

# VIOLENT JUVENILE OFFENDERS: RETHINKING FEDERAL INTERVENTION IN JUVENILE JUSTICE

*The problem of the delinquent child, though juristically comparatively simple, is, in its social significance, of the greatest importance, for upon its wise solution depends the future of many of the rising generation.*<sup>1</sup>

## INTRODUCTION

Over the past decade, juveniles have accounted for a larger share of violent criminal activity than ever before.<sup>2</sup> In response to the rise in violent juvenile crime, the public has demanded that violent juvenile offenders be held accountable for their actions. To placate popular support for greater accountability, many state legislatures enacted laws imposing greater punishment on juveniles.<sup>3</sup> This modern punitive approach to juvenile delinquency, however,

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1. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). Judge Mack's article, written over 85 years ago, describes the revolutionary changes in juvenile justice that resulted from the creation of juvenile courts.

2. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (116th ed. 1996) [hereinafter 1996 ABSTRACT]. The number of juvenile arrests for violent crime rose from 77,220 in 1980 to 97,103 arrests in 1990 to 125,141 arrests in 1994, an increase of over 62% between 1980 and 1994. *Id.* at 208 tbl. 324. The Abstract defines juveniles as persons between the ages of 10 and 17. *Id.* Violent crimes include murder, forcible rape, robbery, and aggravated assault. *Id.* See also *infra* Part III.B for discussion of the increase in violent juvenile offenders.

3. See *infra* Part III.B.

contradicts the rehabilitative philosophy historically underlying juvenile justice.<sup>4</sup>

When state legislatures first established juvenile courts at the close of the nineteenth century,<sup>5</sup> most acts of delinquency involved relatively minor misconduct.<sup>6</sup> Today, children of all ages carry weapons to school and commit crimes of violence.<sup>7</sup> The violent nature of modern juvenile delinquency presents a far greater danger to society.<sup>8</sup> Moreover, unlike traditional acts of delinquency, such serious violent conduct causes significant harm not only to the victims of violence but also to the surrounding community.

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4. See *infra* Part I.A for discussion of the rehabilitative approach of juvenile courts.

5. For a review of the history of juvenile courts, see ANTHONY M. PLATT, *THE CHILD SAVERS* (1969); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187 (1970).

6. Delinquent acts ranged from relatively minor transgressions such as tardiness at school to more serious acts such as theft. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 *N.C. L. REV.* 1083, 1098 (1991) (noting "smoking, sexual activity, stubbornness, running away from home, swearing, and truancy" as grounds for juvenile court jurisdiction); see also BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 66 (1993) (listing conduct that constituted juvenile delinquency under most statutes during the 1950s and 1960s); PLATT, *supra* note 5, at 4-9 (reviewing the origins of delinquency).

7. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *WEAPONS IN SCHOOLS I* (1989) (stating that "between July 1, 1987 and June 30, 1988, California school officials confiscated 8,539 weapons, including 789 guns"). See also JOSEPH F. SHELEY & JAMES D. WRIGHT, U.S. DEP'T OF JUSTICE, *GUN ACQUISITION AND POSSESSION IN SELECTED JUVENILE SAMPLES* (1993). A sample of 758 male students in 10 inner-city high schools indicated that 22% owned guns and 6% owned three or more guns. *Id.* at 2-5. The survey also indicated that 12% of the students who owned guns reported currently carrying a gun "all" or "most of the time" and another 23% did so at least "now and then." *Id.* at 5. Three percent of the students claimed they carried a gun to school "all" or "most of the time" and 6% did so "now and then." *Id.* In 1994, 3,000 juveniles were charged with criminal homicide; 5,400 with forcible rape; 37,000 with robbery; 85,300 with aggravated assault; and 177,700 with simple assault. JEFFREY A. BUTTS, U.S. DEP'T OF JUSTICE, *DELINQUENCY CASES IN JUVENILE COURT, 1994* (Fact Sheet No. 47) (1996) [hereinafter *DELINQUENCY CASES 1994*]. For further discussion of juvenile violence and the effect of guns on delinquency, see DAVID HUIZINGA ET AL., U.S. DEP'T OF JUSTICE, *URBAN DELINQUENCY AND SUBSTANCE ABUSE 18* (1994) (describing the correlation between gun ownership and delinquency).

8. See *infra* Part III.B.

Historically, states were responsible for establishing and administering juvenile justice systems with little intervention by the federal government.<sup>9</sup> As the rate and severity of juvenile delinquency increased throughout the twentieth century, however, Congress expressed greater interest in asserting control over certain juvenile matters.<sup>10</sup> Recently, Congress addressed violent juvenile offenders by enacting tougher laws that allow the criminal prosecution of juveniles in federal court.<sup>11</sup> In addition, legislation is pending in the Senate that would reshape federal juvenile law and encourage states to adopt a more punitive approach to serious juvenile offenses.<sup>12</sup>

Because actual or threatened federal intervention is likely to persist until violent juvenile crime is adequately curtailed, this Note examines the need for federal intervention to address the states' failure to control juvenile crime. Part I discusses the foundations of juvenile justice and the historical roles the state and federal governments have played in the evolution of juvenile justice. Part II reviews the theoretical justifications of punishment in the context of juvenile justice. Part III discusses state efforts to control violent juvenile offenders and presents statistical data demonstrating the failure of present juvenile justice measures to effectively curb the growth of violent juvenile crime. Part IV examines the Violent and Repeat Juvenile Offender Reform Act of 1997, a bill introduced in the Senate at the beginning of the 105th Session of Congress. Part IV concludes that Congress should enact the bill after incorporating several proposed amendments.

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9. See *infra* Part I.A-I.B for discussion of state and federal involvement in juvenile justice.

10. See *infra* Part I.B. In addition to Congress, since the 1960s the Supreme Court has significantly extended constitutional protections to juvenile offenders. See *infra* Part I.B.2.

11. See *infra* Part II.B.

12. See Violent and Repeat Juvenile Offender Reform Act of 1997, S. 10, 105th Cong. (1997). For further discussion of this bill, see *infra* Part IV.

## I. HISTORY OF JUVENILE JUSTICE

### A. Juvenile Courts

Modern juvenile justice systems trace their roots back to the Progressive Era of the late nineteenth century.<sup>13</sup> Prior to the establishment of juvenile courts, children who committed crimes were subject to the same criminal proceedings and penalties as adults.<sup>14</sup> Progressive reformers, however, viewed children as passive and innocent beings incapable of possessing criminal intent.<sup>15</sup> Progressives considered juvenile delinquency a disease in need of specialized treatment.<sup>16</sup> According to Progressives, successful treatment required addressing the child's individualized needs regardless of the severity of his offense.<sup>17</sup> To accomplish this,

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13. See KRISBERG & AUSTIN, *supra* note 6, for discussion of juvenile justice during the Progressive Era.

14. See Mack, *supra* note 1, at 106.

The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act—nothing else—and if it had, then of visiting the punishment of the state upon it.

*Id.*

Prior to the creation of juvenile courts, the common law infancy defense provided the only special protection for youths charged with crimes, creating a presumption that children less than 7 years old lacked criminal capacity. See Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 659-60 (1970). The defense also created a rebuttable presumption that children between 7 and 14 years old were not responsible for their actions. *Id.* at 660.

15. See PLATT, *supra* note 5, at 36-55; Ainsworth, *supra* note 6, at 1096-1101; Fox, *supra* note 5, at 1189-95.

16. See Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 909-12 (1995).

17. *Id.* at 914.

[A] juvenile who commits murder is not to be charged with, found guilty of, or punished for murder; rather, he is simply to be adjudicated delinquent and treated in such a way as to cure his disease of delinquency. His murderous conduct is a symptom of his disease of delinquency and of his need for individually-tailored treatment to cure him of that disease. The same view applies to a juvenile who shoplifts; his misdeed establishes him as a delinquent—no more and no less than the murderer—and shows him to be equally in need of individualized treatment to cure his disease.

Progressives advocated a specialized system for juvenile delinquents<sup>18</sup> that, contrary to standard criminal proceedings, focused on the offender rather than the offense and emphasized rehabilitation over punishment.<sup>19</sup>

In 1899, Illinois became the first state to establish a juvenile court modeled after the Progressive vision.<sup>20</sup> By 1945, every state and federal jurisdiction had established a court system.<sup>21</sup> The creators of the juvenile courts intended for the juvenile courts to operate in a procedurally informal manner and emphasize treatment over punishment.<sup>22</sup> To protect juveniles from the harmful stigma associated with criminal trials, juvenile proceedings and records were hidden from public view.<sup>23</sup> In addition, upon reaching majority, an individual's juvenile record was expunged.<sup>24</sup> Juvenile court dispositions could take a variety of forms<sup>25</sup> because courts exercised nearly limitless discretion over the juveniles brought before them.<sup>26</sup>

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Consequently, the length of treatment and coerciveness of intervention are determined not by what the juveniles have done, but by what the juvenile court deems necessary to cure them of their disease of delinquency.

