

## NOTES

# THE REGRESSIVE MOVEMENT: WHEN JUVENILE OFFENDERS ARE TREATED AS ADULTS, NOBODY WINS

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### I. INTRODUCTION

A separate justice system for juveniles was first created over a century ago with the express purpose of rehabilitating young offenders.<sup>1</sup> However, public outrage over the perceived increase in violent crimes committed by children, coupled with the apparent failure of the juvenile justice system to control criminal youth, have resulted in a shift toward a more retributive rhetoric and a call for harsher policies to deal with juveniles who break the law.<sup>2</sup>

Consequently, our juvenile justice system has become increasingly punitive in nature. As of 2002, forty-two states had juvenile court purpose clauses; most of them listed punishment as a stated goal.<sup>3</sup> All fifty states and the District of Columbia currently have provisions that allow the transfer of juveniles to adult court in certain circumstances.<sup>4</sup> California's Proposition 21, approved in 2000 by a wide margin of voters, requires trial in adult court for juveniles as young as fourteen for certain offenses, and permits the death penalty for juveniles who commit gang-related murder.<sup>5</sup>

To a certain extent, this shift is occurring in other parts of the world as well. Over the last few decades, Western European countries have

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<sup>1</sup> See Joseph F. Yeckel, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 334–36 (1997).

<sup>2</sup> See, e.g., Tony Freemantle, *Lawmakers Get Tougher on Juvenile Offenders*, HOUSTON CHRON., Apr. 26, 1998, at A26. See also Lance Gay, *GOP Urges Crackdown on Crime by Youths*, PLAIN DEALER, May 6, 1999, at 17A; Patrick T. McCormick, *Fit to be Tried? Legislators Have Been Making it Easier to Punish Juveniles as Adults*, AMERICA, Feb. 11, 2002, at 15; Evelyn Nieves, *California's Governor Plays Tough on Crime*, N.Y. TIMES, May 23, 2000, at A16.

<sup>3</sup> See Patrick Griffin & Melanie Bozynski, *State Juvenile Justice Profiles: National Overviews*, NAT'L CTR. FOR JUVENILE JUSTICE, at <http://www.ncjj.org/stateprofiles/overviews/faq9t.asp#barj> (last updated Nov. 19, 2003).

<sup>4</sup> See PATRICK GRIFFIN, PATRICIA TORBET, & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 1 (1998).

<sup>5</sup> See Gang Violence and Juvenile Crime Prevention Act of 1998, CAL. PENAL CODE § 182.5 (2004). The initiative was approved by 62.1% of the popular vote. See Ctr. on Juvenile & Criminal Justice, *About Proposition 21*, at [http://www.cjcj.org/jjic/prop\\_21.php](http://www.cjcj.org/jjic/prop_21.php) (last visited Feb. 17, 2004).

instituted harsher penalties for juvenile offenders, marking a transition from the traditional view of juvenile delinquency as a social welfare problem to a more punitive view of juvenile crime.<sup>6</sup> Unlike the United States, however, these countries have also increased their efforts to prevent juvenile crime by focusing on alternative, community-based sanctions, early recognition of at-risk youth, and training programs to aid in the reintroduction of offenders into the community.<sup>7</sup> Also unlike the United States, nearly every country in the world has abolished the death penalty for crimes committed under the age of eighteen.<sup>8</sup>

Although a great deal of criticism has been levied against our juvenile justice system's apparent leniency toward offenders and its inability to protect the public, many argue that our increasingly narrow focus on punishment is short-sighted and ineffective.<sup>9</sup> One expert commented that simply putting more people in prison with longer sentences, but failing to address the causes of crime, is "like building cancer wards to stop cancer that is caused by smoking."<sup>10</sup> The prevention of a single crime can have a profound effect on reducing crime overall—one study found that over one-third of first-time juvenile offenders go on to commit more crimes, with nearly 10% of that group becoming chronic reoffenders.<sup>11</sup> Simply "getting tough" on young offenders exacerbates this problem because juveniles who serve time in adult prisons generally have higher rates of recidivism than

<sup>6</sup> Starting in the 1980s,

Public opinion and governments were inclined towards an increased punitive approach to delinquency. The pure rehabilitative model appeared more and more to be naïve. As a consequence, attention to the "justice" element in dealing with juvenile offenders became more important, including a stricter punishment-orientation. From the late eighties, these evolutions are reflected in several changes in the formal regulations of juvenile justice, e.g. in Italy (1988), England and Wales (1988–89), Germany (1990), Belgium (1994) and the Netherlands (1994–95).

INST. OF LOCAL GOV'T STUDIES—DEN., *CONFRONTING YOUTH IN EUROPE: JUVENILE CRIME AND JUVENILE JUSTICE* (Lode Walgrave & Jill Mehlbye eds., 1998), available at <http://www.akf.dk/eng98/juvenile.htm>.

<sup>7</sup> See, e.g., Paul Vlaardingerbroek, *International Perspectives on Adolescents' Competence and Culpability: New Trends in the Juvenile Justice System*, 18 QUINNIPIAC L. REV. 491, 502 (1999). See also Josine Junger-Tas, *Juvenile Delinquency: What to Do? The Case of the Netherlands*, 2 FED. SENTENCING REP. 248 (1999).

<sup>8</sup> The United States is one of only two countries that have not ratified the United Nation's Convention on the Rights of the Child, which bans the death penalty for crimes committed under the age of eighteen (the other country is Somalia). "In the past four years, only five countries have executed individuals for crimes they committed when younger than 18—the Democratic Republic of Congo, China, Iran, Pakistan, and the United States." Warren Richey, *Global Legal Trends Make Waves at High Court*, CHRISTIAN SCI. MONITOR, Oct. 21, 2004, at USA 2. Furthermore, the United States executes more juvenile offenders than any other country: "Since 1990, only six countries are known to have executed people for crimes committed when under 18. Five of them—Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen—have executed a total of nine such prisoners between them. The sixth country—the USA—has executed eight juvenile offenders in the same period, including two this year." Amnesty Int'l, *Juvenile Offender Facing Execution in Virginia—a Step Backwards*, AMR 51/76/98 (Oct. 9, 1998), available at <http://web.amnesty.org/library/index/ENGAMR510761998>.

<sup>9</sup> See, e.g., Mark H. Moore & Stewart Wakeling, *Juvenile Justice: Shoring Up the Foundations*, 22 CRIME & JUST. 253, 253–54 (1997).

<sup>10</sup> Linnet Myers, *Cultural Divide Over Crime and Punishment*, CHI. TRIB., Oct. 13, 1995, at N1 (quoting Irvin Waller, director of the Int'l Ctr. for the Prevention of Crime in Montreal).

<sup>11</sup> See Orange County Prob. Dep't, *8% Problem Study Findings: Exploratory Research Findings and Implications for Problem Solutions*, at <http://www.oc.ca.gov/probation/solution/contentpsf.asp?h=psm> (Mar. 1999) (last visited Jan. 8, 2005) [hereinafter *8% Study*] (see *infra* notes 157–70 and accompanying text).

those who do not.<sup>12</sup> Furthermore, kids who serve time in jail are at greater risk for assault, rape, and suicide.<sup>13</sup> Clearly, when it comes to reducing juvenile crime, an ounce of prevention is worth a ton of cure.

Part II of this Note briefly highlights key points in the development of the juvenile justice system in the United States, including the underlying theoretical justifications for its creation and current trends in juvenile justice policy. Part III discusses juvenile crime statistics and evaluates what happens when states “get tough” on juvenile crime. Part IV examines some promising alternatives to sending juvenile offenders through the adult criminal system. Part V concludes that we must regain our focus on prevention and rehabilitation of juvenile offenders, because not only are these methods more likely to be effective than adult sanctions in reducing crime, they reflect the most basic underlying assumptions of how society should treat troubled children.

## II. ORIGIN AND PURPOSE OF THE JUVENILE JUSTICE SYSTEM

### A. HISTORICAL BACKGROUND

Prior to the end of the nineteenth century, our criminal justice system made no distinction between juveniles who broke the law and adult criminals.<sup>14</sup> Children over the age of seven who were convicted of a crime were imprisoned with adults and suffered adult consequences.<sup>15</sup> In 1828, a twelve-year-old boy was found guilty of bludgeoning an elderly woman to death.<sup>16</sup> Even though the verdict was based almost entirely on his questionable confession, he was sentenced to death by hanging.<sup>17</sup> In 1847, a ten-year-old boy was executed for murder after he confessed the crime.<sup>18</sup> Despite the court’s recognition that the confession contained “plain tokens of a mischievous discretion,” it was unanimously agreed that sparing him the ultimate punishment would lead to children committing “such atrocious crimes with impunity.”<sup>19</sup>

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<sup>12</sup> See Donna M. Bishop, Charles E. Frazier, Lon Lanza-Kaduce, & Lawrence Winner, *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996) (showing that transferring juveniles to adult court increased short-term recidivism across seven classes of offenses). See also Lawrence Winner, Lon Lanza-Kaduce, Donna M. Bishop, & Charles E. Frazier, *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQ. 548, 558 (1997) (discussing a long-term recidivism study that shows juveniles transferred to adult court reoffended more often and more quickly than those who were not transferred, for all classes of offenses except property crimes). See *infra* notes 122–34 and accompanying text.

<sup>13</sup> See Vincent Schiraldi & Jason Zeidenberg, *The Risks Juveniles Face When They Are Incarcerated With Adults*, Ctr. on Juvenile & Criminal Justice (1997), at <http://www.cjcr.org/pubs/risks/risks/html>.

<sup>14</sup> See Yeckel, *supra* note 1, at 334.

<sup>15</sup> See Juvenile Justice FYI, *History of America’s Juvenile Justice System*, at [http://www.juvenilejusticefyi.com/history\\_of\\_juvenile\\_justice.html](http://www.juvenilejusticefyi.com/history_of_juvenile_justice.html) (last visited Feb. 18, 2004) [hereinafter *History of Juvenile Justice System*].

<sup>16</sup> See *State v. Guild*, 10 N.J.L. 163, 163, 190 (1828).

<sup>17</sup> See *id.*

<sup>18</sup> See *Gault*, 387 U.S. 1, 80 n.2 (1967) (Stewart, J., dissenting) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*23 (Wendell ed. 1847)).

