, about the effectiveness of the state reforms initiated as part of the recent national trend to shift the focus of the juvenile justice system from rehabilitation to punishment and deterrence.¹³⁵ The general debate on how to reform the treatment of juvenile offenders has produced three main alternatives.¹³⁶

One proposed alternative is to abolish the juvenile justice system, thereby ending the separation between the juvenile and criminal justice systems.¹³⁷ Abolitionists maintain that the current juvenile justice system contains serious shortcomings.¹³⁸ They claim that the procedural protections afforded by the juvenile court are inferior to those provided in adult criminal court.¹³⁹ Indeed, according to abolitionists, juveniles commonly are represented by lawyers with little experience and, in many states, are not entitled to jury trials.¹⁴⁰ Abolitionists also

¹²⁹ See Oddo, *supra* note 29, at 115.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.* at 116.

¹³³ See JUVENILE OFFENDERS, *supra* note 5, at 101.

¹³⁴ See Ainsworth, *supra* note 26, at 927; Zierdt, *supra* note 30, at 427, 434.

¹³⁵ See Ainsworth, *supra* note 26, at 936; Feld, *supra* note 19, at 822; Zierdt, *supra* note 30, at 402; Hunt, *supra* note 98, at 668.

¹³⁶ See *infra* notes 137-180 and accompanying text.

¹³⁷ See Ainsworth, *supra* note 26, at 929; Feld, *supra* note 19, at 822.

¹³⁸ See Ainsworth, *supra* note 26, at 927.

¹³⁹ See *id.* at 928. One scholar has gone so far as to say that "the juvenile court is now a deficient criminal court." See Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997).

¹⁴⁰ See Ainsworth, *supra* note 26, at 928.

claim that juvenile offenders do not receive individualized dispositions because the juvenile justice system does not have the resources to provide specialized treatment.¹⁴¹ Further, abolitionists argue that incarceration of juveniles is viewed as punishment, even if imposed in the name of treatment.¹⁴² Finally, supporters of this alternative believe that the current two-tiered justice system, where cases are allocated merely on the basis of an "age of majority," cannot be effective because all children do not mature at the same age.¹⁴³

In addition to arguing that the shortcomings of the current juvenile justice system have prevented it from achieving its original goals, abolitionists also point out that the recent reforms have brought the juvenile justice system closer in resemblance to the adult system.¹⁴⁴ The due process protections required by the Supreme Court have added formality to a juvenile justice process envisioned by the Progressives as individualized and procedurally informal.¹⁴⁵ In addition, the shift in focus from rehabilitation to punishment of juvenile delinquents illustrates the inadequacy of the due process protections in place and raises the need to provide juveniles with the same procedural protections adults receive.¹⁴⁶

Thus, abolitionists argue that because the current juvenile justice system is not achieving its original goals and the recent reforms have made it resemble the adult system, the juvenile system should be abolished in favor of one unified system.¹⁴⁷ Although abolitionists propose one justice system applicable to all defendants, they also recognize that the present adult criminal system has its own shortcomings.¹⁴⁸ Thus, abolitionists favor creation of a new system altogether, under which each defendant would be evaluated individually, with age as one of the factors influencing sentencing.¹⁴⁹

Supporters of a second alternative for dealing with young offenders also express concern over the recent reforms to the juvenile

¹⁴¹ See *id.* at 928-29.

¹⁴² See *id.* at 928.

¹⁴³ See *id.* at 948.

¹⁴⁴ See Feld, *supra* note 19, at 821.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 822.

¹⁴⁷ See Ainsworth, *supra* note 26, at 927-31; Feld, *supra* note 19, at 821-22.

¹⁴⁸ See Ainsworth, *supra* note 26, at 931; McLatchey, *supra* note 8, at 417. The adult criminal justice system is overcrowded and "justice is dispensed through waivers and pleas negotiated by defense attorneys who are often less than zealous . . . advocates." See McLatchey, *supra* note 8, at 418 n.190.