*Id.*

18. To Progressive reformers, juvenile delinquency included both criminal and non-criminal acts. *Id.* at 909.

19. Ainsworth, *supra* note 6, at 1096-1101.

20. Illinois Juvenile Court Act, 1899 Ill. Laws 131.

21. See Charles W. Thomas & Shay Bilchik, *Criminal Law: Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

22. See Ainsworth, *supra* note 6, at 1098.

23. See Rossum, *supra* note 16, at 912.

24. See Samuel M. Davis, *Legal and Procedural Issues Related to the Waiver Process*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 227, 238-39 (John C. Hall et al. eds., Academy for Contemporary Problems 1981).

25. For example, the original Illinois Act authorized juvenile courts to institutionalize children, send children to orphanages or foster homes, or place children on probation. See KRISBERG & AUSTIN, *supra* note 6, at 30.

26. Ainsworth, *supra* note 6, at 1099. Indeterminate sentencing is a key tenet of the philosophy behind the juvenile justice system. A juvenile sentenced for an indeterminate length of time is subject to the juvenile court's jurisdiction until the court determines that the juvenile is rehabilitated. *Id.* at 1099-1100. See also Barry C. Feld, *The Juvenile Court Meets the*

Regardless of the severity of the offense that served as a basis for juvenile court jurisdiction, however, juveniles were released once they were rehabilitated.<sup>27</sup>

Although rehabilitation was the original objective of juvenile courts, the increasingly violent and destructive behavior associated with juvenile delinquency over the last several decades has thwarted the realization of this goal.<sup>28</sup> The failure of traditional juvenile justice systems to adequately rehabilitate violent juvenile offenders has prompted many states to modify their juvenile codes to remove violent juveniles from the protective jurisdiction<sup>29</sup> of the juvenile courts.<sup>30</sup> The expansion of transfer provisions has been accompanied

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*Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 847-50 (1988) (discussing indeterminate sentencing in juvenile courts).

27. Ainsworth, *supra* note 6, at 1100.

28. See *infra* Part III.B for statistics documenting the failure of juvenile justice systems ability to control rates of delinquency.

29. A juvenile subject only to the jurisdiction of the juvenile court system is protected in a variety of ways. First, under traditional juvenile systems, once the juvenile reaches majority, jurisdiction of the juvenile court ceases and the juvenile is released from any future obligations to continue his rehabilitative treatment. Second, when the juvenile reaches majority, the juvenile's criminal records are expunged. Thus, if the juvenile goes on to commit future crimes as an adult, he may appear to have a "clean" record and the state may decide not to prosecute him. Even if the former juvenile offender is prosecuted and convicted, the sentencing judge may treat him leniently as an apparent first-time offender. See generally PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 35-44 (1996) [hereinafter STATE RESPONSES].

30. See *id.* at 3-10 (summarizing modifications of state transfer mechanisms through the 1995 legislative session). Modifications of state juvenile codes have taken three general forms to allow the transfer of juveniles to criminal courts: judicial waiver, prosecutorial discretion, and statutory exclusion. MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, HOW JUVENILES GET TO CRIMINAL COURT (1994). Judicial waiver allows juvenile court judges, at their discretion, to transfer juveniles to criminal court. *Id.* In states allowing judicial waiver, judges typically base their decision to transfer on the juvenile's age, the offense committed, the juvenile's prior record, and the juvenile's amenability to treatment. *Id.* Between 1988 and 1992, waivers increased 68% and the number of waivers doubled for all offense categories except property offenses. *Id.*

States adopting prosecutorial discretion authorize prosecutors to file charges against juveniles in either juvenile or criminal court. *Id.* Criminal and juvenile courts share original jurisdiction for charges of serious, violent, or repeated crimes. *Id.* As of 1994, twelve states authorized prosecutors to file certain cases in either juvenile or criminal court. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, STATE LAWS ON PROSECUTORS' AND JUDGES' USE OF JUVENILE RECORDS (1995).

by an erosion of the confidentiality surrounding juvenile proceedings.<sup>31</sup> In response to demands for public access to juvenile proceedings, many state legislatures have enacted laws limiting confidentiality in juvenile proceedings.<sup>32</sup> By excluding some delinquents from juvenile jurisdiction, recent punitive measures achieved precisely what the Progressives sought to reform—the treatment of juvenile offenders as adults.

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The final method of transfer is statutory exclusion under which juveniles are removed from juvenile jurisdiction if certain statutory criteria are satisfied. SICKMUND, *supra*, at 3. One form of statutory exclusion adopted by legislatures is lowering the minimum age limit the juvenile may be prosecuted as an adult. As of 1994, eleven states have set the upper age limit for juvenile court jurisdiction under eighteen. *Id.* Many states that have enacted statutory exclusion provisions also exclude certain serious offenses from juvenile court jurisdiction. *Id.* Serious offenses typically excluded are murder and person offenses such as rape, assault or robbery. *Id.* Some states also exclude certain drug, property, weapons, or felony offenses. *Id.* In addition, several states exclude felony charges if the juvenile has prior felony adjudications or convictions. *Id.*

31. See STATE RESPONSES, *supra* note 29, at 35-44 (discussing recent modifications of confidentiality provisions by states).

32. See *id.* at 37-38 fig. 8 (summarizing current state confidentiality provisions). For a discussion of the constitutionality of laws that restrict press access to juvenile proceedings, see generally Susan S. Greenebaum, Note, *Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?*, 44 WASH. U. J. URB. & CONTEMP. L. 135 (1993). See also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609-10 (1982) (invalidating a state statute requiring judges to exclude the press and general public from the courtroom during testimony of the victim in trials for specified sexual offenses involving victims under the age of eighteen); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) (holding that First Amendment interests outweigh interests in juvenile anonymity when a newspaper publishes the name of a juvenile murder suspect that it had discovered by interviewing witnesses, police, and the prosecuting attorney unless the state could show an "interest of the highest order" that would outweigh the interest of the unrestrained press); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (*per curiam*) (holding that a state court may not prohibit the publication of truthful information obtained at judicial proceedings open to the public); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (holding that a state's policy preserving the anonymity of a juvenile offender is outweighed by a criminal defendant's right to probe into the potential bias of a critical witness).

Other courts addressing the issue of confidentiality also indicate a willingness to deny confidentiality under certain circumstances. In *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994), the court interpreted the Federal Juvenile Delinquency Act to allow district judges to regulate access to the proceedings on a case-by-case basis by balancing the interests of the parties. *Id.* at 1361. When confronted with the issue of confidentiality in *News Group Boston, Inc. v. Commonwealth*, 568 N.E.2d 600 (Mass. 1991), the Massachusetts Supreme Judicial Court held that no fundamental right exists to exclude the public from juvenile proceedings. *Id.* at 603.

### B. Federal Juvenile Justice Policy

Until the 1970s, the federal government played a relatively minor role in shaping juvenile justice policy on the state level.<sup>33</sup> Statutes enacted by Congress to facilitate the prosecution of juveniles in federal court, such as the Federal Juvenile Delinquency Act of 1938 (FJDA)<sup>34</sup> and the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA),<sup>35</sup> apply to only a small number of juveniles that fall within the narrow jurisdiction created by the particular statute.<sup>36</sup> The remaining (and overwhelming majority) of juvenile offenders are tried in state courts. Thus, in order to effectuate meaningful changes in juvenile justice, federal legislation must operate at the state level.

#### 1. The Federal Juvenile Delinquency Act

In 1938 Congress enacted the FJDA to provide federal courts with jurisdiction over certain juvenile delinquency proceedings.<sup>37</sup> The FJDA granted the Attorney General<sup>38</sup> unlimited discretion in deciding

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33. In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP) to encourage reform in state juvenile systems. Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.). See *infra* Part I.B.3 for further discussion of the JJDP.

34. Pub. L. No. 75-666, §§ 1-9, 52 Stat. 764, 764-66 (1938) (codified as amended at 18 U.S.C. §§ 5031-5042 (1994)).

35. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of U.S.C.). See *infra* Part I.B.4 for further discussion of the VCCLEA.

36. See 141 CONG. REC. S13,656-59 (daily ed. Sept. 15, 1995) (remarks by Sen. Ashcroft) (stating that 197 juveniles were tried in federal proceedings in 1990; 166 in 1991; 109 in 1992; 64 in 1993; and 92 in 1994). Because so few juveniles are tried in the federal justice system, federal laws broadening the number of offenses for which a juvenile can be tried as an adult are of limited deterrence value.

