

EXECUTIVE SUMMARY

The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court

Edited by Jeffrey Fagan and Franklin E. Zimring

Introduction

In the closing decades of the 20th century, America began to fear its youth. Legislators and commentators spoke ominously of a nation under siege by a rising generation of “superpredators.” Americans were convinced that youth violence was out of control—and that it was bound to get worse. In response, 46 of the 50 states made significant changes in laws targeting juveniles: they expanded the circumstances under which defendants as young as ten years of age could be tried in criminal courts, and they allowed adolescents to receive criminal punishments as high as life imprisonment without the possibility of parole.

The discussion surrounding these changes has been passionate. On one side are those who view transfer¹ of juvenile offenders to adult court as an essential strategy in the “war on crime”; on the other are those who see it as an attack on youth welfare. On neither side are the arguments based on empirical data, substantive analysis, or a coherent theory of either adolescent development or juvenile justice. In fact, remarkably little has been written about the empirical realities of the transfer process—how it is changing, what its effects have been—and there have been no serious attempts to take it out of the political realm, into the realm of policy.

The Changing Borders of Juvenile Justice is the first book to take a scholarly, analytical look at the phenomenon

¹ “Transfer,” “waiver,” or “remand” refers to the decision to try juveniles in (adult) criminal courts—not to their relocation from juvenile to adult correction facilities.

of transfer. Its editors, Jeffrey Fagan and Franklin Zimring, have brought together experts from law, social science, and public policy to address the evolution of transfer, its social impacts, and the possibilities of reform. The book, a product of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, examines transfer legislation and practices as a window onto the theory and principles underlying the juvenile justice system. It demonstrates the need for continuity and coherence between the juvenile and criminal courts and policies. And it shows how important it is for youth advocates to think about what happens *after* transfer, as young offenders make their way in the adult criminal justice system.

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From safety valve to politics: the role of transfer in the juvenile justice system

American law recognizes that children are different from adults; it acknowledges their immaturity, limits their privileges and responsibilities, and affords them a broad range of special protections. A century ago, our juvenile justice system was established on that understanding. Unlike the criminal justice system, the juvenile courts were designed to provide individual, supportive responses to children in trouble. They sought ways to hold youth accountable for their actions without stigmatizing or harming them, without destroying their life opportunities. From the outset, its central tenets were treatment and rehabilitation.

At the same time, the system recognized that some crimes and some youth required a stronger response than the juvenile system, with its limited options for punishment, could offer. For the sake of public protection—and perhaps retribution as well—a safety valve was needed. The solution was *transfer*: every jurisdiction in the country defined circumstances in which some offenders below the age of majority could be moved out of the juvenile system and tried as adults in criminal courts. Generally, the factors considered in transfer decisions were the seriousness of the crime, the age and culpability of the youth, and his or her amenability to treatment and rehabilitation. Once transferred, adolescents convicted in criminal court were eligible for punishment in the adult system, though often with a “youth discount” in the length and type of sentence that acknowledged the special circumstances of their age.

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While transfer has always been practiced in the juvenile justice system, for most of the century it was a sidebar, used only in extraordinary circumstances. By contrast, the last two decades have seen a dramatic increase in the volume and breadth of transfers—a trend without any corresponding increase in the rate of serious juvenile crime. Even with the decline in youth violence in recent years, and little evidence that transfer is an effective policy to prevent or reduce youth crime, the political pressure to transfer juveniles to the criminal court persists.

The issue for policymakers is no longer whether adolescent offenders are amenable to treatment. Instead,

transfer has become a highly politicized issue, a response to the fearful and increasingly vengeful temper of the times. That outlook took shape first in the criminal courts, where, beginning in the 1980s, it produced steep increases in incarceration of adults and of adolescents over the maximum age for juvenile court. When incarceration rates in the juvenile courts failed to follow suit, that system became the next theater in the war on crime.

The growing complexities of transfer

In response to calls for greater sanctions against juveniles, the 50 states have devised a bewildering array of statutes and mechanisms to relocate young offenders to criminal courts. In general, they fall into three broad categories:

- **Selective case-by-case transfer.** Nearly every state makes provisions for judicial waiver—that is, allowing the juvenile court judge to decide that a particular case ought to be prosecuted in criminal court. This is the traditional method of transfer, long used in cases of serious or chronic crime, where the youth is not thought to be amenable to treatment, or where the crime is deemed to require sanctions beyond those available to the juvenile system. It most closely preserves the juvenile justice system of individualized response. Lately, though, a number of states have passed legislation that, for many cases, gives *prosecutors* rather than judges the power to decide which defendants stay in the juvenile system and which are transferred to criminal court.
- **Wholesale exclusion.** During the 1980s and 1990s, a growing number of states either supplemented or replaced judicial waiver with proscriptive legislation. Such legislation automatically removes certain offenses from the jurisdiction of the juvenile courts for offenders of a certain age. The list of offenses is often a long one, producing a sharp increase in the number of cases tried in criminal courts. At the same time, it gives prosecutors—who have the power to select what charges an

offender will face—a large measure of invisible but very real discretion.