¹⁴⁹ See Ainsworth, *supra* note 26, at 931; McLatchey, *supra* note 8, at 417.

justice system and focus on community-based treatment programs in an effort to prevent juveniles from committing crimes.¹⁵⁰ One scholar maintains that recent violent crimes committed by juveniles have been dramatized by the media and that making the juvenile court more like an adult court in response to these few crimes will prevent society from deterring juvenile crime.¹⁵¹ Supporters of community-based treatment programs argue that changing the focus of the juvenile justice system to punishment and imprisonment is a reactive response, rather than a preventive response, to juvenile crime.¹⁵² They maintain that imprisonment will not deter delinquents from re-offending or prevent others from committing crimes, because it does not take into account the troubling backgrounds of many of these juveniles.¹⁵³ Supporters of this approach argue that in order to reduce crimes committed by juveniles, the juvenile justice system should include community-based treatment programs that take into account the causes of delinquency.¹⁵⁴

Advocates of this alternative point out that some of the primary causes of delinquency have been identified.¹⁵⁵ Juveniles often commit crimes as a reaction to their environment, which most likely includes impoverishment, sub-standard housing and health care, inadequate education, and domestic problems.¹⁵⁶ According to statistics on incarcerated juveniles, the majority of violent juvenile offenders have witnessed physical violence and have themselves been victims of abuse.¹⁵⁷ To deter juveniles from re-offending and to prevent other juveniles from committing crimes, supporters argue, the juvenile justice system should include treatment programs that focus on the individual child in his or her community.¹⁵⁸ These programs will rehabilitate juvenile delinquents more effectively and protect society from juvenile crime.¹⁵⁹ Supporters point out that this approach remains consistent

¹⁵⁰ See Zierdt, *supra* note 30, at 434.

¹⁵¹ See *id.* at 402, 434.

¹⁵² See Abbe Smith, *The Dream of Growing Older: On Kids & Crime*, 36 B.C. L. REV. 953, 1009-10 (1995); Zierdt, *supra* note 30, at 402.

¹⁵³ See Smith, *supra* note 152, at 1009-10.

¹⁵⁴ See Zierdt, *supra* note 30, at 426, 427.

¹⁵⁵ See *id.* at 427.

¹⁵⁶ See *id.* at 426-27.

¹⁵⁷ See *id.* at 427. In fact, in 1997, "75 percent of violent juvenile offenders suffered serious abuse by a family member, 80 percent witnessed physical violence from beatings and killings, 50 percent came from homes with one parent families, [and] over 25 percent had a parent who abused drugs or alcohol." See *id.*

¹⁵⁸ See *id.* at 427, 434.

¹⁵⁹ See Zierdt, *supra* note 30, at 434.

with the mission of the juvenile justice system, which was founded on the idea that a juvenile can be rehabilitated most effectively within the community.¹⁶⁰

According to its supporters, a community-based treatment program would maintain the traditional two-tiered structure of the justice system (adult and juvenile) but would replace incarceration of juveniles with a community model in an effort to rehabilitate juveniles.¹⁶¹ The community model would be organized similarly to intensive probation and would thus provide for the close monitoring of the juvenile through "continuous case management; emphasis on reintegration and reentry services; opportunities for youth achievement and involvement in program decision making; clear and consistent consequences for misconduct; enriched educational and vocational programming; and a variety of forms of individual, group, and family counseling matched to youth's needs."¹⁶² Although these programs are expensive, research shows that they could be less expensive than incarceration.¹⁶³

A third alternative for addressing the juvenile justice controversy consists of implementing a blended sentencing option in the juvenile courts of those states lacking this option.¹⁶⁴ Supporters of this approach maintain that states that treat juveniles completely as adults, either through legislative transfers of juveniles to adult court or through entirely adult sanctions imposed by juvenile or adult courts, have gone too far.¹⁶⁵ These reforms, it is argued, place too much emphasis on punishment whereas blended sentencing provides a way to keep the focus on the rehabilitation of juveniles and make the rehabilitation process more effective.¹⁶⁶

Like those advocating abolition of the juvenile justice system, supporters of blended sentencing believe that the current two-tiered justice system has not reduced juvenile crime or fostered the rehabilitation of juvenile offenders.¹⁶⁷ In addition, both abolitionists and supporters of blended sentencing agree that a main problem is that an "age of majority" division between juvenile and adult court jurisdic-

¹⁶⁰ See *id.* at 433.

¹⁶¹ See *id.*

¹⁶² See *id.* at 429, 433.

¹⁶³ See *id.* at 428.

¹⁶⁴ See Hunt, *supra* note 98, at 668. As of 1997, blended sentencing options were available in twenty-two states. See JUVENILE OFFENDERS, *supra* note 5, at 108.

¹⁶⁵ See Hunt, *supra* note 98, at 668, 670-71, 680.