37. Pub. L. No. 75-666, § 2, 52 Stat. 764, 765 (1938) (codified as amended at 18 U.S.C. § 5031 (1994)).

38. See *Cox v. United States*, 473 F.2d 334, 336 (4th Cir. 1973) (holding that Congress could legitimately grant the Attorney General discretion in deciding whether to prosecute a juvenile as an adult and that the exercise of such discretion does not require a due process hearing). See also *United States ex rel. Bombarino v. Bensinger*, 498 F.2d 875, 877 n.7 (7th Cir. 1974) (quoting *People v. Jiles*, 251 N.E.2d 529, 531 (1969) (noting that "[w]hile it may be highly desirable to commit to the judge of a specialized juvenile court the determination of



whether to offer prosecution as a juvenile to any defendant under the age of eighteen not surrendered to state officials or charged with offenses punishable by life imprisonment or death.<sup>39</sup>

The FJDA remained virtually unchanged until Congress enacted the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDA).<sup>40</sup> The JJDA amended the FJDA by: (1) changing the definition of a juvenile, (2) requiring judicial approval before prosecuting a juvenile as an adult, (3) restricting the number of offenses for which a juvenile could be tried as an adult, and (4) providing for federal prosecution of juveniles when no state would exercise jurisdiction over the offender.<sup>41</sup> In response to the growing number of juveniles committing serious offenses, however, Congress further amended the FJDA by enacting the Comprehensive Crime Control Act of 1984.<sup>42</sup> The 1984 Act expanded the federal role in juvenile justice by authorizing the prosecution of juveniles as adults for additional offenses and mandating adult trial of juveniles in certain cases.<sup>43</sup>

As amended, the FJDA specifies three situations in which a federal prosecutor may invoke jurisdiction over a juvenile offender: (1) if a state lacks, or refuses to assert, jurisdiction over a particular juvenile offender;<sup>44</sup> (2) if the state's programs do not adequately meet the needs of the juvenile;<sup>45</sup> or (3) if there is a substantial federal interest in prosecuting the particular defendant.<sup>46</sup> Once a prosecutor

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whether or not a particular juvenile is to be prosecuted criminally, we are aware of no constitutional requirement that a State must do so").

39. Pub. L. No. 75-666, § 2, 52 Stat. 764, 765 (1938) (codified as amended at 18 U.S.C. § 5031 (1994)).

40. See *infra* Part I.B.3 for discussion of the JJDA.

41. 18 U.S.C. §§ 5031-5032 (1994).

42. Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (1984) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

43. 18 U.S.C. § 5032.

44. *Id.*

45. *Id.*

46. *Id.* This exception applies most frequently when juveniles are charged with

establishes federal jurisdiction over the juvenile offender, the FJDA provides three routes by which juveniles may stand trial as adults. First, a juvenile may consent to stand trial as an adult.<sup>47</sup> Second, if a juvenile is charged with committing a violent felony or certain drug offenses and is over a certain age, the Attorney General may request criminal jurisdiction.<sup>48</sup> In such a case, a federal judge must conduct a hearing to determine whether criminal prosecution is in the interest of justice by balancing the severity of the alleged offense against the juvenile's amenability to rehabilitative treatment.<sup>49</sup> Finally, if the

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committing violent felonies and certain drug or firearms offenses that are federal crimes. *Id.* See *United States v. Male Juvenile*, 844 F. Supp. 280, 285 (E.D. Va. 1994) (holding that an ordinary bank robbery does not involve a "substantial Federal interest" even when a weapon is used).

47. 18 U.S.C. § 5032. Paragraph four of § 5032 states: "A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult. . . ." *Id.*

A juvenile may desire criminal prosecution because he may believe that the procedural rights afforded to criminal defendants would aid in his defense. For example, in juvenile proceedings, a jury is not a constitutional requirement. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Thus, a juvenile who believes that a jury will view his defense favorably may wisely consent to criminal prosecution.

48. 18 U.S.C. § 5032. Paragraph four of § 5032 further provides:

[W]ith respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence of an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959), or section 922(x) of this title, or in section 924(b), (g), or (h) of this title, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice. In the application of the preceding sentence, if the crime of violence is an offense under section 113(a), 113(b), 113(c), 1111, 1113, or, if the juvenile possessed a firearm during the offense, section 2111, 2113, 2241(a), or 2241(c), "thirteen" shall be substituted for "fifteen" and "thirteenth" shall be substituted for "fifteenth".

*Id.*

49. 18 U.S.C. § 5032. Paragraph five of § 5032 states:

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the

prosecutor invokes a mandatory transfer provision and the juvenile offender is sixteen years of age or older and charged with certain serious offenses, then criminal jurisdiction can be established.<sup>50</sup>

## 2. Constitutional Protections Extended to Juvenile Court Proceedings

As juvenile court dispositions began to increasingly resemble sentences handed down by criminal courts, juveniles claimed that the informal and non-adversarial procedures characteristic of juvenile proceedings violated their constitutional right to due process. In 1966 the Supreme Court validated this argument in *Kent v. United States*<sup>51</sup> by holding that juveniles are constitutionally entitled to due process and representation by counsel.<sup>52</sup> The following year the Court extended due process protections to juvenile proceedings in *In re*

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juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

*Id.*

50. Mandatory transfer provisions for certain violent felonies or serious drug violations were added by Congress in the 1984 amendments to the FJDA. *Id.* Paragraph four provides further:

[A] juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in section 32, 81, 844(d), (e), (f), (h), (i) or 2275 of this title, subsection (b)(1)(A), (B), or (C), (d), or (e) of subsection 401 of the Controlled Substances Act, or section 1002(a), 1003, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 959, 960(b)(1), (2), (3)), and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.

*Id.*

51. 383 U.S. 541 (1966).

52. *Id.* at 561-63.

*Gault*.<sup>53</sup> In that case, the Court provided juveniles with a right to notice of charges made against them,<sup>54</sup> a right to counsel,<sup>55</sup> a right to the privilege against self-incrimination,<sup>56</sup> and a right to confront and cross-examine witnesses.<sup>57</sup> In 1970 the Court continued to expand the constitutional protection for juveniles in *In re Winship*,<sup>58</sup> holding that juvenile courts must apply the reasonable doubt standard in juvenile delinquency proceedings.<sup>59</sup> Five years later, in *Breed v. Jones*,<sup>60</sup> the Court held that the double jeopardy protections provided by the Fifth Amendment also apply to juveniles tried in juvenile court.<sup>61</sup> The only constitutional protection that the Court expressly denied to juveniles was the unqualified right to a jury trial.<sup>62</sup>

### 3. The Juvenile Justice and Delinquency Prevention Act of 1974

Congress enacted the JJDP A<sup>63</sup> to prevent delinquency and divert

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53. 387 U.S. 1 (1967).

54. *Id.* at 33.

55. *Id.* at 41.

56. *Id.* at 55.

57. *Id.* at 56-57.

58. 397 U.S. 358 (1970).

59. *Id.* at 368.

60. 421 U.S. 519 (1975).

61. *Id.* at 541.

62. *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971). In denying the right to a jury trial in juvenile delinquency proceedings, the *McKeiver* Court noted that despite the failure of juvenile courts to rehabilitate juveniles, the introduction of a jury trial would defeat the rehabilitative goal by turning the proceeding into an adversarial process. *Id.* at 545. The Court noted that "[t]here is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.*

Although refusing to mandate jury trials for juvenile proceedings, the *McKeiver* Court noted that nothing prevented states from installing jury systems in their own juvenile court systems. *Id.* See Joseph B. Sanborn, Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230, 233 (1993) (noting that eleven states have instituted jury trials for juveniles).

63. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat.

juveniles from the traditional juvenile justice system by providing states with an incentive to reform their juvenile codes.<sup>64</sup> To effectuate these policies, Congress conditioned the receipt of federal funds on compliance with three substantive requirements.<sup>65</sup> First, states could no longer place juveniles charged with status offenses<sup>66</sup> in secure correctional facilities or secure detention.<sup>67</sup> Second, states could no longer confine juveniles alleged or found to be delinquent in facilities where they would have regular contact with incarcerated adults.<sup>68</sup> Third, Congress required states to establish an adequate system of monitoring detention and correctional facilities to ensure that the

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1109 (codified as amended at 42 U.S.C. §§ 5601-39 (1994)). The JJDP Act created the Office of Juvenile Justice and Delinquency Prevention (OJJDP) as the official federal agency for financing and administering juvenile delinquency program. *Id.* § 5611. The JJDP Act charges the Coordinating Council on Juvenile Justice with making recommendations to the Attorney General and President regarding the coordination of overall federal policy. *Id.* § 5616. For discussion of the JJDP Act amendments of the FJDA, see *supra* Part I.B.1.

64. *Id.* § 5602(b). The Act provides:

[It is the] declared policy of Congress to provide the necessary resources, leadership, and coordination (1) to develop and implement effective methods of preventing and reducing juvenile delinquency . . . ; (2) to develop and conduct effective programs to prevent delinquency, to divert juveniles from the traditional juvenile justice system and to provide critically needed alternatives to institutionalization; (3) to improve the quality of juvenile justice in the United States; (4) to increase the capacity of State and local governments and public and private agencies to conduct effective juvenile justice and delinquency prevention and rehabilitation programs and to provide research, evaluation, and training services in the field of juvenile delinquency prevention; (5) to encourage parental involvement in treatment and alternative disposition programs; and (6) to provide for better coordination between State, local, and community-based agencies and to promote interagency cooperation in providing such services.