- **Expansion of punishment options for juvenile courts.** Some legislatures have created systems of “blended jurisdiction.” In these systems, certain juvenile cases are heard in a special division of the juvenile court, often with jury trials, and harsher penalties are available. Some jurisdictions hold further hearings once the offender—who has been placed in a juvenile corrections facility—reaches 17 or 18 years of age, with the option to impose a new and longer sentence in an adult facility. Other jurisdictions may impose such a mixed sentence at the original hearing. These blended systems, with their ability to impose serious prison terms, appear to undermine the juvenile justice system’s commitment to the life opportunities of young offenders.

In all of these recent reforms, what is missing is any substantive discussion of the principles behind transfer and the standards for implementing it. Policymakers have not dealt with some fundamental issues: who does and doesn’t belong in juvenile court, and for what reasons; who should make transfer decisions, and what measures and weights should guide them in making their decisions.

Neither have policymakers considered some of the consequences of different transfer policies—outcomes that make policy choices more difficult. For example, blended jurisdiction may improve the prospects for some youth (those who, under a different system, would have been transferred to adult court) and make things worse for others (those who would have been dealt with in the traditional juvenile system). Where does this leave advocates who are committed to the welfare of delinquent youth?

Dealing with racial discrimination is another complicating factor. Presumably, every jurisdiction wants to keep discrimination to a minimum—but how is that to be measured? Under a judicial waiver system, there may be fewer transfers overall, including fewer African-American youth, but their proportion in the system is high. Under a

legislated exclusion system, the concentration of racial minorities among the transfer population may be somewhat lower, but the numbers will be much higher. What choice should a youth advocate make?

As the variations in transfer mechanisms continue to increase, across jurisdictions and over time, one thing is clear: the need for empirical assessment of transfer policies, and for ongoing evaluations of transfer law in action, has never been greater. Moreover, the need reaches beyond the boundaries of the juvenile system. We know, for example, that transfers are putting increasing strain on the criminal justice system, where prosecutions demand far more resources. We don’t yet know what this will do to the system, or—far more important—how it will affect the youths involved. Data collection has not kept pace with the growing complexity of the system, and those who follow youth welfare seldom extend their watchfulness into the criminal courts.

The increasing use of transfer highlights the need for explicit policies toward adolescents in criminal courts.

Beyond transfer: What happens to transferred youths?

Many people seem to think that transfer, in one form or another, can resolve society’s conflicts and tensions about punishing young offenders. In fact, it merely moves them. With increasing numbers of youth being handled by the criminal justice system, transfer today is a more problematic part of that system than ever before.

The problems go far beyond overburdening the courts. From the standpoint of reducing recidivism and controlling crime, for example, transfer has proven to be counterproductive. Far from being “scared straight,” some studies

have found that youths transferred to the criminal system are *more* likely to commit new offenses, especially if they've spent time in jail or prison. They also reoffend more quickly and more often.

Even more troublesome is the question of how transferred youths are to be treated in the criminal system. There is no evidence that a 14-year-old who commits a "transferable" crime is more mature or responsible than others his age, or less amenable to treatment. How then,

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should such offenders be handled by the courts? Will criminal courts consider the same factors, and make the same behavioral assumptions, as the juvenile courts? And what should be done with the convicted youth? The influx of young offenders to jails and prisons raises significant issues of security and programming for penal institutions.

Achieving justice in transfer cases depends on the quality of justice in the criminal justice system. The increasing use of transfer highlights the need for explicit policies toward adolescents in criminal courts. Such policies will need to address issues such as diminished responsibility and reduced levels of punishment, as well as the development of age-appropriate institutions, programs, and protections.

As the editors point out, interest groups that have long operated in the juvenile justice domain will have to follow young offenders into the realm of the criminal courts—or lose influence over what happens to them.

Formulating a transfer policy for the 21st century

On the whole, the contributors to *Changing Borders* recognize that transfer is an unavoidable—even essential—

element of the juvenile justice system. For that reason, the editors conclude, it is critically important that policymakers look closely at how the various transfer systems are working in practice, examine how their benefits and drawbacks compare to the likely alternatives, and seek a rational foundation for reform.

Fagan and Zimring lean heavily toward the traditional system of judicial waiver—a "one-kid-at-a-time" approach, with decisions made by judges in waiver hearings. But they acknowledge the need for important changes in that system.

First, the decision-making process: Judicial waiver operates today without legal standards or guidelines to inform the decisions made by juvenile court judges. Policymakers need to consider establishing such standards—and that means they can no longer put off discussion of the theory and principles behind the juvenile justice system. In the meantime, the editors suggest, the system should require judges to give a detailed, written justification for every decision for or against waiver.

Second, the treatment of transferred juveniles: There is scant legal or procedural recognition that very young defendants require special treatment in the criminal courts. Politically, the issue is a difficult one, for the very reasons that have led to the rising rates of transfer—the public demand for unqualified and limitless punishment. Yet as more and younger adolescents are transferred to the criminal system, the need for their special treatment becomes more urgent. Driven by necessity, if not by theory, an institution very like the juvenile court may soon evolve within the boundaries of the criminal justice system, much as it has in many European countries and, more recently, in New York City.

In any case, despite its limitations—and despite two decades of tinkering and redrawing lines—the juvenile justice system has proven to be remarkably resilient. Its persistence confirms that even while Americans may fear their children, they still care about saving them. As advocates and policymakers struggle to understand how best to do that, *Changing Borders* offers a solid foundation of principle, theory, and practical understanding. Δ