<sup>19</sup> *Id.*

At the turn of the twentieth century, the Progressive movement ushered in a period of sweeping social change in the United States. In this atmosphere of political activism and social reform, women gained the right to vote, new labor protections were enacted, Prohibition was ratified, and W.E.B. DuBois and others founded the National Association for the Advancement of Colored People (“NAACP”).<sup>20</sup> Social activists of the time also pressed for criminal justice reforms, including the creation of separate institutions for juvenile offenders.<sup>21</sup> While states had slowly been implementing separate courts for juveniles since the late 1800s, momentum picked up at the turn of the century; by the 1930s, juvenile courts were well-established throughout the United States.<sup>22</sup> These changes were influenced and informed by a new understanding of juvenile delinquency that stressed the importance of keeping young offenders away from “the corrupting influences of adult criminals” and emphasized reform over punishment.<sup>23</sup> Under the authority of *parens patriae*,<sup>24</sup> juvenile courts had the power to mandate treatment, supervision, and care of young offenders within their jurisdiction.<sup>25</sup> Proceedings were informal, and judges had wide latitude to consider mitigating circumstances when deciding cases involving juveniles.<sup>26</sup> The focus of the system was primarily on the welfare of the child, rather than exacting punishment for the offense.<sup>27</sup> As a result, delinquents were treated in much the same way as orphans and homeless children, and did not carry the stigma of a criminal record.<sup>28</sup>

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<sup>20</sup> See Greg D. Feldmeth, *Chronology: Progressivism & World War I (1892–1919)*, at <http://www.polytechnic.org/faculty/gfeldmeth/chron.prog.html> (Mar. 31, 1998) (listing important Progressive Era reforms). See also U.S. CONST. amend. XVIII (repealed 1933) (ratifying Prohibition); U.S. CONST. amend. XIX (providing women with the right to vote); *Muller v. Oregon*, 208 U.S. 412, 412 (1908) (upholding state statute limiting number of hours women could work); MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920* 200 (2003) (discussing the origins of the NAACP). But not all progressive reforms survived; see, e.g., *Lochner v. New York*, 198 U.S. 45, 45 (1905) (overturning state legislation limiting working hours for bakers).

<sup>21</sup> See MCGERR, *supra* note 20, at 113. See also ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 9–10 (2d ed. 1977).

<sup>22</sup> Illinois is generally regarded as the first state to establish a separate court system for juveniles in 1899; but this is the source of some debate, because laws providing for separate trials for minors were enacted in Massachusetts in 1874 and New York in 1892. “By 1917 juvenile court legislation had been passed in all but three states and by 1932 there were over 600 independent juvenile courts throughout the United States.” PLATT, *supra* note 21, at 9–10.

<sup>23</sup> *Id.* at 54–55.

<sup>24</sup> “[T]he state in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 511 (2d Pocket ed. 2001).

<sup>25</sup> See 47 AM. JUR. 2d *Juvenile Courts* § 35 (2003) (“A juvenile delinquency statute is an assertion of the state’s power as *parens patriae* and its right to exercise proper parental control over those of its minor citizens who are disposed to go wrong, and constitutes a codification of the ancient equitable jurisdiction over infants under the doctrine”). See also *Witter v. Cook County Comm’rs*, 100 N.E. 148, 150 (Ill. 1912) (stating “This court long ago declared it to be a power, which exists in every well-regulated society, to see that infants within the jurisdiction of the court are not abused, defrauded, or neglected, and that they shall be reared and educated under such influences as will make them good citizens, and that this power is vested in the court of chancery, representing the government.”).

<sup>26</sup> See *History of Juvenile Justice Law*, *supra* note 15. See also PLATT, *supra* note 21, at 141–42.

<sup>27</sup> HOWARD N. SNYDER & MELISSA SICKMUND, NAT’L CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT* 86–87 (1999), available at <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html>. The role of juvenile court judges was seen as “doctor-counselor” rather than disciplinarian. See PLATT, *supra* note 21, at 142.

<sup>28</sup> See PLATT, *supra* note 21, at 137–38. Despite these lofty ideals, however, it should be noted that the life of a juvenile delinquent was often quite difficult. In one Chicago youth reformatory, boys were

Since the early days of juvenile justice reform, a series of key U.S. Supreme Court decisions have resulted in a shift from the Progressive ideal of informal proceedings, individualized treatment, and the rehabilitation of young offenders, to a system in which the distinction between juveniles and adult criminals is often very blurred.<sup>29</sup> The 1967 Supreme Court decision in *Gault* was particularly important because it established due process rights for juveniles in formal proceedings that closely paralleled those for adult criminals.<sup>30</sup> In his dissent, Justice Stewart was remarkably prescient when he expressed concern that the decision would “convert a juvenile proceeding into a criminal prosecution” and that “to impose the Court’s long catalog of requirements upon juvenile proceedings . . . is to invite a long step backwards into the nineteenth century. In that era there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial.”<sup>31</sup> By introducing a new level of formality into juvenile proceedings, *Gault* did, in fact, significantly alter the framework of the juvenile justice system.<sup>32</sup>

Shortly after the Court’s decision in *Gault*, Congress passed two key juvenile crime measures that were intended to prevent delinquency while still maintaining the separation of juvenile offenders from adult criminals.<sup>33</sup> The Juvenile Delinquency Prevention and Control Act of 1968 provided federal funding for states that developed community-based programs to prevent juvenile crime.<sup>34</sup> A few years later, the Juvenile Justice and Delinquency Prevention Act of 1974 created several new agencies that focused on reducing juvenile crime through prevention.<sup>35</sup> In addition, Congress directed states to remove status offenders<sup>36</sup> from adult facilities, maintain “sight and sound” separation between juveniles and adult offenders, and evaluate and remedy any “disproportionate confinement of minority youth” in their state in order to receive federal grants under the Act.<sup>37</sup>

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routinely whipped with a leather strap, locked up in the “hole” for weeks at a time with no shoes or mattress, handcuffed to pipes, and manacled. *See id.* at 150.

<sup>29</sup> *See, e.g., Gault*, 387 U.S. 1, 55 (1967) (holding that juveniles have the same constitutional right to due process as adults in criminal proceedings). *See also Schall v. Martin*, 467 U.S. 253, 273–74 (1984) (upholding the constitutionality of a N.Y. statute allowing pretrial detention of juveniles); *Winship*, 397 U.S. 358, 368 (1970) (holding that the “beyond a reasonable doubt” standard applied in the adjudication stage of juvenile cases, rather than “by a preponderance of the evidence.”). These decisions have resulted in a shift from the informality of the original juvenile courts to one that “increasingly resembles, both procedurally and substantively, the adult criminal court system.” Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U.L. REV. 821, 821 (1988).

<sup>30</sup> *See Gault*, 387 U.S. at 55.

<sup>31</sup> *Id.* at 79–80.

<sup>32</sup> *See Feld*, *supra* note 29, at 826.

<sup>33</sup> *See History of Juvenile Justice Law*, *supra* note 15.

<sup>34</sup> *See id.*

<sup>35</sup> The 1974 Act created the Office of Juvenile Justice and Delinquency Prevention (OJJDP), the Runaway Youth Program, and the National Institute for Juvenile Justice and Delinquency Prevention (NIJJDP). *See id.*

<sup>36</sup> Status offenses are those acts which would not be considered violations if committed by an adult rather than a juvenile. Examples include running away, truancy, and incorrigibility. BLACK’S LAW DICTIONARY, *supra* note 24, at 497.

<sup>37</sup> *See SNYDER & SICKMUND*, *supra* note 27, at 88.

This congressional endorsement of community-based prevention programs and the deinstitutionalization of status offenders were largely overshadowed, however, by a wave of “get tough” legislation enacted in the late 1980s and 1990s in response to a sharp increase in juvenile crime.<sup>38</sup> An amendment to the 1974 Act allowed states to try juveniles as adults for certain offenses, including weapons violations.<sup>39</sup> Between 1992 and 1997, all but three states enacted laws making their juvenile justice systems more punitive, and many added language to the purpose clauses of their juvenile codes that reflected an emphasis on punishment and public safety.<sup>40</sup>

#### B. TRADITIONAL THEORIES OF PUNISHMENT IN THE CONTEXT OF JUVENILE JUSTICE

Any juvenile justice policy that emphasizes punishment over treatment lies far afield of the system’s original aim of addressing the special needs of young offenders. The “get tough” mantra and its progeny represent the antithesis of the Progressive goal of individualized treatment and rehabilitation of juvenile delinquents.

When the juvenile court system was established, arguments for punishing children were based on rehabilitative ideals and the protection of the child. These principles were premised on the notion that “society had a responsibility to recover the lives of its young offenders before they became absorbed in the criminal activity” for which they were being punished.<sup>41</sup> The traditional justification for rehabilitating offenders—that punishment should ultimately result in a positive modification of behavior<sup>42</sup>—seems particularly appropriate when applied to children, who have not fully developed their decisionmaking skills and are not wholly cognizant of the consequences of their actions.<sup>43</sup> While successful rehabilitation does control crime by preventing repeat offenses, its primary objective is to correct the behavior of the offender.<sup>44</sup>

<sup>38</sup> See *id.*

<sup>39</sup> See *History of Juvenile Justice Law*, *supra* note 15.

<sup>40</sup> See SNYDER & SICKMUND, *supra* note 27, at 89. The stated mission of the California Youth Authority, the department of the Youth and Adult Correctional Agency responsible for juvenile institutions in California, is to “protect the public from criminal activity.” CAL. YOUTH AUTH., ABOUT THE CALIFORNIA DEPARTMENT OF THE YOUTH AUTHORITY, at <http://www.cya.ca.gov/about/default.html> (last visited Feb. 17, 2004).

<sup>41</sup> *History of Juvenile Justice Law*, *supra* note 15.

<sup>42</sup> See Jody L. Sundt, *Rehabilitation Model*, in 3 ENCYCLOPEDIA OF CRIME & PUNISHMENT 1360, 1360 (David Levinson ed., 2002).