*Id.*

65. The Supreme Court has approved Congress' conditioning of federal funding to encourage states to adopt certain regulations. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (upholding a federal law conditioning state eligibility for federal highway funds on the state setting its minimum drinking age at 21-years-old as a valid exercise of Congress' spending power).

66. A status offense is an offense which, if committed by an adult, would not be a crime.

67. 42 U.S.C. § 5633(a)(12)(A).

68. *Id.* § 5633(a)(13).

state would place no juveniles in contact with incarcerated adults.<sup>69</sup> A state failing to submit a plan<sup>70</sup> that complies with the JJDPa requirements forfeits a percentage of its federal funding.<sup>71</sup>

#### 4. The Violent Crime Control and Law Enforcement Act of 1994

Congress enacted the VCCLEA<sup>72</sup> to address serious juvenile and gang violence. The VCCLEA authorizes the criminal prosecution of juveniles as young as thirteen years of age for certain serious felonies including first- and second-degree murder, attempted murder, and bank robbery.<sup>73</sup> The VCCLEA also criminalizes participation in criminal street gangs. Membership in a criminal street gang subjects juveniles to federal jurisdiction if they also commit certain federal crimes.<sup>74</sup> In determining whether to transfer a juvenile to adult status,

69. *Id.* § 5633(a)(14). Congress was concerned that exposure to adult criminals would transform juvenile delinquents into hardened criminals. *See* 141 CONG. REC. H874 (daily ed. Jan. 30, 1995) (statement of Rep. Martinez) ("Prior to the imposition of [the JJDPa mandate to segregate juvenile and adult prisoners] young children . . . were housed in the same facilities as hardened adult criminals and . . . subjected to abuse by those adult prisoners."); 140 CONG. REC. S14,118 (daily ed. Oct. 4, 1994) (remarks of Sen. Cohen) ("One of the primary aims of the [JJDPa] was to segregate juvenile offenders from adult criminals so the youth would not be negatively influenced by adults convicted of, or awaiting trial on serious criminal charges.")

70. The requirements for state plans are listed at 42 U.S.C. § 5633(a).

71. 42 U.S.C. § 5633(c)(3). Under the current version of the JJDPa, if a state fails to comply with the requirements of § 5633(a)(12)(A), (13), (14), or (23) its funding may be reduced by 25% for each such noncompliance. *Id.* Subsections (a)(12)(A), (13), and (14) of § 5633 prohibit the mingling of juveniles with incarcerated adults. Subsection (a)(23) of § 5633 seeks "to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population."

72. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-323, 108 Stat. 1796 (codified in scattered sections of the U.S.C.).

73. § 140001, 108 Stat. at 2031 (amending 18 U.S.C. § 5032). *See supra* note 48 (quoting applicable portion of § 5032).

74. These crimes include:

- (1) a Federal felony involving a controlled substance . . . for which the maximum penalty is not less than 5 years;
- (2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another; and
- (3) a conspiracy to commit an offense described in paragraph (1) or (2).

federal judges may consider the role a juvenile played in a criminal street gang.<sup>75</sup> In addition, the VCCLEA amends the FJDA to authorize federal courts to release information relating to the adjudication to the Federal Bureau of Investigation if a juvenile thirteen years of age or older is convicted of certain crimes of violence.<sup>76</sup>

## II. PUNISHING VIOLENT JUVENILE OFFENDERS

Because of the perceived escalation of violent juvenile crime, some states have shifted the focus of their juvenile justice systems from rehabilitation to punishment.<sup>77</sup> States justify this shift on one or

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18 U.S.C. § 521(c) (1994). The statute defines "criminal street gang" as an ongoing association of at least five persons that has a primary purpose of committing one or more of the criminal offenses listed at 18 U.S.C § 521(c). *Id.*

The Commerce Clause is the basis for federal jurisdiction over juveniles accused of participating in a criminal street gang. *See* 18 U.S.C. § 521(a)(C). As a result of the Supreme Court's recent restriction of the scope of the Commerce Clause, courts may be reluctant to find that the activities of gangs affect interstate or foreign commerce. *See United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that the Gun-free School Zones Act, which made it a federal offense to knowingly possess a gun in a school zone, did not affect interstate commerce). *Cf. United States v. Oliver*, 60 F.3d 547, 549-50 (9th Cir. 1995) (upholding the federal carjacking statute, 18 U.S.C. § 2119, as a valid exercise of Congress' power under the Commerce Clause).

75. § 150002, 108 Stat. at 2035 (amending 18 U.S.C. § 5032).

In considering the nature of the offense . . . the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.

*Id.*

76. § 140005, 108 Stat. at 2032 (amending 18 U.S.C. § 5038(f)). The information which may be released by the court includes: name, offense, and sentence. *Id.* Before Congress enacted the VCCLEA, a juvenile's records would also be transmitted to the Federal Bureau of Investigation only if on two separate occasions the juvenile had been convicted of a crime which, if committed by an adult, would be a felony crime of violence or an offense under statutes prohibiting drug manufacture and importation. 18 U.S.C. § 5038(f).

77. *See infra* notes 99 and 105 for states that have amended the purpose of their juvenile justice systems to emphasize punishment over rehabilitation. *See also* STATES RESPONSES, *supra* note 29, 17-24.

more of the following theories: (1) punishment will deter future juvenile offenders, (2) punishment will incapacitate juvenile offenders and prevent them from committing future offenses, and (3) punishment satisfies society's desire for accountability and retribution.<sup>78</sup> Part A presents the arguments supporting punishment of juvenile offenders. Part B then challenges age-based exclusions found in state juvenile codes which immunize most juveniles under a certain age from criminal prosecution.

### *A. Philosophical Arguments for Punishment*

The goal of juvenile justice systems has traditionally centered on rehabilitating juvenile offenders.<sup>79</sup> However, many states now openly advocate punishment of juvenile offenders who commit serious crimes.<sup>80</sup> Supporters of punishment-based juvenile justice systems maintain that because traditional juvenile justice systems have not achieved meaningful results through rehabilitation, punishment might deter or incapacitate violent juveniles and, at a minimum, satiate the public's desire for retribution.<sup>81</sup>

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78. See *infra* Part II.A.4.

79. See Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 641 (1994) ("An integral part of the philosophy of the juvenile court was that children were not fully responsible for their acts and consequently should be shielded from the punishment that would be exacted from a responsible actor."). See also *supra* Part I.A.

80. See *infra* notes 99 and 105. See, e.g., Jeffrey K. Day, Comment, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 U. PUGET SOUND L. REV. 399 (1992) (discussing the state of Washington's abandonment of the rehabilitation model of juvenile justice in favor of a punishment-based model).

81. See R. Daniel O'Connor, Note, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal "Three-Strikes and You're Out" Scheme*, 36 B.C. L. REV. 847, 848 (1995). For a discussion of the effectiveness of selective incapacitation and objections to the use of selective incapacitation in sentencing policy, see Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511 (1982) [hereinafter *Selective Incapacitation*].



## 1. Rehabilitation

According to rehabilitationists, punishment should be designed to alter the offender's behavior so that the offender will be less inclined to engage in unlawful conduct in the future. Punishment for other purposes is to be avoided.<sup>82</sup> Rehabilitationists view juveniles as products of their environments who are in need of special treatment designed to help them respond productively to negative external influences.<sup>83</sup> Proponents of rehabilitation in the juvenile justice system claim that modification of a juvenile's improper conduct can occur only through altering the juvenile's thinking, goals, and values.<sup>84</sup> By providing a nurturing environment for juvenile offenders, rehabilitationists believe that the former offenders will develop new, positive self-images which will, in turn, result in lower juvenile crime rates.<sup>85</sup>

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82. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (1948) ("[A]ll punishment in itself is evil. Upon the principle of utility, if it ought to at all be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."). *But see* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 25-27 (1968). In disparaging the suggestion that rehabilitation should serve as the objective of criminal law, Hart states:

Reform can only have a place within a system of punishment as an exploitation of the opportunities presented by the conviction or compulsory detention of offenders. . . .

There is indeed a paradox in asserting that Reform should "predominate" in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer not to prevent murder . . . . Society is divisible at any moment into two classes (i) those who have actually broken a given law and (ii) those who have not yet broken it but may. To take Reform as the dominant objective would be to forgo the hope of influencing the second and—in relation to the more serious offences—numerically much greater class. We should thus subordinate the prevention of first offences to the prevention of recidivism.

*Id.* at 26-27.

83. Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 482 (1995).

84. See Anne R. Mahoney, "Man, I'm Already Dead": *Serious Juvenile Offenders in Context*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443, 454 (1991).