¹⁶⁶ See *id.* at 668, 670.

¹⁶⁷ See Ainsworth, *supra* note 26, at 948; Hunt, *supra* note 98, at 668, 670-71.

tion does not focus adequately on the individual situations of juvenile delinquents.¹⁶⁸ Supporters of blended sentencing, however, reject the abolitionists' unified system and instead propose a three-tiered system, with one tier as a "transitional component between the juvenile and adult systems."¹⁶⁹ This transitional "third tier" would identify certain juveniles eligible to receive blended sentences and thus would only apply at the sentencing phase.¹⁷⁰ According to the supporters of blended sentencing, juveniles between the ages of fourteen and seventeen who are charged with a felony and who were previously adjudicated delinquent of a felony offense would be eligible to receive blended sentencing.¹⁷¹ Under this approach, then, juvenile court judges may impose a sentence consisting of detention at a state youth facility until the juvenile reaches age twenty-one, combined with a suspended adult prison sentence to be served if the juvenile re-offends, has not been rehabilitated, or does not comply with the conditions of the juvenile sentence.¹⁷²

Supporters of the blended sentencing approach maintain that unlike legislative transfer and wholly adult sentences, blended sentencing does not over-punish because it bases the need to implement an adult sentence on the juvenile's individual rehabilitation progress, not entirely on the nature of the offense.¹⁷³ Proponents of blended sentencing believe this approach will rehabilitate juvenile offenders more effectively.¹⁷⁴ Because it applies to repeat juvenile offenders, it offers them one more chance to reform within the juvenile system.¹⁷⁵ The suspended adult sentence, moreover, provides added incentive for the juvenile to rehabilitate and to abide by the terms of the juvenile sentence—thereby avoiding the adult sentence altogether.¹⁷⁶ Additionally, blended sentencing broadens the jurisdiction of the juvenile court so that a juvenile offender has until age twenty-one, instead of eighteen, to rehabilitate.¹⁷⁷ Supporters also argue that this transitional sentence will separate those who committed a crime because of

¹⁶⁸ See Hunt, *supra* note 98, at 671.

¹⁶⁹ See Ainsworth, *supra* note 26, at 948–49; see also Hunt, *supra* note 98, at 668, 671; McLatchey, *supra* note 8, at 420.

¹⁷⁰ See Hunt, *supra* note 98, at 671.

¹⁷¹ See *id.* at 669.

¹⁷² See *id.* at 669–70.

¹⁷³ See *id.* at 668, 670–71.

¹⁷⁴ See *id.* at 668, 673.

¹⁷⁵ See McLatchey, *supra* note 8, at 420.

¹⁷⁶ See Hunt, *supra* note 98, at 673.

¹⁷⁷ See *id.*

immaturity or peer pressure and are therefore more likely to reform from those who "are prone to being criminals" and are therefore less likely to reform.¹⁷⁸ This approach, it is further argued, will more adequately protect the public because, insofar as rehabilitation will be more effective, those detained will be less likely to re-offend.¹⁷⁹ Furthermore, those who cannot be rehabilitated—even after two chances to reform—will then be incarcerated so that they are not back out on the streets.¹⁸⁰

III. IN SUPPORT OF TREATING JUVENILES AS ADULTS

In the wake of recent incidents of juvenile violence—such as the shootings by juveniles in Littleton, Colorado, where fifteen were killed and twenty-three injured, and Jonesboro, Arkansas, where five were killed and ten wounded—the public is justifiably concerned about its safety.¹⁸¹ Indeed, Andrew Golden and Mitchell Johnson were only eleven and thirteen, respectively, on March 24, 1998, when they pulled a fire alarm at their Arkansas middle school and hid in the woods near the school, dressed in camouflage.¹⁸² As students and teachers exited the school, the two boys opened fire, killing five people and wounding ten more.¹⁸³ Because they were under age fourteen at the time of the shooting, Arkansas law prevented jurisdiction over Golden and Johnson from being transferred to adult court.¹⁸⁴ The juveniles were adjudicated delinquent in juvenile court, where they received a disposition consisting only of detention in a juvenile facility until age twenty-one.¹⁸⁵

In order to significantly reduce juvenile crime, the juvenile justice system must continue to expand its focus to include not only its original goal of rehabilitation but also punishment and deterrence. Abolishing the juvenile justice system, implementing community-based treatment programs and allowing for blended sentencing are

¹⁷⁸ See McLatchey, *supra* note 8, at 421.