<sup>43</sup> It is well settled that juveniles are developmentally different from adults; differences in developmental maturity can also exist within groups of children:

Fundamentally, the ability to integrate any understanding of the consequences of one’s actions over a long period of time, to anticipate futures and make current choices in accord with anticipated futures, cannot occur for most children before the age of 13 or 14 years. A few may be able to do so at younger ages, others will need even more time . . . . Most states do not license people to drive until they reach 16 years of age. The right to vote, buy tobacco products, or serve in the military is not granted until age 18 years. One must be 21 years old to buy alcohol products. Society recognizes developmental maturity as important to the responsible exercise of these behaviors . . . .

Juvenile Justice Accountability Bd.—Fla. Dep’t of Justice, *Reducing Juvenile Crime: Lessons from Research on Young and Chronic Offenders*, JJAB Doc. #99-005-OE (Sept. 29, 1999).

<sup>44</sup> See Sundt, *supra* note 42, at 1360.

Over the years, however, the administration of juvenile justice has shifted in emphasis from the “juvenile” and the special needs of young offenders, and now focuses almost entirely on “justice”—exactng sufficient punishment for the crimes committed. This represents a more retributive ideal; one in which punishment is imposed as society’s moral imperative and the possibility of reform is irrelevant.<sup>45</sup> Punishment as retribution, however, raises complicated questions when applied to juveniles. Retributivists argue that society has an obligation to punish harmful behavior, regardless of who commits the act; yet assigning moral culpability to children, who are not yet fully responsible for their actions, is difficult to reconcile with the reasons for creating a separate juvenile justice system in the first place and the principles of social responsibility that support it.<sup>46</sup>

### C. THE CURRENT STATE OF OUR JUVENILE JUSTICE SYSTEM

A survey of how states define the purposes of their juvenile courts reveals that most have adopted a more punitive stance in dealing with juvenile crime.<sup>47</sup> As of 2003, only nine states had incorporated language modeled after the Standard Juvenile Court Act, which is premised on the doctrine of *parens patriae*.<sup>48</sup> Just three states and the District of Columbia had incorporated statutory language that “emphasizes the promotion of the welfare and best interests of the juvenile as the sole or primary purpose of the juvenile court system.”<sup>49</sup> In contrast, many states currently include punishment and/or offender accountability as a stated goal.<sup>50</sup> Wyoming and Texas, for example, place public safety and punishment prominently at the top of the list in their juvenile justice purpose clauses.<sup>51</sup>

In furtherance of these punitive goals, most states have enacted legislation that allows easier (and in some cases, mandatory) prosecution of

<sup>45</sup> See Yeckel, *supra* note 1, at 350.

<sup>46</sup> See PLATT, *supra* note 21, at 153–55 for a discussion of retribution as a justification for punishment.

<sup>47</sup> Patrick Griffin, *National Overviews: State Juvenile Justice Profiles*, NAT’L CTR. FOR JUVENILE JUSTICE (Sep. 23, 2003), at <http://www.ncjj.org/stateprofiles/overviews/faq9.asp>.

<sup>48</sup> The declared purpose of the Standard Juvenile Court Act was that:

“each child coming within the jurisdiction of the court shall receive . . . the care, guidance, and control that will conduce to his welfare . . . and [] when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him.”

*Id.*

<sup>49</sup> *Id.*

<sup>50</sup> For example:

[a]s of 1991, thirty-nine states incorporated statements of juvenile justice philosophy into their codes. Nearly two-thirds of the thirty-nine endorsed punishment in some way. Over one-third of the thirty-nine recognized punishment as the sole objective of the juvenile system. Just three years earlier, less than a quarter of statutory purpose clauses had recognized punishment as a goal of the juvenile system.

Donna M. Bishop, Lonn Lanza-Kaduce, & Charles E. Frazier, *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL’Y 129, 138 (1998).

<sup>51</sup> “This Act shall be construed to effectuate the following public purposes: (i) to provide for . . . the protection of the public and public safety; (ii) consistent with the protection of the public and public safety; (A) to promote the concept of punishment for criminal acts . . . .” WYO. STAT. § 14-6-201(c) (Michie 2003). The purpose clause in Texas’ Juvenile Justice Code contains almost identical language. TEX. FAM. CODE § 51.01 (Vernon 2004).

juveniles in adult court; this type of prosecution is known as “transfer.”<sup>52</sup> In some cases, these transfer provisions apply to children as young as ten.<sup>53</sup> In Florida, a juvenile who commits a felony and has had three or more offenses resulting in residential commitment will be prosecuted in criminal court, regardless of age.<sup>54</sup> Nearly all states have adopted or amended laws lowering the minimum ages for juvenile and criminal court jurisdiction, while increasing the number and range of offenses for which juveniles will be automatically tried in adult court.<sup>55</sup>

There are three mechanisms by which juveniles can be transferred to adult court: judicial waiver, prosecutorial discretion (also known as direct file), or statutory exclusion (also known as automatic or legislative waiver).<sup>56</sup> Most states utilize some combination of two of these provisions. A few use only one, some use all three.<sup>57</sup>

Judicial waiver provisions have been in place since the inception of the juvenile justice system, although until the late 1960s, transfer to adult court was typically reserved for the most incorrigible offenders.<sup>58</sup> The number of cases transferred to adult court by judicial waiver has fluctuated over the last three decades. Between 1971 and 1981, nationwide juvenile transfers by judicial waiver increased from less than 1% of juvenile arrests to more than 5%, but by 1985 had declined to 1.4% of the total cases.<sup>59</sup> Over the next ten years, the total number of transfers by waiver increased about 60%, but still only represented about 1.4% of total cases.<sup>60</sup> The number of transfers by waiver has since declined 54% through 2000, although trends vary across offense categories.<sup>61</sup>

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<sup>52</sup> “Between 1992 and 1995 alone, forty states adopted or modified laws making it easier to prosecute juveniles in criminal courts.” Bishop et al., *supra* note 50, at 139. As of 1999, twenty-nine states had automatic transfer provisions; fifteen states allowed prosecutorial waiver. Forty-six states authorized judicial waiver. CHARLES M. PUZZANCHERA, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, OJJDP FACT SHEET: DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1990–1999 (Sept. 2003).

<sup>53</sup> The minimum age is ten for juveniles to be tried as adults for any offense in Kansas; in Vermont, the minimum age is ten for murder and certain other offenses. See GRIFFIN ET AL., *supra* note 4, at 14–15.

<sup>54</sup> See Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 809 n.191 (2000).

<sup>55</sup> See Bishop et al., *supra* note 50, at 140.

<sup>56</sup> See GRIFFIN ET AL., *supra* note 4, at 1.

<sup>57</sup> In 2000, fourteen states had only judicial waiver provisions: Hawaii, Idaho, Iowa, Kansas, Maine, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, South Dakota, Tennessee, Texas, and Wyoming. Two states had only automatic waiver provisions: Massachusetts and New York. Two states utilized only prosecutorial waiver: Arkansas and Nebraska. Twenty-seven states used a combination of two types of waiver. Alabama, Alaska, Delaware, Illinois, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia and Wisconsin utilized judicial and automatic waiver. Colorado, Michigan, Montana, and Virginia had judicial and prosecutorial waiver provisions. Connecticut and Georgia utilized prosecutorial and automatic waiver. The remaining five states—Arizona, California, Florida, Louisiana, and Vermont—used all three. See Beresford, *supra* note 54, at 808, 814, 829.

<sup>58</sup> See *id.* at 794.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See Office of Juvenile Justice & Delinquency Prevention, *OJJDP Statistical Briefing Book*, U.S. Dep’t of Justice (Aug. 11, 2003), available at <http://www.ojjdp.ncjrs.org/ojstabb/court/qa06502.asp?qaDate=20030811>.



Current waiver provisions grant varying amounts of discretion to juvenile courts. Cases must originate in juvenile court, after which they may be transferred to criminal court either (a) at the judge's sole discretion; (b) because they meet specified criteria for mandatory waiver; or (c) upon a probable cause determination of an offense for which the state has deemed waiver to be presumptively appropriate.<sup>62</sup> In most states, courts must take several factors into account when making the decision whether to waive jurisdiction; however, some authorize waiver for any offense as long as age requirements are met.<sup>63</sup>

Under direct file provisions, prosecutors have complete discretion to determine whether to initiate proceedings in the juvenile or criminal court.<sup>64</sup> Because "direct file statutes generally provide few guidelines or criteria for the exercise of prosecutorial discretion," prosecutors exert tremendous influence over how juvenile cases are handled.<sup>65</sup> One study found that 85% of juvenile transfers to adult court are a result of prosecutorial discretion or automatic waiver; only 15% are transferred per judicial waiver.<sup>66</sup> In 1995, for example, "Florida prosecutors sent almost as many juvenile cases to adult court as judges nationwide."<sup>67</sup>

Automatic or legislative waiver derives from the concept that "'the 'right' of a juvenile to be in juvenile court is entirely a statutory right' and that the legislature can take the right away."<sup>68</sup> States with automatic waiver provisions statutorily exclude certain categories of offenses and/or offenders from juvenile court jurisdiction.<sup>69</sup> Essentially, the decision of whether to try a juvenile in adult court has been predetermined by legislation, triggered when the prosecution charges a juvenile with an excluded offense.<sup>70</sup> The use of statutory waiver has increased over the last decade, fueled by the public's perception of high juvenile crime rates and the perceived failure of the juvenile courts to adequately punish offenders.<sup>71</sup> As one expert explained:

In public discourse, it is almost taken for granted that getting tougher and harsher will be more effective than traditional modes of response to juvenile crime. Anecdotal accounts are common of juveniles laughing at the juvenile system, accumulating "free" crimes until they reach the age of majority. Some advocates of transfer claim that an experience in criminal court—no matter what the sentencing outcome—gives young offenders a good shaking up . . . . In other words, transfer per se is thought to have symbolic value, quite apart from whatever consequences

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<sup>62</sup> See GRIFFIN ET AL., *supra* note 4, at 1, 4, A3.

<sup>63</sup> See *id.* at 3–4.

<sup>64</sup> See *id.* at 7.

<sup>65</sup> Furthermore, these decisions are generally not subject to judicial review. Bishop et al., *supra* note 50, at 140.