85. *Cf. id.*

## 2. Deterrence

In theory, deterrence accomplishes at least two interrelated objectives. First, punishment conditions the offender to refrain from taking future action, such as committing additional crimes, that will lead to additional punishment.<sup>86</sup> Second, by punishing the offender, individuals contemplating criminal conduct may refrain from engaging in similar conduct to avoid similar punishment.<sup>87</sup> The success of deterrence depends on the ability of present and future offenders to comprehend the risks associated with engaging in the proscribed conduct.<sup>88</sup> Additionally, the effectiveness of deterrence is critically linked to swift and predictable punishment.<sup>89</sup> For many juvenile offenders, however, punishment is rarely both swift and predictable.<sup>90</sup>

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86. Deterrence of a person who has already violated the law is known as specific deterrence. Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 435 (1990). See Frank G. Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 588 (1982) ("Deterrence does not act as a direct restraint on conduct; rather it works to manipulate the motives or incentives behind that conduct.").

87. Punishment of an offender for the purpose of conditioning other persons from engaging in unlawful conduct is termed general deterrence. Dresser, *supra* note 86, at 435. Utilitarians argue that because the offender will view punishment as undesirable, he will not engage in conduct subjecting him to future punishment to ensure that he maximizes his happiness. See ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* 113 (1991).

88. VAN DEN HAAG, *supra* note 87, at 113. The author notes:

Prospective offenders need be no more rational than rats are when taught by means of rewards or punishments to run a maze. Experimenters must calculate the effects they desire and the means appropriate to achieve them. So must legislators. But the rats do not calculate, nor do the subjects of legislation need to.

*Id.* See also Carrington, *supra* note 86, at 589 ("Irrespective of [a potential criminal's] intellectual capacity to understand a concept, human beings are capable of responding to threats, learning from experience, and forming habits.").

89. See RALPH ELLIS & CAROL ELLIS, *THEORIES OF CRIMINAL JUSTICE* 19 (1989).

90. See Jeffery A. Butts, *Speedy Trial in the Juvenile Court*, 23 AM. J. CRIM. L. 515 (1996) (noting the recent increase in the length of juvenile court dispositions in recent years).

### 3. Incapacitation

Incapacitation theorists suggest that incarcerating violent and repeat offenders for long periods of time will reduce the overall level of crime.<sup>91</sup> Because offense rates for violent crime generally peak around the age of seventeen and decline substantially over the next ten years, incarceration of violent juvenile offenders during the peak of their offending years would remove these juveniles from communities when they are most likely to commit violent crimes.<sup>92</sup> Another advantage of incapacitating violent juvenile offenders is that juvenile justice professionals could concentrate their resources on juveniles more amenable to rehabilitation.

Implementing a system of punishment based on principles of incapacitation forces judges to predict an offender's future behavior. Judges must attempt to predict whether a particular offender, based on the offender's prior record, will commit future crimes if not incarcerated.<sup>93</sup> The success of incapacitation therefore depends not only on apprehending and sentencing offenders but also on accurately predicting which delinquents will reoffend at relatively early stages

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91. See John Blackmore & Jane Welsh, *Selective Incapacitation: Sentencing According to Risk*, 29 CRIME & DELINQ. 504 (1983). Selective incapacitation seeks to identify "high risk" offenders and impose "long, 'incapacitating' prison sentences." *Id.* See also *Selective Incapacitation*, *supra* note 81, at 511 ("Selective incapacitation theory asserts that the effect of imprisonment on street crime is a direct function of the rate at which incarcerated offenders would have committed crimes if they were not confined."); James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1953 (1991) (defining "selective incapacitation" as a method of weeding out the groups most likely to commit crimes and least amenable to rehabilitation).

92. See 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 23 (Alfred Blumstein et al. eds., 1986); ALFRED BLUMSTEIN, NAT'L INST. OF JUSTICE, VIOLENCE BY YOUNG PEOPLE: WHY THE DEADLY NEXUS? 3 (1995); see also MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY ON CRIME 253 (1990); Daniel S. Nagin & David P. Farrington, *The Onset and Persistence of Offending*, 30 CRIMINOLOGY 501 (1992). The relationship between age and crime rates is commonly referred to as the "age-crime curve." BLUMENSTEIN, *supra*, at 3. To the extent that the age-crime curve accurately forecasts criminal behavior, sentencing violent juvenile offenders to prison terms reaching beyond the at-risk ages for violent crime (the late-twenties for most offenses) will reduce violent crime.

93. JACQUELINE COHEN, U.S. DEP'T OF JUSTICE, INCAPACITATING CRIMINALS: RECENT RESEARCH FINDINGS (1983).

in their criminal careers.<sup>94</sup>

#### 4. Retribution

While deterrence and incapacitation are theories based on the principle that punishing offenders will reduce future crime,<sup>95</sup> retributionists maintain that individuals who commit crimes deserve punishment in proportion with their moral culpability.<sup>96</sup> For retributionists, punishment is not related to deterring future crimes or rehabilitating the offender;<sup>97</sup> rather, the sole reason for punishing offenders is because they "deserve it."<sup>98</sup> Although retribution often serves as a justification for punishing adult offenders, legislatures and courts rarely consider retribution an appropriate goal of juvenile justice systems.<sup>99</sup>

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94. *Id.* Opponents of incapacitation argue that two persons who commit the same offense deserve equal punishment. *Id.* Moreover, unequal punishment is viewed as unfairly punishing people for crimes they may never commit solely because a judge believes they will re-offend. *Id.*

95. See *supra* notes 86-94 and accompanying text.

96. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195 (W. Hastie, B.D. trans. 1887) ("[P]unishment . . . must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime."); MICHAEL S. MOORE, *THE MORAL WORTH OF RETRIBUTION*, in *PHILOSOPHY OF LAW* 635 (Joel Fineberg & Hyman Gross eds., Wadsworth, 4th ed. 1991); C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 46-48 (1987).

97. See KANT, *supra* note 96, at 195. Kant states:

Judicial Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society. . . . [W]oe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even the due measure of it . . . .

*Id.*

98. TEN, *supra* note 96, at 46-48.

99. Washington state is an example of a state with a retributionist goal for its juvenile justice system. See WASH. REV. CODE ANN. § 13.40.010(2) (West 1993) ("It is the . . . intent of the legislature that youth . . . be held accountable for their offenses and that both communities and the juvenile courts carry out their functions consistent with this intent."). *But cf.* United States v. R.L.C., 503 U.S. 291, 315 (1992) (O'Connor dissenting) ("[T]he focus of sentencing [in juvenile proceedings] is on treatment, not punishment. The presumption is that juveniles are still teachable and not yet 'hardened criminals.'").

### B. Criminal Culpability of Juveniles

In every state, the jurisdiction of juvenile courts is reserved for offenders falling below a legislatively prescribed age.<sup>100</sup> Although juveniles at or below the jurisdictional age limit may be transferred to criminal court,<sup>101</sup> no offender over the age limit may be tried in juvenile court. A certain degree of arbitrariness necessarily exists when drawing lines for the purpose of imposing adult criminal sanctions.<sup>102</sup> Often, age-based classifications are more a desire for administrative convenience than a determination of criminal capacity. Assuming that an individual understands the nature and quality of his actions, punishing all offenders equally regardless of age is less arbitrary than the current blanket immunization of many younger juveniles from criminal liability. Imposing adult penalties on juvenile offenders is also not inherently unfair. Several studies indicate that children under eighteen are capable of mature decisionmaking and suggest that fixing the threshold for criminal liability for juveniles at the age of fourteen or lower would not subject juveniles to criminal sanctions without culpability.<sup>103</sup>

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100. As of 1994, age 17 was the oldest age permitted for original juvenile court jurisdiction in delinquency matters in 39 states and the District of Columbia. SICKMUND, *supra* note 30, at 4 tbl. 4.

101. See *supra* note 30.

102. See *infra* note 103 and accompanying text.

103. One study indicates that children as young as 10 years old are "as competent at decision-making as adults." LAURENCE HOULGATE, *THE CHILD AND THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS* 61-73 (1980). Another study concludes that by age fourteen, "the average child has reached the equivalent level of moral reasoning possessed by most adults." Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 *VITA HUMANA* 11, 16 (1963). See also Barry C. Feld, *The Decision to Seek Criminal Charges: Just Desserts and the Waiver Decision*, 3 *CRIM. JUST. ETHICS* 27, 37 (1984) ("Psychological research concerning legal socialization, internalization of social and legal expectations, and ethical decision making . . . indicates that by about age fourteen a youth has acquired most of the legal and moral values that will guide his behavior through later life."). *Id.*

### III. STATE RESPONSES TO VIOLENT JUVENILE OFFENDERS

#### *A. Punishment Adopted as a Goal*

In response to the decline in public support for traditional juvenile justice systems,<sup>104</sup> several state legislatures have amended their juvenile codes to include the punishment of juvenile offenders and protection of society as official purposes of their states' juvenile justice systems.<sup>105</sup> Some states have even made punishment the primary goal of the juvenile justice system.<sup>106</sup>

Juvenile courts were neither designed nor intended to handle violent juvenile offenders.<sup>107</sup> The remedial authority of juvenile courts is of limited value when confronted with growing numbers of

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104. Polling data confirms the public's apathy towards the traditional juvenile justice system. In one national adult survey, when interviewees were asked whether they believed that programs emphasizing rehabilitation and protection of juveniles who commit the same crimes as adults have been successful in controlling juvenile crime, 23% of the respondents answered "not successful at all," 49% answered "not very successful," 24% answered "moderately successful," and 1% answered "very successful." Gallop/CNN/USA Today telephone poll conducted Sept. 6-7, 1994 (sample size 1,022 national adult), available in WESTLAW, Poll database.