¹⁷⁹ See Hunt, *supra* note 98, at 673.

¹⁸⁰ See *id.* at 673–74.

¹⁸¹ See *Ark. Buys Former County Prison, Will Keep School Snipers in Custody; State Can Fulfill Law Requiring Separation from Other Offenders*, BALT. SUN, June 12, 1999, at 4A; James Barron, *Terror in Littleton: The Dead*, N.Y. TIMES, April 23, 1999, at A21; Judith Graham & Bob Selter, *Massacre Shatters School "A Suicide Mission"*, CHI. TRIB., Apr. 21, 1999, at 1.

¹⁸² See *Ark. Buys Former County Prison*, *supra* note 181, at 4A; Rick Bragg, *Judge Punishes Arkansas Boys Who Killed 5*, N.Y. TIMES, Aug. 12, 1998, at A1.

¹⁸³ See Bragg, *supra* note 182, at 4A.

¹⁸⁴ See *id.*

¹⁸⁵ See *Ark. Buys Former County Prison*, *supra* note 181, at 4A.

not, by themselves, the most effective means of reform.¹⁸⁶ Massachusetts' juvenile justice system, however, which combines the transfer of jurisdiction over certain juveniles to adult court with blended sentencing for other juveniles, provides an example of a system that best protects society from violent crimes committed by juveniles by balancing the goals of punishment, deterrence and rehabilitation.¹⁸⁷

A. *Rejecting the Unified and Community-Based Theories*

Abolishing the separate juvenile and adult justice systems and creating a new unified system does not provide a practical or effective solution to the problem of juvenile crime.¹⁸⁸ A unified justice system, under which each defendant would be evaluated individually, would remove elements of punishment and deterrence from the justice system and individualization would make the determination of sentences less swift and less predictable.¹⁸⁹ Additionally, providing this individualized treatment for adult and juvenile defendants, and making age just one of the factors influencing sentencing, would be costly, time-consuming and inefficient.¹⁹⁰ Finally, if one reason for abolishing the juvenile justice system is its lack of requisite resources to rehabilitate juveniles effectively, how would juveniles benefit by broadening the group of offenders eligible to receive individualized treatment?¹⁹¹ Indeed, juveniles could "fall through the cracks" more easily in a unified system.¹⁹² Thus, a unified system would not further punishment, deterrence or rehabilitation of juvenile offenders.¹⁹³

Similarly, community-based treatment programs would not be the most effective method for dealing with juvenile offenders. Although the juvenile justice system was founded on the principle that juvenile offenders should be treated differently because they cannot reason right from wrong, the type of violence that juveniles commit has changed radically from 1899, and community-based treatment programs practically eliminate the punishment and deterrence that is

¹⁸⁶ See *infra* notes 188–206 and accompanying text.

¹⁸⁷ See MASS. GEN. LAWS ch. 119, §§ 58, 74 (1998).

¹⁸⁸ See McLatchey, *supra* note 8, at 420–21.

¹⁸⁹ See Ainsworth, *supra* note 26, at 949.

¹⁹⁰ See McLatchey, *supra* note 8, at 420.

¹⁹¹ See *id.* (arguing that in a unified system, court dockets would be overcrowded and courts would lack sufficient resources).

¹⁹² See *id.*

¹⁹³ See *id.* at 421.

necessary to stop violent crime committed by juveniles.¹⁹⁴ In fact, instead of focusing on the offense of the individual juvenile and on imposing a suitable punishment, this approach considers juvenile crime a social problem that can be remedied only by treating the child within his or her community.¹⁹⁵ A two-tiered system thus would not provide enough punishment, especially where the system would provide no transition between the community-based treatment programs offered to juveniles under the age of eighteen and adult penalties offered to juveniles age eighteen or older.