<sup>66</sup> See Bldg. Blocks for Youth, *Fact Sheet: Transfer of Youth to the Adult Criminal Justice System*, at [http://www.buildingblocksforyouth.org/issues/transfer/facts\\_transfer.html](http://www.buildingblocksforyouth.org/issues/transfer/facts_transfer.html) (last visited Feb. 20, 2004).

<sup>67</sup> Bldg. Blocks for Youth, *Fact Sheet: Florida's Experience with Trying Juveniles as Adults*, at [http://www.buildingblocksforyouth.org/issues/transfer/facts\\_florida.html](http://www.buildingblocksforyouth.org/issues/transfer/facts_florida.html) (last visited Feb. 20, 2004).

<sup>68</sup> Beresford, *supra* note 54, at 807.

<sup>69</sup> See GRIFFIN ET AL., *supra* note 4, at 8.

<sup>70</sup> See *id.*

<sup>71</sup> See Beresford, *supra* note 54, at 807–09.

may follow at sentencing. . . . [I]f the criminal court gives young offenders “real” consequences—sanctions that are harsher and more punitive than the sanctions typically provided by the juvenile courts—their motivations to commit future crimes will be further reduced.<sup>72</sup>

Critics of automatic waiver argue that not all offenders who fit the statutory criteria should be painted with the same brush, and note that certain cases warrant the exercise of some discretion.<sup>73</sup> Furthermore, many juveniles are transferred to adult court for nonviolent offenses. One source shows that nearly three-quarters (71%) of juveniles transferred to adult court in Florida were charged with nonviolent offenses, such as property offenses and drug violations.<sup>74</sup>

Because the consequences for juveniles who are transferred to criminal court by statutory waiver can be dire—once transferred to criminal court, juveniles face the possibility of adult sentences, including life in prison or the death penalty—many states that have direct file or automatic transfer have adopted reverse waiver provisions.<sup>75</sup> These provisions authorize criminal courts to transfer cases back to juvenile court, whether it was filed in criminal court directly or, in some cases, even if it was transferred there via waiver.<sup>76</sup> Some reverse waiver provisions allow the court to sentence an offender as a juvenile even after a conviction in criminal court.<sup>77</sup> In addition, a handful of states that grant prosecutors discretion to file in criminal court have mechanisms to somewhat limit that discretion; for example, requiring them to provide written reasons for failing to charge a juvenile in adult court for specified offenses, or enumerating factors that prosecutors must consider when determining whether to file in juvenile court.<sup>78</sup>

### III. JUVENILE CRIME AND THE CONSEQUENCES OF GETTING TOUGH

#### A. PERCEPTIONS, STATISTICS, AND TRENDS

In the early 1990s, some researchers began predicting a wave of violent juvenile crime, warning of a new generation of young “superpredators” that

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<sup>72</sup> Bishop et al., *supra* note 12, at 173.

<sup>73</sup> See Beresford, *supra* note 54, at 811 n.197.

<sup>74</sup> See Bldg. Blocks for Youth, *supra* note 67.

<sup>75</sup> See Jennifer Taylor, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. Cal. L. Rev. 983, 987–89 (2002). In states like Florida that have adopted “once an adult, always an adult” rules, juveniles who are transferred to adult court prior to age eighteen are treated as adults for any subsequent offenses. See DONNA BISHOP, CHARLES FRAZIER, LONN LANZA-KADUCE, & HENRY GEORGE WHITE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, OJJDP FACT SHEET: A STUDY OF JUVENILE TRANSFERS TO CRIMINAL COURT IN FLORIDA (Aug. 1999). In 1998, thirty-one states had these provisions. See GRIFFIN ET AL., *supra* note 4, at 10.

<sup>76</sup> GRIFFIN ET AL., *supra* note 4, at 9–10.

<sup>77</sup> See Taylor, *supra* note 75, at 989 n.48.

<sup>78</sup> See GRIFFIN ET AL., *supra* note 4, at 14.

would soon be sweeping the nation.<sup>79</sup> Although the superpredator theory has been widely discredited (even its former champion now espouses prevention over harsh punishment), there remains strong public sentiment that violent juvenile crime is a problem of epic proportions.<sup>80</sup> Not surprisingly, the media is primarily responsible for shaping public perception of juvenile crime. According to one source, “[t]hree-quarters of the public say they form their opinions about crime from what they see or read in the news,” while less than a quarter say they get their primary information on crime from personal observation.<sup>81</sup> Overwhelming media attention to particularly heinous crimes, like the Columbine tragedy, generates widespread fear even though school shootings remain extremely rare.<sup>82</sup>

In California, proponents of Proposition 21 argued that the measure was necessary to deal with juvenile crime that was ballooning out of control.<sup>83</sup> Advocates such as Assemblyman Rod Pacheco claimed that “the rate at which juveniles were arrested for violent offenses rose a staggering 60.6 percent between 1983 and 1998. Sadly, speculation is that this trend will continue as the juvenile population is expected to grow dramatically—33 percent—over the next 15 years.”<sup>84</sup> These frightening figures were echoed throughout the campaign.<sup>85</sup> It appears, though, that these doomsayers misinterpreted the data. While the total number of juvenile arrests for violent felonies did increase during that period by 60.6%, it is misleading to use this figure as an indicator of the crime rate, because it does not take into account changes in the population.<sup>86</sup> A more accurate indicator is the juvenile arrest rate, typically expressed as the number of arrests per 100,000 juveniles—which for juvenile felonies actually fell by 12% overall between 1983 and 1998.<sup>87</sup> When adjusted for violent felonies only, the arrest rate did increase, but by much less than reported, and varied by the age of the offender. The violent felony arrest rate for juveniles ages

<sup>79</sup> See, e.g., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, 1999 NATIONAL REPORT SERIES: JUVENILE JUSTICE BULLETIN: CHALLENGING THE MYTHS 2 (Feb. 2000), available at <http://www.ojjdp.ncjrs.org>.

<sup>80</sup> See Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19. For an example of an extreme view of juvenile crime, see Walter Allen, *Editorial, Laws Too Lenient on Young Criminals*, DAILY NEWS OF L.A., Mar. 1, 2000.

<sup>81</sup> Ctr. on Juvenile & Criminal Justice, *Myths and Facts About Youth and Crime*, at [http://www.cjcj.org/jjic/myths\\_facts.php](http://www.cjcj.org/jjic/myths_facts.php) (last visited Feb. 17, 2004).

<sup>82</sup> “There was less than a one in two million chance of being killed in a school in America in 1998–1999, yet 71% of Americans felt that a school shooting was likely in their community.” *Id.* Between 1991 and 2001, only .62% of homicides among school-aged children were school-related. See LITTLE HOOVER COMM’N, NEVER TOO EARLY, NEVER TOO LATE TO PREVENT YOUTH CRIME & VIOLENCE 21 (June 2001).

<sup>83</sup> “Californians voted to support the building of larger correctional facilities and tougher crime legislation, like Proposition 21, because of a perception that today’s youth are more violent and are committing more crimes.” Ctr. on Juvenile & Criminal Justice, *supra* note 81.

<sup>84</sup> Rod Pacheco, *Editorial, Proposition 21: YES: Crime Measure Addresses Problem*, PRESS ENTERPRISE., Feb. 20, 2000, at A13.

<sup>85</sup> See Allen, *supra* note 80. See also Michael D. Bradbury, *Commentary, Debate on Proposition 21: More Tools Are Needed to Curb Juvenile Crime; Youths Who Commit Violent Adult Crimes Must Be Made to Face Serious Adult Prison Sentences*, L.A. TIMES, Feb. 29, 2000, at B7.

<sup>86</sup> See LITTLE HOOVER COMM’N, THE JUVENILE CHALLENGE: MAKING PREVENTION A PRIORITY app. D (Sept. 1994).

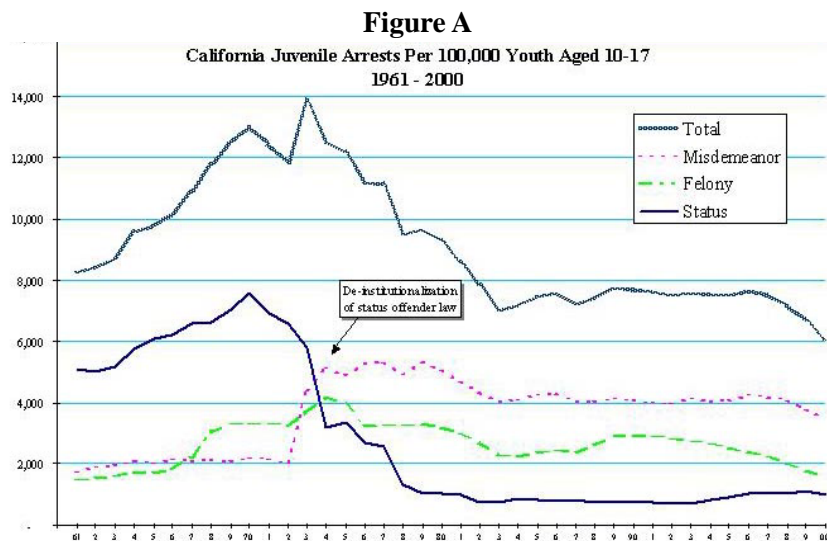
<sup>87</sup> See *id.*

ten to twelve increased only 12.1% in the fifteen years between 1981–83 and 1996–98; for teenagers under the age of eighteen, the violent felony arrest rate rose 31.4% during the same period.<sup>88</sup> While these increases are not trivial, they hardly seem to rise to the level of epidemic; and they clearly fall far short of the numbers used by advocates of Proposition 21.

Furthermore, contrary to the assertion that an increase in population leads to a commensurate increase in the rate of arrests, the juvenile crime rate does *not* appear to track population levels. Between 1987 and 1994, national juvenile arrest rates for violent crime nearly doubled, while the juvenile population grew only slightly.<sup>89</sup> Then, from 1994 to 1997, as the juvenile population continued a slight increase, juvenile arrests dropped significantly.<sup>90</sup> “In fact, the magnitude of the decline in violent crime arrests in the 3-year period between 1994 and 1997 was greater than the projected growth in the juvenile population over the next 20 years.”<sup>91</sup>

Finally, it bears noting that in 1998, two years before voters approved Proposition 21, the juvenile arrest rate in California was lower than it was in 1961.<sup>92</sup>

Overall, juvenile arrest rates in California show a major decline over the past thirty years. As shown in Figure A below, total juvenile arrest rates peaked in the early 1970s due primarily to status offenses, and have been steadily declining since:<sup>93</sup>



<sup>88</sup> See Daniel Macallair & Michael Males, *Dispelling the Myth: An Analysis of Youth and Adult Crime Patterns in California Over the Past 20 Years* Tbl.3, Ctr. on Juvenile & Criminal Justice (2000), at <http://www.cjcr.org/pubs/myth/myth.html>.