In another survey, interviewees were asked whether they believed that juveniles who commit violent crimes should be treated the same as adults or whether they should be treated more leniently. Sixty-one percent of respondents believed that juveniles who commit violent crimes should be treated the same as adults and 13% responded that they should receive more lenient treatment. L.A. Times telephone poll conducted Jan. 15-19, 1994 (sample size 1,516, national adult), available in WESTLAW, Poll database.

105. See, e.g., CAL. WELF. & INST. CODE § 202 (West Supp. 1996) ("provide for the protection and safety of the public"); HAW. REV. STAT. § 571-1 (1985) ("render appropriate punishment to offenders"); N.Y. FAM. CT. ACT § 301.1 (McKinney 1983) ("In any [juvenile delinquency] proceeding . . . the court shall consider the needs and best interests of the respondent as well as the need for protection of the community.").

106. See *supra* notes 99 and 105; see also Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1072 n.467 (1995) (quoting *In re D.F.B.*, 430 N.W.2d 475 (Minn. Ct. App. 1988), a case in which the court partially justified its decision to transfer a juvenile to criminal court on the language of the state's amended purpose clause).

107. See *supra* Part I.A for a discussion of the mission of the juvenile courts. See also McCarthy, *supra* note 79, at 641 (noting that recent legislature attempts to remove violent juvenile offenders from the juvenile court may help focus the court on its original rehabilitative mission).

seriously depraved juveniles committing increasing numbers of violent crimes.<sup>108</sup> In response to the public outcry against juvenile courts granting violent juvenile offenders light sentences, many state legislatures have enacted measures specifically authorizing punishment of violent juvenile offenders.<sup>109</sup> State legislatures have also enacted measures that enhance the opportunities to transfer violent juveniles to criminal courts.<sup>110</sup> But despite these efforts to combat violent juvenile crime, significant reductions in juvenile crime have not occurred.<sup>111</sup> Additionally, present state policies have not significantly deterred young offenders from committing crimes<sup>112</sup>

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108 See *infra* Part III.B. See, e.g., Tim Bryant, *Third Killer Convicted in Murder of Waitress*, ST. LOUIS POST-DISPATCH, Oct. 27, 1995, at A16. On October 10, 1993, Katie Aulbur, a twenty-three year old St. Louisan, was abducted near her apartment on her way home from work. *Id.* A thirteen-year-old juvenile, one of three assailants, pointed a sawed-off shotgun at her, robbed her, and forced her into the trunk of her car. *Id.* When Aulbur forced her way out of the trunk, she was removed from the car and the juvenile clubbed her on the head with his shotgun. *Id.* When this failed to kill her, the juvenile ran her over and dumped her body in a ravine. *Id.* Two years later, the juvenile, now fifteen, pleaded guilty under the juvenile code to second-degree murder and will be released from custody when he turns eighteen. *Id.* At the time of the murder, Missouri law forbade trying a juvenile under 14 as an adult. *Id.*

In Chicago two juveniles, ages 10 and 11, lured a 5-year-old boy into an abandoned apartment complex. See Debbie Howlett, *Chicago Tot's Young Killers Test System*, USA TODAY, Nov. 28, 1995, at A3. The juveniles then attacked the boy and dangled him out of a 14th-floor apartment window before dropping him to his death. *Id.* The juveniles claimed they did this because the boy had gotten them in trouble and refused to steal candy for them. *Id.*

109. See Sheffer, *supra* note 83, at 489-510 for a comparison of serious juvenile offender statutes that are aimed at providing greater punishment for juveniles and those that are attempting to accomplish both punishment and rehabilitation. See also STATE RESPONSES, *supra* note 29, 17-24.

110. See *supra* note 30 and accompanying text for discussion of these transfer mechanisms.

Some states also incorporate presumption-burden-shifting into their judicial waiver statutes. If the prosecution has alleged certain enumerated offenses, transfer is presumed unless the offender affirmatively establishes his or her amenability within the juvenile justice system. See, e.g., CAL. WELF. & INST. CODE § 707(b) and (c) (West 1984 & Supp. 1996). See also STATE RESPONSES, *supra* note 29, at 5, 6 figs. 3, 4 (presenting figures of transfer options available in each state).

111. See *infra* Part III.B.

112. *Id.* See, e.g., Eric L. Jensen and Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 100-102 (1994) (concluding that the Idaho legislative waiver law did not have a deterrent effect on violent juvenile crime).

or rehabilitated juveniles convicted or detained for serious violent offenses.<sup>113</sup>

### *B. Increase in Violent Juvenile Crime*

In 1994, juvenile courts across the United States handled an estimated 1,555,200 delinquency cases,<sup>114</sup> an increase of 41% over the 1985 caseload.<sup>115</sup> The most disturbing trend is the increase in the number of serious violent crimes committed by juveniles.<sup>116</sup> For

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113. See MARC LE BLANC & MARCEL FRECHETTE, *MALE CRIMINAL ACTIVITY FROM CHILDHOOD THROUGH YOUTH 83-84* (1989) (estimating that as many as 60% of adolescents who were arrested or convicted will have criminal records as adults); TED PALMER, *A PROFILE OF CORRECTIONAL EFFECTIVENESS AND NEW DIRECTIONS FOR RESEARCH 47-48* (1994) (concluding that there are no particular rehabilitative programs that can produce a large reduction in recidivism).

114. *DELINQUENCY CASES 1994*, *supra* note 7, at 1. A delinquency offense is an act "if committed by an adult could result in criminal prosecution." JEFFREY A. BUTTS, U.S. DEP'T OF JUSTICE, *OFFENDERS IN JUVENILE COURT, 1993 2* (1996) [hereinafter *JUVENILE OFFENDERS 1993*]. Delinquency offenses are classified as either person, property, drug, or public order offenses. *Id.* at 2 tbl. 1. The national delinquency case rate increased 11% between 1990 and 1994, from 50.7 to 56.1 cases disposed per 1,000 youth at risk. JEFFREY A. BUTTS, U.S. DEP'T OF JUSTICE, *PERSON OFFENSES IN JUVENILE COURT, 1985-1994* (Fact Sheet No. 48) (1996) [hereinafter *PERSON OFFENSES 1994*].

115. *PERSON OFFENSES 1994*, *supra* note 114, at 2. "Property offenses" include burglary, larceny-theft, motor vehicle theft, arson, vandalism, trespassing, and stolen property offenses. *DELINQUENCY CASES 1994*, *supra* note 7, at 1 tbl. 1. In 1994, 803,400 delinquency cases were filed for property offenses. *Id.* This marked an increase of 22% between 1985 and 1994 and a 7% increase between 1990 and 1994. *Id.*

"Person offenses" include criminal homicide, forcible rape, robbery, aggravated assault, simple assault, and sex offenses. *Id.* In 1994, 336,100 delinquency cases were filed for person offenses. *Id.* This represents a 6% increase between 1993 and 1994, a 38% increase between 1990 and 1994, and a 93% increase between 1985 and 1994. *Id.*

"Public order" offenses include obstruction of justice, disorderly conduct, weapons offenses, liquor law violations, and nonviolent sex offenses. *Id.* In 1994, 295,600 cases involving public order offenses were filed. *Id.* tbl. 1. This marks a 9% increase from 1993, and a 27% increase from 1990. *Id.* In 1994, 120,200 cases involved drug violations. *Id.* This represents an increase of 35% over 1993 and a 69% increase from 1990. *Id.*

Sixty-one percent of the delinquency cases processed in 1994 involved juveniles under the age of 16. *Id.* at 2. Additionally, juveniles age 16 and under accounted for 64% of person offense cases, 64% of property offense cases, and 42% of the drug offense cases. *Id.*

116. Between 1983 and 1992, juveniles accounted for 25% of the increase in murders, forcible rapes, and robberies. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, *ARE JUVENILE'S DRIVING THE VIOLENT CRIME TRENDS?* (Fact Sheet No. 16) (1994). In 1992, juveniles were



instance, between 1988 and 1992, the number of juveniles arrested for murder increased by 51% compared with an increase of only 9% for adults.<sup>117</sup> Accompanying the surge in violent crime is a corresponding increase in the number of weapons used in crimes by juveniles.<sup>118</sup>

The increasing rate of violent juvenile crime has led to a greater number of juvenile transfers to criminal court.<sup>119</sup> Between 1989 and 1993, transfers to criminal court increased 41% and transfers of person offense cases increased 115%.<sup>120</sup> Criminal court transfers, however, represented only a small fraction of all petitioned delinquency cases in 1989 and 1993.<sup>121</sup> In 1989, the cases most frequently transferred to criminal court were drug offenses;<sup>122</sup> in 1993, person offenses were most frequently transferred.<sup>123</sup> However, only a small number of petitioned person offense cases were successfully transferred in 1993.<sup>124</sup>

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arrested for over 16% of all murder and non-negligent manslaughter charges. 1996 ABSTRACT, *supra* note 2, at 209 tbl. 325.

117. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, JUVENILE VIOLENT CRIME ARREST RATES 1972-1992 (Fact Sheet No. 14) (1994). Between 1988 and 1992, juvenile arrests for forcible rape increased by 17% compared with 3% for adults. *Id.* Juvenile arrests for aggravated assault increased by 49% compared with an increase of only 23% for adults. *Id.*

118. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, YOUTH VIOLENCE, GUNS, AND ILLICIT DRUG MARKETS (1995). Between 1976 and 1985, a gun was used in an average of 59% of homicides involving juveniles ages 10 to 17. *Id.*

119. See *supra* note 30 for discussion of state transfer mechanisms.

120. JUVENILE OFFENDERS 1993, *supra* note 114, at 5. The actual number of delinquency cases that involved juvenile transfer to criminal court was 11,800 in 1993 compared to 8,300 cases in 1989. *Id.* at 7 tbl. 11. In 1994, the number of cases transferred increased to 12,300. DELINQUENCY CASES 1994, *supra* note 7, at 2. A person offense was the most serious charge in 44% of these cases. *Id.*

121. Transfers made up 1.5% of all delinquency cases in 1993 and 1.4% in 1989. JUVENILE OFFENDERS 1993, *supra* note 114, at 7 tbl. 12.

122. *Id.* In 1989, 2.8% of all drug cases were transferred to criminal court. *Id.*

123. DELINQUENCY CASES 1994, *supra* note 7, at 2. In 1994, 2.7% of all person offense cases were transferred to criminal court. *Id.*

124. In 1993, only 5,000 person offense cases were transferred out of 181,800 cases petitioned. JUVENILE OFFENDERS 1993, *supra* note 114, at 7 tbls. 10 and 11. In addition, approximately 137,000 other person offense cases were not petitioned. *Id.*

The existence of transfer provisions has failed to provide an adequate solution to violent juvenile crime. Because of the discretion vested in state officials, prosecutors, and judges in states with prosecutorial discretion or judicial waiver transfer mechanisms may simply exercise their discretion and refuse to transfer juveniles who should otherwise be tried as adults.<sup>125</sup> Moreover, even if a juvenile is transferred to criminal court the juvenile may never be prosecuted for a myriad of reasons.

#### IV. THE NEED FOR FEDERAL INTERVENTION

While rehabilitation should remain the primary focus of juvenile justice systems for the vast majority of juvenile offenders,<sup>126</sup> a small number of chronic juvenile offenders who commit a disproportionate share of violent crime should not escape accountability for their actions by virtue of their age. For such juveniles,<sup>127</sup> incapacitation is the only realistic option to ensure that society is adequately protected.<sup>128</sup> To deal with violent juvenile offenders, Congress should enact legislation modeled after the Violent and Repeat Juvenile Offender Reform Act of 1997 (VRJOA),<sup>129</sup> a bill introduced in the Senate at the beginning of the 105th Session of Congress.

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125. See Rossum, *supra* note 16, at 922-95 (citing survey research that reveals that juvenile justice professionals oppose efforts to limit their discretionary decisionmaking authority).

126. See *United States v. Bland*, 472 F.2d 1329, 1349 (D.C. Cir. 1972) (Wright, J., dissenting). Judge Skelly Wright noted that:

[T]here is no denying the fact that we cannot write these children off forever. Some day they will grow up and at some point they will have to be freed from incarceration. . . . [T]he kind of society we have in the years to come will in no small measure depend upon our treatment of them now.

*Id.*

127. The following proposal is based on defining violent crime to include murder, attempted murder, forcible rape, aggravated assault, or robbery while armed with a dangerous or deadly weapon.

128. Studies have shown that juveniles are less likely to re-offend after their release from custody if they are incapacitated during their peak crime years. See *supra* note 92 and accompanying text.

129. S. 10, 105th Cong. (1997).

The VRJOA proposes to substantially modify juvenile justice at both the state and federal levels. The VRJOA is principally designed to bridge the gap created by ineffective state prosecution of violent juvenile offenders and the limited federal jurisdiction over such offenders. The VRJOA would expand federal jurisdiction over violent juvenile offenders by amending the FJDA to permit the criminal prosecution<sup>130</sup> of juveniles fourteen years of age and above charged with certain crimes of violence<sup>131</sup> or serious drug offenses.<sup>132</sup> The VRJOA also targets gang violence<sup>133</sup> by creating new federal

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130. Under the present version of the FDJA, the decision to criminally prosecute a juvenile is made by the Attorney General. 18 U.S.C. § 5032. The VRJOA removes the Attorney General from this decision and vests the United States Attorney in the appropriate jurisdiction with the decision to prosecute a juvenile as an adult. S. 10, sec. 102(a), § 5032(a)(1). In making this decision, the VRJOA permits the United States Attorney to consider “the prior juvenile records of the subject juvenile, and, to the extent permitted under State law, the prior State juvenile records of the subject juvenile.” S. 10, sec. 102(a), § 5032(g)(1). The decision by the United States Attorney is not subject to review by any court. S. 10, sec. 102(a), § 5032(a)(1).

131. S. 10, sec. 102(a), § 5032(a)(1)(A). The VRJOA refers to the definition of “crime of violence” located at 18 U.S.C. § 16 which provides:

The term “crime of violence” means –

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

132. S. 10, sec. 102(a), § 5032(a)(1)(B). The VRJOA allows for a juvenile to be criminally prosecuted if the juvenile is charged with a federal offense that “involves a controlled substance . . . for which the penalty is a term of imprisonment of not less than 5 years.” *Id.* A controlled substance is defined according to 21 U.S.C. § 802(6).

133. S. 10 §§ 201-209. The VRJOA proposes to revise the VCCLEA criminal street gang provisions (codified at 18 U.S.C. § 521). The VRJOA defines a “criminal street gang” as:

[A]n ongoing group, club, organization, or association of 3 or more persons, whether formal or informal—

- (A) a primary activity of which is the commission of 1 or more predicate gang crimes;
- (B) any members of which engage, or have engaged during the 5-year period preceding the date in question, in a pattern of criminal gang activity; and
- (C) the activities of which affect interstate or foreign commerce.

S. 10 § 203(a)(1)(A). “Pattern of criminal gang activity” is defined as:

penalties for offenses committed by gangs<sup>134</sup> and authorizing the hiring of attorneys to assist in the prosecution of juvenile criminal street gangs.<sup>135</sup> The VRJOA also allows United States Attorneys to release the records of juvenile offenders to law enforcement authorities and officials of schools where a juvenile offender enrolls

[T]he commission of 2 or more predicate gang crimes committed in connection with, or in furtherance of, the activities of a criminal street gang—

- (A) at least 1 of which was committed after the date of enactment of the Federal Gang Violence Act;
- (B) the first of which was committed not more than 5 years before the commission of another predicate gang crime; and
- (C) that were committed on separate occasions.

*Id.* The term “predicate gang crime” is defined as follows:

[A]n offense, including an act of juvenile delinquency that, if committed by an adult, would be an offense that is—

- (A) a Federal offense—
  - (i) that is a crime of violence (as that term is defined in section 16 [of Title 18 of the U.S.C.]) including carjacking, drive-by-shooting, shooting at an unoccupied dwelling or motor vehicle, assault with a deadly weapon, and homicide;
  - (ii) that involves a controlled substance (as that term is defined in [21 U.S.C. § 802] for which the penalty is imprisonment of not less than 5 years;
  - (iii) that is a violation of section 844, section 875 or 876 (relating to extortion and threats), section 1084 (relating to gambling), section 1955 (relating to gambling), chapter 44 (relating to firearms), or chapter 73 (relating to obstruction of justice);
  - (iv) that is a violation of section 1956 (relating to money laundering), insofar as the violation of such section is related to a Federal or State offense involving a controlled substance . . . ;
  - (v) that is a violation of [8 U.S.C. §§ 1324(a)(1)(A), 1327, or 1328](relating to alien smuggling);
- (B) a State offense involving conduct that would constitute an offense under subparagraph (A) if Federal jurisdiction existed or had been exercised; or
- (C) a conspiracy, attempt, or solicitation to commit an offense described in subparagraph (A) or (B).