One of the problems with the current two-tiered justice system is that the penalties imposed on juveniles and adults can be drastically different, and community-based juvenile treatments would sharpen this contrast by imposing *very* different penalties under the community-based and adult tiers.¹⁹⁶ For example, on November 10, 1990, in Virginia, Douglas Thomas murdered James and Kathy Wiseman, the parents of his girlfriend.¹⁹⁷ Thomas killed the couple according to a plan constructed by his girlfriend, Jessica.¹⁹⁸ Because Thomas was seventeen at the time of the murder, he was eligible for transfer to adult court, where he was tried and sentenced to receive the death penalty.¹⁹⁹ Jessica Wiseman, on the other hand, who masterminded the murder of her parents when she was only fourteen, was tried as a juvenile because of her age and was sentenced to juvenile detention.²⁰⁰ Whereas Douglas Thomas was executed on January 10, 2000, Jessica Wiseman was released in 1997.²⁰¹ The community-based approach not only would preserve, but also would widen the gap in such cases by giving the juvenile a mere "slap on the wrist" through alternative community programs, as opposed to the actual detention imposed on Jessica Wiseman.

Community-based treatment of juvenile offenders not only would fail to provide enough punishment for offenders, but also would fail to prevent juvenile crime from occurring in the first place. One likely

¹⁹⁴ See Cloud et al., *supra* note 7, at 64.

¹⁹⁵ See Smith, *supra* note 152, at 965; Zierdt, *supra* note 30, at 427.

¹⁹⁶ See Zierdt, *supra* note 30, at 427-28.

¹⁹⁷ See Bill Baskervill, *Man Executed for '90 Killings; Supreme Court, Gilmore Reject Last-Minute Bids for Stay*, WASH. POST, Jan. 11, 2000, at B2.

¹⁹⁸ See *Thomas v. Commonwealth*, 419 S.E.2d 606, 608 (Va. 1992); Baskervill, *supra* note 197, at B2.

¹⁹⁹ See *Thomas*, 419 S.E.2d at 608-09; Baskervill, *supra* note 197, at B2.

²⁰⁰ See Baskervill, *supra* note 197, at B2.

²⁰¹ See Baskervill, *supra* note 197, at B2; Va. *Man Executed in Double Murder*, CHARLESTON GAZETTE, Jan. 11, 2000, at 2C.

reason why community-based programs do not effectively prevent juveniles from committing crimes is that these programs are targeted specifically at repeat offenders or youth in certain impoverished areas.²⁰² Many of the recent violent juvenile crimes, however, were committed by juveniles from middle-class, suburban backgrounds.²⁰³ For example, thirteen-year-old Seth Trickey—who was accused of firing at least fifteen rounds from a semiautomatic weapon at a Fort Gibson, Oklahoma middle school on December 6, 1999—was an honor student, active in his church group, quiet and well-liked.²⁰⁴ He was part of a close, middle-class family living in a town of 4000, and he had not had any previous contact with law enforcement.²⁰⁵ The type of violent acts committed by juveniles today, as demonstrated by Seth Trickey's alleged shooting spree, is too severe and too capable of mass harm to be ignored by community-based prevention efforts—yet, this is exactly what is happening.²⁰⁶ Providing community-based treatment for *all* crimes committed by *all* juveniles, however, would be too costly and difficult to administer. Thus, the community-based approach fails as a preventive approach.

B. *Massachusetts as a Model of Juvenile Justice Reform*

To prevent juveniles from committing crimes, the juvenile justice system should focus more on punishment and deterrence in addition to rehabilitation. While blended sentencing should be part of the reform, it should be coupled—in certain cases—with an automatic transfer of jurisdiction to adult court. Massachusetts' laws governing juvenile justice provide a workable model of transfer of juvenile court jurisdiction through legislative waiver, in combination with blended sentencing for "youthful offenders," and thus effectively promote the goals of punishment, deterrence and rehabilitation.²⁰⁷

First, Massachusetts' legislative waiver and youthful offender statutes help focus Massachusetts' juvenile justice system, in specific cir-

²⁰² See Zierdt, *supra* note 30, at 426–27.

²⁰³ See Graham & Sector, *supra* note 181, at 1; Rod Walton, *Boy Enters Innocent Plea*, *TULSA WORLD*, Dec. 15, 1999, at 1. A series of school shootings occurred in Pearl, Mississippi; West Paducah, Kentucky; Springfield, Oregon; and Jonesboro, Arkansas. See Bragg, *supra* note 182, at A1.

²⁰⁴ See Arnold Hamilton, *School Attack Suspect Seeks Juvenile Trial: Shooting "Aberrant" for Boy*, *Lawyers Say*, *DALLAS MORNING NEWS*, Dec. 15, 1999, at 39A.

²⁰⁵ See *id.*; Walton, *supra* note 203, at 1.

²⁰⁶ See Zierdt, *supra* note 30, at 426–27.