<sup>89</sup> See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 79, at 6.

<sup>90</sup> See *id.*

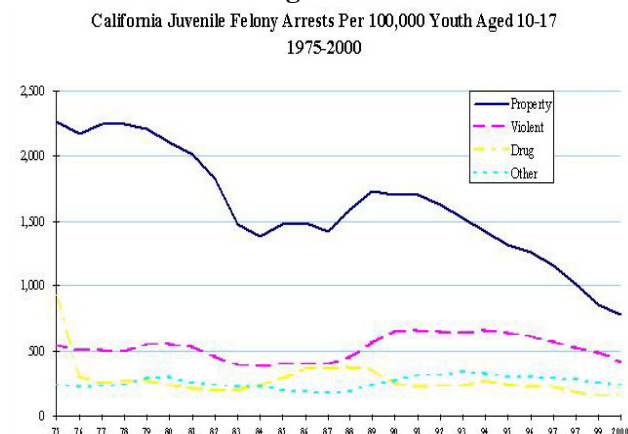
<sup>91</sup> *Id.*

<sup>92</sup> Cal. Youth Auth., *General California Juvenile Crime Trends and CYA Commitments* Fig.1, at <http://www.cya.ca.gov/about/trends/sld001.htm> (last visited Feb. 20, 2004).

<sup>93</sup> See *id.*

Juvenile felony arrests have also been steadily declining over the last decade. Total felony arrest rates dropped more than 52% from 1992 to 2002; arrests for violent felony offenses declined by 58% during the same period.<sup>94</sup> As Figure B illustrates, “[b]y the year 2000, California’s juvenile felony offense rate reached its lowest level since the mid-1960s: half the level of the peak period of the mid-1970s.”<sup>95</sup>

**Figure B**<sup>96</sup>



Nationally, violent crime rates did increase during the 1990s.<sup>97</sup> This increase occurred across all age groups, though, not just for juveniles. In fact, the highest increase in violent crime arrests occurred among those in their thirties and forties.<sup>98</sup> The juvenile violent crime rate increased sharply between 1988 and 1994, then declined steadily for the next seven years; by 2001, it was back down to the 1983 level, representing a 44% decrease.<sup>99</sup>

Juvenile homicide rates are another key indicator of violent crime trends. The national youth murder rate began to increase sharply in 1987, and by 1993 it had more than doubled.<sup>100</sup> However, from its peak that year to 2001, the juvenile murder arrest rate fell 70%, and the total number of arrests declined by about two-thirds.<sup>101</sup> Because the majority of legislation that increased the prosecution of juveniles as adults was enacted between 1992 and 1995, it seems unlikely that such an immediate and significant

<sup>94</sup> See Office of the Attorney Gen., *Juvenile Felony Arrests by Gender, Offense & Arrest Rate* Tbl.3C, at <http://ag.ca.gov/cjsc/datatabs.htm> (last visited Mar. 22, 2004).

<sup>95</sup> Cal. Youth Auth., *supra* note 92.

<sup>96</sup> *Id.* at Fig.4.

<sup>97</sup> See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 79, at 3.

<sup>98</sup> “No one has argued that there is a new breed of middle-aged superpredator, but the data provide more support for that conclusion than for the concept of a juvenile superpredator.” *Id.*

<sup>99</sup> See HOWARD N. SNYDER, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, OJJDP JUVENILE JUSTICE BULLETIN: JUVENILE ARRESTS 2001 at 1, 5 (Dec. 2003), available at <http://www.ojp.usdoj.gov/ojjdp>.

<sup>100</sup> See *id.* at 1, 6.

<sup>101</sup> See *id.* at 1.

impact could be attributed solely to legislation that was newly enacted or, in many cases, had yet to be adopted.<sup>102</sup>

Overall, youth homicide rates in California show significant upward and downward cycles over the last three decades, but ultimately they were about the same in the late 1990s as in the 1970s.<sup>103</sup> Between 1993 and 2000, homicide arrest rates fell by 74%.<sup>104</sup> Juvenile homicide arrest rates rose slightly over the next two years, but the 2002 rate was still just 35% of the 1998 homicide rate.<sup>105</sup>

One might easily conclude that because juvenile violent crime rates increased significantly in the late 1980s and early 1990s, juveniles must be getting more violent. Unfortunately, those who would apply Ockham's razor to the problem of juvenile crime overlook many other factors that play an important role in determining crime rates. For example, the arrest rates for aggravated assault increased substantially between 1980 and 1997 for all age groups; but classifications of aggravated assault vary by jurisdiction.<sup>106</sup> One authority questions whether this is significant, because simple assault rates also increased during that period.<sup>107</sup> However, while the incidence of aggravated assault based on police reports has increased rapidly, it has remained flat in victimization surveys, suggesting that there is considerable discretion exercised in how these offenses are classified.<sup>108</sup>

Other explanations flow from a recognition of important policy changes during that period. Many communities increased enforcement of curfew laws and other status offenses.<sup>109</sup> In California, for example, arrests for status offenses increased 36.3% between 1991 and 1996.<sup>110</sup> National drug offense arrest rates for juveniles nearly doubled between 1992 and 1996, but without a corresponding increase in drug use, indicating increased enforcement rather than increased abuse.<sup>111</sup> A shift in attitude regarding domestic violence is believed to have resulted in increased arrest rates for aggravated assault.<sup>112</sup> Finally, some former status offenses have

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<sup>102</sup> See PUZZANCHERA, *supra* note 52.

<sup>103</sup> See MACALLAIR & MALES, *supra* note 88, at 7.

<sup>104</sup> See Office of the Attorney Gen., *supra* note 94.

<sup>105</sup> *See id.*

<sup>106</sup> See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 79, at 3. *See also* Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in *THE CRIME DROP IN AMERICA* 17 (Alfred Blumstein & Joel Wallman eds., 2000).

<sup>107</sup> See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 79, at 3.

<sup>108</sup> See Blumstein & Wallman, *supra* note 106, at 16–17.

<sup>109</sup> See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 79, at 4.

<sup>110</sup> See OFFICE OF THE ATT'Y GEN., CAL. DEP'T OF JUSTICE, *CRIME & DELINQUENCY IN CALIFORNIA*, 1996 vi, available at <http://ag.ca.gov/cjsc/pubs.htm>.

<sup>111</sup> Arrests for possession of marijuana accounted for most of the increase in drug abuse arrests. *See id.* at vii.

<sup>112</sup> See Blumstein & Wallman, *supra* note 106, at 17–18. *See also* Fla. Dep't of Juvenile Justice, *Key Juvenile Crime Trends and Conditions*, at <http://www.djj.state.fl.us/statsresearch/keytrends.html> (last visited Mar. 13, 2004) (suggesting that one reason juvenile arrests for aggravated assault and battery increased from FY1994–95 to FY1999–00 was because of an increase in arrests for juveniles for domestic violence).

been reclassified as assault, leading to higher arrest rates in that category without any change in the behavior of the offender.<sup>113</sup>

Ultimately, no simple explanation exists for the increases in juvenile crime in the late 1980s, which makes it more difficult for proponents of “get tough” legislation to defend solutions that are simply more punitive. Fiery rhetoric about violent youth combined with misleading interpretation of data disguises the fact that juvenile crime has been declining for years, both in California and nationwide. A more thoughtful and reasoned approach to juvenile crime, one which takes into account the myriad of factors that influence juvenile arrest statistics, is more likely to continue the downward trend over the long term.

#### B. GETTING TOUGH ON JUVENILE CRIME: DOES IT WORK?

Despite California’s long-term decrease in juvenile crime, however, the state’s juvenile custody rate is still among the highest in the country. In 1999, at nearly one and a half times the national average, California was fourth behind the District of Columbia, South Dakota and Louisiana.<sup>114</sup> Presumably, Proposition 21 will increase custody rates; but its impact is just beginning to be felt as it only recently survived a constitutional challenge.<sup>115</sup> As a result, “[t]here has not yet been extensive research predicting the long-term effects of the legislation.”<sup>116</sup>

If Florida’s experience is any indication, though, it does not appear that the get-tough penalties of Proposition 21 are likely to be successful in reducing crime. Florida has been transferring a high number of juveniles to criminal court for nearly thirty years, while also imposing harsh penalties on its violent offenders.<sup>117</sup> Between 1973 and 1998, for example, twenty-two states sentenced offenders to death for crimes committed while under age eighteen; yet Florida alone accounted for 14% of those sentenced.<sup>118</sup> Despite its get-tough approach, however, Florida’s violent juvenile crime rate in 1998 was 54% higher than the national average.<sup>119</sup> The juvenile arrest rate in Florida did decline briefly, from 1998 to 1999;<sup>120</sup> however, it was still higher in 1999 than it was in 1984.<sup>121</sup> Because the nation as a whole has experienced a significant downward trend in juvenile crime over

<sup>113</sup> For example, incorrigibility. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 79, at 4.

<sup>114</sup> See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, OJJDP STATISTICAL BRIEFING BOOK (Oct. 30, 2002), available at <http://ojjdp.ncjrs.org/ojstabb/corrections/qa08601.asp?qaDate=20020130>.

<sup>115</sup> See *Manduley v. Super. Ct.*, 27 Cal. 4th 537 (2002) (upholding the constitutionality of Proposition 21).

<sup>116</sup> *Ctr. on Juvenile & Criminal Justice*, *supra* note 5.

<sup>117</sup> See *Bldg. Blocks for Youth*, *supra* note 67.

<sup>118</sup> Texas and Florida together account for 40% of those sentenced to death for crimes committed as a juvenile for that period. See SNYDER & SICKMUND, *supra* note 27, at 212.