*Id.*

134. The bill provides that any person engaging in a pattern of criminal gang activity shall be sentenced to a term of imprisonment of not less than 10 years and not more than life. § 203(a)(2).

135. § 209. The bill authorizes the hiring of Assistant United States Attorneys and attorneys in the Criminal Division of the Department of Justice for the purpose of prosecuting juvenile criminal street gangs. *Id.*

or seeks to enroll.<sup>136</sup>

Under the VRJOA, juveniles prosecuted as adults in federal court would be treated identically to adult defendants. Transferred juveniles would be tried under the same procedures applicable to adult defendants,<sup>137</sup> and federal proceedings would be open to the general public.<sup>138</sup> When sentencing a juvenile offender, the VRJOA allows a federal judge to consider the juvenile's entire record.<sup>139</sup> In addition, federal judges may impose the death penalty on juveniles over the age of sixteen.<sup>140</sup> Once a juvenile is tried as an adult and

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136. S. 10, sec. 102(a), § 5032(g)(3).

The United States Attorney may release such Federal records, and, to the extent permitted by State law, such State records, to law enforcement authorities of any jurisdiction and to officials of any school, school district, or postsecondary school at which the individual who is the subject of the juvenile record is enrolled or seeks, intends, or is instructed to enroll, if such school officials are held liable to the same standards and penalties to which law enforcement and juvenile justice system employees are held liable under Federal and State law, for the handling and disclosure of such information.

*Id.*

137. S. 10, sec. 102(a), § 5032(e). When a juvenile is tried as an adult in federal court, the case "shall proceed in the same manner as is required by this title and by the Federal Rules of Criminal Procedure in proceedings against an adult." *Id.*

138. S. 10, sec. 102(a), § 5032(f)(1).

Any offense tried in a district court of the United States pursuant to this section shall be open to the general public, in accordance with rules 10, 26, 31(a), and 53 of the Federal Rules of Criminal Procedure, unless good cause is established by the moving party or is otherwise found by the court, for closure.

*Id.* The VRJOA mandates that a defendant's status as a juvenile, by itself, does not constitute good cause for closure. S. 10, sec. 102(a), § 5032(f)(2).

139. S. 10, sec. 102(a), § 5032(g)(2).

[T]he district court responsible for imposing sentence shall have complete access to the prior juvenile records of the subject juvenile, and, to the extent permitted under State law, the prior State juvenile records of the subject juvenile. At sentencing, the district court shall consider the entire available juvenile record of the subject juvenile.

*Id.*

140. S. 10, sec. 102(a), § 5032(d); § 103. Currently, the defendants less than 18 years of age at the time of the offense are not eligible for the death penalty. 18 U.S.C. § 3591(b).

sentenced by a federal judge, the VRJOA removes the possibility that a juvenile offender may be released from incarceration solely by reaching the age of eighteen.<sup>141</sup>

The VRJOA would also encourage states to adopt reforms in their juvenile justice systems by providing incentive grants to states that authorize the prosecution of violent juvenile offenders as adults.<sup>142</sup> To qualify for federal funding under the VRJOA, a state must make reasonable efforts to: (1) allow for the prosecution of juveniles age fourteen and older as adults if they commit certain offenses; (2) provide for graduated sanctions for juvenile offenders; (3) treat juvenile offenders equally throughout the state; and (4) collect and distribute information concerning juvenile offenders to law enforcement agencies.<sup>143</sup> The funding<sup>144</sup> provided by the VRJOA must be used by qualifying states for programs specified by the Act. These programs include: hiring additional personnel such as judges, prosecutors, or probation officers; collecting juvenile criminal

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141. S. 10, sec. 102(a), § 5032(e). "No juvenile sentenced to a term of imprisonment shall be released from custody simply because the juvenile reaches the age of 18 years." *Id.*

142. S. 10, sec. 302(b), § 204(h). To qualify for grants under the VRJOA, a State must make reasonable efforts to ensure that

juveniles age 14 and older can be prosecuted under state law as adults, as a matter of law or prosecutorial discretion for a crime of violence (as that term is defined in [18 U.S.C. § 16]) such as murder or armed robbery, an offense involving a controlled substance (as defined in [21 U.S.C. § 802]), or the unlawful possession of a firearm (as that term is defined in [18 U.S.C. § 921(a)] or a destructive device (as that term is defined in [18 U.S.C. § 921(a)]).

S. 10, sec. 302(b), § 204(h)(3). Thus, the VRJOA appears to remove state juvenile judges from the decision whether to transfer a juvenile offender to criminal court. Instead, the VRJOA requires states to allow prosecution "as a matter of law or prosecutorial discretion." S. 10, sec. 302(b), § 204(h)(3)(A). This requirement seemingly forces states to replace judicial waiver approaches, or at least supplement them, with statutory exclusion or prosecutorial discretion transfer mechanisms. See *supra* note 30 for discussion of transfer mechanisms.

143. S. 10, sec. 302(b), § 204(h)(3)(A)-(D).

144. One-quarter of one percent (0.25%) of the amount of funding available for incentive block grants is allocated to each state. S. 10, sec. 302(b), § 206(a)(1)(A). Of the remaining funds, each state is to receive "an amount that bears the same ratio to the amount of remaining funds . . . as the juvenile population of such State bears to the juvenile population of all the States." S. 10, sec. 302(b), § 206(a)(1)(B).

records, fingerprints, and photographs; and incarcerating violent juvenile offenders for longer periods of time.<sup>145</sup> The VRJOA funding could also be used by states to share juvenile records with other federal, state, and local law enforcement agencies.<sup>146</sup>

While the VRJOA represents a desirable step towards removing the often artificial distinction between juvenile and adult offenders, several amendments would improve the bill. First, the VRJOA should contain provisions requiring states to keep and maintain records of violent juvenile offenders as a condition of receiving federal funding. Congress should also expand these requirements to provide greater access to juvenile records. At a minimum, criminal and juvenile records of juvenile offenders should be provided to school officials. Providing greater access to the records of violent juvenile offenders would enhance the protection of society in several ways. First, school officials could inspect the criminal background of violent offenders and take necessary precautions to ensure the safety of students and teachers. Second, providing these records to both juvenile and criminal courts would allow judges to make more accurate predictions of future criminal behavior. Finally, the maintenance of these records could serve as a deterrent to some juveniles if they know their records will be no longer be expunged once they reach the age of majority.

Second, Congress should not mandate the criminal prosecution of juveniles who commit drug offenses because these offenses are not inherently violent. While drug offenses may involve crimes of violence, these acts would be covered by other provisions. In addition, drug offenses are not necessarily crimes of depravity. A juvenile charged with drug distribution may have acted purely out of an economic motivation. Moreover, rehabilitation may be a more effective alternative for juveniles charged with drug offenses than

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145. S. 10, sec. 302(b), § 204(h)(2).

146. S. 10, sec. 302(b), § 204(h)(2)(I). Federal grant money could be used by states "for the development and implementation of coordinated multijurisdictional or multiagency programs for the identification, control, supervision, prevention, investigation, and treatment of the most serious juvenile offenses and offenders." *Id.*

those charged with the commission of violent crimes.

Third, the VRJOA requirements that states must fulfill to qualify for federal funding should not apply universally to every state. States maintaining effective policies for controlling the commission of violent juvenile crimes should be excepted from the provisions requiring the criminal prosecution of juveniles who commit violent crimes. Only states with violent juvenile offense case rates over a certain number of cases<sup>147</sup> per 1,000 youth at risk<sup>148</sup> should be subject to these federal regulations.

### CONCLUSION

While juvenile courts continue to play a useful and important role in overseeing the rehabilitation of the majority of juvenile delinquents, the juvenile court system is ineffective at handling the relatively small portion of juvenile offenders who commit serious violent crimes. In most cases, such juveniles are less amenable to rehabilitation than juveniles who commit non-violent crimes. As a result, the potential risk to society by releasing these violent offenders following an unsuccessful attempt at rehabilitation is unacceptably high. Despite the danger presented by violent juvenile offenders, some states refuse to punish these offenders in proportion with their crimes. Accordingly, to ensure the adequate protection of society, Congress should enact legislation that provides federal funding for juvenile justice programs to states allowing the criminal prosecution of violent juvenile offenders.

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147. The number of cases per 1,000 youth at risk should be adjusted to account for the varying demographics of the states. Nationally, in 1994 there were 12.1 person offense cases per 1,000 youth at risk. PERSON OFFENSES 1994, *supra* note 114, at 1.

148. "Youth at risk" is defined as youth age 10 or older who are potentially subject to the original jurisdiction of the juvenile court according to the laws of their state.

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