²⁰⁷ See MASS. GEN. LAWS ch. 119, §§ 58, 74 (1998).

cumstances, on punishment of the offender.²⁰⁸ Legislative waiver in Massachusetts mandates that any juvenile between the ages of fourteen and seventeen accused of murder in the first or second degree automatically be tried in adult court, subject to adult penalties.²⁰⁹ Juvenile court does not retain any jurisdiction over these offenders.²¹⁰ Transfer of jurisdiction to adult court provides the opportunity to punish juvenile offenders more strongly because the adult court can impose an adult sentence.²¹¹ In addition to the punishment imposed by an adult sentence, the transfer of jurisdiction to adult court itself provides punishment because it carries with it a stigma of serious wrongdoing. Also, adult court proceedings are completely open to the general public, unlike juvenile court proceedings, which remain confidential to a certain degree.²¹²

While helping to expand the focus of the juvenile justice system to include punishment, Massachusetts' legislative waiver statute also reasonably limits that expansion to older juveniles charged with the serious crime of murder.²¹³ To allow a juvenile between the ages of fourteen and seventeen who is found guilty of murder to receive a juvenile sentence or even a blended sentence poses too great a risk to the public's safety. A juvenile disposition could mean less than two years in juvenile detention and then automatic release, and a blended sentence could mean less than five years in juvenile detention with a suspended adult sentence.²¹⁴ Neither sentence imposes enough punishment for the adult crime of murder.

The need for more serious punishment for juveniles who commit very serious crimes was expressed by Massachusetts state legislators, district attorneys, the Attorney General, and the Governor, following the initial decision of Judge Paul Heffernan to try fifteen-year-old Edward O'Brien as a juvenile for the gruesome murder of his neighbor.²¹⁵ On July 23, 1995, O'Brien stabbed Janet Downing ninety-seven

²⁰⁸ See *id.*

²⁰⁹ See *id.* § 74.

²¹⁰ See *id.*

²¹¹ See *id.* § 72B. Thus, if the juvenile offender tried in adult court in Massachusetts were found guilty of murder in the first degree, the sentence would be life in prison without parole. See *id.* ch. 265, § 2.

²¹² See MASS. GEN. LAWS ch. 119, § 60A; JUVENILE OFFENDERS, *supra* note 5, at 94.

²¹³ See ch. 119, § 74.

²¹⁴ See *id.* § 58.

²¹⁵ See Oddo, *supra* note 29, at 125-26; Ellen O'Brien, *A Death Next Door*, BOSTON GLOBE, Aug. 31, 1997, at 12.

times just a few hours after he helped her carry in her groceries.²¹⁶ The judge's decision not to transfer jurisdiction over O'Brien to adult court sparked public outrage and provided some impetus for Massachusetts' 1996 legislative waiver statute, which was offered by State Representative Paul Haley.²¹⁷ Supporters of the legislative waiver statute, including republican Governor William Weld, maintained that "society has an obligation to exact retribution . . . [and that] only by facilitating the transfer of violent offenders to the adult system . . . would retribution be properly attained."²¹⁸

In addition to imposing punishment through legislative waiver, Massachusetts law also effectuates punishment through its creation of the category of "youthful offender."²¹⁹ Juveniles who were between the ages of fourteen and seventeen at the time of the alleged offense and who are accused of committing particular offenses may be treated as youthful offenders for sentencing purposes.²²⁰ Specifically, a youthful offender must be accused of committing an offense that could be punishable by imprisonment if committed by an adult.²²¹ In addition, a youthful offender must have a prior commitment to the Department of Youth Services (DYS) or be accused of committing either specific firearm offenses or an offense involving the infliction or threat of serious bodily harm.²²² Jurisdiction over a youthful offender remains in juvenile court and the youthful offender may receive one of three punishments: an entirely juvenile disposition consisting of commitment to DHS until age twenty-one; an entirely adult sentence; or a blended sentence consisting of commitment to DHS until age twenty-one with a suspended adult sentence.²²³ The fact that a juvenile court may extend juvenile court jurisdiction until age twenty-one, impose an adult sentence, or impose a blended sentence on a youthful offender provides additional punishment in the juvenile justice system.²²⁴ Notwithstanding the variety of harsh punishments that may be imposed against youthful offenders, the statute limits the impositions of this sentencing authority to only the most dangerous youthful offenders, by requiring a juvenile court judge to make a written finding

²¹⁶ See O'Brien, *supra* note 215, at 12.