<sup>119</sup> See *Bldg. Blocks for Youth*, *supra* note 67.

<sup>120</sup> See JUVENILE JUSTICE ACCOUNTABILITY BOARD, FLA. DEP’T OF JUVENILE JUSTICE, 2000 ANNUAL REPORT 53 (June 15, 2000), available at <http://www.djj.state.fl.us/statsnresearch/jjab/2000arfb/2000arfb.pdf>.

<sup>121</sup> *Id.*

the last decade, the implication is that Florida's harshly punitive methods have had little deterrent effect on juvenile crime in that state.

Studies have found, in fact, that transferring juveniles to adult court actually increases the likelihood of recidivism. A seven-year study comparing recidivism rates of juvenile robbery and burglary offenders found that the robbery offenders who were transferred to adult court consistently had a higher rate of recidivism than those processed as juveniles.<sup>122</sup> Those prosecuted in criminal court also had a higher frequency of rearrest and were rearrested more quickly than their counterparts who were not transferred.<sup>123</sup> The type of sanction imposed also had an impact on recidivism. "Criminal sentences, whether probation or incarceration, produced higher recidivism than did juvenile dispositions."<sup>124</sup> Rearrest rates were nearly 25% higher for those incarcerated in adult facilities than those held in juvenile facilities, and more than 26% higher for those sentenced to adult probation compared to those sentenced to juvenile probation.<sup>125</sup>

Another prominent study compared Florida youths who were transferred to criminal court in 1987 with those who were retained in the juvenile system, and made similar findings. Researchers matched pairs of offenders based on several factors, including the type of offense, the number of charges, prior offenses, age, gender, and race.<sup>126</sup> The first part of the study found that transfer to adult court increased recidivism over the short term (less than two years) for all seven classes of offenses that were included in the study, and for every measure of recidivism employed.<sup>127</sup> The transfer group was rearrested at a higher rate, they were rearrested more quickly, and they were more likely to commit a felony offense after release than the nontransfer group.<sup>128</sup> Based on these findings, the researchers concluded that:

Overall, the results suggest that transfer in Florida has had little deterrent value. Nor has it produced any incapacitative benefits that enhance public safety. Although transferred youths were more likely to be incarcerated and to be incarcerated for longer periods than those retained in the juvenile justice system, they quickly reoffended at a higher rate than the nontransferred controls, thereby negating any incapacitative benefits that might have been achieved in the short run.<sup>129</sup>

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<sup>122</sup> Researcher Jeffrey Fagan compared offenders processed in criminal court in two counties in southeastern New York with those processed in juvenile court in two adjacent counties in northern New Jersey in 1981-82. No significant differences were found for the transferred and nontransferred burglary offenders. Bishop et al., *supra* note 50, at 142-43.

<sup>123</sup> *See id.* at 143.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 143-44.

<sup>126</sup> *See id.* at 144-45.

<sup>127</sup> *See id.* at 145. *See also* Bishop et al., *supra* note 12, at 183.

<sup>128</sup> *See* Bishop et al., *supra* note 12, at 182-83.

<sup>129</sup> *Id.* at 183. Statistics show that juveniles who are transferred not only serve longer sentences than their nontransferred counterparts, juvenile transfers convicted of murder receive longer sentences than their *adult* counterparts as well: on average, nearly two and a half years longer. SNYDER & SICKMUND, *supra* note 27, at 178.



The results of this study strongly suggest that, in the short term at least, sending juveniles to criminal court is counterproductive in terms of both crime reduction and public safety.

The second part of the study analyzed the same matched pairs from 1987, but extended the follow-up period through November 1994 and specifically focused on how transfer affected recidivism over the long term.<sup>130</sup> The researchers substantially confirmed their earlier findings: transfer of juveniles is more likely to aggravate recidivism than to control it.<sup>131</sup> They did find that those transfers charged with felony property offenses were less likely to reoffend than their nontransferred counterparts, a phenomenon for which they could find no clear explanation.<sup>132</sup> For all other classes of offenses, however, juveniles who were transferred had higher rates of recidivism, and were rearrested more times and more quickly over the long term than those who were not transferred.<sup>133</sup> Over the short or the long term, then, it appears that the “net effect of transfer is to increase the likelihood, the rate, and the severity of re-offending and to decrease the time to re-arrest.”<sup>134</sup>

Its dubious value as a method to control juvenile crime notwithstanding, there are plenty of other reasons to be concerned about the increased use of transfer. First, these provisions disproportionately impact minorities.<sup>135</sup> Minority youth ages ten to seventeen represent less than 25% of the population in Florida, but represent over 55% of the juveniles transferred to the criminal system.<sup>136</sup> In 1996, minorities comprised 75% of the population between ages ten and seventeen in Los Angeles County, yet they accounted for 95% of the cases transferred to adult court.<sup>137</sup> The easy argument is that this disparity simply reflects a higher arrest rate among minority youth for serious crime, rather than discriminatory application of transfer provisions. Minorities do have a higher arrest rate in Los Angeles County for felony violent crimes.<sup>138</sup> However, even after controlling for arrest rates, the transfer rate for minority youth is still double the rate for white youth.<sup>139</sup>

The disproportionate impact on minorities appears to be cumulative as offenders move through the system. Statewide statistics indicate that once transferred to adult court, minority offenders in California are more likely

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<sup>130</sup> See Bishop et al., *supra* note 50, at 146. See also Winner et al., *supra* note 12, at 549.

<sup>131</sup> See Winner et al., *supra* note 12, at 558–59.

<sup>132</sup> See *id.* at 560.

<sup>133</sup> See *id.* at 558–61. See also Bishop et al., *supra* note 50, at 147.

<sup>134</sup> Bishop et al., *supra* note 50, at 148.

<sup>135</sup> Nationally, “[t]he likelihood of waiver is greater for black than for white juveniles across all four general offense categories [person, drug, property, and public order offenses].” SNYDER & SICKMUND, *supra* note 27, at 172.

<sup>136</sup> See JUVENILE JUSTICE ACCOUNTABILITY BOARD, *supra* note 120, at 111.

<sup>137</sup> “Hispanic youth are 6 times more likely, African American youth are 12 times more likely, and Asian/other youth 3 times more likely than white youths to be found unfit for juvenile court and transferred to adult court in Los Angeles County.” MIKE MALES & DAN MACALLAIR, *THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA* 5 (Jan. 2000).

<sup>138</sup> See *id.* at 6.

<sup>139</sup> See *id.*

than white offenders to receive harsher sentences for equivalent offenses.<sup>140</sup> Because sentencing in adult court can have lifelong consequences for juveniles—criminal convictions make it more difficult to find a job, can limit occupational choices, and can have negative effects on family and personal relationships—a system that disproportionately imposes those consequences on minorities is particularly troublesome.<sup>141</sup>

Moreover, incarcerating juveniles with adult inmates can have tragic results. While being held in an adult jail for failing to pay \$73 in traffic fines, a seventeen-year-old boy was tortured to death over a fourteen-hour period by his cellmates.<sup>142</sup> A sixteen-year-old was raped and stabbed while being held in an adult jail for six months on charges that were later dropped.<sup>143</sup> A seventeen-year-old serving time in an adult prison was choked to death by his cellmate.<sup>144</sup> Other juveniles in the same facility were scalded by boiling water and assaulted with heavy locks—one teenager lost an eye.<sup>145</sup> A study of Florida prison records showed that over a four-year period, children in adult facilities are twenty-one times more likely to be assaulted or injured than their counterparts in juvenile detention.<sup>146</sup> Other studies have shown that juveniles serving time in adult prisons are eight times more likely to commit suicide than those in juvenile facilities.<sup>147</sup> Clearly, placing juveniles in custody with adults puts them at tremendous risk for life and limb.

Even juveniles who remain housed with other juveniles can suffer permanent and debilitating harm just by virtue of being incarcerated. On one level, physically separating offenders from home is disruptive to family, school, and other social ties, which directly contributes to increased recidivism.<sup>148</sup> In addition, when “ties to the conventional community are broken[, i]nmate groups provide subcultural support for crime,” which further encourages recidivism.<sup>149</sup>

Perhaps less obvious is the stigmatizing effect of punishment. As one criminologist commented, “involvement in the juvenile justice system really makes one a delinquent by defining one that way. As a youngster cannot easily get rid of this ‘stigma,’ he finally ends up believing he is a real delinquent and so acts like one.”<sup>150</sup> This assertion helps explain how transferring juveniles leads to increased recidivism, and is well supported

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<sup>140</sup> See *id.* at 8.

<sup>141</sup> See Bishop et al., *supra* note 50, at 154 (describing negative consequences of criminal convictions).

<sup>142</sup> See Bldg. Blocks for Youth, *Factsheet: Incarcerating Youth With Adult Inmates Results in Tragedies*, at <http://www.buildingblocksforyouth.org/issues/adultjails/factsheet.html> (last visited Mar. 17, 2004).

<sup>143</sup> See Editorial, *Leaving Some Behind*, BALT. SUN, Sept. 12, 2003, at 16A.

<sup>144</sup> See Ronnie Greene & Geoff Dougherty, *Kids in Prison: Young Inmates Report Highest Rate of Assault: Scalding Water, Handmade Knives, Locks Among Weapons Used to Attack*, MIAMI HERALD, Mar. 19, 2001, at 1A.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See Bldg. Blocks for Youth, *supra* note 142.

<sup>148</sup> See Bishop et al., *supra* note 50, at 152.

<sup>149</sup> *Id.*

<sup>150</sup> JOSINE JUNGER-TAS, MINISTRY OF JUSTICE: THE HAGUE (NETH.), *DELINQUENCY PREVENTION IN THE NETHERLANDS* 20 (1977).

by generally-accepted theories of social learning and social control, such as John Braithwaite's theory of reintegrative shaming.<sup>151</sup>

Shaming is reintegrative if it communicates that the person being punished is still considered to be part of the group. Thus, the disapproval, even moral outrage, in serious offense situations, must be directed at the criminal act rather than the actor. In contrast, shaming that stigmatizes operates to sever the offender from the group.<sup>152</sup>

Formal shaming (i.e., punishment administered by the state) is less reintegrative and therefore less effective than the informal shaming produced by the disapproval of an individual's family and immediate community.<sup>153</sup> For shaming to be effective in reducing crime, it is important that the offender's parents, teachers, and community reinforce a sense of moral outrage at the offense; but at the same time, shaming must also "provide ways to reclaim the offender as a part of the group."<sup>154</sup> Criminal sanctions stop short of this crucial step, leaving an offender stigmatized, unable to rejoin conventional society, and primed to reoffend.<sup>155</sup>

It is difficult to imagine that simply transferring more juveniles to adult court can ever reduce the problem of juvenile crime. It seems the height of folly to think that sending juveniles to serve time with violent adults, severing community ties in the process, and leaving offenders to replace family relationships with newly-forged jailhouse bonds could possibly prepare troubled youth to lead productive, law-abiding lives once they are released back into their communities. Certainly, no one would suggest that juveniles who commit violent offenses should go unpunished; however, "merely punishing delinquents is not enough. Since most of them will come back into the community, it is worthwhile to invest in their future and give them some practical and social tools to cope with life."<sup>156</sup> Transferring more kids to adult court, without a concerted effort to understand the root causes of crime and prevent reoffending, is just throwing the baby out with the bathwater.

#### IV. ALTERNATIVE APPROACHES: CRAFTING SOLUTIONS THAT FIT THE PROBLEM

##### A. DEFINING THE PROBLEM

In the early 1990s, confronted with a rise in juvenile crime arrests, a growing juvenile population, and limited resources, the Orange County

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<sup>151</sup> Generally speaking, the theory is that "shaming that is reintegrative and forgiving works better to prevent or deter crime than shaming that is stigmatizing and condemnatory . . . Braithwaite identifies the community, rather than the justice system, as the primary agent of effective crime control." Bishop et al., *supra* note 50, at 150.

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

<sup>154</sup> *Id.* at 151.

<sup>155</sup> *See id.* at 152.

<sup>156</sup> Junger-Tas, *supra* note 7.

(California) Probation Department (“OCPD”) initiated a study to determine how effective its efforts were in reducing crime.<sup>157</sup> That research led to the identification of a group of chronic juvenile reoffenders, dubbed the “8% Problem,” that was responsible for committing more than half of the crimes in the county. Subsequently, the OCPD developed a pilot intervention program specifically aimed at reducing offenses within this group.<sup>158</sup>

In Phase I of the study, 3,000 first-time offenders were tracked for a period of three years to evaluate how many went on to commit subsequent offenses.<sup>159</sup> The study included two sets of data, one from offenders who entered the Orange County juvenile justice system for the first time in 1985 and one from those who entered in 1987.<sup>160</sup> Additionally, the OCPD identified and compared differences between nonrecidivists, low-rate recidivists, and chronic recidivists.<sup>161</sup> The study found that for the 1987 cohort, 71% did not reoffend and 21% were classified as low-rate recidivists. The chronic recidivists, representing the remaining 8%, accounted for 55% of the repeat offenses for the group.<sup>162</sup>

Based on these findings, Phase II focused entirely on gaining a better understanding of the “8% Problem” and its cost to the County.<sup>163</sup> The product of this research was the identification of several factors which, when combined with the age of the offender, could reliably be used to predict which juveniles would become chronic recidivists—the very first time they are referred to the juvenile justice system.<sup>164</sup> In other words, by applying these factors, prevention strategies can be focused on potential chronic reoffenders as soon as they commit their first offense. Not only does this have significant implications for reducing crime, it has the potential for huge cost savings as well. The “8%” averaged nearly twenty months of incarceration for subsequent offenses, at a cost of \$44,000 each.<sup>165</sup> “Because at least 500 new ‘8% problem’ cases are added to

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<sup>157</sup> See 8% Study, *supra* note 11.

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

<sup>160</sup> For the 1987 group, the researchers extended the tracking period for an additional three years, for a total of six years. See *id.*

<sup>161</sup> Nonrecidivists were those with only one criminal offense (their first) during the three-year study period. Low-rate recidivists were defined as those juveniles with two or three criminal justice referrals, and chronic recidivists had four or more referrals. See *id.*

<sup>162</sup> The results for the 1985 cohort were substantially the same. Nonrecidivists for that group comprised 66% and low-rate recidivists 24%; chronic recidivists represented 10% of the group but were responsible for 58% of repeat offenses. See *id.* at Tbl.1.

<sup>163</sup> Phase II only analyzed data from the 1987 cohort. See *id.*

<sup>164</sup> These factors were: age of the offender (a majority of the “8%” were age 15 or younger at the time of their first offense); whether they were subsequently made wards of the court and if so, at what age; and whether offenders had significant problem areas in their lives, such as substance abuse, family problems, trouble in school or a pattern of delinquent behavior (stealing, running away, or gang affiliation). The accuracy of these factors was tested using the 1987 cohort. Overall, they accurately predicted chronic recidivism in 70% of the cases (with 19% false positives and 11% false negatives). The accuracy rose to 77% for offenders ages fifteen and younger. It was least accurate in predicting chronic recidivism for older offenders, falling to 64% for those age sixteen and older. See *id.* Although the test produced a relatively high number of false positives, overinclusiveness in this case should not be problematic if these factors are used only as a method to direct juveniles to appropriate intervention programs.

<sup>165</sup> See *id.*

Orange County's criminal justice system annually, each new group could potentially cost taxpayers \$22 million to incarcerate."<sup>166</sup>

Phase III of the study tested the factors by applying them to 905 first-time wards of the court: "the recommended target population and the more serious of the first-time offenders."<sup>167</sup> The test substantiated the findings in Phase II, with the factors correctly identifying non-recidivists, low-rate, and chronic recidivists with 66% accuracy.<sup>168</sup> These findings strongly suggest that singling out those juveniles who are most likely to reoffend, and then tailoring intervention methods to address specific risk factors, can result in a dramatic reduction in later, potentially violent offenses.<sup>169</sup> Based on the conclusions of all three phases of the study, the OCPD made recommendations for case identification procedures and assessment tools, and outlined a pilot project (including a formal experimental research component), which was implemented in June 1997.<sup>170</sup>

In addition to targeted intervention programs, there is compelling evidence that prevention programs can have a significant effect on reducing crime by reaching juveniles *before* they commit their first offense. Statistics show that juvenile crime peaks during after-school hours, which strongly suggests that greater supervision during that time can have a significant deterrent effect.<sup>171</sup> Those who experience juvenile crime first-hand confirm the value of after-school programs. In a poll of police chiefs across the country, 69% said that "after-school and educational programs are the most effective programs for reducing juvenile crime."<sup>172</sup> Other groups have also advocated increased efforts aimed at juvenile crime prevention. In 1994, the same year Orange County initially published their report, the Little Hoover Commission made several recommendations to the California State Legislature on how best to deal with juvenile crime.<sup>173</sup> The Commission concluded that the State should focus its efforts on prevention: "The Governor and the Legislature should direct all state agencies involved in anti-crime efforts to make early intervention and prevention programs a top priority."<sup>174</sup> To accomplish this goal, the Commission recommended that the State "consolidate juvenile anti-crime

<sup>166</sup> *Id.* Other jurisdictions have estimated similar potential cost savings by reducing recidivism. Florida, for example, estimates that a 4% reduction in recidivism would result in \$65 million in long-term savings. See Fla. Dep't of Juvenile Justice, *supra* note 112.

<sup>167</sup> 8% Study, *supra* note 11.

<sup>168</sup> This test produced a higher number (28%) of false positives than the first. However, "[b]y correcting problems with variable definitions for the first-time ward data set, the number of false positives can be significantly reduced." *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> "1 in 5 violent crimes committed by juveniles occur in the four hours following the end of the school day (i.e., between 2 p.m. and 6 p.m.)." Similar patterns were observed for gang-related violence. MELISSA SICKMUND, HOWARD N. SNYDER, & EILEEN POE-YAMAGATA, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE—STATISTICS SUMMARY (Aug. 1997), available at <http://www.ojjdp.ncjrs.org/pubs/html>. In Florida, "[j]uvenile crime, including violent offenses, peaks at around 3 p.m., generally right after school lets out." Fla. Dep't of Juvenile Justice, *supra* note 112.

<sup>172</sup> LITTLE HOOVER COMM'N, *supra* note 82, at 36–37.

<sup>173</sup> *See generally* LITTLE HOOVER COMM'N, *supra* note 86.

<sup>174</sup> *Id.* at vii.

efforts in a single agency,” one that should “draft a clear statement of philosophy, purpose and function that focuses on deterrence as the cornerstone for the juvenile criminal justice system.”<sup>175</sup>

Although then-Senator Bill Lockyer proposed to former Governor Gray Davis that they implement the Commission’s recommendation to establish a coordinating council, the Governor never responded (although the Attorney General’s office has supported the prevention agenda).<sup>176</sup> The Office of Criminal Justice Planning (“OCJP”), which was in a position to take a lead on the prevention issue, was eliminated in 2003, but Governor Arnold Schwarzenegger is required to propose something to take its place.<sup>177</sup>

#### B. SANTA CRUZ COUNTY: A MODEL SOLUTION

In 1997, the juvenile hall in Santa Cruz County, California was operating at 133% of its capacity.<sup>178</sup> Faced with the costly prospect of expanding the facility, the County chose instead to reform the system.<sup>179</sup> Now, less than ten years later, a host of innovative programs have been implemented. Not only have these programs reduced the number of incarcerated youths by nearly half, they have shortened average stays in detention, reduced the disproportionate confinement of minorities, and most impressively, reduced the juvenile arrest rate in Santa Cruz County by nearly 40%.<sup>180</sup>

In 1997, the Santa Cruz County Probation Department (“SCCPD”) established several programs and services that were shaped by a set of values aimed at providing a quality “System of Care” for both offenders and the community.<sup>181</sup> The goal of the SCCPD is to “help youth repair the harm created by their crimes,” while at the same time providing “opportunities for youth to develop competencies that will help them to become self-reliant, productive citizens.”<sup>182</sup>

A key component of the SCCPD’s success is its early intervention program. Every juvenile who is arrested within the city limits is screened and assessed by a probation officer.<sup>183</sup> In addition, an officer makes contact with each first-time offender, even for the most minor offenses.<sup>184</sup> Subsequent to these evaluations, a range of interventions can be implemented based on the seriousness of each offense and the needs of the

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<sup>175</sup> *Id.* at iv, vi.