²¹⁷ See Oddo, *supra* note 29, at 125-26.

²¹⁸ See *id.* at 124-25.

²¹⁹ See MASS. GEN. LAWS ch. 119, § 52.

²²⁰ See *id.*

²²¹ See *id.*

²²² See *id.* ch. 269, §10.

²²³ See *id.* ch. 119, § 58.

²²⁴ See MASS. GEN. LAWS ch. 119, § 58.

that the punishment is necessary to ensure present and future public safety.²²⁵

Second, in addition to providing more focus on punishment, Massachusetts' legislative waiver and youthful offender statutes also expand the focus of the juvenile justice system to provide greater deterrence.²²⁶ The increased focus on punishment through legislative waiver also provides deterrence because of the possibility that a juvenile will receive an adult sentence of life in prison for the crime of murder. Additionally, the possible blended juvenile and adult sentences or extended juvenile sentence should deter older juveniles from committing crimes that would qualify them as youthful offenders.

In addition to the deterrence provided by greater punishment of certain juveniles, Massachusetts' legislative waiver statute also provides deterrence because it automatically waives jurisdiction for certain juveniles, thereby thrusting them into the center of a full-scale adult criminal prosecution.²²⁷ Legislative waiver sends a clear message that any juvenile between the ages of fourteen and seventeen who is accused of committing murder will be tried as an adult.²²⁸ In addition, the statute's deterrent effect is heightened by the swiftness with which legislative waiver is imposed. Contrary to judicial waiver, legislative waiver is automatic.²²⁹ Waiver of juvenile court jurisdiction requires a transfer hearing that can take up to a year to complete, during which time witnesses may relocate and evidence may be compromised, making it extremely difficult to prosecute the case.²³⁰ In addition to providing faster transfers to adult court, legislative waiver also deters by providing clear standards for transfer as opposed to prosecutorial waiver, which gives prosecutors complete discretion to proceed in juvenile or adult court.²³¹ Prosecutorial waiver thus "invites arbitrary,

²²⁵ See *id.* In fact, in determining the sentence of a youthful offender, the judge must hold a sentencing recommendation hearing at which he or she must, by statute, consider certain factors such as the nature of the offense, the youthful offender's delinquency history (if any), the nature of services available through the juvenile system, the age and maturity of the juvenile and the likelihood that he or she will avoid future criminal conduct. See *id.*

²²⁶ See *id.* §§ 58, 74.

²²⁷ See *id.* § 74.

²²⁸ See *id.*

²²⁹ See Zierdt, *supra* note 30, at 416.

²³⁰ See Scott Harshbarger & Carolyn Keshian, *The Attorney General of Massachusetts' Bill Relative to the Trial and Sentencing of Serious Juvenile Offenders*, 5 B.U. PUB. INT. L.J. 135, 139 (1996); McLatchey, *supra* note 8, at 407.

²³¹ See McLatchey, *supra* note 8, at 410.

capricious transfer decisions on the part of the prosecutor"—whereas legislative waivers are applied systematically and predictably.²³²

Although more severe punishments and swifter, automatic transfer to adult court under certain circumstances would seem to provide deterrence, some have argued that juvenile offenders cannot be deterred because they do not conduct a cost-benefit analysis before committing a crime, but rather, act based on emotion and/or peer pressure.²³³ This argument fails, however, because in many cases, juveniles know that the crime they have committed is wrongful and are thus presumably capable of being deterred.²³⁴ For example, in 1989, nine-year-old Cameron Kocher used a rifle to shoot and kill seven-year-old Jessica Carr.²³⁵ Even at age nine, however, Cameron knew that his actions were wrong because he tried to hide the spent cartridge.²³⁶ If juveniles who commit murder when they are as young as nine years old try to conceal their actions, juveniles between the ages of fourteen and seventeen are likely to be aware of the seriousness of the crimes they commit and are capable of being deterred.

Nevertheless, part of the reason juveniles are not deterred by punishments for juvenile crime might be that juvenile proceedings are still fairly confidential in many states.²³⁷ Transferring jurisdiction to adult court, however, would allow these proceedings to be more open to the public, increasing awareness among juveniles of the possibility of trial in adult court.²³⁸ Thus, insofar as Massachusetts' youthful offender statute allows youthful offender trials to be open to the general public as if they were adult trials, the imposition of an adult or blended sentence on a youthful offender may be publicized so that more juveniles become aware that severe penalties can be imposed on youthful offenders.²³⁹ This greater awareness should deter more juveniles from committing crimes.