<sup>176</sup> See E-mail from Jim Mayer, Executive Director, Little Hoover Commission, to Kelly Angell (Feb. 18, 2004, 14:12 PST) (on file with author).

<sup>177</sup> *See id.*

<sup>178</sup> See Ctr. on Juvenile & Criminal Justice, *Reforming the Juvenile Justice System*, at <http://www.cjcj.org/jjic/reforming/php> (last visited Feb. 17, 2004).

<sup>179</sup> *See id.*

<sup>180</sup> *See id.* See also Eric Bailey, *Jobs, Not Juvenile Hall*, L.A. TIMES, Dec. 18, 2003, at A1.

<sup>181</sup> These values are: family preservation, interagency collaboration, family involvement, and cultural competence. See Prob. Dep’t of Santa Cruz County, *Juvenile Services*, at <http://www.co.santa-cruz.ca.us/prb/org/juvenileservices.html#index> (last visited Mar. 17, 2004).

<sup>182</sup> *Id.*

<sup>183</sup> *See id.*

<sup>184</sup> *See id.*

individual offender.<sup>185</sup> These programs include community service, education, restitution, and counseling.<sup>186</sup> Offenders may be assigned to work in a community garden, on projects such as erosion control and clearing out streams, or they may be given family counseling, anger management classes, or tutoring.<sup>187</sup> They may also be ordered to perform restitution to their victims, which can take a myriad of forms. Some offenders participate in a “Victim Impact Class,” designed to educate youth about how their bad acts impact the victims of crime, or they may be confronted directly by the victims themselves.<sup>188</sup> Seemingly simple gestures can have significant and long-lasting impacts. For example, one offender wrote a sincere letter of apology for stealing a bicycle.<sup>189</sup> The bicycle’s owner, a teacher, was appalled at the boy’s horrible grammar and offered to provide tutoring as part of the youth’s restitution program.<sup>190</sup> Other offenders are enrolled in a job training and mentoring program; upon successful completion, they are hired by participating businesses.<sup>191</sup>

For more serious offenses, the court orders home detention instead of juvenile hall.<sup>192</sup> Offenders may not leave home except to go to school, work, or counseling.<sup>193</sup> In addition to SCCPD supervision via personal visits to home and school, offenders may also be fitted with an electronic monitoring device.<sup>194</sup> Only as a last resort—when other programs have failed, the offender has very serious problems, or for violent or weapons offenses—will juveniles be sent to detention.<sup>195</sup>

By all accounts, the program has been a tremendous success. Since launching the program in 1997, the number of juvenile arrests has decreased by 25%, while at the same time the County’s juvenile population has increased by 20%.<sup>196</sup> Moreover, home detention is less than half the cost of incarceration, making the County a model of fiscal, as well as social, responsibility.<sup>197</sup>

Comprehensive programs that promote alternatives to incarceration have been implemented in other states with similarly positive results.<sup>198</sup> Rather than merely instituting harsher punishments for juvenile offenders, a more sophisticated approach of prevention and intervention, tailored to the special needs of youths, shows real promise of success.

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<sup>185</sup> *See id.*

<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See* Bailey, *supra* note 180.

<sup>190</sup> *See id.*

<sup>191</sup> *See* Prob. Dep’t of Santa Cruz County, *supra* note 181.

<sup>192</sup> *See id.*

<sup>193</sup> *See id.*

<sup>194</sup> *See id.*

<sup>195</sup> *See id.* *See also* Bailey, *supra* note 180.

<sup>196</sup> *See* Bailey, *supra* note 180.

<sup>197</sup> *See id.*

<sup>198</sup> For example, Multnomah County, Oregon implemented a similar program, resulting in significant reductions in its detention population, juvenile crime rates, and overrepresentation of minorities in secure detention. *See* Ctr. on Juvenile & Criminal Justice, *supra* note 178. *See also* LITTLE HOOVER COMM’N, *supra* note 82, at 31–33 (listing twelve U.S. cities that have successfully implemented programs aimed at reducing youth violence).

## V. CONCLUSION: PREVENTION AND REHABILITATION ARE THE KEYS TO AN EFFECTIVE JUVENILE CRIME POLICY

Clearly, increasing the severity of punishment does not work to reduce juvenile crime. An individualized approach with a focus on prevention, early intervention, and rehabilitation has far more potential for success than does a one-size-fits-all, heavily punitive system.

Imposing adult-like sentences on juveniles is not only ineffective, it also fails to address the special needs of school-age children. Incarceration simply does not leave juvenile offenders equipped to successfully reenter their communities. Efforts to educate offenders in detention are marginal at best. For example, a recent hot topic was the California Youth Authority's ("CYA") controversial practice of locking juvenile inmates in cages while they are being tutored.<sup>199</sup> Youth advocates say this practice is dehumanizing and degrading, and the CYA's own task force recommended two years ago that the use of cages be reduced.<sup>200</sup>

Purely punitive solutions also fail to take into account the widely-accepted notion that violence is a learned behavior.<sup>201</sup> Evidence shows that children who are victims of abuse or neglect are more likely to commit violent crimes as juveniles and adults.<sup>202</sup> One study found that these children "begin committing crimes at younger ages, commit nearly twice as many offenses as non-abused children, and are arrested more frequently."<sup>203</sup> In addition to the traumatizing effects of family violence and neglect, abuse often leaves children bereft of the skills they need to deal with conflict in safe and healthy ways. Children who experience violence at the hands of their caregivers are more apt to "learn that violence is an acceptable reaction to conflict and frustration, and they adopt this behavior as adults."<sup>204</sup>

Socioeconomic factors play a significant role in juvenile violence as well. Many offenders come from unstable homes in poor neighborhoods, and suffer from addiction, mental health problems, and learning disabilities.<sup>205</sup> Orange County's "8% Study" found that "more than half of the families of high-risk youth studied for this report had significant problems impeding their ability to provide adequate supervision, structure, or support to their children."<sup>206</sup> It seems patently unfair to impose harsh penalties on juveniles who, through no fault of their own, come from

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<sup>199</sup> See Jill Leovy & Jia-Rui Chong, *Youth Authority to Review Use of Cages; Inmate Advocates Say the 'Secure Program Areas' for Teaching Violent Youths Are Inhumane, Call for a Ban*, L.A. TIMES, Feb. 6, 2004, at A1.

<sup>200</sup> *See id.*

<sup>201</sup> See LITTLE HOOVER COMM'N, *supra* note 82, at 13.

<sup>202</sup> *See id.*

<sup>203</sup> *Id.*

<sup>204</sup> LITTLE HOOVER COMM'N, *supra* note 86, at 26 (quoting CAL. TASK FORCE TO PROMOTE SELF-ESTEEM & PERSONAL & SOCIAL RESPONSIBILITY, TOWARD A STATE OF ESTEEM 100, 103-04 (Jan. 1990)).

<sup>205</sup> See Jenifer Warren, Jill Leovy, & Nora Zamichow, *A Daily Lesson in Violence & Despair*, L.A. TIMES, Feb. 17, 2004, at A1.

<sup>206</sup> *8% Study*, *supra* note 11.



highly disadvantaged backgrounds and lack the most basic social skills and family support that others may take for granted.

One must also question the moral implications of punishing offenders who may have biological factors driving their actions. Emerging evidence suggests that some individuals may be biologically predisposed to crime, because of either genetic factors or environmental causes.<sup>207</sup> One study incorporating genetic research, adoption studies, psychophysiology, and brain imaging concluded that certain individuals are biologically predisposed to crime.<sup>208</sup> Some traits are inherited; however, many are heavily influenced by social factors.<sup>209</sup> Furthermore, biological factors such as poor prenatal nutrition, complications at birth, and exposure to pollutants can lead to varying degrees of brain impairment.<sup>210</sup> Although controversial, these findings have tremendous policy implications for the treatment of criminals and the prevention of crime.

Finally, incarceration is expensive. In this current climate of shrinking state budgets, cost is an important consideration. One estimate places the annual cost of detention at \$36,000 per child, enough to cover a year's tuition at an elite private college.<sup>211</sup> Even a modest reduction in the national juvenile detention population could result in savings of hundreds of millions of dollars per year.<sup>212</sup>

When it comes to juvenile crime, the benefits of prevention cannot be overstated. As one former police chief succinctly put it, "if we don't concentrate on the high chair, we will be concentrating on the electric chair."<sup>213</sup> Violent juvenile offenders often start out committing relatively minor offenses, such as vandalism and truancy.<sup>214</sup> Treating these offenders when they first enter the system can potentially prevent a large percentage of later, more violent crimes. "Prevention and early intervention provide the most immediate opportunities to make a difference in the lives of California's children."<sup>215</sup> Ignoring these hard-learned lessons, and continuing to use adult methods and justifications to punish children, is not only ineffective but costly—both in dollars and the lives of our troubled youth.

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<sup>207</sup> See LITTLE HOOVER COMM'N, *supra* note 82, at 11. See also ADRIAN RAINE, *The Biological Basis of Crime*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 43, 43 (James Q. Wilson & Joan Petersilia, eds., 2002).

<sup>208</sup> See RAINE *supra* note 207, at 43–44.

<sup>209</sup> See *id.* at 47.

<sup>210</sup> See *id.* at 62–66.

<sup>211</sup> See Bailey, *supra* note 180.

<sup>212</sup> As of 1999, there were 108,931 juveniles in custody in the U.S. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 114. Using \$36,000 as an estimate of annual costs, a 10% reduction in the juvenile detention population would result in savings of nearly \$400,000,000 in a single year.

<sup>213</sup> LITTLE HOOVER COMM'N, *supra* note 82, at 37 (quoting George Sweat, North Carolina's director of juvenile services).

<sup>214</sup> See Warren et al., *supra* note 205. "For instance, a youth caught extorting lunch money from other students to support a developing drug habit may slip through the system until he becomes a hardened juvenile drug addict who is burglarizing homes to support his habit." LITTLE HOOVER COMM'N, *supra* note 86, at 73. See also *supra* note 164 and accompanying text.

<sup>215</sup> LITTLE HOOVER COMM'N, *supra* note 82, at 1.