Finally, Massachusetts' legislative waiver and youthful offender statutes not only focus more on punishment and deterrence but also more effectively retain the original goal of the juvenile justice sys-

²³² See *id.* at 410 n.94, 412.

²³³ See Zierdt, *supra* note 30, at 423; Hunt, *supra* note 98, at 656; McLatchey, *supra* note 8, at 421.

²³⁴ See Cloud et al., *supra* note 7, at 64.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See JUVENILE OFFENDERS, *supra* note 5, at 101.

²³⁸ See *id.* at 95 (stating that proceedings in all adult courts are open to the public).

²³⁹ See MASS. GEN. LAWS ch. 119, § 60A (1998).

tem—rehabilitation.²⁴⁰ Admittedly, legislative transfer of juveniles to adult court does not permit those juveniles to be rehabilitated within the juvenile system. The legislative waiver provision, however, is limited to *older* juveniles charged with *murder* who are not as amenable to rehabilitation and who deplete the juvenile justice system's scarce resources that could be used more effectively to rehabilitate amenable youthful offenders or juvenile delinquents.²⁴¹ Allowing the juvenile justice system to focus on the most amenable juveniles should hopefully prevent additional adult criminal activity in the long run.

In addition, the blended sentences that youthful offenders may receive help rehabilitate juvenile offenders in several ways.²⁴² First, a youthful offender who receives a blended sentence remains committed to DYS until age twenty-one before the suspended adult sentence can begin.²⁴³ Juvenile detention usually is limited to age eighteen, so blended sentencing provides for a longer time period in which the juvenile can reform within the juvenile system.²⁴⁴ Second, the suspended adult sentence provides added incentive for the juvenile to reform.²⁴⁵ Third, because youthful offenders include some juveniles who are repeat offenders, blended sentencing gives them another chance to rehabilitate within the juvenile system.²⁴⁶ Finally, Massachusetts' youthful offender sentencing guidelines allow youthful offenders to receive traditional juvenile "sentences," which make up part of the individualized treatment upon which the juvenile justice system was founded.²⁴⁷

CONCLUSION

According to prosecutors, Nathaniel Abraham told classmates that he planned to shoot someone and practiced shooting at targets before he shot and killed a complete stranger. After the shooting, Abraham went home, watched television and bragged to a classmate. The fact that Abraham was only eleven years old when he committed this murder is reason enough for the public to be horrified. The fact that Abraham already had more than ten run-ins with the police prior

²⁴⁰ See *infra* notes 241–247 and accompanying text.

²⁴¹ See ch. 119, § 74.

²⁴² See *infra* notes 243–247 and accompanying text.

²⁴³ See ch. 119, § 58.

²⁴⁴ See *id.* § 72; Hunt, *supra* note 98, at 673.

²⁴⁵ See MASS. GEN. LAWS ch. 119, § 58; Hunt, *supra* note 98, at 673.

²⁴⁶ See ch. 119, §§ 52, 58; Hunt, *supra* note 98, at 673.

²⁴⁷ See ch. 119, § 58; JUVENILE OFFENDERS, *supra* note 5, at 86.

to his eleventh birthday is equally frightening. Perhaps most disconcerting of all, however, is the fact that after committing murder, Abraham will be held in juvenile detention until age twenty-one—perhaps not even that long—and then will be released back on to the street. Sentences such as this have been regarded by the public as too lenient in a society where incidents of violent crime appear to be escalating. State legislatures have responded to the public's concern by reforming the juvenile justice system. These reforms have expanded the focus of juvenile justice from its original goal of rehabilitation to include punishment and deterrence.

A national debate has arisen over the types of changes that states have made, which include transferring jurisdiction over juveniles from juvenile court to adult court, imposing stronger sentences on juvenile delinquents, and lessening the confidential nature of juvenile proceedings. The debate includes proposals ranging from the abolishment of the juvenile justice system altogether to the creation of community-based treatment as an alternative to punishment in prison. The most effective way to reform the juvenile justice system, however, consists of a combination of juvenile and adult treatment of juvenile offenders that properly balances all three goals of punishment, deterrence and rehabilitation.

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